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ARE CONSTITUTIONAL RIGHTS PERSONAL?

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Professor Matthew Adler has argued that many constitutional rights are not personal moral rights, but "rights against rules" that are pragmatic and instrumental in nature.[1] The reason rights are not personal, in Adler's view, is that they are rule-dependent—the constitutionality of a statute depends not just on how it affects someone, but on what it says—its *formulation* of a rule. Constitutional litigants are in some cases allowed to challenge the formulation of rules, regardless of whether the error in formulation would make any difference to the way the litigant is treated. Adler argues that because the litigant would receive no different treatment whether the law is formulated correctly or not, the litigant does not suffer from the constitutional error any "personal" legal disability that would set him apart from any other citizen, and is, therefore, not enforcing a personal right. Instead, Adler believes that constitutional rights are better understood as positive-law creations that allow citizens to sue as private attorneys-general.

Adler's most vivid example is the defendant charged with flag burning, but who is guilty of arson as well. This defendant, argues Professor Adler, has no personal right to complain about his conviction, because he is guilty of arson, a crime the state may properly punish. In Adler's view, the arsonist/flag-burner has suffered no injury in merely being punished for the wrong reason and can invoke no moral or personal right. I argue that Adler misses an important dimension of moral right: dignity and respect. Even though punishing me for an illegitimate reason may not matter in terms of years behind bars (if I should be punished anyway), it would matter in terms of respecting my dignity, as I explain below.

Adler's position illuminates a larger problem with rights scholarship generally. The standard account of the nature of rights thinks of rights as either spheres of autonomy ("will theory") or as property ("interest the-

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1. *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998); Matthew D. Adler, *Personal Rights and Rule-Dependence: Can the Two Coexist?*, 6 LEGAL THEORY (present issue).

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ory")[2]—rights are choices or goods (or some combination of the two). Neglected is an account of rights that thinks of them not as choices or goods but as *practices* of mutual *respect*. I use 'respect' here in the sense employed by Kantian ethics—respect for persons as creatures of reason who may not be used merely as ends. This notion of respect does not itself dictate anything about choices or goods (unless a utilitarian calculus is grafted on to it), but states only that whatever purposes one wishes to achieve, one must respect the rational nature in oneself and in others in doing so. This limitation rules out slavery, violence, and fraud, but cannot serve to flesh out the positive requirements of respect in full, or to tell us in all cases what counts as slavery, violence, or fraud.

So how can respect mean anything "in itself" if it must be filled out by cultural context? Respect is an idea that translates across languages and cultures. However, as with any general, abstract term, we may be clear about its core applications (slavery = antebellum slavery of African Americans in the American South), but be less certain about its application to analogous cases. Is an indentured servant a slave? Is a serf a slave? Is a live-in domestic servant (who is "on-call" 24 hours a day) a slave? Were Greek and Roman slaves (who could own property, marry, and who were often highly educated) slaves? Is a coal miner who "owes his soul to the company store" a slave? Is a married woman under coverture and strict no-divorce laws a slave? Is a welfare recipient who is required to work in order to receive subsistence benefits a slave?

As I (and many others of greater authority) have argued elsewhere,[3] the open texture in language (and therefore in law) makes possible moral growth and adaptation to new situations. But it also means that we must forego more certainty than a Wittgensteinian "family resemblance" theory of definition can give us. We have in language a set of core cases that function as precedents: They guide our thinking but cannot predetermine it. Working out difficult moral issues requires the trial and error of practice, and the reasoned-argument-by-analogy from the core instances, not the application of definitional rules.

So, as abstract Kantian respect cannot alone tell us how that respect must be instantiated except in a few core cases, I would fill it in with the embodied practices of respect already at work in cultures.[4] Respect is the touchstone, but practices provide the substance and concrete imperatives (i.e., respect may be shown by looking someone in the eye or by averting one's glance, depending on the cultural practice and context). When rights are rethought as respect-practices, I argue, the moral wrong done to the arson-

2. For an account of will and interest theories, *see* Matthew H. Kramer, N.E. Simmonds, & Hillel Steiner, A DEBATE OVER RIGHTS (1998). *See also,* Linda Ross Meyer, Unruly Rights (forthcoming).

3. *See* Linda Ross Meyer, *When Reasonable Minds Differ,* 71 N.Y.U. L. REV. 1467, 1470 (1996), and works cited therein.

4. For a fuller account of respect-rights, *see* Meyer, *supra* note 2.

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ist/flag-burner becomes clear: Punishing someone because of his political message is disrespectful, even if the punishment might be warranted on other grounds.

Thinking of rights as respect-practices differs from thinking of them in terms of an interest theory, because the injury does not depend on the victim's tangible losses. Even if a victim suffers no loss to reputation or self-regard, the victim of an insult has still suffered a moral injury. Hence, the existence of a right does not depend on the subjective distress or desires of the victim.

Thinking of rights as respect-practices differs from thinking of them in terms of a will theory, because more choice/autonomy is not necessarily better. In some contexts, choices themselves can be demeaning: Women, for example, were often given the choice whether to participate in jury service, whereas men were required to serve.[5] Within its cultural context, the distinction did not enhance the dignity of women.

