THE PIETY OF MY NEGATIVE JUDAISM

Andrew Koppelman[*]

Many American Jews never got much of a Jewish religious education; I am one of them. Some of us are constitutional law scholars. Is there anything distinctively Jewish about our scholarship?

At least with respect to my own work, I think the answer is yes. Judaism sometimes influences the thought of American Jews through means other than the transmission of Jewish intellectual traditions.

I am a secularized American Jew. That gives me a distinctive orientation, which in turn influenced the writing of my book, *Defending American Religious Neutrality*.[1] It is a hackneyed truism that American Jews are outsiders (though that is not unique to Jews; American Catholics have a similar experience).[2] This may help to explain the concern, in the work of a lot of American Jewish scholars, for those who are marginalized by the prevailing regime.

What is distinctive about being a Jew in a predominantly Christian society is the rejection of the core belief of mainstream religion, the divinity of Christ. That has led to a self-imposed exclusion from Christian rituals, including those whose religious content is marginal, such as Christmas celebrations. These have nothing to do with Christian theology, but they obviously have something to do with Christ. In the case of Jews who had only a modest education in Judaism and who barely participated in its practices, this exclusion paradoxically is more salient than it is for those whose Judaism has a lot of substance in their lives. It is one of their few manifestations of piety.

My family was barely Jewish. We did not keep kosher, go to temple, or even observe Yom Kippur, which, for many Jews, is the one time of year when they do attend services. We had Jewish

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[*] John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Thanks to Roberta Kwall for helpful comments on an earlier draft.

[1] ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013).

[2] Tracy Fessenden's description of F. Scott Fitzgerald's conflicted identity is remarkably reminiscent of familiar accounts of American Jews. *See* TRACY FESSENDEN, CULTURE AND REDEMPTION: RELIGION, THE SECULAR, AND AMERICAN LITERATURE 181-212 (2007).

friends, but they did not follow those practices either, as far as I knew. Passover was the important annual ritual for us, with Hanukkah trailing along after. I knew enough about Orthodox Judaism to understand that from the standpoint of that tradition, only celebrating Passover and Hanukkah was weird.[3] I only learned much later that this kind of practice is typical for American Jews.[4]

When I was a child, resistance to the pressure to participate in Christian rituals (especially Christmas) was the only thing I regularly did that marked me as Jewish. I understood that any willingness to engage in any behavior that implicitly treated Christianity as an existential option would manifest disrespect toward something that deserved enormous respect.

Determined self-exclusion from the particular theological commitments of mainstream American Christianity is the means by which secular Judaism conveys its respect for the transcendent. That practice, being entirely negative, is of course entirely compatible with speculative agnosticism and existential atheism. It also may have helped me understand an aspect of American law that has persisted for centuries but which has evaded the comprehension of American scholars. There is an interesting isomorphism between my amorphous piety and that of American law.

The interpretation of the Establishment Clause of the U.S. Constitution is intensely debated. Two factions dominate contemporary discussion. One tends to regard the law of the religion clauses as a flawed attempt to achieve neutrality across all controversial conceptions of the good. This faction views the attempt as flawed because it is satisfied with something less than the complete eradication of religion from public life. The other faction thinks that any claim of neutrality is a fraud, and that law necessarily involves some substantive commitments. This faction claims that there is thus nothing wrong with frank state endorsement of religious propositions: if the state is inevitably

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[3] Justice Brennan was correct that the political practice of erecting a menorah, "the symbol of a relatively minor Jewish religious holiday," next to Christmas trees, and having this be the only political acknowledgement of Judaism that occurs in any calendar year, "has the effect of promoting a Christianized version of Judaism." County of Allegheny v. ACLU, 492 U.S. 573, 645 (1989) (Brennan, J., dissenting). The celebration of Passover as the central Jewish holiday is even more distant from mainstream Judaism.

[4] *See A Portrait of Jewish Americans*, PEW RESEARCH CTR., (Oct. 1, 2013), http://www.pewforum.org/2013/10/01/jewish-american-beliefs-attitudes-culture-survey/. Thanks to Bobbi Kwall for referring me to this source.

going to take sides, why not this one? One side regards religion as toxic and valueless; the other is untroubled by the state's embrace of an official religion. Neither sees much value in the way American law actually functions.

Yet America has been unusually successful in dealing with religious diversity. The civil peace that the United States has almost effortlessly achieved has been beyond the capacities of many other generally well-functioning democracies, such as France and Germany. Even if the American law of religious liberty were entirely incoherent, it might still be an attractive approach to this perennial human problem. There is, however, a deep logic to the law that its critics have not understood.

Prominent scholars of religion ridiculed President-elect Dwight Eisenhower's 1952 declaration: "Our form of government has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is."[5] Eisenhower nonetheless revealed a deep insight into the character of American neutrality.

My book, *Defending American Religious Neutrality*, elaborates on Eisenhower's observation. Here is the argument, very briefly stated.

