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Review Essay[*]

Can American Courts Respect Religious Reasoning?

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In 1977, legal philosopher Ronald Dworkin published *Taking Rights Seriously,* and it quickly received wide notice. At the time recently appointed H.L.A. Hart's successor at Oxford, Dworkin combined jurisprudential analysis with pointed commentary on United States Supreme Court cases, the latter developed principally in essays in the *New York Review of Books*. Defining law through its aspiration to justice and defining justice in terms of rights, Dworkin argued that judges were entitled to use moral philosophy both to interpret legal rules through the principles they instantiate and to fill in gaps in the law by leveraging general legal concepts into more precise conceptions. Often paired with his contemporary John Rawls's *Theory of Justice*, Dworkin's theory that judges should rework the law when possible to insure "equal concern and respect" was seen to elaborate the practical meaning of Rawls's first principle of justice (equal rights to basic liberties) as well as to boost the activism of judges, whom he encouraged to model "Hercules."

Francis Beckwith's *Taking Rites Seriously: Law, Politics, and the Reasonableness of Faith* puns on Dworkin's title and engages some of his concerns, but its specific purpose is not jurisprudential, at least not in any comprehensive sense. Rather, Beckwith starts by showing how poorly Herculean judges understand religion and how unfairly they treat religious people as a result. Completed as the Court handed down its decision in *Obergefell v. Hodges* nationalizing same-sex marriage as a constitutional mandate, the book for the most part posits liberal premises and

[*] Francis J. Beckwith, *Taking Rites Seriously: Law, Politics, and the Reasonableness of Faith* (Cambridge, UK: Cambridge University Press, 2015). 240 pp. $28.99. Page references appear in parentheses in the text.

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illustrates how contemporary secularism betrays them when the rights and liberties of religious people are at stake. Drawing on a series of essays published over the previous decade, Beckwith makes a cogent case that judges need to reboot their approach to religion, something that, ironically, *Obergefell*—insofar as it registers the end of Christian authority in American culture—may give them the occasion to do.

After briefly sketching judicial carelessness in the definition of religion, Beckwith begins in earnest in his second chapter with a sustained critique of what he calls Secular Rationalism, the view that "religious beliefs are irrational because they are…unprovable…, incontestable…, and…insulated from the ordinary standards of evidence and rational justification" (22). He tackles the question of epistemology: After quickly and adroitly showing that reason, too, affirms incontestable truths, Beckwith presents "the central philosophical belief of Christian theists—that there exists a self-existent personal necessary eternal being on which the universe depends for its existence" (26)—and documents the cosmological, moral, ontological, and teleological arguments made on its behalf in recent decades, not to mention in the distant past. Believers in the academy may have been as rare in Dworkin's day as the proverbial atheist in a foxhole, but today they are a powerful presence, at least in Philosophy, and Beckwith's footnotes are veritable bibliographic essays for anyone who has not been keeping up with the literature. Likewise, "Christianity's central historical belief…that Jesus of Nazareth died and rose from the dead, and thus vindicated his claim to the Son of God" (28) has plentiful academic defenders, and here, too, there are essays in the notes. Wait, you say, isn't all this academic literature, peer-reviewed though it may be, by Christians? "Would anyone take seriously a philosopher who dismissed the rationality of philosophical materialism because its proponents are uniformly philosophical materialists?" (29, n. 78) replies Beckwith. Some of the arguments supporting theism are carefully rehearsed, others are simply cited, but he succeeds, I think, in making clear that the cocktail-party assumption that all right-thinking and highly educated people have no use for religion is simply a prejudice, although still a widespread one. If you are not persuaded by the length of the footnotes, read the works he cites.

To be clear: Beckwith is not insisting that his readers accept the arguments in favor of theism, much less of Christianity, only that they acknowledge the seriousness of religious reasoning itself, in its diverse modes, and admit its presence once again at the seminar table. The next task is to break the news to judges, who generally got their degrees in the high secularist mid-twentieth century or took advantage of curricular chaos to skip philosophy and theology (if the latter was even offered at their schools). Ignorant of the philosophical heft of religious ideas, judges impugn the motives of those who defend public accommodation of religion, accusing them of irrationality and bad faith and striking their laws and policies as purposefully unconstitutional. Beckwith here cleverly refers to the No Religious Test Clause of Article VI of the original Constitution and argues that judges'

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administration of the "secular purpose" prong of the "*Lemon* test" runs afoul of it: Their analysis privileges those who have wholly secular reasons for their policy views and denies to any who bear the witness of their faith, if not public office itself, at least the capacity to influence official action. Legal analysis has long been able to distinguish the purpose of a law, implicit in its terms, from the motives of those who passed it. Only in the case of obvious bad faith, usually where race was involved, has a proven illegitimate motive been able to defeat an objectively legitimate purpose. To decide, for example, that a law allowing teachers to begin the school day with a moment of silence is an attempt at religious establishment because its sponsor blurted out that he hoped students would use that moment to pray, as the Court did in *Wallace v. Jaffree*, is actually an attack on the legislator's personal belief, argues Beckwith; if the law itself is fair and equal, why launch an inquisition into that?

