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# Commentary on Gibney & (and) Courtright

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# COMMENTARY ON GIBNEY & COURTRIGHT

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As host to these two scholars, I am loathe to speak harshly of them; and as instigator of this symposium issue of the Journal, I am reluctant to confess that one of its principal papers is fatally flawed. The Gibney/Courtright essay is, however, so thoroughly misguided, its ultimate policy proposal so utterly subversive of first amendment values, that its flaws must be revealed. Because its perspective on the role of religion in American life may be fairly widely shared by many in positions of power, there may be some value in taking the article on at its most elementary points.

The historical section of their essay seems to be an instance of law office history; that is to say, the authors ransack the historical record to shore up a predetermined position. They do not learn from history, and as a result neither do we. I find myself constantly asking: what is the real agenda at work here? Is it reasonable to believe that evangelists, or even televangelists, are more to be feared as a class than are secular broadcasters, car salesmen, or our intellectual elite? Does that elite have some sort of obligation to those it perceives as less able to look out for their own interests such that it must save them from the depredations of *evangelists*? The answer to both of these questions might be affirmative, but a competent history would make the case for such an answer—it would not presuppose it. Yet that is precisely what this history seems to me to do. The entire historical sketch is an extended enthymeme in which the unstated premise is that there is something intellectually and morally rotten about those who devote their lives to preaching the Gospel on television. If this were true, we might forgive the history its selectivity, but because we are given no reason to believe it—and because we have every reason to disbelieve it—we cannot be quite so forgiving.

It is, however, the suggestion that religiously sponsored broadcasting be banned from the airwaves that is really troub-

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lesome. If the past seventy years of first amendment jurisprudence have taught us anything, it would be, I should have thought, that only the weightiest of considerations can justify the suppression of speech or press. But in their essay Gibney and Courtright rest total suppression of religious broadcasting on the flimsiest of factual predicates, and on the wildest extrapolations from these facts. Something must be said against what they propose. But first a word or two of context-setting.

Modernity is characterized, I believe, by a vast shift in consciousness, the ultimate implications of which elude even the most searching inquirers.[1] The scientific enterprise and the technocratic state rest on a shifting, protean set of presuppositions that differ radically from the articulated presupposition of the medieval *Weltanschauung*. The shift from Ptolemaic geocentricism to Copernican heliocentricism is not just the prototypical paradigm shift in the history of science; it is also emblematic of the shift in consciousness that characterizes modernity. From a world with evident and explicit theological moorings, we moved with Copernicus, and again with Darwin, into a world as to which the role of God is radically unclear. Where once it was easy to see the world and the human species as the special objects of divine creative activity, now both the planet and the species present themselves as chance products of only loosely law-like natural forces. Where once basic values had an obvious divine warrant, now they take on a wholly different aspect for us. Freud, Skinner, Marx, and the sociobiologists proffer explanations for our values that seem to undercut the explanations that were quite satisfactory to the premodern mind.

Some find the scientific world-view entirely satisfying; others find it completely misguided. The vast majority of us, however, are both attracted and repelled by it. We therefore assemble for ourselves unstable amalgams of the scientific (as we understand it) and of the non-scientific in our efforts to make sense of things. We might, for example, be coldly "scientific" at the macro-level, but fervently "religious" on the micro-level, treating epidemics as blind, brute facts of life, but the death of our own friends as divinely ordained, providential events. Or we might think "scientifically" across a broad spectrum of questions, but insist on a non-scientific approach to one particular question, the origin of species, for example. I

1. I developed themes similar to those sketched here in Robinson, *Foreword: Why Schooling is So Controversial in America Today*, 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 519 (1988).

do not say this in order to criticize; I do not know what else we are to do, living as I believe we do without any easy way to reconcile the claims of science with the demands of the heart. Indeed to be modern is to be caught in just this tension between bloodless rationality and our need to inhabit a human world.

The modern western state also suffers from the tension just described. Insofar as it is technocratic, it draws its strength and its legitimacy from the scientific enterprise. Insofar as it is democratic, it tends to conform itself to popular sentiment, and if popular sentiment is ambivalent about scientific rationality, the democratic state will manifest that ambivalence as well. I have argued elsewhere in the pages of this symposium that the deistic way out of this dilemma is, in fact, no solution at all; that it demeans religion and dilutes political discourse.[2] I should add here that it also fails to solve the problem that I have been sketching in these remarks. We do not solve the problem of God, as an intellectual matter, by hying the divinity off to the sidelines, any more than we solve it, as a political matter, by making all of our public religious discourse purely ceremonial. If I am at all right in what I have argued, our states, no less than ourselves, must get by with less than perfect reconciliations of the demands of the secular with those of the sacred. Those who seek to erect a high wall between church and state misunderstand both the limited utility of metaphors and the existential dilemma of modernity.

