

## Remarks on the Installation of Marc O. DeGirolami As the Inaugural Cary Fields Chair

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**REMARKS ON THE INSTALLATION OF  
MARC O. DEGIROLAMI  
AS THE INAUGURAL CARY FIELDS CHAIR**

MARK L. MOVSESIAN<sup>†</sup>

I am grateful for this opportunity to make some brief remarks in honor of the inaugural Cary Fields Professor of Law, my friend and colleague, Marc DeGirolami. My work as a scholar and teacher, and my flourishing as a person, owe much to him, and to his wife, Lisa, and his son, Thomas, with whom I have spent many happy hours over the past decade, both in New York and in Rome, where our work as co-directors of the Center for Law and Religion often takes us.

I will not speak tonight about what Marc's friendship means to me, personally, though. Rather, I will address what his presence means to our law school, and why he so richly deserves the honor our school has bestowed on him. For ten years, Marc has been a pillar of our academic community. He was a driving force behind the Center's most recent initiative, the Tradition Project—a three-year endeavor that brought together scholars, jurists, and journalists to discuss the continuing value of tradition in law, politics, and culture. I will have much to say tonight about the role of tradition in Marc's thought. He is a talented and beloved teacher who has taught across the curriculum, offerings as diverse as Constitutional Law, Criminal Law, Torts, and Professional Responsibility. Marc has helped shape hundreds of our alumni, who will carry the memory of his classes with them throughout their careers.

Tonight, though, I would like to focus on Marc's contributions as a tireless, thoughtful, and influential scholar. He always has several writing projects underway, and several more in his head, waiting to be put to paper. This energy explains Marc's great productivity: one book (so far) and dozens of chapters, articles, essays, and blog posts. He is a widely sought-after speaker at law

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schools and universities. Marc's latest paper, on traditionalist interpretation, has the potential to reshape the way scholars understand how the Supreme Court decides cases under the Constitution.<sup>1</sup>

Three interrelated themes characterize Marc's work: a commitment to legal scholarship in the old dispensation; a healthy skepticism about theory, or at least about univalent theories that attempt to explain law in terms of a single goal or interest; and a recognition of law's inevitable complexity. I would like to say a word about each of these themes and then show how they blend together to give Marc's scholarship its unique, and paradoxically novel, voice. In tradition, Marc has discovered an overlooked source of insights about law that suggest a new and exciting path forward for the scholarly community.

First, Marc's work reflects a commitment to traditional legal scholarship—a sort of scholarship of which we see less and less, sadly. Most of us today are specialists. We know a lot about a particular area of law, but not so much about others. Traditionally, though, American legal scholars were generalists, who over the course of a career would write about many different subjects. True, a scholar might devote special attention to a particular field—John Henry Wigmore on evidence or Samuel Williston on contracts or Soia Mentschikoff on commercial law. But the best scholars often branched out into different areas. I think of someone like Grant Gilmore, an expert in contracts, but also in secured transactions and admiralty—and French literature! (His specialty was the symbolist poet Stéphane Mallarmé).<sup>2</sup> Traditional scholarship assumed, in the phrase we usually attribute to Maitland, that law is “a seamless web,” and that it is not profitable, or even possible, to try to understand one subject without knowing something about all the others.<sup>3</sup>

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<sup>1</sup> Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. (forthcoming 2020) (St. John's Sch. of Law Legal Studies Research Paper Series, Paper No. 19-0019, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3349187](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3349187) [hereinafter DeGirolami, *Traditions of American Constitutional Law*].

<sup>2</sup> On Gilmore and Mallarmé, see Phillip C. Bobbitt, *The Age of Consent*, 123 YALE L.J. 2334, 2334 (2014).

<sup>3</sup> On Maitland, see Lawrence B. Solum, *Legal Theory Lexicon: The Law is a Seamless Web*, LEGAL THEORY BLOG (Oct. 1, 2006, 2:54 PM), [https://lsolum.typepad.com/legaltheory/2006/10/legal\\_theory\\_le.html](https://lsolum.typepad.com/legaltheory/2006/10/legal_theory_le.html).

As I say, we have moved to a different model of legal scholarship today, a more specialized model, much in the manner of other disciplines like medicine. But, in his work, Marc has maintained the traditional, generalist approach. He has written in many different areas and his repertory continues to expand. He has written extensively in law-and-religion, his main area of expertise.<sup>4</sup> He has written in criminal law, for example, on culpability and on punishment theory.<sup>5</sup> He has written in constitutional law, both generally with regard to constitutional interpretation and specifically with respect to the First Amendment.<sup>6</sup> Lately, he is branching out into torts.<sup>7</sup>

Marc's work reflects the traditional model in another important way as well. Marc pays attention to other scholars. Now, of course, all of us pay attention to the work of our contemporaries. It is important to do so in order to contribute to the scholarly conversation—and to be cited ourselves! But Marc's work recognizes that brave men lived before Agamemnon and that one should not ignore the contributions of scholars who thought and wrote long before we came onto the scene.<sup>8</sup> All scholars are, in a sense, contemporaries. Scholarship partakes of the eternal.

