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God and Man at the Supreme Court: Rethinking Religion in Public Life

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Let's begin with a multiple choice test. Who said, "At the heart of liberty is the right to define one's own concept of existence"? Was it (a) Albert Camus; (b) Jean-Paul Sartre; (c) Justice David Kennedy; or (d) all of the above?

The correct answer is (d); in one way or another, each of them said it. I don't believe that is a coincidence.

The quotation, of course, comes from the Supreme Court's decision in *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992). But it could just as easily have come straight out of Sartre's *Being and Nothingness*, or from one of Camus's novels. In fact, it would be difficult to find a more succinct summary of the existentialist message than Justice Kennedy's "[a]t the heart of liberty is the right to define one's own concept of existence."

Much has been written about that sentence. Some suggest that it is a window on the Supreme Court's jurisprudence. Others dismiss it as just another bit of overblown judicial rhetoric, a throw-away line in the midst of a long opinion. I would like to suggest that it is both. It is certainly overblown rhetorically. (This is, after all, the same justice who once brooded that he didn't know if he were "Caesar crossing the Rubicon, or Captain Queeg cutting his tow line.") But just because Justice Kennedy sometimes gets carried away, it doesn't follow that his hyperbole should be disregarded. Like the rest of us, he reveals something of himself in his throw-away lines. Few people have read Einstein. But every McDonald's clerk will tell you that "all things are relative." Most people don't read Kierkegaard, but many still remark on the need for a "leap of faith." So, too, with Justice Kennedy. It may be difficult to imagine him sitting up at night drinking espresso and reading Kafka. But his thinking may still be—and evidently is—strongly influenced by the Americanized, pop version of existentialism that the late Allan Bloom referred to as "nihilism without the abyss."

In a real sense, there is no such thing as a throw-away line in a Supreme Court opinion. Every society has a public philosophy, whether articulated or not. It is made up of the predominant assumptions about the great ideas—about God and man, about the nature of society and the state, of freedom and responsibility, and so forth. It is the medium through which we discuss the issues of the day. America's public philosophy is uniquely influenced by Supreme Court decisions. Much of the current American vocabulary of "rights," for example, derives

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ultimately from opinions of the Warren Court. And that Court's social teachings regularly turn up, a generation later, in the opinion polls.

A critical aspect of a society's public philosophy is its anthropology, its implicit understanding of who we are and what makes us tick. To take a simple example, in the same way that any McDonald's clerk will tell you that "all things are relative," any American will tell you that "all men and women are created equal." This is a particularly important facet of America's public philosophy, and one that differs significantly from, say, Saudi Arabia's or even England's public philosophy. Lines like Justice Kennedy's thus do more than just offer us a glimpse of his thinking. For better or worse, they also shape our public anthropology. They teach us who we are.

My thesis is that there are two very different public anthropologies contending for place in America's public philosophy, and that the debate over religion in public life is best understood as a manifestation of the contest between these two competing anthropologies.

In the first anthropology, human beings come with a built-in thirst for the transcendent. They may not know who, or even if, God is, but they have a natural desire to find out. It is a desire that may be repressed or even ignored. But nevertheless it is natural to human beings to wonder about and search out the possibility that there is a God. In the words of Abraham Maslow, "spiritual life is...part of the human essence. It is a defining characteristic of human nature...without which human nature is not full human nature." This is not a new idea. It is a common point of all world religions, and is also firmly rooted in the classical Western tradition. It is, for example, vintage Aristotle. But if it is not merely new, it is also not merely old. It is a prominent feature of Personalist philosophy, as well as of Vatican II and the United Nations Declaration on Human Rights. And if the Gallup polls year after year are to be believed, it is the anthropology accepted by the vast majority of Americans.

What is more, according to this anthropology our religious impulse is intimately bound up with our social impulse. We are born with the desire for community. While each of us is unique, we humans are nevertheless social creatures, eager to form families, gather in clans and tribes, display our arts, and commemorate with ritual the great events of life. This, once again, is vintage Aristotle. It is book one of the *Politics*. (In fact, the English word "idiot" derives from the Greek, *idiotes*, meaning a private person, that is, one who does not participate in the life of the *polis*. Aristotle, in other words, wouldn't hesitate to describe post-modern, autonomous, self-seeking loners as idiots. And, as usual, he would be right.)

Thus, according to the first anthropology, human beings come with a built-in thirst for the transcendent and a built-in desire to live in community. They therefore require freedom to do two things: first, to search with authenticity for the transcendent; and second, to express in the full measure of their humanity—in the arts, in public worship, and in political discourse—what it is they believe they've found. In short, because the religious impulse is natural to human beings, religious expression is natural to human culture.

