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Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decisionmaking Around the World

Randall Kelso, South Texas College of Law

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R. Randall Kelso*

I. Introduction

Moral reasoning refers to an effort to identify through reasoning how persons ought to behave and what ought to be. Sometimes in philosophy this has been referred to as a search for “the good.”¹ Of course, ideas on what is good have differed from one society to another and have changed from time to time within individual societies. At all times, however, the question of the morality of “egotism” or “self-interest” has been central to the debate. Explicit acknowledgment of this fact, and the triumph of non-egocentric modes of moral reasoning in the modern world, can help explain current moral and legal reasoning by constitutional courts and other actors around the world.

In pursuit of this explanation, Part II of this article will discuss traditional views on the morality of egocentric versus non-egocentric thought. Part III will then discuss the emerging trend among constitutional courts and other actors around the world to adopt non-egocentric thought as the basis for moral and legal decisionmaking. Part IV will explain this emerging trend in terms of a modern explication for the rationality of non-egocentric moral reasoning. Part V will provide a brief conclusion.

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* Spurgeon E. Bell Distinguished Professor of Law, South Texas College of Law. B.A., 1976, University of Chicago; J.D., 1979, University of Wisconsin-Madison School of Law.

¹ The classic use of this terminology is by Plato, who defined “the good as the highest object of knowledge,” in THE REPUBLIC OF PLATO, Chapter XXIII, and by Aristotle, who defined “the good as the aim of action” in his NICOMACHEAN ETHICS, Book I.
II. Traditional Views on Egocentric Versus Non-Egocentric Thought

Some moral philosophers have taken the position that egotism or self-interest is rational, and therefore good and just, and have built their moral systems on a foundational principle of self-interest. Thomas Hobbes in the 17th century, Friedrich Nietzsche in the 19th century, and Robert Nozick in the 20th century, are examples of this. Most moral philosophers, however, reject this view. By various ways, or “prisms” as they can be called, these philosophers banish egocentricism from their account of moral reason.

For example, the Scottish Enlightenment philosophers in the 18th century, like David Hume, Frances Hutcheson, and Adam Smith, rejected Hobbes’ rational self-interest in favor of “moral sense” reasoning. As Adam Smith stated in The Theory of Moral Sentiments, an individual ought to act like an “impartial spectator,” giving equal

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2 See 1 ENCYCLOPEDIA OF ETHICS 546 (Becker & Becker eds. 1992) (“[Hobbes’] argument is concerned to persuade people to institute and maintain a sovereign. Given Hobbes’ psychological theory, people will do this only if they believe it is in their self-interest. Hence, self-interest is all that can yield obedience to the laws of nature and political obedience to the sovereign.”), discussing Thomas Hobbes, LEVIATHAN (1651).

3 See 2 ENCYCLOPEDIA OF ETHICS 906 (Becker & Becker eds. 1992) (“The morality of an abundant, creative, and egoistic power that Nietzsche describes as the origin of human evolution ultimately becomes the norm of his own ethics.”), discussing Friedrich Nietzsche, BEYOND GOOD AND EVIL (1886).

4 Robert Nozick, ANARCHY, STATE & UTOPIA 302 (1974) (“The model is designed to let you choose what you will, with the sole constraint being that others may do the same for themselves and refuse to stay in the world you have imagined.”).

5 See, e.g., Garry Wills, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 193-201 (1978), discussing, inter alia, David Hume, AN INQUIRY CONCERNING THE HUMAN UNDERSTANDING (1748); David Hume, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS (1751); Adam Smith, THE THEORY OF MORAL SENTIMENTS (1759).

weight to others’ interests as well as one’s own. This is a version of the basic biblical principle of “love of neighbor as oneself.” Adam Smith stated:

In the same manner, to the selfish and original passions of human nature, the loss or gain of a very small interest of our own, appears to be of vastly more importance . . . than the greatest concern of another with whom we have no particular connection. . . . Before we can make any proper comparison of those opposite interests, we must change our position. We must view him, neither from our own place nor yet from his, but from the place and with the eyes of a third person who has no particular connection with either, and who judges impartially between us. . . .

When the happiness or misery of others depends in any respect upon our conduct, we dare not, as self-love might suggest to us, prefer the interest of one to that of many. The man within immediately calls to us, that we value ourselves too much and other people too little, and that by doing so we render ourselves the proper object of contempt and indignation of our brethren.7

Immanuel Kant’s view that reason compels an individual “to act only in accordance with a principle that one could will to be a universal law” and for everyone “to treat others always as end-in-themselves, and not as a means to your ends” also rejects egotism, and thus is in direct contrast to Nietzsche’s egocentricism.8 Likewise, John Rawls’ principle that justice derives from individuals agreeing upon rules from “an original position” where no individual will be favored rejects Nozick’s egocentric approach.9 A similar enterprise is John Finnis’ account of basic human goods, like

7 Smith, supra note 5, at 221, 223, cited in Kelso & Kelso, supra note 6, at 517-18.

8 See 1 ENCYCLOPEDIA OF ETHICS 666 (Becker & Becker eds. 1992) (“This yields the first formulation of Kant’s categorical imperative, the Formula of Universal Law: ‘Act only on a maxim which you can at the same time will to be a universal law. . . .This leads Kant to a new formulation of the categorical imperative: ‘Act always so that you treat humanity, in your own person or another, never merely as a means but also at the same time as an end in itself.’”), discussing Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS (1785); Immanuel Kant, CRITIQUE OF PURE REASON (1788)).

knowledge and friendship, leading to a rejection of egotism in favor of loving one’s neighbor as part of “integral human fulfillment.” Ronald Dworkin’s principle of “equal concern and respect” for others, based upon Dworkin’s view of the best interpretation of the existing moral principles of Western industrialized societies, represents a similar rejection of the morality of egoism.

Moral reasoning based on religious traditions adopt a similar point of view. All major religious traditions, including Buddhism, Christianity, Hinduism, Islam, and Judaism, affirm the principle that moral behavior is not self-centered, but reject such an egocentric perspective. In various ways, each of these traditions affirms as moral the basic principle of “love of neighbor as thyself,” also phrased as the Golden Rule of “do unto others as you would have them do unto you.”

10 See generally John Finnis, NATURAL LAW AND NATURAL RIGHTS 59-99 (1980).

11 Ronald Dworkin, TAKING RIGHTS SERIOUSLY 272-73 (1977) (“Government must not only treat people with concern and respect, but with equal concern and respect.”).

