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Liberty versus the Morality Police

by George C. Leef

Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality by Elizabeth Price Foley (Yale University Press, 2006); 287 pages, \$35.00.

Most Americans have settled somnolently into the view that whatever laws are passed are all right because they're the product of democracy. To be sure, there are small factions that are heard to argue, "The government has no business doing that!" with respect to issues that adversely affect them, but few people express opposition *in principle* to the vast array of authoritarian nanny-state enactments we get from federal, state, and local politicians.

One who does, however, is Elizabeth Price Foley. Her new book, *Liberty for All*, is a direct and formidable challenge to the validity of laws that restrict the freedom of American citizens to peacefully live as they choose. Foley, who is a professor of law at Florida International University, hits the nail right on the head when she writes, "The slow, steady, and silent subversion of the Constitution has been a revolution that Americans appear to have slept through, unaware that the blessings of liberty bestowed upon them by the founding generation were being eroded."

If you think that sounds like the voice of a constitutional originalist, that's precisely the stance Foley takes. She explains that earlier in her life she had adhered to the standard set of "liberal" beliefs on the desirability of government intervention, but during law school she was fortunate enough to have had a professor who helped her to see the vast chasm between the words of the Constitution and the way the Supreme Court had interpreted those words — interpretation that gave the green light to coercive statutes the Founders would have vigorously opposed.

In working out her argument, Foley reaches conclusions that are sure to upset both liberals and conservatives, but she confronts opponents from all sides, writing,

I have concluded that "liberty for all" was meant to be the pre-eminent value underlying American laws. If this is deemed ideological (undoubtedly it will be by those who think that all constitutional

theory is inherently ideological), it at least has the distinct advantage, over liberalism or conservatism, of being truly tolerant of all points of view, something I think America needs more of these days.

Foley's case is rooted in her contention that there are two "foundational principles" on which our Constitution was based — limited government and individual sovereignty. Thus, the "morality of American law" (a phrase that recurs throughout the book) should rule out the enactment of laws that reflect nothing but the desire of some (or even nearly all) citizens to impose their moral beliefs on others. The Founders were strongly committed to the belief that individuals should be free to control their own lives and shape their own destinies. That, of course, is why the Constitution enumerates only a very few powers Congress is to have. The Bill of Rights reinforces the idea that government authority is to be exercised only for the protection of life, liberty, and property by erecting "a constitutional fence around government power by cordoning off areas of individual liberty that are immune from government intrusion."

All right, but what about the states? Aren't they given "police powers" that are said to justify most of the "public morality" legislation Foley deplores? It has become fashionable among devotees of the megastate to argue that federalism was supposed to give state governments carte blanche for all manner of "social experiments." Foley quotes James Madison to the contrary:

The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The first order of business is the protection of people's rights to life, liberty, and property, and if it's possible to legislate in a way that improves order and prosperity without infringing on those rights, the states may do so. Therefore, the "police powers," Foley argues, should be limited to situations where one party is inflicting harm on another.

"Harm" is a highly contested word these days. Some people say that they have been harmed if others say things that offend them or act in ways that annoy them. Foley argues against that conception of harm, pointing out the obvious fact that emotional distress is incapable of objective verification. Rather than trying to use the law in the impossible quest of preventing anyone from being unhappy, she maintains that law should be used only to protect life, liberty, and property against tangible, provable harm. And it follows that laws should not be enacted simply to protect the interests of "society." If there is no cognizable harm to any individual, then there can't be any harm to the abstraction called "society." That also means that laws designed solely to protect an individual person from his own bad choices (bad from the standpoint of other people, of course), are not proper exercises of government authority either.

Applying libertarian principles

Having set forth her analytical framework, the greater part of the book is devoted to the application of that framework to instances of laws passed just because some people want to impose their morality on others. A few examples will demonstrate the consistency of Foley's libertarian vision.

Consider the laws that still exist in some states (and which, Foley shows, are sometimes still enforced) against cohabitation. What justification is offered for such laws? One is that it is immoral for people who are not married to engage in sexual intercourse. A second justification is that such laws further society's interest in encouraging marriage. Foley easily disposes of both rationales. As to the first, she observes that people who cohabit in no way do any harm to the life, liberty, or property of others. As to the second, society is not entitled to punish individuals merely because they have decided to act in a way that doesn't further a social institution. Individual sovereignty ought to trump those rationales, she contends.