So much for the first anthropology. Its main competition today comes from a vulgarized form of existentialism. According to this view, human beings come with no built-in thirst for anything transcendent. Rather, people come with a built-in affliction of fear and alienation. And they require freedom not to go questing for some nonexistent transcendent but, as Sartre put it, to define their own lives through their own actions, free from any distressing claims of morality or eternity. Religion, in this view, is at most one among many possible hobbies available to the

enlightened, if angst-ridden, individual. As we will see, this pop version of existentialism appears to have captivated a number of Supreme Court justices.

Which anthropology a government accepts determines what sort of religious liberty it permits. A government that holds the first anthropology, which is that the religious impulse is natural to human beings, will let a thousand flowers bloom. It will take no position on who God is. (That is, after all, beyond its competence, because it is only the state.) But it will nonetheless welcome religious expression—from all traditions—in public culture. And its own cultural offerings will reflect the society in which it finds itself, including that society's religious dimensions. In short, it will recognize freedom of religion.

Jersey City, New Jersey, under Mayor Bret Schundler, is a good example. The city puts up a creche for Christmas, a menorah for Chanukah, and proclaims Ramadan with a sign, and celebrates the Hindu New Year, in addition to hosting scores of other cultural events. (The American Civil Liberties Union is, of course, suing the city. My organization, the Becket Fund, is defending it.)

By contrast, a government that has fallen into the second, let us call it Sartrean, anthropology will take a very different track. It will seek to protect its alienated, atomized, individual citizens from unwanted and distressing religious claims. It will be largely indifferent to private expression of religion but hostile to public expression of it. Indeed, it will tolerate public religion at all only as one item in a longer list of allegedly similar things. It will grant freedom from religion. Such a government will behave, in other words, exactly like our Supreme Court.

Perhaps the only constant in the Court's tangled religion clause jurisprudence is its insistence that the government must be neutral not only among the individual religions but also between religion and what the Court calls irreligion. Now, it is difficult rhetorically to argue against neutrality. Neutrality sounds too neutral to ever be offensive. But "neutrality between religion and irreligion" paints with too broad a brush. It fails to distinguish between two very distinct ideas: the theological question of who God is and the anthropological question of who we are. It thus ends up requiring the government to treat religion, not as a natural human trait, but merely as one possible private choice. In the process the Court does much to shape—I would say "distort"—our public anthropology.

The Court's privatization of religion has been relentless and cuts across all categories of its otherwise disparate religion clause jurisprudence. For example, the Court now considers tax exemptions for religious organizations to be constitutional only so long as similar tax exemptions are provided to other, allegedly similar but secular entities. Thus, in *Texas Monthly, Inc.* v. *Bullock,*[1] the Court struck down a state sales tax exemption for religious publications. The plurality wrote "when government directs a subsidy exclusively to religious organization that is not required by the Free Exercise Clause," that effort violates the Establishment Clause.[2] Later, in *Jimmy Swaggart Ministries* v. *Board of Equalization of California,*[3] the Court ruled that tax exemptions for religious organizations were constitutional if they were "part of the general exemption for nonprofit institutions." Taken together, if the cases demonstrate the Court's

1 489 U.S. 1 (1989).
2 489 U.S. at 15.
3 493 U.S. 378 (1990).

determination not to permit tax benefits to religious organizations *qua* religious organizations, but only as one among many types of charity.

The same principle holds true for other types of public benefits. The Court has made clear that they may go to religious organizations only if they are offered by the government to a wide class of beneficiaries, both religious and secular, and end up aiding the religious organizations only because of the intervening private choices of individuals. So, for example, in *Witters* v. *Washington Department of Services for the Blind,* the Court permitted the state of Washington to issue a vocational tuition grant to a blind man who intended to use the money to attend a Bible college. The Court approved the scholarship because it was not given directly to the college, but only to Mr. Witters, who was free to apply it either to religious or secular colleges. Similarly, just this past June, in *Agostini* v. *Felton,* the Court held that the Establishment Clause did not prevent New York City from providing Title I remedial instruction to disadvantaged children inside parochial school buildings. The Court held that so long as the same remedial instruction was offered both to public and parochial school children it was constitutional, because it was the children's families that chose to send them into parochial school, not the state. Justice Sandra Day O'Connor likened such cases to a federal worker donating his government paycheck to his church. Once again, the principle is neutrality: so long as the government gives a benefit to its citizenry according to a religion-neutral criterion, it is acceptable if some of those private citizens choose to use the benefit at religious institutions.