12 See generally Mark 12:31 (“Thou shalt love thy neighbor as thyself.”); Issac Herzog, 1 THE MAIN INSTITUTIONS OF JEWISH LAW 386 (Soncino Press 1936-39) (“[B]ring the law as much as possible into line with the highest ethical norms, already presided over the growth and development of Jewish law [which] commanded ‘Love thy neighbor as thyself’ and ‘Love the stranger as thyself.’ Leviticus xix, 33-34.”), cited in Amihai Radzyner, Between Scholar and Jurist: The Controversy over the Research of Jewish Law Using Comparative Methods at the Early Time in the Field, 23 J. L. & Rel. 189, 208 (2007-2008); Geoffrey R. Stone, The World of the Framers: A Christian Nation?, 36 UCLA L. Rev. 1, 13 (2008) (“For Jefferson, the fundamental principles of morality, which he believed were held in common in all religions, were captured by Jesus’ maxims, ‘Treat others as you would have them treat you’ and ‘Love thy neighbor as thyself.’”), citing Kerry Walters, RATIONAL INFIDELS: THE AMERICAN DEISTS 181 (1992); Zainah Anwar & Jana S. Rumminger, Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform, 64 Wash. & Lee L. Rev. 1529, 1541 (2007) (discussing “the recognition of equality between men and women in Islam, the imperative of ijtihad (independent reasoning to arrive at a legal principle) in modern times, [and] the dynamics between what is universal for all times and what is particular to seventh century Arabia . . . .”); Imam Feisal Abdul Rauf, What is Islamic
From this perspective, the specific doctrinal statements made in the various religious texts can all be understood as derivations from this basic point. For example, as Pope John Paul II noted in his encyclical, *Veritatis Splendor (The Splendor of Truth)*, there is a direct connection between the specific principles of morality stated in the Bible and the general non-egocentric moral command of “love of neighbor as oneself.” In *Veritatis Splendor*, Pope John Paul II stated:

> [T]he commandments belonging to the so-called “second tablet” of the Decalogue, the summary and foundation of which is “the commandment of love of neighbor:” [In these] commandment[s] we find a precise expression of “the singular dignity of the human person,” “the only creature that God has wanted for its own sake.” The different commandments of the Decalogue are really only so many reflections on the one commandment about the good of the person, at the level of the many different goods which characterize his identify as a spiritual and bodily being in relationship with God.\(^\text{13}\)

The view implicit in this passage is that one should understand these biblical commandments based upon their consistency with being derivable from the background principle of “love of neighbor as thyself,” and not as independent principles separate from that concept. By the same logic, from this perspective any biblical passage, not merely the “second tablet” of the 10 Commandments, should be interpreted to be consistent with the foundational moral principle of “love of neighbor as thyself.” Interpretation of isolated biblical passages which leads to results inconsistent with “love of neighbor as thyself” should be rejected.

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\(^{13}\) *Law*, 57 Mercer L. Rev. 595, 599-600 (2006) (“Islamic Law, called Sharia, starts off from these two commandments” – “love the Lord thy God” and “love thy neighbor as thyself.”); R. Mary Hayden Lemmons, *Tolerance, Society, and the First Amendment: Reconsiderations*, 3 U. St. Thomas L.J. 75, 89 (2005) (“Hinduism: ‘One should never do that to another which one regards as injurious to one’s own self”; and Buddhism: ‘Hurt not others in ways that you yourself would find hurtful.’”).

*Veritatis Splendor (The Splendor of Truth) ¶ 13 (1993).*
For example, prior to the United States Civil War in 1861, many Southerners in the United States cited discrete passages in the Bible to support the morality of slavery. In the 1860s, Jefferson Davis, President of the Confederate States of America, stated, “[Slavery] is sanctioned in the Bible, in both Testaments, from Genesis to Revelation. . . . It has existed in all ages, has been found among the people of the highest civilization, and in nations of the highest proficiencies in the arts.”\(^{14}\) More generally:

The religious defense of slavery was rooted in the Bible, and apologists found numerous references there to justify slavery. Mosaic law was said to authorize the buying, selling, holding, and bequeathing of slaves as property. Abraham and other prophets held slaves, and the New Testament failed to condemn slavery. The Apostles were said to have received slaveholders into the church. But the most important Biblical reference Southerners pointed towards was Genesis 9:25, Noah's curse on Ham, father of Canaan, for Ham's indiscretion towards Noah, which clerics read as specifically authorizing African-American slavery.

In the Bible's words, Noah became drunk and lay "uncovered inside his tent." Ham "saw his father's nakedness and told his two brothers outside." But the brothers, Shem and Japheth, walked into the tent backwards and covered their father with a garment without ever looking at him. When Noah awoke and discovered what his youngest son had done, he said: "Cursed be Canaan! The lowest of slaves will he be to his brothers . . . . Blessed be the LORD, the God of Shem! May Canaan be the slave of Shem . . . . May God extend the territory of Japheth; may Japheth live in the tents of Shem, and may Canaan Be his slave."

A Georgian in 1844 summarized the masters' interpretation of this passage thus: "From Ham were descended the nations that occupied the land of Canaan, and those that now constitute the African or Negro race." J.B. Thrasher of Mississippi added that blacks "are the lowest and most degraded of the descendants of Canaan." And South Carolinian Iveson L. Brookes explained that Ham deserved "decapitation" for his crime, but a merciful God chose to punish him "by flattening his head, kinking his hair, and blackening his skin, thereby making him black and subject to slavery."\(^{15}\)

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\(^{14}\) *What the Bible Says About Human Slavery* 1 (www.religioustolerance.org/sla_bibl.htm) (citing a quote by Jefferson Davis).

Of course, this analysis is inconsistent with the basic biblical imperative that all individuals are created by God, and thus entitled to equal natural rights. It is also inconsistent with Jesus’ general statements concerning love, the equality of all persons, and the “Golden Rule” (treating one’s fellow humans as one expects to be treated by others). Not surprisingly, it is also inconsistent with general moral reasoning based upon any major religious tradition in the world – that rejection reflected in the modern ban on slavery in the 1948 United Nations Universal Declaration of Human Rights.\(^{16}\)

A similar example in 20\(^{th}\)-century America involves the issues of segregation and bans on interracial marriage. The traditional view supported such institutions based on a traditional reading of the Bible, as reflected in a state court opinion in *Loving v. Virginia*, which stated, “Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”\(^{17}\) As the United States Supreme Court stated in *Loving v. Virginia*, such a view is “obviously an endorsement of the doctrine of White Supremacy,”\(^{18}\) and thus is inconsistent with biblical imperative of “love of neighbor as thyself.”

Many examples of the same dynamic can be given. For example, the traditional Christian view opposed Galileo’s contention that the earth moved around the sun. The modern faith in science, based on giving equal concern and respect to scientific proofs,


\(^{17}\) 388 U.S. 1, 3 (1967) (quoting the state trial judge opinion in *Loving*).

