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HAUERWAS ON RELIGIOUS FREEDOM

*John H. Garvey**

Stanley Hauerwas has argued that freedom of religion is not a good or intelligible moral policy. He has tried to illustrate the point by reference to some of Stanley Fish's ideas about freedom of speech. This is a complicated argument, and I think (in case I have misunderstood him) that I had best begin with a recapitulation. I will then mention three problems that I have with his argument.

Professor Hauerwas offers us two different ways of looking at the relation between religion and the state.¹ One is the view which he attributes to George Will and Thomas Jefferson.² These people see the relation between Christianity and democracy as a cooperative one. Hauerwas has this view as his target when he criticizes freedom of religion. The second view, which Hauerwas himself holds, sees church-state relations as antagonistic.

Let me sharpen the distinction between these two views by drawing, as Hauerwas does, on an analogy to freedom of speech. First Amendment theorists have offered us two different ways of looking at the relation between speech and politics. One is the "town meeting" paradigm. It holds that speech is important because the people, who are sovereign in our system of government, need to be well informed. Freedom of speech is like the Speech or Debate Clause writ large. When the people are deliberating about issues of public policy, they should be allowed, as members of Congress are, to speak their minds in an uninhibited way.

The second view about the relation between speech and politics is the "checking value" paradigm. It begins with the opposite assumption: there is a distinction between the rulers and the ruled, and freedom of speech is designed to protect criticism of the rulers. The ideal speaker in this paradigm is not the citizen at a town meeting but a critical and independent press. We cannot trust the govern-

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1. Stanley Hauerwas & Michael Baxter, C.S.C., *The Kingship of Christ: Why Freedom of "Belief" Is Not Enough*, 42 DEPAUL L. REV. 107 (1992).

2. *Id.* at 109.

ment to regulate speech because it is, as it were, the enemy; the press represents the people.

I think that Hauerwas makes a distinction very much like this in his discussion of religion. The first view (the one he attributes to Will and Jefferson) holds that religion can play a role in democracy. Here the people are sovereign, religion is a contribution to the political debate, and we ought to attend to religious claims just as we do to other points of view. Religion is important in the same way as other kinds of speech are important, and to ignore it is undemocratic. But the role of religion under this view is limited to weightless verbal exchange.

Hauerwas really dislikes this view for a number of reasons. One is that in order to process Christian ideals for mass consumption we have to water them down. "Love your enemy" does not really mean "love your enemy," it means "do the best you can under the circumstances." Another is that the Christian lobby can be co-opted by government leaders who want support and guidance. We know this is happening when we see religious groups celebrating the Gulf War. Notice that this kind of Christianity is easy to live with. We can give it religious freedom and not worry about the consequences. (Here Hauerwas refers to Stanley Fish, who says the same thing about freedom of speech: all kinds of speech are important, all speakers should be free, but only if speech doesn't really matter.³)

Hauerwas then offers us a second way of looking at religion, which is like the "checking value" of speech. Here the government is the enemy, and the ideal religious actor is a critical and independent church. Its function, like the function of the press, is to take shots at the government.

Hauerwas says he is not interested in constitutional matters, but if he were, you can see that he would favor separation between religion and government. In most cases he would vote with Justice Brennan, though his reasons would be those of Pius XI. Hauerwas would say, for example, that the government should not write prayers (like the Regents' prayer) for use in the public schools, nor should it build crèches with public funds, because it dilutes Christian ideals when it packages them for mass consumption. It treats Jesus like Santa Claus; they both become tools of the chamber of commerce, used to help the downtown merchants sell goods.

3. *Id.* at 111-13.

I do not know his feelings about parochial school aid, but I would guess that he agrees with the result in *Aguilar v. Felton*,⁴ again for reasons that Pius XI would find congenial. Government aid to parochial schools is bad, and the reason is that the government makes parochial schools take crucifixes out of the classrooms in order to get the money. There is an analogy to this in free speech law. It is that artists should watch out for grants from the National Endowment for the Arts because they will have to make politically correct (I should say “politically incorrect”) art in order to get the money. The First Amendment envisions a critical and independent press, not the Federal Register or Stars and Stripes. Conditional grants undermine the freedom of speech.

