The Morality of Human Rights

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ABSTRACT

The Universal Declaration of Human Rights embodies a particular morality: the morality of human rights. In this article, I address several questions concerning that morality, beginning with this fundamental question: What reason do we have, if any, to accept, rather than reject, the morality of human rights? I also explicate two human rights—the human right to moral equality and the human right to moral freedom—and then pursue the implications of the two rights for two human rights controversies: the controversies concerning, respectively, abortion and same-sex marriage.

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?"[1]

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1. Richard Rorty, *Human Rights, Rationality, and Sentimentality, in* On Human Rights: The Oxford Amnesty Lectures 1993 111, 115, 121–22 (Stephen Shute & Susan Hurley eds., 1993). *See id.* at 120–21:

> [B]etween Kant's time and ours 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

The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948,[2] embodies a particular morality: the morality of human rights (as I call it). In this essay, I address several questions concerning that morality.[3]

I. WHY ACCEPT THE MORALITY OF HUMAN RIGHTS?[4]

I begin with this fundamental question: What reason (or reasons) do we have, if any, to accept, rather than reject, the morality of human rights; more precisely, what reason do we have, if any, to live our lives—and to do what we reasonably can, all things considered, to get our governments to conduct their affairs—in accord with the morality of human rights?

The term "human right" has no canonical meaning. Indeed, the term, as philosopher James Griffin has observed, "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 jurisprudents as well."[5] However, in the context both of the Universal Declaration of Human Rights and of the several international

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not as offering one more theory about what we really are but as providing reasons why we need not ask what we really are.

In earlier writings, I was skeptical of Rorty's call to abandon "human rights foundationalism" (*Id.* at 116). *See* Michael J. Perry, The Idea of Human Rights 30–39 (1998); Michael J. Perry, Toward a Theory of Human Rights 26–29 (2007). As this essay makes clear, I am no longer skeptical.

2. A large scholarly literature discusses the drafting and adoption of the Universal Declaration. Two important works: Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (2001); Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting, and Intent (1999). *See also* Siep Stuurman, The Invention of Humanity: Equality and Cultural Difference in World History 497–508 (2017).

3. In July 2019, Secretary of State Michael R. Pompeo

> launch[ed] a Commission on Unalienable Rights at the State Department . . . The Commission . . . will study . . . the Universal Declaration on Human Rights, along with our founding documents and other important works. Its members will address basic questions: What are our fundamental freedoms? Why do we have them? Who or what grants these rights? How do we know if a claim of human rights is true? What happens when rights conflict? Should certain categories of rights be inextricable "linked" to other rights?

Michael R. Pompeo, *Unalienable Rights and U.S. Foreign Policy*, Wall Street J. (8 July 2019). Much of my discussion in this essay is relevant to several of the foregoing (and related) questions. The critical response to Secretary Pompeo's launch of the Commission was swift. *See, e.g.*, Robin Wright, *The Unbelievable Hypocrisy of Trump's New "Unalienable Rights" Panel*, New Yorker (9 July 2019); Kenneth Roth, *Beware the Trump Administration's Plans for "Fresh Thinking" on Human Rights*, Wash. Post (11 July 2019); Roger Cohen, *Trump's Ominous Attempt to Redefine Human Rights*, N.Y. Times (12 July 2019).

4. For an earlier version of some of the material in this part of the essay, see Michael J. Perry, A Global Political Morality: Human Rights, Democracy, and Constitutionalism 13–41 (2017).

5. James Griffin, On Human Rights 14–15 (2008).

human rights treaties that have entered into force in the period since the adoption of the Universal Declaration,[6] the term "human right" does have a particular meaning.

When we read the Universal Declaration and the several international human rights treaties that have followed in the Universal Declaration's wake, we see that the documents state rules of conduct for government, both rules that direct government *not* to do something and rules that direct government *to do* something. The principal terminology in which such rules are conventionally discussed is the terminology—the language—of "human rights."[7] The language of human rights entails the language of "duties:" To say that A has a right that B not do X to A is to say that B has a duty not to do X to A; to say that A has a right that B do X for A is to say that B has a duty to do X for A.

As the international human rights documents illustrate:

- The rights (rules) listed in documents directly regulate government actors; in that sense, the duty-bearers are government actors.[8] However, some rights require government actors to regulate nongovernment actors and thereby indirectly regulate nongovernment actors. For example, Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women[9] requires state parties "to take all appropriate measures to eliminate discrimination by any person, organization, or enterprise."

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6. For a comprehensive compilation of the treaties, a compilation that includes, for each treaty, the date the treaty entered into force and a list of the countries that have ratified the treaty, see United Nations Treaty Collection, *Multilateral Treaties Deposited with the Secretary General,* https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en.
7. *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.

8. Unlike international human rights treaties, treaties concerning what is conventionally called "international humanitarian law" directly regulate nongovernment (as well as government) actors. See especially Rome Statute of the International Criminal Court, *adopted* 17 July 1998, U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (*entered into force* 1 July 2002). In the future, there may be one or more international human rights treaties that directly regulate nongovernment actors. *See* Larry Catá Backer, *Considering a Treaty on Corporations and Human Rights: Mostly Failures But with a Glimmer of Success* (2015), http://ssrn.com/abstract=2652804; Douglass Cassel & Anita Ramasastry, *White Paper: Options for a Treaty on Business and Human Rights,* 6 Notre Dame J. Int'l & Comparative L. i-x, 1–50 (2016).
9. As of July 2019, there are 189 state parties to the Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (*entered into force* 3 Sept. 1981) [hereinafter CEDAW]. The United States, however, is not one of them. *See* Lisa Baldez, Defying Convention: U.S. Resistance to the U.N. Treaty on Women's Rights (2014).

- Although according to most of the rights listed in the documents, the rights-holders are all human beings (i.e., all *born* human beings[10]), according to some of the listed rights, the rights-holders are not *all* human beings but only *some*.

Article 37 of the Convention on the Rights of the Child, which is the most widely ratified international human rights treaty,[11] is an example of an international human right according to which only some human beings are the rights-holders: Article 37 requires government to "ensure that: (a) . . . Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." Article 38 of the Convention is another example: Article 38 requires government to "refrain from recruiting any person who has not attained the age of fifteen years into their armed forces."

As Articles 37 and 38 of the Convention reflect, that government may justifiably do something to some human beings, does not entail that government may justifiably do the same thing to all human beings. For example, that government may justifiably recruit adults into the military does not entail that it may justifiably recruit children. Similarly, that government may justifiably decline to do something for some human beings—for example, able-bodied persons—does not entail that that it may justifiably decline to do the same thing for human beings who are disabled. One of the most recent international human rights treaties to enter into force (2008) is the Convention on the Rights of Persons with Disabilities.[12] Another example is Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women, which provides, in relevant part, that "States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."[13]

Philosopher John Tasioulas has claimed that the term "human right" has an "orthodox" meaning, which Tasioulas endorses: a right "possessed

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10. The Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess, art. 1, U.N. Doc. A/RES/3/217A (1948) [hereinafter UDHR] states, "[a]ll human beings are born free and equal in dignity and rights . . . and should act towards one another in a spirit of brotherhood." In part three of this essay, I discuss the human rights controversy concerning abortion.
11. As of now, every member of the United Nations except one is a party to the Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 37, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (*entered into force* 2 Sept. 1990). The one: the United States. *See* Martha Middleton, *The Last Holdout: The ABA Adds its Voice to Calls for the United States to Ratify the Convention on the Rights of the Child*, ABA J. 64 (2016).
12. As of July 2019, there are 179 state parties to the Convention on the Rights of Persons with Disabilities, *adopted* 13 Dec. 2006, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 (2006) (*entered into force* 3 May 2008).
13. CEDAW, *supra* note 9, art. 12.

by all human beings simply in virtue of their humanity."[14] However, in the context of the Universal Declaration and of the several international human rights treaties that have followed in its wake, some human rights are rights possessed not by all human beings but only by some. As the term "human right" is understood both in the Universal Declaration and in the treaties that have followed in its wake, a right is a *human* right, *even if the rights-holders are not all but only some human beings*, if the fundamental rationale for establishing and protecting the right (e.g., as a treaty-based right) is that conduct that violates the right violates the norm stated in Article 1 of the Universal Declaration that "all human beings . . . should act towards one another in a spirit of brotherhood." For example, the fundamental rationale for Articles 37 and 38 of the Convention on the Rights of the Child is that for government to engage in conduct that violates either article is for it to fail to act "in a spirit of brotherhood" toward some human beings: children.

The morality of human rights—the morality embodied in the Universal Declaration—is not just a political morality.[15] Again, according to Article 1 of the Universal Declaration, "all human beings . . . should act towards one another in a spirit of brotherhood."[16] Nonetheless, in stating rules of conduct for government—every government—the morality of human rights is a political morality.[17] Indeed, the morality of human rights is the first truly global political morality in human history.[18] What does the morality of human rights require of government?

In drafting Article 1 of the Universal Declaration, René Cassin, the French delegate to the United Nations commission charged with drafting what would become the Universal Declaration,

> had wanted to stress "the fundamental principle of the unity of the human race" because Hitler had "started by asserting the inequality of men before

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14. John Tasioulas, *On the Foundations of Human Rights, in* Philosophical Foundations of Human Rights 45 (Rowan Cruft, S. Matthew Liao & Massimo Renzo eds., 2015) (emphasis added). Tasioulas calls this definition, which he affirms, "the orthodox view." *Id.*
15. By a "political morality," I mean: (a) a set of norms about how government—whether a particular government or group of governments, a particular kind of government, or every government—should act toward the human beings over whom it (or they) exercises power; a set of norms, in particular, about what government should not do to and what it should do for the human beings over whom it exercises power; and (b) the rationales that warrant, or are thought to warrant, the norms.
16. As Alexandre Lefebvre has emphasized, "contrary to the widespread impression that nation-states are the primary addressees of human rights documents, [the Universal Declaration] explicitly name[s] another subject. . . . [T]he principal addressee . . . is not government or a people; it is, instead, each and every individual person." Alexandre Lefebvre, Human Rights as a Way of Life: On Bergson's Political Philosophy 78 (2013).
17. *Cf. id.* at xv-xvi: "Bergson uses human rights as a kind of perspective from which to evaluate all other institutions, types of political organization, and what we might generally call political phenomena. . . . [For Bergson, human rights] are the means by which to judge the sense, value, and orientation of all other political forms."
18. *See* Perry, A Global Political Morality, *supra* note 4, at 26–27.

