

A RESPONSE TO MICHAEL J. PERRY

Professor Perry makes two connected points. First, on moral issues that are widely controversial among Catholics and other Christians, Catholics may make political choices that are contrary to the position of the magisterium—provided that these Catholics are in respectful conversation with the teaching of the magisterium. Second, it is appropriate (morally and legally) for citizens of a liberal democracy to vote based on religious beliefs that lack plausible, independent secular grounding. This paper focuses on point one, while Professor Perry's books (past and future) emphasize point two.¹

I concur in part and dissent in part. On point one, I agree that, on contested moral questions, it is important for Catholics to engage in dialogue about moral norms among themselves and with the magisterium. Such dialogue and debate are properly the task of theology and theologians. It is because of point one, however, that I differ with point two. The ongoing disagreement among Catholics about sexuality and marriage reminds us why citizens of a liberal democracy should not impose their theological convictions upon their fellow citizens by force of law. On the theme of the convention, the current situation of American Catholics calls for a reduced public life.

The presentation recognizes (as it must) that some American Catholics disagree with some moral teachings of the magisterium. This is old news; since *Humanae Vitae* lay Catholics have dissented from some central tenets of Catholic sexual ethics. Professor Perry reports that today "many Catholics hold that same-sex marriage is not immoral and that the law should recognize same-sex marriage." They believe this for many reasons: development of doctrine; contemporary experience; historical shifts in knowledge; "new conditions"; "new depths of insight"; and a commitment to human well-being. Other Catholics—including the magisterium—"continue to defend the position that homosexual sexual conduct is always hostile to human well-being."

By now, on homosexuality as on contraception, every theologian in this Society is aware of all sides of the argument. Infallible—Historical. Absolute—Prima Facie. Intrinsically Disordered—Proportionate. Catholic disagreement is profound and ongoing.

¹See, e.g., Michael J. Perry, *Love and Power* (New York: Oxford Univ. Press, 1991).

Yet in such circumstances, Catholic bishops took to the public political arena, to support Proposition 22 here in California and to oppose legal rights for same-sex unions in Vermont.²

This is point two. Citizens of liberal democracies have reason to be suspicious when religious groups who do not agree internally about their moral norms propose those same standards externally as law for everyone. Such advocacy may suggest, first, that religious groups use the law to implement standards that they cannot enforce by other means. Second, and more serious in a democracy, it sends a message that Catholics expect non-Catholics to be governed by a moral code about which they themselves have doubts.³ I suspect that this is the perception to which philosophers like Richard Rorty respond. They wonder why a contested Catholic moral code is relevant to the civil law that governs non-Catholics.

Rorty and others may overreact to a public role for religion because they suspect bad faith in Catholic (and other religious) attempts to impose contested religious views on secular citizens. My own view on this subject is that good faith poses the real problem—the good faith of Catholics who inhabit the natural law position. Catholic theology, Catholic churches, Catholic schools and other institutions form Catholics in the worldview that morality is universal, that civil law is based on universal morality and that the same law applies to all humans and to all human experience. How can the Rortys banish us from the public square when (unlike scriptural fundamentalists) our arguments are always translated into the secular language of human well-being and of public reason?

Because the translation may fail. Natural law becomes Catholic law. We may confuse the particular Catholic perspective with the universal human one. Insisting that a moral position is universal does not make it so; serious dissent suggests that it is not. At a certain point, insistence that a contested norm is universal makes the argument implausible. In such circumstances, citizens may perceive that the Catholic argument is not about all human values, but is an assertion that Catholic values are the ones that everyone should follow.

When citizens of a liberal democracy decide what law should govern them regarding same-sex unions and other questions, their *starting point* should be the values of their legal tradition, not particular moral views. Such a debate about same-sex unions and equal benefits may have occurred in the Vermont courts and legislature. Here in California that discussion was preempted by a moral and religious one, in which the churches asserted their theological values in public terms. The moral debate blocked a full argument about the values of the law.

Legal disputes, including questions about same-sex unions, remind us that the publicly accessible values of Catholics differ from the values of a liberal democracy. Equal protection and privacy are fundamental values of the American

²California Proposition 22, Defense of Marriage Initiative (7 March 2000).

³See Leslie C. Griffin, "Good Catholics Should Be Rawlsian Liberals," *Southern California Interdisciplinary Law Journal* 5 (1997): 297-373.

constitutional tradition; they are not important to Catholicism.⁴ On legal and political questions, citizens of liberal democracies have the duty to consider the legal arguments *first*. The ethic of the citizen is to inhabit, not only her own moral tradition, but the moral tradition of the law that governs everyone. Under the First Amendment, our constitutional values should take priority over the morality of religious groups.

In the 1950s American Catholics believed that their religion should be religious truth for everyone. Today the question is moral, not religious, pluralism. Despite Vatican II, *Dignitatis Humanae*, and John Courtney Murray, it may be Leo XIII who is vindicated in the new millennium. Americanism and Catholicism may now be incompatible.⁵ The American commitment to liberty, equality, and privacy may be more than Rome can tolerate. As a matter of natural law, American Catholics may be unable to tolerate moral pluralism.

In such circumstances there is a huge task for American Catholic theology and theologians, but not, I think, for public theology. Our American marketplace of ideas has permitted extensive public discussion of Catholic views of abortion, homosexuality, and the death penalty, and why they should be law. Catholics have been less public and less candid about their assessment of constitutional morality, and whether they are permanent dissenters from the public consensus. Are there any Catholic theologians left who stand ready to defend the American proposition?

Law professor Perry is correct to call for dialogue among Catholics about contested moral questions. He has been too modest about his theological credentials and expertise; he has carefully and thoughtfully engaged the theologians and the theological literature. In public life, it is time for Catholics to exercise a similar modesty. I recommend that theologians return the compliment and engage him on his expertise in constitutional law. With Cardinal Bernardin, "we have much to learn from the world."⁶

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⁴U.S. Const. amend. XIV; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵For a discussion of the Americanism controversy, see Gerald P. Fogarty, *The Vatican and the American Hierarchy from 1870 to 1965* (Wilmington: Michael Glazier, 1985) 177-94.

⁶Joseph Cardinal Bernardin, "The Consistent Ethic of Life After *Webster*," *Origins* 19 (1990): 748.