A further word of context setting needs to be said. Human communities of all sorts are likely to suffer from several sorts of moral confusion. Most fundamentally, the constraints on human behavior that are essential to any moral code are likely to be regarded as impediments to happiness instead of as preconditions to it. Philosophers as different as Plato[3] and Spinoza[4] have addressed this form of confusion, but with little popular success. Relatedly, infantile conceptions of human happiness are likely to proliferate, conceptions that identify happiness with a state of carefree bliss of the sort that is thought to lie on the winning side of a lottery, for example. The moralist's effort to show either that happiness is the by-product of the exercise of one's abilities or that it is through

2. *See* Robinson, *Foreword: Religious Discourse and the Reinvigoration of American Political Life*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 385 (1990).

3. *See* PLATO, REPUBLIC, Books II and IV. Note especially numbers 358-67 and 441-48.

4. *See* B. SPINOZA, THE ETHICS, Parts IV and V. Note especially Propositions XLI and XLII of Part V.

our care for others that we are rescued from solipsistic narcissism is about as likely to achieve popular success as were the efforts of Plato and Spinoza to prove that virtue is intrinsically rewarding. Additionally, poor criteria of merit are likely to prevail over sound criteria. The bright, the beautiful, the rich, the well-born are likely to be taken as intrinsically more valuable than are the slow, the disfigured, the poor, and the unknown. The banal half-thought of the celebrity is bruited over the airwaves, but the hard-won wisdom of the laborer gets no attention at all. And where virtue is acknowledged, those virtues that to a mature mind would be subordinate are likely to be the most respected. So martial traits such as courage will be celebrated; humility, kindness, and patience will be underrated. Finally, from the variety of ways in which different cultures have understood the demands of morality, and from the undeniable difficulty of resolving some moral problems, the move to relativism and subjectivism can appear to be not just easy but somehow requisite, as if the only moral imperative was that there should be none at all.

Each of these forms of moral confusion need to be countered if, as individuals or as a polity, we are to be spared the consequences of acting on misguided conceptions of happiness, virtue, or personal worth. But how are we to recall ourselves to elementary common sense in these matters? How, that is, can we institutionalize that reminder of our propensity to folly? A free and critical press is part of the answer if it uses its freedom to subject those at the apex of power to searching moral scrutiny. A rich literary culture also helps, especially if it is able to lead those who participate in it endlessly to recall how human relations would be if moral clarity were to prevail. But, I would argue, the churches are much more likely to act as effective antidotes to moral confusion than are the direct beneficiaries of the press clause of the first amendment. Insofar as the churches proclaim the inversion of secular values that is announced in the Gospels, insofar, that is, as they assert that those who see themselves as wise are foolish, as brilliant are benighted, as clean are foul, as saved are lost, and so on, they serve as useful counters to our proclivity to turn the moral universe upside down.[5]

As the state is at least as likely as any other aspect of the social system to fall victim to moral confusion, it needs the cor-

5. I discuss the Gospels' inversion of secular values in Robinson, *Response to Paul Sigmund*, in RELIGION AND POLITICS IN THE AMERICAN MILIEU (L. Griffin ed. 1989).

rective provided by the religious critique of worldly valuation. As the churches can provide this critique only insofar as they are capable of distancing themselves from the state, they need to resist the temptation to ally themselves too closely to those in power. For these reasons, a healthy polity will be one in which religion is both free from governmentally imposed limitations on its critical voice and free from self-imposed inhibitions against such a critique.[6] In our constitutional order the free exercise clause of the first amendment serves the first of these objectives, and the non-establishment clause serves the second.

What then is the state to do about religious broadcasting? Our authors propose that it be banned. Their arguments for their proposal are multiple: religious broadcasting, they argue, violates both the "effects" prong and the "entanglement" prong of the *Lemon* test; the regulation of religious broadcasting could, they say, tread on the Free Exercise prerogatives of imaginary satanists; a complete ban on *all* religious broadcasting would, they argue, because of its evenhandedness violate no one's free exercise rights. I find these arguments to be wholly unconvincing, and I shall attempt here to explain why that is so.

The religion clauses ought to be read as integrated components of the amendment of which they are a part; religion clauses jurisprudence ought, therefore, to be aligned with the jurisprudence of the rest of the first amendment. General first amendment jurisprudence has, since Holmes' decision in *Schenck*[7] and more explicitly since Brandeis' concurrence in *Whitney*,[8] been premised upon the benefits that accrue to society from minimal governmental censorship of the expression—oral, written, non-verbal—of ideas. In particular, this jurisprudence teaches, we should not be led by some parade of imaginary horribles to silence a certain kind of speech simply because that speech could under certain circumstances lead to conduct that the state is entitled to suppress. We should instead remedy bad speech by better speech, staying the hand of the police power until the speech in question threatens imminently to cause serious harm.

