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Spring 2006

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THE “RIGHT” OF RELIGIOUS LIBERTY OF THE CHILD: ITS MEANING, MEASURE, AND JUSTIFICATION

*Patrick McKinley Brennan**

The true source of rights is duty.

Gandhi¹

INTRODUCTION: “RIGHTS,” DECLARATIONS, PERSUASION

The question I wish to raise concerns religious liberty for the child and specifically what it means to say, as people sometimes do, that the child has a human or natural² *right* to religious liberty. Such an inquiry may seem otiose. After all, to question human rights is retrograde; to oppose liberty, unenlightened; to slight children, downright despicable. Add to this the widening embrace of children’s rights as declared in international instruments and there results the risk that little becoming remains to be said here.

There is, however, a wildcard in the mix, and its name is *religion*. All “human rights” are not, it seems, created equal. The right of religious liberty, though “the oldest of the internationally recognized human rights,” has retrogressed into the “‘neglected grandparent’ of human rights.”³ In the nation that first assayed to give its citizens and the world a living experiment in true religious liberty, genuine religious liberty is arguably further from realization

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¹ THE BIRTHRIGHT OF MAN 24 (Jeanne Hersch ed., UNIPUB 1969).

² This essay uses “natural” and “human” interchangeably as modifiers of a right that precedes (and survives) rights conferred by positive law.

³ W. Cole Durham, *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1 (Johan D. van der Vyver & John Witte, Jr. eds., Kluwer Law Int’l 1996). Randy Barnett’s respected book on the foundations of liberty and rights, to pick one example, makes no significant mention of religion. RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (Oxford Clarendon Press, 1998).

than ever.⁴ Not only are violations of religious liberty frequent in the United States, they occur with the secular blessing of the Supreme Court, and are systematic—not sporadic. “The U.S. Supreme Court has ensnared the First Amendment religion clauses in a network of antinomies,” according to one of the nation’s leading scholars of law and religion.⁵ Charting the Supreme Court’s course with respect to religious liberty, another leading scholar warns against renouncing our constitutionally enshrined rights when they fall out of favor.⁶ By the reckoning of almost anyone who takes the right to religious liberty seriously, we behold a dispiriting state of affairs, a case in John T. Noonan, Jr.’s point that “declarations are not deeds, that a form of words by itself secures nothing, and that the same words pregnant with meaning in one cultural context may be entirely barren in another.”⁷

The “free exercise” language of the First Amendment, much like Socrates says in the *Phaedrus* with respect to writing in general, just lies there; the little black marks on the page are powerless to raise themselves up and make progress in human minds.⁸ When words contribute to the creation of positive liberty, it is because they issue from and receive the intelligent attention of the minds of the individuals and communities charged with living under and administering those words. No one is converted by a syllogism, and a commitment to creating the conditions precedent to the exercise of religious liberty requires more than a nod in its direction. If true liberty of religion is to be possible, the men and women who control the institutions that are necessary for realizing the conditions necessary to that liberty must themselves appropriate the *meaning* of religious liberty—fathom its implications, its costs, its complications—and proceed to their deeds prepared persuasively to identify the conditions necessary for true liberty for religion. For unless they can *persuade*, the only tools to their hands will be chance and force. Chance is a force that is not ours to administer, and what force we can forge is, at least in the long run, the enemy of liberty. As one scholar mused: “Is everyone to use force against everyone to convince everyone that force is beside the point?”⁹

⁴ *Contra* JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY* (1998) (arguing that despite setbacks and inconsistencies, the American experiment in religious liberty has moved in the direction of religious liberty).

⁵ John Witte, Jr., *The Integration of Religious Liberty*, 90 MICH. L. REV. 1363 (1992).

⁶ JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 232 (2d ed. 2005) (quoting Douglas Laycock).

⁷ John T. Noonan, Jr., *The Tensions and the Ideals*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES*, *supra* note 3, at 594.

⁸ PLATO, *PHAEDRUS* 23 (Benjamin Jowett trans., Kessinger Publ'g 2004) (1871).

⁹ BERNARD LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 632 (1958).

This Essay’s insistence upon *persuasion* may strike a dissonant chord. To some philosophical minds, it suffices to declare that our human rights *just are* our human rights. This simplistic strain of thought has a past. Though the notion of a “right” has a history older than the Reformation, a history discussed below, it is fair to say (paraphrasing John Rawls) that “rights” in the sense we ordinarily speak of them today emerged in the post-Reformation as a response to pluralism—religious pluralism in particular.¹⁰ Among people who had failed to persuade one another of the details of the good life and of what God asks of his intelligent creatures, rights took on a life of their own, ostensibly self-sufficient points of agreement in a universe of disagreement.¹¹ As the rudiments from which “liberal democracy” is constructed, rights are said to precede—and to survive any political implementation of—comprehensive conceptions of the good. The agreement betokened by talk of such rights is as consequential as the disagreement it masks, as Richard McKeon observed in 1947:

The conception of natural rights, sacred and inherent in man, was written into the constitutions of the eighteenth, nineteenth and twentieth centuries, not because men had agreed on a philosophy, but because they had agreed, despite philosophic differences, on the formulation of a solution to a series of moral and political problems.¹²

In the context of the United Nations Educational, Scientific and Cultural Organization’s (UNESCO) drafting of the prototype of such documents, the Universal Declaration of Human Rights (Declaration),¹³ Jacques Maritain did not shrink from acknowledging the poverty and pregnancy of the situation:

¹⁰ See JOHN RAWLS, *POLITICAL LIBERALISM* xxiv–xxv (2005).

¹¹ See *id.* at xxv–xxx.

¹² Richard McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 37 (UNESCO ed., 1949).

The philosophers of the seventeenth and eighteenth centuries prepared the intellectual instruments by means of which bills of rights and declarations of rights were framed and, eventually, written into the constitution of most of the states of the Western World. Yet agreement in the promulgation of those declarations of rights, far from signifying a general agreement on a single basic philosophy, provided a framework within which divergent philosophies, religious, and even economic, social and political theories might be entertained and developed

Id. at 35.

¹³ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR].

How . . . can we imagine an agreement of minds between men who are gathered together precisely in order to accomplish a common intellectual task, men who come from the four corners of the globe and who not only belong to different cultures and civilisations, but are antagonistic spiritual associations and schools of thought . . . ? Because . . . the goal of UNESCO is a practical goal, agreement between minds can be reached spontaneously, not on the basis of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same conception of the world, of man and of knowledge, but upon the affirmation of a single body of beliefs for guidance in action. No doubt, this is little enough, but it is the last resort to intellectual agreement. It is, nevertheless, enough to enable a great task to be undertaken¹⁴

Is it enough to bring the Declaration to fruition? Of course not. Maritain knew as well as anyone that declarations are not deeds.¹⁵ But Maritain, McKeon, UNESCO, and the United Nations spoke in the context of leaders and a world broadly eager to do deeds and already fairly clear about which deeds to do first. Having recently been led down a *via negativa* rendering palpable the horrors of not making certain egregious behaviors simple “don’ts,”¹⁶ there was an urge for action, for which blunt language manifesting wide agreement would be a great rhetorical help. And in point of fact, the Declaration and its progeny have done yeoman’s service in the work of securing liberty and justice for all people. Michael Novak, no stranger to this subject, stated the following when celebrating the Declaration’s fiftieth anniversary:

A small band of intrepid thinkers and doers succeeded, fifty years ago, in doing what many thought impossible, formulating a document to which all nations on earth might repair, and a document that was as responsible as anything for the “Helsinki process,” which many credit with undermining the legitimacy of Communist governments in Eastern Europe. For here were official documents, signed by their own government officials and proudly published (at first) in official Communist newspapers, that informed dissidents of rights they didn’t

¹⁴ Jacques Maritain, *Introduction* to HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS, *supra* note 12, at 9, 10. “God” was excised from the Declaration. See MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 146–47 (2001).

