

From Religious Freedom to Moral Freedom†

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I. INTRODUCTION

In 1966, eighteen years after it adopted the Universal Declaration of Human Rights, the United Nations General Assembly adopted the multilateral treaty known as the International Covenant on Civil and Political Rights (ICCPR).¹ In 1976, after the requisite number of countries had become parties to the treaty, the ICCPR entered into force as among those parties.² As of July 2010, there were 166 parties to the ICCPR, including, as of 1992, the United States.³ Article 18 of the ICCPR 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.⁴

Both Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 12 of the American

1. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

2. *See id.*

3. *United Nations Treaty Collection*, UNITED NATIONS (July 29, 2010, 6:28 PM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

4. International Covenant on Civil and Political Rights, *supra* note 1, art. 18, at 178. Another international document merits mention here: Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1981), *available at* <http://www2.ohchr.org/english/law/religion.htm>; *see also* 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) (using the 1981 U.N. Declaration to compare religious liberty in Australia, Canada, Ireland, Israel, New Zealand, South Africa, and the United Kingdom).

Convention on Human Rights contain language largely identical to language in Article 18 of the ICCPR.⁵

Article 18 of the ICCPR clearly protects the right to moral freedom as well as the right to religious freedom, as does Article 9 of the European Convention and Article 12 of the American Convention. 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 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.”⁶ Moreover, article 18 explicitly affirms that it is about moral as well as religious freedom when it states that “[t]he States Parties to the [ICCPR] undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious *and*

5. Article 9 of the European Convention states:

- (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.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 222, 230 [hereinafter European Convention]. Article 12 of the American Convention states:

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.

American Convention on Human Rights art. 12, Nov. 22, 1969, 1144 U.N.T.S. 123, 148 [hereinafter American Convention].

6. International Covenant on Civil and Political Rights, *supra* note 1, art. 18, at 178 (emphasis added).

moral education of their children in conformity with their own convictions.”⁷

The right to moral freedom is not only analogous to the right to religious freedom. The right to moral freedom, as I explain in this essay, represents a broadening of the right to religious freedom—a broadening that for many of us is compelling.

The right to religious freedom is the right to freely practice one’s religion: to live one’s life in harmony with one’s religious convictions and commitments. The right to moral freedom is the right to freely practice one’s morality: to live one’s life in harmony with one’s moral convictions and commitments. Moreover, the right to moral freedom, like the right to religious freedom, is broad rather than narrow. The right to religious freedom is 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. 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 convictions and commitments that are the yield of one’s conscientious effort to discern what sort of person one should be—and what sort of life, therefore, one should live—especially in relation to other persons; in particular, *moral* convictions and commitments are the yield of one’s conscientious effort to discern what choices are, for oneself if not for everyone, and all things considered, right rather than wrong, just rather than unjust, good rather than bad, or the like.

The *all things considered* is crucial. In the real world, if not in every academic moralist’s study, moral questions are intimately related to religious—or metaphysical—questions; there is no way to address 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 moral questions has long been intimately bound up with one’s response—one’s answers—to certain other questions: Who are we? From where did we come? What is our origin? our beginning? Where are we going? What is our destiny? our end?⁸

7. *Id.* (emphasis added).

8. “In an old rabbinic text three other questions are suggested: ‘*Whence* did you come?’ ‘*Whither* are you going?’ ‘*Before whom* are you destined to give account?’” ABRAHAM J. HESCHEL, *WHO IS MAN?* 28 n.§ (1965). “All people by nature desire to know the mystery from which they come and to which they go.” DENISE LARDNER CARMODY & JOHN TULLY CARMODY, *WESTERN WAYS TO THE CENTER: AN INTRODUCTION TO WESTERN RELIGIONS* 198–99 (1983). “The questions Tolstoy asked, and Gauguin in,

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, meaningless, absurd? Communities, especially historically extended communities—*traditions*—are the principal matrices of religious answers to such questions.⁹ If any questions are fundamental, these questions—*religious or limit questions*—are fundamental.¹⁰ Such questions—*naïve questions*, “questions with no answers,” “barrier[s] that cannot be breached”¹¹—are “the most serious and difficult . . . that any human being or society must face.”¹² Pope 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”

say, his great Tahiti triptych, completed just before he died (“Where Do We Come From? What Are We? Where Are We Going?”), are the eternal questions children ask more intensely, unremittingly, and subtly than we sometimes imagine.” ROBERT COLES, *THE SPIRITUAL LIFE OF CHILDREN* 37 (1990).