The middle section of the book develops Beckwith's earlier public or published positions on a few much-debated topics in bioethics. His chapter on dignity is a critique of Steven Pinker's attack on the use of the concept in the report of the Bush-era President's Council on Bioethics. Every argument Pinker makes against the concept of dignity—that it is relative, fungible, harmful, and unnecessary—Beckwith illustrates in reverse of Pinker's preferred concept of autonomy. The chapter is a fast-paced display of philosophical prowess, and its purpose seems to be more to neutralize the opposition than to establish the reality of human dignity, though to be fair, Beckwith has addressed this question elsewhere. The chapter on embryonic stem-cell research likewise reprints and develops a specific dispute, this time with Dean Stretton. Again, Beckwith's arguments are valuable, but the points are mostly narrow, the larger issues having been elaborated elsewhere; his discussion of the comatose "Uncle Jed," in comparison to the fetus whose brain is undeveloped, is worth reading if you like the use of analogies to clarify pregnancy and pre-natal life, in the tradition of Judith Jarvis Thomson but to opposite effect. The chapter ends with a valuable, if understated, critique of the *Hobby Lobby* decision, where the right result was reached for the wrong reason, according to Beckwith. While it is important that the Court respected the claim of the Christian business-owners to be free of a government mandate to purchase an insurance policy for their employees that included coverage of what the owners believed to be immoral (because abortifacient) forms of contraception, the Court missed an opportunity to indicate the rationality of the owners' refusal to cooperate in evil, stressing instead the sincerity of their belief, whether or not it is rational. As the culture grows more impatient with religious beliefs it increasingly sees as irrational, it will become less likely to indulge them. Here as elsewhere in the law, toleration is a weak reed to build upon in contrast to right.

When Beckwith turns in his final part to "Nature and Sex," the drama grows, not because he turns to romance but to the issue of "Intelligent Design" (ID), the topic of an earlier book that he does not exactly retract but concerning which he

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admits his thinking has changed. In *Law, Darwinism, and Education* Beckwith had defended the right of educators to teach children the arguments in favor of intelligent design alongside the science of evolution as not inconsistent with the Establishment Clause of the Constitution. True enough, he thinks the 2005 case of *Kitzmiller v. Dover Area School District*, which appears to have settled the matter, surprisingly, at the federal district court level, was wrongly decided or at least poorly argued, the judge having inferred religious motives in the school board sufficient to destroy the state's claim (remember Beckwith's critique of the analysis of motive) and having been convinced by expert testimony disputing the scientific character of ID, which Beckwith thinks was beside the point in the case. But Beckwith himself criticizes not only the school board's formulation of its policy as incoherent, asserting simultaneously that evolution is a "theory, not a fact" and that students must keep an open mind about it, but also ID itself, which he agrees is not scientific but which he faults for trying to compete with science. Citing David Bentley Hart and others, he now distinguishes Thomistic Design, to which he adheres, from ID, which he repudiates. The latter places God in competition with nature—did complexity come through natural causation, or did God miraculously intervene?—while the truer understanding sees divine wisdom in the entire structure of nature itself, making the question of God's means of creation misconceived if the means in question are analogized to causes within nature, not behind it. God is the efficient cause of nature because he is its necessary cause, but there is no reason to think he acts like a watchmaker, much less an inspector charged to correct manufacturing mistakes. The details of proximate efficient causation can be safely left to natural science as it is practiced today, Beckwith concludes, although science itself ought to know itself better than it does, if only to show philosophy the respect it deserves as the queen of the sciences. In particular, science relies on formal causation all the time, and sometimes on final causation, its close cousin, even though it only speaks comfortably of material and efficient causes. Beckwith does not assert the triumph of Aristotelianism over science, but he does mean to show that science does not trump every other argument in the public sphere. How could it, if it supposes the human being to be a merely material thing and causation a concatenation of necessary events?

