A right to religious and moral freedom? A reply to Rafael Domingo

Michael J. Perry*

I am grateful to Rafael Domingo for engaging with my argument, and to the International Journal of Constitutional Law for inviting me to reply.

Let me begin by informing the reader that the “final draft” (so to speak) of my argument is an essay that has just been published in the Journal of Law and Religion: “Freedom of Conscience as Religious and Moral Freedom.”¹ As he was drafting his critique of my argument, Professor Domingo read that essay, which he cites in his critique. I recommend that the reader who wants to delve more deeply into the disagreement between Professor Domingo and me read the essay, which is available on the web.²

1. Moral as well as religious freedom

Here is the position for which I argue: Moral freedom—the freedom to live one’s life in accord with one’s moral convictions and commitments—merits protection as a human right³ no less than religious freedom, which is the freedom to live one’s life in accord with one’s religious convictions and commitments. (For one who self-identifies as religious, there may be an overlap between the two freedoms, because for such a person, some of her moral convictions and commitments may be based on her religious

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convictions and commitments.) The right to religious and moral freedom protects the freedom to live one’s life in accord with one’s religious and/or moral convictions and commitments. The articulation of the right in article 18 of the International Covenant on Civil and Political Rights (ICCPR) is canonical, in this sense: The great majority of the countries of the world—about 87 percent—are parties to the ICCPR, including, as of 1992, the United States.

Of course, the protection afforded by the right to religious and moral freedom is—and as a practical matter, it must be—only conditional protection; the protection is not absolute (unconditional). Under the right, government may not ban or otherwise impede conduct protected by the right, thereby interfering with one’s freedom to live one’s life in accord with one’s religious and/or moral convictions and commitments, unless, as I have explained elsewhere, each of three conditions is satisfied:

- **The legitimacy condition.** The government action at issue (law, policy, etc.) must serve a legitimate government objective. The specific government action at issue might be not the law (policy, etc.) itself but that the law does not exempt the protected conduct.
- **The least burdensome alternative condition.** The government action—which, again, might be that the law does not exempt—must be necessary to serve the legitimate objective, in the sense that the action serves the objective significantly better than would any less burdensome government action.
- **The proportionality condition.** The legitimate objective served by the government action must be sufficiently weighty to warrant the burden imposed by the government action.

It bears emphasis that the position for which I argue—the position that Professor Domingo rejects—is not idiosyncratic. The International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 18 [hereinafter 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.


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

See Perry, Freedom of Conscience, supra note 1.
Political Rights, in article 18, explicitly recognizes the right to religious and moral freedom as a human right; moreover, a growing number of scholars now argue that moral freedom should be protected alongside religious freedom as a fundamental right. For example, in *Secularism and Freedom of Conscience*, Catholic philosopher Charles Taylor and co-author Jocelyn Maclure argue in support of the right to religious and moral freedom.7 “Religious diversity.” Taylor and Maclure explain,

must be seen as an aspect of the phenomenon of “moral pluralism” with which contemporary democracies have to come to terms. . . . Although the history of the West serves to explain the fixation on religion . . . the state of contemporary societies requires that we move beyond that fixation and consider how to manage fairly the moral diversity that now characterizes them. The field of application for secular governance has broadened to include all moral, spiritual, and religious options.8

In the conclusion to their book, Taylor and Maclure write: “There do not seem to be any principled reasons to isolate religion and place it in a class apart from the other conceptions of the world and of the good.”9

I concur in Taylor and Maclure’s conclusion. To prevent one from living one’s life in accord with one’s religious and/or moral convictions and commitments, or to make it significantly more difficult for one to do so, is hurtful, sometimes greatly hurtful. As philosopher Mark Wicclair puts the point in his important book, *Conscientious Objection in Health Care: An Ethical Analysis*: “[Even] one instance of acting against one’s conscience—an act of self-betrayal—can be devastating and unbearable.”10 Wicclair elaborates:

7 See JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE (2011).
8 Id. at 20 and 106, “Moral pluralism’ refers to the phenomenon of individuals adopting different and sometimes incompatible value systems and conceptions of the good.” Id. at 20.
9 Id. at 105. Robert Audi concurs: see ROBERT AUDI, DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE 42–43 (2011). Many others have reached the same conclusion. This is just a sampling: Gidon Sapir & Daniel Statman, *Why Freedom of Religion Does Not Include Freedom from Religion*, 24 LAW & PHIL. 467, 487 (2005) (“We understand freedom of religion as a branch of freedom of conscience or as a branch of the right to culture, there is no justification for granting it special status within the framework of these rights.”); Howard Kiszlowicz, Richard Haigh, & Adrienne Ng, *Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom*, 48 ALBERTA L. REV. 679, 681 (2011) (“arguing that there is no principled reason that matters of conscience should be treated differently from matters of religious belief and practice”); Gemma Cornelissen, *Religion-Based Exemptions: Are Religious Beliefs Special?*, 25 RATIO JURIS 85 (2012) (answering “no”).

Although BRIAN LEITER reaches the same conclusion in *Why Tolerate Religion?* (2012), he does so principally on the basis of a problematic argument about the ways in which religiously based claims of conscience are relevantly different from claims of conscience that are not religiously based. See Robert Merritew Adams, *Review of Brian Leiter, Why Torate Religion?*, N.D. PHIL. REV., Jan. 6, 2013, http://ndpr.nd.edu/news/36599-why-tolerate-religion/; William Galston, *Claims of Conscience: Religious Freedom and State Power*, COMMONWEAL, Apr. 19, 2013, http://www.commonwealmagazine.org/claims-conscience. As the work cited in the preceding paragraph illustrates—and indeed as this essay illustrates—one need not rely on Leiter’s argument to support the conclusion that, in MACLURE & TAYLOR’S articulation, “[t]here do not seem to be any principled reasons, for purposes of freedom of conscience, to isolate religion and place it in a class apart from the other conceptions of the world and of the good” (supra note 7, at 105).

10 MARK R. WICCLAIR, CONSCIENTIOUS OBJECTION IN HEALTH CARE: AN ETHICAL ANALYSIS 11 (2011). See also Sapir & Statman, supra note 9, at 474: “[C]oercing people to act against their deepest normative beliefs presents a severe threat to their integrity and makes them experience strong feelings of self-alienation and loss of identity; therefore, it should be avoided as far as possible.”
[A] loss of moral integrity can be devastating. It can result in strong feelings of guilt, remorse, and shame as well as loss of self-respect. Moral integrity can be of central importance to people whose core beliefs are secular as well as those whose core beliefs are religious. [Martha] Nussbaum cites a powerful image that Roger Williams used to defend liberty of conscience: “To impose an orthodoxy upon the conscience is nothing less than what Williams, in a memorable and oft-repeated image, called ‘Soule rape’.” The reference to rape of the soul suggests that this statement was meant primarily as a defense of religious tolerance. Nevertheless, when a failure to accommodate secular core beliefs results in a loss of moral integrity, it can be experienced as an assault on one’s self or identity.\footnote{Wicclair, supra note 10, at 26 (quoting Martha C. Nussbaum, Liberty of Conscience: In Defense of America’s Defense of Religious Equality 37 (2008)). For Wicclair’s full response to the question “why the exercise of conscience is valuable and worth protecting”, see Wicclair, supra note 10, at 25–31. Cf. Douglas Laycock, Reviews of a Lifetime, 89 Tex. L. Rev. 949, 985 (2011): The only reasons that can justify religious liberty to a broad audience in a religiously diverse society are reasons that do not require acceptance or rejection of any propositions of religious faith. Of course such a scheme will not persuade everybody, and perhaps in the end will not persuade anybody. But that is what I was trying to do. I am happy to supplement the argument with religious reasons when speaking to audiences that might be persuaded by them. Some citizens have a religious reason (or reasons) for affirming the right to religious and moral freedom, and for them, the religious reason may be the dominant reason. On religious reasons for religious liberty, see Daniel O. Conkle, Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty, 32 Cardozo L. Rev. 1755, 1763–1767 (2011).}

2. The legitimacy condition

Why does Professor Domingo reject as unsound the position that moral freedom should be protected alongside religious freedom as a human right? In this brief “Reply to Rafael Domingo,” I want to comment on a fundamental aspect of Professor Domingo’s argument.