9. See Abraham J. Heschel, *Faith (Concluded)*, *RECONSTRUCTIONIST*, Nov. 17, 1944, at 12.

Not the individual man nor a single generation by its own power, can erect the bridge that leads to God. Faith is the achievement of many generations, an effort accumulated over centuries. Many of its ideas are as the light of the star that left its source a long time ago. Many enigmatic songs, unfathomable today, are the resonance of voices of bygone times. There is a collective memory of God in the human spirit, and it is this memory which is the main source of our faith.

Id. For a later statement on faith incorporating some of the original essay, see ABRAHAM JOSHUA HESCHEL, *MAN IS NOT ALONE: A PHILOSOPHY OF RELIGION* 159–76 (1951).

10. DAVID TRACY, *PLURALITY AND AMBIGUITY: RELIGION, HERMENEUTICS, HOPE* 86 (1987).

11. In Milan Kundera’s *The Unbearable Lightness of Being*, the narrator, referring to the “questions that had been going through Tereza’s head since she was a child,” says: [T]he only truly serious questions are ones that even a child can formulate. Only the most naïve of questions are truly serious. They are the questions with no answers. A question with no answer is a barrier that cannot be breached. In other words, it is questions with no answers that set the limits of human possibilities, describe the boundaries of human existence.

MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* 139 (Michael Henry Heim trans., Perennial Classics 1999) (1984).

12. DAVID TRACY, *THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM* 4 (1981). Tracy adds:

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.

To formulate such questions honestly and well, to respond to them with passion and rigor, is the work of all theology.

Id.

and that “the answer given to these questions decides the direction which people seek to give to their lives.”¹³

It bears mention that the Canadian Constitution establishes and protects a right substantially like the article 18 right to moral freedom. Section 2 of the Charter of Rights and Freedoms, which is part of the Canadian Constitution, states, “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.”¹⁴ 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 conduct and practices.”¹⁵ According to the Canadian Supreme Court, 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.”¹⁶

The religious and moral practices protected by article 18 include not just practices one believes oneself religiously or morally obligated to engage in—obligated by the pronouncements of religious or moral texts

13. JOHN PAUL II, ENCYCLICAL LETTER *FIDES ET RATIO* para. 1 (1998). In the introduction to *Fides et Ratio*, John Paul II wrote:

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

Id. *Fides et Ratio* would more accurately be named *Fides et Philosophia*. See *id.* para. 26. We find a similar statement in the Second Vatican Council’s *Declaration on the Relation of the Church to Non-Christian Religions*:

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

SECOND VATICAN COUNCIL, *NOSTRA AETATE: DECLARATION ON THE RELATION OF THE CHURCH TO NON-CHRISTIAN RELIGIONS* para. 1 (1965), available at http://www.jewishvirtuallibrary.org/jsource/anti-semitism/Nostra_Aetate.html.

14. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 2(a) (U.K.).

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

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

and authorities. After all, a practice one believes oneself religiously or morally obligated to engage in, for example forsaking meat on Lenten Fridays, may be relatively inconsequential next to a practice one does not believe oneself religiously or morally obligated to engage in but that one nonetheless has religious or moral reason to engage in, for example receiving communion wine. As the Supreme Court of Canada put the point in a case involving the right to 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 nonobligatory 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.¹⁷

However, a practice one has religious or moral reason to engage in should not be confused with a practice one does not have religious or moral reason not to engage in. Article 18 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 or moral in nature.

Some ICCPR rights—such as the article 7 right not to “be subjected to torture or to cruel, inhuman or degrading treatment or punishment”—are unconditional (absolute): they forbid or require government to do something, *period*.¹⁸ Some other ICCPR rights, by contrast, are conditional: they forbid or require government to do something *unless certain conditions are satisfied*. Under article 18, government may not ban or otherwise regulate or impede a religious or moral practice unless these two conditions are satisfied:

17. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 588 (Can.).

