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Michael Perry's Right to Religious Freedom

Richard S. Kay*

Michael Perry's defense and elaboration of a human right of religious freedom¹ is, like all of his work, the reflection of careful and creative thought. He has, in this essay, meticulously set forth criteria for recognizing such a human right and then has measured religious liberty against those criteria. His case for the human right is compelling and any weaknesses in it appear to inhere in the very nature of the concepts at issue. Typically, Perry has not presented the argument in the easy case. Rather, he elaborates it in the context of a society (his theocratic Elysium, a perfectly imaginable society) where his claims are tested in the most difficult circumstances. In so doing he has revealed both the appeal and the limits of a practical public space for religious

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1. Michael Perry, *A Human Right to Religious Freedom? The Universality of Human Rights, the Relativity of Culture*, 10 ROGER WILLIAMS U. L. REV. 385 (2005). In these comments I follow Perry's terminology speaking of a right of "religious freedom" or "religious liberty." *E.g., id.* at 393. In fact, his discussion speaks only to a right of toleration of dissident religious beliefs or practices. *See id.* at 400-08. The term, "religious freedom," may arguably be applied to a wider idea, embracing equality of religious practices. *See* Carol Weisbrod, Address at the Annual Meeting of the American Society of Legal History Regarding Toleration, Pluralism and Research on Religion in America (Oct. 29, 2004) (on file with author). For an illuminating and rigorous analysis of the basis of a policy of exemption from public duties for religious dissidents, see generally Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325 (2005).

freedom.

My purpose in these comments is to add some complications and doubts to Perry's lucid and precise presentation. I will raise two particular aspects of the right he describes. The first concerns the prospects for making the case for religious freedom to sincere adherents of human rights who are also sincere believers in a religion that prescribes a single path to salvation. The second concerns the consequences of defining the right in a necessarily qualified way. Emphasizing these two problems raises some grim possibilities: First, the likelihood of establishing a broad right to religious liberty may be least where it is needed the most; second, even where codified in legally enforceable form, religious freedom may not protect religious practice much more than would be the case in the absence of such a legal right.

RELIGIOUS RIGHTS IN A BELIEVING SOCIETY

Perry hypothesizes a society, Elysium, in which the great majority of the population adheres to a religion ("the one true faith," or TOTF) that simultaneously holds two relevant precepts. First, it believes in "human rights" as Perry defines them. That is, the governing elements of the society accept the proposition that "every human being has inherent dignity, and is therefore inviolable."² In addition, however, they also hold to a theological teaching that there is no salvation outside TOTF.³ Let us take as a given that conversion of, and therefore salvation for, non-TOTFers is made more difficult by the open existence of competing creeds.⁴ How then should the law implement the Elysian commitment to respecting and cherishing every human being? Perry reasonably supposes that, at least in the first instance, the authorities of Elysium can best show their concern for their dissenting fellow citizens by maximizing the chances that they will achieve salvation.⁵ That will involve reducing the opportunities for them, as well as for existing TOTFers, to be led astray. Therefore, Elysian authorities will prohibit proselytism and public worship for non-TOTF religions. An argument that this limitation violates

2. Perry, *supra* note 1, at 401.

3. *Id.* at 402.

4. This is not, of course, an unarguable proposition. But history tells us that most religious societies have assumed its truth.

5. Perry, *supra* note 1, at 406.

human rights would be akin to an argument that there is a human right to disease against health, or to stupidity against wisdom. For believers it will be self-evident that, as Perry notes, "error has no rights."⁶

Perry finds such a regime incompatible with a society that genuinely respects human rights. That is because his concept of human rights demands protecting people "against actions/policies that, even if they do not violate human beings, are nonetheless a source of unwarranted human suffering."⁷ But the Elysians, of course, find the suffering inherent in their restrictions anything but unwarranted. Perry's difference with them thus depends not on an argument about human rights in general, but about whether TOTF is "true." Perry agrees that his position depends on an assumption that the TOTFers' beliefs in an exclusive route to salvation are based on a "mistaken theology."⁸

People who do not think that there is only one path to salvation may be persuaded by Perry's arguments to bring external pressure to bear on the erring society. But within that society itself we may expect his position to have a limited appeal. That is because we have now transformed the argument about the value of a right of religious freedom into one over theology. History has shown us that rational argument has had limited success in resolving religious differences. Intuitively, the resistance to such attempts would seem to be stiffest exactly among those groups who are convinced they already know the one and only truth. Perry's response to this difficulty is a brave one. If we reject the mistaken theology of TOTF and embrace the value of religious liberty, we should never concede the futility of dialogue. Perry quotes Ronald Beiner that "the next stage of argument may yet bring an enlargement of moral vision to one of the contending parties. . . . [T]here is no need to give in to moral or intellectual 'pluralism', for it always remains open to us to say 'Press on with the argument.'"⁹

6. *Id.* at 408 n.39 (quoting John T. Noonan, Jr., *Development in Moral Doctrine*, 54 THEOLOGICAL STUD. 662, 669 (1993)).

