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The Public Square and the Jew as Religious Other

by
SHELDON H. NAHMOD*

Introduction

In *The Other Side of Religion*,¹ Professor William Marshall suggests that the United States places two primary constraints on the role of religion in the “public square,”² the site of public political decisionmaking. The formal constraint is the Establishment Clause, while the informal constraint is “the general perception that religion and religious conviction are purely private matters that have no role or place in the nation’s political process.”³ In support of these constraints, he argues that there ought to be a presumption against religious involvement in the public square because religion by its nature has a “dark side.”⁴

Marshall uses Dostoevsky’s Grand Inquisitor narrative from *The Brothers Karamazov* as a proof-text to demonstrate that religious “persecution and intolerance [cannot] be ascribed to the malevolence of religious leaders . . . [and] cannot be explained as merely the abuse of power by misguided individuals.”⁵ Rather, they are deep psychological responses to “forces that assault a believer’s religious structure,” and that are perceived as “threatening evils that must be eliminated” for the sake of the community.⁶

Marshall concludes that this dark side “has the potential to be a powerfully destructive political force” that may harm the process of political decisionmaking by converting it into a battleground, lead to “acrimonious divisiveness among different religions,” and generate “move-

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1. William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843 (1993) [hereinafter Marshall, *The Other Side*].

2. RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE* at vii (1984).

3. Marshall, *The Other Side*, *supra* note 1, at 844.

4. *Id.* at 854-55, 859-63.

5. *Id.* at 853.

6. *Id.* at 858.

ments of intolerance, repression, hate, and persecution.”⁷ Thus the public square should be “generally off-limits to religion” so that, at the very least, the “urge to be intolerant” is diluted.⁸

Marshall’s use of the Grand Inquisitor narrative is interesting and his position is well thought out; he does not go far enough, however, in his view of the dark side of religion.

My position is captured by the following quotation: “One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution.”⁹ This is the uncharacteristic way in which Justice Felix Frankfurter began his dissent in *West Virginia Board of Education v. Barnette*,¹⁰ the celebrated flag-salute case. In this brief Essay, I will approach the role of religion in the public square from the perspective of the group to which Justice Frankfurter and I belong and which I consider the paradigmatic Religious Other: adherents to the Jewish religion.

I. Observations on the Grand Inquisitor Narrative and Jewish Memory and Experience

Although Dostoevsky’s Grand Inquisitor narrative may be interpreted as showing that religious persecution is not necessarily attributable to evil motives, this is far from the only lesson to be learned from it. Consider that the Grand Inquisitor has the power of life and death over all alleged heretics. Indeed, the narrative discloses that the day before the visit of Jesus the Grand Inquisitor burned one hundred heretics at the stake.¹¹ The Grand Inquisitor dominates others through the threat of physical force because he combines religion with virtually untrammelled political power.

It is not so clear, however, that the Grand Inquisitor is exercising that power in order to benefit religion and humanity. Although the Grand Inquisitor claims he is acting to protect the community from the dangerous freedom that Jesus espouses, he should not be taken at his

7. *Id.* at 859.

8. *Id.* at 862.

9. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

10. *Id.* Several years before *Barnette*, Justice Frankfurter wrote the majority opinion in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), a decision that *Barnette* overruled.

11. “[A] day before, nearly a hundred heretics had been burnt all at once by the cardinal, the Grand Inquisitor, *ad majorem gloriam Dei* in ‘a magnificent auto da fe,’ in the presence of the king, the court, the knights, the cardinals, and the fairest ladies of the Court and the whole population of Seville.” FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 291 (David Magarshack trans., Penguin Books 1982) (1880).

word. He may represent the worst case: an evil person who uses religion to hide his desire for domination over others. The narrator's observation that the Grand Inquisitor is in fact an atheist supports this interpretation.¹²

Whether the Grand Inquisitor is actually an evil person does not really matter.¹³ Instead, the real lesson is that religious and political power are a potentially dangerous combination. It is a lesson not only from literature, but also from a more trenchant narrative—that of history. Surely this is one of the reasons that the Establishment Clause is in the First Amendment. Many Christians who came to America in its formative years did so to escape religious persecution. Similarly, Jews began to immigrate to this land of religious freedom because in most other countries they were subject to the whims of religious fervor supported by political power, typically in the form of an authoritarian regime.

