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MY SCHOLARLY TRAJECTORY

*Michael J. Perry**

INTRODUCTION

I am greatly honored that my colleague, John Witte, and my dean, Mary Anne Bobinski, thought this Festschrift a fitting way to mark my retirement from law teaching¹ and that the colleagues and friends whose work appears in these pages accepted John's invitation to contribute.² And I am deeply grateful for all that John and the student editors of the *Emory Law Journal* did over the past many months to bring the Festschrift to fruition.

John asked me to provide, for the Festschrift, an account of my scholarly trajectory. I begin with a few words about my background in the period when the seeds of my scholarly trajectory were planted: the period prior to my becoming a law professor.

I. BACKGROUND

I was born in Louisville, Kentucky—where I was also raised—a few months after the end of the Second World War. My parents were Irish Catholics and, like most Irish Catholics at the time, Democrats. As far back as I can remember, our household—a very bookish household—was full of talk about religion and politics; it was also full of talk, therefore, about morality. The talk was, in the main, progressive—both religiously and politically.

The decade of the 1960s—which for me, as for so many others of my generation, was profoundly formative—nourished my growing interest in various issues at the interface of religion, morality, and politics.³ The postwar Civil Rights Movement was already well under way when, in September 1960, I began my freshman year at Saint Xavier High School. A little over two years

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¹ I retire from teaching law at the end of the 2022-2023 academic year.

² It is a special delight for me that two of the contributors to this Festschrift were once my students: Dan Conkle and Cathy Kaveny.

³ Cf. Jennifer Szalai, *Think You Know the 1960s? 'The Shattering' Asks You to Think Again*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/10/26/books/review-shattering-america-1960s-kevin-boyle.html> (book review).

later, Pope John XXIII convened the Second Vatican Council (1962–65),⁴ which transformed many important teachings of the Roman Catholic Church in a direction I found intuitively appealing. In September 1964, I took a train from Louisville to Washington, D.C., to begin my undergraduate studies at the nation’s premier Jesuit university: Georgetown. During my four years at Georgetown, moral opposition to the American war in Vietnam—including religiously based moral opposition, such as that personified by the Jesuit Daniel Berrigan⁵—grew ever more widespread and intense. The months shortly before and after my graduation in June 1968 were momentous: In early April, Martin Luther King Jr., by that time one of the most prominent religious leaders opposing America’s military involvement in Vietnam’s civil war, was assassinated; Washington, D.C., erupted in flames; martial law was declared. In early June, Robert Kennedy, campaigning in part as an anti-war candidate, was assassinated just hours after prevailing in California’s Democratic presidential primary. In late August, the Chicago police violently attacked the anti-war protesters gathered near the site of the Democratic National Convention in downtown Chicago, where the trial of the Chicago Seven would begin a little over a year later.

My own moral opposition to the war, aided and abetted by my parents and by some of my Jesuit mentors, led me to become, a few months after graduating from Georgetown, a conscientious objector.⁶ My two years of alternative service consisted of a few months as an orderly at the Cambridge City Hospital in Massachusetts, a few more months as a psychiatric attendant at the hospital, and then a year and a half as a childcare worker at the Walker Home for Children in Needham, Massachusetts. By the time I completed my alternative service, the tumultuous decade of the 1960s had ended.⁷ In September 1970, I headed to Columbia University to study law. Now in my mid-twenties, I was eager not only to study law but also to get to know New York City up close and personal.

⁴ See Pope John XXIII, Address at the Solemn Opening of the Second Vatican Council (Oct. 11, 1962), https://www.vatican.va/content/john-xxiii/es/speeches/1962/documents/hf_j-xxiii_spe_19621011_opening-council.html.

⁵ See Daniel Lewis, *Daniel J. Berrigan, Defiant Priest Who Preached Pacifism, Dies at 94*, N.Y. TIMES (Apr. 30, 2016), <https://www.nytimes.com/2016/05/01/nyregion/daniel-j-berrigan-defiant-priest-who-preached-pacifism-dies-at-94.html>.

⁶ My hometown draft board had recently dealt with the application of my fellow Louisvillian, Muhammad Ali, for conscientious objector status. See *Clay v. United States*, 403 U.S. 698 (1971).

⁷ The decade had ended, but not the tumult. In May 1970, for example, members of the Ohio National Guard fired into a crowd of Kent State students participating in an antiwar demonstration, killing four and wounding nine. Jerry M. Lewis & Thomas R. Hensley, *The May 4 Shootings at Kent State University: The Search for Historical Accuracy*, KENT ST. UNIV., <https://www.kent.edu/may-4-historical-accuracy> (last visited Apr. 28, 2022).

My plan was to become a civil rights lawyer. So I was not only privileged but also delighted to spend the summer after my first year of law school assisting Marvin Karpatkin, one of the two general counsels of the American Civil Liberties Union (ACLU).⁸ Among the cases on which Karpatkin was working that summer was *Wisconsin v. Yoder*, the important Free Exercise case decided by the U.S. Supreme Court the following year.⁹ In my second year of law school, I was also privileged to have as teachers both Telford Taylor, who had served as Counsel for the Prosecution at the Nuremberg Trials,¹⁰ and Michael Meltsner, the great civil rights lawyer who had recently joined the law faculty at Columbia University as a clinical professor.¹¹ Unlike many of my law school classmates, I did not want to work for a conventional law firm, so I chose to spend the summer between my second and third years of law school with The Legal Aid Society of New York City, working on criminal cases.

After graduating from Columbia Law and taking the New York Bar, I spent a year from 1973 to 1974 as a law clerk for one of the greatest federal trial judges since the end of the Second World War: Jack B. Weinstein.¹² I then spent a second year between 1974 and 1975 as a law clerk for the federal appeals judge who, at the time, was the only woman in that position in the country: Shirley M. Hufstедler. President Jimmy Carter confirmed to me, shortly after I arrived at Emory Law in 2003, that he had planned to nominate Judge Hufstедler to be the first female justice of the Supreme Court of the United States (if he had been reelected in 1980 and there had subsequently been a vacancy).¹³

⁸ Both the ACLU National Office and Harvard Law School now offer Marvin M. Karpatkin Fellowships. See, e.g., *ACLU Fellowship Opportunities*, CAREER DEV. OFF. BLOG (Aug. 8, 2011), <https://cdo.law.miami.edu/?p=2077>.

⁹ 406 U.S. 205 (1972).

¹⁰ See Richard Severo, *Telford Taylor, Who Prosecuted Top Nazis at the Nuremberg War Trials, Is Dead at 90*, N.Y. TIMES (May 24, 1998), <https://www.nytimes.com/1998/05/24/nyregion/telford-taylor-who-prosecuted-top-nazis-nuremberg-war-trials-dead-90.html>.

¹¹ For an account of Professor Meltsner's great work, see generally MICHAEL MELTSNER, WITH PASSION: AN ACTIVIST LAWYER'S JOURNEY (2017). From 1979 to 1984, Michael Meltsner was dean of the Northeastern University School of Law. *Faculty Directory: Michael Meltsner*, NE. UNIV. SCH. OF L., <https://law.northeastern.edu/faculty/meltsner/> (last visited Apr. 28, 2022).

¹² See JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN (2011); Laura Mansnerus, *Jack B. Weinstein, U.S. Judge with an Activist Streak, Is Dead at 90*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/nyregion/jack-b-weinstein-dead.html>.

¹³ See Sam Roberts, *Shirley Hufstедler, Judge and Cabinet's First Education Secretary, Dies at 90*, N.Y. TIMES (Mar. 31, 2016), <https://www.nytimes.com/2016/04/01/us/shirley-hufstедler-pioneering-judge-and-first-cabinet-level-education-secretary-is-dead-at-90.html>. Judge Hufstедler served in the Carter Administration as the Secretary of the (recently created) Department of Education. *Id.*

Although, I originally planned to become a civil rights lawyer, I ended up following a different career path—one that, before arriving at Columbia Law, I had not considered.

II. RIGHTS-BASED CONSTITUTIONAL CONTROVERSIES

In September 1975, I began my career as a law professor, focusing on constitutional law. I began at Ohio State University, where I was happy to follow in the footsteps of two of the most important constitutional law scholars of their generation, who also began their careers at Ohio State: William Van Alstyne and Kenneth Karst.¹⁴ Why constitutional law? Throughout the 1960s and the first half of the 1970s, I was increasingly engaged not just by the controversy over the American war in Vietnam but also by various other important, divisive political and moral controversies. By the time I began my career as a law professor, constitutional law had become a principal venue for many such controversies, including those over racial discrimination, abortion, and capital punishment (and, later, those over sex-based discrimination, same-sex relationships, and physician-assisted dying).