American First Amendment doctrine has used "neutrality" as one of its master concepts,[6] but it treats religion as a good thing. Its neutrality is its insistence that religion's goodness be understood at a high enough level of abstraction that the state takes no position on any live religious dispute. It holds that religion's value is best honored by prohibiting the state from trying to answer religious questions. This neutrality has over time become more vague as America has become more religiously diverse, so that today (with the exception of a few grandfathered practices) the state may not even affirm the existence of God.

Religion, as such, is routinely given special treatment. Quakers' and Mennonites' objections to participation in war have been accommodated since Colonial times. Such accommodations are ubiquitous and very popular. Americans *like* religion, even minority religions. When Congress enacted the Religious Freedom

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[5] Both the statement and the ridicule are noted in Patrick Henry, *"And I Don't Care What It Is": The Tradition-History of a Civil Religion Proof-Text*, 49 J. AM. ACAD. OF RELIGION 35 (1981). Eisenhower's critics included Will Herberg and Robert Bellah.

[6] *See, e.g.*, Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 18 (1947); Zorach v. Clauson, 343 U.S. 306, 314 (1952); Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 676 (1970); Wallace v. Jaffree, 472 U.S. 38, 60 (1985); Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819, 839-46 (1995); McCreary County of Ky. v. ACLU, 545 U.S. 844, 860, 874-81 (2005).

Restoration Act (RFRA), which attempted to require states to grant such exemptions, the bill passed unanimously in the House and drew only three opposing votes in the Senate.[7] After the Supreme Court struck down the Act as exceeding Congress's powers, many states passed their own laws to the same effect.[8] The RFRA remains valid as applied to federal law.

Disestablishment, too, is based on a judgment that religion is especially valuable. One of its central purposes has always been protecting religion from corruption by the state.[9] James Madison, the principal author of the First Amendment, argued that:

> [E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.[10]

The same theme turns up in numerous Supreme Court opinions. Just one example: the Court's declaration in *Engel v. Vitale* that under the Establishment Clause "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[11] Any notion of corruption implies a norm or ideal state from which the corruption is a falling off. If religion were not thought valuable, the notion of its corruption would be incoherent.

In short, American law treats religion as valuable but says almost nothing about what religion is. The closest the Supreme Court has come to addressing the question of how to define religion for legal purposes is a pair of draft exemption cases during

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[7] Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 160 (1997).

[8] For a survey, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211-12, 212-12 nn.368-73 (2004).

[9] See KOPPELMAN, *supra* note 1, at 46-77; Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

[10] James Madison, *Memorial and Remonstrance Against Religious Assessments* (Nov. 11, 1785), *in* 2 THE WRITINGS OF JAMES MADISON 187 (Gaillard Hunt ed., 1901).

[11] Engel v. Vitale, 370 U.S. 421, 431-32 (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*).

the Vietnam war. Both involved claimants who conscientiously objected to war, but who would not avow belief in God. The Court responded with a functional definition of religion, holding that the question a court must answer is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[12] It explained that the pertinent objection "cannot be based on a 'merely personal' moral code," but it gave no example of the line that it was drawing. These were statutory interpretation cases, only tangentially related to the constitutional issue: two concurring opinions declared that if the statute were read less broadly, it would violate the establishment clause.[13] Since then the Court has offered no further clarification of what it means by "religion."

As stated earlier, this same valuation of something that is intentionally underspecified is as much religiosity as I have. I find religion fascinating, spend a lot of time studying it, and in some moods suspect that it grasps some Transcendent Something that really exists. I am pious enough, even with respect to substantive religious beliefs that I think are hooey, to be disgusted by the modern Christmas display, paid for by tax dollars secured through the influence of the local merchants association, reminding us that Jesus suffered and died on the cross so that we could enjoy great holiday shopping.

On the other hand, I have never seriously considered engaging in religious rituals. They do nothing for me and God, who (if She exists) is magnificently self-sufficient and so does not get anything out of them either. Occasionally I have a reason to attend a religious service, and I am always bored. I am moved by the religious music of Bach, Mozart, and Brahms, but to hear those performed well one must go to a secular venue.

When I look at American law, it is a little like looking in a mirror. I am left with enormous respect for something vague and unnamable. There is value there. The law also treats it as valuable. Without an analogous basis in my own religious orientation, I might not have seen it, even though it has been in plain sight all along.

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[12] United States v. Seeger, 380 U.S. 163, 166 (1965).

[13] *Id.* at 188-93 (Douglas, J., concurring); Welsh v. United States, 398 U.S. 333, 344-67 (1970) (Harlan, J., concurring). The story is told in detail in Andrew Koppelman, *The Story of Welsh v. United States: Elliott Welsh's Two Religious Tests*, *in* FIRST AMENDMENT STORIES 293 (Richard Garnett & Andrew Koppelman eds., 2011).