

**DRAFT**

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**Abstract**

*This brief Foreword evaluates the innovative new theory of law, religion, and state by Catholic jurist, Rafael Domingo, and shows some of its antecedents in the natural law theory of Dutch Protestant jurist, Hugo Grotius.*

**Keywords:** Hugo Grotius; Rafael Domingo; law and religion; natural law theory; religion and state; establishment of religion; secularism; theism; Christianity; religious pluralism

**Foreword**

In his monumental tome, *On the Law of War and Peace* (1625), Dutch Protestant jurist Hugo Grotius ventured the (in)famous "hypothesis" that the law of nature would exist "even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him." For Grotius, this was not a declaration of impiety, but a call for respect and reverence for God even in the midst of the bitter religious wars that were tearing his Christian world apart. For Grotius it was impious for any one state to pretend that it had fully captured divine truth in its law, and to kill and persecute others for taking contrary religious views. God's truth is above the law and politics of any human community, he insisted, and wars of religion are an insult to God. It was likewise impious for any antagonist, even in the midst of a just war, to defy the natural "law written on the heart" that guided them on the paths of virtue. The law of nature teaches not only war but also peace, not only retribution but also reconciliation. Regardless of what any state law and policy might require, the natural law sets limits on human behavior even in wars between the bitterest enemies.

In this short and provocative treatise, Spanish Catholic jurist, Rafael Domingo articulates a comparable need to bracket God from the positive law of any state – again out of respect for God and God's law, in all the different ways that God is understood today. For Domingo, respect for God requires a state and community to recognize an antecedent or transcendent source of law and rights that lies beyond the positive laws of the state. A state may acknowledge God in ceremonies, symbols, and political iconography that accord with local beliefs. It may acknowledge that rights and duties, and moral principles and practices of life are rooted in "the law of nature and nature's God." But beyond that, the state cannot and should not go. God is a "metalegal concept," Professor Domingo insists, who is above the formulations of any state or any political legal order. The state has enormous power and responsibility in secular matters, but it has no jurisdiction, no power to "declare the law" (*jus dicere*) for the religious sphere. Religion is left to the

conscience of each individual and to the confessions of peaceable religious communities.

In our multi-religious world, the law of the modern state must be secular, Professor Domingo insists. This means that states should end traditional forms of religious establishment – whether Christian, Jewish, Muslim, Hindu, Confucian, or otherwise. The state has no business dictating, defining, or favoring any particular religious doctrine, liturgy, text, or canon. It has no business involving itself in the polity, property, or personnel of any religious body. It has no business coercing its subjects to practice or fund religion, or discriminating in favor of one religion and against another. For the state to reduce God and religion to a simple political category or a legal command is ultimately a form of political idolatry, even blasphemy. For the state to dictate to private consciences or to religious authorities how they should be or act religiously is ultimately an invasion of the sovereignty of God. Traditional *religious* approaches to law and politics, while they may have been popular in the second millennium, cannot be sustained.

Modern *secularist* approaches to religion are equally problematic, however, Professor Domingo insists. The modern state must not establish a secularist ideology -- whether liberalism, socialism, communism, or fascism – that stands in the place of a traditional religion and commands comparable devotion and allegiance in violation of the conscience of the individual, the authority of religious communities, and the ultimate sovereignty of God. Stalinist Russia, Maoist China, Nazi Germany, Mussolini's Italy, Pinochet's Chile, Pol Pot's Cambodia, are only a few of the many examples of modern totalitarian states that have arrogated to themselves this kind of transcendent power.