¹⁵ See *id.* at 17.

¹⁶ Michael Novak, *Human Dignity, Human Rights*, FIRST THINGS, Nov. 1999, at 39.

know they had. Waving these newspaper clippings, they embarrassed their leaders and put them on the defensive.¹⁷

Declarations are *not* deeds; pregnant language may yet become barren. It is not enough to “stand for” religious liberty, to declare its choice worthy. People, both leaders and citizens, must be persuaded to *act*.

Documents do not *entail* deeds nor do they *specify* the particular deeds to be done by those poised to act. Action is called for, and actions are always particular, performed in the present, in a world that has not been beheld before. The purposefully anemic language of the declarations leaves for future identification the particulars of the deeds to be done. Again McKeon, writing in the late 1940s, catches the conflict, the danger of reposing upon language, including the language of rights:

The fundamental problem is not found in compiling a list of human rights: the declarations of human rights that have been prepared by committees and group who have undertaken the study of the problem and the declarations that have been submitted to the Commission on Human Rights are surprisingly similar, and little difficulty is encountered in the mere statement of the rights that ought to be included in the list. The differences are found rather in what is meant by these rights, and these differences of meanings depend on divergent basic assumptions, which, in turn, lend plausibility to and are justified by contradictory interpretations of the economic and social situation, and, finally, lead to opposed recommendations concerning the implementation required for a world declaration of human rights.

These three sources of differences concerning the meanings of human rights render nugatory any agreement concerning the list of human rights, and indeed, once they are raised, make even agreement concerning the bare enumeration impossible. The *faith* ‘in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women’ which is re-affirmed in the Charter of the United Nations stands in need, if it is to be significant, of some resolution of these differences. . . . Opposed philosophies lead to opposed interpretations of history and the present. . . . The debates concerning a modern declaration of rights will turn, not on questions concerning what the rights are, but on

¹⁷ *Id.* at 42; see also PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS (2d ed. 1998).

questions of basic assumptions, actual fact, and appropriate implementation.¹⁸

Declarations are not deeds.

I. FROM NATURAL RIGHTS TO NATURAL DUTY

Declarations are *not* deeds, and non-accidental correct deeds will proceed from correct understanding of basic premises and actual facts. But whence correct understanding? The very phenomenon that made “rights talk” an attractive and efficient refuge in the first place was disagreement, both deep and wide, and disagreement continues apace. One soul’s orthodoxy remains another’s heterodoxy; one man’s *modus ponens* serves as another’s *modus tollens*; one person’s correct understanding operates as another’s “nonsense upon stilts.”¹⁹ This last reference is to Jeremy Bentham’s jab at “natural rights,” the idea that humans enjoy—by nature, in virtue of their humanity, and prior to positive law—a *moral* entitlement to do, or not do, certain acts (or at least not to be interfered with in the performance of certain acts). So conversant are we in “rights talk”—from the “right to life” and the “right to choose,” to the “rights of smokers” against those of non-smokers—that it serves to remember that, in making these claims of entitlement, we are making claims of *moral* entitlement, that is, claims about what *ought* obtain. One scholar states: “[T]he idea of natural rights is a moral one. It does not refer to the rights that people can actually exercise in any given society but to the rights that ought to be recognized in all societies”²⁰ This is easy to forget, because when our idiom is “rights,” we bypass moral *argument* even as we make what is in fact a *moral* claim. Nor, as mentioned above, is this an accident. It is the *boast* of the typically modern conceptions of rights that they are free-standing, assertable without embrace of a theory of the human good. In our Declaration of Independence, for example, Thomas Jefferson and his cooperators said in the name of the American people that “all men” are endowed “with certain unalienable rights,” and the “truths” about those rights are said to be “self-evident.”²¹ *Mirabile auditu!*

¹⁸ McKeon, *supra* note 12, at 35–36 (emphasis added).

¹⁹ JEREMY BENTHAM, *Anarchical Fallacies*, in 2 THE WORKS OF JEREMY BENTHAM 489, 501 (John Bowring ed., London, Simpkin, Marshall, & Co. 1843).

²⁰ BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150–1625, at 5 (1997).

²¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

“Ostensibly, of course, a monological demonstration presents to silent onlookers the inferences to be drawn necessarily from any individual’s insights into necessary and certain self-evident truths. For example, the starting point of Jefferson’s apparent demonstration is: ‘[w]e hold these truths to be self-evident’”²² But in fact, “any attempt to substitute logical demonstration for rhetorical conviction only falsifies the circumstance [of assent] and opens the way for propagandistic manipulation in the guise of ‘objectivity.’”²³ One scholar asserts: “Even Jefferson, whose goal was to win consent to a revolutionary act, finds himself constrained to disguise his rhetorical exhortation and defense as a demonstration seeking only assent to a proposition.”²⁴

It has been observed, unexceptionably, that “there is no truth that can be more useful to a politician than an allegedly self-evident or undeniable truth when he is trying to win an argument”²⁵ But once the argument has been won, what of the minds that find that what was appealingly billed as “self-evident” turns out to be *not even plausible*? The risk is not merely speculative, as Brian Tierney’s report of the relevant history bears out: “Jefferson’s self-evident truths about inalienable rights have not seemed evident to most of the human race over most of recorded human history.”²⁶ Picking up where Tierney leaves off, Keith Pavlischek asks the question that concentrates the current inquiry: “How, if we no longer believe in ‘self-evident’ truths, can we establish the ‘inalienable right’ to religious liberty that in America we have traditionally viewed as axiomatic?”²⁷ How one might establish it, and what “it” is, are the questions this Essay pursues.

As for the character and quality of “our” *current* assent to the “truths” about the existence of natural or human rights, perhaps they were caught in the Preamble of the Charter of the United Nations and again in the Declaration:

²² P. CHRISTOPHER SMITH, *THE HERMENEUTICS OF ORIGINAL ARGUMENT: DEMONSTRATION, DIALECTIC, RHETORIC* 5–7 (Northwestern Univ. Press 1998); *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

²³ SMITH, *supra* note 22, at 7.

²⁴ *Id.*

²⁵ MORTON J. WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 34 (Oxford Univ. Press 1987).

²⁶ TIERNEY, *supra* note 20, at 1. On the difficulties of making the case for a natural and important equality among all human persons, see Patrick McKinley Brennan, *Arguing for Human Equality*, 18 J.L. & RELIGION 99 (2002) and Patrick McKinley Brennan, *Meaning’s Edge, Love’s Priority*, 101 MICH. L. REV. 2060, 2071–74 (2003).

²⁷ KEITH J. PAVLISCHEK, JOHN COURTNEY MURRAY AND THE DILEMMA OF RELIGIOUS TOLERATION 3 (1994).

The signatories shared a “*faith* in fundamental human rights.”²⁸ This faith proved infectious, and four decades later it was possible to say that “faith in human rights” is “a global concept.”²⁹ The irony, of course, is that when rights emerged in the post-Reformation, the purpose was to establish public life on a foundation other than (the Catholic) *faith*.