> attacking their liberties." Later on, Cassin reiterated the point that "the authors of that Article had wished to indicate the unity of the human race regardless of frontiers, as opposed to theories like those of Hitler." When someone . . . observed that these principles were too well known and did not need to be stated again, Cassin quickly responded that the argument "was invalid in light of recent events. Within the preceding years," he said, "millions of men had lost their lives, precisely because those principles had been ruthlessly flouted." He thought it "was essential that the UN should again proclaim to mankind those principles which had come so close to extinction and should refute the abominable doctrine of fascism."[19]

The *general* requirement of the morality of human rights, as Cassin's comments indicate, is that (in the words of Article 1) "all human beings . . . should act towards one another in a spirit of brotherhood:" Neither any government actor nor anyone else should act towards any human being in a hateful or even indifferent way; to do so would be to violate the morality of human rights. The most common bases for acting towards some human beings in such a way, as Article 2 of the Universal Declaration indicates, include "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[20]

The *specific* requirements of the morality of human rights are the several rights set forth in the Universal Declaration. The specific requirements/rights are specifications, for particular contexts, of the general requirement. Article 5 of the Universal Declaration, for example, is, in part, a specification for the context of punishment: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

What reason(s) do we have, if any, to accept the morality of human rights? In particular, what reason do we have to accept the general requirement, which grounds the specific requirements? That some of us have a reason to live our lives, and to do what we reasonably can, all things considered, to get our governments to conduct their affairs, in accord with the requirement to "act towards all human beings in a spirit of brotherhood" does not entail that others of us have the same reason—or, indeed, any reason—to

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19. Morsink, *supra* note 2, at 38–39. *See also* Stuurman, *supra* note 2, at 498: "According to . . . Cassin, the declaration had to be based on the 'great fundamental principle of the unity of all the races of mankind.'" Stuurman adds: ". . . Cassin belonged to a Jewish family . . . [and] had lost twenty-nine relatives in the Holocaust." *Id.* On Cassin, see Glendon, *supra* note 2, at 61–64; Jay Winter & Antoine Prost, René Cassin and Human Rights: From the Great War to the Universal Declaration (2013). Cf. Glendon, *supra* note 2, at 68 (quoting Eleanor Roosevelt's comments on the use of the word "men"): "[W]hen we say 'all men are brothers,' we mean that all human beings are brothers, and we are not differentiating between men and women. . . . I have always considered myself a feminist but I really would have no objection to the use of the word as the Committee sees it."

20. *See* David Livingstone Smith, Less Than Human: Why We Demean, Enslave, and Exterminate Others (2011); David Livingstone Smith, *The Essence of Evil*, aeon (24 Oct. 2014), http://aeon.co/magazine/society/how-does-dehumanisation-work/.

do so. For example, some of us have a theistic reason: a reason based on a theistic worldview.[21] But many of us are not theists, and the inquiry I want to pursue here is secular, not theological: What reason do we who are not theists have, if any, to accept the "act towards all human beings in a spirit of brotherhood" requirement?[22]

I want to consider two main answers—perhaps *the* two main answers—beginning with the answer offered by John Finnis, who is widely regarded as the most important "natural law" moral philosopher of our time. Article 1 of the Universal Declaration tells us that we ("all human beings") should to act towards one another "in a spirit of brotherhood." Finnis tells us that we should act towards one another with "fundamental impartiality."[23] If the difference between Article 1's "in a spirit of brotherhood" norm and Finnis's

21. Notwithstanding the profound differences among the three main theistic worldviews—Judaism, Christianity, and Islam—in each of them, as philosopher Hilary Putnam noted, "the whole human race [is regarded] as One Family [and] all women and men as sisters and brothers." Hilary Putnam, The Many Faces of Realism 60–61 (1987).

As a statement by the Second Vatican Council of the Roman Catholic Church put the point: "We cannot truly call on God, the Father of all, if we refuse to treat in a brotherly way any man . . . Man's relation to God the Father and his relation to men his brothers are so linked together that Scripture says: 'He who does not love does not know God' (1 John 4:8)." (In the statement, which appears in the Council's *Declaration on the Relation of the Church to Non-Christian Religions, in* Nostra Aetate (1965), "man" is meant, of course, in a sense inclusive of women.) The sensibility that animates the Council's statement is not distinctively Christian. *See, e.g.*, Ben Zion Bokser & Baruch M. Bokser, *Introduction: The Spirituality of the Talmud, in* The Talmud: Selected Writings 7, 30–31 (1989):

> As the rabbis put it: "We are obligated to feed non-Jews residing among us even as we feed Jews; we are obligated to visit their sick even as we visit the Jewish sick; we are obligated to attend to the burial of their dead even as we attend to the burial of the Jewish dead."

Charles Taylor has written that the "affirmation of universal human rights [that characterizes] modern liberal political culture [represents an] authentic development[] of the gospel." Charles Taylor, A Catholic Modernity? 16 (1996). Taylor hastens to add "that modern culture, in breaking with the structures and beliefs of Christendom, also carried certain facets of Christian life further than they ever were taken or could have been taken within Christendom. In relation to the earlier forms of Christian culture, we have to face the humbling realization that the breakout was a necessary condition of the development." *Id.* For Taylor's development of the point, with particular reference to modern liberal political culture's affirmation of universal human rights, see *id.* at 18–19.

Consider, in the context of Taylor's "authentic development of the Gospel" statement, that both Pope John XXIII and Pope John Paul II revered the Universal Declaration. In his encyclical *Pacem in Terris* (1963), John XXIII called the Universal Declaration "an act of the highest importance." In his first encyclical, *Redemptor Hominis* (1979), John Paul II referred to the Universal Declaration as "a magnificent effort." Sixteen years later (1995), in his address to the United Nations, John Paul II described the Universal Declaration as "one of the highest expressions of the human conscience of our time." In 1998, in his message for World Peace Day, John Paul II emphasized that the Universal Declaration should be "observed integrally both in spirit and in letter." *Quoted in* Avery Dulles, *Human Rights: Papal Teaching and the United Nations*, 179 America 14, 15 (1998).

22. Of course, that one is a theist does not mean that one cannot have a nontheistic reason—whether in addition to or instead of a theistic reason—to accept the morality of human rights.

23. *See* John Finnis, Natural Law and Natural Rights 106–09 (2011).

"fundamental impartiality" norm is, as it seems to me to be, merely terminological, and if Finnis succeeds in providing a nontheistic rationale for his norm, then he has succeeded in providing a nontheistic rationale for Article 1's "in a spirit of brotherhood" norm. What nontheistic reason do we have, according to Finnis, to act towards all human beings with "fundamental impartiality?" "My own well-being," Finnis insists, "is [not] of more value than the well-being of others, simply because it is mine: intelligence and reasonableness can find no basis in the mere fact that that A is A and not B (that I am I and not you) for evaluating his (our) well-being differently."[24] My own well-being is not of more value *to whom* than the well-being of others? It is not unreasonable—and would not be at all surprising—that A values his own well-being and the well-being of his family, friends, and tribe, etc., more highly than he values B's well-being and the well-being of B's family, etc. and vice versa. I concur in legal philosopher Jeffrey Goldsworthy's judgment that "Finnis has tried to do in two pages [in *Natural Law and Natural Rights*] what . . . others have devoted entire books to: . . . show that egoism is inherently self-contradictory or irrational. All of these attempts have failed."[25]

In a lecture delivered in 2005, twenty-five years after *Natural Law and Natural Rights* was first published, Finnis said something suggestive of a different nontheistic rationale for the "fundamental impartiality" norm: that an act that violates the norm so contravenes human nature as to be "self-mutilating."[26] The essay by Richard Rorty that includes the passage with which I began this essay is, inter alia, a critique of "natural law" theories such as Finnis's. Rorty's point is not that there is no such thing as human nature but that, contra Finnis and other natural law thinkers,[27] there is no human nature *of the sort imagined by such thinkers*: a human nature such that only one morality—in Finnis's case, a morality that includes, as a basic feature, the "fundamental impartiality" norm—is consistent with human nature. Even if to live a life *in accord with* the "fundamental impartiality" norm does not contravene human nature, why should we believe that it

24. *Id.* at 107. Finnis's moral egalitarianism allows, as any such moral theory must, that there is "reasonable scope for self-preference," there are "bounds of reasonable self-preference, of reasonable discrimination in favor of myself, my family, my group(s)." *Id.* at 107–08. *Cf.* Bharat Ranganathan, *On Helping One's Neighbor*, 40 J. Religious Ethics 653, 653 (2012) (arguing that "accepting an obligation to assist does not necessarily result in one's abandoning one's special relations, abnegating self-regard, or no longer pursuing other non-moral strivings").

25. J.D. Goldsworthy, *God or Mackie?: The Dilemma of Secular Moral Philosophy*, 30 Am. J. Jurisprudence 43, 75 (1985).

26. John Finnis, *On "Public Reason"* 16–17 (Notre Dame Legal Studies, Paper No. 06–37, 2005), http://ssrn.com/abstract=955815.

27. *See* D.J. O'Connor, Aquinas and Natural Law 57 (1968):

> In so far as any common core can be found to the principal versions of the natural law theory, it seems to amount to the statement that the basic principles of morals and legislation are, *in some sense or other,* objective, accessible to reason and based on human nature.

contravenes (what we know of) human nature, *that it is "self-mutilating,"* to live a life of a different sort: a life *not in accord with* the norm, a life, say, in which, although one's "treatment of a rather narrow range of featherless bipeds is morally impeccable," one is "indifferent to the suffering of those outside this range?"[28] Given what we know about the vast range of human communities across space and time, it is more plausible to conclude that, as philosopher Stuart Hampshire stated, although "[t]here are obvious limits set by common human needs to the conditions under which human beings flourish and human societies flourish[,]" it is nonetheless the case "that human nature, *conceived in terms of common human needs and capacities,* always underdetermines a way of life, and underdetermines an order of priority among virtues, and therefore underdetermines the moral prohibitions and injunctions that support a way of life."[29]

Let us move on to consider the second main answer to the "what non-theistic reason" question. The answer is embedded in the three components of what is conventionally called the International Bill of Human Rights: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[30] In its preamble, the Universal Declaration refers to "the inherent dignity . . . of all members of the human family" and states, "[a]ll human beings are born free and equal in dignity . . . and should act towards one another in a spirit of brotherhood."[31] The two international covenants each refer, in their preambles, to "the inherent dignity . . . of all members of the human family" and to "the inherent dignity of the human person"—from which, both covenants declare, "the equal and inalienable rights of all members of the human family . . . derive." In 1986, the UN General Assembly adopted a resolution—Setting International Standards in the Field of Human Rights—according to which international human rights treaties should not designate a right as a human right unless the right is, *inter alia*, "of fundamental character and derive[s] from the inherent dignity and

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28. *See* Rorty, *supra* note 1, at 124:

    > Moral philosophy has systematically neglected the much more common case: the person 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.

29. Stuart Hampshire, Morality and Conflict 155 (1983) (emphasis added). *See also* Rorty, *supra* note 1, at 119 ("nothing in that nature that is relevant to our moral choices"). *Cf.* Phillip Honenberger, Book Note, Notre Dame Phil. Reviews (2019) (reviewing Maria Kronfeldner, What's Left of Human Nature?: A Post-Essentialist, Pluralist, and Interactive Account of a Contested Concept (2018)).

30. International Covenant on Civil and Political Rights, *adopted* 19 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *adopted* 19 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR].

31. UDHR, *supra* note 10, art. 1.

worth of the human person."[32] In 1993, the UN-sponsored World Conference on Human Rights adopted the Vienna Declaration and Programme of Action, which includes this language: "Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person."[33]

The passages quoted in the preceding paragraph constitute this twofold claim: *Each and every (born) human being (1) has equal inherent dignity and (2) is therefore inviolable: not-to-be-violated.* A few words of clarification are in order. The *Oxford English Dictionary* defines dignity as "[t]he quality of being worthy or honourable; worthiness, worth, nobleness, excellence." That every human being has "inherent" dignity is the International Bill's way of saying that the dignity that every human being has, she has not as a member of one or another group (racial, ethnic, national, religious, etc.), not as a man or a woman, not as someone who has done or achieved something, and so on, but simply as a human being. To say that every human being has "equal" inherent dignity is to say that no human being has more—or less—inherent dignity than any other human being: "All human beings are . . . equal in dignity." That every human being is inviolable—not-to-be-violated—is to say that one should not violate any human being; instead, one should respect every human being; that is, "all human beings . . . should act towards one another in a spirit of brotherhood." In the relevant sense, one *violates* a human being when one fails to act in accord with the morality of human rights. One *respects* a human being when one does so act.