The understanding of rights as respect-practices, although foreign to much rights scholarship, is not foreign to common sense or common law. Tort law allows nominal recovery for dignitary harms such as invasion of privacy, battery, and assault, even when no monetary, mental distress, or reputational harm is done. The affront to dignity is still recognized as a moral injury, legally redressable:

> Interest in personal integrity still is entitled to protection, although the plaintiff is asleep or under an anaesthetic, or otherwise unaware of what is going on. Proof of the technical invasion of the integrity of the plaintiff's person by even an entirely harmless, but offensive, contact entitles the plaintiff to vindication of the legal right by an award of nominal damages.[6]

Moreover, tort law parses dignitary harms in a very contextual, intent-sensitive way, following, for the most part, the contours of cultural practice and meaning, treating rights precisely as cultural phenomena, not as quanta of goods or choices.[7] My favorite example from tort law is the opposite results in two tort cases of "exposure of private facts."[8] Both cases involved journalists' exposure of similar kinds of facts: In one case a columnist exposed that the plaintiff was gay, in the other, that the plaintiff had undergone a sex change. From a "property or choice" rights standpoint, there is little differ-

5. *See* Hoyt v. Florida, 368 U.S. 57 (1961) (upholding statute allowing women, but not men, to "volunteer" for jury service), *overruled by* Taylor v. Louisiana, 419 U.S. 522 (1975). For other examples of more-choice-is-not-better, *see* Jennifer Gerarda Brown, *The "Sophie's Choice" Paradox and the Discontinuous Self: Two Comments on Wertheimer*, 74 DENV. U. L. REV. 1255 (1997).

6. W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 40 (5th ed. 1984).

7. *See* the persuasive discussion in Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 974 (1989); Robert Post, CONSTITUTIONAL DOMAINS 51–88 (1995).

8. Sipple v. Chronicle, 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984); Diaz v. Oakland Tribune, 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (1983).

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ence between the cases in either the degree of the exposure[9] or the harm to be expected from it. However, there was all the difference in the world in the intent with which the articles were written and the context of the exposure: The first journalist was chiding President Ford for homophobia in failing to adequately thank a gay man who had protected him from an attack; the second journalist was gossiping that the student body president had undergone a sex change and that classmates should make "other showering arrangements" in physical education classes. The first plaintiff did not recover; the second did. The difference is in the respect the journalists showed the plaintiffs, not in any tangible harm the plaintiffs suffered.[10]

The following examples demonstrate other affronts that most of us would recognize as moral injuries:

1) I flunk a student because he disagreed with me in class. It turns out he would have flunked anyway. Nonetheless, I have wronged him.
2) While I am giving this paper at a conference, one of my colleagues stands up and tells me to shut up because I am wasting everyone's time with my ridiculous theories. It turns out to be true; I am indeed wasting everyone's time with my ridiculous theories. Nonetheless, my colleague has wronged me.
3) I install a surveillance camera in the changing room of my store. A handsome patron uses the room, so I run back to my monitor to ogle. While I am watching, he tries to steal some merchandise. Nonetheless, because of my prurient interest, I have wronged him.
4) Adler's arsonist/flag-burner has been convicted of flag burning *and* of arson. The judge imposes sentence only for the arson conviction. Can the defendant be denied the right to appeal the flag-burning conviction on the ground that he would have received the same sentence anyway? Standard criminal law doctrine says no, because a criminal conviction is presumed to have collateral consequences.[11] (Note that this does not turn on whether the

9. In *Sipple*, the court noted that the plaintiff was already "out," and so held that the facts were not private. However, its alternative holding was that Sipple's homosexuality was "of legitimate public concern" even if it were private. The determination of "legitimate public concern" depended crucially on the context and intent of the revelation.

10. *Sipple* noted that the defendants "were prompted by legitimate political considerations," 154 Cal. App. 3d at 1049, 201 Cal. Rptr. at 670, while *Diaz* declaimed that defendant's "attempt at humor at Diaz's expense removes all pretense that the article was meant to educate the reading public." 139 Cal. App. 3d at 135, 188 Cal. Rptr. at 773.

11. While I would argue that the reason we allow such challenges is to protect dignity, the Court has been rather more chary. In *Pierre v. United States*, 319 U.S. 41, 43 (1943) (per curiam), the Court disavowed that any mere "moral stigma" of a conviction could be cognizable harm that would override a mootness objection when the sentence had already been served. But in *Sibron v. New York*, 392 U.S. 40 (1968), the Court held it would "presume" that a conviction had collateral consequences beyond moral stigma that would allow a petitioner to challenge an old conviction. Recent cases have refused to extend the "presumption" to parole revocation, requiring, again, more than "mere moral stigma," *see* Spencer v. Kemna, 523 U.S. 1, 8 (1998) (citing *Pierre* with guarded approval). As I say *infra*, construing personal rights as dignity-rights makes constitutional doctrine (and its focus on legislative intent) make much more sense. So, despite the Court's comments about "mere moral stigma," I believe the Court does in many contexts recognize personal dignity-based rights, even absent some more tangible harm.

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flag-burning conviction would actually harm him in the future—it might actually benefit him to have flag burning, rather than arson, on his rap sheet.)

5) A police officer calls a suspect "scum" and "dirtbag" and arrests him because he "has an attitude." It turns out that the suspect is guilty of several unsavory crimes. The suspect has nonetheless been wronged.

In all these examples, the potential plaintiff has been wronged, even if the plaintiff is also guilty of a separate wrong or deserves punishment for some other reason. We might wish to bar potential plaintiff's recovery for having unclean hands or a de minimis claim, but he or she has suffered a dignitary harm.

The moral of these examples is that morality is sensitive to intention and to manner, not just to result. Intention and manner matter because we are human, construing each other's actions as meaningful. Respect is conveyed when we act for good reasons; respect is denied when we act for wrong reasons. Kant captured the distinction by grounding morality in the precept that we must not use others for our own ends without having regard for them as ends in themselves.

If one takes dignitary harms into account, then many constitutional rights need not be explained as merely instrumental or pragmatic. Prosecuting a defendant for speaking freely is itself disrespectful, regardless of whether the defendant is guilty of some other offense, just as *Brown v. Board of Education*[12] taught that separate but equal treatment can be disrespectful, regardless of any tangible difference in resources. Hence, standing doctrines that allow the arsonist/flag-burner to raise First Amendment questions,[13] or the guilty defendant to complain about privacy invasions, or the gang member to complain about loitering ordinances,[14] may be protecting genuine, personal rights not to be "dissed," as well as serving some other instrumental purposes.

