

1998

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Recommended Citation

John Langran, *How Far Can We Separate Theology and Jurisprudence? Comment on Edward B. Foley's Jurisprudence and Theology*, 66 Fordham L. Rev. 1233 (1998).

Available at: <https://ir.lawnet.fordham.edu/flr/vol66/iss4/17>

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HOW FAR CAN WE SEPARATE THEOLOGY
AND JURISPRUDENCE? COMMENT ON
EDWARD B. FOLEY'S
JURISPRUDENCE AND THEOLOGY

*John Langan, S.J.**

PROFESSOR Foley's paper, "Jurisprudence and Theology," is definite in its conclusion, which is to propose a further wall of separation between the two realms it surveys, or at least between judges and lawyers and what Foley assumes are their disparate and often contradictory views on the ultimate questions of life and on the ultimate grounds of normative justification. His paper does not evade difficult considerations; and it has a vigorous and forthright character, which is both attractive in itself and morally commendable in its candor before an audience large elements of which will be keen to dispute his conclusion. He deals with issues which have been shaped to a large extent by the recent work of John Rawls,¹ but which have also been treated from a very different perspective by Vatican Council II. Professor Foley might, if he were so inclined, find some magisterial support for his conclusion in the following passage from *Gaudium et Spes*, the Pastoral Constitution on the Church in the Modern World:

If by the autonomy of earthly affairs we mean that created things and societies themselves enjoy their own laws and values which must be gradually deciphered, put to use, and regulated by men (*sic*), then it is entirely right to demand that autonomy.

This is not merely required by modern man, but harmonizes also with the will of the [C]reator. For by the very circumstance of their having been created, all things are endowed with their own stability, truth, goodness, proper laws and order.²

Admittedly, the Council is not explicitly addressing the scope and sources of law; but its general approach is to present the Church as collaborator with "the world" and with the activities of the academic disciplines and the learned professions, rather than as their director or supervisor. I mention this passage, not because I think it summarizes all the important tendencies within the Catholic community on the boundary which Professor Foley is proposing to draw, but because it gives an especially authoritative statement of one tendency, a tendency which has been historically very important in Catholic thought,

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1. John Rawls, *Political Liberalism* (1993).

2. *Gaudium et Spes*, in *Proclaiming Justice and Peace* 99 (Michael Walsh & Brian Davies, eds. 1984).

at least since the time of Thomas Aquinas, though it has roots as early as the apologists of the second century. This tendency affirms the autonomy of reason and of secular intellectual and professional disciplines, but it also affirms an independent role for religious belief and theology in articulating the human situation and in discerning what human beings may rightly do. It expresses an aspiration toward the harmony of nature and grace, of faith and reason, of church and society which has been of enormous practical as well as theoretical importance within Catholicism. At the same time, we should recognize that such an aspiration to harmony has been regarded by many Protestants and by some Catholics as an inadequate guide to the struggles of a sinful humanity to achieve some realization of Christian values in a world marked by conflict and the *libido dominandi*, the craving for power, which Augustine saw as characteristic of the pagan world and of any society which refused to conform itself to the will and the authority of God.

But, even though I think that there might be a Catholic way of moving to something like Foley's conclusion, I also have to record three uncertainties which I have about his project. The first of these is whether Foley, along with Rawls and other proponents of separation of religion from public reason, has an accurate reading of the actual dynamics of religious-political conflict in the contemporary United States. At least in the case of Rawls, I think that in the background of the argument there is a scenario of how religious disruption of a liberal society works. It goes something like this: a) there is a religious group ("the Church") which looks for special privileges (perhaps a quasi-establishment of some sort) for itself and which attempts to block other groups from having comparable protection or influence (and so threatens the free exercise of religion by others); b) the religious group has a theological rationale for its activity which is shared by or imposed on its members, including those who are active participants in the political process but which is not something which can be shared with other persons who stand outside the religious group and who have different comprehensive theories about reality, truth, and goodness; c) the religious group is monolithic or at least has enough internal discipline and cohesion so that it, its members, and the organizations and institutions which it controls will move along the same political lines, maneuvering like some vast political convoy through the waters of Massachusetts Bay or southern Lake Michigan; and d) the actual or prospective success of the religious group in achieving its program will stir up opposition among other religious or ideological groups and will cause civil enmity and destabilization of the society, perhaps ultimately leading to a renewal of religious warfare, which most will admit was one of the most grievous afflictions of early modern Europe. Even if this does not happen, there is a fear that those

who are not members of the aggressive religious group will be reduced to the status of second class citizens.

I trust that the terms in which I have laid out this scenario, a scenario which I would call "the church threat" (I was tempted to call it simply "the Catholic threat"), will evoke a certain skepticism about the likelihood of such a course of events in the late twentieth-century United States. If we direct our attention to the specific steps in the scenario, we can see that "b" does not hold for any significant group apart from Islam, which is not in any position to impose its theology on the American public; "a" may apply to various religious groups on its positive side, but no group comes forward explicitly in favor of restricting the religious liberties of others. But the most significant change in recent times has occurred with regard to "c," especially within Catholicism, which has clearly developed significant internal divisions.