7. *Id.* at 406.

8. *Id.* at 407, 422.

9. *Id.* at 425. It might be noted that both of the writers to whom Perry cites in support of his view that it is worthwhile to continue to argue questions like this do so in the context of morality in general, and not with

Gains from argument, however, generally depend on appeals to reason on both sides. Not every religion agrees with the sentiments of Martin Luther that reason is the “greatest whore the devil has,” and that faith empowered him to “trample reason with its wisdom underfoot.”¹⁰ But certainly some version of that conviction does characterize many of the world’s religions, not excluding—as Luther exemplifies – certain forms of Christianity. Aquinas found reason to be useful only in determining the consequences that follow from sacred principles, but that those principles themselves were grounded in revelation: “If our opponent believes nothing of divine revelation, there is no longer any means of proving the articles of faith by reasoning, but only of answering his objections – if he has any – against faith.”¹¹ When a religion is based on revealed truth, there may well be argument about the meaning of the revelation. But that is hardly the kind of discourse which Perry proposes. If the foundations of faith transcend reason, there is little basis for hoping that basic differences in theology can be resolved by just talking about them.

Perry suggests an alternative basis for protecting religious practice that does not depend on theological argument. Even those committed to TOTF might give way if the right of religious liberty is necessary to maintain social peace. The state’s respect for the human rights of the dissenters, considered alone, would require it to maximize the chances of their conversion. But a broader examination might reveal that toleration would maximize the welfare of the whole population (including that of believers) by eliminating the potential for social discord and violence. There is

respect to a specifically religion-based morality. See RONALD BEINER, *POLITICAL JUDGMENT* 141-44, 187 n.17 (1983); Phillipa Foot, *Moral Relativism*, in *RELATIVISM: COGNITIVE AND MORAL* 152, 162-66 (Jack W. Meiland & Michael Krausz eds., 1982). Indeed Beiner insists that “[f]or judgment at all to be possible, there must be standards of judgment, and this implies a community of judgment. . . .” BEINER, *supra*, at 142.

10. A slightly different English version of these quotations is reproduced in many places without citation. The language in the text, does not, however, seem to appear in any published English translations of Luther’s works. The original German is found at 16 DR. MARTIN LUTHER’S *SÄMMTLICHE WERKE* 142, 145 (Erlangen ed. 1826-57). Pascal put the point more gently when he said that “[t]he heart has reasons that reason cannot know.” BLAISE PASCAL, *PENSEES*, No. 277 (W.F. Trotter trans., N.Y. Dutton 1958) (1660).

11. ST. THOMAS ACQUINAS, *SUMMA THEOLOGICA* Q.1, art. 8, in 19 *GREAT BOOKS OF THE WESTERN WORLD* 8 (Robert Maynard Hutchins et al. eds., 1952).

much wisdom in this argument, and it appears to fit well with the actual experiences of tolerant societies.¹² Whether that reasoning would convince committed believers in TOTF, however, is another matter.

The argument supposes the authorities will perform some kind of cost-benefit analysis. They may be convinced that expanding the scope of religious freedom would best maintain peace and order. But would they find that benefit sufficient to overcome the costs – costs measured in souls lost to damnation. Avoiding that terrible result might appear to more than justify the additional burden of maintaining social order.

Moreover, it is worth remembering that, as a historical matter, the idea that religious liberty conduces to the maintenance of order has been the minority view.¹³ The usual assumption is that religious *uniformity* is most likely to produce social peace.¹⁴ The principle of “*cuius regio, eius religio*,” while authorizing religious diversity among states, depended on an assumption that religious differences *within* states promoted disorder.¹⁵ The European Court of Human Rights held recently that the Turkish ban on the use of headscarves by university students did not violate the right of religious freedom in the European Convention on Human Rights; it did so based in part on the government’s claim that the prohibition was necessary to protect public order.¹⁶

Thus neither of the possible arguments that Perry suggests looks particularly promising as a way of persuading the devoted

12. See JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 65-72 (1960).

13. John Locke and Roger Williams were two of the earliest proponents of the idea that religious liberty was essential to social harmony and order. See, e.g., Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 *ROGER WILLIAMS U. L. REV.* 289, 300 (2005); Kathleen A. Brady, *Foundations for Freedom of Conscience: Stronger than You Think*, 10 *ROGER WILLIAMS U. L. REV.* 359, 381-82 (2005).

