Michigan Law Review

Volume 105 | Issue 6

2007

A Response to Professor Laycock

Marci A. Hamilton
Benjamin N. Cardozo School of Law

A RESPONSE TO PROFESSOR LAYCOCK[†]

Marci A. Hamilton[*]

— So, other than that, Mrs. Lincoln, how was the play?

INTRODUCTION

Almost a hundred years ago, the American Association of University Professors established guidelines for civility among scholars, saying that academic exchanges "should be set forth with dignity, courtesy, and temperateness of language."[1] I agree wholeheartedly with these principles, and I will not succumb to the temptation to respond in kind to Professor Laycock's review.[2] Tone is much less important than having a frank exchange of views.

It is well known that Professor Laycock and I have very different perspectives on the proper interpretation of the Free Exercise Clause. His review and my response should be an opportunity for us to explore our intellectual differences.

In this brief response, I will focus on the two most important theoretical points from *God vs. the Gavel: Religion and the Rule of Law* that he attempts to disparage.[3] They are the heart of my theory, so they are well worth debating.

First, I will address his criticism of my position that legislatures are the better branch to craft religious accommodation than the courts. Second, I will touch on his apparent misunderstanding regarding the "no-harm

---

† This essay responds to Professor Douglas Laycock's review of Professor Hamilton's recent book, *God vs. the Gavel*. *See* Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169 (2007). — Ed.

* Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law, Yeshiva University. I would like to thank Anne Dupre and David Schoenbrod for their helpful comments.

1. *See* Anne Proffitt Dupre, Academic Freedom and Civility (noting how the AAUP set forth a standard that encouraged civility in academic discourse) (manuscript on file with author) (*citing* AAUP's 1915 Declaration of Principles, *available at* www.campus-watch.org/article/id/566 (last visited Jan. 12, 2007)).

2. It is also doubtful whether the care with which he did his work for this review was professional. In the version of the review I received, he mangled the title, calling the book, *God and the Gavel*. There are many other errors indicative of carelessness in the review as well.

3. Miscommunication unfortunately foreshortened the time I was to have to respond, so this response is considerably shorter than originally planned. In the meantime, if any of Professor Laycock's technical concerns have merit, I will certainly take full responsibility and make the appropriate changes in the paperback version of *God vs. the Gavel*, which is to be published spring 2007. I will also publish a more in-depth theoretical response to Professor Laycock's essay in the May issue of the *Michigan Law Review*.

principle," which is no creation of mine, but rather a staple in moral and legal reasoning.

One of the major themes of my book is that it is difficult to have a scholarly dispassionate debate about these important issues because anyone who questions religion provokes ad hominem invective that tends to cut off the conversation. I hope that we can open a conversation here, rather than stifle it.

I. LEGISLATURES: THE "IS" AND THE "OUGHT"

There is a fundamental flaw in Professor Laycock's attempt to discredit my position that legislatures are better suited to crafting religious accommodation than the courts. He cannot understand, or so he says, how anyone could say both that legislatures are better suited institutionally to engage in accommodation but, at the same time, that contemporary legislatures have not done a very good job in crafting accommodations to serve the larger public good.

I assumed it went without saying that there is a distinction between the "is" and the "ought." Professor Laycock has committed the classic philosophical fallacy of confusing the two.[4] In *God vs. the Gavel*, I am both describing the legislative process and then judging how it has been operating of late.

Purely as a descriptive matter, legislatures have greater capacity to engage in wide-ranging inquiry into any subject they choose. They are not limited by rules of evidence, relevancy, or any other judicially-crafted method of handling a case in court. They can create commissions, authorize long-term studies, and hold hearings as often or as long as they wish. It seems to me that this is a non-controversial statement of fact.

Professor Laycock correctly points out that legislatures do not always investigate every issue before them. They can and do pick and choose among the many issues before them. The question, then, is when ought the legislature investigate? A central point of my thesis is that it certainly should investigate when there is a potential for serious harm. Unfortunately, when it comes to religion, legislatures have not done that in recent years.

Despite their capacity to investigate, in this era, legislatures have partaken of the larger cultural taboo against questioning or criticizing religious organizations. The transformative point of *God vs. the Gavel*, which was written as much for a general audience as it was for legal scholars, is that the American culture has taken on a Pollyanna attitude toward religion that has resulted in mistakes of judgment on the part of legislatures, courts, and individuals. This argument is often considered taboo, a taboo which, it would seem, Professor Laycock cannot break.

---

4. DAVID HUME, HUME'S TREATISE OF HUMAN NATURE 165–168 (Ernest Rhys ed., J.M. Dent & Sons, Ltd., 1911) (1739); ARISTOTLE, *Nichomachean Ethics* (W.D. Ross trans.) *in* THE WORKS OF ARISTOTLE §§ 1103b- 1105a (W.D. Ross ed., Oxford University Press, 1925).

