RELIGIOUS FREEDOM AND BEYOND:
THE RIGHT TO MORAL FREEDOM

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At the Second Vatican Council (1962-65), the celebrated American Jesuit John Courtney Murray played a leading role, as is well known, in persuading the magisterium of the Roman Catholic Church--the bishops and, ultimately, the pope--to embrace the right to religious freedom. Murray was concerned with more than just religious freedom, however; he was also concerned with what we may call moral freedom. In 1960, the year in which

1 c 2009, Michael J. Perry.

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the first and, so far, only Catholic was elected to the presidency of the United States, Murray's published *We Hold These Truths: Catholic Reflections on the American Proposition*. Murray wrote, in that now-famous book, that "the moral aspirations of the law are minimal. Laws seek to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order." According to Murray, the law should "not look to what is morally desirable, or attempt to remove every moral taint from the atmosphere of society. It [should] enforce[] only what is minimally acceptable, and in this sense socially necessary."

"But why should 'the moral aspirations of the law' be only 'minimal','" we may fairly ask. "Why should 'laws seek to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order'? Why should the law 'enforce only what is minimally acceptable, and in this sense socially necessary'?" I am about to provide an answer, in the course of defending this claim: The case for liberal democracy's affirming the right to moral freedom is analogous to and no less compelling than the case for its affirming, as it does, the right to religious freedom. Liberal democracy should affirm the former right, therefore, as well as the latter; it should affirm moral freedom as well as religious freedom.

I. The Case for the Right to Religious Freedom

What is the right to religious freedom--and what is the case for liberal democracy's affirming the right?

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3 John Courtney Murray, SJ, *We Hold These Truths: Catholic Reflections on the American Proposition* 166 (1960).

4 Id.
Article 18 of the International Covenant on Civil and Politics Rights (ICCPR) articulates what we may fairly take to be the canonical formulation of the right to religious freedom.\(^5\) According to Article 18:

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 belief 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 assure the religious and moral education of their children in conformity with their own convictions.\(^6\)

The Siracusa Principles--principles adopted by the United Nations for interpreting the "prescribed by law and are necessary to protect public

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\(^5\) The ICCPR, which is a treaty and as such is binding on the several state parties thereto, was adopted and opened for signature, ratification, and accession by the General Assembly of the United Nations on Dec. 16, 1966. The ICCPR entered into force on Mar. 23, 1976; as of January 2007, there were 160 state parties to the ICCPR. The United States is a party to the ICCPR: In September 1992, with the support of President George H. W. Bush, the Senate ratified the ICCPR (subject to certain "reservations, understandings and declarations" that are not relevant here; see 138 Cong. Rec. S 4781-84 (daily ed. Apr. 2, 1992)).

\(^6\) See also the European Convention on Human Rights and Fundamental Freedoms (Article 9); the American Convention on Human Rights (Article 12); and the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on religion or Belief, which was proclaimed by the UN General Assembly on Nov. 25, 1981.
safety, order, health, or morals or the fundamental rights and freedoms of others" language of Article 18 and similar language in other Articles of the ICCPR--state, in relevant part: "Whenever a limitation is required in the terms of the [ICCPR] to be 'necessary,' this term implies that the limitation: . . . (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim."?

The religious practices protected by the right to freedom of religious practice include not just practices one believes oneself religiously obligated to engage in. Such a limitation would make little sense: A practice one believes oneself religiously obligated to engage in (e.g., forsaking meat on Lenten Fridays) may be relatively inconsequential next to a practice (e.g., receiving communion wine) that one does not believe oneself religiously obligated to engage in, but that one nonetheless has strong religious reason to engage in. As the Supreme Court of Canada put the point in a case involving religious freedom:

[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.8

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It bears emphasis that a practice one has religious reason to engage in should not be confused with a practice one does not have religious reason not to engage in. The right to religious freedom protects only practices of the former sort. A right that protected practices of the latter sort would protect a multitude of practices that cannot plausibly be described as religious in nature.