Why should it matter whether we characterize these rights as personal or not? It matters because treating rights as mere policy instruments makes rights malleable and erodable. To take a prominent example, the exclusionary rule, which is not treated as a personal right and has been given only instrumental force, is applied only when policy dictates that it will 'deter' police officers,[15] making it subject to empirical conjectures and so-called policy analysis by the Court.

If the same approach were used for the First Amendment, we would not reverse flag-burning convictions after the flag-burning statute had been repealed; we might take into account political factors, such as changes in

12. 347 U.S. 483 (1954).
13. *See* Texas v. Johnson, 491 U.S. 397 (1989).
14. City of Chicago v. Morales, 527 U.S. 41 (1999).
15. *See, e.g.*, Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998) (declining to apply exclusionary rule to parole revocation proceedings and using balancing test to determine deterrence benefits do not outweigh social costs).

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party dominance in the legislature or changes in the political affiliation of the executive, in determining whether to strike down a statute; we would ask courts to umpire battles of political theory "experts" who would spin out empirical theories of how best to control legislatures; and, worst of all, we would pit the courts against legislatures as the masters of impulse-control and constructors of "incentives" and "deterrents" to unconstitutional legislative action.

Construing constitutional rights as personal, dignity-based rights guarantees that the Court must take them seriously, as valuable in themselves and for themselves, not just as means to some further end (of robust debate, or good government, or cultural diversity, etc.) that could be achieved by some means other than vindicating the right.

I. WHAT KIND OF INJURY IS DIGNITARY HARM?

One difficulty with thinking of constitutional rights as dignitary rights is an ontological one—what sort of thing is dignity and what constitutes harm? If dignity is merely one's subjective sense of self-worth, then there is no wrong done if the victim does not know or find out about his victimization—whether because of youth, mental incapacity, or absence. Under such a (mistaken) view, sexual molestation is no wrong, for example, if the victim is too young or too incapacitated to understand what is going on. Nor is an insult wrong if no reputational harm is done.[16] Moreover, if dignity is subjective, then the law has a very difficult time adjudicating it—victims may prevaricate or vary in their experience of mental anguish, there is no objective way to measure what constitutes a wrong, etc.

On the other hand, if dignity is not a subjective sense of self-worth grounded in the actual mental states of persons, then is it real at all? How can dignity be objective?

The answer to this puzzle is the same as the answer to the puzzle about what is moral or what is wrong.[17] Dignity is not a scientifically discoverable and quantifiable thing. Dignitary harm, unlike monetary, physical, or reputational harm, corresponds exactly to the wrong—the more culpable the defendant, the more impure his motives; the greater the wrong, the greater the dignitary harm. For example, we (as a community) believe a greater wrong is done (and we are more incensed) by the defendant who deliberately flouts law and maliciously injures others than by someone who causes (even great) harm accidentally.

The injury caused by disrespect is to our communal ties,[18] ties which

16. This is Adler's view. Adler, *Personal Rights and Rule-Dependence*, *supra* note 1.

17. For a different answer to the same question that tends to support Adler's view, *see* Heidi Hurd, *What in the World is Wrong?* 5 J. CONTEMP. LEGAL ISSUES 157 (1994).

18. *See* Linda Ross Meyer, *Forgiveness and Public Trust*, 27 FORDHAM URB. L.J. 1801, 1802–04 (2000).

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are not empirically measurable because they also ground our ability to observe (and think empirically) about the world and each other. What counts as more or less of anything? What is a choice or a good? These questions cannot be asked without assuming a common ground, some agreement about the context and purpose of the measurement or definition, some very basic sense of the place of humans vis-à-vis each other and the world. What counts as more or less depends upon standards set by human perception; what counts as goods or choices depends upon human needs; what counts as real depends upon human senses and human interpretation of them. This common ground includes some basic abilities to interpret human behavior (we can interpret bared teeth as a smile or a snarl); the ability, grounded in the "principle of charity,"[19] by which we interpret each other's very speech (I assume you are making sense, and part of making sense is sharing my sense of basic good, i.e., my beliefs that truth is better than lying (and my beliefs about what counts as either one), that knowing is better than not knowing, that living is better than dying, that being full is better than being hungry, etc.); and most basic of all, our conviction that even nature herself follows laws or patterns that we can comprehend, measure, and observe (otherwise why bother trying to make sense of anything?). We are Kant's reasonable creatures who set reason to work in the world as a categorical imperative—we cannot stop making sense.

Our very ability (or, more accurately, imperative) to make sense of the world, to generalize, to see patterns and categories, requires us to recognize each other as "like" ourselves, and, as reasoning beings with our own aims and plans, worthy of respect. Disrespect denies this equality at the most fundamental level and simultaneously undermines the norms that guide our interpretation of the world. Those who disrespect others *tout court*, the "sociopaths," appear to us as "monsters." We do not understand them; their motivations seem irrational, their vision of reality distorted. They seem separate from us, a different life-form, and our interpretive equipment fails us in so deep a way that the usual problems of intercultural translation seem unproblematic by comparison.

Hence, the harm done by disrespect is not just mental anguish, physical pain, or lost opportunities or goods, but breach of trust and alienation from each other, an alienation that threatens to undermine the way in which we make sense of the world. We cannot be what we are—reasonable—without respecting each other as reasonable. We cannot make sense of ourselves and the world without also heeding the command of respect. Because respect is so closely tied to our very understanding of the world and ourselves, we cannot ground respect in some "more basic" or "more real" empirical reality. Respect must precede our attempts to understand empiri-

19. *See* Donald Davidson, ESSAYS ON ACTIONS AND EVENTS 221–23 (1980).

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cal reality, because respect is at the very ground of our understanding of anything. The ought comes before the is.[20]

So, when a norm is violated, if that norm is one directed at, or for the benefit of, another person, the violation is a dignitary harm, even if the victim experiences no mental anguish at all. The wrong, though not affecting in any way the worth of the victim as a person, is nonetheless a wrong to the victim because it is an attempt to deny the terms of union with the victim. Because the wrong harms the relationship between the wrongdoer and victim, what counts as a wrong is set by the norms of the community (the terms of the union or the instantiation of mutual respect) (which again, are not the same as what most people if polled would say the norms are,[21] any more than the rules of grammar are settled by vote).

