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Article 9

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# A CONTEMPORARY PERSPECTIVE OF RELIGION'S VIEWS OF THE LAW OF CHURCH AND STATE

## THE KINGSHIP OF CHRIST: WHY FREEDOM OF "BELIEF" IS NOT ENOUGH

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### I. THE CURRENT SITUATION: THE PREVALENCE OF "MERE BELIEF"

In addressing matters of church and state, Christian theologians in America by and large have assumed that it is their task to justify the First Amendment. We do not intend to take up that task in this Essay; indeed, we intend to do quite the opposite. We intend to show that the theoretical presuppositions and concrete practices underwriting the so-called separation of church and state have produced a set of political arrangements (i.e., the United States of America) that present a deep and intractable challenge to that community whose allegiance is first and foremost to the Kingship of Christ (i.e., "the one, holy, catholic, and apostolic church"). We intend to show, in other words, that the relation between church and state is marked by conflict and that Christian theologians make a profound mistake when they posit some kind of harmony between the two by means of a so-called church-state theory.

A most revealing, and disturbing, version of such church-state theory was recently put forth in a syndicated column by George Will.<sup>1</sup> The column focuses on the Supreme Court's ruling in *Em-*

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1. George F. Will, *Conduct, Coercion, Belief*, WASHINGTON POST, Apr. 22, 1990, at B7.

*ployment Division v. Smith*.<sup>2</sup> Briefly, the case involved two Oregon men, both Native Americans, who were fired from their jobs for ingesting small amounts of the hallucinogen peyote and were then denied unemployment benefits.<sup>3</sup> The men argued that peyote is sacramental in the Native American Church and that, on the basis of the First Amendment prohibition of laws “prohibiting the free exercise” of religion, they should not be penalized for using it.<sup>4</sup> The Court sent the decision back to the state with the affirmation that the Oregon Department of Human Resources has no obligation to pay benefits to the men if they had actually violated state law; the fact that they had used the peyote in religious worship was not relevant.<sup>5</sup>

In his column, Will commends Justice Scalia, author of the majority opinion, for upholding the lower court rulings that denied unemployment benefits to Smith and Black, but then he argues that Scalia did not go far enough. Specifically, Will adverts to a 1972 Supreme Court decision that exempted children of the Old Order Amish, on free exercise grounds, from having to comply with Wisconsin law requiring parents to send their children to school until age 16, and he contends that Scalia should also have struck down that decision. Scalia missed an opportunity to set the record straight, says Will; he could have reasserted the distinction that lies at the heart of the constitutional understanding of “religion” — the distinction between “conduct” and “mere belief.”<sup>6</sup>

In elaborating on the importance of the distinction between conduct and mere belief, Will spins out a story that is at once familiar and sobering. The Founders of the American Republic “wished to tame and domesticate religious passions of the sort that convulsed Europe. They aimed to do so not by establishing religion but by establishing a commercial republic — capitalism. They aimed to submerge people’s turbulent energies in self-interested pursuit of material comforts.” The hero of Will’s story is “the patron saint of libertarians — Saint Thomas. No, not Thomas Aquinas — Thomas

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2. 474 U.S. 872 (1990).

3. *Id.* at 874.

4. *Id.* at 878.

5. *Id.* at 890. A complicating factor in this case was that the men were employed as counselors at a drug and alcohol abuse center called ADAPT (the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment), whose rules explicitly proscribe the use of illegal drugs by employees.

6. Will, *supra* note 1, at B7.

Jefferson.” It was Jefferson who “held that ‘operations of the mind’ are not subject to legal coercion, but that ‘acts of the body’ are. Mere belief, said Jefferson, in one god or 20, neither picks one’s pockets nor breaks one’s legs.” As Will explains it, Jefferson’s distinction between conduct and mere belief “rests on Locke’s principle . . . that religion can be useful or can be disruptive, but its truth cannot be established by reason. Hence Americans would not ‘establish’ religion. Rather, by guaranteeing free exercise of religions, they would make religions private and subordinate.”<sup>7</sup>

It is with this business of making “religions private and subordinate” that Will’s familiar story becomes sobering. Will writes that “[a] central purpose of America’s political arrangements is the subordination of religion to the political order, meaning the primacy of democracy.” This means that “religion is to be perfectly free as long as it is perfectly private — mere belief — but it must bend to the political will (law) as regards conduct.”<sup>8</sup> Ingesting peyote, teaching children in the home, and any other form of religious conduct thus goes unprotected by the Constitution, and Will thinks this is a good thing. Why? Because even though some religious conduct must be restricted (quoting Scalia, Will refers to this as “‘an unavoidable consequence of democratic government’”), this is far more preferable (and here he quotes Scalia again) “‘to a system in which conscience is a law unto itself’”; because, in other words, it avoids anarchy. Will contends that the genius of the Founders was that they “favored religious tolerance because religious pluralism meant civil peace — order.” So, in spite of the laxity displayed with regard to the Old Order Amish children, Will commends Scalia for confining the free exercise of religion to “mere belief” and for allowing the restriction of religious “conduct.” “To understand the philosophic pedigree of Scalia’s sensible position,” Will maintains, “is to understand the cool realism and secularism of the philosophy that informed the Founders.” Thus, he states in conclusion that “Scalia’s position is not only sound conservatism, it is constitutionally correct: It is the intent of the Founders.”<sup>9</sup>

