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ROBERT AUDI'S "LIBERTY PRINCIPLE"

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Robert Audi's "Liberty Principle"

Michael J. Perry

Among the other things he does in *Democratic Authority and the Separation of Church and State*,[1] Robert Audi develops and defends what he calls "the liberty principle" (pp. 40-43). The principle, as Audi explains, protects not only conduct animated by *religious* convictions and commitments but also conduct animated by *nonreligious* convictions and commitments that are comparably deep and identity-defining (42-43).

Both in my new book and in a forthcoming essay,[2] I have written about what I call the right to religious and moral freedom—which some call the right to freedom of conscience.[3] Of the various questions one might want to ask Audi about his liberty principle, these are the questions to which I am eager to hear Audi's response: 'What is the difference, if any, between your liberty principle and the

[1] Robert Audi, *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011). Unless otherwise specified, parenthetical references refer to this text.

[2] See Michael J. Perry, *Human Rights in the Constitutional Law of the United States* (Cambridge: Cambridge University Press, 2013), 112-35; Michael J. Perry, "Freedom of Conscience as Religious and Moral Freedom," forthcoming in *Journal of Law and Religion*.

[3] See, e.g., Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge (MA): Harvard University Press, 2011).

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right—the internationally recognized human right—to religious and moral freedom? If different, are the principle and the right complementary or competitive? If competitive, which should we prefer, and why: your liberty principle or the internationally recognized human right to religious and moral freedom?'

Let me facilitate Audi's engagement with my inquiry by explicating the right to religious and moral freedom, the canonical articulation of which is Article 18 of the International Covenant on Civil and Political Rights (ICCPR),[4] according to which:

> 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

[4] Article 18 is the canonical articulation in the sense that the great majority of the countries of the world—about 87%—are parties to the ICCPR, including, as of 1992, the United States.

> applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[5]

The United Nations Human Rights Committee—the body that monitors compliance with the ICCPR and, under the First Optional Protocol to the ICCPR, adjudicates cases brought by individuals alleging that a state party is in violation of the ICCPR—has stated that "[t]he right to freedom of thought, conscience and religion […] in article 18.1 is far-reaching and profound."[6] How "far-reaching and profound"? Note the breadth of the right that according to Article 18 "[e]veryone shall have": the right to freedom not just of "religion" but also of "conscience." The "right shall include freedom to have or adopt a religion *or belief* of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion *or belief* in worship, observance, practice and teaching" (emphasis added). Article 18 explicitly indicates that the right concerns moral as well as religious freedom—Article 18 explicitly identifies the "belief" that is protected as moral belief—when it states that "[t]he State parties to the

[5] Article 18 of the ICCPR is an elaboration of Article 18 of the Universal Declaration of Human Rights: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

[6] Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/9a30112c27d1167cc12563ed004d8f15?Opendocument.

[ICCPR] undertake to have respect for the liberty of parents and, when applicable, legal guardians to assure the religious *and moral* education of their children in conformity with their own convictions" (emphasis added). So, the right we are considering in this essay protects not only freedom to practice one's religion, including, of course, one's religiously-based morality; it also protects freedom to practice one's morality—freedom to "to manifest his […] belief in […] practice"—even if one's morality is not embedded in a religious tradition, *even if, that is, one's morality is embedded not in a transcendent worldview but in a worldview that is not transcendent*. (By a "transcendent" worldview, I mean a worldview that affirms, rather than denies or is agnostic about, the existence of a "transcendent" reality, as distinct from the reality that is or could be the object of natural-scientific inquiry.[7]) As the Human Rights Committee has put the point:

> [t]he Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. […] Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[8]

In deriving a right to conscientious objection from Article 18, the Human Rights Committee explained that

[7] On the idea of the "transcendent", see Charles Taylor, *A Secular Age* (Cambridge (MA): Harvard University Press, 2007); Michael Warner, Jonathan VanAntwerpen and Craig Calhoun, eds., *Varieties of Secularism in a Secular Age* (Cambridge (MA): Harvard University Press, 2010).
[8] Human Rights Committee, General Comment 22, fn. 6.