Here I am reminded of a remark which the late John Cogley, who was then associated with *Commonweal*, made when he was asked whether the recently concluded Vatican II would leave any lasting divisions within the Catholic church. He said, "Yes - orthodox, conservative, and reform." I am struck and often disedified by the enthusiasm which members of what is purportedly one religious body bring to challenging the views and the moral integrity of their co-religionists. This, of course, is not a peculiarly Catholic phenomenon, as any observer of disputes in the rabbinate or between main-line and evangelical Protestants can readily attest.

What is particularly helpful here is the account of current American controversies offered by James Davison Hunter.³ Hunter stresses the differences within the denominational communities, particularly the division between orthodox and progressive ways of interpreting the traditions of these communities. If Hunter is right, then the most deeply felt and most socially significant differences have ceased to be those among Catholics, Protestants, and Jews and have now become the internal divisions within those groups. These divisions are rooted in differences about accepting or opposing some of the secularizing tendencies which put pressure on religious groups to conform to the norms and practices of the larger society. There are also significant coalitions across denominational lines in support of Israel, for and against abortion, for and against sex education in the public schools, for and against unfettered expression in the public media, etc.

Now I am less than convinced that the orthodox/progressive division overrides denominational differences across the board. For instance, it is easy to imagine a conservative Catholic family being more concerned about a son's marrying a Jewish girl than about his mar-

3. James Davison Hunter, *The Culture Wars: The Struggle to Define America* (1991).

rying a liberal or progressive Catholic. But I think that the orthodox/progressive division is the one which is most salient in the major political fora, in the demands for legislation, in the protests against court decisions, in the pressures brought to bear on presidential candidates. If that is so, then it is reasonable to think that what exacerbates social, political, and religious tension is not the effort to establish the views or practices of a particular denomination, but rather a series of judicial and political decisions which have altered what orthodox religious groups have regarded as the common moral patrimony of our pluralistic society. Encouraging the courts to adopt a purely secular approach to arguments and decisions really amounts to urging them to come down on one side of the cultural wars rather than another, in effect, to take sides in the most inflamed religious disputes of our time. Many of the values argued about with regard to family life and sexuality, challenges to traditional authority in all spheres, public education, and health care decisions are not tied to particular denominations but to the progressive/orthodox polarity which crosses over denominational boundaries. Differences between Catholics and Protestants, for instance, on such issues as contraception, abortion, divorce, tolerance of homosexuality certainly do not arise from the Reformation, but from the different rates at which the religious groups have moved away from traditional norms. The Hunter analysis of contemporary conflicts does not show in itself that major Supreme Court decisions have been mistaken or that Foley's view is wrong; but it does a great deal to show why the secularizing approach does so little to reduce conflict.

The first uncertainty I have considered was about the shape of religious disagreement that might be thought to threaten the stability of secular order; the second uncertainty has to do with the level of moral disagreement which provokes social controversy and political engagement in contemporary American society. Here I propose a map based on an observation made by the late Alan Donagan.⁴ He notes that there is comparatively broad agreement on the precepts of morality, though not on the resolution of particular cases (in which different moralists and different traditions often accord different weights to the considerations whose presence they acknowledge) and not on the ultimate justification of moral precepts. By the precepts of morality, Donagan means norms of the level of specificity found in the Decalogue, in contrast to more general pronouncements such as the categorical imperative or the principle of utility. These are precepts which Catholics would include in the content of natural law and which Jews would regard as binding on the children of Noah who did not share Israel's covenantal relationship with the Lord. Agreement on such precepts is necessary for the stability of society and its major institu-

4. Alan Donagan, *The Theory of Morality* (1977).

tions because these precepts touch on the protection of life, the property system, the legal system, and the family.

Now it seems to me that to a very large extent there continues to be broad agreement on these precepts, but that in contemporary American society we have run into a series of disputes which focus on somewhat more specific principles and which center on categories which either should or should not be included within the scope of the familiar precepts which prohibit murder, theft, false witness, and adultery. Thus within the agreement that human life is to be protected and that murder is wrong, ferocious arguments rage about whether this norm applies prior to birth. The fact of the disagreement is powerful and unavoidable; but it derives much of its power and its importance from its relationship to the more general precept forbidding murder. This is a consideration which should count against drawing straightforward relativistic conclusions from the abundant evidence of sustained moral disagreement in our culture.

Disputes about euthanasia, capital punishment, and the continued viability of just-war doctrine all fall under the general heading of how to draw the line between permissible and impermissible forms of killing. They are questions that can be raised within particular moral traditions (utilitarianism, Kantianism, natural law theory, a theonomous or biblical approach). What is not clear to me is whether achieving agreement on some ultimate ground of moral justification is either necessary or sufficient to resolve these ongoing disputes, many of which seem to be driven by non-theoretical changes which have been occurring in our society, e.g., the rise of the women's movement, changes in medical technology and pharmacology and in demographics, changes which reflect the anonymity of urban life. This should not strike us as philosophically scandalous. The issue is whether, given the moral prohibition against taking human life, certain standard types of exceptions to that prohibition should be allowed or disallowed. The reasons for and against such a change are not reducible simply to previous and more general premises in a moral theory but reflect the complex and changing experience of people in contemporary society.