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6. Although I consider here the instrumental value of religion to a polity, I would not want it thought that I consider religion to be of instrumental value only. Making the case for the intrinsic value of religion would, however, go far beyond the confines of this comment.

7. Schenck v. United States, 249 U.S. 47 (1919).

8. Whitney v. California, 274 U.S. 357, 372-80 (1927).

Religious speech is no less protected by this rationale than is secular speech. No worse use can be made of "Mr. Jefferson's Wall" metaphor than the one that would confine religion to the private domain, leaving the public sphere free of its influence. This is a formula for the amoralization of politics and for the trivialization of religion. Nothing guarantees that religiously based political speech will be wise, compelling, high-minded, or otherwise good, but the same is true for every variety of non-religious speech. Every argument that can be made for allowing non-religious political speech to flourish up to the point at which it threatens imminent, serious harm can also be made for religiously based political speech. The polity that would confine religious discourse to the private sphere does not have freedom of speech or of religion. What is more, it has destroyed the tension between the scientific/rational world-view and the religious/affective one in favor of the former in ways that profoundly misrepresent the balance of forces at play in modernity.

If religious speech deserves at least as much protection as nonreligious speech, what of religious broadcasting? Everything here hinges on how we understand the role of government in broadcasting generally. Does government *sponsor* broadcasting or does it *regulate* privately initiated broadcasting roughly as it regulates traffic on public streets? Insofar as we see government as a reluctant and permissive regulator of the private use of the airwaves, we have no reason to regard it as endorsing what is carried on the air. Insofar as the government as regulator credits broadcasters with serving the public interest in offering "sustaining" time to religious organizations, we have the hint of an establishment clause problem, but one that can be cured by remedies far less draconian than the banning of religious broadcasts from the airwaves. The cure need be nothing more than the expansion of the category in question to include other forms of broadcasting that are likely to be underrepresented if market forces alone are allowed to determine what is sent out over the airwaves. Unlike Professor Gibney and Mr. Courtright, I believe that this "expansion" has already taken place and that the problem that they report is really no problem at all.

If it is unreasonable, as I believe it is, for anyone to infer governmental endorsement from governmental regulation, what remains of the case for banning religious broadcasting? Is the impermissible advancement of religion an effect of the current FCC regulatory regime? Organized religion can benefit from a regulatory regime without a constitutional violation

occurring; it is only when the "principal or primary effect" of the regime is to advance or inhibit religion that a violation occurs. Where religious programs are treated no more favorably than are children's programs, agricultural programs, educational programs, public affairs programs, and a host of other forms of programming that might not thrive if the bottom line were the sole determinant of programming, it is hard to see how an impermissible advancement of religion occurs. A careful reading of *Texas Monthly*[9] will, I believe, sustain this analysis.

What then of the believer or unbeliever who wants to keep the Bakkers and Swaggarts of this world out of their living rooms and thereby out of their children's minds? Do they have a free exercise right to make it impossible for televangelism to creep into their homes against their wills? To say yes would be to say far too much. It might well entitle believers to require that the secular programming that they believe undermines the values that they are trying to instill in their children also be removed from the airwaves.[10] It would entitle others to bar those with whom they disagree on religious grounds from the park that the city regulates or from the streets that the state maintains.[11] But this is to force religion indoors, to keep it in its harmless place. This would surely please those who see all preachers as charlatans and all believers as dupes, but it constitutes a monumental distortion of the religious impulse.

The privatization of religion cannot be squared with anything we know of religion: Jesus, for example, taught that religious truth should be shouted from the housetops[12] and proclaimed to every creature,[13] that it should permeate every facet of human life, that it should be divisive—dividing the good from the dross in ourselves, and dividing good people from evil ones.[14] He may, of course, have been wrong—the state takes no position on the divinity of Jesus—but if so He should be refuted; His teaching should not be distorted to make it look as if it is consistent with the wholly modern privatization of religion. Similar things could, I suspect, be said of Mohammed and his understanding of religion.

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9. Texas Monthly v. Bullock, 109 S. Ct. 890 (1989).

10. *Cf.* Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987).

11. *Cf.* Fowler v. Rhode Island 345 U.S. 67 (1953).

12. *Matt.* 10:27; *Luke* 12:3.

13. *Mark* 16:15, *Matt.* 28:19; *Luke* 24:47, *Acts* 1:8.

14. *Matt.* 10:34-37, *Luke* 12:49-53.