> the [legal] obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief" and emphasized that "there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs.[9]

The Supreme Court of Canada has emphasized that the right we are considering here is a broad right that protects freedom to practice one's morality without regard to whether one's morality is religiously-based. Referring to section 2(a) of the Canada's Charter of Rights and Freedoms, which states that "[e]veryone has […] freedom of conscience and religion", the Court has explained: "The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."[10] Section 2(a) "means that, subject to [certain limitations], no one is to be forced to act in a way contrary to his beliefs or his conscience."[11]

Two clarifications are in order. First: one's choice about what to do or to refrain from doing is protected by the right to religious and moral freedom if the choice is animated by what Maclure and Taylor call a person's "core or meaning-giving beliefs and commitments" as distinct

[9] Id.

[10] R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, 759.

[11] R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 337. See Howard Kislowicz, Richard Haigh and Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom," 48 *Alberta Law Review* 679, (2011): 707-13.

from those that are animated by "the legitimate but less fundamental 'preferences' we display as individuals."[12]

> [T]he beliefs that engage my conscience and the values with which I most identify, and those that allow me to find my way in a plural moral space, must be distinguished from my desires, tastes, and other personal preferences, that is, from all things liable to contribute to my well-being but which I could forgo without feeling as if I were betraying myself or straying from the path I have chosen. The nonfulfillment of a desire may upset me, but it generally does not impinge on the bedrock values and beliefs that define me in the most fundamental way; it does not inflict "moral harm."[13]

Second: that one is not—and understands that one is not—religiously and/or morally obligated to make a particular choice about what to do or to refrain from doing not entail that the choice is not protected under the right to religious and moral freedom. As the Canadian Supreme Court explained, in a case involving a religious practice:

> [T]o frame the right either in terms of objective religious "obligation" or even as the sincere subjective belief that an

[12] Maclure and Taylor, fn. 3, at 12-13.

[13] Id. at 77. Maclure and Taylor are well aware that there will be cases in which it is difficult to administer the distinction between "core or meaning-giving beliefs and commitments" and "the legitimate but less fundamental 'preferences' we display as individuals." See id. at 91-97. But there will also be many cases in which the distinction is relatively easy to administer. For example:

[A] Muslim nurse's decision to wear a scarf cannot be placed on the same footing as a colleague's choice to wear a baseball cap. In the first case the woman feels an obligation—to deviate from it would go against a practice that contributes toward defining her, she would be betraying herself, and her sense of integrity would be violated—which is not normally the case for her colleague (Id. at 77).

> 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.[14]

As Article 18 makes clear, the right to religious and moral freedom is conditional; under the right, government may not ban or otherwise impede one's making a choice about what to do or to refrain from doing, thereby interfering with one's ability to live one's life in accord with one's religious and/or moral convictions and commitments, unless each of three conditions is satisfied:

> *The legitimacy condition*: The government action at issue (law, policy, etc.) must serve a legitimate government objective.[15] The specific government action at issue

[14] Syndicat Northcrest v. Amselem, [2004] 2 R.C.S. 551, 588. "It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection." Id. at 553.

[15] The Siracusa Principles state: "10. Whenever a limitation is required in the terms of the Covenant to be 'necessary,' this term implies that the limitation: (a) is based on one of the grounds justifying limitations recognized by the relevant article of the covenant, [and] (c) pursues a legitimate aim".

might be not the law (policy, etc.) itself but the fact 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 government objective, in the sense that the action serves the objective significantly better than would any less burdensome (to the protected practice) government action.[16]

The proportionality condition: The good the government action achieves must be sufficiently weighty to warrant the burden the action imposes on those who want to act in a way the action impedes.[17]

Article 18 sensibly and explicitly allows government to act for the purpose of protecting "public safety, order, health, or morals or the fundamental rights and freedoms

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For the Siracusa Principles, see United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), reprinted at 7 Human Rights Quarterly 3 (1985).

16 The Siracusa Principles state: "11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

17 The Siracusa Principles state: "10. Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation: […] (b) responds to a pressing public or social need, […] and (d) is proportionate to that aim." On proportionality inquiry under the right to religious and moral freedom, see T. Jeremy Gunn, "Permissible Limitations on the Freedom of Religion or Belief," in John Witte, Jr. and M. Christian Green, eds., *Religion and Human Rights: An Introduction* (New York: Oxford University Press 2011), 254, 263-66 (2012); Kislowicz, Haigh, & Ng, fn. 11, 686-93.

of others." Given, however, that the right we're considering—the right of which Article 18 is the canonical articulation—is the right to religious *and moral* freedom—this question is especially important: What morals count as *public* morals, under the right to religious and moral freedom?