Is there anything common to each and every human being in virtue of which all human beings—including newborns, the severely cognitively impaired, homicidal psychopaths, and so on—have *equal* inherent dignity? There are theistic answers, such as "All human beings are created in the image of God."[34] But is there a plausible *nontheistic* answer? There is good reason to be skeptical. Brian Leiter has argued recently that "the moral egalitarianism that is central to modern morality cannot be defended on any basis other than the supposition that there is an egalitarian God that invests everyone with equal moral worth."[35] He writes:

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32. UNGA Res. Setting International Standards in the Field of Human Rights, U.N. Doc. A/RES/41/120 (1986), https://undocs.org/en/A/RES/41/120.
33. Vienna Declaration and Programme of Action, *adopted* 25 June 1993, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., 22d plen. mtg., pmbl, U.N. Doc. A/CONF.157/23 (1993), *reprinted in* 32 I.L.M. 1661 (1993).
34. *See* Roger Ruston, Human Rights and the Image of God (2004). Pope Francis, in paragraph 65 of his 2015 encyclical on the environment, *Laudato Si': On the Care for our Common Home*, *quoting* John Paul II statement that: "[T]he special love of the Creator for each human being 'confers upon him or her an infinite dignity.'" http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.
35. Brian Leiter, *The Death of God and the Death of Morality*, 102 The Monist 386, 398 (2019). *See also* Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism, in* Equality: Selected Readings 282 (Louis P. Pojman & Robert Westmoreland eds., 1997).

> Here is the dilemma that haunts the basis of equality problem: any feature of persons one might identify as *justifying* their equal treatment is not, in fact, shared equally by persons, thus raising the question how it could justify *equality* of moral consideration. People differ, for example, in their rationality, their sensitivity to pleasure and pain, and their moral capacities, not to mention, to put it in more banal terms, their intelligence, alertness, and empathy. If what warrants equal moral consideration is reason, sentience, or moral sensitivity, then there is no reason to think humans per se warrant equal moral consideration given how much they differ in these attributes.[36]

Again, there is good reason to be skeptical.[37] In any event, many of us, both nontheists and theists, *are* skeptical. Let us ask then: What nontheistic reason, if any, do we who fit the foregoing profile have—we who are unable to discern a plausible nontheistic answer to the question at the beginning of this paragraph—to live our lives, and to do what we reasonably can to get our governments to conduct their affairs, in accord with the requirement to "act towards all human beings in a spirit of brotherhood?"

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36. Leiter, *The Death of God and the Death of Morality*, *supra* note 35, at 394. Leiter, quoting at length from a "devastating" article by Richard Arneson, explains why John Rawls's "appeal to 'range properties'" is not successful. *See id.* at 394–95 (in part *quoting* Richard Arneson, *What, if Anything, Renders All Humans Morally Equal?, in* Singer and His Critics 103, 108–109 (Dale Jamieson ed.,1999). *Cf.* Griffin, *supra* note 5, at 107: "We have a better chance of improving the discourse of human rights if we stipulate that only normative agents bear human rights—no exceptions: not infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on."

37. See—in addition to Pojman, *supra* note 35; Leiter, *The Death of God and the Death of Morality*, *supra* note 35, and the now-classic essay by Richard Rorty, *supra,* note 1—the first chapter ("Against Dignity") of this recent, important work: Andrea Sangiovanni, Humanity Without Dignity: Moral Equality, Respect, and Human Rights 13–71 (2017).

"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." This passage—*quoted in* George Parkin Grant, English-Speaking Justice 77 (1985)—appears in Nietzsche's *Thus Spoke Zarathustra*, Part IV ("On the Higher Man"), near the end of section 1. "Nietzsche's thought," wrote philosopher Bernard Williams, is that "there is not only no God, but no metaphysical order of any kind . . ." Bernard Williams, *Republican and Galilean*, N.Y. Rev. Books (8 Nov. 1990), at 45, 48 (reviewing Charles Taylor, Sources of the Self: The Making of Modern Identity (1989)). "Few contemporary moral philosophers," observed philosopher Philippa Foot, "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 104 (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).

Imagine that we are talking with a nontheist,[38] who is skeptical that there is anything all human beings share in virtue of which all human beings have equal inherent dignity. More broadly, she is skeptical that there is any successful nontheistic "normative theory:" "a theory that purport[s] to justify, discursively and systematically, [one's] normative opinions, to show them to be rationally obligatory and objectively valid."[39] Her skepticism encompasses any nontheistic normative theory (including, of course, John Finnis's natural law theory) "that purports to justify, discursively and systematically," the "in a spirit of brotherhood" norm or any equivalent egalitarian norm, that purports to show the norm "to be rationally obligatory and objectively valid." 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 life of this world."[40] We ask her: "*Why* do you embrace—*why* do you live your life, or aspire to live it, in accord with—the norm?"

She responds:

> 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

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38. 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." *See* Ronald Dworkin, *Religion Without God,* N.Y. Rev. Books (4 Apr. 2013), *citing*, Torcaso v. Watkins, 367 US 488, n.11 (1961):

    > Among 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. *See Washington Ethical Society* v. *District of Columbia*, 101 US App. D.C. 371, 249 F. 2d 127; *Fellowship of Humanity* v. *County of Alameda*, 153 Cal. App. 2d 673, 315 P. 2d 394; II *Encyclopaedia of the Social Sciences* 293; 4 *Encyclopaedia Britannica* (1957 ed.) 325–327; 21 *id.*, at 797; Archer, *Faiths Men Live By* (2d ed. revised by Purinton) 120–138, 254–313; 1961 *World Almanac* 695, 712; *Year Book of American Churches* for 1961, at 29, 47.

    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).

39. The quoted language accompanying this note is Brian Leiter's. *See* Brian Leiter, *Why Marxism Still Does Not Need Normative Theory*, Analyse & Kritik (2015), http://www.analyse-und-kritik.net/Dateien/5a798590516c6_leiter.pdf.

40. On 4 April 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.'" Joseph Casazza, "*Taming the Savegeness of Man": Robert Kennedy, Edith Hamilton, and Their Sources*, 96 The Classical World 197, 197 (2003).

> 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."[41]

We reply, "But the problem of justification persists: the justification of the sensibility that animates your response. 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.'"[42]

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—what justifies my way of being oriented in the world; in particular, my way of being oriented to the Other—if indeed anything justifies it. Are you asking me to provide you with an argument in support of the claim, which for me is a conviction, that there is no better way—no more beautiful way, no more ennobling way—for a human being to be oriented in the world? But I have no such argument. I have nothing to offer you other than my experience, both my experience—from the "inside," as it were—of the sensibility and my experience—from the "outside"—of others, such as the Dalai Lama and Thich Nhat Hahn, who embody the sensibility, my experience of their beautiful, ennobling humanity and peace.[note omitted] 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 will work with me, whatever *their* particular beliefs or motivation.[43]

Recall the passage by Richard Rorty that serves as this essay's epigraph—a passage that lauds the "growing willingness to neglect the question 'What

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41. 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." Richard Rorty, addressing the question "Why should I care about a stranger, a person who is no kin to me, a person whose habits I find disgusting?," sketches these responses:

> "Because this is what it's like to be in her situation—to be far from home, among strangers," or "Because she might become your daughter-in-law," or "Because her mother would grieve for her." Such stories, repeated and varied over the centuries, have induced us, the rich, safe, powerful, people, to tolerate, and even to cherish, powerless people—people whose appearance or habits or beliefs at first seemed an insult to our own moral identity, our sense of the limits of permissible human variation.

Rorty, *supra* note 1, at 133–34.

42. 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). *Cf.* Pojman, *supra* note 35.

43. Perry, A Global Political Morality, *supra* note 4, at 37–38. *See, e.g.*, Dalai Lama, Ethics for the New Millennium (1999); Thich Nhat Hahn, Essential Writings (Robert Ellsberg ed., 2001). *See also* Thupten Jinpa, A Fearless Heart: How the Courage to Be Compassionate Can Transform Our Lives (2015). *Cf.* Linda Trinkhaus Zagzebski, Exemplarist Moral Theory (2017).

is our nature?' and to substitute the question 'What can we make of ourselves?'"—and notice that 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; in Rorty's words, she has told us, "what sort of world we can prepare for our great-grandchildren:"[44] *a world animated by the "in a spirit of brotherhood" norm.*[45]

As her response indicates, our interlocutor's sensibility 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*[46] is a kind of love—different from *eros* and *philia*, but a kind of love nonetheless.[47] Compare to our interlocutor's agapic sensibility that of someone "whose treatment of a rather narrow range of featherless

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44. See text accompanying note 1.
45. Louis Pojman would have identified our interlocutor's response as "the existential strategy." *See* Pojman, *supra* note 35, at 284–85.
46. The term "agape" is widely used in Christian ethics. *See, e.g.*, Timothy P. Jackson, Political Agape: Christian Love and Liberal Democracy (2015); Agape, Justice, and Law: How Might Christian Love Shape Law? (Robert F. Cochran, Jr. & Zachary R. Calo eds., 2017). However, 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*. The agapic sensibility is ecumenical. *See, e.g.*, Philip J. Ivanhoe, *Confucian Cosmpolitanism*, 42 J. Religious Ethics 22, 37 (2014) (*quoting Analects* [of Confucious] 12.5):

    > 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?"

    Ivanhoe then comments:

    > 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.

    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 Intercultural Hum. Rts. Rev. 281 (2013). *Cf.* Hans Ingvar Roth, P.C. Chang and the Universal Declaration of Human Rights 211–14 (2018).
47. 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 can be asked 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.

bipeds is morally impeccable, but who remains indifferent to the suffering of those outside this narrow range."[48] For example, compare 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."[49] What sort of world was Pannwitz preparing for *his* great-grandchildren?

Given that *agape* is a prominent feature of Christian morality,[50] 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. Many of the rescuers interviewed by Kristen Renwick Monroe—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.[51] Moreover, there are many who fit this profile: was a theist in the grip of the agapic sensibility; no longer a theist, but still in the grip—and no less in the grip—of the agapic sensibility.

Is it surprising that in our effort to understand why our interlocutor embraces the "in a spirit of brotherhood" norm, we have finally arrived at a sensibility—an orientation to the Other—so fittingly expressed in the language of love?[52] Listen, in that regard, to the acclaimed Australian philosopher Raimond Gaita,[53] who, like our interlocutor, is a nontheist: "The 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." Gaita continues:

> 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.[54]

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48. *See* Rorty, *supra* note 1, at 124.
49. Alain Finkielkraut, In the Name of Humanity: Reflections on the Twentieth Century 2 (2000).
50. *See supra* note 46, at 312.
51. *See* Kristen Renwick Monroe, The Heart of Altruism: Perceptions of a Common Humanity (1996). *See also* Kristen Renwick Monroe, *Explicating Altruism, in* Altruism & Altruistic Love: Science, Philosophy, & Religion in Dialogue 106–22 (Stephen G. Post et al. eds., 2002); Kristen Renwick Monroe, Ethics in an Age of Terror and Genocide: Identity and Moral Choice (2012).
52. 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." Lefebvre, *supra* note 16, at 70.
53. *See* Philosophy, Ethics and a Common Humanity: Essays in Honour of Raimond Gaita (Christopher Cordner ed., 2011).
54. *Id.* at xviii-xix. What Gaita says next is sobering, to say the least: "Indeed, exactly that is happening." *Id.* at xix.