Recall the three conditions that government must satisfy under the right to religious and moral freedom: the legitimacy condition, the least restrictive alternative condition, and the proportionality condition. It is the first of the three conditions—the legitimacy condition—that marks the principal divide, I think, between Professor Domingo and me.

Professor Domingo writes that a political community, properly understood, is not a religious community, but that a political community, properly understood, is a moral community. Because it is not a religious community, a political community, reasons Professor Domingo, can be agnostic about religious questions and should, for various reasons, protect religious freedom. Professor Domingo places great emphasis on the fact that because a political community is a moral community, a political community cannot be agnostic about moral questions.

I agree with Professor Domingo that a political community, properly understood, is a moral community. Indeed, a liberal democracy, properly understood, is a political community committed to certain moral rights, which we conventionally refer to as human rights. One of those rights, I have argued elsewhere, is the right to religious and moral freedom.\footnote{See Perry, Freedom of Conscience, supra note 1.} Although a political community cannot be agnostic about—and
a liberal democracy is not agnostic about—*all* moral questions, a political community can be—and, under the right to religious and moral freedom, a liberal democracy should be—agnostic about *some* moral questions, such as the question whether the use of contraceptives by a married couple is immoral. Let me explain.

“Protecting public morals” is undeniably a legitimate government objective under the right to religious and moral freedom. The canonical articulation of the right—article 18 of the ICCPR—explicitly says so. However, if in banning or otherwise impeding conduct *purportedly* in pursuit of that objective, government is acting based on—“based on” in the sense that government would not be regulating the conduct “but for”—either a religious belief that the conduct is immoral or a sectarian nonreligious belief that the conduct is immoral, government is not truly acting to protect public morals. It is, instead, acting to protect sectarian morals, and protecting sectarian morals is not a legitimate government objective under the right to religious and moral freedom.

Again, establishing and protecting the right to religious and moral freedom is a principal response to what Maclure and Taylor have identified as “[o]ne of the most important challenges facing contemporary societies,” namely, “how to manage moral and religious diversity.” Crediting the protection of sectarian morals as a legitimate government objective, under the right to religious and moral freedom, would be patently contrary to the effort “to manage moral and religious diversity.” We can anticipate an argument to the effect that managing moral and religious diversity is only one objective, that nurturing social unity is another, and that from time to time the latter objective may require a society, through its government, to protect one or another aspect of sectarian morality. However, such an argument is belied by the

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14 *See* ICCPR, supra note 4, art. 18, ¶ 3.

15 *See* supra text accompanying note 8.

16 In 1931, the fascist dictator of Italy, Benito Mussolini, proclaimed that “religious unity is one of the great strengths of a people.” *Quoted in* JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE 155–156 (2005). *See also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM & MAR. 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 it is quite fallacious.” *Truth and social utility may, but need not, coincide.* (Quoting NICCOLO MACCHIAVELLI, THE DISCOURSES 139, 143 (Bernard R. Crick ed., Leslie J. Walker trans., Penguin 1970) [1520].) *Cf.* ATHEIST DEFENDS BELIEF IN GOD, THE TABLET [London], Mar. 24, 2007, at 33:

A senior German ex-Communist has praised the Pope and defended belief in God as necessary for society . . . “I’m convinced only the Churches are in a state to propagate moral norms and values,” said Gregor Gysi, parliamentary chairman of Die Linke, a grouping of Germany’s Democratic Left Party (PDS) and other left-wing groups. “I don’t believe in God, but I accept that a society without God would be a society without values. This is why I don’t oppose religious attitudes and convictions.”
historical experience of the world’s liberal democracies, which amply confirms not only that, as Macclure and Taylor put it, a society’s “unity does not lie in unanimity about the meaning and goals of existence but also that any efforts in the direction of such a uniformization would have devastating consequences for social peace.”