It is a secondary matter to us whether or not it was “the intent of the Founders” to “make religion private and subordinate,” as Will suggests. We believe that in either case, this is what has taken

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7. *Id.*

8. *Id.*

9. *Id.*

place, at least as regards Christianity. Christianity in America is "private and subordinate"; it has succumbed to "a central purpose of America's political arrangements" (i.e., the subordination of religion to the political order, meaning the primacy of democracy). But whereas George Will celebrates this achievement, we think it is disastrous. Moreover, we find it ironic (to say the least) that theologians in America have entered into this conspiracy to privatize and subordinate Christianity. The conspiracy operates whenever theologians acquiesce in the assumption (so vividly articulated by Will) that Christianity consists of a set of beliefs (mere belief) that can be abstracted from practices and actions (conduct). Part and parcel of this assumption is the notion that in America we are "free" because we are permitted to "believe" anything we want to, just so long as we do not assume that our beliefs can be embodied. The problem with this notion is that "belief" gets confined to an asocial sphere of interiority (e.g., Jefferson's "operations of the mind") in such a way that "freedom" pertains solely to that entity of liberal subjectivity called "the individual" and never to the only body wherein for Christians true belief resides, the body of believers called "the Church."

The usual question that theologians and others take up at this point is the interminable one concerning whether the first clause of the First Amendment, "Establishment," is subordinate to the second clause, "Free Exercise," or vice versa. But we wish to avoid this tack, for when the issue is construed in terms of the First Amendment, the prior questions of the meaning of "freedom" and the meaning of "religion" are too often overlooked. We do not believe that freedom in and of itself is a good. Indeed, we do not believe that freedom, in and of itself, even exists. And the term "religion" is even more problematic in that it usually implies that the service and worship of God can be meaningfully discussed without specifying the identity of God, who God is, which god is being worshiped. In this sense, Christians are not "religious" in any general sense; rather, Christians are the people who acknowledge the Kingship of Christ. So we are dubious about the intelligibility of "freedom of religion," especially when it is put forth as the centerpiece of a political project such as the United States of America.

In order to make our case, we are going to bring together a most unlikely set of political and intellectual allies: Stanley Fish, John Courtney Murray, and Pope Pius XI. We advert to the work of

Stanley Fish because Fish has helped us to see how all claims to "freedom" must inevitably be constrained when it comes to political practice; to John Courtney Murray because his work was more ambiguous than is usually supposed; and to Pius XI because he reminds us that Christians must acknowledge Christ's Kingship not only in belief but in practice, lest they find themselves worshiping foreign gods. By attending to this variety of perspectives on freedom and the good, we hope to show why the problem of "church-state relations" affords no real resolution.

## II. HOW "FREE SPEECH" DEGENERATES INTO INDIFFERENCE ABOUT SPEECH

In an article entitled *There's No Such Thing as Free Speech and It's a Good Thing, Too*,<sup>10</sup> Stanley Fish delivers a simple, straightforward point: Free speech cannot be a good in and of itself.<sup>11</sup> In introducing his argument, Fish points out that while defenders of free speech often buttress their assertions with a quote from Milton's *Areopagitica*, where the virtues of toleration and unregulated speech are extolled, they seldom take note of the way in which Milton "catches himself up short and says, of course I didn't mean Catholics, them we exterminate."<sup>12</sup> Fish notes that in excluding Catholics, Milton was not stipulating the single exception to an otherwise universal principle.<sup>13</sup> Rather, Milton was simply doing what any defender of free speech is compelled to do; he was pointing to possible future scenarios in which freedom of speech would have to be checked for the sake of the overriding ends of the community (which in this case would not countenance seventeenth-century British notions of evil, impiety, and bad manners). Fish thus expands what he sees in Milton into a general observation:

Speech, in short, is never and could not be an independent value, but is always asserted against a background of some assumed conception of the good to which it must yield in the event of conflict. When the pinch comes

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10. Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too*, in *DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES* 231 (Paul Berman ed., 1992).

11. *Id.* at 233.

12. *Id.* at 231-32. Milton's qualifier reads: "'I mean not tolerated popery, and open superstition, which as it extirpates all religious supremacies, so itself should be extirpated . . . that also which is impious or evil absolutely against faith or manners no law can possibly permit that intends not to unlaw itself.'" *Id.* (quoting John Milton, *Areopagitica*).

13. *Id.* at 232.

(and sooner or later it will always come) and the institution (be it church, state, or university) is confronted by behavior subversive of its core rationale, it will respond by declaring "of course we mean not tolerated ———, that we extirpate"; not because an exception to a general freedom has suddenly and contradictorily been announced but because the freedom has never been general and has always been understood against the background of an originary exclusion that gives it meaning.<sup>14</sup>

Hence the first half of the article's title: *There's No Such Thing as Free Speech . . . .*

Fish notes that one way we have managed not to acknowledge this plain, unavoidable reality is by creating laws which posit a distinction between speech and action, the assumption being that speech is inconsequential unless and until it translates into some form of action.<sup>15</sup> And then, within this distinction, legal theorists fashion yet a further distinction. In Fish's words, "Some forms of speech are not really speech because they have a tendency to incite violence; they are, as the court declares in *Chaplinsky v. New Hampshire* (1941), 'fighting words,' words 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'"<sup>16</sup> The difficulty with the fighting words notion, of course, is that utterances which for one group are fighting words are for another group quite innocuous.<sup>17</sup> Thus, it becomes virtually impossible to determine, in the abstract, what constitutes fighting words. The point is this: There is no such thing as speech alone, speech in and of itself, speech separate from action (or conduct).<sup>18</sup> Better it is, Fish suggests, to view the entire matter in terms of consequential and inconsequential behavior (i.e., speech and/or action).<sup>19</sup>

In his essay, Fish is trying to relieve us of the false notion that free speech is curtailed only in abnormal contexts. In actuality, the case is quite the opposite. Only in abnormal contexts is free speech not curtailed. What contexts? Fish lists two, on streetcorners in Hyde Park and on radio talk shows.<sup>20</sup> The extraordinary thing about these contexts is that they are artificially designed for people to say what they want exactly because what they say does not matter.<sup>21</sup> In

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14. *Id.* at 233.