Arguments of the sort I was making in my early writings—arguments defending a particular understanding of a constitutional right and related arguments contending for a particular judicial resolution of a rights-based constitutional controversy¹⁵—presuppose implicitly, if not explicitly, an answer to this twofold question: (1) *When is a court really “interpreting” the text of the U.S. Constitution as opposed to engaging in some other practice, and (2) if the latter, is the “some other practice” one in which it is legitimate for the court to engage?* I knew that eventually I would want to address that question at length—a question that, in the wake of the Court’s controversial rulings in the abortion cases of *Roe v. Wade*¹⁶ and *Doe v. Bolton*,¹⁷ which were decided in January 1973

¹⁴ Professors Van Alstyne (who went on to spend most of his career at Duke) and Karst (who went on to spend most of his career at UCLA) both passed away in 2019. See Sam Roberts, *William Van Alstyne, 84, Dies; Often-Cited Constitutional Law Scholar*, N.Y. TIMES (Feb. 5, 2019), <https://www.nytimes.com/2019/02/05/obituaries/william-van-alstyne-dead.html>; Bill Kisliuk, *In Memoriam: Constitutional Law Scholar Kenneth Karst*, UCLA NEWSROOM (Apr. 12, 2019), <https://newsroom.ucla.edu/stories/in-memoriam-constitutional-law-scholar-kenneth-karst>.

¹⁵ My earliest constitutional writing was drafted during the year between 1974 and 1975, when I was a law clerk to Judge Hufstедler. Michael J. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976).

¹⁶ 410 U.S. 113 (1973).

¹⁷ 410 U.S. 179 (1973).

at the beginning of my final semester of law school, began to loom perhaps larger than ever.¹⁸

In the fall of 1978, while teaching as a visiting associate professor at Yale Law School, I was asked by Yale University Press to serve as an external reader for a manuscript under consideration: John Hart Ely's *Democracy and Distrust: A Theory of Judicial Review*. Of course, I enthusiastically recommended that Yale University Press publish the book, which was eventually published in 1980 by Harvard University Press. Later, while back at Ohio State, I worked with the student editors of the law journal to publish a symposium issue on the virtually simultaneous publication, in 1980, of Ely's *Democracy and Distrust* and Jesse Choper's *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*.¹⁹ The title of the symposium—to which one of the contributors to this Festschrift, Rick Kay, contributed an article—was *Judicial Review Versus Democracy*.²⁰

In May 1979, soon after returning from Yale to Ohio State, I began drafting my first book, which Yale University Press published in 1982: *The Constitution, the Courts, and Human Rights*.²¹ In the book, I defended what today we call a “nonoriginalist” position.²² In his contribution to this Festschrift, Dan Conkle presents the argument and comments on it critically and, in my judgment, persuasively.²³ I long ago abandoned my early nonoriginalist positions. The position I now affirm—in recent writings²⁴ and in my 2017 book, *A Global*

¹⁸ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 2–3 (1980) [hereinafter ELY, *DEMOCRACY AND DISTRUST*]. See generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (explaining the gravity and legal criticisms of *Roe*).

¹⁹ ELY, *DEMOCRACY AND DISTRUST*, *supra* note 18; JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

²⁰ Symposium, *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1–831 (1981). For Rick Kay's contribution, see Richard S. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

²¹ MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982). The University of Dayton Law Review published a symposium issue on my first book. Symposium, *Judicial Review and the Constitution—The Text and Beyond: Marking the Publication of The Constitution, the Courts, and Human Rights by Michael J. Perry*, 8 U. DAYTON L. REV. 443–831 (1983); see also Raoul Berger, *Lawyering vs. Philosophizing: Facts or Fantasies*, 9 U. DAYTON L. REV. 171 (1984) (a comment on, and belated contribution to, the symposium).

²² PERRY, *supra* note 21, at 91.

²³ See Daniel O. Conkle, *Human Rights, Constitutional Rights, and Judicial Review: Comparing and Assessing Michael Perry's Early and Contemporary Arguments*, 71 EMORY L.J. 1365 (2022).

²⁴ Michael J. Perry, *Two Constitutional Rights, Two Constitutional Controversies*, 52 CONN. L. REV. 1597, 1600–04 (2021) [hereinafter Perry, *Two Constitutional Rights*] (my contribution to the Festschrift celebrating the scholarly career of Richard S. Kay, who is a contributor to this Festschrift); Michael J. Perry, *Constitutional Rights as Human Rights: Freedom of Speech, Equal Protection, and the Right of Privacy*, 57

*Political Morality: Human Rights, Democracy, and Constitutionalism*²⁵—is both more complex and more tenable than the position I defended in 1982.²⁶

Let me sketch the 1982 position, which is *partly* originalist.²⁷ That five or more Justices of the U.S. Supreme Court have ruled that a right is part of the constitutional law of the United States does not entail that the right is *legitimately* regarded as such. Consider, then, this question, which is a more precise version of the question articulated two paragraphs back: What criteria should we apply to determine whether a right (or other norm) claimed to be part of the constitutional law of the United States is legitimately regarded as such? My answer is the following.

First, *R* is a constitutional right if constitutional enactors made *R* a constitutional right—if they entrenched *R* in the Constitution of the United States; if other, later enactors did not entrench in the Constitution a norm that supersedes *R*; and if no norm that supersedes *R* has become constitutional bedrock. I explain “constitutional bedrock” below. By constitutional “enactors,” I mean what Rick Kay means:

By enactors, I mean the human beings whose approval gave the Constitution the force of law. In the case of the original establishment of the United States Constitution that means the people comprising the majorities in the nine state conventions whose ratification preceded the Constitution entering into force. With respect to the amendments that means the people comprising the majorities in the houses of Congress proposing the amendments and in the ratifying legislatures of the necessary three-quarters of the states.²⁸

Second, *R* is a constitutional right if (1) *R* is a compelling inference from either of the following: (A) the structure of government established by the Constitution, which consists of (i) a separation of powers among the three

WAKE FOREST L. REV. (forthcoming 2022) [hereinafter Perry, *Constitutional Rights as Human Rights*] (my contribution to the symposium honoring the scholarly career of Michael Kent Curtis).

²⁵ See MICHAEL J. PERRY, A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM 95–118 (2017).

²⁶ In his illuminating contribution to this Festschrift, Dan Conkle compares “Early Perry” to “Contemporary Perry.” Although he finds the latter more plausible than the former, Dan nonetheless finds the latter problematic. See Conkle, *supra* note 23.

²⁷ It is not inconsistent to affirm an originalist response to the question of what it means, or should mean, to interpret the constitutional text while at the same time affirming that the constitutional text is not the sole legitimate basis of constitutional adjudication. See Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1314 (2013); Gary Lawson, *No History, No Certainty, No Legitimacy, . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1555–56 (2012).

²⁸ Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709 n.28 (2009).

branches of the national government, and (ii) a division of powers between the national government and state government;²⁹ or (B) the kind of government (“representative democracy”) presupposed by the Constitution; and (2) no norm that supersedes *R* has been entrenched in the Constitution or become constitutional bedrock.

Third, *R* is a constitutional right if *R* is a constitutional bedrock (i.e., a bedrock feature of U.S. constitutional law) in this sense: *R* has become, in the words of Robert Bork, “so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions” that the U.S. Supreme Court should and almost certainly will continue to deem *R* constitutionally authoritative, even if it is open to serious question whether enactors ever entrenched *R* in the Constitution.³⁰ As Michael McConnell has put the point, “[M]any decisions, even some that were questionable or controversial when rendered, have become part of the fabric of American life; it is inconceivable that they would now be overruled. . . . This overwhelming public acceptance constitutes a mode of popular ratification.”³¹

No answer to the “what criteria” question—a question that, in one or another version, has long been contested among constitutional theorists—can escape controversy. Nonetheless, no answer is less contentious than the foregoing threefold answer,³² which, again, is partly originalist. Moreover, it is the answer on which I relied in a recent essay, titled *Two Constitutional Rights, Two Constitutional Controversies*—an essay in which I defended particular

²⁹ See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (Louisiana State University Press 1969); see also Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1301–03 (2019) (examining the tension between original meaning textualism and structural argument); Michael Ramsey, *Thomas Colby: Originalism and Structural Argument*, ORIGINALISM BLOG (Apr. 25, 2019), <https://originalismblog.typepad.com/the-originalism-blog/2019/04/thomas-colby-originalism-and-structural-argumentmichael-rmasey.html> (agreeing with Colby’s argument that originalism is not the same as textualism).

³⁰ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990).

³¹ Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2417 (2006). For a more recent, nuanced statement of Professor McConnell’s position that “stare decisis, at least in its moderate form, is essential to any system of fair adjudication, including constitutional law,” see Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1765–76 (2015). For an argument that “[i]t is not necessarily unoriginalist to adhere to an unoriginalist precedent,” see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358–61 (2015).