18. *See* International Covenant on Civil and Political Rights, *supra* note 1, art. 7, at 175. Article 7 states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” *Id.*

- (1) the regulation serves a legitimate government interest—and better serves it than would any less burdensome (to religious or moral practice) regulation;
- (2) what the regulation achieves in serving that interest—the benefit of the regulation—is proportionate to (commensurate with) the cost the regulation imposes on those subject to the regulation.¹⁹

A. *The Proportionality Condition*

A right to religious or moral freedom obviously would provide no meaningful protection for freedom of religious or moral practice if the consistency of a regulation with the right were to be determined without regard to whether the benefit of the regulation was proportionate to the cost of the regulation. And, indeed, article 18 is authoritatively understood to require that the benefit of the regulation be proportionate to the cost of the regulation.²⁰

19. *See id.*, art. 18, at 178. The right to the free exercise of religion protected by the constitutional law of the United States is not unconditional; it permits government to prohibit some religious practices. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 166 (1879) (upholding the constitutionality of a law banning polygamy).

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

Id.

By its very terms, the free exercise right forbids government to prohibit not the exercise of religion but the “free” exercise of religion—the freedom of religious exercise. Just as government may not abridge the freedom of speech or the freedom of the press, so too it may not prohibit the freedom of religious exercise. The right to freedom of religious exercise is not an unconditional right to do, on the basis of religious belief or for religious reasons, whatever one wants. One need not concoct outdated hypotheticals about human sacrifice to dramatize the point. One need only point, for example, to the refusal of some Christian Science parents to seek readily available lifesaving medical care for their gravely ill child. *See, e.g.*, *Lundman v. McKown*, 530 N.W.2d 807, 818 (Minn. Ct. App. 1995); *see also* Caroline Fraser, *Suffering Children and the Christian Science Church*, *ATLANTIC MONTHLY*, Apr. 1995, at 105, 105 (“Had my brother or sister or I contracted a serious illness or met with a life-threatening accident while we were growing up, we would have been expected to heal ourselves . . .”). Just as the right to freedom of speech does not privilege one to say and right to the freedom of the press does not privilege one to publish whatever one wants wherever one wants whenever one wants, the right to freedom of religious exercise does not—because it cannot—privilege one to do, on the basis of religious belief or for religious reasons, whatever one wants wherever one wants whenever one wants.

20. *See* T. Jeremy Gunn, *Permissible Limitations on Religion*, in *RELIGION AND HUMAN RIGHTS* (John Witte, Jr. & Frank S. Alexander eds., forthcoming 2011).

About the cost a regulation of religious or moral practice imposes on those subject to the regulation, especially if the regulation is a ban: denying religious or moral freedom to people—freedom to live their lives in harmony with their religious or moral convictions and commitments—is hurtful to them, sometimes greatly hurtful. The hurt consists of the suffering that attends the experienced disintegration of a central aspect of their lives: they are legally prevented from living their lives in harmony with one or more of their core convictions and commitments; in that sense, and to that extent, they are legally prevented from living their lives in harmony with themselves. “[H]aving and acting on core beliefs is central to what makes us ‘persons.’”²¹

B. The Legitimacy Condition

What government interests are *legitimate* for purposes of article 18? Article 18 does not call into question the legitimacy of government acting to protect—to list the most obvious examples—the lives, health, safety, liberty, property, or socioeconomic well-being of human beings; human rights; the orderly functioning of society, including the orderly functioning of democratic and judicial processes; or nonhuman animals or other sentient life. However, there are certain imaginable government interests that cannot count as legitimate under the right to religious freedom or 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

However absolutist the term “necessary” might seem to be in the language of the conventions, neither the European Court nor other tribunals have interpreted it in such a strong or uncompromising manner. In order to avoid the consequences of giving “necessary” an overly robust interpretation that would lead to striking down state restrictions that were somewhat less than absolutely necessary, international tribunals have substituted an entirely different term that does not appear anywhere in the text: “*proportional*.” Thus, rather than asking whether a state restriction was in fact “necessary,” the European Court asks instead whether the restriction is “proportional” to the harm that the state seeks to avoid.

Id.; see also United Nations, Econ. & Soc. Council, Comm. on Human Rights, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex, para. 10 (1985) [hereinafter Siracusa Principles] (“Whenever a limitation is required in the terms of the Covenant to be ‘necessary’, this term implies that the limitation . . . [i]s proportionate to that aim.”). On the Siracusa Principles, see generally *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 3 (1985).

21. Steven D. Smith, *What Does Religion Have To Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 932 (2005).

hand what one had given with the other. As 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.”²²

II. RIGHT TO RELIGIOUS FREEDOM: IMAGINABLE-BUT-ILLEGITIMATE GOVERNMENT INTERESTS

With respect to the article 18 right to *religious* freedom, there are three main imaginable-but-illegitimate government interests.