The idea that a relationship can be harmed even if the victim is unaware of the wrong may seem odd at first. But it is perfectly understandable for a spouse to feel betrayed when he discovers his wife once, long ago, had an undisclosed adulterous relationship, even if he neither knew nor felt its effects then or in the present (assuming a relationship in which sexual fidelity is the norm). Nor would the spouse think that the wrong occurred only when he discovered it or only in the telling of it. The wrong occurred when the infidelity did, even though he was not aware of it. And if the spouse never finds out, has the wrong never occurred? Is the relationship still the same? I think it is sensible to say that a wrong may affect only the wrongdoer, but that, nonetheless, what distances the wrongdoer from the victim still stretches, attenuates, or even breaks the bond between them.

II. DON'T EVEN THINK ABOUT IT

So why draw the line at wrong actions? If empirical harm or other empirical effects do not matter, then why not punish wrongful thoughts? Though I will, of course, conclude that we should not punish thoughts (banish the thought!), I want to resist treating this as a mere reductio ad absurdum argument.

20. I cannot pretend these ideas are mine, of course. Kant makes this move in the Third Section of the *Groundwork of the Metaphysics of Morals,* as well as in his more general attempt to limit "pure reason" in order to allow room for morality and faith. *See* Immanuel Kant, CRITIQUE OF PURE REASON 29 (Norman Kemp Smith trans., 1929) ("I have therefore found it necessary to deny knowledge, in order to make room for faith."). Heidegger, among others, builds on this insight in *Being and Time.* The best I can do for now in understanding or explaining either one is recorded in Linda Meyer, *Between Reason and Power: Experiencing Legal Truth,* 67 U. CIN. L. REV. 727 (1999) (Kant) and Linda Ross Meyer, *Is Practical Reason Mindless?* 86 GEO. L.J. 647 (1998) (Heidegger). Please see the works cited in those articles.

21. Hence, I would resist classification as a "social meaning" theorist, because in many cases those theories try to discover "social meaning" empirically, an enterprise that I would find inapt as well as circular. *See, e.g.*, Larry Lessig, *The Regulation of Social Meaning,* 62 U. CHI. L. REV. 943 (1995); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence,* 83 VA. L. REV. 349 (1997). For normative accounts of practice, see Marianne Constable, THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW AND KNOWLEDGE 15, 85–89 (1994); Alasdair MacIntyre, AFTER VIRTUE, 187–203 (2d ed. 1984).

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First, it is clear that we should and do punish wrongful speech, the First Amendment notwithstanding. Threats, bribes, blackmail, assault, libel, slander, extortion, solicitation, conspiracy, etc., are all legally actionable events that may consist in nothing but words.

Second, as anyone who has stuck his foot in his mouth knows, the line between thoughts and words is often thin. Though we can exercise some control over when we speak our mind, we have all at least made a few "Freudian slips," and most of us have done far worse.

Third, we learn to feel shame for our less-savory thoughts, and we learn to focus, "pay attention," and control our thoughts (to some extent, at least) precisely so our private obsessions do not materialize into public atrocities. Not only does indulging one's fantasies of revenge or violence all too often accompany the "real" thing, but even in smaller doses it disturbs our mental focus and mood, and makes it difficult for us to do our work in the world with pleasure, good will, and composure. We counsel each other to "get your mind off it" or "put it behind you." If we really took the view that thoughts were "immaterial" and hence did not matter, I would not be afraid, angry, affronted, or disturbed to learn that someone was obsessed with thoughts of violence against me. But, of course, I would be.

We do not punish wrongful thoughts, in order to allow ourselves a measure of freedom and to focus on matters more easily provable and public.[22] But there is no reason to think that thoughts themselves are outside the realm of the morally relevant or that thoughts cannot be wrongs, even though intangible and perhaps unknown.

These ontological questions, of course, deserve much fuller treatment than I can give them here. But I must leave them aside for now to explain how this notion of respect can operate within constitutional law, as it more obviously does within tort law.

III. WHEN DOES PROSECUTION UNDER A STATUTE "DISS" THE DEFENDANT?

Adler's argument is designed, in part, to make it possible for constitutional litigants to seek "facial" invalidations of statutes that are unconstitutional, and he believes that the personal rights thesis stands in the way, because so few statutes will be unconstitutionally applied to all the people all the time.[23]

22. I would not take the view that we must publicly punish every moral wrong (or even that every moral right must be an enforceable legal right—but see Heidi Hurd, *Moral Rights and Legal Rules: A Natural Law Theory*, 6 LEGAL THEORY (present issue)). We may forgive them. Here I differ from the retributivist, though that is a story for another time. For a first cut, *see* Meyer, *supra* note 18.

23. This is the standard for facial challenges supposedly articulated in United States v. Salerno, 481 U.S. 739, 745 (1987), which has generated a storm of scholarly controversy. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998); Adler, *Rights Against Rules*, *supra* note 1.

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A personal rights thesis, he believes, would restrict standing and thus overrestrict the courts' ability to serve the important role in constitutional adjudication that they have traditionally had in American jurisprudence. I do not believe, however, that if dignitary rights are included, the personal rights thesis would be as restrictive as Adler fears it would be.

To explain why, however, I must make the switch from person-to-person dignitary violations, such as assaults and insults, to statute-to-person dignitary violations, such as unconstitutional laws. When does a statute "disrespect" certain of its citizens? The answer must presuppose principles of statutory interpretation.

