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## Book Review

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PERRY, MICHAEL J. *Toward a Theory of Human Rights: Religion, Law, Courts*. New York: Cambridge University Press, 2007. xii+253 pp. \$70.00 (cloth).

This book brings together two previously separate aspects of Michael J. Perry's thoughtful and pioneering scholarship dealing with the proper relation of morality (especially religious morality) to law and human rights and the role of courts in protecting human rights. Perry's argument concentrates on three related issues: whether the morality of human rights has a religious or secular ground or both, the relation between the morality of human rights and the law of human rights, and the proper role of courts in protecting constitutionally embedded human rights in a liberal democracy. Before addressing these issues, Perry distills the essence of the morality of human rights as holding "that each and every born human being has inherent dignity and is inviolable" (xi). He then begins developing a theory of human rights based on these core moral principles, which he maintains have "become the dominant morality of our time" (4), as demonstrated by their instantiation in many international treaties and conventions.

With respect to the ground of human rights, Perry claims, "That there is a religious ground for the morality of human rights—indeed, more than one—is clear" (xi). By contrast, he maintains that a secular or nonreligious ground has not been clearly established by John Finnis, Ronald Dworkin, Martha Nussbaum, or any other philosopher. Perry concludes that those rejecting a religious ground may have "no ground for the morality of human rights, no warrant for the claim that every human being has inherent dignity and is inviolable" because "Nietzsche's thought ('not only no God, but no metaphysical order of any kind') and the morality of human rights . . . are deeply antithetical to one another" (26, 29).

In light of the morality of human rights, Perry addresses the contemporary legal issues of capital punishment, abortion, and same-sex unions. He concludes that those accepting the morality of human rights should advocate abolishing capital punishment, banning some abortions, and legally protecting same-sex unions. Perry does not view these conclusions, however, as indications of how the Supreme Court should rule. Rather, he argues that the courts should defer to the legislative and executive determinations "unless there is no room for a reasonable difference in judgments about how such a question should be resolved" (109). Perry contends that this deference mitigates the antimajoritarian difficulty arising from judicial ultimacy under the U.S. Constitution by reinvigorating democratic deliberation, both by the populace and by their elected representatives, so that seriously contested constitutional questions are informed by a community of political-moral judgment.

Perry stresses at several points that this book is only the beginning of a complete theory of human rights and encourages further conversation. In this spirit, scholars in religion will likely be interested in further treatment of several aspects of his argument that touch on religion. First, if the morality of human rights requires a religious ground, what role, if any, does the religious ground play in specifying the content of indeterminate human rights norms like equality and liberty? For example, Perry specifies a "general non-discrimination ideal," which prohibits the government from discriminating against a human being "on the basis either of (a) a demeaning view about one or another aspect of (what we many call) one's 'particularity'—about one's race, for example, or one's sex, or (b) a negative generalization about one or an-

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other aspect of one's particularity, if the government can, without serious cost, avoid reliance on the generalization" (66). Based on this ideal, he concludes that the government's "refusal to extend the benefit of law to . . . same-sex unions betrays the non-discrimination ideal to which we who affirm the morality of human rights should be committed" (76). Perry's argument includes a gap between the generality of the morality of human rights (i.e., "that each and every born human being has inherent dignity and is inviolable" [11]) and the quite specific "general" nondiscrimination ideal. Religion scholars, who generally view religious convictions as including specifications of authentic human existence (including both traditional religions and so-called secular conceptions), will likely suggest that religious convictions define what is demeaning and thus what counts as discriminatory. In other words, religion scholars will likely wonder whether Perry's identification of the religious ground for the morality of human rights does not also identify the source or implicit justification for getting from the generality of the morality of human rights to the specificity of the law of human rights. If not, where does the content of the indeterminate legal norms like equality and liberty come from?

For thinking about the relationship between law and religion, however, settling this disagreement is not as important as recognizing the substantial role for religion (whether implicit or explicit) in shaping the content of human rights law. In other words, religion scholars will likely wonder whether Perry's identification of the religious ground for the morality of human rights does not also identify the source or implicit justification for getting from the generality of the morality of human rights to the specificity of the law of human rights. Thus, it would be helpful for Perry to clarify whether he understands his argument to be identifying how specifications of equality (nondiscrimination) require content from religious conceptions of authentic human existence. If not, where does the content of the indeterminate legal norms like equality and liberty come from?

In addition, Perry's arguments for a religious ground for human rights resonate with an increasing focus on ontology in political and legal theory. In political theory, Stephen K. White identifies a weak ontology in the work of Judith Butler, William Connolly, George Kateb, and Charles Taylor that is important for Western notions of human rights (White, *Sustaining Affirmation: The Strengths of Weak Ontology in Political Theory* [Princeton, NJ, 2000]). White argues that their reflective political theories require fundamental conceptions of the self, others, and the world but that these conceptions are partial, fallible, and contestable. Similarly, Steven D. Smith argues that there is an "ontological gap" between the classical or religious ontology presupposed by the practice of law and the scientific ontology presupposed by contemporary legal theory. The defective religious ontology still maintains "a sort of working partnership between a divine author and human legislators," which has been invalidated by an unassailable scientific ontology (i.e., scientific materialism; *Law's Quandary* [Cambridge, MA, 2004], 155). Along with Perry's religious ground for the morality of human rights, the weak ontology in political theory and the ontological gap in legal theory suggest a possible religious or ontological turn in human rights theory. Perry's prior work makes him ideally suited for moving the debate about the foundation of human rights more explicitly in this direction.

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