\(^{18}\) *Id.* at 7.
and the modern Christian view, accept Galileo’s scientific findings as accurate. Passages in the Bible regarding the earth not moving and the sun revolving around the earth are viewed from the modern perspective as mere reference to certain historical views of the ancient world that are not authoritative today.

In sum, no major religious or secular tradition today attempts to defend the practices of the past supporting slavery, or segregation, or anti-miscegenation laws, or opposition to the cosmology of Galileo and Newton. On the other hand, on some issues, like the ordination of women, there is still a split among some religious traditions, with the Catholic Church, for example, still clinging to the historical refusal to ordain women, while Protestant religions have long-since moved to the “love of neighbor as thyself” view, reflected in Galatians 3:28, that “there is neither male nor female: for ye are all one in Jesus Christ,” which supports the ordination of women. The Catholic Church has sometimes used the fact that all of the 12 disciples were men to support the refusal to ordain women. But the fact is that all the disciples were of Middle Eastern descent, and yet that has never stopped there being priests of other ethnicities. Further, both race and gender are irrelevant considerations under the “love of neighbor” understanding of Galatians 3:28, since “there is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Jesus Christ.”

Under this view, long-standing tradition does not make a particular practice moral. As Justice Kennedy noted in Lawrence v. Texas, “‘[T]he fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation [in Loving v. Virginia] from constitutional
Instead, the key in each case is consistency with the foundational principle of “love of neighbor as thyself.”

Under this view, all rational persons will agree on basic moral principles, since these principles are not dependent upon different traditions of various societies. Nor are moral principles based upon an understanding of the Golden Rule where variations might exist depending upon how different individuals might wish in fact to be treated by others. Under that view, persons might end up with different moral principles, since those principles would be dependent on the concrete variations in how different individuals might wish to be treated by others, including any egocentric desires or prejudices any individual may have that would affect how they would want to be treated in practice. Under that understanding of the Golden Rule, an individual could take the view that “do unto others as you would have them do unto you” means you can behave selfishly with respect to other people as long as you are prepared to let them behave selfishly toward you.

The principle of “equal concern and respect” or “love of neighbor as thyself” rejects that kind of universal selfishness. Rather, the proper principle of “equal concern and respect” is based upon the logical implications of treating persons equally, logic being the same for all individuals. Under this view, “do unto others as you would have them do unto you” requires you to give them equal concern and respect as yourself, that is, the principle of “love of neighbor as thyself.” It is this derivation of moral principles from the basic principle of “equal concern and respect” or “love of neighbor as oneself”

that is supported by Pope John Paul II in the passage from *Veritatis Splendor* quoted above.  

**III. Morality of Rational Non-Egocentric Thought as the Basis for Modern Morality**

Based on the discussion in Part II, there is a basic principle of rational behavior, phrased by Ronald Dworkin as "equal concern and respect"; by Kant as "treat others never as a means to an end, but as an end-in-themselves"; or by the various religious traditions as "do unto others as you would have them do unto you", or "love of neighbor as thyself." That broader principle of "equal concern and respect" supports a number of related decisions by constitutional courts around the world on issues of basic human rights and dignity.

For example, there is an emergent concern with gender equality in courts around the world. These decisions are based on the ideal of “equal concern and respect,” and thus the fact that women deserve equal rights and liberties with men. This principle is reflected in many constitutional courts decisions.  

The principle of equal concern and respect also supports respect for human dignity and individual autonomy – giving others equal respect for their views, as long as they give equal respect to yours. This basic principle is reflected in decisions by many constitutional courts around the world. Regarding the nature of adjudication in these countries, Professor Thomas Gray has noted:

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20 *See supra* text accompanying note 13.

Modern rights typically are phrased in terms of broad moral concepts – for example, the right of human dignity was made the central organizing value in the German Constitution, and the prestige of that constitution, and of the German Constitutional Court in implementing it, have made that "dignity clause" particularly influential for other constitutional regimes around the world. . . . In several instances, courts have found the authority to articulate and enforce a body of unwritten constitutional rights, most notably in the European Court of Justice's determination that European Union legislation is implicitly subject to a body of general human rights drawn from the common traditions of the member states. . . .

[Further] is a cluster of phenomena usefully grouped under the label "judicial globalization." In Europe, the treaties establishing the European Union, and the European Convention on Human Rights agreed to by members of the Council of Europe, have taken on higher-law status within the domestic law of European states, and the European Court of Justice and the European Court for Human Rights have increasingly exercised active judicial review powers over trade and human rights law respectively. . . . Systems that come relatively late to strong judicial review, like the Eastern European countries after 1989, and the democratizing countries in Asia during the 1990s, find an established international style of constitutional and human rights adjudication ready for adoption. Human rights provisions are often borrowed from existing constitutions and conventions in the drafting of new ones, and this makes it natural for courts of different countries to cite each other's decisions, thus furthering the emergence of a new *jus gentium* of human rights. Judges increasingly meet with each other across national lines to discuss their work, and this creates more avenues for transmitting judicial techniques and doctrines that have proved successful and prestigious, for building judicial *esprit de corps*, and encouraging newer or less secure constitutional judiciaries to imitate the confident exercise of sweeping powers of the most admired and best-established ones.22

Under this phrasing, there should be toleration for other individuals as long as they are tolerant, but no toleration of other individuals (or groups) that are intolerant and do not give other individuals equal concern and respect themselves. This underlays the concern with not allowing the general principle of toleration and respect for others to

support blind deference to any multicultural tradition, even if that tradition denies certain individuals in that group, or subgroups within that group, equal concern and respect. 23

From this perspective, there is a real concern with giving equal concern and respect to some fundamentalist interpretations of Islam, which deny equal rights to women. For example, this is true with respect to the issue of whether the fundamentalist view regarding women covering their hair should be allowed to be imposed upon girls in Western European countries while attending school. The consensus in European countries has come to be that in order to protect this next generation of women such headware should be banned, so that the women can be protected from having to make a choice on that matter and defend that choice to traditional family members at home. 24

Regarding the Catholic religion, the same concern with equal concern and respect suggests there should be a concern with giving equal concern and respect to that aspect of the Catholic religious tradition, discussed in Part II, 25 which denies women the equal right to be a priest. More generally, while there should be toleration of different religious beliefs, those beliefs should only be tolerated to the extent the beliefs are not a guise for imposing intolerant attitudes on others. Thus, speech about religious beliefs should be respectful, and not deliberately provocative, but criticism of certain religious views and


25 See supra text following note 18.
practices on the ground they do not reflect equal concern and respect is not only permissible, but necessary.\textsuperscript{26}

An additional example of a conflict between traditional views and equal concern and respect is the attempt of some individuals to impose on other individuals what is permissible in matters of sexuality. Of course, some coercive sexual practices, like other forms of coercive behavior, will violate the principle of equal concern and respect and loving one’s neighbor as oneself. Such practices should not be tolerated. However, there are a wide range of sexual practices between competent consenting adults, both heterosexual and homosexual, that do not appear to violate the principle of equal concern and respect.

