

Fordham Urban Law Journal

Volume 30 | Number 1

Article 2

2002

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Recommended Citation

Steven Goldberg, *Religious Contributions to the Bioethics Debate: Utilizing Legal Rights While Avoiding Scientific Temptations*, 30 Fordham Urb. L.J. 35 (2002).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol30/iss1/2>

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Religious Contributions to the Bioethics Debate: Utilizing Legal Rights While Avoiding Scientific Temptations

Cover Page Footnote

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RELIGIOUS CONTRIBUTIONS TO THE BIOETHICS DEBATE: UTILIZING LEGAL RIGHTS WHILE AVOIDING SCIENTIFIC TEMPTATIONS

*Steven Goldberg**

Religious communities and individuals of faith have much to contribute to the debate on legal issues surrounding bioethics. There is no constitutional problem with their participation in that debate; indeed, constitutional principles protect the right to express religious viewpoints in the public square. The real question is what will be said; will religion make a distinctive contribution to the bioethics controversy, or will it merely echo the agenda and the perspective of modern science?

I will begin by outlining the legal right of religious individuals and groups to participate in legislative deliberations such as those relating to bioethics. The interplay of free speech and the religion clauses creates a favorable environment for robust public debate, while the due process clause guarantees that religious values can be passed on in religious schools. I will then turn to a general consideration of what sorts of contributions people of faith might make. Too often, it seems to me, they are seduced by science: eager to talk as if the human genetic code is all that matters, while expressing relatively little interest in vital nonscientific issues, like access to medical care.¹ Whether it is an unconscious adoption of the notion that only science is important, or simply an overwhelming desire to be trendy, religious groups often miss the opportunity to make a distinctive contribution to public debate.

Let us begin by looking at their right to participate in that debate. The free speech clause in the United States Constitution protects religious speech every bit as much as it protects political speech. No branch of the federal or state government can prevent you from talking to your neighbor, writing an editorial, or emailing your Congressman, no matter whether your views are widely shared or yours alone. Moreover, the government cannot prevent

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1. See generally STEVEN GOLDBERG, *SEDUCED BY SCIENCE: HOW AMERICAN RELIGION HAS LOST ITS WAY* (1999) (analyzing the risks when religion adopts a scientific perspective).

you from expressing Christian views any more than it can prevent you from expressing utilitarian views. When the late Justice William J. Brennan, Jr. and the current Justice Antonin Scalia served together on the United States Supreme Court they often disagreed, but on this point they were in complete harmony. As Justice Brennan wrote when the Court unanimously invalidated a law barring clergy from holding political office, we cannot “place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.”² Or, as Justice Scalia more recently held, “a free-speech clause without religion would be Hamlet without the prince.”³

The Constitution also protects the free exercise of religion. By its nature, the practice of a religion cannot be as fully protected as religious speech. When a religious practice, such as the use of the hallucinogen peyote, conflicts with the law, the practice may have to give way.⁴ But that is not the matter before us. When religious speech is involved, the free exercise and free speech clauses point in the same direction: against government censorship. Long before Brennan and Scalia were Justices, a unanimous Supreme Court made this clear. In 1940, the Court considered the case of Newton Cantwell, a Jehovah’s Witness, who had been convicted of breach of the peace for expressing religious views that were quite unpopular in the neighborhood where he was preaching.⁵ The Court at that time was quite diverse: it included conservatives like Justice James C. McReynolds, centrists like Justice Harlan F. Stone, and liberals like Justice William O. Douglas. But the Court was unanimous in reversing Cantwell’s conviction. Relying on free exercise values and traditional free speech doctrine, the Court held that the “state may not unduly suppress free communication of views, religious or other.”⁶ Since there was no “clear and present danger to a

2. *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring in the judgment) (holding that statute disqualifying ministers from holding public office was unconstitutional).

3. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (holding that allowing a group to place a cross in a designated public forum did not violate the First Amendment).

4. *See Emp. Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (holding statute prohibiting use of peyote constitutional because the statute was not aimed at promoting or restricting religious beliefs).