³² Cf. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 138–39 (Amy Gutmann ed., 1997) (“Originalism, like any theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew. It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether *Marbury v. Madison* was decided correctly. Where originalism will make a difference is not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.”).

understandings of the constitutional right to equal protection and the constitutional right of privacy; I also contended for particular judicial resolutions of the ongoing constitutional controversies over the criminalization of abortion and the exclusion of same-sex couples from civil marriage.³³

III. RELIGION IN POLITICS AND LAW, WITH PARTICULAR REFERENCE TO THE HUMAN RIGHT TO MORAL FREEDOM

That a law (or other public policy)—such as a law authorizing capital punishment—is not, or arguably should not be regarded as, *constitutionally* problematic does not entail that the law is not *morally* problematic. My scholarly agenda has included questions about the morality of laws.³⁴ In the late 1970s, in context of such questions, a challenging further question was moving to the fore, a question that has loomed large for me in my scholarly career: In a liberal democracy such as the United States, what role should legitimate, religiously-based moral beliefs play, if any, not only in evaluating the morality of laws but also in deciding what laws to adopt and what laws to repeal? Partly in reaction to the Supreme Court's 1973 rulings in the abortion cases, Baptist minister Jerry Falwell Sr. founded the Moral Majority in 1979, which mobilized Christian conservatives as a force in American politics in the 1980s.³⁵

By the summer of 1982, when I joined the law faculty at Northwestern University, the foregoing question was being contested not just outside the

³³ See Perry, *Two Constitutional Rights*, *supra* note 24; see also Perry, *Constitutional Rights as Human Rights*, *supra* note 24, at 2–3 (defending understandings of three constitutional rights: freedom of speech, equal protection, and the right of privacy).

For the reader interested in a fuller account of my theory of judicial review—a more adequate account than that which space and occasion permit me to provide here—I recommend Dan Conkle's contribution to this Festschrift. Conkle, *supra* note 23. And for the reader interested not only in my theory of judicial review but also in its location in my overall political morality, I recommend Cathy Kaveny's contribution. Cathleen Kaveny, *Michael Perry's Integrative Political Vision*, 71 EMORY L.J. 1545 (2022).

My contributions to constitutional theory during the thirty-five years from 1982—when *The Constitution, the Courts, and Human Rights*, *supra* note 21, was published—to 2017—when *A Global Political Morality*, *supra* note 25, was published—include these books: MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* (1994); MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* (1999); MICHAEL J. PERRY, *CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT* (2009); MICHAEL J. PERRY, *HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2013) [hereinafter PERRY, *HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES*].

³⁴ See, e.g., Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41 (1995) (my contribution to a symposium on sexual orientation and the law); Michael J. Perry, *The Morality of Human Rights*, 42 HUM. RTS. Q. 434, 462–76 (2020) [hereinafter Perry, *The Morality of Human Rights*].

³⁵ Peter Applebome, *Jerry Falwell, Moral Majority Founder, Dies at 73*, N.Y. TIMES (May 16, 2007), <https://www.nytimes.com/2007/05/16/obituaries/16falwell.html>.

academy but also inside it too, by philosophers, political theorists, law professors, and others.³⁶ Columbia University law professor Kent Greenawalt addressed the question in two important books: *Religious Convictions and Political Choice* and *Private Consciences and Public Reasons*.³⁷ Given my background and scholarly interests, I was eager to join the discussion, which I did with my second book, *Morality, Politics, and Law*,³⁸ and especially with my third book, *Love and Power: The Role of Religion and Morality in American Politics*.³⁹

While a member of the law faculty at Wake Forest University, which I joined in the summer of 1997, I hosted a scholarly gathering to discuss the question, “Religiously Based Morality: Its Proper Place in American Law and Public Policy?” Partly in conjunction with that gathering, the contributions to which were later published as a symposium issue of the *Wake Forest Law Review*,⁴⁰ I began drafting my 2003 book, *Under God? Religious Faith and Liberal Democracy*.⁴¹ In his contribution to this Festschrift—a wonderfully discerning, thoughtful, and constructively critical contribution—Chris Eberle provides an excellent account of the developments in my “religion in politics” thinking in the twelve years between *Love and Power* and *Under God?*, as well as the

³⁶ In my judgment, one of the most impressive books on the proper role of religion in the politics of a liberal democracy—perhaps *the* most impressive—was written by a philosopher, Christopher Eberle, who is a contributor to this Festschrift. See CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (2004).

³⁷ KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995).

³⁸ MICHAEL J. PERRY, *MORALITY, POLITICS, & LAW* (1988). The Tulane Law Review published a symposium issue on my second book. Symposium, 63 *TULANE L. REV.* 1281–679 (1989). A contributor to this Festschrift, Rick Kay, contributed an article to the symposium. Richard S. Kay, *Moral Knowledge and Constitutional Adjudication*, 63 *TULANE L. REV.* 1501 (1988).

³⁹ MICHAEL PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991).

⁴⁰ See Symposium, *Religiously Based Morality: Its Proper Place in American Law and Public Policy?*, 36 *WAKE FOREST L. REV.* 217–570 (2001). Four of the contributors to this Festschrift also contributed an article to the symposium: Christopher J. Eberle, *What Respect Requires—And What It Does Not*, 36 *WAKE FOREST L. REV.* 305 (2001); M. Cathleen Kaveny, *Religious Claims and the Dynamics of Argument*, 36 *WAKE FOREST L. REV.* 423 (2001); Paul Weithman, *Religious Reasons and the Duties of Membership*, 36 *WAKE FOREST L. REV.* 511 (2001); Nicholas Wolterstorff, *A Religious Argument for the Civil Right to Freedom of Religious Exercise, Drawn from American History*, 36 *WAKE FOREST L. REV.* 535 (2001). Paul Weithman’s contribution to this Festschrift continues his widely acclaimed, state-of-the-art scholarship on the political philosophy of his doctoral mentor, John Rawls. Paul Weithman, *Catholicism and Overlapping Consensus*, 71 *EMORY L.J.* 1637 (2022).

While at Wake Forest, I organized a second scholarly gathering, the contributions to which were published as a symposium issue. Symposium, *Judicial Review: Blessing or Curse? Or Both? A Symposium in Commemoration of the Bicentennial of Marbury v. Madison*, 38 *WAKE FOREST L. REV.* 313–838 (2003).

⁴¹ MICHAEL J. PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* (2003).

further developments in the seven years between *Under God?* and *The Political Morality of Liberal Democracy*.⁴²

Here, I want to provide a brief account of the human right to moral freedom. It is that right—about which I had not begun to think and write in earnest until I drafted my 2013 book, *Human Rights in the Constitutional Law of the United States*⁴³—that reflects what I have come to regard as the proper role (or, more precisely, the *properly limited* role) of religiously based moral beliefs and sectarian moral beliefs generally in politics and law.⁴⁴

The articulation of the human right to moral freedom in Article 18 of the International Covenant on Civil and Political Rights (ICCPR)⁴⁵—which is an elaboration of Article 18 of the Universal Declaration of Human Rights (UDHR)⁴⁶—is canonical: As of November 2021, 173 of the 197 members of the United Nations (88%) are parties to the ICCPR, including, as of 1992, the United States.⁴⁷ Article 18 of the ICCPR states the following:

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 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

⁴² MICHAEL J. PERRY, LOVE AND POWER, THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); MICHAEL J. PERRY, THE POLITICAL MORALITY OF LIBERAL DEMOCRACY (2010); see Christopher J. Eberle, *The Continuing Quest for the Grail: Perry on the Justificatory Role of Religious Reasons*, 71 EMORY L.J. 1397 (2022).

⁴³ See PERRY, HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES, *supra* note 33, at 112–35.

⁴⁴ What follows in the text is an abbreviated account of the human right to moral freedom. I have provided a fuller account in other venues—most recently, in Perry, *The Morality of Human Rights*, *supra* note 34, at 452–62.

⁴⁵ International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171 [hereinafter ICCPR].

⁴⁶ G.A. Res. 217A (III), Universal Declaration of Human Rights art. 18 (Dec. 10, 1948) [hereinafter UDHR]. Article 18 of the Universal Declaration of Human Rights states, “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.” *Id.*

⁴⁷ *Ratification Status for CCPR - International Covenant on Civil and Political Rights*, U.N. TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en (last visited Apr. 28, 2022).

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.⁴⁸

Note the breadth of the right that, according to Article 18, “[e]veryone shall have,” including the right not only to freedom of “religion” but also to freedom of “conscience.”⁴⁹ 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.”⁵⁰ Article 18 explicitly indicates that “belief” centrally includes moral belief when it states that “[t]he State 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.”⁵¹

The U.N. Human Rights Committee—the body that monitors compliance with the ICCPR and, under the First Optional Protocol to the ICCPR, adjudicates cases brought by one or more 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.”⁵² How “far-reaching and profound”? The right protects not only freedom to practice one’s religion (including, of course, one’s religiously based morality) but also to practice one’s morality—freedom “to manifest one’s religion or belief” in practice—even if one’s morality is not religiously based.⁵³ As the Human Rights Committee has explained:

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

⁴⁸ ICCPR, *supra* note 45, art. 18.

⁴⁹ *Id.*

⁵⁰ *Id.* (emphasis added).

⁵¹ *Id.* (emphasis added).

⁵² General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 ¶. 1 (1994) [hereinafter General Comments and General Recommendations], <https://digitallibrary.un.org/record/201053?ln=en#record-files-collapse-header>.