Some "insults" appear on the face of a statute. For example, laws denying benefits to groups based on their race, religion, ethnicity, etc., are blatantly[24] disrespectful to members of those groups. For example: "No blacks may swim at public swimming pools."[25] For this reason, equal protection doctrine requires "strict scrutiny" of legislative classifications based on "suspect classes" like race, resulting in total invalidations. Our history makes such classifications "suspect" precisely because they have so often been used with the intention to demean minority groups.

Legislating bodies, however, may be sneakier. A prohibition may be phrased in neutral terms, yet make exceptions for other groups that result in a pattern of application that singles out one group for regulation based on impermissible characteristics.[26] Again, if the pattern of enforcement is taken into account, the statute is clearly disrespectful. The pattern of enforcement is a proxy for (or evidence of) the legislature's illegitimate motive. For example: "No one may operate a laundry without a permit." (Permits are routinely refused to Asians.)[27]

More difficult are statutes that on their plain language, purport to be conferring a benefit. Consider for example: "Women may be released from jury service at their request."[28] Or, "Gay men may receive publicly funded mental health evaluations." Are these statutes disrespectful to men or straights? Not disrespectful at all? Plain language interpretation cannot "read between the lines" to take into account the history and context that makes these statutes disrespectful. Properly interpreting these statutes and unmasking their insult requires a look at context and history.

Most difficult of all are statutes that look fine both on their face and in application, but are motivated by disrespect.[29] Consider, for example: "Door-

24. Though blatant, the disrespect here is probably still not in the acontextual "plain meaning" of the statute unless the legislature actually says, "Because we find that black people are inferior," or something really outrageous. *See* Adler, *Personal Rights and Rule-Dependence*, *supra* note 1. "Plain meaning" theories of interpretation have these sorts of difficulties; a good reason for avoiding them.

25. *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526 (1963).

26. *See, e.g.*, Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993).

27. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

28. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975).

29. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 913 (1995); *see* Michael Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY 269 (2000).

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to-door solicitation is prohibited." If the legislature passed this statute after a legislative report on high-pressure sales techniques and exploitation of elderly citizens, the statute is sound, or at least could be "interpreted" to apply only to commercial solicitation and thereby be effectively severed from its potentially unconstitutional applications. But if the legislature passed this statute after its Catholic (or Baptist, or Episcopalian, or whatever) sponsors denounced the "heresies" taught by the Jehovah's Witnesses, then what?

If we think of rights as rights to respect, rather than rights to goods or choices, then the legislature's motivation matters, even when the statute might be justified on other grounds. If the legislature intended the statute's disrespectful features, then the statute ought to be struck down rather than severed, because its other legitimate applications were, at best, camouflage.[30] When the legislature's motivations are mixed or uncertain (as they most often are), the best analogy to our usual practice in social settings is to assume a statute is well motivated, until we have convincing evidence that it is not.[31] (We should not go around assuming we are being insulted, but rather assume the opposite when the context is unclear.)

If the mixed-motive statute is applied in an unconstitutional manner to a particular case, a respect analysis would say only that the statute need not be struck down, and the question whether or not to sever or adopt some

30. *See* Dorf, *supra* note 23, at 279–80.

31. I suppose I must respond to the objection that because a legislature does not have a single brain, it cannot have an intent. This objection to "collective intent" is misguided because intent is never about something "in my mind," but is a word we use all the time to characterize the trajectory and meaning of each others' actions without any mind reading at all. Legislation can have a trajectory and meaning, discernible in all the obvious ways (such as through the language and placement of the statute, the context of its enactment, its broader meaning in the cultural context, etc.). Furthermore, any legislator's (or group of legislators') statement about what she "intended" can be doubted just as you can doubt my statement that I "intended" this article to elucidate the breeding habits of red-bellied woodpeckers. If intent were really something "in my mind," you would have to take my word for it.

For the same reasons that Wittgenstein objected to "private language," *see* PHILOSOPHICAL INVESTIGATIONS para. 243ff. (G.E.M. Anscombe trans., 1958), the objection to collective or legislative intent is not persuasive. *See also*, Brian Bix, *Questions in Legal Interpretation*, in LAW AND INTERPRETATION 137 (Marmor ed., 1995).

I would also reject the "but-for" test of legislative intent (but-for this impermissible motive, would the legislation have been enacted?) posited in Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 28–32, because it seems to assume that the legislation's intent is a collection of the intentions of the individual legislators, making the intention of the key voters determinative. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 439 n.80 (1996) (adopting the but-for test but recognizing the problems with it). The question is not whether a majority of legislators adopting the provision harbored an impermissible motive, but whether the statute's meaning and trajectory, understood in light of the cultural context of its enactment, was disrespectful. Statements of various legislators or bill sponsors might contribute to the evidence of context, but are not determinative.

Tribe uses the example of a no-jet-skiing ordinance that has been passed for the impermissible purpose of keeping jet-skiers from brandishing protest signs, arguing that it should not be struck down *just* because of its impermissible purpose, since most of the activities it prohibits are nonexpressive anyway. Tribe, *supra*, at 32. He also worries that a nonexpressive jet-skier

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narrowing construction could be governed by other principles of moral and political theory. It may even be the case that the fault is not with the statute or its formulation at all. The fault in such cases may lie with the executive branch, not the legislative, in its decision to interpret and apply the statute disrespectfully for forbidden purposes. For example, the problem with police officers stopping cars for traffic violations as a pretext to harrass their minority occupants is not a problem with the way the traffic laws are drafted, but a problem with how they are being used. Likewise, using a public trash-burning ordinance to punish symbolic flag burning is not necessarily a problem with the "overbroad" drafting of the ordinance, but with its Amelia-Bedelia-like enforcement.[32] Sometimes the culprits are not legislators, but prosecutors or police officers who use a nonsensical "literal" meaning of laws in order to punish selectively those with whom they disagree.

Hence, we should not always characterize an "as-applied" challenge as a question of severability; it may just be that the statute has been applied to conduct that is outside its scope if it were properly interpreted (and that does not mean interpreted for its "plain language"). Likewise, we should not assume that some uncommonsensical reading of the statute's "plain language" renders it unconstitutional.[33] Though recent scholarly commentary has tended to treat "narrowing constructions" as the same as "severance,"[34] I believe the similarities have been overstated.

