2014

Freedom of Conscience as Religious and Moral Freedom

Michael J. Perry

Journal of Law and Religion 29, no. 1 (2014): 124–41 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2013.1

ARTICLES

FREEDOM OF CONSCIENCE AS RELIGIOUS AND MORAL FREEDOM[1]

MICHAEL J. PERRY

Robert W. Woodruff Professor of Law, Emory University School of Law; Senior Fellow, Center for the Study of Law and Religion, Emory University School of Law

ABSTRACT

In another essay being published contemporaneously with this one, I have explained that as the concept "human right" is understood both in the Universal Declaration of Human Rights and in all the various international human rights treaties that have followed in the Universal Declaration's wake, a right is a human right if the rationale for establishing and protecting the right—for example, as a treaty-based right—is, in part, that conduct that violates the right violates the imperative, articulated in Article 1 of the Universal Declaration, to "act towards all human beings in a spirit of brotherhood." Each of the human rights articulated in the Universal Declaration and/or in one or more international human rights treaties—for example, the right, articulated in Article 5 of the Universal Declaration and elsewhere, not to be subjected to "cruel, inhuman or degrading treatment or punishment"—is a specification of what, in conjunction with other considerations, the imperative—which functions in the morality of human rights as the normative ground of human rights—is thought to forbid (or to require). A particular specification is controversial if and to the extent the supporting claim—a claim to the effect that the "act towards all human beings in a spirit of brotherhood" imperative forbids (or requires) *X*—is controversial. My aim in this essay is to elaborate and defend a particular specification: the right, internationally recognized as a human right, to freedom of conscience—to freedom, that is, to live one's life in accord with the deliverances of one's conscience.

KEYWORDS: human rights, morality, freedom of conscience, freedom of religion

Religious diversity must be seen as an aspect of the phenomenon of "moral pluralism" with which contemporary democracies have to come to terms. . . . Although the history of the West serves to explain the fixation on religion . . . the state of contemporary societies requires that we move beyond that fixation and consider how to manage fairly the moral diversity that now characterizes them. The field of application for secular governance has broadened to include all moral, spiritual, and religious options.

—Jocelyn Maclure and Charles Taylor[2]

1 This essay is a revised version of chapter 7 of my new book, *Human Rights in the Constitutional Law of the United States* (Cambridge, England: Cambridge University Press, 2013).

2 Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, trans. Jane Marie Todd (Cambridge, MA: Harvard University Press, 2011), 20, 106. "'Moral pluralism' refers to the phenomenon of individuals adopting different and sometimes incompatible value systems and conceptions of the good." Ibid., 20.

In the period since the end of the Second World War, there has emerged what never before existed: a truly global morality. That morality—which I call "the morality of human rights"—consists not only of various rights recognized by the great majority of the countries of the world as human rights, but also of a fundamental imperative that directs "all human beings" to "act towards one another in a spirit of brotherhood."[3] The imperative—articulated in the very first article of the foundational human rights document of our time, the Universal Declaration of Human Rights—is fundamental in the sense that it serves, in the morality of human rights, as the normative ground of human rights: As the concept "human right" is understood both in the Universal Declaration and in all the international human rights treaties that have followed in the Universal Declaration's wake, a right is a *human* right if the rationale for establishing and protecting the right is, in part, that conduct that violates the right violates the imperative to "act towards all human beings in a spirit of brotherhood."[4] Each of the human rights articulated in the Universal Declaration and/or in one or more international human rights treaties—for example, the right, articulated in Article 5 of the Universal Declaration and elsewhere, not to be subjected to "cruel, inhuman or degrading treatment or punishment"[5]—is a specification of what, in

---

In the conclusion to their book, Maclure and Taylor write: "There do not seem to be any principled reasons to isolate religion and place it in a class apart from the other conceptions of the world and of the good." Ibid., 105. Robert Audi concurs: Robert Audi, *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011). Many others have reached the same conclusion. A sampling: Gideon Sapir and Daniel Statman, "Why Freedom of Religion Does Not Include Freedom from Religion," *Law and Philosophy* 24, no. 5 (2005): 487 ("[W]hether we understand freedom of religion as a branch of freedom of conscience or as a branch of the right to culture, there is no justification for granting it special status within the framework of these rights."); Howard Kislowicz, Richard Haigh, and Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom," *Alberta Law Review* 48, no. 3 (2011): 681 ("[We argue] that there is no principled reason that matters of conscience should be treated differently from matters of religious belief and practice."); Gemma Cornelissen, "Religion-Based Exemptions: Are Religious Beliefs Special?," *Ratio Juris* 25, no. 1 (2012) (answering "no").

Although Brian Leiter reaches the same conclusion in *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2013), he does so on the basis of a problematic argument about the ways in which religiously based claims of conscience are relevantly different from claims of conscience that are not religiously based. See Robert Merrihew Adams, review of *Why Tolerate Religion?*, by Brian Leiter, *Notre Dame Philosophical Reviews*, January 6, 2013, http://ndpr.nd.edu/news/36599-why-tolerate-religion/; William Galston, "Claims of Conscience: Religious Freedom and State Power," review of *Why Tolerate Religion?*, by Brian Leiter, *Commonweal*, April 19, 2013, http://www.commonwealmagazine.org/claims-conscience. As the work cited in the preceding paragraph illustrates—and indeed as this essay illustrates—one need not rely on Leiter's argument to support the conclusion that, in Maclure and Taylor's articulation, "[t]here do not seem to be any principled reasons[, for purposes of freedom of conscience,] to isolate religion and place it in a class apart from the other conceptions of the world and of the good."

3 UN General Assembly, Universal Declaration of Human Rights, art. 1, Dec. 10, 1948, http://www.un.org/en/documents/udhr/. Article 1 of the Universal Declaration states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Ibid.

4 See Michael J. Perry, "The Morality of Human Rights," *University of San Diego Law Review* 50 (forthcoming). I have explained in the essay just cited what constitutes a "human right"; the sense in which some human rights are, in some legal systems, "legal" rights; and the sense in which all human rights are "moral" rights. I have also pursued there this inquiry: What reason or reasons does one have, if any, to live one's life in accord with the imperative to "act towards all human beings in a spirit of brotherhood"?

5 Universal Declaration of Human Rights, art. 5. Article 5 of the Universal Declaration states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Ibid.

conjunction with other considerations, the imperative—the normative ground of human rights—is thought to forbid or to require.