14. See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 *U. PA. L. REV.* 149, 163-65 (1991).

15. For a more thorough discussion on this topic, see Eberle, *supra* note 13, at 308-09.

16. See *Leyla Sahin v. Turkey*, App. No. 44774/98 (June 29, 2004); see also *Otto-Preminger Inst. v. Austria*, App. No. 13470/87, 19 *Eur. H.R. Rep.* 34, ¶ 63 (1994) (noting state interest in limiting individual rights “to preserve religious peace.”).

leaders of Elysium to embrace religious liberty. Both positions may be appealing to those who do not think TOTF is the only way to salvation, but these people already need little convincing that the policy of Elysium is offensive.

THE CONTENT OF THE RIGHT OF RELIGIOUS FREEDOM

The second aspect of Perry's right of religious freedom I wish to discuss relates to the qualified character of the right as it is defined in his article. As elaborated, religious practice may, consistent with that right, still be limited or prohibited for a sufficient reason. The question arises whether or not this qualification deprives the concept of the central features we associate with "rights" – namely an immunity of protected activity from the general regulatory power of the state.

Perry notes that it would be impractical to understand freedom of religion as protecting any religiously motivated act: "[T]he 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."¹⁷ He observes that this concern is captured in the text of Article 18 of the International Covenant on Civil and Political Rights (Covenant). That article protects the "right to freedom of thought, conscience and religion [including freedom] to manifest [that] religion in worship, observance, practice and teaching."¹⁸ Importantly, the article then goes on in paragraph (3) to declare:

Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.¹⁹

The retention of a potential for regulation is, as Perry observes, more than a practical response to the risk of dangerously

17. Perry, *supra* note 1, at 397 n.26.

18. International Covenant on Civil and Political Rights, art. 18(1), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

19. *Id.* art. 18(3).

anti-social conduct.²⁰ It is also essential if the right to religious freedom is to be understood as a genuine *human right*—one that can resist the critique of rights based on cultural relativism. The permissible justifications for limiting the exercise of that right mentioned in the text of the Covenant may work out differently in different societies. On this reasoning an infringement of the right of religious practice might be found necessary to protect public order and, therefore, consistent with the Covenant in India, whereas it would not be necessary and thus a violation of the same right in Canada.

Does this qualified version of the right leave it, in common understanding, as a “right” at all? It is true that structured in this way the right of religious freedom only permits the state to limit the right to “*manifest one’s religion*.”²¹ Belief itself, “thought conscience and religion,” appears by implication to be absolutely protected.²² That distinction, however, will be little comfort to many believers. This is apparent when we see that the Covenant illustrates “manifestations” by the examples of “worship, observance, practice and teaching.”²³ These aspects of religion are, for many creeds, far from incidental. Indeed one might ask what would be left of a religion from which these elements were subtracted?

The distinction between belief and practice has been regularly treated but never satisfactorily explained in American “free exercise” jurisprudence.²⁴ In 1990 when the United States Supreme Court resurrected that distinction in *Employment Division v. Smith*²⁵ by upholding the application of controlled substance laws to the ritual use of peyote by Native Americans, the reaction among advocates of religious liberty was one of

20. Perry, *supra* note 1, at 420-23.

21. ICCPR, *supra* note 18, art. 18(3).

22. *Id.* art. 18(1).

23. *Id.*

24. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 167 (1879); see also Carol Weisbrod & Pamela Sheingorn, *Reynolds v. United States: Nineteenth Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 828 (1978) (discussing social background of *Reynolds*); Carol Weisbrod, *Family, Church and State: An Essay on Constitutionality and Religious Authority*, 26 J. FAM. L. 741, 746-59 (1987-88) (commenting on the character of claims for exemption on a religious basis).