5. *Cantwell v. Conn.*, 310 U.S. 296, 301-03 (1940). Cantwell was also convicted of soliciting without a license. *Id.*

6. *Id.* at 308.

substantial interest of the State," Cantwell's speech, however unpopular, had to be protected.⁷

There is another constitutional protection for religion that is less well known but no less important than free speech and free exercise. In 1925, the Supreme Court held, in *Pierce v. Society of the Sisters*, that parents have a substantive due process right to send their children to private schools, including parochial schools.⁸ The case arose after Oregon enacted a law requiring that all children between the ages of eight and sixteen attend public school.⁹ The unanimous Court held that, although states could mandate school attendance, parents had a right to choose private schools if they met state standards.¹⁰ The current Supreme Court has reaffirmed this holding.¹¹ *Pierce* has been called "almost certainly" the Supreme Court opinion "most supportive of the survival of religious communities."¹² It permits those parents who so choose to enlist parochial schools in the creation and maintenance of religious values, assuring that the next generation will have a informed basis if they want to bring religious perspectives to bear in public debate and in private choices.

Given the strong protection the free speech, free exercise, and due process clauses give to the creation and expression of religious viewpoints, it is something of a puzzle why so many people, across the political spectrum, are uncertain about the right to present religious views in policy arguments. Most likely the confusion in the public mind about this point stems from a misunderstanding of the non-establishment of religion clause in the Constitution. Some people, including supporters and opponents of traditional religion, apparently believe that if a clergyman or a devout citizen presents arguments based on religion in support of a bill, passage of that bill would be an "establishment of religion." That has never been the law. And thank goodness. Under that standard, theft and murder, among many other things, would be lawful. Indeed, many of our laws trace their origins to the Bible. Supreme Court Justice Sandra

7. *Id.* at 310-11.

8. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534-35 (1925).

9. See WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927*, at 148-53 (1994) (outlining history of Oregon's compulsory public education initiative).

10. *Pierce*, 268 U.S. at 535.

11. See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (holding that parents have a constitutional right to decide who educates their children).

12. STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 35 (1998).

Day O'Connor, noting that numerous statutes blend secular and religious elements, wrote that, "[c]haos would ensue if every such statute were invalid under the Establishment Clause."¹³

The dominant approach the Supreme Court has taken in this area is to ask if a statute has a secular purpose. If it does, the statute will be upheld even if it is based in part on religious values.¹⁴ Thus the Court upheld the constitutionality of Sunday closing laws, even though they were religiously inspired, because they also served valid secular purposes such as the protection of workers.¹⁵ Now, of course, it can be difficult at times to determine if a statute really has any secular purpose.¹⁶ But this is unlikely to be a problem in the bioethics area. Countless secular arguments, ranging from economic productivity to health and safety concerns, have already been raised on all sides of the debate over research in modern medicine. Under the circumstances, the Court is not likely to find any plausible legislation in this area to be an establishment of religion. After all, the Court has already declined to make such a finding in the highly charged area of abortion. After the Court in *Roe v. Wade*¹⁷ found that women had a substantive due process right to abort early in pregnancy, Congress passed the Hyde Amendment, prohibiting the use of federal funds to reimburse the cost of abortions under Medicaid, except in narrow circumstances.¹⁸ The Amendment was challenged on the ground that it was an unconstitutional establishment of religion because it was based on the Roman Catholic view that life begins at conception. When the Supreme Court rejected this argument, Justice Potter Stewart's opinion for the Court made all of the arguments we have discussed: he noted that the opposition of major religions to stealing does not prohibit the state from outlawing theft, he pointed out that Sunday closing laws had been upheld because they have a secular purpose, and he observed that there were secular opponents of abortion who believe that the fetus should be protected from conception.¹⁹ So the Hyde Amendment was upheld.

13. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring).

14. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1204-06 (2d ed. 1988).

15. See *McGowan v. Maryland*, 366 U.S. 420, 435-36, 445 (1961).

16. See, e.g., *Wallace*, 472 U.S. at 56-57.

17. 410 U.S. 113, 164 (1973).

18. See Hyde Amendment, Pub. L. No. 94-439, tit. II, § 209, 90 Stat. 1434 (1976); *Harris v. McRae*, 448 U.S. 297, 302-03 (1980).

19. *Id.* at 319-20. Other challenges to the Hyde Amendment failed as well.

Thus religious organizations are perfectly free to participate fully in the formation of policy in the field of bioethics. In doing so they will join a vibrant American tradition. As Stephen L. Carter has recently reminded us, “[t]he great social movement of the nineteenth century – the abolition of slavery – and the great social movement of the twentieth – the abolition of legal racial segregation – were both nurtured in churches, publicly justified in religious language, and unapologetically inspired by the Word of God.”²⁰ It is, after all, the Reverend Martin Luther King that we revere today. There is no reason to believe religion will not play a vital role in the great social debates of the twenty-first century as well.