A particular specification is controversial if and to the extent the supporting claim—a claim to the effect that the "act towards all human beings in a spirit of brotherhood" imperative forbids (or requires) *X*—is controversial. My aim in this essay is to elaborate and defend a particular specification: the right, internationally recognized as a human right, to freedom of conscience—to freedom, that is, to live one's life in accord with the deliverances of one's conscience.[6]

A more focused name for the right—and the name that I will use in the remainder of this essay—is the right to religious and moral freedom. Jocelyn Maclure and Charles Taylor begin their book *Secularism and Freedom of Conscience* by stating that "[o]ne of the most important challenges facing contemporary societies is how to manage moral and religious diversity."[7] In the passage of their book that serves as the epigraph for this essay, Maclure and Taylor speak both of "religious diversity" and of "moral diversity." One indispensable strategy for managing *religious and moral* diversity is, as I am about to explain, the right to *religious and moral* freedom—to freedom to live one's life in accord with one's religious and/or moral convictions and commitments.

The articulation of the right to religious and moral freedom that we find in the International Covenant on Civil and Political Rights (ICCPR) is canonical in this sense: The great majority of the countries of the world—about 87 percent—are parties to the ICCPR, including, as of 1992, the United States.[8] Article 18 of the ICCPR states:[9]

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in

---

6 On different understandings of "conscience," see Nathan S. Chapman, "Disentangling Conscience and Religion," *University of Illinois Law Review*, no. 4 (2013): 1457–1501.

7 Maclure and Taylor, *Secularism and Freedom*, 1. Maclure and Taylor conclude their book on the same note. See ibid., 105–10.

8 As of July 2013, 167 of the 193 member states of the United Nations were parties to the ICCPR.

9 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221, is substantially identical:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Organization of American States, American Convention on Human Rights art. 12, Nov. 22, 1969, O.A.S.T.S. no. 36, is also substantially identical:

> 1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
> 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
> 3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
> 4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[10]

The United Nations Human Rights Committee—the body that monitors compliance with the ICCPR and, under the First Optional Protocol to the ICCPR, adjudicates cases brought by individuals alleging that a state party is in violation of the ICCPR—has stated that "[t]he right to freedom of thought, conscience and religion . . . in article 18.1 is far-reaching and profound . . ."[11] How "far-reaching and profound"? Note the breadth of the right that according to Article 18 "[e]veryone shall have": the right to freedom not just of "religion" but also of "conscience." The "right shall include freedom to have or adopt a religion *or belief* of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion *or belief* in worship, observance, practice and teaching" (emphasis added). Article 18 explicitly indicates that the right concerns moral as well as religious freedom—Article 18 explicitly identifies the "belief" that is protected as moral belief—when it states that "[t]he States Parties to the [ICCPR] undertake to have respect for the liberty of parents and, when applicable, legal guardians to assure the religious *and moral* education of their children in conformity with their own convictions" (emphasis added).[12] So, the right we are considering in this essay protects not only freedom to practice one's religion, including, of course, one's religiously based morality; it also protects freedom to practice one's morality—freedom to "to manifest his . . . belief in . . . practice"—even if one's morality is not embedded in a religious tradition, *even if, that is, one's morality is embedded not in a transcendent worldview but in a worldview that is not transcendent.* (By a "transcendent" worldview, I mean a worldview that affirms, rather than denies or is agnostic about, the existence of a "transcendent"

10 United Nations International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171. Article 18 of the ICCPR is an elaboration of Article 18 of the Universal Declaration: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Universal Declaration of Human Rights, art. 18.

Another international document merits mention: UN General Assembly, The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 28, 1981). See Symposium, "The Foundations and Frontiers of Religious Liberty: A 25th Anniversary Celebration of the 1981 U.N. Declaration on Religious Tolerance," *Emory International Law Review* 21, no. 1 (2007).

11 Human Rights Committee, General Comment 22, art. 18 (48th Sess., 1993), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 35 (1994), http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/9a30112c27d1167cc12563ed004d8f15?Opendocument.

12 Cf. Barbara Bennett Woodhouse, "Religion and Children's Rights," in *Religion and Human Rights*, ed. John Witte, Jr. and M. Christian Green (New York: Oxford University Press, 2012), 299.

reality, as distinct from the reality that is or could be the object of natural-scientific inquiry.[13]) As the Human Rights Committee has put the point:

> The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. . . . Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[14]

In deriving a right to conscientious objection from Article 18, the Human Rights Committee explained that "the [legal] obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief" and emphasized that "there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs . . ."[15]

It is misleading, though common, to describe the human right we are considering in this essay as the right to *religious* freedom.[16] Given the breadth of the right—the "far-reaching and profound" right of which the ICCPR's Article 18 is the canonical articulation—the right is accurately described as the right to *religious and moral* freedom or, as many call it, the right to freedom of conscience, in the sense of freedom to live one's life in accord with the deliverances of one's conscience. Whether one calls it the right to freedom of conscience or the right to religious and moral freedom, it is the right to live one's life in accord with one's religious and/or moral convictions and commitments.

The Supreme Court of Canada has emphasized that the right we are considering here is a broad right that protects freedom to practice one's morality without regard to whether one's morality is religiously based. Referring to Section 2(a) of Canada's Charter of Rights and Freedoms, which states that "[e]veryone has . . . freedom of conscience and religion," the Court has explained: "The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."[17] Section 2(a) "means that, subject to [certain limitations], no one is to be forced to act in a way contrary to his beliefs or his conscience."[18]

---

13 On the idea of the "transcendent," see Charles Taylor, *A Secular Age* (Cambridge, MA: Belknap Press of Harvard University Press, 2007); Michael Warner, Jonathan VanAntwerpen, and Craig Calhoun, eds., *Varieties of Secularism in a Secular Age* (Cambridge, MA: Harvard University Press, 2010).

14 Human Rights Committee, General Comment 22, n. 12. Cf. Maclure and Taylor, *Secularism and Freedom*, 20: "The democratic state must . . . treat equally citizens who act on religious beliefs and those who do not; it must, in other words, be neutral in relation to the different worldviews and conceptions of the good—secular, spiritual, and religious—with which citizens identify."

15 Human Rights Committee, General Comment 22, n. 12. See *Yoon and Choi v. Republic of Korea*, CCPR/C/88/D/1321-22/2004 (2006), http://www.wri-irg.org/node/6221 (ruling that Article 18 requires that parties to the ICCPR provide for conscientious objection to military service). For relevant discussion, see Maclure and Taylor, *Secularism and Freedom*, 89–91.

16 For a recent example of such a description, see Christopher McCrudden, "Catholicism, Human Rights and the Public Sphere," *International Journal of Public Theology* 5 (2011): 331.

17 R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, 759. For the text of Section 2(a) see Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

18 R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 337. See Kislowicz, Haigh, and Ng, "Calculations of Conscience," 707–13.