The principle may be best seen, however, in the Court's religious display cases. In two badly splintered decisions, *Lynch* v. *Donnelly* and *Allegheny County* v. *ACLU,* the Court held that government display of religious symbols is permissible only when their context makes clear that the government is in no way favoring religion. In the lower courts this has come to be known as the "plastic reindeer rule," that is, a rule requiring Christmas Nativity scenes to be festooned with plastic reindeer, candy canes and other trinkets. Indeed, the lower federal courts have taken this analysis one step further, and are busily striking down municipal seals, emblems, and mottoes containing religious symbols. The Tenth Circuit recently struck down a city seal that contained, among other things, a cross.[4] Likewise, the Seventh Circuit has struck down two city seals, one reading "God Reigns," the other displaying a cross.[5] Indeed, that court even granted the plaintiffs legal standing in part because they could not bear to look at religious displays, that is because of a worsening of their existential angst.

The Supreme Court is protecting, under the Free Speech Clause, *private* religious expression in open public fora, but only barely. In *Capitol Square* v. *Pinette,* the Court ruled that the Ku Klux Klan had the right to erect a cross in a public square open to other unattended displays. Nevertheless, a majority of the Court was unwilling to make that rule absolute and held open the possibility that religious speech in a public forum could sometimes be constitutionally discriminated against if there was too great a risk that the private speech would be mistaken for the government's own views.

What is more, challenges to public religion, and *only* challenges to public religion, enjoy relaxed standards of what is called standing. The doctrine of standing permits suit only by one

4 *Robinson* v. *City of Edmond,* 68 F.3d 1226 (10th Cir. 1995).
5 *Harris* v. *City of Zion* and *Kuhn* v. *City of Rolling Meadows,* 927 F.2d 1401 (7th Cir. 1991).

whose ox has been gored. Thus, as a general rule, taxpayers may not sue to change policies they disagree with—except for religion. Any taxpayer is permitted to sue to claim that the government is violation of the Establishment Clause. In effect, the Court has deputized the entire citizenry in its mission of privatization.

And, in the name of neutrality, the Court has gutted the Free Exercise Clause, effectively leaving only the non-establishment principle in play.

Some individual justices have tried to take privatization even further. Justice John Paul Stevens in particular has compiled a remarkable voting record. In his nearly 22 years on the Supreme Court he has voted in favor of finding an establishment of religion in almost every Establishment Clause case he has heard. The only exceptions have concerned the constitutionality of Title VII and cases concerning limited, neutral benefits. He has also written some amazing individual opinions. In *Board of Educ. of Kiryas Joel School Dist.* v. *Grumet*,[6] he opined that one of the things that was wrong with a public school district composed exclusively of Hasidic Jews was that it aided Hasidic Jewish parents in raising their children in their faith. Justice Stevens has even gone so far as to suggest that moral convictions are an unconstitutional basis for legislation. Thus, he has written that a legislative preamble declaring life to begin at conception violates the Establishment Clause, because it "endorses the theological position that there is the same secular interest in preserving the life of a fetus during the first 40 or 80 days of pregnancy as there is after viability—indeed, after the time when the fetus has become a person with legal rights protected by the Constitution." *Webster* v. *Reproductive Health Services*.[7] There is an old joke: "Why are Baptists opposed to sex? Because it might lead to dancing." In the same way Justice Stevens appears to be opposed to establishments because they might lead to religion.

The privatization of religion is accomplished even more crudely when the idea reaches the lower, bureaucratic levels of government. Many are fond of telling horror stories of how evangelical children are oppressed by public school teachers. Indeed, entire direct mail campaigns have been built around such stories. And they are, of course, sad. But what is even sadder—and sometimes funny—is how these stories really are not limited either to Christians or even to schoolchildren. Rather, privatization of religion shows itself to be an equal opportunity oppressor of believers of any sort. My favorite example is one that Perry Mason might have called the Case of the Sacred Parking Barrier. Of course, it could only have happened in California.

For many years, behind the tea garden in Golden Gate Park there stood an abandoned parking barrier. And for many years parkgoers complained that the parking barrier was an eyesore and tried to get it removed. Bureaucracy being what it is, however, the parking barrier remained. Until one day a New Age group discovered the parking barrier and began to worship it. Whereupon the park officials decided they had an affirmative constitutional obligation to remove the parking barrier lest public property be worshiped and the separation of paganism and state be breached. (Just think of the implications if this precedent were to hold up. The government would have to remove anything people began to worship. Then we could solve all sorts of problems just by worshiping Congress, provided we could keep a straight face.)

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6 512 U.S. 687 (1994).