25. 494 U.S. 872 (1990).

alarm.²⁶

In addition, this qualified definition of the right raises a problem of differential protection of different religions. An absolute immunity of interference with belief along with potential regulation of practice would probably be more valuable to, say, a Congregationalist than to a Muslim. That is because the internal aspect of being a Congregationalist represents a relatively more significant aspect of the religion than does the purely internal aspect of Islam. Islam (more than Congregationalism) is a matter of doing as well as thinking and feeling.²⁷ The "five pillars" of Islam all involve what the Covenant would regard as "manifestations" of religion.²⁸ While the differences are certainly not linear, we can imagine that various religions would benefit more or less according to the relative importance of inner belief and outward behavior.²⁹

To this it is proper to respond that the human right of religious freedom, as outlined by Perry, does not, in fact, leave manifestations of religion unprotected. To the contrary, Article 18 explicitly states that such manifestations may not be interfered with except for certain purposes and then only in limited circumstances. That is, the right defined in the text singles out religious practice for special protection not by prohibiting any and every interference with it, but by demanding that such

26. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990); Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 688 (1992). Most notably, Congress reacted with the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (1993), attempting to require special justification for public burdens on religious practice caused by generally applicable laws. This requirement was held unconstitutional in *Boerne v. Flores*, 521 U.S. 507 (1997), as an invalid attempt by Congress to use its power to enforce the Fourteenth Amendment to redefine constitutional rights. *Id.* at 511.

27. The relative austerity of Congregationalism can be easily summarized by the words of one of its primary founders, John Cotton: "I love to sweeten my mouth with a piece of Calvin before I sleep." DIARMAID MACCULLOCH, *THE REFORMATION: A HISTORY* 520 (2003).

28. SACHIKO MARATA & WILLIAM C. CHITTICK, *VISION OF ISLAM*, 8-29 (1994).

29. See Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 946 (1989); Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration of Native American Sacred Sites*, 19 ECOL. L. Q. 795, 811 (1992) ("The 'belief-practice' distinction . . . reflects a bias in favor of religions that are portable.").

interference be subject to a particularly rigorous form of scrutiny. As provided in the text of the Covenant, any restriction must be shown to satisfy three criteria: (1) It must be "prescribed by law"; (2) It must have the purpose of protecting one of a list of particular interests; and (3) it must be "necessary" for the protection of such an interest.³⁰ There is no court that adjudicates violations of the Covenant, but experience with interpretation of the parallel provisions in the European Convention of Human Rights raises questions about how strong a safeguard such a qualified right can be.

The "prescribed by law" requirement may be the most valuable. As interpreted by the European Court of Human Rights, any limitation of the relevant rights must take the form of an accessible and reasonably clear rule of law. This does not mean, however, that the restriction must be codified in advance of the regulated action. The European Court, for example, has held that common law rules can be "prescribed by law" if they are sufficiently settled before the claimed right violation.³¹ It has also held that even *unpublished* regulations that were "highly technical and complex" were still "prescribed by law."³² Thus religious dissenters may take only moderate comfort from this scheme. Their observances may not be suppressed willy-nilly, but in a state largely controlled by a dominant orthodoxy this formal obstacle to regulation is, at best, modest.

The requirement that only certain public aims may justify an interference with religious rights is, in contrast, more or less illusory. That is because the specified permissible bases for regulation of rights-protected behavior cover practically the whole field of conceivable public action: the "public safety, order, health, or morals or the fundamental rights and freedoms others."³³ It is hard to think of any realistic regulation that could not be rationally included under one of these categories, and I know of no case in which the European Court of Human Rights has failed to accept a proffered state objective.

30. *Supra* notes 17 & 18 and accompanying text.

31. *Sunday Times v. United Kingdom*, Series A, No. 38, 2 Eur. H.R. Rep. 245, ¶¶ 46-49 (1981).

32. *Groppera Radio AG et al. v. Switzerland*, App. No. 10890/84, 12 Eur. H.R. Rep. 321 ¶¶ 65-68 (1990).

33. ICCPR, *supra* note 18, art. 18(8), Gen. Comment 22.

Beyond the need to state a justification, however, a state found to have limited a right must show that the restriction is actually "necessary" to protect the interest cited. Students of American constitutional law know that there are many kinds of necessity. There is the stringent "no less burdensome alternative" version in the "upper tier scrutiny" of certain measures under the Equal Protection and Due Process clauses of the Fourteenth Amendment.³⁴ But there is also the easy "any means calculated to produce the end" version applied to the "necessary and proper" clause defining the limits of Congressional power.³⁵