The Jewish memory and experience of religious persecution, which have become embedded in Jewish history, prayers, and rituals, go back nearly two thousand years, much further than the American memory and experience. If for no other reason, attention must be paid to this aspect of Jewish history.

Religious persecution against Jews probably had its origins in the increasingly bitter split between Christianity and Judaism in the first centuries of the Common Era. This split was accompanied by politically motivated polemics against Jews in the Gospels, especially the Gospel of John, giving religious persecution of Jews a divine justification. The doctrine of supersession, which maintained that the covenant between God and the Jews was no longer viable and that Christians were the new Israel, also played a major role in constituting Jews as the Religious Other. This history of persecution, together with the Church's developing political power, created an environment in which Jews were often helpless to protect themselves from the many religious pogroms directed at them. Ultimately, this religious otherness and its accompanying hostility became intertwined with nationalistic politics and culminated in this century with the Holocaust.

12. Alyosha (Alexey), who has just heard the story from Ivan, exclaims: "Your inquisitor doesn't believe in God—that's all his secret!" Ivan responds: "Well, suppose it is so! At last you've guessed it! And in fact, it really is so. That really is his whole secret." *Id.* at 307.

13. Immediately after Ivan indicates that the Grand Inquisitor is very likely an atheist, he says: "But is that not suffering, particularly for a man like him who had sacrificed his whole life for a great cause in the wilderness and has not cured himself of his love of humanity?" *Id.* This suggests that the Grand Inquisitor may be an altruist despite being an atheist.

Consequently, Jews familiar with European history and their own place in it have every reason to be suspicious of religion in the public square. After two millennia of experience, they are unlikely to believe that religious passions will gradually fade and that greater tolerance for the Religious Other will eventually emerge. When religious values are combined with political power, Jews become especially concerned. No matter how many menorahs are displayed during Hanukkah, and no matter how often the adjective "Judeo-Christian" is chanted like a mantra, Jews know that they, like other non-Christian religious minorities, will always retain their status as both a religious minority in this country and a victim of religious animosity. Derrick Bell has argued convincingly that racism will never disappear.¹⁴ I believe that religious animosity similarly cannot be eliminated, although we should never stop trying to do so through education and otherwise. Our goal should be to cabin this animosity and to limit it to the extent possible.

II. The Public-Private Distinction

It follows from this assessment that there is reason to be exceptionally wary of religion in the public square.¹⁵ There is, of course, a Free Speech Clause right to bring religious views and perspectives into the public square. If the public square is pervaded by such views and perspectives, however, religious minorities and non-believers can only be the losers. Thus, the Establishment Clause should be interpreted to mandate the complete separation of church and state, not merely an accommodation between them.¹⁶ Both religion and nonreligion are thereby protected. In other words, if religious ideas are to enter the public square under the Free Speech Clause, they must make their own way in the marketplace of ideas, with no help at all from government.¹⁷ Government involvement, even if it is only through speech, can be dangerous.

14. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 1-14, 109-26 (1992).

15. See Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061 (1992) (reviewing and criticizing MICHAEL J. PERRY, *LOVE AND POWER* (1991)).

16. While it is not always easy to apply the much criticized three-part Establishment Clause test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), it should be retained because it tends to support the wall between church and state. For the time being, at least, the test remains alive. See *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992).

For a very different view of accommodation, see Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 34-41 (arguing that accommodation must facilitate exercise of religion). See also Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at the Crossroads*, 59 U. CHI. L. REV. 115, 115 (1992) ("The old [Religion Clause] jurisprudence failed to distinguish between government action that promotes the free exercise of diverse faiths and government action that promotes the majority's understanding of proper religion . . .").

17. Religious *practices* should have the Free Exercise Clause protection of a strict scru-

This is not to denigrate religion and its values. I am criticizing neither religion in general nor Christianity in particular.¹⁸ Deep study of my own religion's values, as well as my more limited study of Christianity, has convinced me that most, if not all, religious values are ennobling for individuals and the community. In fact, I personally believe in the sacredness of Judaism and its tenets.