If cohabitation shouldn't be against the law, same-sex marriage shouldn't be either. It is quite true that many Americans feel strongly that homosexual relationships (and a fortiori, marriages) are morally wrong, but Foley replies that those moral beliefs are not a valid ground for legislation. Here, she points approvingly to language in the Supreme Court's 2003 decision in *Lawrence v. Texas* suggesting that moral considerations alone cannot be the justification for laws that impinge upon individual liberty (some kinds of liberty, at least).

How about polygamy? Foley does not shy away from the obvious result of her legal and philosophical analysis. Because polygamy does not necessarily lead to any harm, it should not be illegal. She acknowledges that polygamous marriages may be abusive, but the same can be true of monogamous marriages. She concludes,

If intimate choices to enter into relationships with others are at the heart of the liberty protected by the Fourteenth Amendment, what could be a more intimate choice than the decision to marry?

Entering into marriage with more than one person does not diminish the intimacy of the decision any more than having multiple children diminishes the intimacy of the family.

Applying her legal principles against laws that do not protect life, liberty, and property but merely impose "public morality" to outlaw nonaggressive conduct, Foley also comes out against drug laws and laws that restrict medical treatments one may seek. An example that overlaps both is the controversy over medical uses of marijuana. The federal government has placed marijuana on its list of forbidden substances, but several states have passed laws allowing people with severe medical conditions to use it under a doctor's prescription. In 2003, federal agents raided the home of Bonnie Raich, who used marijuana grown only for her to help relieve the symptoms

of her severe illnesses. Raich sued, arguing that the federal action was unconstitutional, but the Supreme Court disagreed in its 2005 decision in *Gonzales v. Raich*. Foley takes strong exception to both the federal Controlled Substances Act (the legal grounds for the raid), and the Court's decision. Of the latter, she says,

The net effect is a presumptive plenary federal power to regulate purely intrastate activities under the guise of commerce between the states, and a concomitant evisceration of meaningful federalism, a principle which was designed to provide greater protection to individual liberty.

She is absolutely right.

Inevitably, an author writing a book on the proper boundaries of the law has to face the intractable question of abortion. Foley devotes only a few pages to it and her treatment isn't likely to change the minds of anyone at the poles of opinion. Even though the Supreme Court's *Roe v. Wade* opinion has been soundly criticized on constitutional grounds from many different angles, Foley defends it as a sensible compromise:

The Court's viability demarcation is both consistent with and necessary under the morality of American law. It implements a secular moralism that mandates governmental respect for differing views by limiting governmental power over our lives and carving out a large zone of individual sovereignty.

Many entire books have been written on the abortion question and Foley's brief treatment isn't meant to be definitive. It does, however, follow from her premises. Those who would like to argue against her position will have to deal with those well-considered premises, but I won't go further into this dispute.

Foley makes a very strong case for her analytical framework. Had it been adhered to all along, the United States would be a much freer nation today. The sad truth is that most of our judges are intellectually bound to the status quo with its many laws based on nothing but the desire to impose "public morality" on everyone, but it's not inconceivable that some appellate court might one day embrace her vision. At the very least, it's encouraging to see a major university press publishing such a radically libertarian book.

I think that Foley ends her book too soon. She thoroughly covers several areas of the law where her argument obviously applies, but she says nothing about other issues that most people might regard as involving only "economic" rather than "moral" matters. For instance, when the government imposes a minimum-wage law, it exerts coercive force against someone who has done no harm. How is punishing (or threatening to punish) an employer for paying a wage that "society" regards as too low any different from punishing someone for having sex with the wrong

person? Or, how is punishing a landlord for wanting to rent only to certain kinds of people any different from punishing someone for ingesting a “controlled substance”? I think that laws that interfere with “economic” liberties fare no better than laws that interfere with “personal” liberties under Foley’s analysis.

Let’s hope that she writes a follow-up book examining such issues as the minimum wage, occupational licensure, anti-discrimination laws, and so forth. Whether she does or not, Foley’s *Liberty for All* is an important book for everyone concerned about the erosion of freedom in America.

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