Understandably, the right to religious freedom is not unconditional (absolute). If the condition articulated above—that the ban be necessary to serve a governmental interest that is both legitimate and sufficiently weighty—is satisfied, government may ban a religious practice. (A right to religious freedom would provide little meaningful protection for freedom of religious practice if the consistency of a ban with the right was to be determined without regard to whether the the weight of the interest served by the ban was relatively slight in relation to the weight of the burden imposed by the ban.) So for a country to reject the right to religious freedom is not for it to reject the claim that government should never ban or otherwise impede a religious practice. No country accepts that extreme, and extremely silly, claim. Rather, it is to reject the much more moderate claim that—it is to reject a discursive framework according to which—government should not ban a religious practice unless it can provide at least a plausible justification for doing so, a justification to the effect that the ban is necessary to serve a governmental interest that is both legitimate and sufficiently weighty to be proportionate to the weight of the burden imposed by the ban on those subject to the ban.

Under the right to religious freedom, what counts as a legitimate governmental interest? Although no exhaustive list of such interests is possible, a ban that protects the lives, health, safety, liberty, property, or socio-economic well-being of the citizenry undeniably serves a legitimate governmental interest, as does a ban on conduct that causes environmental degradation or that abuses animals. More to the point: There are certain imaginable governmental interests that cannot count as legitimate under the right to religious freedom, because to count them as legitimate would be to render the right, understood as a fundamental legal right, meaningless; it would be to take away with one's left hand what one had given with one's right. (As the Siracusa Principles state: "The scope of a limitation referred to in the Covenant shall not be interpreted so as to
To affirm the right as one the law should recognize and protect as a fundamental legal right is necessarily to reject, in particular, the following two governmental interests as illegitimate.

1. Protecting (what the powers-that-be regard as) religious truth. We can easily imagine the powers-that-be declaring: "Certain religious teachings are true--for example, the teaching that one who embraces Christianity has a much better chance of being saved--and no government should lack authority to ban practices, religious or not, that may lead some people to reject those teachings." We can also anticipate a secular version of the position: "Certain antireligious teachings are true--for example, the teaching that 'religion is unscientific, superstitious, and an enemy of progress'--and no government should lack authority to ban practices, religious or not, that may lead some people to reject those teachings." Neither the religious nor the secular version of that position is persuasive to those of us who, after reflecting on historical experience, concur in John Locke's judgment that "[n]either the right nor the art of ruling does necessarily carry along with it the certain knowledge of other things, and least of all true religion." (To Locke's "does necessarily carry" we may add "or has ever carried"). "The one only narrow way which leads to Heaven," said Locke, "is not better known to the Magistrate than to private persons, and therefore I cannot safely take him for my Guide, why may probably be as ignorant of the way as my self, and who certainly is less concerned for my Salvation than I my self am." In our (Lockean) judgment, government is not to be trusted as an arbiter of religious (or anti--religious) truth.

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9 Siracusa Principles, n. #, at I.A.2.

10 See Lawrie Breen, "A Chinese Puzzle," The Tablet [London], Mar. 5, 2005 (reporting that "new regulations confirm that Beijing perceives religion as unscientific, superstitious and an enemy of progress"). "Last year a secret document, issued by the Central Committee's Propoganda Department, called for a new drive to promote Marxist atheism." Id.


12 Id. at --.
religious) truth. Or, because we are talking here specifically about government in a liberal democracy, we may say that a political majority is not to be trusted as an arbiter of religious truth. As Locke put it, "the business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular man's goods and persons."\(^{13}\)

That is, government is not to be trusted as an arbiter of religious truth beyond a certain point.

- As I explained elsewhere,\(^{14}\) a liberal democracy is, as such--as liberal democracy--committed to the proposition that every human being has inherent dignity and is inviolable; in the political culture of a liberal democracy, that proposition is axiomatic. In a liberal democracy, government should act in accord with the proposition even in doing so government is implicitly rejecting the position of some (e.g., racist) religions and thereby, in that limited sense, acting as an arbiter of religious truth. ("The world is one in which every human being has inherent dignity and is inviolable; if God exists and created the world, then the world created by God is one in which every human being has inherent dignity and is inviolable.")