Nevertheless, the classical liberal distinction between the public and the private must be reaffirmed.¹⁹ This distinction, admittedly neither natural nor inevitable, is an extremely valuable social construct. Religion belongs presumptively and firmly in the private sphere, and it should influence us only in so far as its ideas are persuasive.

Of course, we need to feel that we belong to a political community in order to function as one.²⁰ But just as we should not attempt to generate this sense of community through the sacralization of patriotic symbols like the flag,²¹ we should not try to do so either by injecting the sacred into the secular or by supplanting the secular with the sacred.

III. Some Concluding Questions

All this said, there are several unresolved questions related to religion in the public square. First, is it possible that the potentially adverse consequences of religion in the public square are somewhat overstated? It might be argued that advocates of religion in the public square should be worried that the marketplace of ideas will have a possible desacralizing effect on religion.²² The marketplace values ideas, but these valua-

tiny test of the sort the Supreme Court unwisely rejected in the famous peyote case, *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 882-85 (1990). A counter-majoritarian judicial tilt in such cases, and not a deferential stance, would protect the practices of religious minorities against discrimination. *But see* William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 310-17 (1991) (defending *Smith's* "rejection of constitutionally compelled free exercise exemptions").

18. This is not to deny the considerable hostility to religion that is present in public life. *See* Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 *passim* (1992) (arguing that the liberal American distinction between public and private life has marginalized religion).

19. *See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 222 (1992) ("Just as the free exercise of religion implies the free exercise of non-religion, so the ban on establishment of religion establishes a civil public order, which ends the war of all sects against all. The price of this truce is the banishment of religion from the public square . . .").

20. The importance of an individual's connection to the political community was asserted long ago by Plato, whose *Republic* "has had the effect of making the ideal of politics, of political power, of the political bond, of the political community, the most distinctive and most influential of all types of community to be found in Western philosophy." ROBERT NISBET, *THE SOCIAL PHILOSOPHERS* 106 (1973).

21. Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511, 525-31 (1991).

22. *See*, for example, *Lynch v. Donnelly*, 465 U.S. 668, 671, 685 (1984), in which the city

tions are not static and change from time to time. This dynamic characteristic of marketplace valuations is in marked contrast to the typical religious position that religious values are sacred and unchanging. Promoting religious ideas in the marketplace of ideas exposes them to competition, counterargument, and modification or rejection. Keeping religion in the private sphere may therefore strengthen religion.

Second, what is the possible role of religion itself in promoting tolerance? In Judaism, the Rabbis since Talmudic times have made it abundantly clear that the "righteous gentile" has a share in the world to come in the afterlife. Salvation is available to those who obey God's laws that were prescribed for the children of Noah, which include a ban on murder and on eating flesh from still-living animals.²³ Do other religions have a similar doctrine under which members of different religions are not disqualified from salvation?

Finally, could a national community that does not care too much about religion, or understand it very well, be the most effective guarantor of religious tolerance? Are we all better off, even the most religious among us, belonging to a national community in which religion is marginalized in the public square and treated with benign neglect? So long as this marginalization does not occur at the expense of those who wish to observe their religion, it could be the ultimate political safeguard for religion in general and religious minorities in particular. On the other hand, when religion is marginalized in the public square, the assimilation and abandonment of religious observance and values may result.

Whatever the answers to these questions, the private observance of religion can flourish and, indeed, has flourished to a considerable extent as a result of the formal and informal constraints on religion in our society. We must always remain on our guard, however, for the demons that religion can unleash. Unfortunately, no religion—Christianity, Judaism, Islam, or any other—has a monopoly on these demons.

of Pawtucket desecralized the creche by using it for commercial purposes. The Supreme Court further desecralized the creche by characterizing it as secular. *Id.* at 681.

23. See *Genesis* 9: 1-19. The Noachide Laws are the following:

1. Providing civil justice through the establishment of courts.
2. The prohibition of blasphemy, including bearing false witness.
3. The abandonment of idolatry.
4. The prohibition of incest.
5. The prohibition of murder.
6. The prohibition of theft.
7. The prohibition against eating the flesh of a living animal.

ENCYCLOPEDIA OF JUDAISM 526 (Geoffrey Widoger ed., 1989). Christians and Moslems are considered to have abandoned idolatry and adopted the Noachide Laws. *Id.*