Prescinding from the irony, what can it possibly mean to have “faith in human rights?” In the Catholic tradition, faith is an infused, supernatural virtue that gives the soul a non-demonstrable assurance of things hoped for.³⁰ Is anything remotely similar suggested with respect to human rights? We can hope that human rights are true, and we can hope that men and women will honor them. But what does it mean to have “faith” in human rights? Faith in human rights may amount to a “last refuge of intellectual agreement among men,” as Maritain understood,³¹ but it would be a mistake to suppose that it gives us reason to be hopeful about the course of conduct that fellow humans will observe. Violations of human “rights” are the last word in many human lives.

Is it possible that the emperor of human rights is not merely a benighted man of faith? Could he be loosed from reality *altogether*?³² Eager to expose the emperor for what he is and then get on with the real business of building moral community, Alasdair MacIntyre substitutes for faith another word—*fiction*:

[T]here are no such rights, and belief in them is one with belief in witches and unicorns. The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: Every attempt to give good reasons for believing that there *are* such rights has failed Natural or human rights . . . are fictions³³

²⁸ U.N. Charter pmbl. (emphasis added); UDHR, *supra* note 13, pmbl.

²⁹ ROBERT TRAER, FAITH IN HUMAN RIGHTS 216 (1991).

³⁰ See generally AVERY CARDINAL DULLES, THE ASSURANCE OF THINGS HOPED FOR: A THEOLOGY OF CHRISTIAN FAITH (1994).

³¹ JACQUES MARITAIN, MAN AND THE STATE 77–78 (1951).

³² Jacques Maritain reports that before a UNESCO committee devoted to the identification of human rights one participant quipped, “we agree on these rights, *providing we are not asked why*.” *Id.* at 77.

³³ ALASDAIR MACINTYRE, AFTER VIRTUE 69–70 (Notre Dame Univ. Press 2d ed. 1984). For another thorough rejection of “natural rights,” see generally LEO STRAUSS, NATURAL RIGHT AND HISTORY (1958).

The judgment of so eminent a philosopher is an important datum—a reason, at the very least, not to take the existence of natural or human rights *for granted*.

Are we, however, so desolate as MacIntyre concludes? The question this Essay has begun to explore is what can be said persuasively to justify and give content to a natural “right” to liberty of religion. If MacIntyre’s point were simply that natural *rights* are not, as witches and unicorns are not, objects of anyone’s *experience*, he would be correct: Brute experience does not exhaust the necessary conditions for affirming anything. If, however, MacIntyre means that we have *no reasons* for affirming that humans enjoy *a moral entitlement to behave (or not) in certain ways, and enjoy it apart from positive law*, then he has perhaps overstated his claim. The devil here is in the argumentative details, as Allen Buchanan understands:

[A]ssertions of right are essentially *conclusory* and hence *argumentative*. An assertion of right is a conclusion about what the moral priorities are. At the same time, because it is a conclusion, it is an admission that it is appropriate to demand support for this conclusion, reasons why such priority ought to be recognized.³⁴

Human rights as irreducible natural phenomena are no part of what this author has good and sufficient reason to judge to be part of the real. However, this author does judge that he and others have good and sufficient moral reason to provide (through the enactments of positive law) opportunities to behave in certain ways (and to forbear from acting in others). Though under some circumstances we might profitably persist in invoking “natural rights,” we should face the fact that they are the context-specific requirements of something other than brute givens of nature. That “natural rights” must be *argued for and given particular content* is not an embarrassment, unless no argument can be made for natural rights and no content can be specified, or, alternatively, an argument can be made for natural rights and their content can be specified but is not. The consequence of such failure, *whatever* its cause, causes us to continue in the “rights talk” that, whatever its adventitious successes, ensures more antinomies and arranges the eventual exigence of a still more final “last refuge” than “the last.”

³⁴ ALLEN BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC* 151 (Westview Press 1991). Cf. GEORGE KATEB, *THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE* 82 (1992) (asserting that people who “keep on demanding an answer to the question” of what rights should be respected “are on the way to abandoning respect for rights”).

But what argument can be made? In a morally heterogeneous world, a world of diverse moral traditions instantiated in countless communities, are there potentially sustainable claims to a *universal* moral entitlement to liberty to behave (or not) in certain ways?

This Essay suggests, by way of an answer, a shift from rights, which are not directly verifiable in human experience, to duty, which is. Of course, were the ultimate springs of duty only local, then this too would be a cul-de-sac, a false start in an effort to justify a universal basis for making claims of particular moral entitlement. But, although the particulars of moral duty are inevitably discovered and implemented locally in community and tradition, there exists one universal duty that precedes and governs the discovery and specification of all others. From the identification of that universal *ought*, we are on the way to justifying and specifying the conditions under which it can be argued that persons should be given an opportunity through positive law and custom to act, or forbear to act, in certain ways.

Immanuel Kant observed that “ought” implies “can,” but it would be false to say unconditionally that someone, A, has a “right” to do some act, X, because A has a duty to do X. Even if no one prevents A from doing X, A may not be able to do X because of the failure of some condition precedent, Z, over which A does not or cannot justly have effective control. Moreover, though it may be the duty of some other person, B, to satisfy Z, there may be no way, or no just way, to arrange satisfaction of that condition by Z or by a surrogate for Z.³⁵ Therefore, when a person has a moral right to do some act, this author means only that no one should interfere with his or her doing it, and that, *ceteris paribus*, the conditions that allow him or her to do it should be satisfied; absent the satisfaction of those conditions, a person is not effectively free to do them.

This Essay does not attempt to decide the extent to which a hypothesized child should have an enforceable positive right to satisfaction of the conditions necessary to his enjoying religious liberty. The project here is to expose the duty that can provide *the basis of a commitment to protect the freedom of religion*, which will in turn provide a measure and focus for those charged with realizing the particular conditions that will allow satisfaction of that duty, including and particularly as concerns the child.

³⁵ See HILLEL STEINER, AN ESSAY ON RIGHTS 74 (Oxford Blackwell 1994).

II. FROM FAITH IN CONSCIENCE TO INTELLIGENCE ABOUT INTELLIGENCE

The leading contender for a source of universal moral duty is *conscience*. John Noonan, certainly one of the world's leading advocates of freedom of religion,³⁶ holds that "[t]he foundation of religious rights is found in human conscience"³⁷ In his work on the foundations of religious liberty, Noonan is the brilliant expounder of a popular, perennial, and appealing view. To many, conscience has seemed a universally verifiable source of duty and thus a plausible candidate for justifying a universal natural right to liberty for religion. Conscience is a concept older than the best Greek philosophy, borne along and variously reconceived through a long tradition from Jewish and Christian scripture, Cicero, the heretic Peter Abelard, the condemned but canonized Aquinas, Bishop Butler, and the person next door who has heard, believed, and now proclaims that he is to follow his conscience. John Henry Cardinal Newman caught the surge of the tradition in his remark to the Duke of Norfolk: "If I am obliged to bring religion into after-dinner toasts (which indeed does not seem quite the thing), I shall drink—to the Pope, if you please,—still, to Conscience first, and to the Pope afterward."³⁸

But *what is this "conscience"* to which Everyman makes ready reference, confident that thereby he has said it all? One scholar proclaims: "Conscience has been much neglected by philosophers."³⁹ Steven Smith frames the questions we should face:

What *is* "conscience" anyway? Is it some discrete faculty or cognitive power—a sort of sublime Jiminy Cricket chirping truth into our souls? Or, alternatively, is "conscience" merely a label we attach to the conclusions of our moral reasoning—or perhaps to our opinions (however come by) on moral questions? When we discuss, say, the question of conscientious objection from military service, can we even be confident that we are all referring to the same thing? Or that we mean the same thing that more historically removed

³⁶ See Charles J. Reid, Jr., *The Fundamental Freedom: Judge John T. Noonan, Jr.'s Historiography of Religious Liberty*, 83 MARQ. L. REV. 367 (1999).