- Certain governmental interests are undeniably legitimate, and government must be legally free to serve such interests--for example, protecting the lives, health, and safety of the citizenry--even if in doing so government is sometimes implicitly rejecting the position of some religions and thereby, in that limited sense, acting as an arbiter of religious truth.

A court orders a state to desegregate its schools, the country goes to war, educational funds are made available equally to men and women. The

\(^{13}\) Id. at ---.

\(^{14}\) See Michael J. Perry, The Political Morality of Liberal Democracy --- (forthcoming, 2010).
government has implicitly rejected religious notions that (1) God wishes rigid racial separation, (2) all killing in war violates God's commandments, (3) all women should occupy themselves with domestic tasks. A vast array of laws and policies similarly imply the incorrectness of particular religious views.\textsuperscript{15}

But beyond that certain point, government is not to be trusted as an arbiter of religious truth. In particular, government need not act—and we are understandably and justifiably wary about its acting—as an arbiter of religious (theological) disagreements that do not implicate any legitimate governmental interest. We affirm, with Locke, that "the business of laws is not to provide for the truth of opinions, but [only] for the safety and security of the commonwealth, and of every particular man's goods and persons."\textsuperscript{16} Henceforth, when I say that government is not to be trusted as an arbiter of religious truth, I mean that government is not to be trusted as an arbiter of religious disagreements that do not implicate a legitimate governmental interest.

One can imagine the Roman Catholic Church of an earlier time replying to Locke that "so long as the state accepts the Catholic Church as the arbiter of religious truth, there is no problem, because the Catholic Church has 'certain knowledge' of religious truth." By the time of the Second Vatican Council (1962-65), however, the cardinals and bishops of the Catholic Church—a large majority of them—had come to accept that the era had ended in which the Church could realistically expect to wield the kind of influence over a state—any state—it had once wielded over some states, and that the Church too, therefore, should not trust any government, including any political majority in a liberal democracy, as an arbiter of religious truth.\textsuperscript{17}


\textsuperscript{16} See n. #.

\textsuperscript{17} See Perry, the Political Morality of Liberal Democracy, n. #, at ---.
Now, the second imaginable-but-illegitimate governmental interest:

2. Protecting the religious unity of society. We can easily imagine the powers-that-be declaring: "In the long run, religious unity, understood as a kind of 'glue', enhances the strength of a nation ('strength' as in 'united we stand, divided we fall'); therefore, no government should lack authority to ban practices, religious or not, that over time may diminish the nation's religious unity and thereby weaken the nation."\(^{18}\) (In 1931, the fascist dictator of Italy, Benito Mussolini, proclaimed that "religious unity is one of the great strengths of a people."\(^{19}\)) But that position too is belied by historical experience—not least, the historical experience of religious freedom in the United States. Indeed, given the suffering it causes and the divisiveness it precipitates, the coercive imposition of religious uniformity—if not necessary to serve some other, important governmental interest, such as protecting the lives, health, or safety of the citizenry—is more likely to corrode than to nurture the strength of a democracy, especially if the democracy is, as liberal democracies typically and increasingly are, religiously pluralistic.\(^{20}\)

This, then, is the fundamental warrant for liberal democracy’s affirming the right to religious freedom: Political majorities are not to be

\(^{18}\) See Michael W. McConnell, "Establishment and Disestablishment at the Founding. Part I: Establishment of Religion," 44 William & Mary L. Rev. 2105, 2182 (2003): "Machiavelli, who called religion 'the instrument necessary above all others for the maintenance of a civilized state,' urged rulers to 'foster and encourage' religion 'even though they be convinced that is it quite fallacious.' Truth and social utility may, but need not, coincide." (Quoting Niccolo Machiavelli, The Discourses 139, 143 (Bernard R. Crick ed. & Leslie J. Walker trans., Penguin 1970) (1520).)

\(^{19}\) Quoted in John T. Noonan, Jr., A Church That Can and Cannot Change 155-56 (2005).