John Finnis’ moral philosophy, as well the traditional doctrines of most religions, view some of these practices as immoral. For example, Finnis has concluded that homosexual acts “on a moral analysis are always objectively wrong, like other essentially masturbatory acts” because in his view of morality a sense of “equal worth and human dignity” requires outlawing such conduct “on the ground that it expresses a serious misconception of, and actually degrades, human worth and dignity, and thus degrades their own personal worth and dignity.”\textsuperscript{27} Finnis’ argument, however, has been rightly criticized as being based not on a principled extension of equal concern and respect for


others, but as reflecting traditionally held biases implicit in Finnis’ account of basic human goods.\textsuperscript{28} To the extent that individuals succeed in imposing on others these collateral biases of their moral systems of reasoning, they are not acting in a rationally justifiable manner, and, from the perspective of reason, are not advancing the common good of society.

Of course, some persons, and some religious traditions, argue against homosexuality, or masturbation, or the use of contraceptives, based on the belief that the “purpose” of sexual activity is procreation. Thus, any sexual activity that does not carry the possibility of procreation is immoral. Unless such reasoning can be plausibly derived from the rational principle of equal concern and respect, such a view would be just another example of collateral moral beliefs that individuals should feel free to adopt or not.

It is unclear what that plausible rational derivation would be. “Activities” do not have “purposes.” Only people have purposes that people, themselves, define. If any particular individual’s collateral moral belief is that sexual activity should only be for procreation, that would be fine for that individual, but that view should not be imposed on others. This is true even if that collateral moral belief is embedded in a moral theory or religious doctrine whose foundational principle is the rational principle of love of neighbor as oneself.

With respect to this point, it is true that Aristotle’s view was that objects, in addition to people, have purposes. Through acceptance of this Aristotelian notion in St. Thomas Aquinas’ natural law theory, this view still forms part of much modern Catholic

natural law today. Aristotle’s famous example of his thesis on objects was that “an acorn” has a purpose “to grow into an oak tree.” Aristotle stated this as part of his thesis that every phenomena can be understood in light of his four causes, including a final cause, or purpose. For Aristotle, “in the case of non-human nature, the final cause of things is simply its formal cause (that is, its shape, or substance, or essence).” In contrast, human beings “exercise a different kind of final causation that is directed to purposes beyond their own form or shape.”

As applied to the actions of individuals, Aristotle is right that individuals do have purposes for which they act. However, from the perspective of science, “acorns,” being non-conscious entities, do not have purposes. Although some “acorns” will grow into “oaks” under the regular order of events, it represents an anthropomorphic fallacy to state that they have a purpose to do so. Pathetic or anthropomorphic fallacy has been defined as “[i]ncorrectly projecting (attributing) human emotions, feeling, intentions, thoughts, traits upon events or objects which do not possess the capacity for such qualities.” Aristotle is wrong in concluding that the two kinds of causation, conscious and non-conscious, are similar and that events or objects have purposes.

Regarding the procreative purpose that conscious individuals may attribute to sexual activity some of the time – as opposed to the irrational view that the non-conscious activity itself has some purpose – it is nevertheless true that sometimes, between consenting adults, the purpose of sexual activity may not be procreative, but

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29 Brian Cubbage, Aristotle 2 (www.personal.psu.edu/users/n/b/nbc104/HSAAITIA.html).

may be merely to exercise an inalienable right to “life, liberty, and the pursuit of happiness.” From the perspective of rational thought, there is nothing immoral about that, because that activity does not appear to deny either party equal concern and respect. The fact that some persons, based on traditional attitudes, may disagree with this analysis because of their customary or traditional views, does not affect this conclusion from the perspective of rational thought. This analysis naturally supports a right to access to contraception as part of responsible family planning. Since there is no “purpose” of sexual activity to procreate, but sexual activity for the sake of intimacy and pleasure alone is not immoral, rationally planned behavior effectively to permit sexual activity without resulting pregnancy is moral. Such rights to family planning are increasingly reflected in constitutional doctrine around the world.  

Under this view, the protection of individual rights to liberty and equality are paramount. Thus, a pluralistic democratic society is viewed not as an end-in-itself, but rather as the best means by which to ensure that society protects and advances the fundamental principle of equal concern and respect for all individuals. This view of government is reflected in the Declaration of Independence. As phrased in the Declaration, “We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are

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31 See, e.g., Daniel C. Maguire, SACRED CHOICES: THE RIGHT TO CONTRACEPTION AND ABORTION IN TEN WORLD RELIGIONS (2001) (discussing how all major world religions have strands supporting some right to family planning); WHAT MEN OWE TO WOMEN (John C. Raines & Daniel C. Maguire, eds., 2001) (discussing how all major world religions have strands supporting equality between husband and wife in marriage).
life, liberty, and the pursuit of happiness” and that “to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.”

From this perspective, the approach to moral and constitutional reasoning advanced by the many contemporary proponents of “deliberative democracy” do not completely represent such an approach to the nature of law and society. The proponents of “deliberative democracy,” such as Professors Amy Gutmann and Dennis Thompson in *Democracy and Disagreement*, do not believe that rational principles of justice can be determined on their own, separate from a political process of deliberation by members in society. Proponents of deliberative democracy do reflect the premise that rational thought is not self-centered or egotistic, and thus individuals in society are entitled to equal concern and respect. Thus, under deliberative democracy, each citizen must reject egocentric self-interest in favor of deliberating in a good faith manner based on trying to achieve the common good for society in general, and every member of society is entitled to participate equally in that debate. However, reflecting Richard Rorty’s embrace of ultimate value relativity, the proponents of deliberative democracy require each individual to reason in a way that justifications for actions could be accepted by

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32 For the complete text of the Declaration of Independence available online, see, e.g., http://www.archives.gov/exhibits/charters/declaration.html.