Recognizing that interpretation of statutes is not a "plain meaning" enterprise but one that follows common sense and practice also eliminates some concerns with "notice" when statutes are "severed" by "court legislation."[35] If courts are merely restoring a commonsense interpretation of a

would be able to avoid regulation under the ordinance because its "facial invalidity" would confer standing to challenge it on anyone who was prosecuted. *Id.* at 32 n. 77. However, my view of respect-rights does not entail that facial invalidity gives everyone a right to challenge a statute (a respect-right is not a right to be prosecuted under a valid law), but instead that anyone who is "dissed" by the statute may sue (i.e., only those jet-skiers who are engaged in expressive conduct). Moreover, if the ordinance covers all jet skiing, then no council would pass it *only* to prohibit expressive jet skiing, unless they intended to apply it in a discriminatory fashion (as in *Yick Wo*), in which case it *should* be struck down because the "jet-ski" stuff is really camouflage (and no nonexpressive jet-skiers will be prosecuted). If many of the ordinance's proponents sought it as an environmental measure, but the key votes were cast by some with an impermissible motive, the ordinance, on my analysis, would stand, because neither its meaning nor its intended trajectory are impermissible, even if the legislators' motives were "mixed."

32. Peggy Parish, AMELIA BEDELIA (1992) (children's book about a "literalist" housekeeper who gets her instructions wrong by taking them too literally). One might also classify the Goldman v. Weinberger, 475 U.S. 503 (1986), situation as a problem of enforcement, rather than legislation, though the Court declined to grant redress.

33. I would argue that this was why the Court rejected a facial challenge in Yazoo & Mississippi Valley Railroad Co. v. Jackson Vinegar Co., 226 U.S. 217 (1912), not because of some doctrine of requiring all challenges to be as-applied rather than facial. *See Yazoo* at 219: "How the state court may apply it to other cases and *whether its general words may be treated as more or less restrained*, and how far parts of it may be sustained if others fail are matters upon which we need not speculate" (emphasis added). *See* the discussion in Dorf, *supra* note 23, at 242–43.

34. *See, e.g.*, Richard Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1333 (2000).

35. *See* Dorf, *supra* note 29.

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statute, the meaning of which has been mangled by foolish or discriminatory enforcement procedures, there is no "severance" of unconstitutional applications or worries about judicial legislation and "notice." For example, if a commuter who nodded off on the train were prosecuted for "sleeping" in the train station, we (I believe) would not conclude that the town had misdrafted the ordinance, but that the police officer had misapplied it, and we would not worry that our ruling in favor of the commuter would upset settled expectations about the scope of the rule. (The conclusion might be different, however, if the statute is drafted vaguely *in order to allow* discriminatory enforcement, as perhaps in *Yick Wo*,[36] *Papachristou*,[37] or *Morales*.[38])

If rights are rights to respect-practices, then the difference between a facial and an as-applied challenge to a statute is just this: A facial challenge argues that the statute is itself an insult because it is intended to disrespect a group of its citizens, either through its plain language, through sneaky preplanned discriminatory enforcement, or by intentionally cutting a wider swath so as to mask its discriminatory intent. A facial challenge calls for the statute's invalidation. An as-applied challenge says that, although the statute

36. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
37. Papachristou v. Jacksonville, 405 U.S. 156 (1972).
38. City of Chicago v. Morales, 527 U.S. 41 (1999).

The Illinois Supreme Court struck down the ordinance in part because it was purposely drafted to allow expansive police discretion in dispersing gang-loiterers: "The city has declared gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets." 177 Ill. 2d 440, 458, 687 N.E.2d 53, 64 (1997). It was not, of course, loitering that the city sought to prevent, but gang intimidation that police officers could not observe. The Illinois Supreme Court was clearly concerned that the ordinance swept broadly *in order to allow* discriminatory enforcement.

On certiorari, the Supreme Court's plurality opinion also lingers on the checkered history of loitering statutes and their discriminatory application, 527 U.S. at 53 n.20 (opinion of Stevens, J.), and one dissenting judge doubts that applying the ordinance solely to gang members would be constitutional: "Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not." *Id.* at 96 (Scalia, J., dissenting). However, one member of the majority denied that purpose was relevant to the constitutional question at all. *Id.* at 68 (O'Connor, J., concurring).

What we all know is that the ordinance was to be used to chase young black and Hispanic men off the streets, before they had done anything wrong. A respect-rights analysis of this case would, in my view, say that intentionally drafting an ordinance to allow police to engage in discriminatory enforcement is an insult, as is assuming criminal intent or activity because of youth, sex, or race. *Morales* is not an example of legislative negligence.

It is also possible to explain the facial challenges of the abortion cases in a similar way. State legislatures were playing political chicken with the Court in these cases, directly attacking the right to abort that the Court had asserted. Here, the legislative intent was to curtail the right itself, so, again, the problem was not negligence or vague drafting, but purposeful attempts to test the Court's resolve and limit the right. *See* the Abortion Control Act adjudicated in Planned Parenthood v. Casey, 505 U.S. 833 (1992). Such attempts give rise to a respect-right claim because if the legislature has gone too far on purpose, it has insulted its citizens who seek to exercise those rights, just as a person would be guilty of an assault if the tap on the shoulder gets too insistent and is intended to provoke. An analogous statute would be one that authorized search warrants to issue on "reasonable suspicion" rather than probable cause in order to test the Court's commitment to its Fourth Amendment interpretation.