³⁷ Noonan, *supra* note 7, at 594.

³⁸ John Henry Cardinal Newman, *A Letter Addressed to His Grace, the Duke of Norfolk*, in CONSCIENCE, CONSENSUS, AND THE DEVELOPMENT OF DOCTRINE 457 (James Gaffney ed., 1992).

³⁹ TIMOTHY C. POTTS, CONSCIENCE IN MEDIEVAL PHILOSOPHY 1 (Cambridge Univ. Press 1980).

figures such as [Thomas] More (or Madison, or Locke, or Roger Williams) meant when they uttered the word?⁴⁰

We can begin to untangle the skein of issues by identifying two leading strands in the tradition about conscience, the first exemplified by James Madison, of which this essay notes one variation. The other is developed by Thomas Aquinas.

Madison, whom Noonan adjudges “the father of free exercise,” contended that the State must yield to conscience because *conscience is God in us speaking to us*.⁴¹ Madison, as Noonan explained, fought for free exercise for all Americans:

The duty was mere; the prescribing authority was supreme. It was supreme because it was not just an inner tickle, a subjective unease: it was for [Madison] the actual voice of another, a communication, a command. The ultimate fact—the ultimate paradox if one likes—is that for the Father of Free Exercise, the rightness of the doctrine is rooted in his own faith. . . the faith that God in us speaks to us.⁴²

This one might refer to as the *vox Dei* notion of conscience.⁴³ Frequently, however, the claim that God’s voice is heard internally is admitted to be metaphorical, as it might turn out to be in Noonan’s own account, as he ends by remitting the matter to *faith*. God is not literally “heard” speaking to the person, as Moses is believed to have *heard* the Father upon Sinai⁴⁴ and as Jesus and John are believed to have *heard* the Father at the baptism in the Jordan.⁴⁵ The communication is not auditory, nor is it even conceptual. Rather, God is “known” through a sixth sense—an *intuitional*, and therefore unassailable, connection. Historically, we associate this extravagant hypothesis with Bishop Butler, and more generally with the Scottish School of Moral Sense (to which Butler belonged).⁴⁶ This intuitional notion of conscience is the cognate *vox Dei* notion reinvented in fancier epistemological garb.

⁴⁰ Steven Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580, 586 (2003).

⁴¹ NOONAN, *supra* note 4, at 88–89.

⁴² *Id.*

⁴³ See POTTS, *supra* note 39, at 63–64.

⁴⁴ Exodus 19:21.

⁴⁵ Matthew 3:17.

⁴⁶ See generally JOSEPH BUTLER, FIFTEEN SERMONS PREACHED AT THE ROLLS CHAPEL: TO WHICH ARE ADDED SIX SERMONS PREACHED ON PUBLIC OCCASIONS (London, C. & R. Ware, T. Longman, & J. Johnson 1774).

More important than what divides the two positions is what they share, to wit, the view that individuals can and do have a kind of direct, unmediated, unimpeachable access to God. Noonan explains that Madison is a case in point: “The radicalness of [Madison]—should we say the madness of Madison?—was to suppose that each individual has a zone in which he or she responds to the voice of God, a zone beyond political authority.”⁴⁷ Noonan continues, explaining that Madison was

[c]onfident . . . that the difficult cases would be rare and de minimis—confident, after all, that the voice of God would not often be heard in distorted or eccentric ways. . . . In the ultimate and absolute relation of each individual to God lies the limitation on civil society and civil government on which [Madison] insists. Without that relation . . . why should a society be constrained to respect conscience? . . . The theology underwrites the political theory . . . By their consciences the people relate to God. The faith that there is a governing God is fundamental.⁴⁸

Noonan contends that Madison understood conscience as an absolute barrier to the claims of the state.⁴⁹ Noonan asserts: “[I]f the duty to follow conscience does not trump all other considerations, including the laws of the State, I do not understand why religion—the duty to our Creator, as it used to be called—leads to moral rights that the State should recognize as legal rights.”⁵⁰ Noonan elaborates that government’s attempts to determine *which* claims of conscience to honor are “coercive, antithetical to the creativity, the liberty, the response to the Spirit that has marked religious endeavor [M]en shall not intervene. That theological stance is . . . the freedom that the first amendment requires.”⁵¹

Must the State accede to *every* claim of conscience? Of course not. Noonan, an admirer of the “absolute barrier” approach, believes that “[t]o hold that religion is truly excepted from all political authority is more mad than Madisonian.”⁵² No one, neither Noonan nor Madison, seriously argues that *every* claim to follow one’s conscience should enjoy the protection of the State. Noonan states that there are “two inescapable elements in any protection of

⁴⁷ NOONAN, *supra* note 4, at 89.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Noonan, *supra* note 7, at 595.

⁵¹ John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713, 725 (1988).

⁵² Noonan, *supra* note 7, at 600.

religious rights: their foundation and the tension of that foundation with the rights, duties, and nature of the State.”⁵³ The United Nations and the Catholic Church affirm that the State must limit the exercise of religion to instances in which the public order is not imperiled.⁵⁴ The brute “right” to religious liberty is a moral entitlement to *some* liberty. The amount of liberty, however, is not determined by some other brute object of experience. It is determined through harmonizing the individual’s claims in the name of conscience with the State’s claims in the name of public order.

If the neighbor did enjoy a hotline to the divine, the only intelligent rejoinder would be *fiat sic*—which would be Madisonian but *not* mad. One reason that no one seriously argues that the State must accede every claim in the name of “conscience” is that “conscience” is *fallible*. Conscience as *vox Dei* or as an unassailable, intuitionist grasp of something non-empirical is a venerable but *unpersuasive* hypothesis. The way to cut Noonan’s knot is to bypass the occult conception of conscience in favor of an internally verifiable account of the human person’s normative relationship to the real and the good. Then it is possible to construct particular moral claims on behalf of opportunities to pursue the real and the good.

III. FROM THE BLACK BOX TO ITS CONTENTS, AND BEYOND

Thomas Aquinas’ conception of conscience, the premier example of the second leading strand in the tradition, will provide a starting point for this appropriation of our actual cognitive operations. Aquinas understood “conscience” to be the conscientious deliverances of *human reason*; indeed, he frequently used “reason” as a synonym for conscience. This is a shorthand for his more elaborated view that conscience is the judgments, the conclusions, of human practical reasoning about what is to be done,⁵⁵ worthy of human obedience because of reason’s own divine creation and orientation toward the

⁵³ *Id.* at 594.

⁵⁴ *See, e.g.*, DIGNITATIS HUMANAE para. 2 (Vatican 1965). *But cf.* para. 13 (stating that “the Christian faithful, in common with all other men, possess the civil right not to be hindered in leading their lives in accordance with their consciences”); Convention on the Rights of the Child art. 14, para. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention].