A. *Protecting—What the Political Powers-That-Be Regard as—Religious Truth*

By *religious* truth, I mean here true answers to religious questions, even if the answers are antireligious. We can easily imagine the powers-that-be declaring: “Certain religious teachings are true—the teaching that one who embraces Christianity has a much better chance of being saved²³—and no government should lack authority to ban practices, religious or not, that may lead some people to reject those teachings.” We can also easily imagine a different powers-that-be declaring: “Certain atheistic teachings are true—the teaching that ‘religion is unscientific, superstitious, and an enemy of progress’²⁴—and no government should lack authority to ban practices, religious or not, that may lead some people to reject those teachings.”

Both declarations—and whatever laws or other policies are based thereon—are jarring 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 of true religion.”²⁵ To Locke’s “does necessarily carry” we may add “or has ever carried.”

22. Siracusa Principles, *supra* note 20, para. 2.

23. See *Other Faiths Are Deficient, Pope Says*, TABLET, Feb. 5, 2000, at 157, 157 (“The revelation of Christ is ‘definitive and complete’, Pope John Paul affirmed to the Congregation for the Doctrine of the Faith, on 28 January. He repeated the phrase twice in an address which went on to say that non-Christians live in ‘a deficient situation, compared to those who have the fullness of salvific means in the Church.’”). Nonetheless, “[Pope John Paul II] recognised, following the Second Vatican Council, that non-Christians can reach eternal life if they seek God with a sincere heart. But in that ‘sincere search’ they are in fact ‘ordered’ towards Christ and his Church.” *Id.* (citation omitted).

24. See Lawrie Breen, *A Chinese Puzzle*, TABLET, Mar. 5, 2005, at 12, 12 (reporting that recent Chinese 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 Propaganda Department, called for a new drive to promote Marxist atheism.” *Id.* at 13.

25. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* 35 GREAT BOOKS OF THE WESTERN WORLD 1, 9 (Robert Maynard Hutchins ed., 1952).

“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, who may probably be as ignorant of the way as myself, and who certainly is less concerned for my salvation than I myself am.”²⁶ In our (Lockean) judgment, government is not to be trusted as an arbiter of religious—or antireligious—truth. Or, because we here in conversation are citizens of a democracy, we may say that a political majority is not to be trusted as an arbiter of religious truth. Government need not act—and we are understandably and justifiably wary about its acting—as an arbiter of religious (theological) disagreement. As Locke put it, “[T]he 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 person.”²⁷

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

26. *Id.*; see also JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in 8 THE PAPERS OF JAMES MADISON 295, 298–301 (Robert A. Rutland et al. eds., 1973) (explaining why “[w]e the subscribers, citizens of [Virginia],” reject the proposed “Bill establishing a provision for Teachers of the Christian Religion”).

5. Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.

Id. at 301.

27. LOCKE, *supra* note 25, at 15. Kent Greenawalt has written: “A court orders a state to desegregate its schools, the country goes to war, educational funds are made available equally to men and women.” Kent Greenawalt, *Five Questions About Religion Judges Are Afraid To Ask*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 196, 199 (Nancy L. Rosenblum ed., 2000). Greenawalt suggests that in so doing, government seems to be saying, implicitly, that the court order, the decision to go to war, and the equal treatment of men and women are not contrary to what God wills—if there is a God who wills. See *id.* “A vast array of laws and policies similarly imply the incorrectness of particular religious views.” *Id.* The better view, however, is that this *seeming* is an illusion, that government’s warrant for the court order, the decision to go to war, and the equal treatment of men and women neither presupposes nor, much less, asserts either that God exists—and wills—or that God does not exist; government’s warrant is agnostic about whether God exists; government’s warrant is thoroughly secular; government’s position is that, bracketing the questions whether God exists and what God wills, the court order, the decision to go to war, and the equal treatment of men and women are each warranted on the basis of purely secular considerations. I would like to thank Steve Shiffrin for emphasizing this point to me.

Second Vatican Council, 1962–1965, 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—especially—any political majority in a democracy, as an arbiter of religious truth.²⁸

Now, the second imaginable-but-illegitimate government interest.