Professor Hauerwas would also vote with Justice Brennan in free exercise cases. Brennan dissented in *Employment Division v. Smith*,⁵ and Hauerwas criticizes the decision. This is hardly surprising. The checking value sees First Amendment actors as critics of the government. The last thing we should do, if we subscribe to this view, is to let the government regulate its critics.

This, then, is what I understand Professor Hauerwas to be saying. I will now mention a few problems I have with it. The first problem is that the analogy between the church and the press — the idea that each one has a checking value — is incomplete. Churches aren't just like the press, because churches have members. It's fine to say, as I once heard Professor Hauerwas say, that the Episcopal Church ought to excommunicate George Bush. Maybe it ought to. But what direction does his institutional analogy offer individual Episcopalians? Hauerwas takes the pastor's point of view. (This is natural. I take the lawyer's point of view.) But what about his flock? There are millions of members in his church, and millions and millions of members in mine, and how should they behave? They can't always and only regard the government as the enemy. Surely Hauerwas doesn't mean to suggest that they should not vote or hold public office. And if they do, how would he have them behave? When I speak about abortion, must I speak in religious terms rather than in some other language? If I am in the Boston Archdiocese, must I vote the Catholic Church's position on pro-abortion candidates? Pius XI would say that I should. Would Professor Hauerwas? Or if I am the governor of Kentucky and my church

4. 473 U.S. 402 (1985).

5. 494 U.S. 872, 907 (1990) (Blackmun, J., dissenting).

condemns the death penalty, must I pardon all capital offenders and give as my reason the fact that my church condemns the death penalty?

My first problem, then, is that Hauerwas's paradigm does not work as well for members as it does for churches. My second problem with the church-press analogy has to do with the intrinsic values of what they are saying. Free speech theory holds that we should protect the press no matter what it says. The important thing is that it should oppose the government. The press is like a weather vane: the wind can come from 360 points on the compass, and the press should always face into the wind. Well, Professor Hauerwas's church is not like the press in that respect. If it is true to its principles it will always face in the same direction. So what should the church do when the wind is at its back? It is too easy to say that the church should always reject the government's help because the government always waters down true religion. What if the government sincerely promoted precisely the same practices as Professor Hauerwas's church?

When I was a young man in the Pennsylvania public schools, the government had us recite the Lord's Prayer at the beginning of each day. I'm sure Professor Hauerwas recites this prayer; his church approves of it. Of course he would not force other people to say it. Jews naturally worried about this in my town. Actually the Catholics did too; they would drop out when the class got to the part about "for thine is the kingdom and the power and the glory" It got a bit complicated, but we had three factions and everybody knew where he stood: Protestants went all the way; Catholics stopped after "deliver us from evil"; Jews kept silent throughout. But nobody was forced to do anything. The Supreme Court nevertheless held the practice unconstitutional.⁶ But if Professor Hauerwas means what he says about Pius XI and the Feast of Christ the King, he should approve of the practice. It coincides with his religious beliefs; here the wind is at his back. The same will be true in lots of other cases: rules in favor of monogamy, rules against homosexuality, rules against funding abortions, repeal of the death penalty. The press checks the government by opposing all of these rules. But the church agrees with the rules. If it is true to its principles, it should promote and support them. That is what Pius XI

6. *School Dist. v. Schempp*, 374 U.S. 203 (1963).

wanted.

My third problem is related to the second one. Churches (unlike the press) have fixed points of view, but they don't all have the same views. Hauerwas has proposed a way for Christians, or maybe just for Methodists, to look at the relation between church and state. He says, in effect, "This is my view. My church stands for these principles, so it ought to promote them (as Pius XI said). We should above all else be true to our own ideals. In arranging the affairs of religion and government, we should be guided by them." But if this works for Professor Hauerwas, then it cannot work for me, because after a certain point my church does not believe what his church believes. Of course he has to think that my church is wrong about this. And I think that his church is wrong. In fact I know it is. But the point is that his theory won't help to solve our political problems until everyone becomes a Methodist. And that is not likely to happen soon.