This kind of requirement for adequate justification of presumptive rights violations is common in modern constitutions. Judicial applications, however, give little indication of just how strict the required necessity must be. The Canadian Charter of Rights and Freedom allows the limitation of many of its rights only when the challenged measure is "demonstrably justified in a free and democratic society."³⁶ The Supreme Court of Canada has set forth a multi-factor test for deciding when an interference is so justified, and that test has been expanded and revised in a number of cases. The result is an inquiry that takes into consideration just about every positive and negative aspect of the challenged action, with respect to the interests of the state as well as the individuals affected.³⁷

A similar development has occurred with the identical term in several articles of the European Convention on Human Rights. The Court in Strasbourg has declared that a sufficient necessity must "correspond[] to a pressing social need [and be]... proportionate to the legitimate aim pursued."³⁸ In making that determination, the "Court will take into account that a margin of

34. See, e.g., *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981).

35. *McCulloch v. Maryland*, 17 U.S. 316, 413-14 (1819).

36. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

37. The leading case is *R. v. Oakes*, [1986] S.C.R. 103. On the transformations of the *Oakes* test, see MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, *EUROPEAN HUMAN RIGHTS LAW: TEXTS AND MATERIALS*, 153-56 (2d. ed. 2000).

38. *Olsson v. Sweden*, App. No. 10465/83, 11 Eur. H.R. Rep. 259, ¶ 67 (1988).

appreciation is left to the Contracting States.”³⁹ The Court’s calculation of whether this level of justification has been reached depends on the particular right implicated, the extent to which the right has been infringed, the status of the applicant who is claiming the violation and which of the permissible state objectives has been put forward.⁴⁰ The record of adjudication, moreover, gives no firm assurance that the same combination of factors will always lead to the same result.⁴¹ In practice, this means that the decision on infringements on religious freedom (as well as other specified rights) is remitted to a process that effectively asks whether there is a good enough reason, all things considered, to uphold any particular measure.

Putting together these two aspects of the definition of the qualified right we are left with this: the belief-action distinction leaves any aspect of religion that might genuinely be at risk subject to potential state control. Such vulnerable religious practice may be subjected to any kind of interference if the state’s action is thought to be sufficiently useful for some sufficiently important social purpose. But the political authorities presumably already undertake such an evaluation before enacting social regulation. If that is all the right requires, religious activity ends up in the same position as any other field of human conduct, such as driving a car or owning property.

I have, however, left out one special consequence that follows from reaching this state of affairs through the peculiar device of a qualified right. If religion were not a right, the propriety of limiting regulations would be determined only in the ordinary legislative process. In modern constitutional systems, and in some international human rights regimes, activities that are within the scope of protected rights are subject to such regulation only to the extent that *some independent court* decides it is consistent with the right as defined in the relevant text. We have seen, however, that the adjudication will end up evaluating the regulation on pretty much the same grounds that we can expect the legislature to have considered in passing the law in the first place.⁴²

39. *Id.*

40. See JANIS, KAY & BRADLEY, *supra* note 37, at 153-56.

41. See *id.*

42. Richard S. Kay, *Rights, Rules and Democracy, in* PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS 117 (T. Campbell et.al. eds., 2003).

So the entrenchment of a right of religious freedom does indeed give an additional protection to the activity that it describes, but that protection is not of the kind that we usually think of in connection with rights. It does not allow a religiously observant person to know in advance that certain activities are certainly—or almost certainly—immune from state interference. Nor can a person know that such activity will be proscribable only for certain well-defined purposes. A right like this does not carve out a defined area of sanctuary from intrusion: it requires only that certain political decisions be approved by a second independent human judgment. The ingredients of this second judgment will differ little from those involved in the initial (legislative) determination. But the decisionmakers will be different, most prominently insofar as they will not equally be held to account for their judgment in the ordinary political process of representative government.

The extent to which rights-holders (in this case observers of religions whose practice might be limited by regulation) will benefit from the recognition of this kind of right, therefore, is less than obvious. On the one hand, rights-holders will not likely be worse off so long as the second source of judgment (i.e., the courts) only review decisions made elsewhere and do not initiate action on their own.⁴³ The benefits that accrue to the rights-holders will follow from the workings of a more complicated political structure. The results may, in their own way, be just as or more unpredictable than unfettered legislative decision-making. Under this system, the security of religious liberty will ultimately depend not on impersonal law but, necessarily, on inconstant human judgment.

43. This is not as obvious as it might appear. The recognition of affirmative social or economic constitutional rights may put considerable creative power in the hands of judges insofar as there are any litigants to put a subject before them. *See, e.g., Republic of South Africa v. Grootboom*, 2001 (1) SALR 46 (CC).