7 492 U.S. 490, 568 (1989) (Stevens, J., dissenting).

The Case of the Sacred Parking Barrier illustrates well the basic principle of public existentialism: that religious expression of any sort—even parking barrier worship—must be banished from public life, not because any particular religion is out of favor, but because religion generally is offensive.

There is, however, a corollary to this principle. It is well-illustrated by the Strange Case of Michael Last. Mr. Last is a county employee of Hilo, Hawaii. And he is a committed atheist who firmly believes that December 25 is a day like any other day and most certainly should not be a public holiday. So, beginning a few years ago Mr. Last demanded to be allowed to work on Christmas. The county agreed, but only on condition that Mr. Last accept extra pay. (Tough bargainers, these county bureaucrats.) Well, Mr. Last tolerated that as long as he could. But this year he put his foot down and demanded that he be paid the normal rate, and not one penny more. Eventually his superiors woke up and decided that Mr. Last could work on Christmas and not get paid extra. But then his union sued. The United Public Workers Union said that because Mr. Last is covered under their collective bargaining agreement he has to be paid more whether he likes it or not. So now Mr. Last is in court fighting his union for the right to work on Christmas without getting overtime.

There's no telling how all this will work out, but everyone is taking it quite seriously. And that illustrates the corollary: Religious expression of any sort must be banished from public life, except for atheism. Atheists get to be as religious as they want.

The constant theme that emerges from both the courts and the bureaucracy is that religion belongs entirely in private. It will be tolerated in public only when it is clearly presented as just one among many types of private choice. All this has been accomplished in the name of neutrality—not merely neutrality among religions, but neutrality between religion and so-called irreligion. Now that is far from being the only possible reading of the First Amendment. In fact, it is not even the most natural reading of it. And it has drawn much criticism, both from academics and members of the Court, including three sitting justices. To date, the criticisms have been historical and textual. But there is a third basis, an anthropological one—the Supreme Court's insistence on privatizing religion is built on a flawed conception of who we are.

If all the Court meant by neutrality between religion and irreligion were that the government could not take sides in theological debates, its position would be coherent. After all, who is the government to decide between Allah and Buddha, between transubstantiation and consubstantiation? But in practice, at least, neutrality has come to mean being neutral not only on who God is, but on who we are. That is, it has come to mean that the government must pretend it doesn't know whether the people it is governing possess or lack a religious impulse. And that is incoherent. The government simply must have a clear idea of just who it is that it is governing. Imagine the government attempting to make law while being "neutral" on whether its citizens are sexual beings. The results would be laughable. It is just as funny to attempt to make constitutional law under the religion clauses while pretending not to know whether the American people are religious.

So, then, the government can take a position on who we are. It can choose an anthropology consciously, rather than by default. Which should it choose, the traditional one, or the Sartrean one? And how should make its decision?

It should choose the traditional one for two reasons. First, traditional anthropology, unlike the pop existentialist view, has empirical data on its side. There never has been a culture, ours

included, without religious elements. Indeed, even the most repressive totalitarian regimes could not succeed in extinguishing religion. They only drove it underground, and only temporarily at that. There is, moreover, an impressive body of social science data suggesting that the spiritual impulse is basic to human psychology. And it is the majority view of the American people.

Second, choosing the traditional anthropology allows the government to be genuinely neutral on cosmic questions. To say human beings thirst for the transcendent is not to say anything about who—or, logically, even if—the transcendent is. It is merely to say something important about who human beings are. But that is not so for the existentialist position the Court has implicitly adopted. It necessarily assumes that there is no transcendent, but only alienated individuals who are anguished by false claims of one.

What would such a change look like? It would look far simpler than the Supreme Court's current, and by its own admission, tangled religion clause jurisprudence. As in Jersey City, Nativity scenes and menorahs, together with Buddhas and proclamations of Ramadan, could return with dignity to the public square unburdened by an entourage of reindeer and Frosty the Snowman. Religious expression in culture would then look like ethnic expression in culture. We do not entertain lawsuits by individual Serbs, for example, who wish to complain about Croatian cultural events and demand neutrality on the grounds of ethnicity. Anglophiles cannot sue to stop St. Patrick's Day parades. There is no reason why religion should be treated any differently.

All schools that educate well—including parochial schools, which educate better and less expensively—could share, in one way or another, in public education aid. And the government, while remaining scrupulously above the fray of which religion is true, could reap the benefit in civic virtue that follows from religious search and expression.

Finally, Justice Kennedy's rhetoric would change. It would now sound something like: "at the heart of Liberty is the right to search for the truth and publicly celebrate the results of that search."