In an article he wrote for the *Ohio State Journal of Criminal Law* in 2012, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, Marc argued that contemporary

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<sup>4</sup> *E.g.*, MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* (2013) [hereinafter DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM*]; Marc O. DeGirolami, *The Two Separations*, in *THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY* 396 (Michael Breidenbach & Owen Anderson, eds., forthcoming Feb. 2020); Marc O. DeGirolami, *On the Uses of Anti-Christian Identity Politics*, in *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND* (William Eskridge & Robin Fretwell Wilson, eds., 2018).

<sup>5</sup> Marc O. DeGirolami, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, 9 OHIO ST. J. CRIM. L. 699 (2012) [hereinafter DeGirolami, *James Fitzjames Stephen*]; Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597 (2009).

<sup>6</sup> *E.g.*, DeGirolami, *Traditions of American Constitutional Law*, *supra* note 1; Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465 (2016) [hereinafter DeGirolami, *Virtue, Freedom, and the First Amendment*].

<sup>7</sup> Marc O. DeGirolami, *A Theory of Malice* (forthcoming) (unpublished manuscript on file with author).

<sup>8</sup> "Many brave men lived before Agamemnon: but all of them, unlamented and unknown, are overwhelmed with endless obscurity, because they were destitute of a sacred bard." HORACE, IV ODES: ODE IX TO MARCUS LOLLIUS (C. Smart, A.M. trans., Theodore Alois Buckley B.A. ed., Nov. 11, 2004) (ebook). Samuel Williston once used this phrase to dismiss the pretensions of the Legal Realists. *See* Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 273 (2005).

punishment theorists should “open themselves” to the scholarship of the past—in particular, to the writing of the Victorian scholar, James Fitzjames Stephen.<sup>9</sup> Looking to Stephen, Marc wrote, would illuminate issues and help contemporary scholars fashion, and perhaps modify, their own approaches.<sup>10</sup> Similarly, in a 2016 article in the *Notre Dame Law Review*, *Virtue, Freedom, and the First Amendment*, about which I will say more later, Marc drew on the work of the late political theorist Walter Berns.<sup>11</sup> Looking to someone like Berns was “somewhat unusual,” Marc conceded, but nonetheless vital, as the insights Berns developed in his work would help today’s scholars understand the values that drive contemporary Supreme Court decisions in the free speech area.<sup>12</sup>

The second theme that characterizes Marc’s work is a skepticism about high theory, especially theory that attempts to explain a body of law through a single, abstract concept. Now, we academics tend to like theory. Theory plays to our strengths as intellectuals and systematizers, and glory often goes to the person who finds the master key that can unlock legal problems and render the theories of other scholars unnecessary. Marc does not reject theory entirely—no scholar can go that far—but he is cautious about it for two reasons. First, abstract theories often lose sight of lived experience. To be legitimate, law must fit the multitudinous circumstances of a real-world political community. It must reflect that community’s history and tradition and the conflicting values that history and tradition inevitably manifest. Abstract theories that ignore real-world particularities are, in Marc’s words, “beguiling but ultimately misleading.”<sup>13</sup>

For example, in a forthcoming piece in the *Notre Dame Law Review*, *The Traditions of American Constitutional Law*, Marc shows how the Supreme Court often interprets constitutional language in a way that favors longstanding customs over abstract concepts.<sup>14</sup> Marc calls this method “traditionalist interpretation”—a method that “focuses on practices, rather than abstract principles or general tests,” to inform constitutional meaning.<sup>15</sup> As one example of this approach, he gives a recent

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<sup>9</sup> DeGirolami, *James Fitzjames Stephen*, *supra* note 5, at 702.

<sup>10</sup> *See id.*

<sup>11</sup> DeGirolami, *Virtue, Freedom, and the First Amendment*, *supra* note 6, at 1468.

<sup>12</sup> *Id.*

<sup>13</sup> DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM*, *supra* note 4, at 7.

<sup>14</sup> DeGirolami, *Traditions of American Constitutional Law*, *supra* note 1.

<sup>15</sup> *Id.* at 2.