34 Id. at 24-33.
individuals having different value beliefs, which are viewed as equally appropriate for individuals to have.35

As stated by Professors Amy Gutmann and Dennis Thompson, “We do not begin with a common morality, a substantial set of the principles or values that we assume we share, and then apply it to decisions and policies. Nor, for that matter, do we end with such a morality. Rather, the principles and values with which we live are provisional, formed and continually revised in the process of making and responding to moral claims in public life.”36 It has been noted by Professor Miriam Galston that legal scholars as diverse as Bruce Ackerman, Mark Tushnet, Robin West, Frank Michelman, Suzanna Sherry, and Cass Sunstein all share an interest in deliberative accounts of public constitutional decisionmaking, as do Professors Christopher Eisgruber and James Fleming.37

The proponents of deliberate democracy do reject a view of what they call “constitutional democracy,” where the underlying principles of that democracy reflect only the concrete customs and traditions of the members of society.38 To this extent, proponents of deliberative democracy reflect the view that respect for others does not

35 Id. at 12-21, 24-26; Eric Blumenson, Mapping the Limits of Skepticism in Law and Morals, 74 Texas L. Rev. 523, 557-66 (1996) (discussing Rorty’s approach, among others).

36 Gutmann & Thompson, supra note 33, at 26.


38 Gutmann & Thompson, supra note 33, at 34.
involve blind deference to multicultural traditions, even if those traditions deny equal concern and respect to others.\textsuperscript{39} To this extent, the conclusions reached by proponents of deliberate democracy mirror those presented here. A better approach, however, is to derive those rights directly from the principle of equal concern and respect, and not as a by-product of a deliberative process from which those rights should emerge as part of inclusion of all persons in the democratic dialogue. Under such a dialogue, the impact of persons included in the dialogue who do not fully give others equal concern and respect may taint the result and pose difficult dilemmas for individuals committed to the process of dialogue who nonetheless want substantive principles of equal concern and respect to be adopted across the board.\textsuperscript{40}

In the economic realm, equal concern and respect supports a concern with free, but fair trade in the context of international trade, including GATT (General Agreement on Tariffs and Trade). As the Vatican has declared, “For a free trade system to be fair, it must not only guarantee legal equality among countries, it must also redress, as much as possible, the disadvantages, in terms of economic negotiating power, of less industrialized economies and of commodity producer economies.”\textsuperscript{41} Equal concern and respect also supports the broad notion of good faith bargaining, performance, and


\textsuperscript{40} See generally, Monique Deveaux, \textit{Cultural Pluralism and Dilemmas of Justice} (Cornell Univ. Press 2000).

enforcement in the European and international contract law context,\textsuperscript{42} and supports the International Labor Organization (ILO)’s Declaration of Principles urging corporations to promote equal opportunity, collective bargaining, and deal with unfair labor practices.\textsuperscript{43}

Equal concern and respect as applied to economic matters also reflects Adam Smith's concept that individuals should behave according to the logic of an "impartial spectator," who judges equally between oneself and others. That concept of the "impartial spectator," a concept in Smith's \textit{The Theory of Moral Sentiments}, which preceded his \textit{The Wealth of Nations}, was used by Smith in \textit{The Wealth of Nations} to note that in a perfectly competitive market a selfish individual would be pressured to behave according to the logic of the impartial spectator, and thus competition would force prices toward their “natural price” through operation of objective supply and demand, not the self-interest of the merchant.\textsuperscript{44} Such an individual gives other individuals equal concern and respect, “view[ing] him, neither from our own place nor yet from his, but from the place and with the eyes of a third person, who has no particular connection with either, and who judges the impartiality between us.”\textsuperscript{45} As discussed in \textit{The Wealth of Nations}, the value of competitive markets is to channel any latent selfish passions, which the “impartial spectator,” our conscience, may not succeed in controlling, into moral


\textsuperscript{45} Smith, \textit{supra} note 5, at 221, cited in Kelso & Kelso, \textit{supra} note 6, at 517.
behavior. In a perfectly competitive market, an egotistic person will behave in the same way as a moral person due to the pressures of supply and demand. Hence, in Adam Smith’s phrase, the “invisible hand” of the market works to the benefit of society.\footnote{Smith, supra note 44, Bk. IV, Ch. II, at 351-52. For discussion of the behavior of an impartial spectator in a market economy, from the perspective of both Adam Smith and John Stuart Mill, see Michel Rosenfeld, Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory, 70 Iowa L. Rev. 769, 798-804, 873-80 (1985).}

Adam Smith’s support for competitive markets assumes a number of things. First, market perversions, such as monopolistic or oligopolistic pricing, should not occur. Such perversions distort the natural price that would be determined under ideal competitive conditions. Second, since selfish passions are immoral, any attempt to pervert the market mechanism for one’s own benefit is immoral. Third, Smith does not legitimate unfair dealing between parties in the market, as would occur when a buyer with less knowledge or less bargaining power is taken advantage of by a seller. Adam Smith may be the prophet of \textit{laissez-faire}, where that term is used to caution governments to keep their hands off well-functioning market mechanisms. But Smith is not the prophet of \textit{caveat emptor}. The impartial spectator calls to us when \textit{caveat emptor} is used to legitimate an unfair bargain that “we value ourselves too much, and others too little.”\footnote{Smith, supra note 5, at 223. The full passage from which this quote appears at supra text accompanying note 7.}

Fourth, when a competitive market is not functioning properly, government regulation is not only warranted, but necessary, to correct that imbalance.

Under such a view, regulation of monopolies can force the higher price otherwise charged by monopolists to better approximate the “natural rate.”\footnote{Smith, supra note 44, Bk. I, Ch. VII, at 65.} Equally justified is
legislation trying to correct the bargaining power disparities between corporations and workers, such as various kinds of child labor laws, or wage, hour and overtime regulation. As Smith noted in *The Wealth of Nations*, “Our merchants and master manufacturers complain much of the bad effects of high wages in raising the price, and thereby lessening the sale of their goods both at home and abroad. They say nothing concerning the bad effects of high profits. They are silent with regard to the pernicious effects of their own gains. They complain only of those of other people.”

Under such an approach, progressive taxation to correct the distorting effects of the market is also justifiable.

Groups that are concerned about the comparative disadvantage workers face in the United States given less adequate labor, environmental, and safety regulations abroad reflect similar concerns. Adam Smith’s doctrine favors free, but fair, trade, with fairness defined not by reducing American workers to third-world status, but by trade agreements which help workers in those countries get equal rights, so that comparative productivity advantages will determine trade outcomes, not exploitation. Tariffs on goods to equalize the impact of third-world exploitation is consistent with Adam Smith. Smith noted in *The Wealth of Nations* about retaliatory action based upon inequalities caused by unfair tariffs by other countries, “The case in which it may sometimes be a matter of deliberation how far it is proper to continue the free importation of certain foreign goods, is, when some foreign nation restrains by high duties or prohibitions the importation of

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49 *Id.* Bk. I, Ch. IX, at 104.