⁵³ *Id.* ¶ 11.

traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.⁵⁴

In deriving a right to conscientious objection to military service from Article 18, the Human Rights Committee observed 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.”⁵⁵

It is misleading, though common, to describe the right under discussion here as the right to *religious* freedom.⁵⁶ Given the breadth of the right—the “far-reaching and profound” right of which the ICCPR’s Article 18 is the canonical articulation⁵⁷—the right is more accurately described as the right to *moral* freedom: As the Supreme Court of Canada has emphasized, it is a broad right that protects freedom to practice one’s morality without regard to whether one’s morality is religion based.⁵⁸ Referring to section 2(a) of the Canada’s Charter of Rights and Freedoms, which states that “[e]veryone has . . . freedom of conscience and religion,”⁵⁹ the Court has explained that “[t]he purpose of [Section] 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.”⁶⁰ 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.”⁶¹ Therefore, I call the right under discussion here the human right to moral freedom. But whether one calls this right, as many do, the right to freedom of conscience (in the sense of the right to live one’s life in accord with the deliverances of one’s conscience) or the right to moral (including religious) freedom, it is the freedom to live one’s life in accordance with one’s moral convictions and commitments, including one’s religiously based moral convictions and commitments.

⁵⁴ *Id.* ¶¶ 1–2.

⁵⁵ *Id.* ¶ 11.

⁵⁶ For an example of such a description, see Christopher McCrudden, *Catholicism, Human Rights and the Public Sphere*, 5 INT’L J. PUB. THEOLOGY 331, 334 (2011).

⁵⁷ General Comments and General Recommendations, *supra* note 52.

⁵⁸ Michael Perry, *Freedom of Conscience as Religious and Moral Freedom*, 29 J.L. & RELIGION 124, 128 (2014).

⁵⁹ 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.).

⁶⁰ *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 759 (Can.).

⁶¹ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 337 (Can.).

The protection provided by some ICCPR rights—such as the Article 7 right not to “be subjected to torture or to cruel, inhuman or degrading treatment or punishment”—is unconditional, in the sense that the rights forbid (or require) government to do something, *period*.⁶² The protection provided by some other ICCPR rights, by contrast, is conditional in the sense that the rights forbid government to do something *unless certain conditions are satisfied*. As Article 18 makes clear, the protection provided by the right to moral freedom is conditional (and as a practical matter, it must be). The right forbids government to ban or otherwise impede conduct protected (“covered”) by the right, thereby interfering with one’s freedom to live one’s life in accordance with one’s moral convictions and commitments unless each of three conditions is satisfied⁶³:

1. **The legitimacy condition:** The government action (law, policy, etc.) must be an effort to achieve, and actually achieve, a legitimate government objective: “public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁶⁴ The particular government action at issue might be not the law itself (e.g., military conscription) but instead might be that the law does not exempt the protected conduct (e.g., provide for conscientious objection).
2. **The least-restrictive-alternative condition:** The government action—which, again, might be that the law does not exempt—must be necessary, in the sense that there is no less restrictive way to achieve the objective.⁶⁵
3. **The proportionality condition:** The overall good the government action achieves—the “benefit” of the government action—must be sufficiently important to warrant the gravity of

⁶² Article 7 states that “[n]o 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.” ICCPR, *supra* note 45, art. 7.

Even those who disagree that interrogational torture—torturing someone to elicit information, either from the person being tortured or from someone else—is always, without exception, morally unjustifiable have good reason to agree that, all things considered, and like ICCPR Article 7, the law should ban such torture unconditionally. See MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 87–106 (1998); NIGEL BIGGAR, WHAT’S WRONG WITH RIGHTS? 167–89 (2020).

⁶³ Perry, *supra* note 58, at 132.

⁶⁴ The Siracusa Principles state the following: “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.” 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 Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4, ¶ 10 (1984) [hereinafter Siracusa Principles].

⁶⁵ The Siracusa Principles state the following: “In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.” *Id.* ¶ 11.

the action's "cost," which is a function mainly of the importance of the conduct the government action bans or otherwise impedes and the extent to which there is an alternative way (or ways) for the aggrieved party (or parties) to achieve what she wants to achieve.⁶⁶

Government action that *implicates* the right also *violates* the right if, and only if, the government action fails to satisfy any of those three conditions.

Consider the first of the three conditions that government must satisfy under the right to moral freedom, lest its regulation of conduct protected by the right violates the right: The government action at issue (law, policy, etc.) must serve a legitimate government objective. 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."⁶⁷ Clearly, then, for purposes of the legitimacy condition, protecting "public morals" is a legitimate government objective.

But what morals count as *public* morals? In addressing that question, consider the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, which were promulgated by the United Nations in 1984⁶⁸ and state, in relevant part, the following:

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.⁶⁹

With respect to "public morals," therefore, the Human Rights Committee has emphasized the following:

[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

⁶⁶ The right to moral freedom obviously would not provide meaningful protection for conduct covered by the right if the consistency of government action was to be determined without regard to whether the benefit of the government action is proportionate to the cost of the government action. And, indeed, Article 18 is authoritatively understood to require that the benefit be proportionate to the cost. *See supra* note 64.

⁶⁷ ICCPR, *supra* note 45, art. 18.

⁶⁸ *Id.*

⁶⁹ *See Siracusa Principles, supra* note 64, ¶¶ 2–4.

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.⁷⁰

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 moral freedom, “[P]ublic morals’ measures should reflect a pluralistic view of society, rather than a single religious culture.”⁷¹

The position of the Human Rights Committee—the Committee’s application of the relevant Siracusa Principles in the context of the Article 18 right to and moral freedom—is quite sound, given what Jocelyn Maclure and Charles Taylor and Maclure call “the state of contemporary societies”:⁷² Such societies—more precisely, contemporary democracies—are typically quite pluralistic, morally as well as religiously:

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.⁷³

⁷⁰ General Comments and General Recommendations, *supra* note 52, ¶¶ 8, 10.

⁷¹ SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 510 (2d ed. 2004).

⁷² JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 106 (Jane Mary Todd trans., 2011).

⁷³ *Id.* at 10, 106 (“Moral pluralism’ refers to the phenomenon of individuals adopting different and sometimes incompatible value systems and conceptions of the good.”); *see also* Charles Taylor, *Democracy Exclusions: Political Identity and the Problem of Secularism*, ABC RELIGION & ETHICS (Sept. 27, 2017, 2:13 PM), <https://www.abc.net.au/religion/democratic-exclusions-political-identity-and-the-problem-of-secu/10095352> (“Everyone agrees today that modern, diverse democracies have to be *secular*, in some sense of this term. But in what sense? . . . [T]he main point of a secularist regime is to manage the religious and metaphysical-philosophical diversity of views (including non- and anti-religious views) fairly and democratically. Of course, this task will involve setting certain limits to religiously motivated action in the public sphere, but it will also involve similar limits on those espousing non- or anti-religious philosophies. . . . For this view, religion is not the prime focus of secularism.”).

Therefore, although government may *purport* to protect “public morals,” it does not truly protect *public* morals if it bans or regulates conduct based on the sectarian belief⁷⁴—religious or secular—that the conduct is immoral. Instead, government is acting to protect *sectarian* morals, and protecting sectarian morals—as distinct from public morals—is not a legitimate government objective under the right to moral freedom.

Crediting the protection of sectarian morals as a legitimate government objective, under the right to moral freedom, would be antithetical to the goal of enabling contemporary democracies to meet the challenge of “manag[ing] fairly the moral diversity that now characterizes them.”⁷⁵ We can anticipate an argument to the effect that managing such diversity is only one of the challenges that contemporary democracies face, that nurturing social unity is another, and that from time to time, in one or another place, meeting the latter challenge may require the political powers-that-be to protect some aspect of a sectarian morality.⁷⁶ However, such an argument is belied by the historical experience of the world’s democracies, which amply confirms, as Maclure and Taylor emphasize, not only that 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.”⁷⁷ The

⁷⁴ Here, “based on” is used in the sense that government almost certainly would not be doing what it is doing “but for” that sectarian belief.

⁷⁵ Perry, *supra* note 58, at 124 (quoting MACLURE & TAYLOR, *supra* note 72, at 20, 106).

⁷⁶ In 1931, the fascist dictator of Italy, Benito Mussolini, proclaimed that “religious unity is one of the great strengths of a people.” JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE 155–56 (2005). Had Mussolini read Machiavelli? Michael McConnell noted that “Machiavelli called religion ‘the instrument necessary above all others for the maintenance of a civilized state,’ [and] urged rulers to ‘foster and encourage’ religion ‘even though they be convinced that is it quite fallacious.’ Truth and social utility may, but need not, coincide.” Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2182 (2003) (quoting NICCOLO MACHIAVELLI, THE DISCOURSES 139, 143 (Bernard Crick ed., Leslie J. Walker trans., Penguin Books 1970) (1520)); *cf.* *Atheist Defends Belief in God*, TABLET (London), Mar. 24, 2007, at 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.’”).