\(^{20}\) The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, n. #, declares: "[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 . . ."
trusted (i.e., beyond a certain point) as arbiters of religious truth; moreover, the coercive imposition of religious uniformity is (beyond a certain point) more likely to corrode than to nurture the strength of a democracy. The warrant, which is rooted in historical experience, is fundamental in the sense that it is ecumenical: Both citizens who are religious believers and those who are not can affirm the warrant. And that the warrant is ecumenical is ideal: Liberal democracies are religiously pluralistic; the citizenry of a liberal democracy typically includes not only religious believers--indeed, religious believers of various stripes--but also nonbelievers. It is ideal that all citizens of liberal democracy--believers no less than non-believers--have the same basic reason to embrace the right to religious freedom.

This is not to say, of course, that every citizen embraces the right, or that every citizen who embraces the right does so for the same reason as every other citizen. In particular, to say that all citizens have the same basic reason to embrace the right to religious freedom is not to deny that some citizens may have an additional, religion-specific reason to embrace the right--for example, "It is God's will that everyone should enjoy the right to religious freedom." Nor is it to deny that a religion-specific reason may be, for some citizens, the dominant reason.

II. The Case for the Right to Moral Freedom

The right to moral freedom (as I conceive it) is analogous to the right to religious freedom: It is the right to freedom to live one's life in harmony with one's moral convictions and commitments. Like the right to religious freedom, the right to moral freedom is broad rather than narrow. The former right broad in that it presupposes a broad account of "religion": Buddhism, for example, no less than Christianity, counts as a religion for purposes of the right, notwithstanding that Buddhism is, in the main, nontheistic. Similarly, the right to moral freedom is broad in that it presupposes a broad account--an ecumenical rather than sectarian account--of "morality": "Moral" convictions and commitments are those convictions and commitments that are the yield of one's conscientious effort to discern what choices--what voluntary, deliberate choices--are, all
things considered, right rather than wrong, just rather than unjust, good rather than bad, or the like.

The "all things considered" in the preceding sentence is crucial. In the real world, if not in every academic moralist's study, fundamental moral questions are intimately related to religious (or metaphysical) questions; there is no way to address fundamental moral questions without also addressing, if only implicitly, religious questions. (That is not to say that one must give a religious answer to a religious question, like the question, for example, Does God exist? Obviously many people do not give religious answers to religious questions.) In the real world, one's response to fundamental moral questions has long been intimately bound up with one's response--one's answers--to certain other fundamental questions: Who are we? Where did we come from; what is our origin, our beginning? Where are we going; what is our destiny, our end? What is the meaning of suffering? Of evil? Of death? And there is the cardinal question, the question that comprises many of the others: Is human life ultimately meaningful or, instead, ultimately bereft of meaning, meaning-less, absurd? If any questions are fundamental, these questions--"religious or limit questions"\(^\text{21}\)--are fundamental. Such questions are "the most serious and difficult . . . that any human being or society must face . . ."\(^\text{22}\) John Paul II was surely right in his encyclical, Fides et Ratio, that such questions "have their common source in the quest for meaning which has always compelled the human heart" and that "the answer given to these questions decides the direction which people seek to give to their lives."\(^\text{23}\)


\(^{22}\) David Tracy, The Analogical Imagination 4 (1981). Tracy adds: "To formulate such questions honestly and well, to respond to them with passion and rigor, is the work of all theology. . . . Religions ask and respond to such fundamental questions . . . Theologians, by definition, risk an intellectual life on the wager that religious traditions can be studied as authentic responses to just such questions." Id.

It is noteworthy that the Canadian Constitution seems to establish and protect a right substantially like the right to moral freedom. Section 2 of the Charter of Rights and Freedoms (1982), which is part of Canada's Constitution, states: "Everyone has the following fundamental freedoms: a) freedom of conscience and religion". The Supreme Court of Canada has written that "[t]he 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 practices." According to the Canadian Supreme Court, the freedom established and protected by s. 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."

Recall that the right to religious freedom does not protect just choices (practices) one believes oneself religiously obligated to make. Such a limitation, as I explained, would make little sense. Similarly, the right to moral freedom does not protect just choices one believes oneself morally obligated to make. A choice one believes oneself morally obligated to make may be relatively inconsequential next to a choice (e.g., working as a doctor in a desperately poor country, such as Haiti, rather than in the U.S. Army) one does not believe oneself morally obligated to make but that, nonetheless, one has strong moral reason to make. And just as a choice one has religious reason to make should not be confused with a choice one does not have religious reason not to make, a choice one has moral reason to make should not be confused with a choice one does not have moral reason not to make. The right to moral freedom protects only choices of the former sort. A right that protected choices of the latter sort would protect a multitude of choices that cannot plausibly be described as moral in nature.