Again, religious and moral freedom—as both the UN Human Rights Committee and the Canadian Supreme Court have emphasized—is the freedom to live one's life in accord with one's religious and/or moral convictions and commitments—at least some of which are, for many, the yield of one's grappling with what are sometimes called "ultimate" questions, such as: Who are we? Where did we come from—what is our origin, our beginning? Where are we going—what is our destiny, our end?[19] What is the meaning of suffering? Of evil? Of death? And there is the cardinal such question, which comprises many of the others: Is human life ultimately meaningful or, instead, ultimately bereft of meaning—meaningless, absurd?[20] If any questions are fundamental, these questions—what Catholic theologian David Tracy has memorably called "religious or limit questions"[21]—are fundamental. Such questions—"naïve" questions, "questions with no answers," "barriers that cannot be breached"[22]—are "the most serious and difficult . . . that any human being or society must face . . ."[23] Historically extended communities—"traditions"—are principal matrices of answers to all such "religious or limit questions."[24]

---

19 "In an old rabbinic text three other questions are suggested: 'Whence did you come?' 'Whither are you going?' 'Before whom are you destined to give account?'" Abraham J. Heschel, *Who Is Man?* (Stanford, CA: Stanford University Press, 1965), 28. "All people by nature desire to know the mystery from which they come and to which they go." Denise Lardner Carmody and John Tully Carmody, *Western Ways to the Center: An Introduction to Western Religions* (Belmont, CA: Wadsworth Publishing, 1983), 198–99. "The questions Tolstoy asked, and Gauguin in, say, his great Tahiti triptych, completed just before he died ('Where Do We Come From? What Are We? Where Are We Going?'), are the eternal questions children ask more intensely, unremittingly, and subtly than we sometimes imagine." Robert Coles, *The Spiritual Life of Children* (Boston: Houghton Mifflin, 1990), 37.

20 For the person deep in the grip of, the person claimed by, the problem of meaning, "[t]he cry for meaning is a cry for ultimate relationship, for ultimate belonging," wrote Rabbi Heschel. "It is a cry in which all pretensions are abandoned. Are we alone in the wilderness of time, alone in the dreadfully marvelous universe, of which we are a part and where we feel forever like strangers? Is there a Presence to live by? A Presence worth living for, worth dying for? Is there a way of living in the Presence? Is there a way of living compatible with the Presence?" Heschel, *Who Is Man?*, 75. Cf. W. D. Joske, "Philosophy and the Meaning of Life," in *The Meaning of Life*, ed. E. D. Klemke (New York: Oxford University Press, 1981), 250 ("If, as Kurt Vonnegut speculates in The Sirens of Titan, the ultimate end of human activity is the delivery of a small piece of steel to a wrecked space ship wanting to continue a journey of no importance whatsoever, the end would be too trivial to justify the means."); Robert Nozick, *Philosophical Explanations* (Cambridge, MA: Harvard University Press, 1981), 586 ("If the cosmic role of human beings was to provide a negative lesson to some others ['don't act like them'] or to provide needed food to passing intergalactic travelers who were important, this would not suit our aspirations—not even if afterwards the intergalactic travelers smacked their lips and said that we tasted good.").

21 David Tracy, *Plurality and Ambiguity: Religion, Hermeneutics, Hope* (San Francisco, CA: Harper & Row, 1987), 86.

22 In Milan Kundera's *The Unbearable Lightness of Being*, the narrator, referring to "the questions that had been going through Tereza's head since she was a child," says that "the only truly serious questions are ones that even a child can formulate. Only the most naive of questions are truly serious. They are the questions with no answers. A question with no answer is a barrier than cannot be breached. In other words, it is questions with no answers that set the limits of human possibilities, describe the boundaries of human existence." Milan Kundera, *The Unbearable Lightness of Being* (New York: Harper & Row, 1984), 139.

23 David Tracy, *The Analogical Imagination* (New York: Crossroad, 1981), 4. Tracy adds: "To formulate such questions honestly and well, to respond to them with passion and rigor, is the work of all theology. . . . Religions ask and respond to such fundamental questions . . . Theologians, by definition, risk an intellectual life on the wager that religious traditions can be studied as authentic responses to just such questions." Ibid.

24 "Not the individual man nor a single generation by its own power, can erect the bridge that leads to God. Faith is the achievement of many generations, an effort accumulated over centuries. Many of its ideas are as the light of the star that left its source a long time ago. Many enigmatic songs, unfathomable today, are the resonance of voices of bygone times. There is a collective memory of God in the human spirit, and it is this memory which is the main source of our faith." From Abraham Heschel's two-part essay "Faith," *The Reconstructionist* 10, Nov. 3 & 17

Of course, not all who address such questions end up giving answers that constitute a transcendent worldview. To the contrary, many end up giving answers that constitute a thoroughgoing rejection of any transcendent worldview.[25] Nonetheless, John Paul II was surely right in his encyclical *Fides et Ratio* that such questions "have their common source in the quest for meaning which has always compelled the human heart" and that "the answer given to these questions decides the direction which people seek to give to their lives."[26]

Two clarifications are in order. First, that one's choice about what to do or to refrain from doing is protected by the right to religious and moral freedom, if one's choice is animated by what

---

(1944). For a later statement on faith, incorporating some of the original essay, see Abraham J. Heschel, *Man Is Not Alone: A Philosophy of Religion* (New York: Farrar, Straus & Young, 1951), 159–76.

25 Consider, for example, Bertrand Russell's worldview:

> That man is the product of causes which had no prevision of the end they were achieving; that his origin, his growth, his hopes and fears, his loves and his beliefs, are but the outcome of accidental collocations of atoms; that no fire, no heroism, no intensity of thought and feeling, can preserve an individual life beyond the grave; that all the labor of the ages, all the devotion, all the inspiration, all the noonday brightness of human genius, are destined to extinction in the vast death of the solar system, and that the whole temple of man's achievement must inevitably be buried beneath the debris of a universe in ruins—all these things, if not quite beyond dispute, are yet so certain that no philosophy which rejects them can hope to stand. Only within the scaffolding of these truths, only on the firm foundation of unyielding despair, can the soul's habitation henceforth be safely built.