⁷⁷ MACLURE & TAYLOR, *supra* note 72, at 18. See generally BRIAN J. GRIM & ROGER FINKE, THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY 222 (2011) (“[T]he core thesis [of this book] holds: *to the extent that governments and societies restrict religious freedoms, physical persecution and conflict increase.*”); Paul Cruickshank, *Covered Faces, Open Rebellion*, N.Y. TIMES (Oct. 21, 2006), <https://www.nytimes.com/2006/10/21/opinion/21cruickshank.html> (arguing that religious restrictions will only enhance political symbolism of restricted acts). The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states, “[T]he disregard and infringement of . . . the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars

political powers-that-be do not need—and under the legitimacy condition, properly construed, they do not have—discretion to ban or otherwise regulate conduct based on a sectarian belief that the conduct is immoral.⁷⁸

When is a belief, including a secular 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.⁷⁹

We may generalize Murray’s insight: A belief that *X* is immoral is sectarian—that is, in the context of contemporary democracies, which, again, are typically quite pluralistic, morally as well as religiously—if the claim that *X* is immoral is one that is widely contested among the citizens of such a democracy.

and great suffering to mankind.” Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. Doc. A/36/684 pmbL, UNOHCH (Nov. 25, 1981), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ReligionOrBelief.aspx>.

⁷⁸ That the coercive imposition of a sectarian moral belief violates the right to moral freedom does not entail that the *noncoercive* affirmation of theistic belief invariably does so. Examples of the latter from the United States include the following: 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 noncoercive affirmation of theistic belief violates the Establishment Clause of the U.S. Constitution: PERRY, *supra* note 42, at 100–19.

⁷⁹ John Courtney Murray, *Memo to Cardinal Cushing on Contraception Legislation* [hereinafter Murray, *Memo to Cardinal Cushing*], <https://library.georgetown.edu/woodstock/murray/1965f#1> (last visited Apr. 28, 2022); see also John Courtney Murray, *Toledo Talk* (May 5, 1967), <https://library.georgetown.edu/woodstock/murray/1967g> (a compilation of available newspaper sources of Murray’s argument). Murray influenced Boston’s Archbishop, Cardinal Richard Cushing, and in turn Cushing influenced the repeal of the Massachusetts ban on the sale of contraceptives. Seth Meehan, *Legal Aid*, B.C. MAG. (2011), <https://bcm.bc.edu/index.html%3Fp=708.html>; Seth Meehan, *Catholics and Contraception: Boston, 1965*, N.Y. TIMES (Mar. 15, 2012), <https://campaignstops.blogs.nytimes.com/2012/03/15/catholics-and-contraception-boston-1965/>; see also Joshua J. McElwee, *A Cardinal’s Role in the End of a State’s Ban on Contraception*, NAT’L CATH. REP. (Feb. 28, 2012), <https://www.ncronline.org/news/politics/cardinals-role-end-states-ban-contraception> (explaining how Cushing helped to end Massachusetts’s ban on contraception). For the larger context within which Father Murray wrote and spoke, see generally LESLIE WOODCOCK TENTLER, *CATHOLICS AND CONTRACEPTION: AN AMERICAN HISTORY* (2004). For a discussion of Murray’s work by one of his foremost intellectual heirs, see generally David Hollenbach, *Religious Freedom, Morality and Law: John Courtney Murray Today*, 1 J. MORAL THEOLOGY 69 (2012).

Of course, it will not always be obvious on which side of the line a particular moral belief falls—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.⁸⁰ By contrast, certain moral beliefs—certain moral norms—are now clearly ecumenical, rather than sectarian, in contemporary 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.⁸¹

In addressing questions about the morality of laws—laws such as those criminalizing abortion and excluding same-sex couples from civil marriage—I have relied on, as a principal criterion, the human right to moral freedom,⁸² which is a core component of the morality of human rights.⁸³ As I said, the human right to moral freedom reflects what I have come to regard as the properly limited role, in politics and law, not just of religiously based moral beliefs but also of sectarian moral beliefs generally.⁸⁴

IV. THE MORALITY OF HUMAN RIGHTS

In the summer of 2003, my wife Sarah and I (and our two children) moved to Atlanta, Georgia, where I joined law faculty at Emory University and Sarah,

⁸⁰ Murray, *Memo to Cardinal Cushing*, *supra* note 79.

⁸¹ MACLURE & TAYLOR, *supra* note 72, at 11.

⁸² See, e.g., Perry, *The Morality of Human Rights*, *supra* note 34, at 462–76.

⁸³ See *id.* at 452–62. In addressing questions about the morality of laws, I have also relied on, as a principal moral criterion, another core component of the morality of human rights: the human right to moral equality. On the human right to moral equality, see *id.* at 449–52; Michael J. Perry, *Moral Equality?*, 59 SAN DIEGO L. REV. (forthcoming 2022) (my contribution to a symposium titled *Inequalities: Do They Matter—And If So, Which Ones, and Why?*).

⁸⁴ In her insightful contribution to this Festschrift, Cathy Kaveny comments on my thinking about the human right to moral freedom—in particular, my thinking about the implications of the right for the question of the proper role of religiously based moral beliefs in law and politics. Kaveny, *supra* note 33.

who had long been a medical social worker, began a career in public health at the U.S. Centers for Disease Control and Prevention. At Emory, I was privileged to join the great Harold Berman⁸⁵ both as a Robert W. Woodruff University Chair and as a senior fellow of Emory Law's Center for the Study of Law and Religion. The Executive Director of the Center was (and remains) John Witte, who succeeded his mentor Harold Berman as a Woodruff University Chair in 2014.⁸⁶

By the time I arrived at Emory University, the morality of human rights—by which I mean the morality embodied in the Universal Declaration of Human Rights (UDHR) and in one or more of the several international human rights treaties that have entered into force in the period since the adoption of the UDHR by the U.N. General Assembly in 1948—was at the forefront of my thinking and writing.

In the early 1980s, the language of “human rights” became a moral *lingua franca*.⁸⁷ In particular, it became a principal (if not the principal) language in which many of the divisive political-moral controversies of the day were being conducted, including the controversy over U.S. government's involvement in the horrific civil war that engulfed El Salvador. During a week that spanned the end of 1987 and the beginning of 1988, at the invitation of a Dominican priest then working with the poor in El Salvador, I visited El Salvador to learn more about its civil war. My brief sojourn there was transformative. Soon after returning to the United States, I began to address in my teaching and writing certain fundamental questions in human rights theory, such as the following:

—In the context of the morality of human rights, what does the contested term “human right” mean?⁸⁸

⁸⁵ See Douglas Martin, *Harold J. Berman, 89, Who Altered Beliefs About Origins of Western Law, Dies*, N.Y. TIMES (Nov. 18, 2007), <https://www.nytimes.com/2007/11/18/us/18berman.html>.

⁸⁶ Emory Univ. Sch. of L., *John Witte Jr. Named Woodruff Professor*, EMORY L. NEWS CTR. (Nov. 21, 2014), <https://law.emory.edu/news-and-events/releases/2014/11/witte-named-woodruff-professor.html>. Martha Fineman, who is a contributor to this Festschrift, joined the law faculty at Emory as a Woodruff University Chair at the same time I did, and so I have been privileged to have both John and Martha as esteemed colleagues and dear friends for close to two decades.

⁸⁷ Cf. JÜRGEN HABERMAS, RELIGION AND RATIONALITY: ESSAYS ON REASON, GOD, AND MODERNITY 153–54 (Eduardo Mendieta ed., 2002) (“Notwithstanding their European origins, . . . [i]n Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victims of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity.”).

⁸⁸ Philosopher James Griffin observed, “The term ‘human right’ is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly—and not just among politicians, but among philosophers, political theorists, and jurists as well.” JAMES GRIFFIN, ON HUMAN RIGHTS 14–15 (2008).

—What is the content of the morality of human rights?

—In particular, what is the content of these two core components of the morality of human rights: the human right to moral equality and the human right to moral freedom?

—What are the implications of the morality of human rights—especially the human rights to, respectively, moral equality and to moral freedom—for some of the political-moral controversies that divide us, such as those over capital punishment, abortion, and same-sex marriage?⁸⁹

—Are anti-poverty rights—such as the right of access to adequate healthcare—truly human rights?

And then there is the most fundamental question of all, which proceeds from the fact that the most basic requirement of the morality of human rights is the imperative to “act towards one another in a spirit of brotherhood,” articulated in Article 1 of the UDHR⁹⁰ and directed not just to all governments but to “all human beings”⁹¹:

—What reason or reasons do we have, if any, to live our lives in accord with—and to do what we can, all things considered, to get our governments to act in accord with—the imperative to treat not just some but all human beings “in a spirit of brotherhood”?