15. *Id.* at 235.

16. *Id.* at 236.

17. *Id.*

18. *Id.*

19. *Id.* at 235.

20. *Id.* at 237.

21. *Id.*

contrast, most of our speech does matter, does carry consequences, does make a difference. The problem with appealing to “free speech” as an absolute is that it reduces speech to the level of radio talk show prattle. It makes speech a matter of indifference.

Fish points out how this notion that speech is inconsequential, a matter of indifference, works to the detriment of those who are on the losing end of society’s political power games. It works like this. Defenders of free speech (Fish cites Benno Schmidt) maintain that the solution to, for example, racial epithets is not to restrict speech but to counter those epithets with more speech.<sup>22</sup> Therefore, the key task is to construct a setting in which harmful speech can be canceled out by additional speech, a marketplace of ideas where speech is freely exchanged according to its worth. But we should note, Fish insists, that for defenders of free speech, “The idea that the effects of speech can penetrate to the core — either for good or for ill — is never entertained; everything is kept on the level of weightless verbal exchange; there is no sense of the lacerating harms that speech of certain kinds can inflict.”<sup>23</sup> This could work, Fish argues, “only if the pain and humiliation caused by racial or religious epithets could be ameliorated by saying something like ‘So’s your old man.’”<sup>24</sup> Fish’s point, again, is that “expression is more than a matter of proffering and receiving propositions, that words do work in the world of a kind that cannot be confined to a purely cognitive realm of ‘mere’ ideas.”<sup>25</sup>

We find Fish’s argument particularly helpful in showing how the constitutional principles of “freedom of speech,” when fused with the notion that speech is inconsequential, that speech in and of itself consists of “mere speech,” too often serve as a rhetorical cover for the most venomous of ideologies.<sup>26</sup> A recent controversy on the cam-

22. *Id.* at 239-40.

23. *Id.* at 240.

24. *Id.*

25. *Id.* at 240-41.

26. In an earlier draft of his essay, Fish presses his case by exposing the remarkable inconsistency of those who currently criticize “political correctness” on the basis of free speech. He calls attention to the way *Time* magazine covers matters of free speech in a way that is contradictory, if not downright duplicitous. In the April 1, 1991 issue, *Time* asks its readers to imagine a place “where it is considered racist to speak of the rights of the individual when they conflict with the community’s prevailing opinion”; and then launches into a familiar, by now well-worn, critique of antiharassment codes. William A. Henry III, *Upside Down in the Groves of Academe*, *TIME*, Apr. 1, 1991, at 66. Fish then notes, with irony, that it is something of a surprise when in the same issue one reads a report of a French anti-Semite who, after having characterized the Nazi gas chambers as a mere “detail of history,” was sued by a group of Holocaust survivors and ordered to



pus of Duke University illustrates what we mean. In the fall of 1991, the student newspaper, *The Chronicle*, ran an advertisement by a group called the Committee for Open Debate on the Holocaust. The ad declared that the Holocaust never happened and alleged that the standard historical reporting of the Holocaust has been the product of a worldwide Jewish conspiracy designed to gain support for the creation of a Jewish homeland. The ad also called for "openness" to this "revisionist" interpretation of the Holocaust. On the day the ad appeared, the student editors also ran an editorial defending their decision to publish the ad in the name of "the spirit of freedom of speech." A spate of commentary and controversy ensued, in the midst of which it was pointed out that the editorial policy had been inconsistent; the editors accepted the Holocaust ad in spite of its abhorrent content, whereas months before they had rejected an advertisement for *Playboy* magazine because they did not want to encourage young women to expose their bodies to soft-core pornography. The point was well-taken. What was at work in the editors' logic? The *Playboy* ad was forbidden because it promoted the degradation of bodies; the Holocaust ad was approved because it dealt in the realm of "ideas."

What was at work here was more than a matter of a terribly shallow understanding of the deleterious power of speech and ideas (though it was at least that). More troubling was the way the editors assumed an understanding of "freedom" whereby "speech" and

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pay a fine of \$180,000. *Comeuppance For a Bigot*, TIME, Apr. 1, 1991, at 50. *Time* commends this decision, accuses him of circulating "inflammatory rhetoric," and gives the story the headline, *Comeuppance For a Bigot*. *Id.* Now what is the difference, Fish asks, between putting a muzzle on an anti-Semite in France and putting a stop to racist rhetoric on college campuses? And then he gives this answer:

What appears to be a contradiction in logical terms makes perfect sense once the issue is reconceived as one involving the different values attached to the infliction of different harms: Holocaust survivors are harmed by the trivialization of their experience; women, blacks, gays, and other minorities are harmed by the epithets and insults directed at them on many campuses. It is just that as *Time* sees it, the potential harm to Holocaust survivors is more worthy of concern than the potential harm to the sensibilities for minority students; and that is why statements demeaning to Holocaust survivors are categorized as "inflammatory rhetoric" while language demeaning to women, blacks, etc. is categorized as the protected exercise of freedom of expression. The moral is unmistakable; whether or not an assaultive form of speech is tolerated or regulated will depend on whether or not the group it harms is in a position to command either the affection or the respect of the society.

Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too* (unpublished draft, on file with the authors). From this moral, Fish draws the appropriate conclusion: "If you wish to enjoy the protection of society against the verbal harms others may inflict on you, you must become a group the society takes seriously, either because it loves you or fears you." *Id.*

“ideas” (as opposed to “actions” or “fighting words”) are cordoned off and given a domain of their own which then, so everyone assumes, deserves protection. Theoretically, this protection is normally thought to be the job of constitutional law, but, as was evident at Duke, it is a job that many people and organizations in American society have internalized and taken on as their own. In this sense, the Constitution’s rhetoric on free speech has certainly performed its pedagogical task — all too well, as we see it. For now we have a private sphere not only of speech and ideas, but also (as George Will might put it) of “mere speech” and “mere ideas,” of speech and ideas understood apart from any substantive account of the good which they serve. The upshot is that our society is now marked by a pervasive form of indifferentism as regards speech.

When the indifferentism inevitably ensues when speech is considered apart from the good, “freedom of speech” enjoys protection in the United States according to arbitrary patterns of political influence and power as much as according to any consistent application of constitutional principles. Moreover, the rhetoric of free speech in this context can be put to dangerous purposes. Many Jews and others at Duke came to recognize this in the fall of 1991. Catherine MacKinnon and other feminist theorists have been arguing the same point for some time.<sup>27</sup> We suggest that this ideology can also be of great danger to Christians, not only in relation to freedom of speech, but also, in an even more destructive way, in relation to freedom of religion. For just as “freedom of speech” has paved the way for an indifferentism about speech in America, likewise “freedom of religion” has paved the way for “religious indifferentism.”

### III. HOW “FREEDOM OF RELIGION” DEGENERATES INTO RELIGIOUS INDIFFERENTISM

In light of this last claim about religious indifferentism, the name that often comes to mind is John Courtney Murray, the great apologist of the “American compromise.” Murray is currently celebrated both by Catholic liberals and Catholic neo-conservatives as the one who single-handedly turned the church around regarding religious freedom in general and American democracy in particular. Specifically, Murray is lauded for securing a distinction between the public profession of religion of a given society and the care (or establish-

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27. See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987).

ment) of religion by the state within that society. But there is an aspect of Murray's thought which Murray-ites of virtually all persuasions (liberal, conservative, and in-between) neglect to take seriously. We refer to Murray's enduring belief that any society is best which worships the true God and cleaves to the good, and his fear that when this is not acknowledged the result is religious indifferentism.<sup>28</sup> Ironically, Murray exemplified this problem as he sought to preclude the state from tending to any aspect of the care of religion, while at the same time insisting that the state protect the public morality. The tension is irresolvable.

The deep ambiguity of Murray's project has been brought to light by Keith Pavlischek who makes clear that Murray tried to have things both ways.<sup>29</sup> Pavlischek points out that while Murray defended the First Amendment as a necessary pragmatic accommodation in the face of America's religious pluralism,<sup>30</sup> he would not in principle exclude the possibility that the state might be competent to speak in religious matters. For if, Pavlischek reasons, the citizens of a given society determine to restrict the activity of what they take to be false religion, and if they do so through due process and out of concern for the well-being of the temporal order (e.g., if they want to curb the spread of religiously based polygamy), then there is nothing in Murray's argument to provide a basis for prohibiting such a development.<sup>31</sup> Pavlischek thus notes the arbitrariness in Murray's a priori claim that the state is incompetent in religious matters.<sup>32</sup>

The problem, Pavlischek argues, lies in the very structure of Murray's categories. Take, for instance, the distinction Murray made between direct and indirect influence of the church on the state and civil society. Pavlischek notes that Murray consistently insisted that the church, as mediated through the Christian conscience, could and should wield influence in the temporal realm so as to bring it into harmony with universal moral order; thus he stipulated that the state is incompetent to speak on contentious "religious matters."

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28. See JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (1960).

29. KEITH PAVLISCHEK, *THE DILEMMA OF RELIGIOUS TOLERATION AS EXEMPLIFIED IN THE WORK OF JOHN COURTNEY MURRAY, S.J.* 217 (1990) (unpublished Ph.D. dissertation, University of Pittsburgh) (forthcoming as a book from Thomas Jefferson University Press).

30. See, e.g., MURRAY, *supra* note 28, at 45-78.

31. PAVLISCHEK, *supra* note 29, at 217.

32. *Id.* at 218.

And yet at the same time Murray refused to give a merely procedural or functionalist (Rawlsian) account of the state. Pavlischek explains the intractability of this dilemma:

The crucial issue revolved around the extent to which a society should strive to bring the juridical order into harmony with the moral order, which in Catholic thought could not be totally abstracted from its own revelationally grounded truth claims. More precisely, it involved the extent to which a society should strive to bring the juridical order into harmony with the moral order if certain conditions were to hold. The traditionalists simply held that if Catholic hegemony obtained, the state ought to be confessional. Murray conceded to his traditionalist opponents that Catholic-Christian society is a good, indeed a "good of the highest order," but at the same time wanted to remove the state out of positive concern for that good. Consistently carried out, this would put the state out of the virtue-creating business altogether. The state would indeed be a purely functional state, a position that Murray, as a Thomist, could not accept.<sup>33</sup>

Pavlischek concludes, in other words, that try as he might, Murray could not have it both ways.