Of course, in a pluralistic society such as ours, no single religion, not even all religions together, will or should be the sole determinant of how we resolve deeply contested social issues. It is short sighted and misguided for anyone to believe that they can play a role in American politics without genuinely seeking common ground with those of varying perspectives. And I recognize that there is an important debate among political theorists about the appropriate scope of explicitly religious arguments when public officials debate certain issues.²¹ But resolving social issues entirely without the input of religious values is neither legally required, nor wise.

So I am not concerned about the legal right of religious groups or individuals to participate in the bioethics debate. But I am concerned about how that right will be used. My concerns began in 1995 when I read a front page story in the New York Times reporting that leaders from more than eighty religious denominations had

20. See STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 20 (2000); see also MARTIN E. MARTY & JONATHAN MOORE, *POLITICS, RELIGION, AND THE COMMON GOOD: ADVANCING A DISTINCTLY AMERICAN CONVERSATION ABOUT RELIGION'S ROLE IN OUR SHARED LIFE* 44-45 (2000).

21. Kent Greenawalt, John Rawls, and Michael Perry are among the participants in this debate. Greenawalt believes certain public officials should not publicly justify decisions in religious terms. See, e.g., Kent Greenawalt, *Religion and American Political Judgments*, 36 *WAKE FOREST L. REV.* 401, 410 (2001). Rawls argues that religious justifications should not be used when society is addressing fundamental structural questions. See JOHN RAWLS, *POLITICAL LIBERALISM* 10 (1993). Perry takes a view that is “more congenial to the airing of religious arguments” than either Greenawalt’s or Rawls’s; he would typically allow public officials and other citizens to rely on religious arguments. MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 61 (1997); see also Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy*, 36 *WAKE FOREST L. REV.* 217, 229-34 (2001).

issued a statement opposing the patenting of human genes.²² I read the statement, studied its background, and, to make a long story short, I was shocked.²³ Not because of any disagreement about patent law. The problem was that the religious leaders were relying on a report that described genetics research as though it changed everything. Genetic science, the report said, “explores the essence of life.”²⁴ It forces us “to examine, as never before, the meaning of life,”²⁵ it promises “to alter . . . human nature,”²⁶ and it forces us to re-evaluate “determinism versus free will, the nature of sin, . . . and the meaning of personhood.”²⁷

These are remarkable sentiments. They would be remarkable even if they were presented by an utterly secular speaker, since someone with that point of view is typically aware that the environment, as well as heredity, plays a crucial role in human behavior. One might expect that religious leaders would stress not only the environment, but the possibility that humans exercise free will. After all, the notion that human behavior can be described, at least in part, as the result of antecedent causes did not come into being with the Human Genome Project. Philosophers, theologians, scientists, and others, ranging from Lucretius to Aquinas, from Spinoza to Freud, have worried about this matter for quite some time. Descartes, in his *Discourse on Method*, imagined a mechanical creature, physically identical to a human being, that was able to dream, smell, taste, and speak, before concluding that such a creature would not be human because it would lack a soul.²⁸ There is nothing in the Human Genome Project that would change Descartes' view.

I am afraid that the overreaction on the part of some religious leaders to progress in genetics is not an isolated incident. Too often, people of faith seem to be seduced by science; to believe that science always has the most important things to say about the human condition. Consider the recent movement to view prayer as a form of medicine. Now praying may in fact sometimes improve

22. Edmund L. Andrews, *Religious Leaders Prepare to Fight Patents on Genes*, N.Y. TIMES, May 13, 1995, at A1.

23. Steven Goldberg, *Gene Patents and the Death of Dualism*, 5 S. CAL. INTERDISC. L.J. 25, 33-34 (1996) (discussing the history of the statement, which traces its origins to a report of the General Conference of the Methodist Church).

24. THE BOOK OF RESOLUTIONS OF THE UNITED METHODIST CHURCH 331 (1992).

25. *See id.*

26. *See id.* at 330.

27. *See id.* at 329.