⁵⁵ *E.g.*, S. THOMAE DE AQUINO, SUMMAE THEOLOGIAE, I-II, q. 19, a. 6 ad 3 (Collège Dominicain d’Ottawa ed., 1941) (“errore rationis vel conscientiae”). *Cf. id.* I-II, q. 19, a. 5 respondeo (“conscientia sit quodammodo dictamen rationis est enim quaedam applicatio scientiae ad actum”). *See* JOHN FINNIS, AQUINAS 256 n.4 (Oxford Univ. Press 1998).

real and the good.⁵⁶ Although there is dispute as to the particulars of Aquinas’ understanding of the operations of human reason, there will be agreement with his claim that humans *reason*. To the extent, then, that Aquinas roots particular human duties in what is verifiable in our human reasoning, his account is more persuasive than any that rests on an occult entity operating through a “sixth” sense.⁵⁷ Often, alas, conscience becomes (if not for Aquinas himself, then for his intellectual offspring) something higher than the judgments of reason. Conscience becomes a “faculty” in its own right.⁵⁸ Reified as “conscience,” reason slides self-aggrandizingly up a hill in the direction of Butler and Madison.

As R.M. Hare counseled, “We must not think that, if we can decide between one course and another without further thought . . . this necessarily implies that we have some mysterious intuitive faculty which tells us what to do.”⁵⁹ If a moral entitlement to religious liberty is to be securely grounded in reality, what is needed is a thorough *unmasking* of conscience through a deeper understanding of reason and the authority of its deliverances. To avoid promoting conscience out of the intelligible world, it is necessary to recover and understand the activities and structure of human intelligence as it actually *operates*—a project the philosopher and theologian Bernard Lonergan referred to as opening the “black box.”⁶⁰ Lonergan himself will guide this Essay as it attempts to pry open the black box of human intelligence. In nearly a half-century of scholarship stretching from the 1930s to the early 1980s, Lonergan showed us more about human intelligence than perhaps any other philosopher. The Lonergan name, unheard of by many, is not itself material to the present purpose of this Essay. The goal is to open the black box of human intelligence so that the reader may verify whether his or her intelligence works as Lonergan found his own to work. There is, after all, no abstract way to verify the operation of human intelligence. Others can assist the individual’s effort to discover the operation of human intelligence within her, but no one can make

⁵⁶ *Id.*, I-II, q. 19, a. 5 ad 2.

⁵⁷ For a thorough exposition and penetrating analysis of Aquinas’ understanding of conscience, see ERIC D’ARCY, CONSCIENCE AND ITS RIGHT TO FREEDOM (Sheed & Ward 1961).

⁵⁸ For a discussion on the “faculty” notion of conscience, in contrast to notions of conscience rooted in cognitional theory, see J. LEON HOOPER, THE ETHICS OF DISCOURSE: THE SOCIAL PHILOSOPHY OF JOHN COURTNEY MURRAY I (1986).

⁵⁹ R.M. HARE, THE LANGUAGE OF MORALS 64 (1952).

⁶⁰ See Bernard Lonergan, Lecture Delivered at Hobart and William Smith Colleges: Self-transcendence: Intellectual, Moral, Religious (Oct. 10, 1974); see also RICHARD LIDDY, TRANSFORMING LIGHT: INTELLECTUAL CONVERSION IN THE EARLY LONERGAN 154 (1993), available at http://www.lonergan.org/Online_Books/Liddy/c6r.pdf.

that discovery for her. A person can only use her own intelligence to determine if she has intelligence. Thus, if she can verify for herself what the author reports on the basis of his own intelligence, we may be on the way to a persuasive justification and measure of religious liberty.

There are many obstacles in the way of this verification, some of which we have encountered already. It seems that we humans have been from the beginning enchanted with the noblest of senses, the power of sight.⁶¹ The Western tradition in epistemology, from Aristotle through Descartes and beyond, has often supposed that what goes on inside the black box is a single kind of act akin to ocular vision—a seeing with the “eyes of the mind.” However, if you begin to attend to what it is that you are doing when you know what it is that you know, what you will discover, I submit, is that the mind has no eyes, nor any equipment usefully understood by that or any similar metaphor. When you know, you know through a complex of acts: (1) *experiencing*, (2) *questioning* that experience, “What is it?”, (3) *interpreting* that experience, (4) *questioning* that interpretation, “Is it so? Is this interpretation correct?”, and, finally, (5) *judging* the sufficiency of the evidence for the interpretation. If knowledge you are to achieve, both of *what is* and *what is worth doing* (that is, the good), each of these acts is necessary, and only jointly are they—on condition that you judge correctly—sufficient.

Therefore, we reach the real and the good not by simple mental looks but through a structured series of irreducibly diverse cognitive acts. This structured series is exemplified most dramatically in what we know as the “scientific method”: interpreting data to produce a hypothesis and eventually judging the sufficiency of the evidence in support of the hypothesis. The suggestion, which the reader must verify for himself or herself, is that all human knowledge enters through the pattern exemplified in the scientific method. As Bernard Lonergan liked to say: “The wheel of method not only turns but also rolls along.”⁶² The basic pattern of our knowing is methodical, that is, progressive and cumulative.

That knowledge enters through this methodical pattern, if at all, has consequences. The *ex professo* project of Descartes, that emblem of Enlightenment, was to work things out outside of the community and unburdened of the ballast of the past—striving to live each day “as if it were

⁶¹ See MARTIN JAY, *DOWNCAST EYES: THE DENIGRATION OF VISION IN TWENTIETH-CENTURY FRENCH THOUGHT* 1 (1993); RUDOLF ARNHEIM, *VISUAL THINKING* 1 (1997).

⁶² BERNARD LONERGAN, *METHOD IN THEOLOGY* 5 (1972).

his first.”⁶³ Descartes thought he had the cognitive equipment to do just that: infallible “mental looks” and intuitions.⁶⁴ But if, as suggested here, humans lack such access to the world and yet grow in knowledge of the real and the good, we must remit ourselves to the only *method* we have—receiving what our forebears have handed down to us and correcting it as necessary. Self-correction is the exigence and responsibility of fallible agents living in history.

The bulk of the “communitarian” literature commends community for reasons different from, and in some respects inconsistent with, the argument on behalf of community and tradition that begins, as this Essay does, with the necessary and sufficient conditions of the entrance of knowledge and of human living consistent with that knowledge. As the term is used here, “tradition” comprises the inherited, shared starting points of a particular community. The quality of those starting points inexorably determines where the community’s members start their living and growing, and, as a result, where they can go. It is plain enough that humans are conditioned by our history. We are conditioned in a particularly important—though frequently overlooked or devalued—way by what our community and tradition mediate with respect to *the value and method of the human search for the real and the good*. That we are born into a tradition and a community is not the end of the story because we all can press on toward greater knowledge and more effective instantiation of the good that we have come to know. However, in a community that intentionally or negligently stunts or represses the search for the real and the good, the individual must pay a double-price: he must overcome the cultural barriers that stand in the way of transcending his given interiority to grow in the real and the good.⁶⁵

IV. FROM FACT TO DUTY

What, the reader may fairly ask, has this sketch of gnoseology to do with identifying a basis for—and a measure of—a positive entitlement to religious liberty? Answer: penetration of the “black box” of human intelligence reveals not a random series of cognitive acts, but rather cognitive acts that are *already*

⁶³ MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 7 (1962).