It is important to note that this was not due to any shortcoming of Murray. On the contrary, Murray's ability to perceive this dilemma and wrestle with it was but an indication of his high intellectual stature in comparison to that of his detractors, whose more blunt-edged analysis remained incognizant of it. Moreover, we want to make it crystal clear that Murray's dilemma was not simply the result of the institutionalization of the liberal (and supposedly limited) state. Rather Murray's inability to resolve the tension between Christianity and the state was due to the nature of Christian convictions. Inherent in Christian convictions is a substantive account of the good, and this account of the good cannot be held in abeyance while determining the moral character of a given political arrangement. Thus, there is an inherent tension between the Christian account of the good and all so-called political accounts of the good.

This tension has been captured nicely by Charles Taylor in an essay entitled *Religion in a Free Society*.<sup>34</sup> Taylor argues that "the Christian Church gave its members a universal allegiance, which could easily conflict with, or at least rival their political ties."<sup>35</sup> The political ties with which Christianity originally conflicted were asso-

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33. *Id.*

34. Charles Taylor, *Religion in a Free Society*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 93 (James Davison Hunter & Os Guinness eds., 1990).

35. *Id.* at 100.

ciated with civic republicanism. Christianity, Taylor points out, "tended to preach against the warrior virtues, which were often central to the patriotism of early republics. The ideal citizen of an ancient republic was also a warrior."<sup>36</sup> The ideal citizen of heaven was anything but a warrior, or else a warrior in a remarkably different sense. "The result," Taylor observes, "was a certain distance between Christianity and the republican tradition," and then Taylor elaborates:

A writer like Machiavelli, who has to be seen in this light, wondered whether Christianity as against the ancient pagan religions was not an element of potential corruption in a republic. And not only Machiavelli, who might be thought to be specially anti-Christian: Rousseau had similar doubts, although he was more embarrassed about them. From the Christian side, the insistence on some distinction between church and state seemed to render impossible the kind of fusion between polis and religious community that was normal in the ancient world.<sup>37</sup>

Because it is impossible to fuse the polis and the religious community, church-state relations, says Taylor, are irremediably marked by tension and irresolution. He refers to it as a "malaise" and remarks that "[i]t is one of the legacies of Christendom that religion can neither be fully integrated in nor fully excluded from the state."<sup>38</sup>

Taylor observes that the United States is the one polity which has attempted to bring together Christianity and the republican tradition.<sup>39</sup> The political and cultural ethos of the founding of America was marked by a unique mix of republican virtue and Christian rectitude. Granted, there were differences among orthodox Christians from New England and "the more urbane deists" from Virginia, but amid the differences, Taylor argues, there was a shared religious consciousness and a core of common values which issued forth in a political arrangement that enabled people to do two things at once: on the one hand, they were able to be part of the new republic and to share in its common values, including its religions, while on the other hand, they were able to participate in their own particular confessional church.<sup>40</sup> As Taylor describes it:

To the extent that freedom was seen as part of what God destined for

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36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 101.

40. *Id.* at 101-02.

humans, one could be playing a part in God's purposes as a citizen outside of any denomination, even as one did as a worshiper in one's particular church. Many Americans could feel related to God in one way through the state, as much as they related to Him in a rather different way through the church congregation.<sup>41</sup>

Thus, there were two spheres in which people in America were able to be "religious," one in their own specific confessional or denominational context, the other in an expressly nonspecific national context. Taylor acknowledges that this unspecified, civically-sponsored "god" was not always in the forefront of people's religious consciousness:

But it comes out in moments of crisis and high significance, as one would expect. Think of the invocations of God on the occasion of great decisions by Abraham Lincoln . . . during the Civil War. The God invoked at these moments was a nonconfessional God, no church's property (though sometimes foreigners might feel that He belonged to the Republic).<sup>42</sup>

The purpose of Taylor's article is to emphasize how the separation of church and state was not designed to preclude "God" or "religion" from public life, and to make the case against the contemporary proponents of what he calls "liberal freedom," that "God" and "religion" need not, and ought not, be excluded or "sidelined" from public life, which, as Taylor has it, would erode "civic freedom." In other words, Taylor pits "liberal freedom" against "civic freedom" and contends that in these days of individualism and privatization, we have too much of the former and need more of the latter.<sup>43</sup>

We think Taylor is wrong to pit "liberal" against "civic" freedom, for they are but two sides of the same coin made necessary by the kind of political arrangement we call the United States of America. Moreover, insofar as that political arrangement underwrites a "nonconfessional God" and a nonecclesial version of Christianity, it runs into profound conflict with Christianity. When "Christianity" becomes separable from the social form in which it is to be embodied, two things happen: (1) Christian belief gets located in an interior, asocial sphere, "the heart" or "conscience" or some other private (i.e., nonpublic) space, and thus degenerates into "mere belief"; and (2) in consequence of the first, a "public" space is cleared away for a counterfeit form of "religion" to emerge that is said to be "common" and thus becomes "the religion of the nation."

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41. *Id.* at 102.

42. *Id.*

43. *Id.* at 104-13.