The political powers-that-be do not need, and under the right to religious and moral freedom they do not have, discretion to ban or otherwise regulate conduct based on sectarian belief that the conduct is immoral.

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

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

Generalizing Murray’s insight, this much, at least, is clear: A belief, including a nonreligious belief, that X is immoral is sectarian if the claim that X is immoral is one that


18 That the coercive imposition of sectarian moral belief violates the right to religious and moral freedom does not entail that the noncoercive affirmation of theistic belief does so. Examples of the latter, from the United States: the phrase “under God” in the Pledge of Allegiance; “In God We Trust” as the national motto; and “God save this honorable court” intoned at the beginning of judicial proceedings. I have addressed elsewhere the question whether the noncoercive affirmation of theistic belief violates the Establishment Clause of the U.S. Constitution: see MICHAEL J. PERRY, THE POLITICAL MORALITY OF LIBERAL DEMOCRACY 100–119 (2010) (ch. 6, Religion as a Basis of Lawmaking).

is widely contested—and in that sense sectarian—among the citizens of a religiously and morally pluralistic democracy.

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

[They] are the constitutive values of liberal and democratic political systems; they provide these systems with their foundation and aims. Although these values are not neutral, they are legitimate, because it is they that allow citizens espousing very different conceptions of the good to live together in peace. They allow individuals to be sovereign in their choices of conscience and to define their own life plan while respecting others’ right to do the same. That is why people with very diverse religious, metaphysical, and secular convictions can share and affirm these constitutive values. They often arrive at them by very different paths, but they come together to defend them.20

That a political community—including a liberal democracy—is a moral community does entail that a political community cannot be agnostic about all moral questions. But it does not entail that a political community cannot be agnostic about any moral questions. A political community can be agnostic and, under the right to religious and moral freedom, should be agnostic about some moral questions.

Rafael Domingo and I are presently colleagues at Emory University’s Center for the Study of Law and Religion. Our conversations have revealed that we share a religious background: Roman Catholicism. Nonetheless, we disagree about this: I concur in the judgment of Jesuit theologian John Courtney Murray and Catholic philosopher Charles Taylor that a political community should not ban or otherwise impede, on the basis of sectarian moral premises, one’s ability to live one’s life in accord with one’s religious and/or moral convictions and commitments. So, unlike Professor Domingo, I affirm the right—the internationally recognized human right—to religious and moral freedom.

3. Conclusion

Let me conclude with a suggestion. I argue in support of protecting, as a single human right, religious and moral freedom. Professor Domingo, by contrast, argues in support of protecting two rights, between which, in his “Response,” he distinguishes sharply: the right to religious freedom and the right to “freedom of conscience.” The latter right, Professor Domingo explains, protects “moral autonomy” but not “moral independence.” It seems clear that Professor Domingo believes that there is a practical difference between his position and mine. It is not clear to me, however, that there is a practical difference, much less what it is. It would be helpful if eventually Professor Domingo would clarify what he believes to be the practical difference between our

20 Maclure & Taylor, supra note 7, at 11.
respective positions by illustrating his position with concrete examples of conduct—of moral choices—that fit this profile: moral choices that are (conditionally) protected by the right to religious and moral freedom but not by the different right that Professor Domingo articulates and defends, the right that protects “moral autonomy” but not “moral independence.” Does a women’s choice to use contraceptives, for example, fit that profile?²¹

²¹ It may be useful to the reader, in understanding my position and in distinguishing between Rafael Domingo’s position and mine, to read what I have to say about the implications of the right to religious and moral freedom for particular issues. See Perry, Human Rights in the Constitutional Law, supra note 1, at 136–157 (discussing same-sex marriage), and 158–178 (discussing abortion). See also Michael J. Perry, David C. Baum Memorial Lecture: Why Excluding Same-Sex Couples from Civil Marriage Violates the Constitutional Law of the United States, ILL. L. REV. (forthcoming 2014).