According to the right to moral freedom, understood as analogous to the right to religious freedom, government has good reason to ban (or otherwise impede) a moral practice if, and only if, this condition is satisfied: The choice to enact the ban, rather than to forgo the ban in favor of a

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different policy, serves a governmental interest that is both legitimate and sufficiently weighty to be proportionate to the weight of the burden imposed by the ban on those subject to it. Or, more simply: The ban is necessary to serve a legitimate and sufficiently weighty governmental interest. What I said with respect to the right to religious freedom is no less true with respect to the right to moral freedom: A right to moral freedom would provide little meaningful protection for moral freedom if the consistency of the ban with the right was to be determined without regard to whether the weight of the interest served by the ban was relatively slight in relation to the weight of the burden imposed by the ban.

Under the right to moral freedom, what counts as a "legitimate" governmental interest? Although, again, no exhaustive list of such interests is possible, there are certain imaginable governmental interests that cannot count as legitimate under the right to moral freedom, because to count them as legitimate would be to render the right meaningless; it would be to take away with one's left hand what one has given with one's right. (Again, the Siracusa Principles state: "The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.") To affirm the right as one the law should establish and protect is necessarily to reject, in particular, the following three imaginable governmental interests as illegitimate.

1. Protecting (what the powers-that-be regard as) moral truth. We can easily imagine the powers-that-be declaring: "Certain moral teachings are true--for example, the teaching that homosexual sexual activity is immoral--and no government should lack authority to ban practices that may lead some people to reject those teachings." That position is not persuasive to those of us who, after reflecting on historical experience, are skeptical about government's ability--including, in a liberal democracy, a political majority's ability--to discern not just religious truth but also moral truth. We are understandably and justifiably wary not just about government's acting as an arbiter of religious truth but also about its acting as an arbiter of moral truth.26

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26 See n. # and accompanying text [McConnell on "the Civil Magistrate" as a poor judge of "the 'Truth' about human sexuality"].
That is, we are wary about government's acting as an arbiter of moral truth beyond a certain point.

- Again, a liberal democracy is committed to the proposition that every human being has inherent dignity and is inviolable; in the political culture of a liberal democracy, that proposition is axiomatic. In a liberal democracy, government should act in accord with the proposition even if some moralities reject the proposition.

- Certain governmental interests are undeniably legitimate, and government must be legally free to serve such interests: for example, protecting the lives, health, and safety of the citizenry. Decisions about whether in a particular context to serve such an interest, decisions about the extent to which to do so, decisions about how to do so--these are all, whatever else they are, moral decisions. So government must act as an arbiter of moral disagreements that implicate one or more legitimate governmental interests.

But beyond that certain point, government should not be trusted as an arbiter of moral truth. In particular, government need not act--and we should be wary about its acting--as an arbiter of moral disagreements that do not implicate any legitimate governmental interest. We should affirm, with Locke, that "the business of laws is not to provide for the truth of opinions, but [only] for the safety and security of the commonwealth, and of every particular man's goods and persons." Henceforth, when I say we should not trust government as an arbiter of moral truth, I mean that we should not trust government as an arbiter of moral disagreements that do not implicate a legitimate governmental interest.

Notice, then, the right to moral freedom does not remove--nor is it aimed at removing--moral controversies from the politics of a liberal democracy. (What a quixotic ambition that would be!) Even in a liberal democracy that takes seriously the right to moral freedom, politics will

\[^{27}\] See n. #.
provide many occasions for serious moral controversy. Something Robin Lovin wrote, in commenting on my argument, is relevant here:

If we adopt Perry's proposal about moral tolerance and the purposes of government, we will need to be candid that we are not proposing it as an end to social conflict over moral issues. We are proposing that if we are going to make morality the subject of political discussion, the questions at issue must concern things with which government is necessarily involved, not simply those issues in which some of us want to use the coercive powers of government to keep other people from doing things we think they ought not to do. I, for one, would welcome that shift in the terms of the public moral argument, but I wouldn't expect it to be any less contentious than the arguments we are having now.