⁶⁴ *Id.*

⁶⁵ An excellent account of where Lonergan’s epistemology leads with respect to community and traditions can be found in Thomas Kohler, *The Integrity of Unrestricted Desire: Community, Values, and the Problem of Personhood*, in *AUTONOMY AND ORDER: A COMMUNITARIAN ANTHOLOGY* 57 (Edward W. Lehman ed., 2000). Although Kohler’s essay appeared after the completion of the original draft of this paper, the author profited from it in making revisions.

structured and assembled. Before one specifically adverts to it, before one becomes self-conscious about it, one is always and already borne along and out of the confines of one's subjectivity by a *desire for the real and the good*. Lonergan states: "The operations . . . [of human intelligence] stand within a process that is formally dynamic, that calls forth and assembles its own components. . . . [T]he many levels of consciousness are just successive stages in the unfolding of a single thrust, the eros of the human spirit."⁶⁶ This dynamic desire of the human spirit manifests—but does not exhaust—itsself in the questions we ask, one after another, every day of our conscious lives. Lonergan states: "This primordial drive . . . is the pure question. It is prior to any insights, any concepts, any words, for insights, concepts, words, have to do with answers; and before we look for answers, we want them; such wanting is the pure question."⁶⁷ This dynamism at the human core is different from other human desires. As Lonergan explains, the dynamic *eros* for the real and the good is "a self-assertive spontaneity that demands sufficient reason for all else but offers no justification for its demanding. It arises fact-like, to generate knowledge of fact, to push the cognitional process from the conditioned structures of intelligence to unreserved affirmation of the unconditioned."⁶⁸ Because the *eros* at the center of every rational subject is for the real and the good, its satisfaction moves the subject beyond his subjectivity to *what is* and to *what is good*. More acutely stated, satisfaction of this desire has as its consequence nothing short of *transcendence*. The desire itself is *transcendent*, in the sense that it intends what lies beyond the interiority of the subject. Through satisfaction of that desire, the individual human *transcends* his interiority; in his correct judgments of the real and the good, the subject is transcendent. Lonergan further asserts:

[A]nswers are *to* questions, so that if questions are transcendent, so also must be the meaning of corresponding answers. If I am asked whether mice and men really exist, I am not answering the question when I talk about images of mice and men, concepts of mice and men, or the words, mice and men.⁶⁹

Lonergan referred to the successful use of human cognitive capacities to satisfy the dynamic *eros* for the real and the good as *transcendental method*. Such a

⁶⁶ LONERGAN, *supra* note 62, at 13, 16.

⁶⁷ LONERGAN, *supra* note 9, at 9.

⁶⁸ *Id.* at 332.

⁶⁹ BERNARD LONERGAN, *Cognitional Structure*, in 4 COLLECTED WORKS OF BERNARD LONERGAN 205, 213 (1988).

method “is concerned with meeting the exigencies and exploiting the opportunities presented by the human mind itself.”⁷⁰

This *eros* for the real and the good, through the satisfaction of which we transcend ourselves and come to the real and the good, is *duty* in its most primordial form. We debate our specific duties. Ought I give up red meat? Ought I kill in self-defense? Prior to our judgments about the contents of such specific duties, however, there is operative in us the dynamic desire for the real and the good. This transcendent desire is constitutive of us; it bids us move from people who are in the dark to become people who are knowers of reality, and it bids us become knowers and then instantiators of the good. This transcendent movement is spontaneous, but we can either refine the conditions of its satisfaction or, if we choose, frustrate them. Stated differently:

Spontaneously we move from understanding with its manifold and conflicting expressions to critical reflection; again, the spontaneity is not unconscious or blind; it is constitutive of our critical rationality, of the demand within us for sufficient reason, a demand that operates prior to any formulation of a principle of sufficient reason; and it is the neglect or absence of this demand that constitutes silliness. . . . [T]hat spontaneity is not unconscious or blind; it constitutes us as conscientious, as responsible persons, and its absence would leave us psychopaths. . . . [T]he normative force of its [human intelligence’s] imperatives will reside, not just in its claims to authority, not just in the probability that what succeeded in the past will succeed in the future, but at root in the native spontaneities and inevitabilities of our consciousness which assembles its own constituent parts and unites them in a rounded whole in a manner we cannot set aside without, as it were, amputating our own moral personality⁷¹

From the fact of our transcendent desire it does not follow that we are always and everywhere in position to reach judgments that are certain. Indeed, it frequently happens that questions occur to us that we cannot now answer with certainty. We can, however, reach judgments of probability; in the alternative, we can change the question we are asking, restricting the scope of our judgment. We can always judge,⁷² and, in doing so correctly, we are transcending our interiority and coming to knowledge of what really is and is

⁷⁰ LONERGAN, *supra* note 62, at 14.

⁷¹ *Id.* at 18.

⁷² “You can always judge, even when you do not understand, since you can say, I do not understand, which is itself a judgment.” JOSEPH FLANAGAN, *QUEST FOR SELF-KNOWLEDGE: AN ESSAY IN LONERGAN’S PHILOSOPHY* 125 (1997).

really good by exploiting the opportunities and exigencies of our given natures. We can, of course, evade the desire to know; we can prefer nescience to knowledge. But if we seek to meet the demands of the unrestricted desire to know as best as we can, and thus avoid the temptation to amputate our moral personality, we are meeting the opportunities and exigencies of our given human nature.

These opportunities and exigencies, this primordial duty, are universal and verifiable by every rational person through his or her consciousness. The duty does not vary culturally, but instead provides the criterion by which every culture's conception of the specifics of human obligation (and opportunity) are to be tested. It is, as Lonergan says, "a concern that is both foundational and universally significant and relevant."⁷³ This concern

attacks the so-called "naturalistic fallacy" at its roots by showing that, at the subject-pole, there is no "jump" from "is" to "ought" because one is already there. The fact is that in one stroke transcendental method, by uncovering and revealing the single, fundamental, and radical exigence of the human spirit for full self transcendence . . . shows not only that the human person's genuine *self-realization is self-transcendence*, but also that the *basic human "fact" is a drive for "value,"* that in the most radical sense, *the human person's "is" is an "ought."* Rather than a "naturalistic fallacy," in fact, transcendental method reveals, as Michael Novak has argued, a new and rich meaning of "natural law": not an authoritarian code written on tablets "out there," nor an arbitrary whimsical standard "in the heart," but a natural law constituted by the radical dynamism of the human spirit. The "first principles" of this natural law are "not verbal, propositional imperatives or judgments, but rather operations of the human person unfolding according to their own inherent exigency."⁷⁴

By taking the human person as he is, as an is-that-is-already-an-ought, we are in position to understand the way in which the human person, because of the opportunities and exigencies of his given nature, is an embodied "right." There is nothing occult about natural right (and duty) understood in this manner. "The source of natural right," Lonergan explains, "lies in the norms

⁷³ LONERGAN, *supra* note 62, at 14.

⁷⁴ WALTER E. CONN, CONSCIENCE: DEVELOPMENT AND SELF-TRANSCENDENCE 214 (1981) (quoting in part Michael Novak, *Bernard Lonergan: A New Approach to Natural Law*, 41 PROC. OF THE AM. CATHOLIC PHIL. ASS'N 246, 248 (1967)).

immanent in human intelligence.”⁷⁵ These norms are dynamic, calling for the person to transcend himself through engagement in tradition and community, which are themselves to be constructed along lines consistent with the immanent norms of the human spirit. We are for ourselves “an ethical assignment.”⁷⁶

This alone, I would suggest, is the context in which it is possible to justify and measure, on naturally available ground, a right to religious liberty. Before turning to do so specifically, however, *caveat lector*: what this Essay has proposed in the several preceding pages is something of a new context for considering an old problem. This new context involves a reversal of a host of the most basic Western assumptions about knowledge and ethics; fully to grasp and evaluate that context would be a long labor indeed. This Essay has aspired to do no more than sketch its shape, hoping thereby to suggest why it is so urgently needed even, or perhaps especially, by believers in “rights.”⁷⁷

V. THE CHILD IN THE FAMILY

The preceding analysis has suggested the way in which all humans are under a duty of transcendence that can be satisfied only through participation in community and tradition, and in tradition and community of particular kinds. Turning now to explore the implications of this analysis for a moral claim on behalf of the child for religious liberty, this author is aware that tradition and community—and “their religion”—are exactly what certain lovers of liberty anathematize as freedom’s public enemy number one. Children are especially vulnerable to forced “assent,” which is why it should

⁷⁵ Bernard Lonergan, *Natural Right and Historical Mindedness*, in *A THIRD COLLECTION* 169, 176 (Frederick E. Crowe ed., 1985).