Talk about human dignity is common in discourse about human rights.[55] Recall that our interlocutor rejects the "equal inherent dignity" rationale for the morality of human rights. Can our interlocutor nonetheless participate in dignity-talk? She can—and sometimes does: When she says that each and every human being has human dignity, she means simply that each and every human being is one of those ("all human beings") towards whom we are to "act in a spirit of brotherhood." And when she says that government is violating someone's human dignity, she means that government is not acting towards him or her "in a spirit of brotherhood." Thus understood, dignity-talk is not about some spiritual or metaphysical quality that each and every human being, as such, is claimed to have, nor does it presuppose the "equal inherent dignity" rationale.

II. TWO HUMAN RIGHTS: MORAL EQUALITY; MORAL FREEDOM[56]

Again, the general requirement of the morality of human rights—to "act towards all human beings in a spirit of brotherhood"—grounds the specific requirements: The specific requirements—the rights listed in the Universal Declaration—are specifications, for particular contexts, of the general requirement. I focus in this part on two such rights, two that have been of special concern to me in my scholarly work: the right to moral equality and the right to moral freedom.

A. The Human Right to Moral Equality

The Universal Declaration begins by affirming that "[a]ll human beings are born free and equal in dignity and rights" and then goes on to state that all human beings "should act towards one another in a spirit of brotherhood."[57] According to Article 1, every human being is as worthy as every other human being—no human being is less worthy than any other human being—of being treated "in a spirit of brotherhood."[58] Thus, the right to moral equality: the right of every human being to be treated as the moral equal of every other human being, in this sense: as *equally entitled with every other human being to be treated—as no less worthy than any other human being of being treated—"in a spirit of brotherhood."*

55. *See, e.g.*, Pablo Gilabert, Human Dignity and Human Rights (2018).
56. For an earlier version of some of the material in this part, see Perry, A Global Political Morality, *supra* note 4, at 55–87.
57. UDHR, *supra* note 10, art. 1.
58. *Id.*

The human right to moral equality is therefore more than a specification of the general requirement; it is an *entailment* of the general requirement: To accept the requirement to "act towards all human beings in a spirit of brotherhood" is *necessarily* to accept the human right to moral equality; it would make no sense to accept the former and reject the latter.

The most common grounds for treating some human beings as morally inferior—as less worthy than some other human beings, if worthy at all, of being treated "in a spirit of brotherhood"—have been, as listed both in Article 2 of the Universal Declaration and in Article 26 of the International Covenant on Civil and Political Rights, "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[59]

Under the right to moral equality, government may not disadvantage any human being based on the view that she—or someone else, someone, for example, to whom she is married[60]—is morally inferior. Similarly, government may not disadvantage any human being based on a sensibility to the effect that she is morally inferior—a sensibility such as "racially selective sympathy and indifference," namely, "the unconscious failure to extend to a [racial] minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group."[61] Or, analogously, a sensibility such as sex-selective sympathy and indifference. Government is disadvantaging a human being based at least partly on such a view or sensibility if but for that illicit, demeaning view or sensibility, government would not be disadvantaging her.

The right to moral equality entails not only that government may not deny to any human being the status of citizenship based on the view (or on a sensibility to the effect) that she is morally inferior; it also entails the right to *equal* citizenship: Government may not disadvantage any citizen based on the view that she is morally inferior. So, for example, government may not abridge—it may not dilute much less deny—any citizen's right to vote based on the view that she is morally inferior.[62]

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59. *Id.*, art. 2; ICCPR, *supra* note 30, art. 26.
60. *See* Loving v. Virginia, 388 U.S. 1 (1967). In response to "a now-discredited argument in defense of antimiscegenation laws"—namely, "that whites can marry only within their race; nonwhites can marry only within their race; therefore, antimiscegenation laws do not deny 'equal options'"—John Corvino has written:

    > Putting aside the problematic assumption of two and only two racial groups—whites and nonwhites—the argument does have a kind of formal parity to it. The reason that we regard its conclusion as objectionable nevertheless is that we recognize that the very point of antimiscegenation laws is to signify and maintain the false and pernicious belief that nonwhites are morally inferior to whites (that is, unequal).

    John Corvino, *Homosexuality and the PIB Argument*, 115 Ethics 501, 509 (2005).
61. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harvard L. Rev. 1, 7–8 (1976).
62. *Cf.* Mathias Risse, Book Note, Notre Dame Phil. Reviews (2014) (reviewing Human Rights: The Hard Questions (Cindy Holder & David Reidy eds., 2013)).

    > [I]t would not be helpful to appeal to [the human right to democratic governance] under many of the typical circumstances that prevent the emergence of democracy. In particular, if there are

The right to moral equality obviously does not require—no sensible right requires—that government treat every human being the same as every other human being. Government need not permit children to vote or drive cars. Nor need government distribute food stamps to the affluent. The examples are countless. But what government may *not* do is deny a benefit to anyone or impose a cost on anyone—government may not disadvantage any human being—based on the view (or on a sensibility to the effect) that she is morally inferior: less worthy than someone else, if worthy at all, of being treated "in a spirit of brotherhood."

As (in part) a right against government, the right to moral equality is often articulated as the right to "the equal protection of the law." Some examples:

- Article 26 of the International Covenant on Civil and Political Rights: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

- The African Charter on Human and People's Rights states, in Article 2, that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;" the Charter then states, in Article 3: "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."

- Article 15(1) of the Canadian Charter of Rights and Freedoms: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

- Article 9 of the South African Constitution: "1. Everyone is equal before the law and has the right to equal protection and benefit of the law . . . . 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

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substantial concerns that the racial or ethnic constellation in a country would, under the political conditions that one could reasonably expect to obtain, lead to a kind of excessively populist politics that might generate or exacerbate violent conflict, the sheer fact that there is a human right to democracy should not be decisive for anything.

For a concrete example of a situation of the sort to which Risse is referring, see Thomas Fuller, *In Myanmar, The Euphoria of Reform Loses Its Glow*, N.Y. Times (4 July 2014).

Like the preceding provisions, the United States Constitution, in the second sentence of section one of the Fourteenth Amendment, speaks, inter alia, of equal protection:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*[63]

As I have explained elsewhere,[64] the human right to moral equality is the core of the Fourteenth Amendment right to equal protection.

B. The Human Right to Moral Freedom

The articulation of the human right to moral freedom in ICCPR[65]—which is an elaboration of the Universal Declaration[66]—is canonical: As of July 2019, 173 of the 197 members of the United Nations (88 percent) are parties to the ICCPR, including, as of 1992, the United States. Article 18 states:

> 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 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.[67]

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63. United States Constitution, 14th Amendment (emphasis added).
64. Most recently in my contribution to the Festschrift honoring Richard Kay: Michael J. Perry, *Two Constitutional Rights, Two Constitutional Controversies*," 52 Connecticut L. Rev. (forthcoming 2020).
65. ICCPR, *supra* note 30, art. 18.
66. UDHR, *supra* note 10, art. 18 of the Universal Declaration 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.

Another international document merits mention: Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *adopted* 25 Nov. 1981, G.A. Res. 36/55, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/55 (1981). *See* Symposium, *The Foundations and Frontiers of Religious Liberty: A 25th Anniversary Celebration of the 1981 U.N. Declaration on Religious Tolerance,* 21 Emory Int'l L. Rev. 1 (2007).

67. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, art. 9, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953) is substantially identical:

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 "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 ensure the religious *and moral* education of their children in conformity with their own convictions."[68]

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 one or more individuals alleging that a state party has violated the ICCPR—stated that "[t]he right to freedom of thought, conscience and religion . . . in article 18.1 is far-reaching and profound."[69] How "far-reaching and profound?" The right 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 religiously-based.* 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

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> 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.

American Convention on Human Rights, *signed* 22 Nov. 1969, art. 12, O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (*entered into force* 18 July 1978) 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.

68. ICCPR, *supra* note 30, art. 18 (emphasis added).
69. Human Rights Committee, General Comment 22, art. 18, ¶ 1 (Forty-eighth session, 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.

> 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.[70]

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."[71]

Though common, it is misleading to describe the right we are discussing here as the right to *religious* freedom.[72] 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 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 religiously-based. 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."[73] 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."[74] 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."[75] Therefore, I call the right we are discussing here as the human right to moral freedom. But whatever one calls the right—whether one calls it, 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, instead, the right to moral (including religious) freedom—it is the right to the freedom to live one's life in accord with one's moral convictions and commitments, including one's religiously-based moral convictions and commitments.

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70. *Id.*
71. *Id* ¶ 11. *See* Yoon and Choi v. Republic of Korea, Communications Nos. 1321/2004, 1322/2004, *adopted* 3 Nov. 2006, U.N. GAOR, Hum. Rts. Comm., 88th Sess., U.N. Doc. CCPR/C/88/D/1321–22/2004 (2006) (ruling that Article 18 requires that parties to the ICCPR provide for conscientious objection to military service).
72. For an example of such a description, see Christopher McCrudden, *Catholicism, Human Rights and the Public Sphere*, 5 Int'l J. Pub. Theology 331 (2011).
73. Canada's Charter of Rights and Freedoms, § 2(a) (1982), https://laws-lois.justice.gc.ca/eng/const/page-15.html.
74. R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, 759.
75. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 337. *See* Howard Kislowicz, Richard Haigh & Adrienne Ng, *Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom*, 48 Alberta L. Rev. 679, 707–13 (2011).

Moreover, 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 by the right to moral freedom. As the Canadian Supreme Court has 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 experience 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 for some reason he or she sincerely derives a closeness to his or her God by sitting in a succah? Surely not.[76]

"It is the religious or spiritual essence of an action," reasoned the Court, "not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection."[77]

But by the same token—that is, because "[i]t is the religious or spiritual essence of an action . . . that attracts protection"—not every choice one makes or wants to make qualifies as a choice protected by the right to moral freedom. A choice to do or not to do something is protected by the right if, and only if, the choice fits this profile: animated by what Jocelyn Maclure and Charles Taylor, in their book *Secularism and Freedom of Conscience*, call "core or meaning-giving beliefs and commitments" as distinct from "the legitimate but less fundamental 'preferences' we display as individuals."[78]

> [The] 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."[79]

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76. Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, 588 (passages rearranged).
77. *Id.* at 553.
78. Jocelyn Maclure & Charles Taylor, Secularism and Freedom of Conscience 12–13 (Jane Marie Todd, trans., 2011). For Maclure and Taylor's elaboration and discussion of the distinction, see *id.* at 76–77, 89–97. For a functionally similar distinction, see Robert Audi, Democratic Authority and the Separation of Church and State 42–43 (2011).
79. Maclure & Taylor, *supra* note 78, at 77.

Although, as Maclure and Taylor are well aware, "it is difficult to establish in the abstract where the line between preferences and core commitments lies,"[80] I am inclined to concur with what Maclure and Taylor have argued:

> Whereas it is not overly controversial to classify beliefs stemming from established philosophical, spiritual, or religious doctrines as meaning-giving, what about the more fluid and fragmented field of values? Should the person who has her heart set on attending to a loved one in the terminal stage of life be classified with the . . . Muslim who is intent on honoring her moral obligations? The answer to that question is likely yes. It is unclear why a hierarchy ought to be created between, on the one hand, convictions stemming from established secular or religious doctrines and, on the other, values that do not originate in any totalizing system of thought. Why, in order to be "core," "fundamental," or "meaning-giving," must a conviction originate in a doctrine based on exegetical and apologetic texts? Moreover, attending to an ailing loved one is for some people an experience charged with meaning, one that leads them to face their own finitude and incites them to reassess their values and commitments . . . . A man may very well come to believe that if he cannot devote himself to his gravely ill wife or child, his life has no meaning, but he may not necessarily conduct a sustained metaphysical reflection on human existence . . . . [W]e believe it is rather the intensity of a person's commitment to a given conviction or practice that constitutes the similarity between religious convictions and secular convictions.[81]

Wherever "in the abstract" the line "between preferences and core commitments" is drawn, there will be 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.[82]

And there will be cases in which there is room for reasonable doubt about which side of the line a choice falls on. Wouldn't a generous application of the right to moral freedom involve resolving the benefit of the doubt in favor of the conclusion that the choice at issue is animated by "core or meaning-giving beliefs and commitments"—and is therefore protected by the right?