Now, the second imaginable-but-illegitimate governmental interest:

2. Protecting the moral unity of society. We can easily imagine the powers-that-be declaring: "In the long run, moral unity, understood as a kind of 'glue', enhances the strength of a nation; therefore, no government should lack authority to ban practices that over time may diminish the nation's moral unity and thereby weaken the nation." But that position is farfetched: If it is not necessary to serve some other governmental interest—for example, protecting the lives, health, or safety of the citizenry—the coercive imposition of moral uniformity, like the coercive imposition of religious uniformity, is more likely to corrode than to nurture the strength of a democracy, especially if the democracy is, as liberal democracies typically and increasingly are, morally as well as religiously pluralistic.

Finally: 3. Protecting the moral "health" of the citizenry. Health includes, of course, psychological health as well as physical health; indeed, we have learned—and are still learning—that with respect to many illnesses, such as clinical ("major") depression, the line between the "physical" (e.g., genetic) and the "psychological" is far from clear. In any event, one's psychological health no less than one's physical health is a legitimate governmental concern. (Bans on the use of some addictive substances, such as heroin, are best understood, I think, as aimed at least partly at protecting psychological health.) But does health also include what we
may call "moral" health, so that protecting the moral health of the citizenry is a legitimate governmental interest?

In the context of religion and morality, we must be wary about using the term "health" metaphorically. (Moreover, we must be alert to the possibility that a conception of moral "health" is distorting a conception of psychological health. The most prominent recent example of that phenomenon: The traditional moral condemnation of homosexuality is one of the main factors that led psychiatrists to understand homosexuality as a psychopathology.\textsuperscript{28}) To affirm the right to religious freedom is to reject the proposition that protecting the religious (or spiritual) "health" of the citizenry is a legitimate governmental interest, because if protecting the citizenry's religious health were a legitimate governmental interest, the right to religious freedom would be largely meaningless: A political majority could ban a religious practice whenever it judged the practice, and the religious belief that animates the practice, to be seriously detrimental to the religious health--the religious well-being--not only of those who engage in the practice, but also of those who might be influenced to do likewise. ("Practicing a false religion--say, one according to which Jesus Christ is not the Son of God and the Lord and Saviour of all--is profoundly detrimental to one's religious health.") Similarly, to affirm the right to moral freedom is to reject the proposition that protecting the moral "health" of the citizenry is a legitimate governmental interest, because if protecting the citizenry's moral health were a legitimate governmental interest, the right to moral freedom would be largely meaningless: A political majority could ban a moral practice whenever it judged the practice, and the moral belief that animates the practice, to be seriously detrimental to the moral health--the moral well-being--not only of those who engage in the practice, but also of those who might be influenced to do likewise. ("Practicing a false morality--say, one according to which same-sex sexual intimacy can be a great human good--is profoundly detrimental to one's moral health.") Protecting one's physical and/or psychological health is undeniably a legitimate governmental interest, but protecting one's moral "health" cannot be, consistently with the right to moral freedom, a legitimate governmental interest, anymore than

protecting one's religious "health" can be, consistently with the right to religious freedom, a legitimate governmental interest.

So, if one thinks that in a liberal democracy there is no good reason for us not to trust political majorities as arbiters of religious truth, and that protecting the religious "health" of the citizenry should therefore be deemed a legitimate governmental interest, one should--like the pre-Vatican II Catholic Church--oppose the right to religious freedom. Similarly, if one thinks that there is no good reason for us not to trust political majorities as arbiters of moral truth, and if, like Catholic moralist Robert George, one thinks that protecting the moral "health" of the citizenry--and, relatedly, the moral "ecology" of the community, as George puts it--should therefore be deemed a legitimate governmental interest, one should, and no doubt will, oppose the proposed right to moral freedom. Pace evangelical-Christian scholar (and federal judge) Michael McConnell, we may ask Robert George: "Is the Civil Magistrate about whom John Locke wrote more 'competent a judge' of the 'Truth' about, for example, human sexuality than about religion?"

