GOD vs. THE GAVEL: A BRIEF REJOINDER

*Douglas Laycock**

I recently reviewed[1] *God vs. the Gavel*[2] by Professor Marci Hamilton, and she published a brief response.[3] My review briefly summarized the book and then made three principal points, addressing Hamilton's institutional competence thesis,[4] her "no-harm" principle,[5] and the remarkable number of legal and factual errors in the book.[6] In this reply, I will review each of these points in turn.

I. INSTITUTIONAL COMPETENCE

The book's central legal claim is that only legislators may legitimately exempt religious behavior from regulation, and then only by enacting specific rules rather than generally applicable standards. Yet Hamilton condemns the legislature's bad judgment, its inadequate process, and its frequent secrecy. Her examples of exemptions that should not have been granted were nearly all granted by legislatures, not courts. I found her preference for legislatures "incomprehensible" in light of her critical assessment of legislative capacities and performance.[7]

Her only response is that I have confused an "ought" with an "is"—that legislatures ought to conform to her proposed rules even though they have not done so "of late."[8] But on questions of institutional competence, who "ought" to decide necessarily depends on an "is"—on the actual strengths and weaknesses of existing institutions. That is the whole point of debates about institutional competence. Arguing that Congress *ought* to do things beyond its capacities is like arguing that earthworms *ought* to fly, even if none of them have done so lately.

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1. Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169 (2007).

2. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005).

3. Marci A. Hamilton, *A Response to Professor Laycock*, 105 MICH. L. REV. 1189 (2007). [Editor's note: Professor Hamilton was originally scheduled to write an in-depth response to Professor Laycock's book review in this issue of the *Michigan Law Review*. During the editing process for that response, however, Professor Hamilton withdrew her submission.]

4. Laycock, *supra* note 1, at 1172–77.

5. *Id.* at 1171–72.

6. *Id.* at 1177–87.

7. *Id.* at 1173.

8. Hamilton, *supra* note 3, at 1190.

Most of the defects that Hamilton identified in the legislative process, and most of the additional defects that I identified,[9] are inherent in the process. These defects flow from the pressures of the political process and from the unmanageable demands on legislators' time. They cannot be wished away by saying that legislators "ought" to do better.

Hamilton has great faith in the potential of legislative hearings; I explained at some length why this faith is "divorced from reality."[10] I argued that on a question sufficiently focused for the judicial process, judges can devote more time and attention, have a more reliable fact-finding process, and are more likely to make a principled judgment that takes both sides seriously. Her only response is to repeat what she said in the book and to claim that her view "is a non-controversial statement of fact."[11] A real response would have to address the argument and evidence offered in the review. The comparative institutional competence of courts and legislatures to resolve requests to exempt particular religious practices from regulation is the fundamental disagreement between us, and the fundamental legal claim in her book. To simply assert that her view of that question is non-controversial is to assume her conclusion.

II. THE NO-HARM PRINCIPLE

The book opens with the proposition that churches should be subject to all the regulation that restricts other organizations, "unless they can prove that exempting them will cause no harm to others" (p. 5). I showed that that standard is untenable if taken literally, and that by the end of the book, Hamilton had agreed that the real question "is one of balancing" harm against liberty (p. 297). She now says that she intended a balancing test from the beginning and never meant for "no harm" to be taken literally.[12] She seems to think that if I had remembered my John Stuart Mill, I would have understood that.[13]

It is good to have her confirm in print that "no harm" is not intended literally. But if I misread her, I am sure that I will not be the only one. The book gets much of its impact from the rhetoric of "no" harm. She accentuates that rhetorical effect by calling it the "no-harm principle" instead of using the more common phrase, the "harm principle."

"No" harm is what she actually says, early in her introduction (p. 5) and again in the concluding phrase of her introduction (p. 11). It would have been so easy to clarify on page 5, instead of on page 297, that she really means to balance harms, and that balancing inevitably leads to "little" harm,

9. Laycock, *supra* note 1, at 1174–75.

10. *Id.* at 1174.

11. Hamilton, *supra* note 3, at 1190.

12. *Id.* at 1191.

13. *See id.*

not to "no" harm. Her intended audience of voters and legislators[14] does not read responses to academic book reviews, and many of them no doubt quit reading long before page 297.

Even if Mill had appeared much earlier, generically invoking Mill would not clarify whether "no harm" really means balance of harms. A leading Mill scholar describes the harm principle as "largely an empty formula;"[15] everything depends on what counts as harm. The better interpretations require harms to be evaluated on multiple criteria and weighed against the harm of invading liberty.[16] But in political debate, interest groups have learned to claim that they are harmed by any conduct they wish to regulate. "Claims of harm have become so pervasive that the harm principle has become meaningless."[17] In this political tradition, the harm principle does indeed morph into a demand for absolutely "no" harm. Hamilton's book is principally a political demand for greater regulation of churches, and it is entirely reasonable for readers to assume that it is written in this political tradition—to assume that she means what she says about "no harm."