Establishment Clause case, *Town of Greece v. Galloway*, which upholds the constitutionality of legislative prayer.<sup>16</sup> In holding the practice constitutional, the Court stressed that legislative prayer is a longstanding, continuous custom in America that dates to the early Republic.<sup>17</sup> As I read him, Marc favors this traditionalist approach to constitutional interpretation, at least most of the time. A different approach, one focused on abstract ideas like equality or neutrality, would illegitimately slight the lived experience of millions of Americans over the course of centuries—and, inevitably, reflect the values and commitments of a narrow set of actors, judges, and scholars at the expense of citizens more broadly.<sup>18</sup>

Marc is skeptical about high theory for another reason as well. Theory, Marc believes, can obscure what is really going on in the cases. For example, in the article about the First Amendment I mentioned a moment ago, in which he cites Walter Berns, Marc critiques the conventional theory that explains the Court's free-speech jurisprudence in the second half of the twentieth century in terms of an abstract commitment to neutrality—a refusal on the Court's part to prefer one substantive vision of the good society to others.<sup>19</sup> The Court's commitment to neutrality, the theory goes, explains why it was willing to rule that centuries-old blasphemy laws were invalid and that pornography, long reviled in the law, was constitutionally protected speech. In fact, Marc argues, this theory misrepresents what the Court was doing in its First Amendment jurisprudence. What the Court was actually doing was not upholding substantive neutrality, but steering America away from one substantive vision of the good society to another.<sup>20</sup>

The emphasis on the particular and concrete, rather than the universal and abstract, leads me to the third theme that characterizes Marc's work: a recognition of law's inevitable complexity. Law always reflects the ambient culture—and no culture is ever simple. Culture always embodies conflicting values, which exist in a tension that is never fully resolved. Our

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<sup>16</sup> 134 S. Ct. 1811 (2014). For DeGirolami's treatment of this case, see DeGirolami, *Traditions of American Constitutional Law*, *supra* note 1, at 6–8.

<sup>17</sup> See *Town of Greece*, 134 S. Ct. at 1818–25.

<sup>18</sup> See DeGirolami, *Traditions of American Constitutional Law*, *supra* note 1, at 48.

<sup>19</sup> DeGirolami, *Virtue, Freedom, and the First Amendment*, *supra* note 6, at 1490–98.

<sup>20</sup> *Id.* at 1516.

own culture, for example, historically has been committed, all at once, to both individual and community, to both faith and skepticism, to both equality and liberty. Consequently, our law is pulled in different directions and never settles on a single, unifying value. The wise scholar, Marc maintains, recognizes the irresolvable tensions and does not content himself with simple, artificial solutions. He accepts that law will always reflect a plurality of values that never quite cohere.

The best example of this theme in Marc's work is his 2013 book, *The Tragedy of Religious Freedom*.<sup>21</sup> In that book, Marc develops a conception of religious liberty that avoids "reductive and systematic justifications."<sup>22</sup> Marc's crucial insight is that one cannot explain or defend religious liberty in terms of a single, abstract value. When it comes to religious liberty, our culture, and consequently our law, is committed to values that are "incompatible and incommensurable," including piety, autonomy, egalitarianism, and majority rule, to name just a few.<sup>23</sup> This is why, Marc maintains, conflicts over religious liberty are ultimately "tragic," in the "classical and literary" sense: they do not admit of harmonious conclusions in which all tensions are resolved, as in a happy wedding at the end of a play.<sup>24</sup> The wise judge understands this fact and approaches such conflicts with a modest understanding of what he or she can accomplish with any particular decision—and with the recognition that all judicial resolutions are, in the deepest sense, provisional.

So, these three themes characterize Marc's work: a commitment to old-fashioned legal scholarship; a focus on concrete particularities, rather than abstractions; and a recognition of law's inevitable complexity and pluralism. These are the virtues of a Burkean conservatism—rather than one of the many varieties of modern conservatism, which place great store in economic theory and often focus on one value, like liberty or nationalism, to the exclusion of others. The virtues of Burkean conservatism are tradition, balance, prudence, respect for religion, and recognition of the great plurality of values that make up a culture. One does not encounter this approach very much in the academy today, but it is Marc's own, and he employs it with great skill.

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<sup>21</sup> DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM*, *supra* note 4.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 55.

That is why I said at the beginning that Marc's voice is, paradoxically, a novel one—and here I will close. We are accustomed to think of the great scholar as the person who comes up with something no one has thought of before: a new theory, a new explanation, a new prescription that will change the law in exciting ways. But, like the actor in that old French film says, "Novelty is as old as the hills."<sup>25</sup> In looking to tradition, Marc has discovered something new and overlooked in the legal academy—something that will add to our knowledge and understanding of how law works and should work. I know that all of us here look forward to watching Marc develop his insights in the years ahead, and congratulate him as he receives the Cary Fields Chair tonight.

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<sup>25</sup> CHILDREN OF PARADISE (Pathé 1945).