A generous application of the right—more precisely, a default rule according to which the benefit of the doubt is resolved in favor of the conclusion that the choice at issue is protected by the right—is much more feasible than it would be were the protection provided by the right unconditional ("absolute"). However, the protection provided by the right to moral freedom

80. *Id.* at 92.
81. *Id.* at 92–93, 96, 97.
82. *Id.* at 77.

is only conditional. 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*.[83] 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—as a practical matter, it must be—conditional: 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 accord with one's moral convictions and commitments, unless each of three conditions is satisfied:

- *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."[84] The particular government action at issue might be not the law (policy, etc.) itself but that the law does not exempt the protected conduct.
- *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.[85]
- *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 the action's "cost," which is a function mainly of the importance of the conduct the government actions 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.[86]

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83. ICCPR, *supra* note 30, art. 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.

84. 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 Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, U.N. Doc E/CN.4/1984/4 (1984), *reprinted in* 7 Hum. Rts. Q. 3 (1985) [hereinafter Siracusa Principles].

85. *Id.*

> 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.

86. The right to moral freedom obviously would not provide meaningful protection for conduct covered by the right if the consistency of government action with the right 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.

It is an essential aspect of the *conditional* human right to moral freedom that 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 violate 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." 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 1984,[87] and which state**,** in relevant part:

> 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.

With respect to "public morals," therefore, 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.[88]

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."[89]

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87. *See supra* note 84.
88. General Comment 22, *supra* note 69, n.4, 8, 10.
89. The International Covenant on Civil and Political Rights 510 (Sarah Joseph, Jenny Schultz & Melissa Castan eds., 2004).

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 Taylor and Maclure call "the state of contemporary societies:"[90] 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.[91]

Therefore, if in banning or otherwise regulating (impeding) conduct *purportedly* in order to protect "public morals," government is acting based on—"based on" in the sense that government almost certainly would not be doing what it is doing "but for"—a sectarian belief, whether religious or secular (nonreligious), that the conduct is immoral, government is not truly acting to protect *public* morals. 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."[92] 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

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90. Maclure & Taylor, *supra* note 78, at 106.
91. *Id.* at 10, 106. "'Moral pluralism' refers to the phenomenon of individuals adopting different and sometimes incompatible value systems and conceptions of the good." *Id* at 10. *See also* Charles Taylor, *Democratic Exclusions: Political Identity and the Problem of Secularism*, ABC Religion & Ethics (5 Apr. 2016), http://www.abc.net.au/religion/articles/2016/04/05/4437500.htm:

> 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.

92. Maclure & Taylor, *supra* note 78.

aspect of a sectarian morality.[93] 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."[94] The 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.[95]

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 [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

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93. 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 155–56 (2005). Had Mussolini read Machiavelli? "Machiavelli called religion 'the instrument necessary above all others for the maintenance of a civilized state,' [and who] 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 William & Mary L. Rev. 2105, 2182 (2003) (*quoting* Niccolo Machiavelli, The Discourses 139, 143 (Bernard R. Crick ed.). *Cf. Atheist Defends Belief in God*, The Tablet [London] 33 (24 Mar. 2007):

> 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."

94. Maclure & Taylor, *supra* note 78, at 18. *See generally* Brian J. Grim & Roger Finke, The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century (2011). "[T]he core thesis [of this book] holds: to the extent that governments and societies restrict religious freedoms, physical persecution and conflict increase." *Id.* at 222. *See also* Paul Cruickshank, *Covered Faces, Open Rebellion*, N.Y. Times (21 Oct. 2006). 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 and great suffering to mankind." Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *supra* note 66.

95. That the coercive imposition of 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: 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 whether the noncoercive affirmation of theistic belief violates the Establishment Clause of the US Constitution: Michael J. Perry, The Political Morality of Liberal Democracy 100–19 (2010) (Chapter 6 "Religion as a Basis of Lawmaking").

> 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.[96]

We may generalize Murray's insight: A belief that X is immoral is sectarian—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, and in that sense sectarian, among the citizens of such a 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 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.[97]

Unlike the human right to moral equality, the human right to moral freedom is not an entailment of the general requirement of the morality of human rights: To accept the general requirement—the requirement to "act

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96. "Memo to Cardinal Cushing on Contraception Legislation" (n.d., mid-1960s), http://woodstock.georgetown.edu/library/murray/1965f.htm. *See also* John Courtney Murray, SJ, Toledo Talk (5 May 1967) (commentary available in Georgetown University Library), http://woodstock.georgetown.edu/library/murray/1965f.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 (2011); Seth Meehan, *Catholics and Contraception: Boston, 1965*, N.Y. Times (15 Mar. 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 Catholic Reporter (28 Feb. 2012), https://www.ncronline.org/news/politics/cardinals-role-end-states-ban-contraception. For the larger context within which Father Murray wrote and spoke, see Leslie Woodcock Tentler, Catholics and Contraception: An American History (2004). For a recent reflection on Murray's work by one of his foremost intellectual heirs, see David Hollenbach, S.J., *Religious Freedom, Morality and Law: John Courtney Murray Today*, 1 J. Moral Theology 69, 75 (2012).

97. Maclure & Taylor, *supra* note 78, at 11.

towards all human beings in a spirit of brotherhood"—is not *necessarily* to accept the Article 18 right to moral freedom. Nonetheless, the appeal of the Article 18 right to most who accept the general requirement is apparent: Assume that government is acting in a way that prevents some human beings from living their lives, or otherwise seriously restricts their ability to live their lives, in accord with their religious and/or moral convictions and commitments, thereby causing them great suffering. Assume, further, that the government action is not an effort to protect (in the words of Article 18) "public safety, order, health, or morals or the fundamental rights and freedoms of others" —*or* that there is a way less restrictive of conduct covered by Article 18 to provide such protection—*or* that the good the government action actually succeeds in achieving is too slight to warrant the suffering the action causes. The Article 18 right forbids such government action.

Nonetheless, we can imagine someone who, although accepting the general requirement of the morality of human rights, has reason to reject the specific requirement that is the Article 18 right: Imagine a religious community according to whose theology those who die while adhering to a false religion (or to no religion) will not be saved but, instead, will suffer eternal damnation: *Extra ecclesiam nulla salus.*[98] If a member of such a community believes that giving false religions free reign in a society makes it more likely that some human beings, perhaps many, will fall into and eventually die in the grip of a false religion, thereby suffering eternal damnation, she may reject the Article 18 right as a fundamentally misguided attempt—a counterproductive attempt—to diminish human suffering. On the other hand, if she doubts that government—*any* government—can be trusted to adjudicate accurately among competing religious claims, or if she is fearful that leaving governments free to try to do so will yield more harm than good, or if both, she may, on such a basis, accept the Article 18 right as, all things considered, an appropriate specification of the general requirement of the morality of human rights, notwithstanding her conviction that "*extra ecclesiam nulla salus.*"

III. TWO RIGHTS-BASED CONTROVERSIES: ABORTION; SAME-SEX MARRIAGE[99]

In this part, I pursue the implications of the morality of human rights for two human rights controversies, both of which have been, and remain,

98. The meaning of the Latin phrase accompanying this note: Outside the church there is no salvation. For a contemporary example of such a theology, see Matthew Haag, *How a 'Jews for Jesus' Moment Backfired for Mike Pence*," N.Y. Times (30 Oct. 2018), https://www.nytimes.com/2018/10/30/us/mike-pence-rabbi-jacobs.html.

99. For an earlier version of some of the material in this part, see Perry, *Two Constitutional Rights, Two Constitutional Controversies, supra* note 64.

prominent in the United States: the controversies concerning, respectively, abortion and same-sex marriage. Specifically, I pursue the implications, for each of the two controversies, of the two human rights on which I focused in the preceding part: the human right to moral equality and the human right to moral freedom.

A. Abortion

My concern here is with criminal bans on what we may call "early gestational stage" abortions—abortions during the first trimester of pregnancy—not with criminal bans on abortions during the latter two trimesters of pregnancy.[100] Do criminal bans on such abortions violate either the right to moral equality or the right to moral freedom (or both)?

Not all such criminal bans are identical; some are more restrictive than others. The Texas statute that was at issue in *Roe v. Wade* (1973)[101] banned all abortions except those necessary to save the life of the mother; the statute banned even (1) abortions necessary to protect the physical health of the mother from a serious threat of grave and irreparable harm, (2) abortions to terminate a pregnancy that began with rape, and (3) abortions to terminate a pregnancy that will yield (a) a child who, because of a grave defect, is "born into what is certain to be a brief life of grievous suffering"[102] or (b) a child who, because of the congenital brain disorder known as anencephaly, is missing a major portion of its brain and is destined to die within hours or days of its birth. The Texas statute was, in a word, extreme; only a statute that banned even those abortions that the Texas law exempted—abortions necessary to save the mother's life—would be more extreme.[103]

Does a criminal ban as extreme as the Texas statute violate the human right to moral equality, which forbids government to treat anyone less well than another, or otherwise disadvantage anyone, based on the demeaning view that she is morally inferior, in this sense: not worthy, or less worthy than some others, of being treated, in the words of Article 1 of the Universal Declaration, "in a spirit of brotherhood." (A law (or other government action) is based on a view if but for the view the law would not have been enacted or would not be maintained.) As I explained in the preceding part

100. *Cf.* Donna Harrison et al., *It Is Never Necessary to Intentionally Kill a Fetal Human Being to Save a Woman's Life: In Support of the Born-Alive Abortion Survivors Protection Act*, Public Discourse (17 Feb. 2019), https://www.thepublicdiscourse.com/2019/02/49619/.

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

102. John Schwartz, *When Torment Is Baby's Destiny, Euthanasia Is Defended*, N.Y. Times (10 Mar. 2005), at 3.

103. In May 2019, Alabama enacted a ban on abortions as extreme as the Texas statute. *See* Timothy Williams & Alan Blinder, *Lawmakers Vote to Effectively Ban Abortion in Alabama*, N.Y. Times (14 May 2019), https://www.nytimes.com/2019/05/14/us/abortion-law-alabama.html.

of this essay, a law based on sex-selective sympathy and indifference—the failure to extend to women the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to men—violates the right to moral equality.

Some think it admirable for a woman to choose to continue with a pregnancy that fits one of the three following profiles: poses a serious threat of grave and irreparable harm to her physical health; began with rape; will yield a child who, because of a grave defect, is "born into what is certain to be a brief life of grievous suffering"—or a child who is missing a major portion of its brain and is destined to die within hours or days of its birth. But because it is difficult to the point of implausible to understand a law that *coerces* a woman to continue with such a pregnancy—a pregnancy that fits one (or more) of those three profiles—as *not* based at least in part on sex-selective sympathy and indifference, criminal bans as extreme as the Texas statute violate the human right to moral equality.