But less obvious versions of this kind of state excess are also at hand in current aggressive policies of laïcité in modern-day France and elsewhere in Europe or policies of secularization in modern-day America and Canada. These state policies, too, ultimately fail to respect God, religion, and conscience. They sometimes catechize versions of “liberty, equality, and fraternity” that can run roughshod over religious ideas of responsibility, difference, and community. They sometimes teach nationalism, patriotism, and cultural allegiance that make idols of a state, people, and ways of life. They sometimes protect, promote, and prescribe fundamental ideas about sex, marriage, and family life that upend millennia-long patterns of sexual morality taught by religious communities. But more troubling, still, is that these secularists often adopt policies that treat religion as just too dangerous, divisive, and diverse in its demands to be accorded any kind of special protection or accommodation. Freedom of conscience claims, the argument goes, unfairly demand the right to be a law unto oneself, to the detriment of general laws and to the endangerment of other people's fundamental rights and legitimate interests. Institutional religious autonomy is too often just a special cover for abuses of power and forms of prejudice that should not be countenanced in any organization – religious or not. Religion should be viewed as just another category of liberty or association, with no more preference or privilege than its secular counterparts. Religion should be treated as just another form of expression that must play by the rules of rational democratic deliberation just like everyone else.

Professor Domingo works hard in this book to counter these new “secularist approaches,” to law and politics as much as the old “religious approaches.” He promotes what he calls “a secular theistic approach” that separates religion and state, that accommodates all sincere claims of conscience, and that defers to the inner workings of peaceable religious organizations that remain true to their callings. His approach calls each community to respect God, but not to make God an object or end of state power. It calls each community to respect the autonomy of peaceable religious communities, but does not give any religious community the secular power to coerce its subjects or to control the state. It calls political and religious communities alike to accommodate the conscience of each individual, but to avoid collapsing claims of conscience into simple claims of personal preference. And this approach calls all communities to recognize that fundamental questions of morality – of war and peace, life and death, marriage and family, nature and bioethics, and the like – must draw on states, religions, and private consciences together for reflection and resolution, and stop pretending that these questions can be treated only dogmatically, only pragmatically, or only with value-neutrality.

This argument depends on a complex differentiation of different spheres of life and power. It presupposes the ability of secular reason and secular law to operate with religion as a friendly ally, but neither as object or enemy. It presupposes the ability of religion to cooperate with the state, but to remain confined to its own principal sphere and respect the conscientious claims even of its own members. And it presupposes distinctions between religion and law, religion and morality, conscience and belief, secularity and secularism, the spiritual and temporal orders, and more – all of which boundaries have been and are fiercely contested.

These are all delicate balances to strike, but Professor Domingo brings great learning to the task, drawing on politics, history, jurisprudence, political theory, comparative law, European human rights law, and American constitutional law to drive home his points. He puts sundry great scholars in the dock for close examination – Ronald Dworkin, John Rawls, Jürgen Habermas, Charles Taylor, Michael McConnell, Joseph Raz, Kent Greenawalt, Michael Perry, and scores of others, including Popes John Paul II and Benedict XVI – in an attempt to work out and defend his position. What emerges in these pages is a lithe, learned, and lively engagement with some of the most fundamental questions of law, religion, and the state that are challenging persons and peoples throughout the world.

Professor Domingo would be the first to insist that he is no modern-day Grotius, and that this slender volume is no substitute for the massive three-volume masterwork, *On the Law of War and Peace*. But the efforts of Grotius and Domingo still bear comparison. Both are serious Christians, ultimately interested in preserving and protecting what Grotius called *The Truth of the Christian Religion*, against contrary claims by the state and academy. Both are experts on classical Roman law and see its pre-Christianized form as an ideal type of comprehensive system of public, private, penal, and procedural law that avoided both religious and secularist approaches to law and religion, conscience and morality. Both aspire to use the idea of a “secular legal system” to build both world peace and what Domingo in his last Cambridge University Press title called *The New Global Law*.

It has been a pleasure for me to watch this book grow from a small idea first discussed over a cup of coffee a few years ago into this short work, which will doubtless inspire many more books in the years ahead as these provocative ideas are worked out more fully. Professor Domingo has been a colleague in our Law and Religion Center, and was kind enough to share these book ideas in the making with our colleagues and students. Given his Spanish background, Romanist training, and Catholic casuistry, he has made novel contributions to our law and religion work, and offered unique perspectives to our classes, colloquies, and conversations. It's a joy to see these literary fruits of his labors, and it's a privilege to include his work in our new Cambridge Law and Christianity series.

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