For those of us who think that there is good reason--that our historical experience provides us with good reason--not to trust political majorities as arbiters of moral truth (or moral "health"), and who support the proposed right to moral freedom, the trajectory of American law over the course of the last century is heartening. In practice if not in principle, American law has been moving in the direction of moral freedom. As legal historian William Novak has noted, "[b]y the standards of late twentieth-century law, the public regulation of morality is increasingly suspect." Novak explains:

The burgeoning public/private distinction, the jurisprudential separation of law and morality, and the expansion of


constitutionally protected rights of expression and privacy have yielded a polity whose legitimacy theoretically rests on its ability to keep out of the private moral affairs of its citizens. As the American Law Institute declared in the 1955 Model Penal Code, "We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor." "Public morality" may soon become an oxymoron.\(^{32}\)

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In my judgment, the right to moral freedom is a compelling extension of the right to religious freedom--an extension animated by the logic, so to speak, of the fundamental warrant for liberal democracy's affirmation of the right to religious freedom.\(^{33}\)

\(^{32}\) Id. Novak goes on to illustrate that "[t]he relationship between laws and morals in the nineteenth century could not have been more different. Of all the contests over public power in that period, morals regulation was the easy case." Id. at 149. See id. at 149-89. For a constitutional decision that tends to confirm Novak's prediction about public morality's becoming an oxymoron, see Lawrence v. Texas, 539 U.S. 558 (2003).


It is fitting, therefore, that Article 18 of the ICCPR, which recognizes and protects the right to religious freedom, also recognizes and protects—or certainly seems to—the right to moral freedom. Article 18 states that "[e]veryone shall have the right to freedom of . . . conscience" as well as to freedom of religion, and states further that "[t]his 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 affirms the close connection between religious freedom and moral freedom when it states that "[t]he State parties to the [ICCPR] undertake to have respect for the liberty of parents and, when applicable, legal guardians to assure the religious and moral education of their children in conformity with their own. According to Article 18, "[f]reedom to manifest one's religion or belief 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" (emphasis added). Again, the Siracusa Principles state, in relevant part: "Whenever a limitation is required in the terms of the [ICCPR] to be 'necessary,' this term implies that the limitation: . . . (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim."34

As with the right to religious freedom, so too with the right to moral freedom: All citizens of liberal democracy—Christians no less than non-Christians and non-believers—have the same basic reason to embrace the right to moral freedom: Government—a political majority—is not to be trusted (i.e., beyond a certain point) as an arbiter of moral truth; moreover, the coercive imposition of moral uniformity is (beyond a certain point) more likely to corrode than to nurture the strength of a democracy. Religious believers do not have less reason than non-believers—instead, religious believers and non-believers have the same basic reason—to insist that government not ban (or otherwise impede) a moral practice unless the ban is necessary to serve a legitimate governmental interest, the weight of which is proportionate to the weight of the burden imposed by the ban. Christians and other believers no less than non-believers—all of them have good reason, the same good reason, to affirm, with John Courtney Murray,

34 Siracusa Principles, n. #, at I.A.10.
that "the moral aspirations of the law [should be] minimal. Laws [should] seek to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order."35

35 See n. # and accompanying text.

There are many well-rehearsed practical problems with using the criminal law to regulate morality--problems that lead even some who would reject the right to moral freedom to oppose some instances of so-called morals legislation. See, e.g., Robert P. George, Making Men Moral 41-42 (1993). See also David Skeel & William J. Stuntz, "Christianity and the (Modest) Rule of Law," ... (arguing that in part because of such practical problems, Christians should be wary about using the criminal law to regulate morality); Joseph Boyle, "Positivism, Natural Law, and Disestablishment," 20 Valparaiso L. Rev. 55, 59 (1985): "Thomas Aquinas, a natural lawyer if ever there was one, . . . argues that the law should not seek to prohibit all vices, but only the more serious ones, and 'especially those which involve harm to others, without whose prohibition human society could not be preserved.'" (Quoting Thomas Aquinas, Summa Theologiae at First Part of the Second Part, Question 96, Article 2; emphasis added.)