28. BRUCE MAZLISH, *THE FOURTH DISCONTINUITY: THE COEVOLUTION OF HUMANS AND MACHINES* 22-24 (1993).

your health. But it can serve many other purposes as well, including teaching us about our connections to other people and about accepting what lies ahead of us, even when what lies ahead is outside of our understanding and control. When we view prayer only as medicine it becomes just another item on a list with aspirin and acupuncture: useful for arthritis, not indicated for pancreatic cancer. Religion is trivialized when it becomes just a minor branch of science.

When I talk about my concern that clergy and religious spokesmen are overemphasizing the possible use of prayer as medicine, I am often met with amazement. Rabbis and ministers have asked me, "What's wrong with using prayer as medicine if it cures people?" Of course, there is nothing wrong with adding prayer to exercise, a healthy diet, and pills if all of these make us healthier. Good doctors should be well aware of these possibilities if they are, in fact, real possibilities. But I believe clergy have a calling that is distinct from the medical profession. The fact that many of them are eager to talk about petitionary prayer in terms of medical outcomes and double blind studies is not good news. First of all, from a theological point of view, prayer might not always work in a way that can be measured by modern science. Secondly, and most importantly, I would hope that clergy have a different agenda than that of scientists.

Perhaps an analogy will make this more clear. Suppose a suitably rigorous double blind study demonstrated that wheat grows taller if you play modern jazz within ten feet of the crop during the growing season. That would be terrific news for people who are interested in growing wheat, and I assume agricultural scientists would follow up with studies to determine whether the trumpet music of Wynton Marsalis or the saxophone music of Joshua Redman is the more efficacious approach. But I would be shocked and disappointed if Wynton Marsalis and Joshua Redman gave up trying to produce better jazz and focused *their* efforts on deciding what kind of music makes wheat grow. They are jazz musicians: they have their own history, traditions, and goals that are quite distinct from growing wheat. I hope the clergy also have a mission that is distinct from that of science.

Let me give another example where I believe modern religion has been seduced by science. Consider the obsession some people of faith have with finding scientific proof for the Biblical account of creation. It is a commentary on our culture that we have a movement called "creation science," as though science were the final

arbiter of everything that matters. Creation science is not just bad science, it is bad theology as well. Even if it were true, it would not be a compliment to say that the Bible is a science text.

Part of the problem with giving science an unduly large role in our thinking is that we then tend to believe that only those things that are quantifiable are worthy of our attention. This perspective is quite widespread in our society. As Gertrude Himmelfarb has pointed out, we now see "the attempt of political philosophy to transform itself into political science, history into social science, literary criticism into semiotics" ²⁹ Religious organizations should stand against this tendency; they should not exemplify it.

The overarching point, and the one we have to keep in mind when we consider the bioethics debate, is that science cannot generate our values and science should not set our agendas. Science can tell us about what is, but not about what ought to be. Slavery's existence did not make it right. Similarly, the fact that something is scientifically possible does not mean that it is desirable.

There is another, more subtle way that science tends to affect public debate. The value system of science stresses progress, and thus puts a tremendous emphasis on priority, that is, on being first with a new discovery.³⁰ The media have a similar interest in breakthroughs, so there are often remarkable headlines, suggesting that amazing new energy sources and medicines are right around the corner. The reality, of course, is often more mundane. The path from science to useful technology is not always smooth; energy sources produce waste, medicines have side effects; indeed, nuclear energy is not too cheap to meter, and the war on cancer has yet to succeed.³¹ There are times when focusing on the latest headline misses the bigger point, the more persistent issues that always confront us. Again, people of faith should have a particular ability to take the longer view. Science is not likely to eradicate all of our needs, including our need to choose between good and evil, between right and wrong.

Of course the relationship of science to religion is more complex than I have indicated here. There are various ways the two can

29. GERTRUDE HIMMELFARB, MARRIAGE AND MORALS AMONG THE VICTORIANS 92 (1986).

30. STEVEN GOLDBERG, CULTURE CLASH: LAW AND SCIENCE IN AMERICA 3 (1994).

31. *See id.* at 1-5, 84-111.

interact; they need not always be separate to survive.³² But surely most of us would agree that science should not swallow religion.

I speak as someone who strongly supports basic scientific research.³³ And I believe that informed social policymaking often requires that we non-scientists inform ourselves about recent discoveries and their implications. It is not possible to make sensible policy and moral decisions in a vacuum. But we should never assume that the latest discovery changes everything. Often, on important social and moral issues, it changes very little.