What then of the cases that Gibney and Courtright use to shore up their argument? *Everson*,[15] *Schempp*,[16] and *Lemon*[17] are all inapt. They concern state-owned schools that many children are, for all practical purposes, *compelled* to attend. To say that in that environment state-prescribed prayers should not be read is to say nothing about the constitutional status of religious broadcasting. When the day comes that the state compels children to watch assigned television programs for half the year, then the relevance of *Everson* and its progeny to this new form of compulsion can be explored. As for the argument that Gibney and Courtright extract from *Pacifica*,[18] there are some arguments that do not need refutation; one that proceeds from the premise that religious broadcasting is "far more detrimental to a young person"[19] than is the broadcasting of indecent language is, I think, among those arguments. There is, of course, something to their *Pacifica* argument; the state should not subvert parents in their attempts to control their children's religious formation. But it is impossible to get from this obvious truth to the "remedy" that Gibney and Courtright propose. Something far less drastic than a ban on religious broadcasting would surely suffice as a protector of parental control in this area.

Once again, I find myself asking: what's going on here? Is it imaginable that the financial and sexual misconduct of a few prominent televangelists has led otherwise careful scholars to propose a wholesale restructuring of first amendment jurisprudence? One hopes not; Swaggart and Bakker ought to be virtual non-entities for the purposes of the formulation of constitutional doctrine. The Republic can easily survive them; it seems, in fact, to be well on its way to squaring accounts with both of them. What the Republic cannot easily survive is the inversion of constitutional doctrine that Gibney and Courtright propose. When every potential broadcaster *except* the religious broadcaster has an equal shot at some governmentally regulated and inherently scarce good, and when this condition is said to be mandated by the religion clauses of the first amendment, then things have been turned upside down. When, in order to prevent harm to religion clauses interests, we inhibit

15. Everson v. Board of Educ., 330 U.S. 1 (1947).
16. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
17. Lemon v. Kurtzman, 403 U.S. 602 (1971).
18. F.C.C. v. Pacifica Found., 438 U.S. 726 (1978).
19. Gibney & Courtright, *Arguments for the Elimination of Religious Broadcasting from the Public Airwaves*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 765, 802 (1990).

all religions in their access to the dominant medium of communication in our day, we have completely lost our moorings. I will conclude this comment, and with this comment conclude this symposium with a few words on why this proposal is not simply inconsistent with our constitutional tradition but also utterly subversive of the very idea of the first amendment.

Marx had it all wrong: ideas are not the epiphenomenal superstructure of basic economic realities; policy disputes are routinely the only effective way in which we join issue on deep theoretical disagreements. When evolutionists combat creationists over the content of a high-school science text, two different world-views are struggling for cultural hegemony. When pro-lifers battle pro-choicers, when anti-pornographers lock horns with civil libertarians, even when foreign policy or environmental issues are debated, deep theoretical differences are exposed. What each side really wants is to have its view of the world ratified; policy will fall into place once that is done. What makes these problems so intractable is that we don't live in a time or place where either side can really win the cultural hegemony that it seeks. We are still coming to terms with the scientific enterprise, and we will, I think, be doing this for some time to come. We would, I suspect, be immensely uncomfortable if we found ourselves living in a society where a monistic world-view—either scientific or religious—enjoyed unchallenged cultural hegemony. We actually benefit from the tension that we experience, and we can view the first amendment as institutionalizing that tension.

The first amendment keeps the government from siding definitively with one faction or the other in the struggles that I have just described. It resists the marginalization of the minority voice, and it prohibits the ascendant forces from silencing that voice. When two ways of understanding things each attract us, when they appear to be independently inadequate and jointly irreconcilable, when no third synthesizing viewpoint seems to be available, the temptation always is to burke one of those viewpoints and to canonize the other. This is true both within the individual and within the community, and it is this temptation that the first amendment resists. The result, at the political level, is a high level of irritation—we must put up with flag burners,[20] Nazis,[21] smut peddlers,[22] and perhaps with an

20. *See* Texas v. Johnson, 109 S. Ct. 2533 (1989).

21. *See* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.) *cert. denied*, 439 U.S. 916 (1978).

22. The conditions under which government may regulate smut are set out in Miller v. California, 413 U.S. 15 (1973).

Elmer Gantry or two. But, we are convinced, these are tolerable costs to pay for living in a society that does not succumb to official truth and single vision. To ban religious speech from the airwaves because of a fear of its potential intrusiveness or because of the sins of a few of its originators is not simply to threaten all speech that is unacceptable to our cultural elite; it is also to betray the fundamental idea behind the first amendment. Where a technocratic government respects religious speech, there we can be sure that dissidence of all sorts flourishes, and it is only where dissidence flourishes that hope exists for that kind of cultural breakthrough that will allow us to get beyond the scientific-religious dilemma with which we now must grapple.