The yield of my engagement with such questions includes several books, from *The Idea of Human Rights: Four Inquiries*⁹² to my most recent book, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism*.⁹³

⁸⁹ In his contribution to this Festschrift, as I read it, Fred Gedicks is pursuing the implications, for the controversy over the legal significance that should attach to the harms that religious accommodations often imposed on third parties, of two political-moral commitments, which are also federal constitutional commitments: the commitments to, respectively, religious freedom and moral equality. See Frederick Mark Gedicks, *Coase and Accommodation: A Reply*, 71 EMORY L.J. 1455 (2022).

⁹⁰ Article 1 of the Universal Declaration states that “[a]ll human beings . . . should act towards one another in a spirit of brotherhood.” UDHR, *supra* note 46, art. 1.

⁹¹ *Id.*; see Perry, *The Morality of Human Rights*, *supra* note 34, at 439–40.

⁹² PERRY, *supra* note 62. The *Journal of Law and Religion* published a symposium issue on this book. Symposium, *Perry Symposium*, 14 J.L. & RELIGION 1–163 (1999).

⁹³ PERRY, *supra* note 25; see MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS (2007); PERRY, *supra* note 62.

In his contribution to this Festschrift, David Hollenbach elaborates and defends an understanding of the nature of human rights—a solidaristic as distinct from an individualistic understanding—that, as Hollenbach explains, enables human rights to serve as a truly global political morality. David Hollenbach, *A Relational Understanding of Human Rights: Human Dignity in Social Solidarity*, 71 Emory L.J. 1485 (2022).

Although the morality of human rights is the third and final addition to the portfolio of my major scholarly interests, there is a deep affinity between several issues with which I have been concerned since the beginning of my scholarly career and those with which I have been concerned more recently, in the context of my work on the morality of human rights. For example, some of my earliest writings were about the constitutional right to equal protection,⁹⁴ and the human right to moral equality is the core of the constitutional right to equal protection.⁹⁵ Similarly, some of my earliest writings were about, *inter alia*, cases that invoked the contested constitutional right of privacy,⁹⁶ and that right is best understood as a version of the human right to moral freedom.⁹⁷ As I noted above, three of my books have addressed the question of the proper role of religiously based moral beliefs in politics and law, and that question is best understood, I now think, as a question, at least in part, about the implications—the requirements—of the human right to moral freedom.⁹⁸

I want to conclude this account of my scholarly trajectory by sharing my present thinking regarding the final and most fundamental of the questions listed two paragraphs back: What reason or reasons do we have, if any, to live our lives in accord with—and to do what we can, all things considered, to get our governments to act in accord with—the imperative to treat not just some but all human beings “in a spirit of brotherhood”? There is, to say the least, good reason to be skeptical that there is a plausible nontheistic answer to the question.⁹⁹ In any event, many of us (nontheists as well as theists) *are* skeptical.

⁹⁴ See, e.g., Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 541–42 (1977); Michael J. Perry, *Constitutional “Fairness”: Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 383–84 (1977); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1024 (1979).

⁹⁵ See Perry, *Two Constitutional Rights*, *supra* note 24, at 1604–12.

⁹⁶ See Perry, *supra* note 15, at 690–91; Michael J. Perry, *Substantive Due Process Revisited: Reflection on (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417, 420–21 (1976).

⁹⁷ See Perry, *Two Constitutional Rights*, *supra* note 24, at 1612–29.

⁹⁸ See PERRY, *supra* note 25, at 74–79.

⁹⁹ See Brian Leiter, *The Death of God and the Death of Morality*, 102 MONIST 386, 398 (2019); Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism*, in EQUALITY: SELECTED READINGS 282, 282 (Louis P. Pojman & Robert Westmoreland eds., 1997); Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS: THE 1993 OXFORD AMNESTY LECTURES 111, 119 (Stephen Shute & Susan Hurley eds., 1993); see also ANDREA SANGIOVANNI, HUMANITY WITHOUT DIGNITY: MORAL EQUALITY, RESPECT, AND HUMAN RIGHTS 13–71 (2017) (arguing that there is reason to be skeptical about “dignity”-based rationales).

Consider the following quote by Nietzsche: “The masses blink and say: ‘We are all equal.—Man is but man, before God—we are all equal.’ Before God! But now this God has died.” GEORGE PARKIN GRANT, ENGLISH SPEAKING JUSTICE 77 (1985) (quoting FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA: A BOOK FOR ALL AND NONE 232 (Adrian Del Caro & Robert Pippin eds., Adrian Del Cro trans., 2006) (Part IV, Section 1: “On the Higher Man”)). “Nietzsche’s thought,” wrote philosopher Bernard Williams, is that “there is . . . not only no

Imagine that we are talking with someone, a nontheist,¹⁰⁰ who is skeptical that there is *any* successful nontheistic “normative theory,” defined as “a theory that purport[s] to justify, discursively and systematically, [one’s] normative opinions, to show them to be rationally obligatory and objectively valid.”¹⁰¹ Her skepticism encompasses any such theory that purports to justify the “in a spirit of brotherhood” norm or any equivalent egalitarian norm¹⁰² or to show the norm “to be rationally obligatory and objectively valid.”¹⁰³ Nonetheless, our interlocutor is unyielding in her embrace of the “in a spirit of brotherhood” norm—“unyielding in her commitment to do all she reasonably can, in alliance with like-hearted others, to ‘tame the savageness of man and make gentle the

God, but no metaphysical order of any kind.” Bernard Williams, *Republican and Galilean*, N.Y. REV. (Nov. 8, 1990), <https://www.nybooks.com/articles/1990/11/08/republican-and-galilean/> (reviewing CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* (1989)). Philosopher Philippa Foot observed that “[f]ew contemporary moral philosophers have really joined battle with Nietzsche about morality. By and large we have just gone on taking moral judgments for granted as if nothing had happened. We, the philosopher watchdogs, have mostly failed to bark.” PHILIPPA FOOT, *NATURAL GOODNESS* 103 (2001). Consider this variation, by Charles Taylor, on Foot’s point:

The logic of the subtraction story is something like this: Once we slough off our concern with serving God, or attending to any other transcendent reality, what we’re left with is human good, and that is what modern societies are concerned with. But this radically under describes what I’m calling modern humanism. That I am left with only human concerns doesn’t tell me to take universal human welfare as my goal; nor does it tell me that freedom is important, or fulfillment, or equality. Just being confined to human goods could just as well find expression in my concerning myself exclusively with my own material welfare, or that of my family or immediate milieu. The, in fact, very exigent demands of universal justice and benevolence which characterize modern humanism can’t be explained just by the subtraction of earlier goals and allegiances.

Charles Taylor, *Closed World Structures*, in *RELIGION AFTER METAPHYSICS* 47, 61 (Mark A. Wrathall ed., 2003); see CHRISTIAN SMITH, *ATHEIST OVERREACH: WHAT ATHEISM CAN’T DELIVER* (2019).

¹⁰⁰ Ronald Dworkin emphasized that one’s being a nonbeliever in the sense of a nontheist does not necessarily mean that one is not “religious” or “spiritual.” He cites *Torcaso v. Watkins* for the proposition that “[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.” Ronald Dworkin, *Religion Without God*, N.Y. REV. (Apr. 4, 2013), https://www.nybooks.com/articles/2013/04/04/religion-without-god/?lp_txn_id=1306677 (citing *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) among other sources). As the Court noted in *Torcaso*, Buddhists are not, in the main, theists. Cf. Sallie B. King, *Buddhism and Human Rights*, in *RELIGION AND HUMAN RIGHTS: AN INTRODUCTION* 103 (John Witte, Jr. & M. Christian Green eds., 2012) (discussing whether the human rights are compatible with Buddhist teachings and how Buddhist revolutionaries have embraced them as a means of political revolution in Burma, Tibet, and Cambodia).

¹⁰¹ See Brian Leiter, *Why Marxism Still Does Not Need Normative Theory*, 37 *ANALYSE & KRITIK* J. PHIL. & SOC. THEORY 23, 23 (2015).

¹⁰² PERRY, *supra* note 25, at 186 (quoting UDHR, *supra* note 46, art. 1).