If something like this cursory mapping of the arguments in this area of moral and legal dispute is correct, then it does not seem that we need to resolve ultimate jurisprudential issues; this should come as a welcome relief in a pluralistic society. Rather, as a society we need to arrive at legal resolutions of these issues which will to the extent possible respect the consciences of ordinary citizens and protect the basic values recognized by our society and which will thus preserve religious liberty and social peace.

The third area of uncertainty that I feel as I look over Professor Foley's paper is conceptual. It is really a double conceptual difficulty. The first part of it runs something like this. We know what it means

for a judge to aim at neutrality or impartiality between disputants in a legal case. For instance, in attempting to resolve a dispute between a Christian and a Jew, it would be not merely offensive but a serious failing in impartiality for a judge to base his or her decision on a premise which was affirmed in the religious tradition of one of the parties to the dispute and denied in the religious tradition of the other. This seems obvious when, for instance, the judge relies on a Christian premise and decides the case in favor of the Christian; the more interesting situation, I suggest, is one in which the judge relies on a Christian premise and decides the case against the Christian. In any event, we have some idea of what we are worried about. The central element in our concern is that the matter is settled in a way which advantages one party in the dispute, which raises doubt as to whether justice will be seen to be done in the case, and which seems to be a ready instrument for the entrenchment of prejudice. The law then becomes an alien imposition which one privileged group uses to coerce the members of a less privileged group. This revolts our sense of justice and is a plausible threat to the stability of social order, roughly on the lines mentioned earlier with regard to "the church threat."

We can extend our understanding of this situation to the similar but not identical situation in which the court is asked to be impartial or neutral between religion and irreligion, between belief and unbelief. Here, of course, we are not talking about a specific sort of religious belief (Catholic or Shi'ite or Presbyterian or Orthodox Jewish), but about the whole family of religious beliefs. But we are not talking, as epistemologists would, about all sorts of beliefs about sealing wax and cabbages and kings, about likely pennant winners and the paths of comets; but more specifically about what Foley discusses as transcendental beliefs. We can see that it would be unfair to persons who are skeptical about all religious beliefs to have their cases decided on grounds which presuppose the acceptance of one or more commonly held religious beliefs. So the constitutional rejection of religious tests, even of the most generic sort, impresses us as an appropriate exercise of fairness.

But when we move to the next stage, the other half of the difficulty comes into play. That is, the notion of religion is broadened to include virtually any belief that brings with it what Quine would call an "ontological commitment." There is precedent for this in the jurisprudence shaping conscientious objection cases, in which beliefs which held a place comparable to traditional religious beliefs, even if they involved no commitments with regard to a supernatural creator or a divine being or were not associated with the teachings of any traditionally recognized religious body, were to be accorded equal status in justifying and legitimating moral objections to participation in war. I do not mean to challenge the extension of the status of conscientious objector to those who lack traditional religious beliefs and commit-

ments. Rather, my concern is that once one begins to equate religion and any strong belief about nature or ultimate reality or any belief which could imply such a strong belief, then both the sense of contrast between belief and unbelief and the social good to be achieved by neutrality between them become vague and, I would argue, ultimately incoherent.

Professor Foley now grants that there are inescapable difficulties in attempting to maintain a strict meta-ethical or jurisprudential neutrality.⁵ What he commends us to is a regime in which meta-ethical and ultimate jurisprudential rationales are kept private and even covert for the sake of achieving greater acceptability for public judicial opinions. He grants that such a regime in which ultimate justifications are kept out of public view runs the risk of appearing arbitrary.⁶ The feasibility of maintaining such a regime in an open society seems highly questionable. The continuation of such a regime would, in fact, diminish the public credibility of decisions which offered the appearance of neutrality achieved by the suppression of contentious issues which are understood to be intrinsic to the process of judicial reasoning (whereas many theological considerations can be excluded by a careful and appropriate focusing of the question to be decided).

In conclusion, I am struck by a paradox in the argument that Professor Foley offers us in his eloquent and lively paper. On the one hand, theology and "the religious" become encompassing notions, which do not require any reference to God; at the same time, this is used as a justification for removing not merely religion but also its various equivalents and substitutes from the realm of public discourse and decision. My sense is that this sort of paradox is an expectable result of a strategy that seeks both for ultimate justification and for consensus beyond contestability in a pluralistic society. Our living together as well as we do and as contentiously as our various traditions of prophecy and witness require is a remarkable thing, an effect, one suspects, of certain graced pragmatism rather than of a drive for theoretical consistency and perfect neutrality.

5. Edward B. Foley, *Jurisprudence and Theology*, 66 *Fordham L. Rev.* 1195, 1206-7 (1998).

6. *Id.* at 1209.

Notes & Observations