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Book Review: "The Tragedy of Religious Freedom"

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The Tragedy of Religious Freedom. By Marc O. DeGirolami.
Cambridge: Harvard University Press, 2013. 320pp.

The intimations of government are to be found in ritual, not in religion or philosophy; in the enjoyment of orderly and peaceable behavior, not in the search for truth or perfection.

Michael Oakeshott, *On Being Conservative*¹

When English theorist Michael Oakeshott praised the warm virtues of “being conservative” he was not, of course, defending the modern American political ideology. Rather, he endorsed a particular “disposition” or attitude towards the social and political conflicts that inevitably arise between free and independent persons. His was a habit of presumptive deference to the collective wisdom of those that have come before; a humility in the face of enduring questions of human association, and a reluctance to replace hard won customs with our own blinding theoretical or moral certainties. Our past has value, not just as a transcendental mediator of contemporary disputes, but because our ancestors, too, were good and decent people who worked to make their world a fulfilling place. This regard for custom sees in the past not perfection, but vitality, conciliation, and the natural concomitance of human flourishing and human tragedy. It is this same disposition that Marc DeGirolami’s thoughtful and rewarding new book, *The Tragedy of Religious Freedom*, takes toward the American experience of religious liberty.

Consider, as DeGirolami does, the case of Jonas Yoder, a member of the Old Order Amish, who violated compulsory school attendance laws to keep his children

¹ Oakeshott, Michael. “On Being Conservative.” *The Portable Conservative Reader*. Ed. Russell Kirk. New York: Penguin, 1982. 567-599. Print.

at home on the farm as his faith required.² Or the cross on Sunrise Rock in the Mojave National Preserve, which stood for seventy years as a World War I memorial before a Park Service employee sued to have it taken down.³ These cases ask us not only to assess our myriad notions about the nature and importance of religious liberty, but also to reconcile those conceptions with other deeply held social and political values. DeGirolami contends that we cannot hope to resolve such controversies by reference to any single overarching principle, but must instead consider the particular values at stake in each case in the light of our collective historical experience of religious freedom. And, most importantly, we must acknowledge that legal resolutions inevitably come at real cost; the elevation of one value in a given case entails a tragic remainder—the loss or denigration of other important human ideas and experiences.

With this in mind, DeGirolami recommends “the method of tragedy and history”—a holistic and transparent balancing of value, loss, sacrifice, and history within case-specific contexts—as an approach to questions of religious liberty.⁴ DeGirolami’s heart is thus profoundly conservative in the best Oakeshottian and Burkean sense, as he contends we should give history a “special regard” in our deliberations about religious freedom.⁵ Indeed, DeGirolami is at his best when he urges “less Burkeanism” and “more Burke”—our traditions, he argues, have both instrumental *and* inherent value—and we might fruitfully apply his insights here to

² *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

³ *Salazar v. Buono*, 559 U.S. 700 (2010).

⁴ DeGirolami, p. 9.

⁵ *Ibid.* p. 121.

contexts well beyond religious liberty.⁶ This conservatism, of course, does threaten to place one value—history or custom—above all others, but DeGirolami carefully reminds us that his regard for the past is merely presumptive, not determinative.⁷ It is simply a working respect for the sacrifices and conciliations that have shaped our lived experience of religious freedom.

Still, DeGirolami's is not a dissenter's or Protestant account of religious liberty. A disposition towards historical value judgments inevitably tilts the scales in favor of those practices and compromises with which we are most familiar. While DeGirolami celebrates the Supreme Court's deference to history in *Van Orden v. Perry*—which upheld a longstanding monument of the Decalogue on the Texas State Capitol grounds—one might fairly wonder whether such doctrine fairly serves religious minorities or those that would challenge traditional orthodoxies.⁸ We might doubt, in other words, that DeGirolami's concession to “modest movement” is generous enough to embrace Martin Luther's radical stand at Wittenberg.⁹ Even as a disposition, the turn to social and doctrinal history may leave dissenters bearing a disproportionate share of tragic loss.

With that said, DeGirolami's is a thoughtful and sophisticated meditation on the protean relationship between law and faith in a society committed to religious freedom. His intellectual and cultural influences are broad and rewarding; his style is rich and accessible; and his critique of both theoretical foundationalism and skepticism is profound and compelling. *The Tragedy of Religious Freedom* is an

⁶ *Ibid.* pp. 115-120.

⁷ *Ibid.* p. 144.

⁸ *Van Orden v. Perry*, 545 U.S. 677 (2005).

⁹ DeGirolami, p. 111.

important book that will undoubtedly influence and enrich this discussion for years to come.

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