⁷⁶ J. Verstraeten, *Solidarity and Subsidiarity*, in *PRINCIPLES OF CATHOLIC SOCIAL TEACHING* 133, 137 (David A. Boileau ed., 1994).

⁷⁷ Max L. Stackhouse & Stephen E. Healey, *Religion and Human Rights: A Theological Apologetic*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES*, 485–516 (John Witte, Jr. & Johan D. van der Vyver eds., Kluwer Law Int’l 1996), has been most helpful to this author’s thoughts on the subject of how to talk persuasively about moral entitlement. In future work the author hopes to show more fully than is possible here why the position rooted in the intentional transcendence of the human is not just another among “[a]ll sorts of post-Christian views of human moral *a priori*, self-evident truths and natural rights . . .” *Id.* at 494.

The reader interested in continuing the foundational work adumbrated here might profitably consult the following secondary works: Frederick E. Crowe, *An Exploration of Lonergan’s New Notion of Value*, in *APPROPRIATING THE LONERGAN IDEA* 51 (Michael Vertin ed., 1989); FREDERICK CROWE, *LONERGAN* (1992); *THE DESIRES OF THE HUMAN HEART: AN INTRODUCTION TO THE THEOLOGY OF BERNARD LONERGAN* (Vernon Gregg ed., 1988); FLANAGAN, *supra* note 72; LIDDY, *supra* note 60.

be said forthrightly that there is no good, let alone the possibility of authentic transcendence, in compelled “assent” to an inheritance. The call to transcendence, though it depends upon community and tradition for success, is irreducibly personal and individual. No one can do it for anybody else. Lonergan states it thus: “By his own acts, the human subject makes himself what he is to be, and he does so freely and responsibly; indeed, he does so precisely because his acts are the free and responsible expressions of himself.”⁷⁸ In the more technical language of the philosophers, the act of searching is reflexive—a performance that only you can do for yourself. What Robert George says with respect to “religious truth” is of broader import:

[N]o one can search for religious truth, hold religious beliefs, or act on them authentically, for someone else. Searching, believing, and striving for authenticity are interior acts of individual human beings. As interior acts, they cannot be compelled. If they are not done freely, they are simply not done at all.⁷⁹

No one can cause you to transcend your interiority by making a correct judgment of the real or the good. Sticks and stones can break your bones, whether you like it or not, and sights and sounds can assault your senses. But the act of self-transcendence that is cognitive or moral issues from the inside out, if it occurs at all.

The child’s case is no exception. Nevertheless, the needs of the child, if she is to search at all, are somewhat different from those of the typical adult. None of us is born knowing how to transcend our interiority. First, we must be taught what is the real and the good. Second, we must come to embody the real and the good through performance. “The annual crop of infants is a potential invasion of barbarians, and education may be conceived as the first line of defense.”⁸⁰ After the short span of the child’s amoral infancy wanes, the child leaves the world of immediacy and brute sense experience. The child then discovers—non-thematically, and in fits and starts—the possibility of self-transcendence. Inevitably, both children and adults live in community. Furthermore, both children and adults learn what to do “from the example of those about us, from the stories people tell of the good and evil men and women of old, from the incessant flow of praise and blame that makes up the

⁷⁸ Bernard J.F. Lonergan, *The Subject*, in A SECOND COLLECTION 69, 79 (William F.J. Ryan & Bernard J. Tyrrell eds., Westminster Press 1974).

⁷⁹ ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 220–21 (1995).

⁸⁰ *Id.*

great part of human conversation”⁸¹ In the case of children, the first order of business must be initiation into *the orthodoxies and orthopraxies of search itself*. Such an education gives the child the ability to open himself to the possibility of self-transcendence by mastering and exploiting the possibilities of his own rational nature. Growing up is a matter of learning not to live every day as if it were one’s first. More importantly, growing up requires learning how methodically to exploit the opportunities and exigencies of our given potential. Though the *eros* is innate, the ability to satisfy the *eros* is learned.

Who is apt to give the child the right education? If the education relates to religious propositions, we should turn to catechists. If the education relates to other types of propositions, we might well turn to the relevant experts. The *first* education, however, relates to how humans become capable of self-transcendence through searching for the real and the good. For the most part, it is to the *parents* that we must turn for this primary education.

Apart from the fact that the parent is ordinarily under a moral duty to care for the child, the parent ordinarily is the person best-positioned to know and care about *the individual* child. Thus, the parent is best able to show the individual child what it is to *care*. For, to care is itself the verb that best sums up what the person who satisfies the basic opportunities and exigencies of the human spirit is *doing*. “[A] [m]ind that does not care,” as Joseph Vining says, “is no mind to seek, no mind to take into oneself, no mind to obey: it has no authority.”⁸² Professionals may have at their disposal information that parents lack. However, at least ordinarily, it is the parent who *cares* about the individual child. Those parents who care about their children can consult the professional and apply the learning of the professional to the individual child.⁸³

We cannot expect all families to agree about the details of the good—nor even that children will agree with their own parents. Soon enough the child acquires reason and perceives that the parent is fallible about the content of the good life. In due course some children reject

⁸¹ Lonergan, *supra* note 78, at 83.

⁸² JOSEPH VINING, FROM NEWTON’S SLEEP 32 (1995).

⁸³ See T. B. BRAZELTON & S. GREENSPAN, THE IRREDUCIBLE NEEDS OF CHILDREN 79–144, 159–76 (2000). The authors explain the psychological data on the need for responses tailored to the individual differences of each child and each child’s need for sustained experience in the community. *Id.*; see also Shelley Burtt, *The Proper Scope of Parental Authority: Why We Don’t Owe Children an “Open Future,”* in CHILD, FAMILY, AND STATE 243, 243–70 (Stephen Macedo & Iris M. Young eds., 2003). Burtt gives an excellent account of the authority parents should hold and exercise with respect to the child’s needs if the child is to grow into a person capable of moral maturity. This Essay has referred to such moral maturity as “self transcendence.”

the parental code either in detail or altogether—temporarily or forever. What a child cannot escape while remaining within the jurisdiction of the family is the direct and constant experience of an adult who believes that *there is a good to be grasped* and who demonstrates this belief even (or especially) in the course of conflict with the child.⁸⁴

In the *encounter* with care, the child is educated into the method of care and the orthodoxies and orthopraxies of the search for the real and the good. The point is *not* that all parents will be great seekers or teachers, but only that on the whole they will be the best.⁸⁵ For parents are the ones positioned to care most for the child and to exemplify the orthopraxy of the search. Parents teach their children how to pay attention, understand correctly, judge reasonably, and act consistently with what they have learned. Coons states:

The family is for most of us *the* primary medium of moral expression. The parent experiences the child as both an audience and a message to the world. In a faint echo of the divine, children are the most important Word most of us will utter. For most children, the family—autocratic and even arbitrary—remains on balance the best hope of authentic religious liberty.⁸⁶

The argument just sketched for submitting the child to the educational embrace of the parents depends on the contingent factual premise that the parents *care*. This assignment of educational control to the parents receives additional fortification from the related but distinct fact that the family is the primary society in which humans find both themselves and the possibility of their fulfillment. “Society” as used herein is not a mere aggregate of members but rather a distinct “group person.” Society bears its own identity, integrity, and function. A “society,” as the *Compendium of the Social Doctrine of the Church* explains, in words that resonate with the learning of the *philosophia perennis*,

is a group of persons bound together organically by a principle of unity that goes beyond each one of them. As an assembly that is at

⁸⁴ John E. Coons, *The Religious Rights of Children*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES, *supra* note 77, at 157, 172.