Regarding review of government administrative and criminal enforcement action, equal concern and respect requires not punishing or regulating the individual more than necessary. Thus, in the language of the Lord High Executioner in Gilbert and Sullivan's The Mikado, "My object all sublime, I shall achieve in time, to make the punishment fit the crime, the punishment fit the crime."52 This principle of proportionality of punishment applies not only under United States Supreme Court doctrine regarding criminal punishment, but in the world at large as well.53

This principle of proportionality sensibly applies not only to criminal punishment, but to other kinds of executive action. Disproportionate regulation is unjust under this view because it does not respect the rights of individuals to equal concern and respect when balanced against the government's concerns which support the regulation. The notion of proportionality to measure the constitutionality of government action is an emerging concept in the world in a number of contexts.54

51 Smith, supra note 44, Bk. IV, Ch. II, at 363-64.


53 See Harmelin v. Michigan, 501 U.S. 957, 997-1001 (1991) (Kennedy, J., joined by O'Connor & Souter, JJ., concurring in part and concurring in the judgment) (Eighth Amendment Cruel and Unusual Punishment Clause prohibits punishments which are “grossly disproportionate” to the crime); Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 Colum. J. Transnat'l L. 72, 75 (2008) (“In criminal law, the severity of the punishment is expected to be proportionate to the seriousness of the crime; in classic international law, proportionality is found in the law of reprisal and the use of force, and so on.”).

For example, the principle of proportionality applies to a state’s coercive recourse to military force under Article 2(4) and Article 51 of the UN Charter. Article 2(4) prohibits the use of coercive force against other states. Article 51 makes an exception when force is used as a countermeasure to an attack. It has been noted, “In seeking to establish a legal threshold for a state’s recourse to military force, the International Court of Justice has deployed the principle of proportionality.”\textsuperscript{55}

The principle of proportionality also has been applied to a state’s choice of weapons and tactics under the Hague and Geneva Conventions.\textsuperscript{56} It has also been applied in the context of disproportionate actions against individuals that may be war crimes, crimes against humanity, or violations of human rights.\textsuperscript{57} For example, regarding the jurisprudence of personal criminal liability for violations of the law of armed conflict, it has been noted, “[T]he general lawfulness of destroying life or limb of an enemy combatant is restricted by the principles of necessity and proportionality.”\textsuperscript{58}

The principle of proportionality can also apply to nonmilitary countermeasures taken by one state against another.\textsuperscript{59} For example, while a state that unlawfully transgresses against another is obliged to make restitution, the developing doctrine is that

\begin{itemize}
\item \textsuperscript{55} Id. at 719-22.
\item \textsuperscript{56} Id. at 723-34.
\item \textsuperscript{57} Id. at 734-37.
\item \textsuperscript{58} Id. at 737, citing Prosecutor v. Kordic and Cerkez, No. IT-95-14/2-A, para. 686 (Dec. 17, 2004).
\item \textsuperscript{59} Franck, supra note 54, at 738-42.
\end{itemize}
restitution “may not impose a burden ‘out of all proportion to the benefit.’” The principle of proportionality also applies to countermeasures taken in trade disputes challenged before a WTO panel under the General Agreement on Tariffs and Trades (GATT); and in the context of state action against individuals claimed to infringe disproportionately personal rights, such as cases before the European Court of Justice, or cases implementing global or regional human rights, such as those under the International Covenant on Civil and Political Rights.

The combination of the principles of equal concern and respect, and its subsidiary principle of proportionality, can also be used to address other moral dilemmas outside of a strict legal context. For example, the current approach of the Israeli government toward the Mideast Peace Process is to focus on three related issues: economic, security, and political issues. A better approach would be to note that true security – for both Israelis and Palestinians – derives from a related set of ESP concerns: economic, spiritual, and political. Long-lasting spiritual agreement will only come about from a dialogue between the parties, based upon equal concern and respect for each, on what would be a just solution to all the issues involved: land issues, right to control borders, status of East Jerusalem, and other such matters. While military security issues are naturally of vital importance, only when the parties engage in a meaningful dialogue on moral grounds – which is not currently happening on either side – will true ultimate security arise. That debate can happen at both official and unofficial levels, by individuals or groups. But

60 Id. at 743, citing Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 35(b) (2001).

61 Franck, supra note 54, at 742-52.

62 Id. at 752-62.
only when such a moral dialogue becomes an explicit part of the peace process, based on the premise of “equal concern and respect” or “love of neighbor as thyself” – the shared fundamental principle of Judaism, Islam, and Christianity – will a true, secure peace agreement become possible.

**IV. Modern Explication of the Rationality of the Non-Egocentric Perspective on Morality**

As discussed in Part III, there is an emerging trend among constitutional courts and other actors around the world to adopt non-egocentric thought as the basis for moral and legal decisionmaking. This trend can be explained by connecting modern moral reasoning with modern understanding of the demands of rational thought, linking the demands of modern cognitive reasoning with the logic of modern moral thinking.

Historically, the moral systems discussed in Part II which rejected the egotistic understanding of rational thought represented by Hobbes, Nietzsche, and Nozick did so not by challenging the basic view that rational thought was self-interested, but by developing arguments, either secular or religious, that rational thought did not define an individual’s moral obligations. For example, as noted earlier, the Scottish Enlightenment philosophers in the 18th century, like David Hume, Frances Hutcheson, and Adam Smith, rejected Hobbes’ rational self-interest in favor of “moral sense” reasoning. However, because this “moral sense” reasoning was not explicitly grounded in a foundational moral principle of “equal concern and respect”, any individual

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63 See supra text accompanying notes 2-12.

64 See supra text accompanying note 5.
philosopher’s “moral sense” would not necessarily track exactly the demands of equal concern and respect.

Similarly, because Ronald Dworkin derives his principle of “equal concern and respect” from “the best justification available for the doctrines and devices of law as a whole,” he is logically committed to affirming certain doctrines that are part of that “best justification” that may not be compatible with the generic principle of equal concern and respect. To this extent, Dworkin’s ultimate justification of moral norms is dependent, in part, on customs and traditions reflected in existing doctrine. Some of these traditions may be inconsistent with equal concern and respect, as Justice Kennedy noted in *Lawrence v. Texas* regarding state anti-miscegenation and sodomy laws.