Bertrand Russell, *Mysticism and Logic* (London: Allen & Unwin, 1917), 47–48. Consider too Clarence Darrow's similarly bleak vision, as recounted by Paul Edwards:

> Darrow, one of the most compassionate men who ever lived . . . concluded that life was an "awful joke." . . . Darrow offered as one of his reasons the apparent aimlessness of all that happens. "This weary old world goes on, begetting, with birth and with living and with death," he remarked in his moving plea for the boy-murderers Loeb and Leopold, "and all of it is blind from the beginning to the end." Elsewhere he wrote: "Life is like a ship on the sea, tossed by every wave and by every wind; a ship headed for no port and no harbor, with no rudder, no compass, no pilot; simply floating for a time, then lost in the waves." In addition to the aimlessness of life and the universe, there is the fact of death. "I love my friends," wrote Darrow, "but they all must come to a tragic end." Death is more terrible the more one is attached to things in the world. Life, he concludes, is "not worthwhile," and he adds . . . that "it is an unpleasant interruption of nothing, and the best thing you can say of it is that it does not last long."

Paul Edwards, "Life, Meaning and Value of," in *The Encyclopedia of Philosophy*, ed. Paul Edwards (New York: Macmillan Publishing Company, 1967), 4:470. Whether Clarence Darrow was in fact "one of the most compassionate men who ever lived" is open to question. See Garry Wills, chaps. 8–9 in *Under God: Religion and American Politics* (New York: Simon & Schuster, 1990).

26 John Paul II, *Fides et Ratio*, Encyclical letter on the relation between faith and reason, Sept. 14, 1998. In the introduction to *Fides et Ratio*, John Paul II wrote:

> Moreover, a cursory glance at ancient history shows clearly how in different parts of the world, with their different cultures, there arise at the same time the fundamental questions which pervade human life: Who am I? Where have I come from and where am I going? Why is there evil? What is there after this life? These are the questions which we find in the sacred writings of Israel and also in the Veda and the Avesta; we find them in the writings of Confucius and Lao-Tze, and in the preaching of Tirthankara and Buddha; they appear in the poetry of Homer and in the tragedies of Euripides and Sophocles as they do in the philosophical writings of Plato and Aristotle. They are questions which have their common source in the quest for meaning which has always compelled the human heart. In fact, the answer given to these questions decides the direction which people seek to give to their lives.

Maclure and Taylor call a person's "core or meaning-giving beliefs and commitments" as distinct from "the legitimate but less fundamental 'preferences' we display as individuals."[27]

> [T]he beliefs that engage my conscience and the values with which I most identify, and those that allow me to find my way in a plural moral space, must be distinguished from my desires, tastes, and other personal preferences, that is, from all things liable to contribute to my well-being but which I could forgo without feeling as if I were betraying myself or straying from the path I have chosen. The nonfulfillment of a desire may upset me, but it generally does not impinge on the bedrock values and beliefs that define me in the most fundamental way; it does not inflict "moral harm."[28]

Second, that one is not—and understands that one is not—religiously and/or morally obligated to make a particular choice about what to do or to refrain from doing does not entail that the choice is not protected under the right to religious and moral freedom. As the Canadian Supreme Court explained, in a case involving a religious practice:

> [T]o frame the right either in terms of objective religious "obligation" or even as the sincere subjective belief that an obligation exists and that the practice is required . . . would disregard the value of non-obligatory religious experiences by excluding those experiences from protection. Jewish women, for example, strictly speaking, do not have a biblically mandated "obligation" to dwell in a succah during the Succot holiday. If a woman, however, nonetheless sincerely believes that sitting and eating in a succah brings her closer to her Maker, is that somehow less deserving of recognition simply because she has no strict "obligation" to do so? Is the Jewish yarmulke or Sikh turban worthy of less recognition simply because it may be borne out of religious custom, not obligation? Should an individual Jew, who may personally deny the modern relevance of literal biblical "obligation" or "commandment," be precluded from making a freedom of religion argument despite the fact that

---

Ibid., introduction, pt. 1. See ibid., chap. 3, pt. 26. (*Fides et Ratio* would more accurately be named *Fides et Philosophia*.) We find a similar statement in the Second Vatican Council's *Declaration on the Relation of the Church to Non-Christian Religions* (Nostra Aetate, 1):

> People look to their different religions for an answer to the unsolved riddles of human existence. The problems that weigh heavily on people's hearts are the same today as in ages past. What is humanity? What is the meaning and purpose of life? Where does suffering originate, and what end does it serve? How can genuine happiness be found? What happens at death? What is judgement? What reward follows death? And finally, what is the ultimate mystery, beyond human explanation, which embraces our entire existence, from which we take our origin and toward which we tend?

27 Maclure and Taylor, *Secularism and Freedom*, 12–13. For discussion of the distinction, see ibid., 76–77, 89–93, 97. For a functionally similar distinction, see Robert Audi, *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011), 42–43.

28 Maclure and Taylor, *Secularism and Freedom*, 77. Maclure and Taylor are well aware that there will be cases in which it is difficult to administer the distinction between "core or meaning-giving beliefs and commitments" and "the legitimate but less fundamental 'preferences' we display as individuals." See ibid., 91–97. But there will also be many cases in which the distinction is relatively easy to administer. For example:

> [A] Muslim nurse's decision to wear a scarf cannot be placed on the same footing as a colleague's choice to wear a baseball cap. In the first case the woman feels an obligation—to deviate from it would go against a practice that contributes toward defining her, she would be betraying herself, and her sense of integrity would be violated—which is not normally the case for her colleague.

Ibid., 77.

for some reason he or she sincerely derives a closeness to his or her God by sitting in a succah? Surely not.[29]

Some ICCPR rights—such as the Article 7 right not to "be subjected to torture or to cruel, inhuman or degrading treatment or punishment"—are unconditional (absolute): they forbid (or require) government to do something, *period*.[30] Some other ICCPR rights, by contrast, are conditional: they forbid (or require) government to do something *unless certain conditions are satisfied*. As Article 18 makes clear, the right to religious and moral freedom is—as a practical matter, it must be—conditional;[31] under the right, government may not ban or otherwise impede conduct protected by the right, thereby interfering with one's freedom to live one's life in accord with one's religious and/or moral convictions and commitments, unless each of three conditions is satisfied:

- ***The legitimacy condition:*** The government action at issue (law, policy, etc.) must serve a legitimate government objective.[32] The specific government action at issue might be not the law or policy itself but that the law does not exempt the protected conduct.

---

29 Syndicat Northcrest v. Amselem, [2004] 2 R.C.S. 551, 588. "It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection." Ibid., 553.

30 United Nations International Convention on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171. Article 7 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." Ibid.