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itself is not disrespectful, its application to the particular plaintiff and her activities is. An as-applied challenge need not call for the statute's invalidation, because the legislature's intention is not impugned; but, depending on other considerations (such as the relative competence of legislature and courts, the nature of the political compromises involved, the likelihood the subject will be revisited by legislatures or courts, the weight and placement of political inertia, etc.) the statute may be severed if necessary.[39]

So, using a respect-rights analysis, the arsonist/flag-burner can complain of insult[40] and mount a facial challenge to the statute only if the statute prohibits "flag burning" or "symbolic acts of burning"; he cannot do this if the statute prohibits "arson" or the "negligent or reckless burning of flammable materials in public" (even if the latter definitions are overbroad and would cover nonarsonist flag-burners), unless he can show that the neutrally phrased statute is mere statutory camouflage intended to disguise a legislative intent to prohibit flag burning. In some cases, of course, it may be that wildly overbroad formulations such as "no burning of anything in public" may be evidence of legislative intent to disrespect rights, confirmed perhaps by history and context.

A no-rational-basis due process challenge may also be understood as the vindication of a respect-right. Prosecution or regulation without a rational basis is insulting and demeaning, as would be subjection to the whims of a tyrant. Kantian respect would require that we act for good reasons.

Analysis of rights as respect-rights also makes sense of the otherwise-bizarre emphasis on legislative intent in constitutional cases. Statutes "directed" at expression are treated differently than statutes that "incidentally burden" expression;[41] statutes enacted out of animus are treated differently

39. On these matters, *see* the insightful discussions in Dorf, *supra* note 29; Dorf, *supra* note 23; Emily Sherwin, *Rules and Judicial Review,* 6 LEGAL THEORY 299 (2000); Fallon, *supra* note 34.

40. I use Adler's example in order to clarify how my view would play out. However, I am not sure that First Amendment rights are respect-rights, *see infra.* A respect-right theory of free speech would look a good deal different than current doctrine, making certain forms of disrespectful speech off-limits. I do not here, however, advocate that all constitutional rights must be respect-rights, only that respect is an element in many of them. However, assuming that we believe a certain level of choice-rights are part of one's due of human dignity, we would have to respect each other's right to be disrespectful, and a statute that intentionally failed to do so would itself be disrespectful.

41. *See, e.g.*, City of Erie v. Pap's A.M., 120 S. Ct. 1382 (2000) (ruling turns on the difference between direct and incidental burdens on speech). The Court's insistence upon the difference between content-based restrictions and content-neutral restrictions has led at least one other commentator to the view that discerning legislative purpose (through such doctrinal proxies as the content-based/content-neutral distinction) is central to First Amendment cases. *See* Kagan, *supra* note 31. A respect-rights analysis would explain why we care so much about legislative purpose, because purpose may have no relation to the quantity or quality of speech restricted. *See also,* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence,* 96 COLUM. L. REV. 1456 (1996) (recognizing importance of motives of police officers, and positing a "targeting" injury analogous to a respect-right); Tribe, *supra* note 31 (stressing that purpose does matter to constitutional doctrine, despite the Court's tendency to disavow it); Michael C. Dorf, *Incidental Burdens on Constitutional Rights,* 109 HARV. L. Rev. 1175, 1183

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than statutes that have disparate impacts;[42] identically phrased statutes, indeed, may be treated differently depending upon the Court's information as to their motivation.[43] Any analysis of rights as interests or choices, or as any other empirical goodies, cannot explain why we care so much about legislative intent. But once rights are understood as dignity-based, intent makes all the difference, just as it does in basic common-law tort law or criminal law.

IV. SO WHO CAN SUE?

Leaving open the possibility that we might allow standing for other purposes, who can sue as a matter of personal right? The answer depends on who is disrespected by the statute. If the statute is racially discriminatory, then any member of the discriminated group has been disrespected and has a personal right to sue. If the statute is intended to curtail certain forms of property or liberty rights, then any rights-exerciser who is prosecuted has the right to sue, even if he might have been prosecuted for some other, valid, reason. If the legislation is irrational, then it disrespects any citizen to whom it is applied. However, if there is no illicit motivation on the part of the legislature, but the legislation is just poorly or even negligently drafted (overbroad or vague), then no one has been disrespected, and standing must depend on (1) other convenience-based rights-against-rules of an Adlerish sort, or (2) infringement of other non-respect-based rights (property or liberty rights), or (3) a respect-right violation in the execution or interpretation of the law. The challenge in cases 2 and 3 would be an as-applied, rather than facial, challenge.

For example, take a door-to-door solicitation restriction that (a) was not intended to drive out the Jehovah's Witnesses and (b) is negligently drafted in failing to exclude noncommercial speech. This restriction could not be challenged as a matter of personal right by the traveling salesman. There is no insult to the salesman's speech rights intended or committed. If it were

(1996) (recognizing centrality of purpose in existing constitutional doctrine (whether a statute is "directed" at a constitutional right), and recognizing that "a government that punishes individuals because of their exercise of individual rights is . . . harmful in itself quite apart from the harm it causes," though arguing that the Court should pay more attention to "incidental burdens" than it currently does. My argument here would only be that citizens who are "incidentally burdened" have not been disrespected (unless perhaps by the executive who chooses to apply the statute to them), but would have to claim an autonomy-based personal right rather than a respect-right to complain of the effects of an otherwise proper statute. Current constitutional law seems to recognize the existence of autonomy-based rights, as well as respect-based rights, *see infra*. For the moment, I remain agnostic about the possibility of thinking of all constitutional rights as respect-rights.).

42. Romer v. Evans, 517 U.S. 620 (1996) (striking down "no special rights" law primarily because it was motivated by animus against homosexuals).

43. Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down a moment of silence statute because it was intended to put prayer in schools, even though other "secularly motivated" statutes might survive).

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applied to the Jehovah's Witness, however, that plaintiff would have a personal right to challenge the application of the statute to herself, because the police officer's decision to enforce it against her was disrespectful, even if the legislature's intent were innocent. (If the legislature's intent were not innocent, the statute should be struck down in its entirety;[44] but if the intent were innocent, the statute could be construed to apply only to commercial solicitation, barring other considerations.)[45] My analysis would, therefore, not account for all forms of overbreadth or third-party standing, and many of those cases would have to be characterized as cases in which standing is based on expedience or prudence, not on personal moral right.

