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978-0-521-86551-7 - *Toward a Theory of Human Rights: Religion, Law, Courts*

Michael J. Perry

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### TOWARD A THEORY OF HUMAN RIGHTS

In *Toward a Theory of Human Rights*, Michael Perry pursues three important, related inquiries:

- Is there a *non-religious* (secular) basis for the morality of human rights?
- What is the relationship between the *morality* of human rights and the *law* of human rights? Perry here addresses the controversial issues of capital punishment, abortion, and same-sex unions.
- What is the proper role of courts in protecting constitutionally entrenched human rights? Perry pays special attention to the role of the United States Supreme Court.

*Toward a Theory of Human Rights* makes a significant contribution both to the study of human rights and to constitutional theory.

Michael J. Perry holds a Robert W. Woodruff Chair at Emory University, where he teaches in the law school. He has written more than sixty articles and essays and is the author of nine books, including *Love and Power: The Role of Religion and Morality in American Politics* (1991); *The Idea of Human Rights* (1998); *We the People: The Fourteenth Amendment and the Supreme Court* (1999); and *Under God? Religious Faith and Liberal Democracy* (2003).

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# Toward a Theory of Human Rights

*Religion, Law, Courts*

MICHAEL J. PERRY

Emory University



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*For my students,  
past, present, future*



I give you a new commandment: love one another; you must love one another just as I have loved you.

John 13:34

Just as a mother protects her child with her own life, in a similar way we should extend an unlimited heart to all beings.

Buddhist teaching

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## Introduction

[W]e [do not] have a clear theory of human rights. On the contrary, . . . the necessary work is just beginning.

John Searle<sup>1</sup>

This book has three parts. Part One (Chapters 1–3) is about the morality of human rights; Part Two (Chapters 4–7), about the relation of the morality of human rights to the law of human rights; and Part Three (Chapters 8–9), about the proper role of courts in protecting the law of human rights.

**Part One.** In Chapter 1, I discuss the morality of human rights, which holds that each and every born human being has inherent dignity and is inviolable.<sup>2</sup> In Chapter 2, I elaborate a religious ground for the morality of human rights. In Chapter 3, I inquire as to whether there is a non-religious ground for the morality of human rights. That there is a religious ground for the morality of human rights – indeed, more than one – is clear. (The eminent philosopher Charles Taylor has argued that the “affirmation of universal human rights” that characterizes “modern liberal political culture” represents an “authentic development[] of the gospel. . . .”)<sup>3</sup> It is far from clear, however, that there is a non-religious ground – a *secular* ground – for the morality of human rights. Indeed, the claim that every born human being has inherent dignity and is inviolable is deeply problematic for many secular thinkers, because the claim is difficult – perhaps to the point of being impossible – to align with one of their reigning intellectual convictions – what Bernard Williams called “Nietzsche’s thought”: “[T]here is, not only no God, but no metaphysical order of any kind. . . .”<sup>4</sup>

**Part Two.** How do we get from the morality of human rights to the law of human rights: What laws should we who affirm the morality of human rights, *because* we affirm it, press our government – our elected representatives – to enact? What policies should we press them to adopt? What laws and

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policies should we press them to avoid? I pursue this inquiry in a general way in Chapter 4. Then, in Chapters 5–7, I focus on three major controversies that engage and divide contemporary American politics: What laws/policies should we who affirm the morality of human rights press our elected representatives to enact/adopt with respect to capital punishment (Chapter 5), abortion (Chapter 6), and same-sex unions (Chapter 7)?

**Part Three.** Many constitutional provisions entrench human rights; that is, they entrench rights-claims – principally rights-claims directed at government – about what may not be done to, or about what must be done for, human beings. Such provisions often give rise to heated controversy. Three examples from the United States: Does capital punishment violate the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution? Does a criminal ban on pre-viability abortions violate the due process clause of the Fourteenth Amendment? Does a legislature’s refusal to extend the benefit of law to same-sex unions violate the equal protection clause of the Fourteenth Amendment? No constitutional questions are more controversial in the United States today than these three.

In Chapter 8, I inquire about the proper role of courts in adjudicating such controversies; I inquire, that is, about the proper role of courts in protecting constitutionally entrenched human rights. In Chapter 9, I focus on a particular court, the Supreme Court of the United States: What role should the Supreme Court play in protecting constitutionally entrenched human rights?

#### MORALITY, LEGALITY, AND RIGHTS-TALK<sup>5</sup>

I confess to a bias against *moral*-rights-talk – a bias that reflects my socialization many years ago into the world of lawyers, where legal rights are generally taken to be the paradigm of rights, and moral rights (so-called) are often “thought of as phony rights, as lacking key features [in particular, enforceability] that real rights have.”<sup>6</sup> But can we talk about the morality of human rights without engaging in moral-rights-talk?

There is an undeniably important role for rights-talk when we are talking about the *law* of human rights – that is, there is an important, even essential, role for *legal*-rights-talk. After all, the law of human rights, like law generally, consists of many legal “rights”; it consists, that is, of many legal *rights-claims*: claims, for example, about what A must refrain from doing to B if A does not want to make himself vulnerable to certain negative legal consequences, such as imprisonment. (A claim about what A must not do to B is a rights-claim, because a claim that A has a legal *duty* (obligation) not to do X to B is a claim that B has a legal *right* that B not do X to him.) But it is far from obvious that



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there is an important, much less essential, role for moral-rights-talk when we are talking about the *morality* of human rights. Consider these claims: (1) Every (born) human being has inherent dignity and is inviolable (not-to-be-violated). (2) To rape a human being is to violate her. (3) We who affirm that every human being has inherent dignity and is inviolable, *because* we affirm it, have conclusive reason to do what we can, all things considered, to try to prevent human beings from violating human beings. None of these claims is, as articulated, a rights-claim; none is a claim about what one must do, or refrain from doing, to someone else if one wants to avoid certain negative consequences to oneself.

Now, this is not to say that none of these claims can be translated into the language of rights. If one has a strong preference for moral-rights-talk, one may want to undertake a translation. For example, one may want to translate the claim that “to rape a human being is to violate her” into the claim that “to rape a human being is to violate her human right – her right as a human being – not to be raped.” There’s nothing wrong with such a translation, as long as we are alert to what the ensuing rights-talk – *moral-rights-talk*, talk about *moral* rights – means and doesn’t mean, as distinct from what *legal-rights-talk* means.

In any event, we can talk about the *morality* of human rights without engaging in moral-rights-talk – and, because of my lawyer’s bias against moral-rights-talk, I prefer to talk about the morality of human rights without engaging in moral-rights-talk. When I say “the morality of human rights,” I’m referring to *the morality that supports the law of human rights*. In Chapter 4, as I noted earlier, I address in a general way the question of how we get from the morality of human rights – from the claim that every human being has inherent dignity and is inviolable – to the law of human rights: What laws should we who affirm the morality of human rights, *because* we affirm it, press our government – our elected representatives – to enact? What policies should we press them to adopt? What laws and policies should we press them to avoid?

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