What gets obscured in this arrangement is the possibility of a Christianity, the material form of which is located neither in a private space nor in a general public space, but in the body of believers, in the church. Only within this ecclesial context, that is, only within a context in which the social landscape is imbued with the presence of Christ, can Christianity emerge as an alternative both to liberal freedom and civic freedom and, more generally, to the political project we call the United States of America.

In reference to the nonconfessional, nonecclesial god-of-the-nation, Taylor points out that “[t]he great majority of American Protestants had no difficulty accommodating the God so invoked with the one they worshiped on Sunday in their respective congregations.”<sup>44</sup> And then he remarks that, “Catholics had greater problems, but then American Catholicism has been remade by this experience.”<sup>45</sup> We find this last remark to be significant. It has been precisely because Catholicism has had an ecclesially grounded understanding of Christianity that it had “greater problems” adapting to America’s god-of-the-nation. Yet insofar as “American Catholicism has been” — or is being — “remade by this experience,” Catholicism has lost (or is losing) its strong sense of the inherently social character of Christianity.

Put differently, in their embrace of the American experiment, Catholics have learned to adapt to a political landscape marked by religious indifferentism. Furthermore, Catholics have been aided in this adaptation to indifferentism by Murray’s successors, who have far too readily appropriated the kind of procedural liberalism to which Murray was so averse. Rather than advance this claim, however, we will provide an alternative vision to the political vision of America, one that is shaped by the acknowledgement that true political authority is to be found not in any republican virtues, new or ancient, nor in any set of governmental procedures, but in Jesus Christ who is our true King.

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44. *Id.* at 102-03.

45. *Id.* at 103.

## IV. PIUS XI: WHY BELIEF IS NOT ENOUGH

It is no coincidence that when Francis J. Connell opposed Murray's revision of the traditional church-state doctrine on the grounds that it would breed indifferentism among Catholics, he employed the image of Christ the King.<sup>46</sup> In doing so, Connell was invoking the authority of Pius XI, who had established the feast of Christ the King in 1925 with the encyclical *Quas Primas*.<sup>47</sup>

In *Quas Primas*, Pius XI has no use for refining abstract distinctions between "belief" and "conduct," nor for positing the "individual conscience" as the site of "religious freedom." Rather, he boldly and bluntly asserts the importance of publicly recognizing and celebrating the Kingship of Christ in reconstituting the entire social order. Reflecting on the title "Christ the King," Pius XI acknowledges that it has often been interpreted metaphorically: Christ exercises reign over our minds, our wills, our hearts, and so draws us along the path of perfection.<sup>48</sup> "But, if we ponder this matter more deeply," the pope points out, "we cannot but see that *the title and power of King belong to Christ as man in the strict and proper sense no less.*"<sup>49</sup> The pope's reasoning, based on the Nicene doctrine of the consubstantiality of the Son with the Father (the church was celebrating the 1600th anniversary of Nicaea that year), was that if Christ became one of us, then he (like us) was embodied; and if Christ is King, then his kingdom is embodied as well.<sup>50</sup> Or to put it conversely, Christ's kingship cannot be confined to some interior, privatized, spiritual realm; it is social, material, and (in the fullest sense of the word) political.

The political point that Pius XI wanted to drive home in instituting the feast was that the common good is to be defined by Christ. This is why the pope writes of the "lordship of Christ" in terms of "a threefold power" coinciding with the legislative, judicial, and ex-

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46. See Francis J. Connell, C.S.S.R., *Christ the King of Civil Rulers*, 119 AM. ECCLESIASTICAL REV. 244 (1948); Francis J. Connell, C.S.S.R., *The Theory of the "Lay State,"* 125 AM. ECCLESIASTICAL REV. 7 (1951).

47. Pope Pius XI, Encyclical on The Kingship of Christ (*Quas Primas*, December 11, 1925), reprinted in 2 SOCIAL WELLSPRINGS: EIGHTEEN ENCYCLICALS OF SOCIAL RECONSTRUCTION 30 (Joseph Husslein, S.J. ed., 1942) [hereinafter *Quas Primas*]. Portions of these reflections on the feast of Christ the King and on *Quas Primas* appeared in Michael J. Baxter, C.S.C., *Dominion Over All, Markings*, Nov. 24, 1991.

48. *Quas Primas*; *supra* note 47, at 32.

49. *Id.*

50. *Id.* at 45-46.



ecutive powers of government.<sup>51</sup> Against the effort of governments to privatize Christian discipleship or eliminate it altogether, and even against Christians and Catholics who tend toward proffering a purely "spiritual" understanding of the kingdom, Pius XI insists that the kingdom is also, in the formal sense, "civil." *"It would be a grave error . . .,"* he writes, *"to say that Christ has no authority whatever in civil affairs, since by virtue of the absolute empire over all creatures committed to Him by the Father, all things are in His power."*<sup>52</sup>

Elaborating on the power of Christ to pervade and influence all creation, the pope explains:

*Nor is there any difference in this matter between the individual and the family or the state; for all men, whether collectively or individually, are under the dominion of Christ. In Him is the salvation of the individual, in Him is the salvation of society. . . . He is the author of happiness and true prosperity for every man and for every nation. "For a nation is happy when its citizens are happy. What else is a nation but a number of men living in concord?"*<sup>53</sup>

Conceptually, this is a most remarkable assertion, for the pope is dissolving several of the leading antinomies of modern social theory, individual/society, individual/state, and individual/family antinomies, much in the way that Augustine dissolved the antinomies that shaped antique political theory.<sup>54</sup> Pius XI thus arrayed himself and the Church against the tendency in secular social theory to create spheres whereby Christ's Kingship is confined to "the soul," "the individual," or at best "the family," and is thereby prevented from directly shaping "the political," "the social," and "the economic."