John Rawls derived his rejection of egocentric self-interest from placing self-interested parties in a hypothetical “original position” and then derived from this a “difference principle” that allows social and economic inequalities only when they benefit the least advantaged individual in society. This “difference principle” is a product of the hypothetical “original position.” Without regard to whether the “difference principle” is rationally derivable from the reasoning of self-interested parties in an “original position,” neither the difference principle nor the original position have

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65 Ronald Dworkin, *Law’s Empire* 400 (1986) ("The actual, present law, for Hercules, consists in the principles that provide the best justification available for the doctrines and devices of law as a whole.").

66 See *supra* text accompanying note 19.

67 Rawls, *supra* note 9, at 17-22.

anything to do with straightforward moral reasoning about the non-egotistic practice of giving other individuals equal concern and respect.

In like manner, John Finnis’ prism involves postulating seven basic human goods and nine aspects of “practical reasonableness” by which to balance these goods. This postulating of goods, however, is the product of Finnis’ intuitions about what would seem reasonable to him and others, and is not based on any rational derivation from first principles. At the end of the day, his seven basic goods do not embody a straightforward rational analysis about the non-egotistic practice of giving other individuals equal concern and respect.

Similarly, Kant’s principle of “universalizability,” that is, self-interested parties should act “only in accordance with a principle that one could will to be a universal law,” is an artificial device that is not synonymous with a straightforward analysis of non-egocentric thought. Indeed, as Philosopher R.M. Hare noted, the principle of “universalizability” is as consistent with an act utilitarian or rule utilitarian moral philosophy as it is with Kantian moral philosophy.

The problem with all of these traditional accounts of non-egocentric moral reasoning occurs when the authors do not stop their moral reasoning with the principle upon which they all agree – “love of neighbor as oneself,” that is, give “equal concern and respect” to others by behaving like an “impartial spectator.” Instead, the authors

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69 Finnis, supra note 10, at 59-126.

filter through whichever prism they have constructed for affirming this moral principle –
whether Dworkin’s “best justification”; Rawls’ “original position”; or Kant’s “principle
of universalizability” – a host of other collateral moral principles unrelated to “love of
neighbor as oneself.” Because each prism filters these other problems differently – for
example, Dworkin’s “best justification” is not synonymous with Rawls’ “original
position” – the authors disagree on these other dilemmas. Each author then attempts to
convince the reader that the author’s prism is right, relying in part on the fact that the
author’s prism handled in an intuitively attractive way the rejection of egocentric thought.

From a modern perspective, two things need to be said about these attempts at
trying to provide non-egocentric principles of moral judgment. First, given our
contemporary understanding of modern physics, no proposed scheme of moral
justification – whether Dworkin’s “best justification”; or Rawls’ “original position”; or
any other scheme of justification – is necessary to affirm the central principle that rational
behavior is not self-centered, but must conform to the logic of the “impartial spectator.”

This is true because reason, or rational thought, is that thought which conforms to
physical reality. For example, it is rational to believe that $2 + 2 = 4$ because that is what
physical reality confirms. Unlike a Newtonian understanding of physics, where self-
centered measurement and reflection was thought to be adequate to comprehend
accurately physical reality, in an Einsteinian universe of relativity, it is necessary to give
equal concern and respect to others’ frames of reference in addition to one’s own in order
to give an adequate account of the physical universe. To be rational in an Einsteinian
universe, therefore, requires rejection of an egotistic preference for one’s own frame of reference.\textsuperscript{71}

Children, who do not have the cognitive abilities yet to see things from others’ frames of reference, naturally cannot internalize this principle on their own. As noted by the famous cognitive developmental psychologist, Jean Piaget, most children from ages 2 to 7 are at a cognitive developmental stage called preoperational thought.\textsuperscript{72} In this stage, the child is able to represent objects and events symbolically, and not just act towards them but think about them. However, the child’s thought is characterized by egocentricism. The child finds it difficult to understand how anyone can see things from a point of view different than the child’s own view. As has been noted, “[T]he child supposes that every one necessarily thinks like himself . . . . [H]is logic lacks exactitude and objectivity . . . because the social impulses of maturer years are counteracted by an innate egocentricity.”\textsuperscript{73} At this stage, “The preoperational child is completely egocentric. Although he is beginning to take a greater interest in the objects and people around him, he sees them from only one point of view: his own.”\textsuperscript{74}

Moral philosophers during the 17\textsuperscript{th}-19\textsuperscript{th} century Age of Enlightenment, operating in a Newtonian world, typically began their analysis with a similar initial assumption that rational thought was self-interested. They then either affirmed that assumption as a

\begin{itemize}
\item \textsuperscript{71} This point is developed in R. Randall Kelso, \textit{Godel, Escher, Bach: More Darkness or Day for Night}, 1981 Wis. L. Rev. 847-52 (1981).
\item \textsuperscript{72} Jean Piaget, \textit{The Psychology of Intelligence} 123-39 (1950).
\item \textsuperscript{73} Jean Piaget, \textit{The Child’s Concept of the World} 33 (1929).
\item \textsuperscript{74} Dorothy G. Singer & Tracey A. Revenson, \textit{A Piaget Primer: How a Child Thinks} 19 (1979).
\end{itemize}
principle of morality, like Hobbes and Nietzsche, or created a prism to alter that principle. This was done either by rejecting pure reason as a moral guide, like the moral sense philosophers of the Scottish Enlightenment, or altering an understanding of pure reason, like Immanuel Kant’s principle of reason willing only that which can be made a universal law. Today, however, given an Einsteinian understanding of rationality, no prism is necessary to affirm the central principle that rational thought is not self-interested.

This understanding of rational thought is consistent with the highest stage of cognitive thinking which emerged from Jean Piaget’s studies of cognitive development: formal operational thought. The defining feature of formal operational logic is the ability fully to put oneself into others’ perspectives, to think abstractly about propositions and not be mired in one’s own narrow framework, and to recognize that viewpoints other than one’s own must be given proper respect. As Piaget phrased it, “The child, after having regarded his own viewpoint as absolute, comes to discover the possibility of other points of view and to conceive of reality as constituted, no longer by what is immediately given, but by what is common to all points of view taken together.”75 This ability is based, according to Piaget, on the “ability [of formal operational thought] to reason by hypothesis. . . . Instead of just coordinating facts about the actual world, hypothetico-deductive reasoning [the scientific method] draws out the implications of possible statements and thus gives rise to a unique synthesis of the possible and necessary.”76