II. THE NO-HARM PRINCIPLE

Professor Laycock argues that there is an inconsistency in my use of the "no-harm principle." Apparently, he takes the term "no-harm" to be literal, meaning that there will never be any harm whatsoever. Thus, when I state in the last chapter that legislatures must decide between levels of harm and religious liberty, and that *de minimis* harm may be acceptable, he thinks he has found a major fissure in my argument. The no-harm principle, though, is not my own invention. As I explain, John Stuart Mill was the father of the principle, which subsequently was woven into modern criminal and tort law (pp. 260, 382). While the term "no" is part of the phrase, it has not been understood to mean absolutely zero harm, but rather accountability to others. Mill put the principle this way: "first, that the individual is not accountable to society for his actions, in so far as these concern the interest of no person but himself. . . . Secondly, that for such actions as are prejudicial to the interest of others, the individual is accountable, and may be subjected either to social or to legal punishments, if society is of opinion that the one or the others is requisite for its protection." (p. 260).

This long-settled principle is that harm needs to be kept to a minimum, and that is the consistent point made throughout *God vs. the Gavel.*

Finally, it is important that I address Professor Laycock's approach to free exercise jurisprudence. Professor Laycock is a scholar whose focus has been doctrinal. He seems to assume that there is only one interpretation of the free exercise cases—his, and that any other interpretation, if it differs from his own, is somehow false. Scholars must always take care to ensure that they do not come across as doctrinaire. Academic orthodoxy—from either side—does little to foster reasoned debate.

One of the main reasons I wrote the second half of *God vs. the Gavel* was to shatter the brittle orthodoxy that passes for free exercise interpretation in so many of the law schools. Whether Professor Laycock agrees with my reading of the cases is utterly irrelevant to the scholarly enterprise. With all complex issues, there are different interpretations of meaning and policy. With the Free Exercise Clause, there are Professor Laycock's interpretations and there are others. When debating these issues in an academic forum, we all must strive to see beyond our own orthodoxy—to see that those who disagree with use have legitimate views worthy of debate—or we risk being severely disabled as a scholar.

There have been many reviews of *God vs. the Gavel*, and to my knowledge none has failed to urge readers to take the book seriously, whether the author agreed with my bottom line or not—except Professor Laycock.[5] *God*

5. *See, e.g.*, Kevin R. den Dulk, Book Review, 15 LAW & POL. BOOK REV. 963 (2005) (reviewing *God vs. the Gavel*) ("Hamilton's book is a lively, far-reaching, and relatively rare counterattack against *Smith*'s numerous critics, and for that reason alone it is worth reading."); Tim Gebhart, *Analyzing Conflicts Between Law and Religion*, Blogcritics.org, July 3, 2005, http://blogcritics.org/archives/2005/07/03/143907.php (reviewing *God vs. the Gavel*) ("Hamilton's work is a worthwhile one . . . Hopefully, it will also find its way into the hands of local, state and national policymakers who will undoubtedly continue to confront and deal with the inevitable collisions between legal order and religious liberty."); Gregg Guetschow, Book Review, Blogcritics.org, July

vs. the Gavel goes beneath the surface of current church/state discourse. Professor Laycock's review never gets that far.

12, 2005, http://blogcritics.org/archives/2005/07/12/175305.php (reviewing *God vs. the Gavel*) ("*God vs. the Gavel* is a valuable contribution to the important topic of the place of religion in American society and culture, in that it argues from a perspective that is not often seen."); William Stacy Johnson, Book Review, 22 J.L. & RELIGION (forthcoming 2007) (reviewing *God vs. the Gavel*) ("Marci A. Hamilton . . . has written an engaging and copiously researched book on the place of religious communities in a democratic republic. The ample case studies alone make this an important contribution."); Noah S. Leavitt, *Establishing Limits: A Review of Two Books on How Religion and Law Co-Exist in America*, FINDLAW, Jun. 24, 2005, http://writ.news.findlaw.com/books/reviews/20050624_leavitt.html (reviewing *God vs. the Gavel*) ("Hamilton's book will provide thought-provoking, controversial reading for everyone, regardless of religion."); Posting of Mark Sargent to Mirror of Justice, http://www.mirrorofjustice.com/mirrorofjustice/2005/07/marci_hamiltons.html (Jul. 17, 2005) (reviewing *God vs. the Gavel*) ("important and provocative new book"); Richard L. Sippel, Book Review, 52 FED. LAW. 72, 73 (Nov./Dec. 2005) (reviewing *God vs. the Gavel*) ("God vs. the Gavel is an important work that legislators ought to read, even if only for its informative encyclopedic content. It would be even better, however, if they heeded Hamilton's thesis and acted accordingly."); Steve Young, Book Review, LIBRARY JOURNAL REV. 76 (Jun. 15, 2005) (reviewing *God vs. the Gavel*) ("Hamilton is predominantly compelling in her analysis of case law and writes with verve and well-tempered vehemence for the general reader."). The most thoughtful response to *God vs. the Gavel* yet written is Kent Greenawalt, The Rule of Law (unpublished manuscript, on file with author). It is not apparent that Professor Laycock read any other reviewer.