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[18] state:

> 2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
>
> 3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.
>
> 4. All limitations shall be interpreted in the light and context of the particular right concerned.

Therefore, with respect to "public morals", the Human Rights Committee has emphasized:

> [T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition […]. If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the

[18] For the Siracusa Principles, see fn. 15.

> Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.[19]

As the editors of a casebook on the ICCPR have put the point, in summarizing several statements by the Human Rights Committee concerning protection of "public morals" under the right to religious and moral freedom: "'[P]ublic 'morals' measures should reflect a pluralistic view of society, rather than a single religious culture."[20]

"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 regulating (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.*

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."[21] Crediting the

[19] Human Rights Committee, General Comment 22, fn. 6.
[20] Sarah Joseph, Jenny Schultz and Melissa Castan, eds., *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (Oxford: Oxford University Press, 2004), 510.
[21] Maclure and Taylor, fn. 3, at 1.

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.[22] However, such an argument is belied by the historical experience of the world's liberal democracies, which amply confirms not only that, as Maclure and Taylor have put the point, a society's "unity does not lie in unanimity about the meaning and

[22] In 1931, the fascist dictator of Italy, Benito Mussolini, proclaimed that "religious unity is one of the great strengths of a people." Quoted in John T. Noonan, Jr., *A Church That Can and Cannot Change*: *The Development of Catholic Moral Teaching* (South Bend (Indiana): University of Notre Dame Press 2005), 155-56. See also 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).) 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."

goals of existence but also that any efforts in the direction of such a uniformization would have devastating consequences for social peace."[23] 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.[24]

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":

[23] Maclure and Taylor, n. 1, at 18. See generally Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge: Cambridge University Press 2011). "[T]he core thesis [of this book] holds: to the extent that governments and societies restrict religious freedoms, physical persecution and conflict increase." Id. at 222. See also Paul Cruickshank, "Covered Faces, Open Rebellion," New York Times, Oct. 21, 2006. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states: "[T]he disregard and infringement of […] the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind."

[24] 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: M. Perry, *The Political Morality of Liberal Democracy* (Cambridge: Cambridge University Press, 2010), 100-19 (Chapter 6: "Religion as a Basis of Lawmaking").

> [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.[25]

We may generalize Murray's insight: a belief, including a nonreligious belief, that X is immoral is sectarian if the claim that X is immoral is one that 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

[25] "Memo to Cardinal Cushing on Contraception Legislation" (n.d., mid-1960s), http://woodstock.georgetown.edu/library/murray/1965f.htm. See also John Courtney Murray, SJ, Toledo Talk [delivered in Toledo on May 5, 1967), http://woodstock.georgetown.edu/library/murray/1965f.htm. Murray's influence on Boston's Archbishop, Cardinal Richard Cushing, and Cushing's influence on the repeal of the Massachusetts ban on the sale of contraceptives, is discussed in Seth Meehan, "Legal Aid," Boston College Magazine, Spring 2011, and in Seth Meehan, "Catholics and Contraception: Boston, 1965," New York Times, March 15, 2012. See also Joshua J. McElwee, "A Cardinal's Role in the End of a State's Ban on Contraception," National Catholic Reporter, Mar. 2-15, 2012. For the larger context within which Father Murray wrote and spoke, see Leslie Woodcock Tentler, Catholics and Contraception: An American History (Ithaca (NY): Cornell University Press, 2004). For a recent reflection on Murray's work by one of his foremost intellectual heirs, see David Hollenbach, SJ, "Religious Freedom and Law: John Courtney Murray Today," 1 *Journal of Moral Theology* 69, 75 (2012).

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 have said 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.[26]

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To recapitulate: under the human right to religious and moral freedom, government may not interfere with one's freedom to live one's life in accord with one's religious and/or moral convictions and commitments unless each of the three conditions is satisfied: legitimacy, least burdensome alternative, and proportionality. And, as I have explained, under the legitimacy condition, government may not regulate conduct on the basis of sectarian moral belief.

Here, again, are my questions for Robert Audi: "What is the difference, if any, between what you call 'the liberty principle' and the internationally recognized human right to religious and moral freedom? If different, are the principle

[26] Maclure and Taylor, fn. 6, at 11.

and the right complementary or competitive? If competitive, which should we prefer, and why: the liberty principle or the right to religious and moral freedom?"

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