31 Similarly, the right to the free exercise of religion entrenched in the constitutional law of the United States is conditional; it permits government to prohibit some religious practices. See Reynolds v. United States, 98 U.S. 145, 166 (1879) (upholding the constitutionality of a law banning polygamy):

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

By its very terms, the free exercise right forbids government to prohibit, not the exercise of religion, but the "free" exercise of religion—that is, the freedom of religious exercise. (The First Amendment states, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .") Just as government may not abridge "the freedom of speech" or "the freedom of the press," so too it may not prohibit the freedom of religious exercise. The right to freedom of religious exercise is not an unconditional right to do, on the basis of religious belief or for religious reasons, whatever one wants. One need not concoct outdated hypotheticals about human sacrifice to dramatize the point. One need only point, for example, to the refusal of some Christian Science parents to seek readily available lifesaving medical care for their gravely ill child. See Lundman v. McKown, 530 N.W.2d 807 (Minn. 1995). See also Caroline Frasier, "Suffering Children and the Christian Science Church," *Atlantic Monthly*, April 1995, 105. Just as the right to freedom of speech does not privilege one to say, and the right to freedom of the press does not privilege one to publish, whatever one wants wherever one wants whenever one wants, the right to freedom of religious exercise does not—because it cannot—privilege one to do, on the basis of religious belief or for religious reasons, whatever one wants wherever one wants whenever one wants.

32 The Siracusa Principles state: "10. Whenever a limitation is required in the terms of the Covenant to be 'necessary,' this term implies that the limitation: (a) is based on one of the grounds justifying limitations recognized by the relevant article of the covenant, . . . [and] (c) pursues a legitimate aim . . ."

For the Siracusa Principles, see United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and

- ***The least burdensome alternative condition:*** The government action—which, again, might be that the law does not exempt—must be necessary to serve the legitimate objective, in the sense that the action serves the objective significantly better than would any less burdensome government action.[33]
- ***The proportionality condition:*** The legitimate objective served by the government action must be sufficiently weighty to warrant the burden imposed by the government action.[34]

The relationship between the normative ground of human rights—the fundamental imperative, articulated in Article 1 of the Universal Declaration, to "act towards all human beings in a spirit of brotherhood"—and, for example, the right of every human being not to be subjected to "cruel, inhuman or degrading" punishment is clear: To subject any human being to such punishment is obviously not to "act towards [him or her] in a spirit of brotherhood." What is the relationship between the normative ground of human rights and the right we are considering in this essay? Why should we think that denying religious or moral freedom to any human being is not to "act towards [him or her] in a spirit of brotherhood"?

To prevent one from living one's life in accord with one's religious and/or moral convictions and commitments, or to make it significantly more difficult for one to do so, is hurtful, sometimes greatly hurtful. As philosopher Mark Wicclair puts the point in his important book, *Conscientious Objection in Health Care: An Ethical Analysis*: "[Even] one instance of acting against one's conscience—an act of self-betrayal—can be devastating and unbearable."[35] Wicclair elaborates:

> [A] loss of moral integrity can be devastating. It can result in strong feelings of guilt, remorse, and shame as well as loss of self-respect. Moral integrity can be of central importance to people whose core beliefs are secular as well as those whose core beliefs are religious. [Martha] Nussbaum cites a powerful image that Roger Williams used to defend liberty of conscience: "To impose an orthodoxy upon the conscience is nothing less than what Williams, in a memorable and oft-repeated image, called 'Soule rape'." The reference to rape of

---

Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, U.N. Doc. E/CN.4/1984/4 (1984), reprinted in *Human Rights Quarterly* 7 (1985): 3.

33 The Siracusa Principles state: "11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation." Ibid.

34 The Siracusa Principles state: "10. Whenever a limitation is required in the terms of the Covenant to be 'necessary,' this term implies that the limitation: . . . (b) responds to a pressing public or social need, . . . and (d) is proportionate to that aim." Ibid.

The right to religious and moral freedom obviously would provide no meaningful protection for practices covered by the right if the consistency of a ban or other policy with the right was to be determined without regard to whether the benefit of the policy was proportionate to the cost of the policy. And, indeed, Article 18 is authoritatively understood to require that the benefit of the policy be proportionate to the cost of the policy.

For an explication and defense of proportionality inquiry, see Matthias Klatt and Moritz Meister, "Proportionality—A Benefit to Human Rights? Remarks on the I*CON Controversy," *International Journal of Constitutional Law* 10 (2012): 687; Kai Möller, "Proportionality: Challenging the Critics," *International Journal of Constitutional Law* 10 (2012): 709. See, with particular reference to proportionality inquiry under the right to religious and moral freedom, T. Jeremy Gunn, "Permissible Limitations on the Freedom of Religion or Belief," in John Witte, Jr. and M. Christian Green, eds., *Religion and Human Rights* (New York: Oxford University Press, 2011), 263–66; Kislowicz, Haigh, and Ng, "Calculations of Conscience," 686–93.

35 Mark R. Wicclair, *Conscientious Objection in Health Care: An Ethical Analysis* (Cambridge: Cambridge University Press, 2011), 11. See Sapir and Statman, "Freedom of Religion," 474: "[C]oercing people to act against their deepest normative beliefs presents a severe threat to their integrity and makes them experience strong feelings of self-alienation and loss of identity; therefore, it should be avoided as far as possible."

> the *soul* suggests that this statement was meant primarily as a defense of religious tolerance. Nevertheless, when a failure to accommodate secular core beliefs results in a loss of moral integrity, it can be experienced as an assault on one's self or identity.[36]

The countries of the world—the great majority of them—agree that for a government to cause anyone such hurt is for the government to fail to "act towards [him or her] in a spirit of brotherhood" . . . *unless* the law or other policy that is the source of the hurt satisfies each of the three conditions: legitimacy, least burdensome alternative, and proportionality. Again, the right to religious and moral freedom is not—as a practical matter it cannot be—unconditional.

Article 18 sensibly and explicitly allows government to act for the purpose of protecting "public safety, order, health, or morals or the fundamental rights and freedoms of others." Given, however, that the right we are considering in this essay—the right of which Article 18 is the canonical articulation—is the right to religious *and moral* freedom—the following question is especially important: What morals count as *public* morals under the right to religious and moral freedom?

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[37] state:

> 2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
> 3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.
> 4. All limitations shall be interpreted in the light and context of the particular right concerned.

Therefore, with respect to "public morals," the Human Rights Committee has emphasized:

> [T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition . . . If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.[38]

As the editors of a casebook on the ICCPR have put the point, in summarizing several statements by the Human Rights Committee concerning protection of "public morals" under the right to religious and moral freedom: "'[P]ublic morals' measures should reflect a pluralistic view of society, rather than a single religious culture."[39]

"Protecting public morals" is undeniably a legitimate government objective under the right to religious and moral freedom: The canonical articulation of the right—Article 18 of the ICCPR—explicitly says so. However, if in banning or otherwise regulating (impeding) conduct *purportedly* in pursuit of that objective, government is acting based on—"based on" in the sense that government would not be regulating the conduct "but for"—either a religious belief that the conduct is

---

36 Ibid., 26 (quoting Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), 37). For Wicclair's full response to the question of "why the exercise of conscience is valuable and worth protecting," see ibid., 25–31.