¹⁰³ Leiter, *supra* note 101, at 23.

life of this world.”¹⁰⁴ We ask her: *Why do you embrace—or why do you live your life or aspire to live it in accord with—the norm?*¹⁰⁵

She responds as follows:¹⁰⁶ *I detest and oppose states of affairs in which human beings—any human beings, not just myself and those for whom I happen to care deeply, such as my family and friends—suffer grievously in consequence of a law or other policy that is misguided or worse. I detest and oppose such states of affairs because I detest and oppose such suffering. And so, I work to build a world in which such suffering is, over time, diminished, all the while remembering, with Dietrich Bonhoeffer, that “[w]e have for once learned to see the great events of world history from below, from the perspective of the outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled—in short, from the perspective of those who suffer.”*¹⁰⁷

We reply: *But the problem of justification persists—the justification of the sensibility that animates your answer. Listen to Leszek Kolakowski:*

When Pierre Bayle argued that morality does not depend on religion, he was speaking mainly of psychological independence; he pointed out that atheists are capable of achieving the highest moral standards . . . and of putting to shame most of the faithful Christians. That is obviously true as far as it goes, but this matter-of-fact argument leaves the question of validity intact.¹⁰⁸

To Kolakowski’s “question of validity,” our interlocutor explains:

Again, I detest and oppose states of affairs in which any human beings suffer grievously in consequence of a law or other policy that is misguided or worse. You ask what justifies my sensibility[,] . . . my way of being oriented [to the Other][,] . . . if indeed anything justifies it. Are you asking for an argument in support of the claim—which for

¹⁰⁴ PERRY, *supra* note 25, at 186 (quoting Robert F. Kennedy, Sen., N.Y., Statement on Assassination of Martin Luther King, Jr. (Apr. 4, 1968)). In Indianapolis, Indiana, after telling the largely African American audience what he himself had just learned—that a little earlier that evening, in Memphis, Tennessee, Martin Luther King, Jr., had been assassinated—Robert F. Kennedy quoted Aeschylus: “Let us dedicate ourselves to what the Greeks wrote so many years ago: to ‘tame the savageness of man and make gentle the life of this world.’” *Id.* (quoting the dedication page).

¹⁰⁵ *Id.* at 36.

¹⁰⁶ And as she responds, our interlocutor recalls Simone Weil. See Andreas Teuber, *Simone Weil: Equality as Compassion*, 43 PHIL. & PHENOM. RSCH. 221, 222–23 (1982) (describing Weil’s definition of equality and applying it to “a broader moral and political framework”).

¹⁰⁷ PERRY, *supra* note 25, at 36 (quoting DIETRICH BONHOEFFER, *After Ten Years: A Letter to the Family and Conspirators*, in A TESTAMENT TO FREEDOM: THE ESSENTIAL WRITINGS OF DIETRICH BONHOEFFER 482, 486 (Geffrey B. Kelly & F. Burton Nelson eds., 1995)). *After Ten Years* bears the date “Christmas 1942.” BONHOEFFER, *supra*, at 482.

¹⁰⁸ PERRY, *supra* note 25, at 36–37 (quoting LESZEK KOLAKOWSKI, RELIGION, IF THERE IS NO GOD: ON GOD, THE DEVIL, SIN, AND OTHER WORRIES OF THE SO-CALLED PHILOSOPHY OF RELIGION 191–92 (1982)).

*me is a conviction—that there is no better, no more beautiful, no more ennobling way of being oriented to the Other? I have no such argument. I have nothing to offer other than my experience, my experience both of the sensibility and of others, such as the Vietnamese Buddhist Thich Nhat Hahn, who embody the sensibility and my experience of their beautiful, ennobling humanity and peace.*¹⁰⁹

*There is much to be done, and life is short. So, I work to build a world in which such suffering is, over time, diminished. And I work to build that world with whomever who will work with me, whatever their particular beliefs or motivation.*¹¹⁰

Our interlocutor's response brings to mind this passage by Richard Rorty:

As I see it, one important intellectual advance made in our century is the . . . growing willingness to neglect the question “What is our nature?” and to substitute the question “What can we make of ourselves?” . . . We are coming to think of ourselves as the flexible, protean, self-shaping animal rather than as the rational animal or the cruel animal. . . . If we can work together, we can make ourselves into whatever we are clever and courageous enough to imagine ourselves becoming. This sets aside Kant's question “What is man?” and substitutes the question “What sort of world can we prepare for our great-grandchildren?”¹¹¹

¹⁰⁹ *Id.* at 37–38 (citing Annabel Laity, *Introduction* to THÍCH NHẬT HANH, THICH NHAT HAHN: ESSENTIAL WRITINGS 1, 1–2, 16 (Robert Ellsberg ed., 2001)) (“To whatever action *Thây* applies himself, it becomes a way of making peace.”); THUPTEN JINPA, A FEARLESS HEART: HOW THE COURAGE TO BE COMPASSIONATE CAN TRANSFORM OUR LIVES, at xx–xxi (2015) (describing compassion as a response to suffering); *cf.* LINDA TRINKHAUS ZAGZEBSKI, EXEMPLARIST MORAL THEORY 3–4 (2017) (showing “how to use exemplars to construct a comprehensive ethical theory”). Louis Pojman would have assigned our interlocutor's answer to “the existential strategy” category. *See* Pojman, *supra* note 99, at 284–85.

¹¹⁰ *Cf.* Alexandre Lefebvre, *Human Rights as Spiritual Exercises*, in THE SUBJECT OF HUMAN RIGHTS 193, 193–94 nn.1–4 (Danielle Celermajer & Alexander Lefebvre eds., 2020) (describing attempts by various bodies of the United Nations to promote human rights as a way of life and arguing that conceptualizing “human rights in terms of spiritual exercises[] . . . [will] embed human rights in the self-understanding of its audience members”). There is no reason to suppose that our interlocutor's orientation to the *human* Other does not extend beyond the human Other. *Cf.* MATHIEU RICARD, A PLEA FOR ANIMALS: THE MORAL, PHILOSOPHICAL, AND EVOLUTIONARY IMPERATIVE TO TREAT ALL BEINGS WITH COMPASSION 3–4 (Shambhala Publ'ns Inc. trans., 2016) (2014) (Ricard, a Buddhist monk, arguing there is a “moral imperative for extending our altruism to all sentient beings” in part because of animals' “capacity to experience suffering”); Marilyn L. Matevia, *Creature Comfort: Foundations for Christian Hospitality Toward Non-Human Animals*, 40 J. SOC'Y CHRISTIAN ETHICS 329, 330–32 (2020) (outlining the concept of restorative justice for animals based on the sacred duty of human hospitality, starting with the principle that “animals have moral standing” and interests); John Berkman, *Must We Love Non-Human Animals? A Post-Laudato Si Thomistic Perspective*, 102 NEW BLACKFRIARS 322, 323–24 (Dominicans of the Eng. Province eds., 2021) (arguing that the Trinitarian divine love requires humans to love “non-humans” because “endless goodness and love . . . is apportioned to each and every human and non-human animal according to the divide Wisdom”).

¹¹¹ Rorty, *supra* note 99, at 115, 121–22; *see also id.* at 120–21 (“[B]etween Kant's time and ours[,]”

Our interlocutor has told us, in effect, what she has made, or is trying to make, of herself and why. And she has also told us, by implication, what *we* can make of ourselves; she has told us, in Rorty's words, "what sort of world we can prepare for our great-grandchildren".¹¹² A world animated by the "in a spirit of brotherhood" norm.¹¹³ Our interlocutor's sensibility, as her responses to our questions indicate, is an aspect of a particular way of being oriented in the world; more precisely, her sensibility is a particular way of being oriented to the Other. Let us call her sensibility "agapic." *Agape* is a kind of love—different, of course, from *eros* and *philia*, but a kind of love nonetheless.¹¹⁴ In his informative book on Henri Bergson's political philosophy, Alexandre Lefebvre argues that, for Bergson, "love is the foundation of human rights. . . . [T]his is precisely Bergson's thesis: the essence of human rights is love."¹¹⁵ Our interlocutor is a personification of Bergson's thesis. Her agapic orientation to the Other brings to mind this statement by the acclaimed Australian philosopher Raimond Gaita,¹¹⁶ who, like our interlocutor, is a nontheist: "[T]he language of love . . . compels us to affirm that even those who suffer affliction so severe that they have irrevocably lost everything that gives sense to our lives, and the most radical evil-doers, are fully our fellow human beings."¹¹⁷ Gaita continues:

Darwin . . . convinced most of us that we were exceptionally talented animals, animals clever enough to take charge of our own future evolution. . . . [W]e have learned that human beings are far more malleable than Plato or Kant had dreamed. The more we are impressed by this malleability, the less interested we become in questions about our ahistorical nature. The more we see a chance to recreate ourselves, the more we read Darwin not as offering one more theory about what we really are but as providing reasons why we need not ask what we really are.").

¹¹² See *supra* note 111 and accompanying text.

¹¹³ See *supra* note 91 and accompanying text. Our interlocutor's response also recalls what Rorty said of the "pragmatist" moral philosopher: "She sees the ideal of human brotherhood and sisterhood not as the imposition of something non-empirical on the empirical, nor of something non-natural on the natural, but as the culmination of . . . a process of remaking the human species." RICHARD RORTY, *PRAGMATISM AS ANTI-AUTHORITARIANISM* 135 (2021).

¹¹⁴ PERRY, *supra* note 25, at 40 & n.41 ("To love another—love in the sense of *agape*—is not necessarily to feel a certain way, but it is necessarily to act a certain way."); cf. Jeffrie G. Murphy, *Law Like Love*, 55 SYRACUSE L. REV. 15, 21 (2004) ("There are, of course, many fascinating questions that could be raised about the love commandment. Does it command love as an emotion or simply that we act in a certain way? Kant, convinced that we can be morally bound only to that which is in our control, . . . called emotional love *pathological love* and claimed that it could not be our duty to feel it. What is actually commanded he called *practical love*—which is simply acting morally as Kant conceived acting morally.").