The antipathy that Pius XI held for secular theory is perhaps nowhere more clearly exhibited than in his story of the rise of the liberal (or "laicist") state. "Anticlericalism" or, to use a clearer word, "secularism"<sup>55</sup> has become a plague on modern politics, an

51. *Id.* at 35-36.

52. *Id.* at 36.

53. *Id.* at 37 (quoting St. Augustine).

54. For an account of Augustine's dissolution of the antinomies of antique theory, see JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY BEYOND SECULAR REASONING* 403-06 (1991).

55. Hussein's translation uses the word "anticlericalism." In another translation, "secularism" is used. See Rt. Rev. Msgr. P.E. Hallett, *Forward to I SELECTED PAPAL ENCYCLICALS AND LETTERS, 1896-1931*, at 3-23 (1939). We think "secularism" is the better word here because it is clear that Pius XI is referring to certain theoretical trends and not just the church hierarchy, which is what the word "anticlericalism" usually implies today.

“evil spirit.”<sup>56</sup> The pope recalls that:

This evil spirit . . . has not come into being in one day, it has long lurked beneath the surface. The empire of Christ over all nations was rejected. The right which the Church has from Christ Himself, to teach mankind, to make laws, to govern peoples in all that pertains to their eternal salvation, that right was denied. Then gradually the religion of Christ came to be likened to false religions and to be placed ignominiously on the same level with them. It was then put under the power of the state and merely tolerated more or less at the whim of princes and rulers. Some men went even further, and wished to set up in the place of God’s religion a natural religion, consisting in some instinctive affection of the heart. There were even some nations who thought they could dispense with God, and their religion should consist in impiety, and the neglect of God.<sup>57</sup>

Here we have, to say the least, a different narrative than George Will’s. Will commends the Founders of the new Republic for exercising “cool realism and secularism” in setting up a political arrangement, a “central purpose” of which is “the subordination of religion to the political order.”<sup>58</sup> Pius XI sees such a subordination as the undoing of any true politics. Thus he continues his narrative by noting that:

The rebellion of individuals and states against the authority of Christ has produced deplorable consequences. We lamented them in the Encyclical *Ubi Arcano*; We lament them today. They are the seeds of discords sown far and wide; those bitter enmities and rivalries between nations which hinder so much the cause of peace; that insatiable greed which is so often hidden under a pretense of public spirit and patriotism, and gives rise to so many private quarrels; a blind and immoderate selfishness making men seek nothing but their own comfort and advantage, and measure everything by these . . . .<sup>59</sup>

Here again, whereas George Will praises the Founders for seeking to “domesticate religious passions” by directing people’s efforts toward establishing “a commercial republic — capitalism” and for aiming “to submerge people’s turbulent energies in self-interested pursuit of material comforts,”<sup>60</sup> Pius XI condemns modern political orders for cultivating “a blind and immoderate selfishness making men seek nothing but their own comfort and advantage, and measure everything by these . . . .”<sup>61</sup> He links this “insatiable greed”

56. *Quas Primas*, *supra* note 47, at 41.

57. *Id.*

58. Will, *supra* note 1, at B7.

59. *Quas Primas*, *supra* note 47, at 41.

60. Will, *supra* note 1, at B7.

61. *Quas Primas*, *supra* note 47, at 41.

to "a pretense of public spirit and patriotism."<sup>62</sup>

Interestingly, both George Will and Pius XI see acquisitiveness as central to their social analysis; but whereas Will sees it as a social virtue, Pius XI sees it, rightly, as a social vice. His point on this score is crucial: Societies constituted on acquisitiveness cannot help but be imprisoned within perpetual conflict and violence.

In the face of the deleterious political, economic, and social forces of the day, Pius XI insisted, in rather startling language, that peace among nations can only be re-established through "the restoration of the Empire of Our Lord."<sup>63</sup> The Kingship of Christ, for Pius XI, was the alternative to the New World Order that was emerging in the mid-1920s. We believe that the Kingship of Christ is the alternative to the New World Order that is emerging today. We have quoted so profusely from *Quas Primas* because Pius XI resists the temptation to conceive of politics as a procedural arrangement which precludes any strong account of the good. Put differently, Pius XI resists the urge to conceive of politics in anything less than soteriological terms. Separating politics from soteriology has become the norm among theologians today, but as we see it, this only lays the theoretical groundwork for religious indifferentism, for assuming that we can discern political apart from the Christ. And this, in turn, paves the way for what we Christians must regard as a truly frightening national agenda — domesticating religious passion, submerging people's energy in the self-interested pursuit of material comfort, constructing an arrangement in which religion is subordinated to the political order. Yet frightening as it is, this national agenda seems to have impressed Christians in America all too well during the recent Gulf War.