A clarification is in order: To say that a law is based on X—in the sense that the law would not have been enacted, or would not be maintained, but for X—is not to deny that the law might also be based on Y. There can be more than one "but for" rationale for a law. In particular, to say that a criminal ban as extreme as the Texas statute is based at least in part on a failure to extend to women the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to men—and therefore violates the human right to moral equality—is not to deny that the statute may also be based in part on a view to the effect that even at the earliest gestational stage, an unborn human being has the same moral status as a newborn infant.

The Georgia statute that was at issue in *Doe v. Bolton* (1973),[104] which was the companion case to *Roe v. Wade*, was more permissive than the Texas statute; it exempted abortions if "(1) a continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or (2) the fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or (3) the pregnancy resulted from forcible or statutory rape." The Georgia statute was a reform measure, based

> upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962) . . . The ALI proposal has served [as of 1973] as the model for recent legislation in approximately one-fourth of our States. The new Georgia provisions replaced statutory law that had been in effect for more than 90 years . . . The predecessor statute paralleled the Texas legislation considered in *Roe v. Wade* . . . and made all abortions criminal except those necessary 'to preserve the life' of the pregnant woman.[105]

104. Doe v. Bolton, 410 U.S. 179 (1973).
105. *Id.* at 182–83.

The proposition that a criminal ban as *relatively* permissive as the Georgia statute, like a criminal ban as extreme as the Texas statute, violates the human right to moral equality seems to me difficult to defend. However, that a law does not violate one human right does not entail that the law does not violate any human right.

Does a permissive ban like Georgia's violate the human right to moral freedom? Such a ban clearly implicates the right, which is the right to live one's life in accord with one's religious and/or moral convictions and commitments. But to *implicate* the right is not necessarily to *violate* the right. Whether a permissive ban violates the right depends on whether the ban achieves, and is necessary to achieve, a sufficiently weighty government objective.

The principal government objective a permissive ban is aimed at achieving is undeniably weighty: the protection of human life. That the life being protected is unborn does not entail that the government objective is not weighty.

No government objective is legitimate, much less weighty, under the right to moral freedom, if government's pursuit of the objective is based on—in the sense that government would not be pursuing the objective but for—a sectarian moral belief. Government's pursuit of the objective of protecting unborn human life is based partly on the premise that human life is worthy of protection and partly on the premise that unborn human life *is* human life. Although the former premise is a moral premise, it is not at all sectarian;[106] the latter premise is not a moral premise, nor is it sectarian: That unborn human life is human life—that an unborn human being is a member of the human species, not of some other species—is an uncontested biological fact. Even though "many describe the status of the embryo imprecisely by asking when human life begins or whether the embryo is a human being . . . no one seriously denies that the human zygote is a human life. The zygote is not dead. It is also not simian, porcine, or canine."[107] Philosopher Peter Singer, who is famously pro-choice, has acknowledged that "the early embryo is a 'human life.' Embryos formed from the sperm and eggs of human beings are certainly human, no matter how early in their development they may be. They are of the species Homo sapiens, and not of any other species. We can tell when they are alive, and when they have died. So long as they

106. It is noteworthy that US law makes it a crime to injure or kill a "child in utero"—defined as "a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb"—while committing one or more of over sixty different federal crimes. The law is codified in two sections of the United States Code: 18 U.S.C §1841, 10 U.S.C. §919(a).

107. H. Tristram Engelhardt, Jr., *Moral Knowledge: Some Reflections on Moral Controversies, Incompatible Moral Epistemologies, and the Culture Wars*, 10 Christian Bioethics 79, 84 (2004).

are alive, they are human life."[108] Similarly, constitutional scholar Laurence Tribe, a staunch pro-choice advocate, has written that "the fetus is alive. It belongs to the human species. It elicits sympathy and even love, in part because it is so dependent and helpless."[109] It is beyond serious debate that unborn human life *is* human life.

Does a permissive ban achieve, and if so, is it necessary to achieve, the weighty government objective it is aimed at achieving? Just as there is no reason to doubt that there are fewer infanticides in consequence of a law criminalizing infanticide than there would be if there were no such law, there is no reason to doubt that there are fewer abortions in consequence of a law criminalizing abortion—indeed, significantly fewer—than there would be if there were no such law.

But is the government objective sufficiently weighty, given that even a ban of the *relatively* permissive sort we are now considering imposes a heavy burden on some women? As the Supreme Court stated in *Roe v. Wade*:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[110]

Notwithstanding that even a permissive ban imposes a heavy burden on (some) women, many conclude that such a ban achieves an objective sufficiently important to warrant the ban. Those who so conclude are typically those who discern no good reason to distinguish, along the dimension of importance, among (a) the welfare of newborns and infants, (b) the welfare of unborn human beings at a late gestational stage; and (c) the welfare of

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108. Peter Singer, The President of Good & Evil: The Ethics of George W. Bush 37 (2004).

109. Laurence H. Tribe, *Will the Abortion Fight Ever End?; A Nation Held Hostage*, N.Y. Times (2 July 1990), at 15.

110. Roe, *supra* note 101, at 153. In his justly famous critique of the Supreme Court's rulings in the Abortion Cases—Roe v. Wade and Doe v. Bolton—John Hart Ely wrote that we must not "underestimate what is at stake: Having an unwanted child can go a long way toward ruining a woman's life." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L. J. 920, 923 (1973). According to Richard Posner, the Court in the Abortion Cases understated the weight of the burden:

> No effort is made to dramatize the hardships to a woman forced to carry her fetus to term against her will. The opinion does point out that "maternity, or additional offspring, may force upon the woman a distressful life and future," and it elaborates on the point for a few more sentences. But there is no mention of the woman who is raped, who is poor, or whose fetus is deformed. There is no reference to the death of women from illegal abortions.

Richard A. Posner, Sex and Reason 337 (1992).

unborn human beings at an early gestational stage. They argue that "no stage of nascent development . . . is so significant that it points to a major qualitative change: not implantation, not quickening, not viability, not birth."[111]

However, many others conclude that even a permissive ban imposes too severe a burden on women. Those who so conclude are typically those whose concern for the welfare of the women who bear, or would bear, the burden dominates their concern for the welfare of unborn human beings, *at least when those human beings are at an early gestational stage*. Such persons typically believe that there *is* good reason to distinguish, along the dimension of importance, between the welfare of newborns and infants and the welfare of unborn human beings at an early or even mid gestational stage—for example, at the stage prior to the emergence of what philosopher David Boonin has called "organized cortical brain activity," which, Boonin explains, emerges no earlier than approximately the twenty-fifth week of gestation.[112]

Some disagreements about whether a law or other government action violates a human right are best understood as *reasonable* disagreements. The disagreement sketched in the two preceding paragraphs is, in my judgment, such a disagreement. My position is that, for the reasons given in the preceding paragraph, even a relatively permissive ban on early gestational stage abortions violates the right to moral freedom. Nonetheless, the contrary position—the position sketched two paragraphs back—does not seem to me to be an unreasonable one.

B. Same-Sex Marriage

Does a government policy of excluding same-sex couples from civil marriage ("the exclusion policy") violate either the human right to moral equality or the human right to moral freedom?[113]

The exclusion policy obviously disadvantages some same-sex couples—those who want access to civil marriage—and the more extreme the policy,

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111. Richard A. McCormick, SJ, Corrective Vision: Explorations in Moral Theology 183 (1994). *Cf.* Michael J. Wreen, *The Standing is Slippery*, 79 Philosophy 553, 571 (2004) (emphasis added):

> The Abortion Argument offers an indirect argument for its conclusion, one that simply piggybacks on the claim that a given being, a two-year-old, is a human being/person/etc. The fundamental grounds for, say, possession of a right to life are not mentioned, much less explored, in the argument. What this means is that it's a secondary, indirect argument, one that attempts to carry the day *without itself tackling any of the weightier issues, both metaphysical and moral, that surround humanity, personhood, moral status, and the right to life*. It could be that such an argument is the best that can be done as far as the issue of foetal status and the morality of abortion is concerned.

112. *See* David Boonin, A Defense of Abortion 115 et seq. (2003).

113. For an informative discussion of same-sex marriage in relation to international legal norms, *see* Kees Waaldjik, *The Gender-Neutrality of the International Right to Marry, in* International LGBTI Law (Andreas R. Ziegler ed., 2019), https://ssrn.com/abstract=3218308.

the more severe the disadvantage. The most extreme version of the policy: refusing to grant to same-sex couples any of the legal benefits that accompany access to civil marriage. A less extreme version: granting to same-sex couples some, but not all, of the legal benefits that accompany access to civil marriage. The least extreme version: Granting to same-sex couples all of the legal benefits that accompany access to civil marriage but refusing to honor the same-sex union—refusing to dignify it—with the title "marriage."[114] However, that the exclusion policy disadvantages same-sex couples does not entail that the policy violates the human right to moral equality; whether the policy violates the right depends on whether the policy is based on the demeaning view that gays and lesbians are morally inferior human beings. Is the policy based on that view? Government action is based on a view if but for the view, the government would not be doing what it is doing. Is the demeaning view that gays and lesbians are morally inferior a "but for" predicate of the exclusion policy?

The view that gays and lesbians are morally inferior is sadly familiar. Judge Richard Posner, writing about the "irrational fear and loathing of" gays and lesbians, has observed that they, like the Jews with whom they "were frequently bracketed in medieval persecutions[,] . . . are despised more for what they are than for what they do . . . ."[115] The Connecticut Supreme Court has echoed that observation, noting that gays and lesbians are often "'ridiculed, ostracized, despised, demonized and condemned' merely for being who they are."[116] Legal scholar Andrew Koppelman has rehearsed some grim examples, including "the judge's famous speech at Oscar Wilde's sentencing for sodomy, one of the most prominent legal texts in the history of homosexuality, [which] 'treats the prisoners as objects of disgust, vile contaminants who are not really people, and who therefore need not be addressed as if they were people.'" Koppelman continues: "From this it is

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114. Refusing to honor the same-sex union—refusing to dignify it—with the title "marriage" does disadvantage same-sex couples. *See* Mathew S. Nosanchuk, *Response: No Substitutions, Please*, 100 Georgetown L. J. 1989, 2004–13 (2012); Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*," 60 UCLA L. Rev. Discourse 184 (2013), http://ssrn.com/abstract=2263582.

115. Posner, *supra* note 110, at 346. As history teaches, the "irrational fear and loathing" of any group often has tragic consequences. The irrational fear and loathing of gays and lesbians is no exception. There is, for example, the horrible phenomenon of "gay bashing." "The coordinator of one hospital's victim assistance program reported that 'attacks against gay men were the most heinous and brutal I encountered.' A physician reported that injuries suffered by the victims of homophobic violence he had treated were so 'vicious' as to make clear that 'the intent is to kill and maim.'" Andrew Koppelman, Antidiscrimination Law and Social Equality 165 (1996). As "[a] federal task force on youth suicide noted[,] because 'gay youth face a hostile and condemning environment, verbal and physical abuse, and rejection and isolation from family and peers,' young gays are two to three times more likely than other young people to attempt and to commit suicide." *Id.* at 149.