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This understanding, that rational thought is non-egocentric, and based on the principle of equal concern and respect, combined with the assertion that moral thought should be rational, supports as moral the foundational principle discussed in Parts II and III: the principle of love of neighbor as oneself, or equal concern and respect for others, or behave according to the logic of the impartial spectator. Moral conclusions directly derivable from this principle are also rational. These include such widely-shared principles such as not taking innocent life, respecting other persons’ bodily integrity and personal property, and not lying to other people for one’s personal gain. This view rejects the concept of self-interested “possessive individualism,” as well as the opposite extreme of self-sacrifice or “altruism.” Instead, such a view supports the impartial spectator’s view of equal concern and respect for both oneself (and thus not self-sacrifice) and others (and thus not possessive individualism).\footnote{On this point regarding “possessive individualism” and “altruism,” see Kelso, \textit{supra} note 71, at 852-55.} In modern terminology, this view supports “five faces of freedom” defined as “self-individuating liberalism” of personal development and expression, combined with “communitarian ideals” of similar rights to development and expression in others, combined with “positive” freedoms to take part equally in government and “negative” freedom from unwarranted government restraint, and a “progressive” agenda.\footnote{See John Lawrence Hill, \textit{The Five Faces of Freedom in American Political and Constitutional Thought}, 45 Boston College L. Rev. 499 (2004); John Lawrence Hill, \textit{A Third Theory of Liberty: The Evolution of our Conception of Freedom in American Constitutional Thought}, 29 Hastings Const. L.Q. 115 (2002).}

It is important to note that this derivation of moral principles from “reason” alone is different from traditional natural law theories that tried to derive moral principles based
on an understanding of the “nature of human beings and the world in which they live.” 79 A focus on reason will be based on the demands of rational thought alone, and will understand that while reality, and thus rational thought, is the same for all individuals, there is not a fixed “human nature” applicable to all individuals equally given each individual’s unique combination of DNA. Further, while one could try to develop a theory of “adult” human nature based on Piaget’s adult “formal operational thought” that would reign in self-centered desires of childhood, and the author of this article tried just that more than twenty-five years ago, 80 the better approach is to derive rational moral principles directly from reason, rather than trying to argue there is an “adult” human nature that is rational and that should trump childish irrational emotions and desires. There is no fixed “human nature,” and even if there were, an attempt to isolate aspects of that nature and argue that certain aspects, like advanced cognitive thought, are more “human” than other aspects, like baser emotions or desires, is not ultimately capable of rational justification.

The second point to be made about the attempts discussed above at providing non-egocentric principles of morality is related to this point. To be persuasive in the unnecessary resort to some moral prism in order to banish egotism from rational thought, the philosopher has to defend why that philosopher’s prism, though going beyond the rational principle of love of neighbor as oneself, is nonetheless valid. Despite much energy devoted to this problem over centuries of philosophy, this cannot be done. An


example may help make the point. In ancient times, much energy was given to the problem of “squaring the circle.” This meant finding a way mathematically, using fractional algebra, to construct a square, the area of which is equal to the area of a given circle. Eventually it was shown that there could be no solution to this problem, since the area inside a circle was a multiple of “π,” which is an irrational number not capable of fractional representation.81

In the 20th century, Godel’s Theorem has provided the corresponding mathematical proof of the impossibility of rationally justifying any particular moral prism. Godel’s Theorem proves that no system of propositions can prove the validity of its own starting premises. Thus, no system of “moral oughts” can be proven valid based upon other “moral oughts,” since those “moral oughts” are not a priori valid either. Godel’s Theorem confirms that there is no way to make a “category” jump from an “is” to an “ought,” because that violates the internal logic of the system, and there are no a priori “oughts” on which to base other “oughts” either. Therefore, despite elaborate attempts at appealing to “reason” or to “widely-held moral intuitions,” no philosophical prism is ultimately capable of analytic defense. In short, David Hume’s insight from two centuries ago that there is no way to bridge the gap between “is” and “ought” is confirmed by Godel’s Theorem.82

81 See Morris Kline, MATHEMATICS IN WESTERN CULTURE 50-51 (1970).

82 See Kelso, supra note 71, at 832 (“What Godel’s theorem cautions is that it is impossible to choose between functions which go from the level of physical existence [“is”] to the level of self-referential, metaphysical statement [“ought”].); R. M. Hare, MORAL THINKING: ITS LEVELS, METHOD AND POINT 16 (1981) (“Hume’s Law (‘No “ought” from an “is”’)), discussing David Hume, A TREATISE ON HUMAN NATURE (1739). For two entertaining descriptions of this problem, see Louis M. Seidman, This Essay is Brilliant/This Essay is Stupid: Positive and Negative Self-Reference in
Despite the view of some to the contrary, Godel’s Theorem does not prove that agreements on what thought is rational is impossible. It is possible to determine the contours of rational thought. Godel’s Theorem does caution, however, that it is impossible to prove that rational thought is moral. The most one can say is that any moral system different than the one imposed by rational thought is necessarily irrational. Further, because of Godel’s Theorem, the only moral system that rationally can be shown to transcend individual preferences, and thus which can serve as a basis for all persons to agree through informed dialogue, rather than through force (either military force, psychological conditioning, or social pressure), is the morality of rational thought.

In sum, one can say that a rational person would follow the principle of love of neighbor as oneself, but that any other moral principles not rationally derivable from this principle are not capable of rational defense. They represent only individual preferences or desires that each individual should feel free to adopt or not, as long as those principles do not conflict with the principle of love of neighbor as oneself.

This view mandates tolerance of other individuals’ practices to the extent they do not violate the principle of love of neighbor as oneself, but intolerance of individuals who violate this principle by attempting to impose their non-rationally based moral prisms on others. This is similar to Einstein’s theory of relativity, which states as a non-negotiable, absolute truth that one must give equal concern and respect to others’ frames of reference in addition to one’s own to give an adequate account of the physical universe.

Modern moral reasoning, in accepting these premises, is thus best understood as based on a sense among moral actors around the world to follow the logic of formal

operational thought. Without explicitly grounding their moral sense in this understanding, it is not surprising that thoughtful individuals would feel comfortable grounding moral reasoning in rational modes of thought. In short, bright individuals tend to feel comfortable reasoning consistent with adult formal operational thought, rather than childish egocentricism.

V. Conclusion

This article has discussed traditional views on the morality of egocentric versus non-egocentric thought, and noted the modern explication for the rationality of non-egocentric moral reasoning. The article also discussed the emerging trend among constitutional courts and other actors around the world to adopt non-egocentric thought at the basis for moral and legal decisionmaking. This was done in the context of equal protection law, particularly rights of gender equality; autonomy interests, including respect for diverse views as long as they do not trample on the diversity rights of others; economic rights; and review of government criminal and administrative action. In each of these areas, the emerging trend in the United States and around the world is to base moral reasoning on the principle of rational thought, which can be phrased alternatively as “love of neighbor as thyself,” follow the logic of an “impartial spectator,” or give each individual “equal concern and respect.”