37 For the Siracusa Principles, see n. 32.

38 Human Rights Committee, General Comment 22 (see n. 11).

39 Sarah Joseph, Jenny Schultz, and Melissa Castan, eds., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2004), 510.

immoral or a sectarian nonreligious belief that the conduct is immoral, government is not truly acting to protect *public* morals. It is, instead, acting to protect *sectarian* morals, *and protecting sectarian morals is not a legitimate government objective under the right to religious and moral freedom.*

Again, establishing and protecting the right to religious and moral freedom is a principal response to what Maclure and Taylor have identified as "[o]ne of the most important challenges facing contemporary societies," namely, "how to manage moral and religious diversity."[40] Crediting the protection of sectarian morals as a legitimate government objective, under the right to religious and moral freedom, would be patently contrary to the effort "to manage moral and religious diversity." We can anticipate an argument to the effect that managing moral and religious diversity is only one objective, that nurturing social unity is another, and that from time to time the latter objective may require a society, through its government, to protect one or another aspect of sectarian morality.[41] However, such an argument is belied by the historical experience of the world's liberal democracies, which amply confirms not only that, as Maclure and Taylor put it, a society's "unity does not lie in unanimity about the meaning and goals of existence but also that any efforts in the direction of such a uniformization would have devastating consequences for social peace."[42] The political powers that be do not need, and under the right to religious and moral freedom they do not have, discretion to ban or otherwise regulate conduct based on sectarian belief that the conduct is immoral.[43]

---

40 See n. 2.

41 In 1931, the fascist dictator of Italy, Benito Mussolini, proclaimed that "religious unity is one of the great strengths of a people." Quoted in John T. Noonan, Jr., *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching* (Notre Dame, IN: University of Notre Dame Press, 2005), 155–56. See Michael W. McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," *William & Mary Law Review* 44, no. 5 (2003): 2182 ("Machiavelli, who called religion 'the instrument necessary above all others for the maintenance of a civilized state,' urged rulers to 'foster and encourage' religion 'even though they be convinced that it is quite fallacious.' Truth and social utility may, but need not, coincide.") (quoting Niccolo Machiavelli, *The Discourses*, ed. Bernard R. Crick, trans. Leslie J. Walker (1520; repr., Harmondsworth, England: Penguin Books, 1970), 143.). Cf. "Atheist Defends Belief in God," *The Tablet* [London], March 24, 2007, 33:

> A senior German ex-Communist has praised the Pope and defended belief in God as necessary for society . . . "I'm convinced only the Churches are in a state to propagate moral norms and values," said Gregor Gysi, parliamentary chairman of Die Linke, a grouping of Germany's Democratic Left Party (PDS) and other left-wing groups. "I don't believe in God, but I accept that a society without God would be a society without values. This is why I don't oppose religious attitudes and convictions."

42 Maclure and Taylor, *Secularism and Freedom*, 18n1. See Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (New York: Cambridge University Press, 2011), 222 ("[T]he core thesis [of this book] holds: to the extent that governments and societies restrict religious freedoms, physical persecution and conflict increase."). See Paul Cruickshank, "Covered Faces, Open Rebellion," *New York Times*, October 21, 2006. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, ¶ 3, U.N. Doc. A/RES/36/55 (Nov. 28, 1981) states: "[T]he disregard and infringement of . . . the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind . . ."

43 That the coercive imposition of sectarian moral belief violates the right to religious and moral freedom does not entail that the non-coercive affirmation of theistic belief does so. Examples of the latter, from the United States: the phrase "under God" in the Pledge of Allegiance, "In God We Trust" as the national motto, and "God save this honorable court" intoned at the beginning of judicial proceedings. I have addressed elsewhere the question of whether the non-coercive affirmation of theistic belief violates the Establishment Clause of the U.S. Constitution: Michael J. Perry, "Religion as a Basis of Lawmaking," chap. 6 in *The Political Morality of Liberal Democracy* (New York: Cambridge University Press, 2010), 100–119.

When is a belief, including a nonreligious belief, that *X* (a type of conduct) is immoral a sectarian belief? Consider what the celebrated American Jesuit John Courtney Murray wrote, in the mid-1960s, in his "Memo to [Boston's] Cardinal Cushing on Contraception Legislation":

> [T]he practice [of contraception], undertaken in the interests of "responsible parenthood," has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence . . .[44]

We may generalize Murray's insight: A belief, including a nonreligious belief, that *X* is immoral is sectarian if the claim that *X* is immoral is one that is widely contested—and in that sense sectarian—among the citizens of a religiously and morally pluralistic democracy.

Of course, it will not always be obvious which side of the line a particular moral belief falls on—sectarian or nonsectarian—but often it will be obvious. As Murray understood and emphasized to Cardinal Cushing, the belief that contraception is immoral had clearly become sectarian. By contrast, certain moral beliefs—certain moral norms—are now clearly ecumenical, rather than sectarian, in religiously and morally pluralistic democracies. Consider, in that regard, what Maclure and Taylor say about "popular sovereignty" and "basic human rights":

> [They] are the *constitutive* values of liberal and democratic political systems; they provide these systems with their foundation and aims. Although these values are not neutral, they are legitimate, because it is they that allow citizens espousing very different conceptions of the good to live together in peace. They allow individuals to be sovereign in their choices of conscience and to define their own life plan while respecting others' right to do the same. That is why people with very diverse religious, metaphysical, and secular convictions can share and affirm these constitutive values. They often arrive at them by very different paths, but they come together to defend them.[45]

---

44 John Courtney Murray, S.J., "Memo to Cardinal Cushing on Contraception Legislation," n.d., mid-1960s, Murray Collection, Woodstock Theological Center Library, Georgetown University, http://woodstock.georgetown.edu/library/murray/1965f.htm; see John Courtney Murray, S.J., "Toledo Talk," May 5, 1967, transcript, Woodstock Theological Center Library, Georgetown University, http://woodstock.georgetown.edu/library/Murray/1967g.htm. Murray's influence on Boston's Archbishop, Cardinal Richard Cushing, and Cushing's influence on the repeal of the Massachusetts ban on the sale of contraceptives, is discussed in Seth Meehan, "Legal Aid," *Boston College Magazine*, Spring 2011, and in Seth Meehan, "Catholics and Contraception: Boston, 1965," *New York Times*, March 15, 2012. See Joshua J. McElwee, "A Cardinal's Role in the End of a State's Ban on Contraception," *National Catholic Reporter*, March 2–15, 2012. For the larger context within which Father Murray wrote and spoke, see Leslie Woodcock Tentler, *Catholics and Contraception: An American History* (Ithaca, NY: Cornell University Press, 2004). For a recent reflection on Murray's work by one of his foremost intellectual heirs, see David Hollenbach, S.J., "Religious Freedom and Law: John Courtney Murray Today," *Journal of Moral Theology* 1 (2012): 75.