B. *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.”²⁹ 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 is more likely to corrode than to nurture the strength of a democracy, especially if the democracy is, as democracies typically and increasingly are, religiously pluralistic.³⁰

28. I have discussed the post-Vatican II Church’s embrace of the right to religious freedom elsewhere. See MICHAEL J. PERRY, *THE POLITICAL MORALITY OF LIBERAL DEMOCRACY* 80–87 (2010); Michael J. Perry, *Liberal Democracy and the Right to Religious Freedom*, 71 REV. POL. 621, 629–35 (2009).

29. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2182 (2003) (quoting NICCOLO MACHIAVELLI, *THE DISCOURSES* 139, 143 (Bernard R. Crick ed., Leslie J. Walker trans., 1970) (1520)) (“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.”); cf. *Atheist Defends Belief in God*, TABLET, Mar. 24, 2007, at 33, 33 (“A senior German ex-Communist has praised the Pope and defended belief in God as necessary for society ‘I’m convinced only the Churches are in a state to propagate moral norms and values,’ said Gregor Gysi, parliamentary chairman of Die Linke, a grouping of Germany’s Democratic Left Party (PDS) and other left-wing groups. ‘I don’t believe in God, but I accept that a society without God would be a society without values. This is why I don’t oppose religious attitudes and convictions.’”). In 1931, the fascist dictator of Italy, Benito Mussolini, proclaimed that “religious unity is one of the great strengths of a people.” JOHN T. NOONAN, JR., *A CHURCH THAT CAN AND CANNOT CHANGE* 155–56 (2005).

30. Cf. Paul Cruickshank, Op-Ed., *Covered Faces, Open Rebellion*, N.Y. TIMES, Oct. 21, 2006, at A13 (“When Jack Straw, the former [British] foreign secretary, declared earlier this month that the niqab made positive relations between Muslims and non-Muslims more difficult because it was ‘such a visible statement of separation and difference,’ he struck a chord with many British voters, only 22 percent of whom think

Finally, the third imaginable-but-illegitimate government interest.

C. Protecting the Religious Health of the Citizenry

Health includes, of course, psychological health as well as physical health, and one's psychological health no less than one's physical health is widely and understandably thought to be a legitimate government concern. But does health also include what we may call *religious* health, so that protecting the religious health of the citizenry is a legitimate government interest?

In the context of religion, we must be wary about using the term *health* metaphorically. To affirm the right to religious freedom is necessarily to reject the proposition that protecting the religious—or spiritual—*health* of the citizenry is a legitimate government interest because if protecting the citizenry's religious health were a legitimate government interest, then the right to religious freedom would be largely meaningless: government 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.³¹ Protecting one's physical or psychological health is undeniably a legitimate government interest, but protecting one's religious *health* cannot be, consistently with the right to religious freedom, a legitimate government interest.

D. Conclusion: Right to Religious Freedom

This, then, is the fundamental argument—the fundamental warrant—for the right to religious freedom: governments, including political majorities, are not to be trusted as arbiters of religious truth; moreover, the coercive imposition of religious uniformity is more likely to corrode than to nurture the strength of a democracy. The warrant, which is

Muslims have done enough to fit into mainstream society.”). 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 4, at 171.

31. Practicing a false religion, for example one according to which Jesus Christ is not the Son of God and the Lord and Savior of all, is profoundly detrimental to one's religious health.

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.³²

III. RIGHT TO MORAL FREEDOM: IMAGINABLE-BUT-ILLEGITIMATE GOVERNMENT INTERESTS

Just as there are, with respect to the article 18 right to *religious* freedom, three imaginable-but-illegitimate government interests, there are, with respect to the article 18 right to *moral* freedom, three imaginable-but-illegitimate government interests.

A. *Protecting—What the Political Powers-That-Be Regard as—Moral Truth*

We can easily imagine the powers-that-be declaring: “Certain moral teachings are true—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 declaration—and whatever laws or other policies are based thereon—is jarring to those of us who, after reflecting on historical experience, are skeptical about government’s ability—including, in a 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. That is, we are understandably and justifiably wary about government’s acting as an arbiter of moral truth *if no legitimate government interests are at stake*.³³ Government is no more to be trusted as an arbiter of a moral disagreements *that do not implicate a legitimate*

32. This is not to deny that some citizens may have a different reason for embracing the right to religious freedom. In particular, some citizens may have a religion-specific reason. Nor is it to deny that for some citizens, the different reason may be the dominant reason. See E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 488 (2009) (“[T]he original reasons for singling out religion and placing it beyond government’s power were mostly religious.”). Wallace then states in a footnote: “I am indebted to Michael McConnell for first calling my attention to this fact and stirring my curiosity to investigate it further. Judge McConnell has made the point in several writings. Steven Smith’s seminal article discussing the underlying justifications for religious freedom also helped shape my early thinking on this matter.” *Id.* at 488 n.11 (citations omitted) (citing Steven D. Smith, *The Rise and Fall of Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991)).