116. Kerrigan v. Comm'r of Publ. Health, 957 A.2d 407, 446 (Conn. 2008).

not very far to Heinrich Himmler's speech to his SS generals, in which he explained that the medieval German practice of drowning gay men in bogs 'was no punishment, merely the extermination of an abnormal life. It had to be removed just as we [now] pull up stinging nettles, toss them on a heap, and burn them.'"[117]

So, we should not discount the possibility that some laws and policies that disadvantage gays and lesbians do indeed violate the human right to moral equality. Ugly examples remain on the books even in the United States. An example: Under the Florida Adoption Act, "[n]o person eligible to adopt . . . may adopt if that person is a homosexual."[118] Under Florida law, which is fairly described as homophobic, ex-felons of all sorts may adopt a child; even a convicted child abuser may adopt a child. But no "homosexual" may do so. The Florida judiciary was right to rule that the statute violates the right that "[u]nder the Florida Constitution, each individual person has a right . . . to equal protection of the laws."[119]

But that some laws and policies that disadvantage gays and lesbians violate the human right to moral equality does not entail that every law and policy that disadvantages gays and lesbians violates the right. It is questionable whether in the contemporary United States, for example, the view that gays and lesbians are morally inferior is a "but for" predicate of the exclusion policy. In the United States, this is, for many and perhaps most who support the exclusion policy, the dominant and sufficient rationale for the policy: *Same-sex sexual conduct is immoral. Admitting same-sex couples to civil marriage would legitimize—"normalize"—immoral conduct. This we must not do.* However, the claim that same-sex sexual conduct is immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings, any more than the claim that, say, theft is immoral asserts, implies, or presupposes that those who steal are morally inferior human beings. By contrast, "the very point" of laws that criminalized interracial marriage was "to signify and maintain the false and pernicious belief that nonwhites are morally inferior to whites."[120]

This is not to deny that some "of the antigay animus that exists in the United States is just like racism, in the virulence of the rage it bespeaks and the hatred it directs towards those who are its objects."[121] Again, some laws and policies that disadvantage gays and lesbians violate the right to equal protection. But "[n]ot all antigay views . . . deny the personhood

117. Andrew Koppelman, *Are the Boy Scouts Being as Bad as Racists?: Judging the Scouts' Antigay Policy*, 18 Pub. Aff. Q. 363, 372 (2004).
118. Fla. Stat. § 63.042(3) (2006).
119. Fla. Dep't of Children & Families v. X.X.G., 45 So. 3d 79, 83 (Fla. Dist. Ct. App. 2010).
120. Corvino, *supra* note 60, at 509.
121. Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 Brooklyn L. Rev. 125, 145 (2006).

and equal citizenship of gay people."[122] As legal scholar Robert Nagel has emphasized, "[t]here is the obvious but important possibility that one can 'hate' an individual's behavior without hating the individual."[123] The Pope and bishops of the Catholic Church insist that same-sex sexual conduct is immoral and are prominent—indeed, leading—opponents of "legislative and judicial attempts, both at state and federal levels, to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means."[124] Nonetheless, the Pope and bishops also insist that all human beings, gays and lesbians no less than others, are equally beloved children of God. "[Our teaching] about the dignity of homosexual persons is clear. They must be accepted with respect, compassion, and sensitivity. Our respect for them means [that] we condemn all forms of unjust discrimination, harassment or abuse."[125]

Predictably, many will be quick to claim that government may not adjudge—that it is no part of government's legitimate business to adjudge—same-sex sexual conduct to be immoral. However, if it is true that, as a matter of the morality of human rights, government may not adjudge same-sex sexual conduct to be immoral, it is not because government's doing so violates the human right to moral equality: Again, adjudging same-sex sexual conduct

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122. *Id.*

123. *See* Robert F. Nagel, *Playing Defense in Colorado*, First Things 34, 35 (1998).

124. United States Conference of Catholic Bishops Administrative Committee, *Promote, Preserve, Protect Marriage: Statement Marriage and Homosexual Unions*, 33 Origins 257, 259 (2003).

125. *Id. See also* Helen M. Alvaré, *A "Bare . . . Purpose to Harm"? Marriage and Catholic Conscience Post*-Windsor 27–28 (2014), http://ssrn.com/abstract=2433741. *Cf.* William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates, Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Georgia L. Rev. 657, 697, 704 (2011):

> The Vatican's 1975 Declaration *Persona Humana* announced that "homosexual acts" are "disordered," but also acknowledged the modern distinction between sexual orientation and sexual acts. The next year, the National Conference of Catholic Bishops responded with a more gay-tolerant document, 'To Live in Christ Jesus" which said this: "Homosexuals, like everyone else, should not suffer from prejudice against their basic human rights. They have a right to respect, friendship and justice. They should have an active role in the Christian community." Different dioceses adopted slightly different readings of these documents. For example, the Church in the state of Washington interpreted the pronouncements to support the conclusion that *"prejudice against homosexuals is a greater infringement of the norm of Christian morality than is homosexual orientation or activity."*
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> [R]eflecting a strong turn in public opinion toward toleration for gay people, the American Catholic Church was subtly readjusting its doctrinal stance toward homosexuality. According to the Vatican, men and women with homosexual tendencies "must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided." After fighting the antidiscrimination law in Massachusetts through the 1980s, Catholic dioceses acquiesced in similar laws adopted by Catholic Connecticut in 1991 and Catholic Rhode Island in 1995. Archbishop John Francis Whealon of Hartford, Connecticut said this in 1991: "The Church clearly teaches that homosexual men and women should not suffer prejudice on the basis of their sexual orientation. Such discrimination is contrary to the Gospel of Jesus Christ and is always morally wrong." Many Connecticut legislators took the Archbishop's statement as tacit approval of the antidiscrimination measure (adorned with religious liberty-protective exemptions). The Roman Catholic shift in emphasis—not necessarily a shift in precise doctrine—was representative of organized religion in America, as public opinion shifted strongly toward toleration of gay Americans and same-sex couples.

to be immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings. Therefore, if government may not exclude same-sex couples from civil marriage, or otherwise disadvantage gays and lesbians, based on the premise that same-sex sexual conduct is immoral, it is because government's doing so violates a human right other than the right to moral equality.

Does the exclusion policy violate the human right to moral freedom? That the policy implicates the right is clear: A core aspect of the freedom to covered by the right—the freedom to live one's life in accord with one's religious and/or moral convictions and commitments—is the freedom to live one's life in an intimate association with another person—an intimate association, that is, of the sort many[126] regard as marital. As the Massachusetts Supreme Court emphasized in 2003, "the decision whether and whom to marry is among life's momentous acts of self-definition."[127]

The freedom protected by the right to moral freedom obviously entails freedom from government action punishing one for making a particular choice in exercising one's religious/moral freedom. But it also includes freedom from government action discriminating against one for making a particular choice in exercising one's religious/moral freedom—in particular, by withholding from one benefits that are bestowed on others who make a different choice in exercising their religious/moral freedom. So, by withholding benefits from a same-sex couple who choose to live their lives in an intimate association (of the sort many regard as marital) with one another while bestowing benefits on a heterosexual couple who choose to live their lives in an intimate association with one another, the exclusion policy implicates the human right to moral freedom.

However, that the exclusion policy *implicates* the right of moral freedom does not entail that the policy *violates* the right, which is not unconditional (absolute), but conditional: A policy that implicates the right does not violate the right if the policy achieves, and is necessary to achieve, a sufficiently weighty government objective. Does the exclusion policy satisfy that condition?

The government objectives that have been asserted in defense of the exclusion policy are of two sorts: morality-based and non-morality-based. By "non-morality-based" objectives, I mean objectives whose pursuit by government does not presuppose that same-sex sexual conduct is immoral.

As I noted earlier, the dominant defense of the exclusion policy, in the United States and elsewhere, involves a morality-based government objective: *Same-sex sexual conduct is immoral. Admitting same-sex couples to civil marriage would legitimize—"normalize"—immoral conduct. This we must*

126. But, of course, not all. *See, e.g.*, Sherif Girgis, Ryan T. Anderson & Robert P. George, What Is Marriage? Man and Woman: A Defense (2012).

127. Goodridge v. Dept. of Public Health, 798 NE 2d 941, 956 (Mass. 2003).

not do.[128] For example, in 2003, the Vatican—specifically, the Congregation for the Doctrine of the Faith, whose Prefect at the time, Joseph Cardinal Ratzinger, later became Pope Benedict XVI—argued that admitting same-sex couples to civil marriage would signal "the approval of deviant behavior, with the consequences of making it a model in present-day society."[129]

Excluding same-sex couples from civil marriage obviously serves the government objective of not taking a step that would legitimize conduct that many believe to be immoral: same-sex sexual conduct. The serious question is whether that government objective—that *morality-based* government objective—qualifies as a *legitimate* government objective, much less a weighty one, under the human right to moral freedom. The answer depends on the reason or reasons lawmakers have for believing that same-sex sexual conduct is immoral. If the only reason lawmakers have is a religious reason—for example, and in the words of one evangelical minister, "[same-sex sexual conduct] [is] in direct opposition to God's truth as He has revealed it in the Scriptures"[130]—then the government objective is clearly not legitimate. Although government's acting to protect *public* morals is undeniably a legitimate government objective, government's acting to protect *sectarian* morals, as I explained in the preceding part of this essay, is not a legitimate government objective. *The human right to moral freedom leaves no room for the political-powers-that-be to ban or otherwise impede conduct, such*

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128. In his letter "to Congress on Litigation Involving the Defense of Marriage Act," Feb. 23, 2011, U.S. Attorney General Eric Holder stated: "[T]he legislative record underlying DOMA's passage contains . . . numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships . . ." In a note attached to that sentence—note vii--the Letter states:

> *See, e.g.,* H.R. Rep. No. 104–664 at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral"); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id.* at 31 (favorably citing the holding [of the U.S. Supreme Court in *Bowers v. Hardwick,* 478 U.S. 186 (1986)] that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable"); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer [v. Evans,* 517 U.S. 620 (1996)] that "[t]his Court has no business . . . pronouncing that 'animosity' toward homosexuality is evil").

http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

129. Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (2003), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

130. So said the Rev. Ron Johnson, Jr., on 28 Sept. 2008. *See* Peter Slevin, *33 Pastors Flout Tax Law With Political Sermons,* Wash. Post (29 Sept. 2008).

> For many Christians, even many evangelical Christians, the belief that same-sex sexual conduct is contrary to the will of God is no longer credible. *See, e.g.*, David G. Meyers & Letha Dawson Scanzoni, What God Has Joined Together? A Christian Case for Gay Marriage (2005).

as contraception, based on a religious or otherwise sectarian belief that the conduct is immoral.

Of course, a religious reason is not the only reason lawmakers have for believing that same-sex sexual conduct is immoral. Indeed, the path of reasoning runs in the opposite direction for many religious believers, whose position is not that same-sex sexual conduct is immoral because it is contrary to the will of God, but that same-sex sexual conduct is contrary to the will of God because it is immoral.[131]

Again, the pope and bishops of the Roman Catholic Church—the "magisterium" of the Church—are leading opponents of "legislative and judicial attempts, both at state and federal levels, to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means."[132] The magisterium's reason—its rationale—for believing that same-sex sexual conduct is immoral is a nonreligious reason: a reason that does not assert, imply, or presuppose that God—or any other transcendent reality—exists.