Murphy explained to me in discussion several years ago that by "pathological" (which is the English word commonly used to translate the German word Kant used), Kant did not mean diseased or sick but simply something from our passions with respect to which we are passive and thus not in voluntary control.

¹¹⁵ ALEXANDRE LEFEBVRE, *HUMAN RIGHTS AS A WAY OF LIFE: ON BERGSON'S POLITICAL PHILOSOPHY* 70 (2013).

¹¹⁶ See *PHILOSOPHY, ETHICS AND A COMMON HUMANITY: ESSAYS IN HONOUR OF RAIMON GAITA* 3 (Christopher Corder ed., 2011) (noting Gaita's simultaneous "disavowal of any religious orientation" and "acknowledge[ment] [of] the power of saintly love").

¹¹⁷ RAIMOND GAITA, *A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE*, at xviii–

On credit, so [to] speak, from this language of love, we have built a more tractable structure of rights and obligations. If the language of love goes dead on us, . . . if there are no examples to nourish it, either because they do not exist or because they are no longer visible to us, then talk of inalienable natural rights or of the unconditional respect owed to rational beings will seem lame and improbable to us.¹¹⁸

Compare to our interlocutor's agapic sensibility the sensibility of someone "whose treatment of a rather narrow range of featherless bipeds is morally impeccable, but who remains indifferent to the suffering of those outside this narrow range."¹¹⁹ Consider, for example, the sensibility of Doktor Pannwitz, the German chemist before whom Primo Levi stood at Auschwitz: "To Doktor Pannwitz, the prisoner standing there, before the desk of his examiner, is not a frightened and miserable man. He is not a dangerous or inferior or loathsome man either, condemned to prison, torture, punishment, or death. He is, quite simply, not a man at all."¹²⁰ What sort of world was Pannwitz preparing for *his* great-grandchildren?

Because *agape* is a prominent feature of Christian morality,¹²¹ it bears emphasis that, as the case of our interlocutor illustrates, one need not be a Christian—or a theist, or a religious believer of any sort—to have an agapic sensibility:¹²² "Many of the rescuers interviewed by Kristen Renwick Monroe—

xix (2002).

¹¹⁸ *Id.* What Gaita says next is sobering, to say the least: "Indeed, exactly that is happening." *Id.* at xix.

¹¹⁹ Rorty, *supra* note 99, at 124.

¹²⁰ ALAIN FINKIELKRAUT, IN THE NAME OF HUMANITY: REFLECTIONS ON THE TWENTIETH CENTURY 2 (Judith Friedlander trans., 2000) (1996).

¹²¹ See, e.g., TIMOTHY P. JACKSON, POLITICAL AGAPE: CHRISTIAN LOVE AND LIBERAL DEMOCRACY 2 (2015) (discussing "*agape* as first political virtue" and arguing that "[l]ove is the foundational norm that ought to structure political principles and policies"); *Introduction, in* AGAPE, JUSTICE, AND LAW: HOW MIGHT CHRISTIAN LOVE SHAPE LAW? 1, 1 (Robert F. Cochran, Jr. & Zachary Calo eds., 2017) (using *agape* to critique "contemporary legal theory and [to think] anew about concrete problems within law" on the basis that "[l]aw grounded in *agape* offers the possibility of more fully encouraging human flourishing"); Laura D'Olimpio, *Ethics Explainer: Agape*, ETHICS CTR. (Sept. 19, 2019), <https://ethics.org.au/ethics-explainer-agape/>.

¹²² The agapic sensibility is not sectarian. The sensibility could just as fittingly be called by other names, including non-western names, such as, for example, "karunic," deriving from the Buddhist term for compassion: *karuṇā*. Barbara O'Brien, *Buddhism and Compassion*, LEARN RELIGIONS, <https://www.learnreligions.com/buddhism-and-compassion-449719> (July 8, 2018).

The agapic sensibility is ecumenical. Philip J. Ivanhoe says, for example, the following:

Sima Niu, feeling distressed, said, "Others all have brothers; only I have none!" Zixia replied, "I have heard the saying: *Life and death are matters of fate; Wealth and honor depend upon Heaven.* Cultivated people are reverently attentive and do nothing amiss; they are respectful and practice the rites, regarding all within the four seas as brothers. How could cultivated people ever worry about having no brothers?"

Philip J. Ivanhoe, *Confucian Cosmopolitanism*, 42 J. RELIGIOUS ETHICS 22, 37 (2014) (quoting *Analects* [of

many of the European non-Jews who, during the Holocaust, at great risk to themselves and their families, rescued Jews and others who were strangers to them—were not theists.”¹²³ Moreover, there are many who fit this profile: a theist, for example, once in the grip of the agapic sensibility can become a non-theist, yet no less in the grip of the agapic sensibility.

I will continue thinking and writing—and, during the 2022–23 academic year, teaching—about the morality of human rights. I plan to do so partly in conversation with several of the contributors to this *Festschrift*, particularly those that provide me with the sort of constructive, critical commentary I both need and welcome as I move forward.¹²⁴

Confucius] 12.5). Ivanhoe then comments the below:

This passage describes the attitude of cultivated people toward others in terms of the notion of a shared, universal family; it encourages us to regard non-kin, even distant strangers, on the analogy of the feelings we have for our own siblings. This remains an important feature of contemporary Chinese culture within which people call and refer to one another using familial terms such as “sister” . . . , “brother” . . . , “aunt” . . . , and uncle” This gives rise to our second conception of Confucian cosmopolitanism: cosmopolitanism as the attitude of seeing other people as part of one’s family.

Id.; see also Mee-Yin Mary Yuen, *Human Rights in China: Examining the Human Rights Values in Chinese Confucian Ethics and Roman Catholic Social Teachings*, 8 *INTERCULT. HUM. RTS. REV.* 281, 284–85, 291 (2013) (explaining the Confucian concept of ren, meaning humanity or benevolence, and “examining [the] implicit human rights values” of Confucian Ethics); cf. HANS INGVAR ROTH, P.C. CHANG AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 211–14 (Univ. of Pa. Press 2018) (2016) (discussing “ren” and the notion of two-man-mindedness from Chinese philosophical traditions as the underlying concept of the terms “brotherhood” and “conscience” that were intended to “emphasize a capacity to identify with other people’s needs and interests and to show compassion” in Article 1 of the U.N. Declaration of Human Rights).

¹²³ PERRY, *supra* note 25, at 39; see KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY* 91, 112–13 (1996); see also Kristen Renwick Monroe, *Explicating Altruism, in ALTRUISM AND ALTRUISTIC LOVE: SCIENCE, PHILOSOPHY, AND RELIGION IN DIALOGUE* 106, 106 (Stephen G. Post et al. eds., 2002) (explaining the social science conceptualization of altruism and arguing that theories should focus less on “self-interest” and more on “the full range of the human psyche”); KRISTEN RENWICK MONROE, *ETHICS IN AN AGE OF TERROR AND GENOCIDE: IDENTITY AND MORAL CHOICE* 3 (2012) (examining the “relationships among identity, choice, and moral acts” within the concept of altruism).

¹²⁴ The contributions most relevant to my work on the morality of human rights are those by, respectively, Chris Eberle, David Hollenbach, Tim Jackson, Rick Kay, and Nick Wolterstorff. See Eberle, *supra* notes 36, 40–42 and accompanying text; Hollenbach, *supra* notes 79, 93 and accompanying text; Timothy P. Jackson, *The Law and Gospel of Human Rights and Duties: John Paul II and Michael Perry on Sacredness and Intentional Killing*, 71 *EMORY L.J.* 1507 (2022); Richard S. Kay, *Normative Systems and Human Rights*, 71 *EMORY L.J.* 1579 (2022); Wolterstorff, *supra* note 124 and accompanying text.

In her *Festschrift* contribution, Martha Fineman focuses on a subject matter with respect to which she has been and remains the leading legal scholar: vulnerability theory. See Martha A. Fineman, *Rights, Resilience, and Responsibility*, 71 *EMORY L.J.* 1435 (2022). Martha and I plan to explore together, in the near future, the relationship between vulnerability theory (“VT”) and the morality of human rights (“MHR”), each of which is in part a political morality: In what respects, if any, do VT and MHR overlap? In what respects, if any, are VT and MHR complementary? In what respects, if any, are VT and MHR competitive?

CONCLUDING COMMENT

As I reported at the outset, the seeds of my scholarly trajectory were planted before I became a law professor. Thanks in part to my parents, I have been, since my high school years, focused on (indeed, obsessed by) questions at the interface of religion, morality, and politics—questions that are, for me, at least as much existential as they are intellectual. It has been a blessing to have had a career in which I was able to grapple with such questions—and to grapple with them in different intellectual domains, from constitutional law to human rights theory, and in ongoing conversation both with students and with other scholars.

Let me now end this account of my scholarly trajectory where I began it: I am greatly honored by, and deeply grateful for, this Festschrift.