33. Recall that article 18 does not call into question the legitimacy of government acting to protect the lives, health, safety, liberty, property, or socioeconomic well-being of human beings; human rights; the orderly functioning of society, including the orderly functioning of democratic and judicial processes; or nonhuman animals or other sentient life.

government interest than it is to be trusted as an arbiter of religious disagreements.

I said above that the right to moral freedom is analogous to the right to religious freedom. There is, however, an important disanalogy between the two rights. Look again, in the preceding paragraph, at the qualifier “that do not implicate a legitimate government interest.” That qualifier is crucial: whereas the right to religious freedom removes religious controversies from democratic politics, the right to moral freedom does not remove—it is not aimed at removing—moral controversies from democratic politics. Even in a democracy that takes seriously the right to moral freedom, politics will provide many occasions for serious moral controversy. Something Robin Lovin wrote, in commenting on an earlier instance of my argument in support of the right to moral freedom, is clarifying on this point:

If we adopt Michael’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.³⁴

Lovin then wrote:

It is important to recognize that freedom of moral practice is a moral commitment, because although the moral arguments for it are the same as the moral arguments for religious freedom, we cannot offer the same practical or prudential incentives for moral tolerance that Locke, for example, could offer his contemporaries for accepting religious tolerance. He could suggest, plausibly, that that toleration would reduce the social friction of religious conflict, and for a nation that still had a wary eye to the recent history of religious warfare, that was often a good enough reason to try it. Freedom of moral practice, I think, is not likely to reduce conflict, but to shift its terms.³⁵

The point, then, is not that government is no more to be trusted as an arbiter of a moral disagreements—*full stop*—than it is to be trusted as an arbiter of religious disagreements. The point, rather, is that government is no more to be trusted as an arbiter of moral disagreements *that do not implicate a legitimate government interest* than it is to be trusted as an

34. PERRY, *supra* note 28, at 93.

35. *Id.* at 93 n.11.

arbiter of religious disagreements. To borrow from Lovin’s language: the morality that under article 18 is a legitimate “subject of political discussion” is the morality that “concern[s] things with which government is necessarily involved.”³⁶ We may call that morality *public morality* to distinguish it from *private morality*—morality that does not implicate a legitimate government interest.

B. *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 a legitimate government interest—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 democracies typically and increasingly are, morally as well as religiously pluralistic.

C. *Protecting the Moral Health of the Citizenry and the Moral Ecology of Society*

Again, health includes 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*, for example genetic, and the *psychological* is far from clear. In any event, one’s psychological health no less than one’s physical health is widely and understandably conceded to be a legitimate government concern. Bans on the use of some addictive substances, such as heroin, are best understood as aimed, at least partly, at protecting psychological health. What about bans on prostitution? “[The ways prostitution harms those working as prostitutes] are deep and pervasive. Prostitutes typically suffer economically, physically and emotionally from prostitution. They rarely find economic success and experience deep and lasting psychological harm that retards their ability to form healthy lasting intimate relationships.”³⁷

36. *Id.* at 93.

37. Ekow N. Yankah, Book Review, NOTRE DAME PHIL. REVIEWS, Apr. 5, 2010, <http://ndpr.nd.edu/review.cfm?id=19348> (reviewing PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION (2010)). Ekow Yankah writes:

Does health also include what we may call *moral* health, so that protecting the moral health of the citizenry is a legitimate government interest?

In the context of morality as well as in the context of religion, we must be wary about using the term *health* metaphorically.³⁸ Again, 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 government interest because if protecting the citizenry's religious health were a legitimate government interest, then the right to religious freedom would be largely meaningless: government 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. Similarly, to affirm the right to moral freedom is to reject the proposition that protecting the moral *health* of the citizenry is a legitimate government interest because if protecting the citizenry's moral health were a legitimate government interest, then the right to moral freedom would be largely meaningless: government 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.³⁹ Protecting one's physical or psychological health is undeniably a legitimate government interest, but protecting one's moral *health* cannot be, consistently with the right to moral freedom, a legitimate government

[De Marneffe] surveys the ways prostitution harms those working as prostitutes. Those harms are deep and pervasive. Prostitutes typically suffer economically, physically and emotionally from prostitution. They rarely find economic success and experience deep and lasting psychological harm that retards their ability to form healthy lasting intimate relationships. (De Marneffe persuasively dispatches the idea that prostitution is harmful *because* it is illegal and thus stigmatized.)