## V. A CALL TO WORSHIP

We confess to offering little in the way of juridical steps for resolving the problem of the relationship between church and state in America. Indeed, we are not concerned with positing any theories of "the state" at all, for we have found that when "the state" is given theoretical status in the abstract sense, this too often paves the way for underwriting very concrete forms of violence. Thus during the Gulf War, for example, John Neuhaus wrote of how the demo-

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62. *Id.*

63. *Id.* at 30.

cratic nations of the West would continue to conflict with those Islamic nations who refused to provide basic human rights for their people.<sup>64</sup> We find a chilling irony operating in such statements: Arab nations are “repressive” in as much as they establish Islam as the state religion, and purportedly Christian nations are ready to discipline them militarily unless and until they convert and become democratic. In light of this logic of the New World Order, our primary concern is to help Christians recover, both in theory and in practice, the habits we need in order to resist a state whose power remains virtually unchecked precisely because it alleges to be constitutionally limited.

Toward this end, we take it that one of the more hopeful political tasks for the Catholic Church in America these days would be to make the Feast of Christ the King as attractive and important for as many as possible. The potential of the liturgy to be a formative power in people’s lives should not be overlooked, for as Pius XI explained:

[P]eople are instructed in the truths of faith and brought to appreciate the inner joys of religion far more effectually by the annual celebration of our sacred mysteries than by any official pronouncements of the teaching of the Church. Such pronouncements usually reach only a few and the more learned among the faithful; feasts reach them all. The former speak but once, the latter speak every year — in fact, forever. *The Church’s teaching affects the mind primarily; her feasts affect both mind and heart, and have a salutary effect upon the whole of man’s nature. Man is composed of body and soul, and he needs these external festivities so that the sacred rites, in all their beauty and variety, may stimulate him to drink more deeply of the fountain of God’s teaching, that he make it a part of himself . . .*<sup>65</sup>

We realize that such a call to worship will come off to many people, especially academics, as quaint at best. And we are well aware that our use of Pius XI in general will be judged by many to be less than “serious” because it does not tackle the complex legal issues attending church-state relations in this country.<sup>66</sup> To these criticisms

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64. Richard John Neuhaus, *Civilizations in Conflict*, WALL ST. J., Jan. 29, 1991, at A18.

65. *Quas Primas*, *supra* note 47, at 39.

66. In a letter responding to this Essay our friend Tom Shaffer observed, “It is no surprise to me that the lawyers at DePaul did not like your freedom-of-religion paper. I did, and that gives you one midwestern lawyer to claim as a fan. I think the dissonance has to do with perception; there is something about looking at religion through a constitutional-law lens that makes even a faithful believer define the issues as the government defines them, as if the church were an intruder on the governmental enterprise. That is really astounding when you consider that the believer-lawyer goes right on being a churchperson and, in other ways, proclaiming the Kingdom.”

we have two responses. First, we write not as apologists for the liberal project as does George Will, nor as theorists groping for a way to make peace with the nation-state, but as theologians of a church constituted by a politics that acknowledges Christ as King. And second, what Pius XI said of the Church's teaching could also be said of papers delivered by theologians at academic conferences: "Such pronouncements usually reach only a few and the more learned among the faithful; feasts reach them all."

Finally, we are aware that some will infer from what we have written that we favor some kind of restoration of "the confessional state." We favor no such restoration. However, we do favor restoring a theoretical commitment to grounding politics in the christological claim that Christ is King. While we find Francis J. Connell's christology to have been inadequate (Murray was probably right to accuse him of being a "crypto-monarchist"<sup>67</sup>), we find the christologies of Murray's successors, both liberal and neo-conservative, to be inadequate as well; indeed they are nonexistent. So we have wanted to underscore that Christians are called first and foremost not to resolve the tension between church and state, but to acknowledge the Kingship of Christ in their lives, which means leaving church-state relations profoundly unresolved, until the day when He comes again in glory.

Perhaps the political form this irresolution takes can be alluded to in the life of Father Max Josef Metzger (1887-1944). After serving as military chaplain in the German Army in World War I, Metzger became a tireless worker in the cause of peace.<sup>68</sup> After being in contact with the International Fellowship of Reconciliation and attending many peace conferences and congresses, Metzger founded a Secular Institute, the Society of Christ the King, which was devoted to the lay apostolate and the works of mercy, and particularly to the cause of international peace.<sup>69</sup> Metzger was also deeply committed to the Catholic ecumenical movement and was a founding member of *Una Sancta*. Metzger was arrested and jailed by the Gestapo three times before his final imprisonment in 1943. Metzger's "crime" was that he had contacted bishops in Allied countries in the

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67. John Courtney Murray, S.J., *For the Freedom and Transcendence of the Church*, 126 AM. ECCLESIASTICAL REV. 28, 43 (1952).

68. THOMAS MERTON, *THE NONVIOLENT ALTERNATIVE* 140-41 (Gordon C. Zahn ed., rev. ed. of THOMAS MERTON ON PEACE 1980).

69. *Id.* at 141.

hope that they could influence their governments to seek a negotiated peace rather than unconditional surrender.<sup>70</sup> This the Nazi government considered to be treasonous, so Metzger was executed on April 17, 1944. As Thomas Merton has written, "Father Metzger did not believe in power, in bombs. He believed in Christ, in unity, in peace. He died as a martyr for his belief . . ." <sup>71</sup> — which thankfully consisted of much more than "mere belief." Metzger's life demonstrates that "making peace" with the politics of this world is not the first task of a Church that worships Christ the King. Our first task rather is to embody Christ's kingdom, and thus to make good on the prayer after communion for the feast of Christ the King:

Lord, You give us Christ, the King of all creation, as food for everlasting life. Help us to live by His gospel and bring us to the joy of kingdom, where He lives and reigns for ever and ever.

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70. *Id.*

71. *Id.*