45 Maclure and Taylor, *Secularism and Freedom*, 11.

Kent Greenawalt has written that "[a] vast array of laws and policies . . . imply the incorrectness of particular religious views." Kent Greenawalt, "Five Questions about Religion Judges Are Afraid to Ask," in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, ed. Nancy L. Rosenblum (Princeton, NJ: Princeton University Press, 2000), 199. He gives three examples: a law that educational funds be "made available equally to men and women[,]" a decision to go to war, and a judicial order that a state desegregate its schools. Ibid.

I disagree. The proposition that a law banning racial segregation (for example) is warranted on the basis of certain premises—*premises that are admissible under the right to religious and moral freedom*—does not entail

Again, to prevent one from living one's life in accord with one's religious and/or moral convictions and commitments, or to make it significantly more difficult for one to do so, is hurtful, sometimes very hurtful. It is fitting, then, that the great majority of the countries of the world recognize the right to religious and moral freedom as a human right. It is fitting, that is, that the countries of the world—the great majority of them—agree that for a government to prevent one from living one's life in accord with one's religious and/or moral convictions and commitments, or to make it significantly more difficult for one to do so, is for the government to fail to act consistently with the normative ground of human rights—with the "act towards all human beings in a spirit of brotherhood" imperative—unless the contested government action (law, policy, etc.) satisfies each of the three conditions: legitimacy, least burdensome alternative, and proportionality. And, as I have explained, under the first of the three conditions—the legitimacy condition—government may not regulate conduct on the basis of sectarian moral belief.[46]

Is the internationally recognized human right to freedom of conscience—to religious and moral freedom—part of, entrenched in, the constitutional law of the United States?

It is a bedrock feature of the constitutional law of the United States that neither the federal government nor state government may, in the words of the First Amendment, "prohibit [ ] the free exercise [of religion]." As interpreted by a majority of the justices now sitting on the Supreme Court of the United States, the right to the free exercise of religion is not the same as—it is not congruent with—the internationally recognized human right to religious and moral freedom. There is no need to do here what has been done well and often elsewhere: explicate the free exercise right as interpreted by a majority of the sitting justices.[47] For present purposes, it suffices to say that, in my judgment, those religious liberty scholars are persuasive who contend—as do the distinguished religious liberty scholars Douglas Laycock and Michael McConnell[48]—that the present Court's interpretation of the free exercise right is too narrow, and that a better interpretation of the right is one according to which the right protects (conditionally, not unconditionally) this comprehensive, twofold religious freedom: freedom to practice and otherwise live one's life in accord with one's own religion, and freedom from laws (and other public policies) that coerce one to practice or otherwise live one's life in accord with—or that discriminate against one on the ground that one

---

that it is incorrect to conclude on the basis of certain other premises—*premises that are not admissible under the right*—that the law is, say, contrary to God's will.

46 It bears emphasis that the rationale for the right to religious and moral freedom that I have presented here is nonsectarian. Cf. Douglas Laycock, "Reviews of a Lifetime," *Texas Law Review* 89, no. 4 (2011): 985:

> The only reasons that can justify religious liberty to a broad audience in a religiously diverse society are reasons that do not require acceptance or rejection of any propositions of religious faith. Of course such a scheme will not persuade everybody, and perhaps in the end will not persuade anybody. But that is what I was trying to do. I am happy to supplement the argument with religious reasons when speaking to audiences that might be persuaded by them.

Some citizens have a religious reason (or reasons) for affirming the right to religious and moral freedom, and for them, the religious reason may be the dominant reason. On religious reasons for religious liberty, see Daniel O. Conkle, "Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty," *Cardozo Law Review* 32, no. 5 (2011): 1763–67.

47 I recommend the interested reader consult this work: Daniel O. Conkle, *Constitutional Law: The Religion Clauses*, 2nd ed. (New York: Foundation Press, 2009), 81–108.

48 See Douglas Laycock, *Religious Liberty* (Grand Rapids, MI: W. B. Eerdmans Publishing, 2011), 2:47–230; Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103, no. 7 (1990): 1409; Michael W. McConnell, "Free Exercise Revisionism and the *Smith* Decision," *University of Chicago Law Review* 57, no. 4 (1990): 1109.

does not practice or otherwise live one's life in accord with—a religion not one's own, a religion one rejects.

I noted earlier in this essay that those who struggle with "religious or limit questions," such as the question "Does God exist?," do not invariably end up giving answers that constitute a theistic or otherwise transcendent worldview. As I said, many end up giving answers that constitute a thoroughgoing rejection of any transcendent worldview. Nonetheless, wrote John Paul II in his encyclical *Fides et Ratio*, such questions "have their common source in the quest for meaning which has always compelled the human heart," and "the answer given to these questions decides the direction which people seek to give to their lives."[49] What sense does it make, then, to understand "religion" in the free exercise right so narrowly that the provision protects only conduct animated by a theistic worldview? Is Buddhism, which in the main is nontheistic, to be excluded from coverage under the free exercise right? And if it is not—if Buddhism is to be included—why are other nontheistic worldviews not included, too?[50] Douglas Laycock, speaking of the free exercise right, is surely correct to insist that "we have to understand religion broadly, so that nonbelievers are protected when they do things that are analogous to the exercise of religion. . . . Nonbelievers have consciences, and occasionally, their deeply held conscientious beliefs conflict with government regulation."[51]

The appeal of a broad understanding of "religion"—the appeal of a generous rather than miserly understanding—is reflected in the breadth of Article 18 of the ICCPR, which, again, as the Human Rights Committee has emphasized, protects

> the freedom of thought and the freedom of conscience . . . equally with the freedom of religion and belief. . . . Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[52]

The appeal of a broad understanding of "religion" is also reflected in what the Canadian Supreme Court has said about section 2(a) of Canada's Charter of Rights and Freedoms: that it "ensure[s] that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."[53] According to the Canadian Supreme Court, section 2(a) "means that, subject to [certain limitations], no one is to be forced to act in a way contrary to his beliefs or his conscience."[54]

This, then, is why we are warranted in saying that the internationally recognized human right to religious and moral freedom is part of the constitutional law of the United States: The right to the free exercise of religion is entrenched in the constitutional law of the United States, and that right is congruent with the right to religious and moral freedom, *if "religion" is understood broadly, as it*

---

49 See n. 26.

50 Cf. Chapman, "Disentangling Conscience and Religion," 199 ("Even those . . . who argue that religious liberty presumes the existence of God, rarely go a step further and suggest that religious liberty should only extend to theistic religions.").