Id. (citation omitted).

38. 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 conclude that homosexuality is a psychopathology. See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 179–80 (1981).

39. Practicing a false morality, for example one according to which same-sex sexual intimacy is not immoral, is profoundly detrimental to one's moral health.

interest, anymore than protecting one's religious *health* can be, consistently with the right to religious freedom, a legitimate government interest.

If one thinks that there is no good reason for us not to trust government, including a political majority, as an arbiter of religious truth and that protecting the religious *health* of the citizenry should therefore be deemed a legitimate government 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 government as an arbiter of moral truth *even when no legitimate government interest is at stake* and if, like Catholic moralist Robert George, one thinks that protecting the moral *health* of the citizenry—and, in a related vein, the moral *ecology* of society, as George puts it—should therefore be deemed a legitimate government interest,⁴⁰ then one should, and no doubt will, oppose the proposed right to moral freedom.⁴¹

For those of us who think that there is good reason—that our historical experience provides us with good reason—not to trust government as an arbiter of moral truth *when no legitimate government interest is at stake* and who therefore support the 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, “By the standards of late twentieth-century law, the public regulation of morality [in the United States] is increasingly suspect.”⁴² 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.”⁴³

Let me try—quixotically—to avoid misunderstanding by rehearsing here something I said a few pages back: the point is not that government

40. See Robert P. George, *Law and Moral Purpose*, FIRST THINGS, Jan. 2008, at 22, 22.

41. Cf. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 44 (2000) (asking whether there is any good reason to conclude that the civil magistrate about whom John Locke wrote “is [any] more ‘competent a Judge’ of the ‘Truth’ about human sexuality than [he is] about religion”).

42. WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 149 (1996).

43. *Id.* Novak goes on to illustrate that “[t]he relationship between law and morals in the nineteenth century could not have been more different. Of all of the contests over public power in that period, morals regulation was the easy case.” *Id.*; see generally *id.* at 149–89 (providing further insight into the relationship between law and morals in the nineteenth century).

is not to be trusted as an arbiter of moral disagreements—*full stop*—but that it is not to be trusted as an arbiter of moral disagreements *that do not implicate a legitimate government interest*. The morality that under article 18 is a legitimate subject of political debate and resolution—which, as I said, we may call “public morality”—is the morality that, in Robin Lovin’s words, “concern[s] things with which government is necessarily involved.”⁴⁴ Again, article 18 does not call into question the legitimacy of government acting to protect the lives, health, safety, liberty, property, or socioeconomic well-being of human beings; human rights; the orderly functioning of society, including the orderly functioning of democratic and judicial processes; or nonhuman animals or other sentient life.

D. Conclusion: Right to Moral Freedom

At the Second Vatican Council, 1962–1965, 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 moral freedom. In 1960, the year in which the first and, so far, only Catholic was elected to the presidency of the United States, Murray published *We Hold These Truths: Catholic Reflections on the American Proposition*. Murray wrote, in that now-famous book, “[T]he moral aspirations of the law are minimal. Law seeks to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order.”⁴⁵ 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.”⁴⁶

Again, the right to moral freedom represents a compelling broadening of the right to religious freedom—a broadening, we can now see, that is animated by the logic, so to speak, of the fundamental warrant for the right to religious freedom. As with the right to religious freedom, so too

44. PERRY, *supra* note 28, at 93.

45. JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 166 (1960).

46. *Id.*

with the right to moral freedom: all citizens—believers of every stripe and nonbelievers—have the same basic reason to embrace the right to moral freedom. Government, including a political majority, is not to be trusted as an arbiter of moral truth—when no legitimate government interest is at stake; moreover, the coercive imposition of moral uniformity, when no legitimate government interest is at stake, is more likely to corrode than to nurture the strength of a democracy. Religious believers do not have less reason than nonbelievers—instead, religious believers and nonbelievers have the same basic reason—to insist that government not ban or otherwise regulate or impede a moral practice unless (1) the regulation serves a legitimate government interest—and better serves it than would any less burdensome regulation—and (2) what the regulation achieves in serving that interest is proportionate to the cost the regulation imposes on those subject to the regulation.⁴⁷ Catholics, Christians, and other believers no less than nonbelievers—all of them have good reason, the same good reason, to affirm, with John Courtney Murray, that “the