V. ALL OR NOTHING?

If rights are understood as respect-practices, then are rights trumps that thwart the political will of even a supermajority? Or can rights, like interests, be compromised and balanced? Again, the analogy to tort law suggests that respect-practices much more govern the manner and intent of action than create substantive demands for certain goods or spheres of autonomy. So, the question is not whether respect-rights should be trumps or weights, but rather whether the government, in implementing its political will, has paid sufficient attention to the dignity of its citizens. Dignity cannot be traded off against policy, but, on the other hand, because it involves few demands for goods or choices, it usually creates no problematic absolute barrier to majority will.

To take one example, one has the right to be free from unreasonable searches and seizures, and searches and seizures must be done in a respectful manner. To use the tort analogy, governmental agents must have good reasons for invading privacy, and they must do so as respectfully as possible. Insults, threats, random rampaging, violence, or destructiveness during a search, "fishing expeditions," media-event searches, harassment, searching without good reason (i.e., without probable cause) would all be prohibited. Protecting the respect-right to privacy is not a matter of "trading" off dignity for public safety nor of allowing privacy to "trump" public safety, but of making sure that searches are justified and done respectfully. In judging questions of when a search is "justified" and done "respectfully," courts need not "weigh" public safety against privacy in some imaginary and abstract

44. Michael Dorf has highlighted the problem of determining what counts as "the statute" given the existence of omnibus appropriations bills, different drafting styles, etc. Dorf, *supra* note 29. These issues are problematic throughout the law. For example, similar problems are encountered in trying to determine when "double jeopardy" has been violated by the prosecution of overlapping statutes regulating the same conduct, or even what counts as an "element" of a crime versus an element of a defense or a sentence. I am afraid my analysis here will shed little light on these questions, although Dorf's proposed solution of placing the burden on the legislature to redraft the statute seems a sensible one.

45. *See* Sherwin, *supra* note 39, for some of those other considerations.

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metric, but can instead draw on analogies from other areas of case law and from the background norms that inform and fill out abstractions such as "probable cause" and "rude." Just as jury instructions often attempt to ground legal terms in everyday experience (as by defining "beyond reasonable doubt" as "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs"[46]), legal terms get their content from deeply rooted and taken-for-granted "ways of going on." Common law analysis recognizes the importance of keeping law tied to the concrete practices and intuitions of everyday life.

Respect-rights, then, are about relations between people, not possessions of individuals. Therefore, the usual distinctions between infringing and violating rights are inapt here—it is not as though the government "infringes" my dignity without "violating" it, as it can my liberty or my property.[47] Rather, the government can take away many of my goods and choices if it has good reason to do so, but it takes away my dignity only when it acts for poor reasons or acts wrongly. A dignitary violation is the result of an interaction with another; it is not a diminution of some good and, therefore, cannot be "compromised" or "balanced."

VI. POSTSCRIPT: CAVEATS REGARDING THE SCOPE OF RESPECT-RIGHTS

I duck the question whether respect-rights are the only sort of rights in the Constitution—though many constitutional rights are compatible with a respect-rights sort of analysis (equal protection, due process, prohibition on cruel and unusual punishment, for example, seem to be respect-type rights requiring the government to act with respect toward its citizens). I duck the question because it is not clear to me that free speech rights and free exercise rights are respect-rights in the same way. Because First Amendment rights are not bounded by respect, they look more like autonomy-rights—indeed, the regulation of disrespectful speech is hobbled by First Amendment principles.[48] Perhaps we can think of public dialogue as incorporating different respect-practices than our daily interactions with others have, precisely in order to insure that all voices are heard. But even that concession would leave out some speech currently protected (such as some hate speech) whose harm is precisely in its efficacy in marginalizing and silencing outsiders.

Once we determined, however, that a certain level of autonomy in speech was guaranteed by the Constitution, governmental actors might have a re-

46. I.E. Devitt & C. Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 12.10 (4th ed. 1992).

47. *See, e.g.*, Alan Gewirth, *Are There Any Absolute Rights?*, in THEORIES OF RIGHTS 91, 92 (Jeremy Waldron ed., 1984).

48. *See, e.g.*, Frederick Schauer, *Speaking of Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 178, 184–190 (Michael J. Meyer & W.A. Parent eds., 1992).

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spect-right-based duty not to intentionally violate these autonomy rights.[49] But these issues are beyond my concerns here, and for the moment at least, I leave the First Amendment to First Amendment scholars, in all its fascinating tail-biting contradiction.

I also leave to one side free exercise rights. These, too, seem to me to be autonomy-rights, not respect-rights (unless we interpret the Free Exercise Clause as an Equal Protection of Religion Clause, as in *Employment Div. Dept. of Human Resources v. Smith*,[50] to mean only that we do not treat religiously motivated practices any *worse* than any other conduct[51]). The commands of religion may transcend even the norms of respect, as many a religiously motivated war has shown. If we protect all religions—even those that believe in human hierarchy rather than human equality—then we again step outside the realm of respect-rights. Religions create their own communities; they do not necessarily follow the rules of the worldly ones, even at the outer rings of overlapping consensus and practice. A strong Free Exercise Clause could not be just a respect-right.

49. Though it is hard to see how a duty to respect the autonomy-right of a speaker would always supercede the duty to ensure that citizens are not disrespected by other citizens. This is why cases such as R.A.V. v. City of Saint Paul, 505 U.S. 377 (1992) (striking down a hate speech ordinance because it was directed at content), are hard to swallow.

50. 494 U.S. 872 (1990).

51. *See* Christopher L. Eisgruber and Lawrence G. Sager, *Religious Liberty and the Moral Structure of Constitutional Rights*, 6 LEGAL THEORY 253 (2000).

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