Let me give an example that might be helpful in our further deliberations during this conference. One kind of issue that is often overlooked when we read headlines about the latest discovery is the question of how the benefits and costs of that discovery will be distributed throughout our society. For example, will rich and poor be affected equally; if not, is that a cause for concern? My focus on distributional issues is not intended to force a liberal or a conservative bias on the question. Different religious and moral traditions will have different teachings about the role of individual responsibility, the coercive power of the state, our obligations to others, and so on. The point is that applying those teachings can greatly enhance the quality of our individual and social choices.

Let me give you an imaginary case to try to give you a sense of what I am talking about. Suppose that next Monday's New York Times reports that scientists at Johns Hopkins, drawing on sophisticated new genetic techniques, have developed a remarkable new pill. This pill, taken exactly once a week for twelve weeks, will reduce by fifty percent the odds that you will contract cancer of any kind. The only side effect is that it will increase by ten percent the odds that you will someday suffer a fatal stroke. Each pill costs one thousand dollars, so the total cost is \$12,000.

I am sure that many sermons the following weekend will talk about this pill. The clergymen will want to make sure their congregations know that their leader is up to date, that he reads the New York Times, and that he studies all medical diagrams contained therein. I hope the sermons will mention that not all apparently dramatic advances actually pan out. More importantly I hope

32. Ian G. Barbour has identified four ways that science and religion can relate to each other: conflict, independence, dialogue, and integration, IAN G. BARBOUR, RELIGION AND SCIENCE: HISTORICAL AND CONTEMPORARY ISSUES 77-105 (1997). John F. Haught, in a similar vein, speaks of conflict, contrast, contact, and confirmation. JOHN F. HAUGHT, SCIENCE AND RELIGION: FROM CONFLICT TO CONVERSATION 9, 204-05 (1995).

33. See GOLDBERG, *supra* note 30, at 183.

there will be time in the sermons to talk about the distributional issues the pill raises. They are, after all, pretty obvious. They concern not only the \$12,000 cost but also the fact that not everyone will learn from the newspapers that the pill exists, what its side effects are, and precisely how often one has to take it.

Our society usually has two automatic reactions to these distributional issues. One approach is the individualistic one: people should be responsible for learning about and paying for the pill on their own. If you believe you are more at risk from stroke than cancer then you might decide not to take the pill; the choice is yours. If you miss a dose, that is your responsibility. And, of course, paying for the pill is up to you. The other approach emphasizes the role of government: tax dollars should be used to educate people about the pill, its risks, and the method for taking it. And tax money might be used to subsidize low income citizens who want to take the pill. The government could even choose to raise taxes enough to make the pill available to everyone at no cost.

As I have indicated, traditional religious perspectives may have an important contribution to make on these issues. Traditional teachings on the role of individual responsibility, the desirability of educating others, and the obligation to help the poor may all be relevant here, and those teachings should be explored every bit as much as the chemical structure of the pill is explored.

But let me suggest that traditional religious perspectives might point us in an additional direction. Modern economics and political science may focus primarily on the individual and the state, but surely religion often cares greatly about intermediate institutions, such as the family, the community, and the church itself. In the United States today, it is quite possible that the government's decision will be that the availability of this pill should be left largely to the workings of the free market, with a patchwork of subsidies through programs like Medicare and Medicaid, and a patchwork of public education programs in hospitals and clinics. Under this approach many people will not be able to afford the pill or will not be well informed about its risks and how to take it.

I can imagine religious groups stepping in and making a distinctive contribution here. Some faiths may teach a particular responsibility to family members; indeed, there may be a responsibility to sacrifice to make sure that your brothers and sisters have the knowledge and the resources they need so that they can make a meaningful decision whether to take the pill. Even more strikingly, some churches may conclude that they have a similar responsibility

to their entire membership in the United States and abroad. Such a church may decide that it should sacrifice to help its own members who lack the resources or the knowledge to decide whether to use the pill. And of course some religious groups may chose to use their resources to help others of every faith obtain the opportunity to use the pill.

Religious groups can and should debate these issues. And they should do so not just when an anti-cancer pill is discovered at Johns Hopkins. In fact, you can give this kind of sermon and have this kind of debate even in the absence of a new discovery. Because these are timeless issues—not easy issues, but timeless ones—and they are relevant to real medicines and medical procedures that exist today. In fact, these issues are and have been relevant for millennia to the distribution of food and education.

Bioethics is going to confront us with new challenges. But some of those challenges can be met with some very old tools.