⁸⁵ John E. Coons, *School Choice as Simple Justice*, FIRST THINGS, Apr. 1992, at 15, 19. Like Coons, this Essay has also argued that parents are not necessarily good deciders. Rather, parents are merely the best deciders.

⁸⁶ Coons, *supra* note 84, at 174.

once visible and spiritual, a society endures through time: it gathers up the past and prepares for the future.

Though families vary in their respective capacities to gather up the past and prepare for the future, the family is by nature the society in which we learn the method of self-transcendence. In the case of families who are incapable of socializing their members, the state or other social organizations will owe such needy families help. In the ordinary case, however, the family will make its particular contribution to the common good by fulfilling its function of initiating its members into the human search for the real and the good.⁸⁷

CONCLUSION: FROM “RIGHTS” TO AN EXPERIMENT IN TRULY HUMAN LIVING

To recapitulate: this Essay has been unable to grasp the meaning of religious liberty for the child in the context of a bald declaration of a “right to religious liberty,” and has also been unable to affirm *simpliciter* the existence of a natural or human “right” to religious liberty. As such, this Essay has taken the universal human duty to search for the real and the good and the method of that search as a position from which to construct a *persuasive* justification for, and specification of, a universal positive-law protection of religious exercise. The grounds for a universal positive-law protection of religious liberty are: (1) the universal—and universally verifiable—fact of the human duty to seek the real and the good, and (2) the universal—and universally verifiable—fact that humans advance in search through participation in a community and through reception and correction of the community’s inheritance. The epistemic conditions of search have led to assign tradition and community an irreducible, non-eliminable place in fulfilling the duty to search. Moreover, this Essay affirms emphatically that the act of search is—because the *duty* to search is—non-delegable. This Essay has emphasized duty and tradition and community in order to make it possible for persons freely and fully to satisfy the conditions of self-transcendence.

One consequence of the preceding analysis is that there is no “right to religious liberty” in the nature of a predetermined cause of action against the State. Such claim to a right would require an enforceable remedy. What has been argued is that every rational person is under an infeasible duty to seek the real and the good. Furthermore, to learn how to carry out that search,

⁸⁷ See Patrick McKinley Brennan, *Harmonizing Plural Societies: The Case of Lasallians, Families, Schools, and the Poor*, J. CATH. LEGAL STUD. (forthcoming 2006).

community is necessary (though not sufficient). The State is limited in what it can do to remedy failures of a particular family *to care*. This lesson has not been heeded by the architects of the expanding administrative State. Any true hope for a child to grow into a person possessing the developed capacity to meet the immanent norms of the human spirit depends in part upon others' satisfaction of their duty to seek the real—that is, to care.⁸⁸ Where individuals and groups fail to satisfying their duties, others' liberties will be reduced. If no one teaches the child how to play, to say that the child is nonetheless free to play is empty and cynical. If no one teaches the child how to seek the real and the good, any freedom he or she has for that search is pharisaical. No one who cares for a child says that the child is free to do what he or she has no idea how to do. Such an answer satisfies only bureaucrats.

The reader alert to the history of natural rights will have noticed that my position pursues a *via media* between the two sides of the ancient debate about whether a natural right is the subjective possession of the individual (the position associated in the first place with William of Ockham) or a natural right is what is due under justice (the position associated in the first place with Aristotle and then Aquinas). By starting with the *dynamism* of human cognition, we bypass at once both the empty formalism of “subjective rights” and the sterile legalism of “objective” theories of justice. By focusing on the dynamics of that generative duty, we justify creating opportunity for the fulfillment of the duty. Moreover, we also deny ourselves the illusion that persons should be “at liberty” to do only exactly what has already been determined to be their due. The resulting position is—building on observations of Michel Villey with respect to Aquinas—the institution of an “experimental method.”⁸⁹ Such an experimental method would give people the opportunity to satisfy the duty to grow in knowledge of the real and the good. In the case of children, the experimental method shows children how *not* to live each day as if it were their first. Instead, children are taught how to add a layer of intelligence to what has gone before and, thus, to self-transcend. In the case of the individual child, the family ordinarily is, much more than any other, the ideal enclave for the execution of this experiment. After all, the family “is not

⁸⁸ See David F. Forte, *Family, Nurture, and Liberty*, in NATURAL LAW AND CONTEMPORARY PUBLIC POLICY 79, 79–106 (David F. Forte ed., 1998).

⁸⁹ MICHEL VILLEY, *LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE* 50 (4th ed. 1975). Villey explains, “Realiste, et non point du tout idéaliste, Aristote pratique une méthode d’observation: à la manière d’un botaniste, il collecte les expériences des empires et cités de son temps. Il présage le droit comparé et la sociologie du droit. *Le droit naturel est une méthode expérimentale.*” *Id.*; see also TIERNEY, *supra* note 20, at 23.

a civil court which must utter a simple yes or no. It can temporize, adjust and compromise; children sometimes change their minds; so do parents. We also learn from each other by hanging together even when we feel momentarily and mutually oppressed.”⁹⁰

Article 14, paragraph 2 of the 1989 Convention on the Rights of the Child (“Convention”) arguably affords ample room for the experimental regime in its requirement that the States Parties respect “the *duties* of the parents . . . to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.”⁹¹ In the blunt imputation to the child of a right to “freedom of thought, conscience and religion,” however, Article 14, paragraph 1 of the Convention contains no hint that what is being advocated under the title of “right” is the creation of an environment in which the child can satisfy his or her duty to grow in knowledge of the real and the good. The Convention does not encourage the conditions precedent to self-transcendence.

Our self-transcendence begins with the quotidian knowledge of the real and with encouragement the good and extends itself into conduct consistent with this knowledge. From the beginning, self-transcendence has all of reality as its horizon. All of reality includes the very source of all being and goodness, God. The *eros* of the human spirit is unrestricted in its scope, and its complete satisfaction would come through knowing (and loving) the ground of all being and goodness. This satisfaction would be the fruit of a sustained effort, not an accident.

Because the Convention fails to identify what the rights are for, one following the Convention might by misadventure create a regime in which children do not seek. Having not learned how, why, or what to seek, children will not find. This would be consequential, for can we love what we do not know? If we are to create a world in which all human beings love their brothers, their sisters, and their God, talk about rights may be useful. However, such talk of rights will only truly be useful if it grows out of an understanding of the universal duty to seek the real and the good. Such an understanding would animate—and refuse to truncate—the habits of heart and the minds of people freely to commit themselves, their politics, and those they care about to a quest for a life in conformity with all the good that is and might yet be—things visible and things invisible.

⁹⁰ Coons, *supra* note 84, at 174.

⁹¹ Convention, *supra* note 54, art. 14.