47. Of course, proportionality inquiry is fraught with difficulty. See Gunn, *supra* note 20.

Proportionality analysis in limitations clause jurisprudence assumes that there should be a proportionate correlation between the seriousness of the harm that the state seeks to prevent when imposing the restriction on the manifestation of religion and the severity of the infringement on the liberty that the restriction imposes. To the extent that a state restriction prevents a great harm and the infringement on the liberty is slight, the restriction presumably is justifiable. For example, the state might delay the opening of a new building for religious worship for a few days until after a fire inspection is complete. To the extent that the state interest is low, and the infringement on liberty is high, the state action presumably is not justifiable. For example, the state’s refusal to allow religious groups to meet without prior authorization of the state presumably is not justifiable, particularly when the state imposes long delays on registration.

The proportionality cases identified in the preceding paragraph are relatively easy to analyze. The more difficult cases are those where there are strongly competing interests of the state and of people seeking to manifest their religion. Should pacifists be permitted to distribute anti-war literature at the entrance to a military base when a country is at war? Should a state official be permitted to proselytize his employees during non-working hours? Should Hindus be permitted to hold a religious celebration in the city of Ayodhya, India, near the site where Hindu nationalists had earlier destroyed the Babri mosque if the celebration might provoke a communal clash? Should the state be able to force children to receive medical treatment that will save their lives if both the children and their parents do not want the treatment? Should state prison authorities in the United States and Canada be required to allow the building of ritual sweat lodges inside prisons for Native Americans? Should women wearing the face-covering burka be required to remove it for state identification photos? May women wearing the burka be prohibited from driving automobiles? May Sikh motorcyclists be required to wear helmets that would force them to remove their turbans? Courts and legislators have been required to answer each of these questions, with the inevitable result that either a legitimate state interest or a form of legitimate religious manifestation has been compromised.

Id. For Gunn’s proposal about how to conduct proportionality inquiry, see *id.*

moral aspirations of the law [should be] minimal. Law[s should] seek[] to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order.”⁴⁸

It is fitting, therefore, that Article 18 of the ICCPR protects not only *religious* freedom but also *moral* freedom.

IV. CONCLUSION

It bears emphasis that nothing I have said in this essay presupposes an answer to the difficult question whether courts should be empowered to protect the right to moral freedom. Even if, all things considered, we should be loathe to empower courts to enforce it, the right to moral freedom can and, for the reasons I have given here, should serve as a fundamental political-moral norm in the public culture of a liberal democracy. I have elsewhere illustrated the role the right can play—the right understood as a political-moral norm—in shaping a liberal democracy’s discourse about divisive political-moral controversies, such as those in the United States over abortion and same-sex unions.⁴⁹

As it happens, and for better or worse, a version of the right to moral freedom has emerged in the constitutional law of the United States. How well—or poorly—has the U.S. Supreme Court handled the right? That is an interesting and important question but beyond the scope of this essay.⁵⁰

48. MURRAY, *supra* note 45, at 166. It seems to me that the logic of the Second Vatican Council’s *Dignitatis Humanae*, the English title of which is *Declaration on Religious Freedom*, supports the right to moral freedom no less than the right to religious freedom. See SECOND VATICAN COUNCIL, DECLARATION ON RELIGIOUS FREEDOM: *DIGNITATIS HUMANAЕ* paras. 1–3 (1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (“[The] demand for freedom in human society chiefly regards the quest for the values proper to the human spirit.”); cf. Gregory Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 3–4 (2006) (“[R]esources drawn from the tradition of Catholic social thought and articulated in the Second Vatican Council’s *Declaration on Religious Freedom* can rectify [the doctrinal incoherence of the relationship between law and morality] by generating an analytical framework for understanding [it].”).

49. See PERRY, *supra* note 28, at 123–55.

50. I have not mentioned here because they are well-rehearsed elsewhere the many practical problems with using the criminal law to regulate morality—problems that lead even some who reject the right to moral freedom to oppose some instances of so-called morals legislation. See, e.g., ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 41–42 (1993); see also David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809, 831–39 (2006) (arguing that in part because of such practical problems, Christians should be wary about using the criminal law to regulate morality).