The turn to Thomistic Design indicates a sort of Catholic moment in Beckwith's argument, and this would be no surprise to the literary biographer, who would note his return to the Catholic faith—the subject of yet another of his books, *Return to Rome*—around the same time as his rethinking of intelligent design. Catholicism figures prominently in his concluding chapter, a tour de force written for the aftermath of *Obergefell*, but in a surprising way. For the purposes of argument, Beckwith adopts the stance of what he calls "justificatory liberalism," a position he attributes to Rawls, to liberalism, and to libertarianism more generally. This position holds that any use of force by the state against an individual in society must be justified by an argument that any reasonable person would accept; since

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liberalism allows people to hold to different "comprehensive doctrines" about God, the world, and humanity, the state relies upon an overlapping consensus to justify its intrusions, a consensus wide enough to allow sufficient social unity but narrow enough to allow real difference in "comprehensive doctrines." Accepting—again, for the sake of the argument (and as a political reality)—that the coercive power of the state can find no justification that would persuade a person who identifies as an active homosexual to abandon his sexual preference, and that this justifies the Court in proclaiming "marriage equality" (that is, a duty of the state to recognize same-sex unions as valid marriages), Beckwith asks whether the state can find an adequate argument to persuade someone whose comprehensive doctrine is Roman Catholicism that he must endorse same-sex marriage and might be punished if he resists, for example, by refusing, if he provides floral, photographic, or food services to weddings, to sell these to gay couples, or by refusing, if he is an educator, to promote the teaching of "marriage equality" to young children in public school.

He answers that the state can produce no such argument: Carefully laying out the Catholic teaching on the complementarity of man and woman in God's plan for creation, the requirement that every sexual embrace between them be open to the creation of new life, the prohibition on sex outside of marriage and on cooperation in doing evil, Beckwith makes the case, not now that Catholic marriage ought to guide the social norm, but simply that it ought to be allowed to flourish without state interference if it can find adherents in a free society. This, he says, is far from certain in the post-*Obergefell* world, as illustrated by a rhetoric already emerging that treats non-endorsement of "marriage equality" as a form of bigotry, as well as by the example of Massachusetts, where judicial proclamation of same-sex marriage a decade earlier led to the defunding of Catholic Charities' adoption services, since they refused—as by Catholic teaching they felt obliged to refuse—to place orphans in same-sex households. It is already the case, strictly speaking, that the state cannot recognize and endorse by law a *Catholic* marriage as such; contraception and abortion have been recognized by the Court as constitutional rights, but neither is allowed in a Catholic marriage, nor is divorce and remarriage, although permitted almost without restriction in all the states. Why, asks Beckwith, should state endorsement of same-sex marriage ask more on its behalf than states are allowed to do in relation to Catholic marriage? On liberal principles, he argues, it should not.

In short, in *Taking Rites Seriously*, Beckwith demonstrates that the reasons of religious people should count equally with other reasons in the public realm. At the very least, they deserve not to be dismissed as irrational out of secularist prejudice, however popular in the intelligentsia, and at most they support affirmative rights—no punning here—in support of religious liberty against coercion by the state. Do these rights, and for that matter, these reasons, inhere in every religion? Beckwith mentions and elaborates especially upon Catholicism, in part because it has thoroughly and publicly propounded its comprehensive doctrine in the

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Catechism of the Catholic Church, making analysis stable and available to Catholic and non-Catholic alike. Moreover, Catholicism has a long history of reconciling faith and reason, employing them simultaneously in the guidance of life and even in the construction of liturgy. Protestantism and Judaism, if less easily codified or less readily accessible to others, also receive occasional mention as comprehensive doctrines that a liberal society ought to respect, not only in their practices but in their modes of thinking and argumentation. What about Islam? It is mentioned in passing in several lists, sometimes within quotations, but one wonders whether at the present moment it does not deserve a more particular accounting from the author, not least because to some in the West its public face seems at present to show religion in its most insistent and least compromising form. Does Islam give reasons in the same way as the others? Does it accord reason the same place in relation to what is meant by the name of God? What of its laws and their obligation, from the madrasa to the household, from shari'a generally to the law allowing polygamy in particular? Can these be promoted in the public realm, or permitted in the private? These matters might be easy to solve at law—whatever is analogous to what Christians do, so may the Muslins—but common sense suggests, or at any rate widespread public opinion feels, that such answers are inadequate when adherents to any religion commit violent acts in the name of God and damage life, liberty, or property. Even courts, Beckwith acknowledges at one point, distinguish better and worse, true and false in religion as they must regarding anything else, at least when the question is unavoidable in the settlement of a case. "Taking rites seriously" in the modern age means taking *all* rites seriously—not just the arguments made on their behalf or against them, but the whole way of life of religious men and women living alongside one another as fellow citizens. Francis Beckwith is a master of many arguments and a writer of many books. Perhaps his next will pick up where this fine book concludes and speak to the emerging questions that few others have adequately raised, much less resolved.

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