51 Douglas Laycock, "McElroy Lecture: Sex, Atheism, and the Free Exercise of Religion," *University of Detroit Mercy Law Review* 88, no. 3 (2011): 431. See Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues* 7, no. 2 (1996): 336–37.

52 See n. 14.

53 See n. 17.

54 See n. 18.

should be understood. That is, the free exercise right, appropriately—that is, broadly—construed, protects (conditionally, not unconditionally) freedom to live one's life in accord with one's own moral worldview, whether theistic or nontheistic; freedom from laws (and other public policies) that coerce one to live one's life in accord with—or that discriminate against one on the ground that one does not live one's life in accord with—a moral worldview not one's own, a worldview one rejects, whether theistic or nontheistic.[55]

Even though, as interpreted by a majority of the sitting justices of the Supreme Court, the free exercise right is not congruent with the right to religious and moral freedom, a version of the right to religious and moral freedom—a version that the Supreme Court has sometimes called "the right of privacy"—has been protected by the Court as a constitutional right for almost fifty years. Consider the following rulings by the Supreme Court in the period since the mid-1960s:

- A 1965 ruling and a 1972 ruling, read in conjunction with one another, establish that government may ban neither the use nor the distribution of contraceptive devices or drugs.[56] In the 1972 ruling, the Supreme Court declared: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[57]
- In 1973, the Supreme Court ruled that restrictive abortion legislation implicated, and that some such legislation violated, "the right of privacy."[58] In 1992, in reaffirming the 1973 ruling, the Court explained:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The

---

55 Law professor George Wright has said to me, in correspondence:

> If the Framers had consensually concluded that religious conscience is somehow distinctive, and to be constitutionally distinguished from a more general, or a purely secular, conscience, I would have lodged no serious objection at the time. But as today's culture, or at least key segments thereof, rejects the idea of any relevant distinctiveness of religious conscience, my Hobbesian approach urges that we simply accept the *equality* of religious and secular consciences, lest we find ourselves seeking, imprudently, to build a stable society on the basis of an apparent principle that persons of exclusively secular conscience are, by loose implication, somehow not operating at the same level of moral depth, seriousness, sustained motivational force, or profundity as are some persons of religious conscience.

George Wright to Michael Perry, e-mail, January 14, 2013.

I have heard it suggested—though I am not arguing here—that to interpret the right to the free exercise of religion to protect religious but not secular conscience is to interpret the right such that it is in tension with the constitutional requirement that government not "establish" religion or with the right to the equal protection of the laws—or with both. It bears mention, in that regard, that in *Welsh v. United States*, 398 U.S. 333 (1970), Justice Harlan, concurring in the result, argued that for Congress to grant conscientious objector status to those whose pacifism is based on theistic religious belief—or, more broadly, on theistic or nontheistic religious belief—while denying such status to those whose pacifism is based on nonreligious belief is to violate the First Amendment requirement that "Congress . . . make no law respecting an establishment of religion . . ." Ibid., 356.

56 See Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

57 Eisenstadt, 405 U.S. at 113 (emphasis in original).

58 See Roe v. Wade, 410 U.S. 113 (1973).

underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps [where] the pregnancy is itself a danger to her own life or health, or is the result of rape or incest. . . .

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[59]

- In 1978, in ruling that "the decision to marry [is] among the personal decisions protected by the right of privacy," the Supreme Court stated:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. . . .

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. . . . [However, w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.[60]

- In 2003, the Supreme Court ruled that government may not criminalize adult, consensual sexual intimacy and that therefore a criminal ban on same-sex sexual intimacy was unconstitutional:

Liberty presumes an autonomy of self that includes freedom of . . . certain intimate conduct. . . . [Government should be wary about attempting] to define the meaning of [an adult, consensual] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. . . . [A]dults may choose to enter upon this relationship . . . and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons to make this choice. . . .

[F]or centuries, there have been powerful voices to condemn homosexual conduct as immoral. [This does not] answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." . . . "[T]hat the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . [I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."[61]

---

59 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850–51 (1992).

60 Zablocki v. Redhail, 434 U.S. 374, 386, 388 (1978). See Turner v. Safley, 482 U.S. 78 (1987).

61 Lawrence v. Texas, 539 U.S. 558, 562, 567, 571, 577–78 (2003) (quoting, at 571, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850 (1992), and, at 577–78, Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

The Supreme Court sought to justify its rulings in the foregoing cases on the basis of "the right to privacy" and/or the right not to have the government "deprive" one of "liberty . . . without due process of law."[62] As a matter of defensible constitutional interpretation, however, the Court would have been on much less controversial ground had it sought to justify its rulings on the basis of the right—the right appropriately construed—not to have government "prohibit" one from engaging in "the free exercise of religion."[63] Whether one or more of the Court's rulings in the foregoing and related cases are justifiable on that basis, however, is a separate question.[64]

ACKNOWLEDGMENTS

For written comments and/or helpful discussion as I was thinking about the issues that engage me in this essay, I want to thank—in addition to those I have already thanked, in the introduction to my book—Nathan Chapman, Rafael Domingo, and Chris Eberle.

Legal historian William Novak has noted that "[b]y the standards of late twentieth-century law, the public regulation of morality [in the United States] is increasingly suspect." William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996), 149. Novak explains:

> The burgeoning public/private distinction, the jurisprudential separation of law and morality, and the expansion of constitutionally protected rights of expression and privacy have yielded a polity whose legitimacy theoretically rests on its ability to keep out of the private moral affairs of its citizens. As the American Law Institute declared in the 1955 Model Penal Code, "We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor."

Ibid. Novak goes on to illustrate that "[t]he relationship between laws and morals in the nineteenth century could not have been more different. Of all the contests over public power in that period, morals regulation was the easy case." Ibid. See ibid., 149–89.

62 The Due Process Clause of the Fourteenth Amendment, which is a limit on state government, provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1. The Due Process Clause of the Fifth Amendment, which, like the rest of the Fifth Amendment, is a limit on the federal government, provides: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V.

63 For an impressive argument that we should reject the position "that [under the due process clauses] courts may identify certain liberties with no source in positive law and protect them even against general and prospective legislation enforced with all proper procedure," see Nathan S. Chapman and Michael W. McConnell, "Due Process as Separation of Powers," *Yale Law Journal* 121, no. 7 (2012): 1792–1801.

64 I address some such questions in chapters 8 & 9 of my new book (see n. 1).