Whatever Hamilton intended, the danger of her no-harm rhetoric is precisely that it encourages the political demand for absolute safeguards against any risk of any effect that any person perceives as any degree of any kind of harm. She tells legislators that they must regulate churches unless churches "prove" that an exemption will cause "no harm" (p. 5). She seems to mean it literally; she repeatedly appears to reject distinctions among harms,[18] and some of her examples involve slight and attenuated harms to doubtful claims of entitlement.[19] Even if it were only a clarification and not a change of position, clarifying at page 297 is too little, too late.

III. Errors and Falsehoods

I documented an "extraordinary number of errors, often with regard to famous cases and basic doctrines."[20] Hamilton has not disputed any of the errors I identified. Her response claims that a draft of my review contains "many . . . errors" of my own, but the only one she has identified is a mistaken conjunction in quoting the book's title.[21]

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14. *See* Laycock, *supra* note 1, at 1170.

15. Joel Feinberg, Harm to Others 203 (1984).

16. *Id.* at 187–217.

17. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. Crim. L. & Criminology 109, 113 (1999).

18. *See* Laycock, *supra* note 1, at 1171.

19. *See id.*

20. *Id.* at 1186.

21. Hamilton, *supra* note 3, at 1189 n.2. That draft had multiple cite-checks pending; in addition to urging the student cite-checkers to be especially vigilant, I independently cite-checked the review myself. Some error or misunderstanding might have slipped through, but if so, it was not for lack of care.

Without addressing any specific claim of error, she says that I assume that any interpretation of free exercise cases other than my own "is somehow false."[22] But I did not label her position on such interpretive issues as false or even erroneous in the sense in which the review charges her with errors. Twice I said that "reasonable people can disagree" about an issue,[23] language one never finds in Hamilton's writings. Three times I suggested that she might have some argument she had not made.[24] I labeled as erroneous or misleading only statements that were objectively wrong, plus one statement where her asserted interpretation seemed clearly wrong to me and she had never offered any argument or explanation for it.[25] It is not a matter of interpretation to accurately state whether a court dismissed all the counts of a complaint against a priest and a bishop, or only some of the counts against the bishop and none of the counts against the priest.[26] Not all the errors I identified were that obvious, but I deliberately omitted any that seemed fairly arguable, and she has not argued with the specifics that remain.

Instead of addressing the errors, she complains that the review is uncivil.[27] There is nothing remotely uncivil about Part II, which argues with her two principal theses, and very little that could be thought uncivil about Part I, which summarizes the book. If the review is uncivil, it is because Part III points out many errors, bluntly and without sugar coating. Only a few sentences, mostly in the introduction, conclusion, and title, characterize the book in judgmental terms—and those judgments are based on the detailed argument in Part III. Whatever readers think about those judgments, I hope they will focus on the argument. The argument in Part III proceeds with close attention to facts and a minimum of rhetoric or debatable claims. If it were uncivil to point out numerous errors—even when they far exceed in number and magnitude the inevitable errors that creep into any lengthy manuscript—then error-ridden books would be immune from criticism.

Hamilton has promised that if any of my "technical concerns have merit," she will "take full responsibility and make the appropriate changes in the paperback version."[28] We will see. But remember that I did not cite-check the whole book for her. I investigated only those passages that appeared wrong on first reading.

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22. *Id.* at 1191.

23. Laycock, *supra* note 1, at 1178, 1182.

24. *Id.* at 1183, 1184, 1186.

25. *Id.* at 1186 (rejecting her unexplained interpretation of *Locke v. Davey*, 540 U.S. 712 (2004)).

26. *See id.* at 1180.

27. Hamilton, *supra* note 3, at 1189.

28. *Id.* at 1189 n.3.

IV. CONCLUSION

It is common ground between Professor Hamilton and me that "some religious behavior must be regulated,"[29] and that "religious believers have no right to inflict significant harm on nonconsenting others."[30] But compiling anecdotes of religious behavior that should be regulated, even if all the behavior were egregious and all the anecdotes were accurate, does not tell us what to do about any other religious behavior. Anecdotes of bad behavior do not tell us what religious behavior should be regulated and what exempted, what should be the standards for granting exemptions, or who should decide exemption questions in particular cases. Those are the essential points of disagreement, and with respect to those points, Professor Hamilton's response does nothing to rehabilitate the unpersuasive claims in the book.

29. Laycock, *supra* note 1, at 1170; *accord id.* at 1177.

30. *Id.* at 1171.