According to the magisterium, it is immoral not just for same-sex couples but for anyone and everyone—even a man and a woman who are married to one another—to engage in (i.e., pursuant to a knowing, uncoerced choice to engage in) any sexual conduct that is "inherently nonprocreative," and same-sex sexual conduct—like contracepted male-female sexual intercourse,[133] masturbation, and both oral and anal sex—is inherently nonprocreative. Because "[w]hat are called 'homosexual unions' . . . are inherently nonprocreative," declared the Administrative Committee of the U.S. Conference of Catholic Bishops, they "cannot be given the status of marriage."[134] As Joseph Cardinal Ratzinger stated in 2003, speaking for the Congregation for the Doctrine of the Faith: Because they "close the sexual act to the gift of life," "homosexual acts go against the natural moral law."[135]

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131. It is not always clear which of two different positions one is espousing when one says that X is contrary to the will of God: (1) X is contrary to the will of God and *therefore* immoral. (2) X is immoral and therefore contrary to the will of God. According to the first position, the reason for concluding that X is immoral is theological: "X is contrary to the will of God." But according to the second position, the reason for concluding that X is immoral is unstated and not necessarily theological, even though the "therefore" is a theological claim.
132. *See supra* note 129.
133. *See* Tentler, *supra* note 96.
134. Statement of the Administrative Committee, United States Conference of Catholic Bishops, *Preserve, Protect, Promote Marriage* (9 Sept. 2003), http://old.usccb.org/comm/archives/2006/06–052.shtml. *See also* Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.
135. *Id. See* Hollenbach, *supra* note 96, at 75:

> The United States Catholic Bishops have adopted particularly pointed public advocacy positions on . . . resistance to gay marriage and public acceptance of the legitimacy of same sex relationships. The Bishops' 2007 statement *Forming Consciences for Faithful Citizenship* was a formal

The Pope and bishops' position that inherently nonprocreative sexual conduct is, as such—as inherently nonprocreative—immoral is a conspicuously sectarian moral position. It bears emphasis, in that regard, that the position is extremely controversial *even just among Catholic moral theologians*,[136] not to mention among the larger community of religious ethicists.

In the United States, the exclusion policy, now defunct because of the Supreme Court's decision in *Obergefell v. Hodges*, was based on—the policy almost certainly would not have remained on the books in those states where it remained on the books but for—the affirmation by many citizens of a religious (e.g., biblical) rationale and/or the bishops' nonreligious rationale for holding fast to the belief that same-sex sexual conduct is immoral. But, again, the human right to moral freedom leaves no room for the political-powers-that-be to ban or otherwise impede conduct based on a sectarian moral belief. Recall from the preceding part of this essay what Catholic moral theologian John Courtney Murray wrote, in the mid-1960s, in his *Memo to [Boston's] Cardinal Cushing on Contraception Legislation*:

> [T]he practice [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.[137]

We may say about the exclusion policy much the same thing Father Murray said to Cardinal Cushing about Massachusetts's anti-contraception policy:

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instruction by the U.S. hierarchy covering the full range of the public dimensions of the Church's moral concerns. In this document, . . . echoing the affirmation by the Catechism of the Catholic Church that homosexual acts "are contrary to the natural law" and that "under no circumstances can they be approved," the bishops oppose[d] "same-sex unions or other distortions of marriage."

136. *See, e.g.*, Stephen J. Pope, *The Magisterium's Arguments Against "Same-Sex Marriage": An Ethical Analysis and Critique*, 65 Theological Stud. 530 (2004); Margaret A. Farley, Just Love: A Framework for Christian Sexual Ethics (2008); Todd A. Salzman & Michael G. Lawler, Sexual Ethics: A Theological Introduction (2012).
Moreover,

> [a] report by Washington-based Public Religion Research Institute found that 74 percent of Catholics favor legal recognition for same-sex relationships, either through civil unions (31 percent) or civil marriage (43 percent). That figure is higher than the 64 percent of all Americans, 67 percent of mainline Protestants, 48 percent of black Protestants and 40 percent of evangelicals.

Catholics Supportive of Gay Unions, National Catholic Reporter 16 (1 Apr. 2011). "What's more, even among Catholics who attend services weekly or more, only about one-third (31 %) say there should be no legal recognition for a gay couple's relationship, a view held by just 13% of those who attend once or twice a month and 16% of those who attend less often." *New Poll: Nuance on Same-Sex Unions Drives Up Catholic Support* (22 Mar. 2011), http://blog.faithinpubliclife.org/2011/03/new_poll_highlights_catholic_s.html.

137. *See supra* note 96.

> *Same-sex marriage has received official approval by various religious groups within the community. It is difficult to see how the state can refuse to countenance, as contrary to public morality, a relationship that numerous religious leaders and other morally upright people approve as morally good. The stand taken by these religious groups and others may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of the human right to moral freedom.*[138]

Is there a non-morality-based government objective—an objective whose pursuit by government does not presuppose that same-sex sexual conduct is immortal—that fares better, under the right of privacy, than the foregoing morality-based government objective? The principal such objective that has been asserted in defense of the exclusion policy is this: *Excluding same-sex couples from civil marriage serves to decrease the number of future children who will be born and raised in single-parent families (where typically the single parent is a mother), which, as a general matter, is not the optimal way for children to be raised.* The idea here is that the exclusion policy diminishes the continuing erosion of the institution of traditional (i.e., heterosexual) marriage, an institution that benefits society in numerous ways, but most importantly by decreasing the number of future children who will be born and raised in single-parent families.[139]

Granting that, under the human right to moral freedom, decreasing the number of future children born and raised in single-parent families is not merely a legitimate government objective but a sufficiently weighty one,[140] this fundamental problem remains: the absence of evidence—evidence, as distinct from speculation about possible future scenarios—to support the proposition that there is a cause-effect relationship between excluding same-sex couples from civil marriage (cause) and decreasing the number of future children who will be born and raised in single-parent families (effect).[141] And

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138. Murray, *supra* note 96. *See* Samuel G. Freedman, *Push Within Religions for Gay Marriage Gets Little Attention*, N.Y. Times (24 July 2015). *See also* Eskridge, *supra* note 125, at 707–08; Laurie Goodstein, *Unions That Divide: Churches Split Over Gay Marriage*, N.Y. Times (13 May 2012); Maggie Astor, *Illinois Clergy Members Support Same-Sex Marriage in Letter Signed by 260*, N.Y. Times (23 Dec. 2012). *Cf.* Samuel G. Freedman, *How Clergy Helped a Same-Sex Marriage Law Pass*, N.Y. Times (15 July 2011).

139. For an elaboration (and critique) of the argument, with citations to and quotations from prominent writings making the argument, see Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2 Univ. Illinois L. Rev. 431, 434–44 (2014). For a recent variation on the argument, see Helen M. Alvaré, *A Children's Rights Perspective Dissent from* Obergefell (George Mason University Legal Studies Research Paper Series, LS 18–06, 2018), http://ssrn.com/abstract=3149912.

140. *See* Koppelman, *supra* note 139, at 437 (referencing "data that shows . . . that single motherhood is especially hard on children").

141. *See id.* at 440: "The causes of these patterns [increasing single motherhood] are not well understood. One survey concludes that the most widely cited papers are 'those that disprove a popular explanation, not those that support one.'" The "survey" Koppelman cites: David T. Ellwood & Christopher Jencks, *The Uneven Spread of Single-Parent Families: What Do We Know? Where Do We Look for Answers? in* Social Inequality 3 (Kathryn M. Neckerman ed., 2004).

given the absence of any evidence to support that proposition, how can we reasonably conclude that the exclusion policy serves the non-morality-based objective it is claimed to serve?

Other non-morality-based objectives that have been asserted in defense of the exclusion policy fare no better. Consider, for example, the case, *Varnum v. Brien*,[142] in which the Iowa Supreme Court ruled that Iowa's exclusion policy violated the Iowa Constitution. After considering several non-morality-based objectives—including "promotion of optimal environment to raise children," "promotion of procreation," and "promoting stability in opposite-sex relationships"[143]—the court concluded: "We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective."[144] The court then went on to say:

> Now that we have addressed and rejected each specific interest advanced by the County to justify the [exclusion policy], we consider the reason for the exclusion of gay and lesbian couples from civil marriage left unspoken by the County: religious opposition to same-sex marriage. The County's silence reflects, we believe, its understanding [that] this reason cannot, under the Iowa Constitution, be used to justify a ban on same-sex marriage.[145]

Nor can that reason—religiously based moral opposition to same-sex marriage—justify the exclusion policy under the human right to moral freedom, as I have explained.

IV. CONCLUDING COMMENT

Does criminalizing early gestational stage abortions violate either the human right to moral equality or the human right to moral freedom (or both)? Does excluding same-sex unions from civil marriage violate either right? Both questions—questions I have just addressed—are greatly contested. In a democracy, should unelected and electorally unaccountable judges be empowered to give answers to these and other contested human rights questions, answers that prevail over the answers given by elected and electorally accountable legislators? I have pursued that inquiry at length elsewhere.[146] Here, in concluding this essay, I want to address—very briefly—a different question.

Imagine a country whose lawmakers profess commitment to the morality of human rights but in which the judiciary is not authorized to decide

142. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).
143. *See id.* at 897–904.
144. *Id.* at 906.
145. *Id.* at 904–06.
146. *See* Perry, A Global Political Morality, *supra* note 4, at 89–184.

whether a law or other policy violates a right that is part of the morality of human rights, a country in which the lawmakers themselves have the final say as to whether they are acting in accord with the morality of human rights.[147] What is the *practical* importance, in such a country, of the morality of human rights?

Consider, in that regard, what Albert Venn Dicey wrote about the French constitution of the time in *An Introduction to the Study of the Law of the Constitution* (1885):

> The restrictions placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution, and from the resulting support of public opinion.[148]

What Dicey said about the constitutional norms to which he was referring we may say about the morality of human rights: that it comprises "maxims of political morality" that derive at least a part of the strength they possess from being formally inscribed not only in the Universal Declaration of Human Rights, but also in one or more of the several international human rights treaties—treaties that have followed in the Universal Declaration's wake—to which the great majority of the nations of the world are parties. Even if not judicially enforced, those maxims of political morality can serve, among the citizens of a country whose lawmakers profess commitment to the maxims, *as fundamental grounds of political-moral judgment, of political-moral argument and critique*. Not that such argument inevitably yields agreement. Of course it does not. But how much better, how much further along, such a state of affairs than one in which "each discussion of governmental behavior started from scratch—if, rather than debating what constituted a violation of, say, the right to a fair trial, we had to begin by discussing whether people

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147. It is noteworthy that in the period since the end of the Second World War, the constitutional entrenchment of (many) human rights and the judicial protection of those rights (and of other constitutionally entrenched norms) has become widespread among the democracies of the world. As Stephen Gardbaum has observed:

> [O]ne of the most striking features of contemporary constitutionalism is the growth of judicial review. The "global expansion of judicial power" that has taken place since 1945, and with even greater vigor since 1989, means that judicial review of legislation is now the norm among drafters of constitutions, with virtually every "third" and now "fourth wave" of democracy having established a constitutional court with this power. Prior to 1945, and even 1989, this was certainly not the case. . . . [W]ith only a handful of remaining exceptions, the venerable and once-dominant model of legislative supremacy has, in Mark Tushnet's memorable phrase, "been withdrawn from sale."

Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?*, 62 Am. J. Comp. L. 613, 613–15 (2014).

148. *Quoted in* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harvard L. Rev. 129, 130 (1893).

should be given fair trials."[149] Or if, rather than debating whether a particular government action (law, policy, etc.) is violating someone's right to moral equality or right to moral freedom, we had to begin by discussing whether she has a right to moral equality or a right to moral freedom.

We may fairly conclude, then, that even in the absence of judicial enforcement—or meaningful judicial enforcement—the morality of human rights has an important practical role to play in enabling focused evaluation of a government's behavior.[150]

149. Kenneth Roth, *Have Human Rights Treaties Failed?*, N.Y. Times (28 Dec. 2014).
150. But, again, among the world's democracies, the absence of judicial enforcement is now the exception, not the rule. *See supra* note 147. *See generally* Comparative Judicial Review (Erin F. Delaney & Rosalind Dixon eds., 2018).