MODERN MORAL REASONING AND EMERGING TRENDS IN CONSTITUTIONAL AND OTHER RIGHTS DECISION-MAKING AROUND THE WORLD

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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." 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 decision-making. Finally, Part IV will explain this emerging trend in terms of a modern explication for the rationality of non-egocentric moral reasoning.

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1. The classic use of this terminology was by Plato, who defined "the good as the highest object of knowledge" in The Republic, 3 PLATO, THE REPUBLIC OF PLATO 211 (Francis Macdonald Cornford trans., 1945), and by Aristotle, who defined the good as the aim of action in Nicomachean Ethics, ARISTOTLE, NICOMACHEAN ETHICS bk. I, at 1 (W.D. Ross trans., 1908) ("[E]very action and pursuit, is thought to aim at some good.").
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 seventeenth century,¹ Friedrich Nietzsche in the nineteenth century,² and Robert Nozick in the twentieth century,³ 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 eighteenth century, including David Hume, Frances Hutcheson, and Adam Smith, rejected Hobbes’s rational self-interest in favor of “moral sense” reasoning.⁵ As Adam Smith stated in The Theory of Moral Sentiments, an individual ought to act like an “impartial spectator,” giving equal weight to others’ interests as well as one’s own.⁶ This is a version of the basic biblical principle of “love of neighbor as thyself.”⁷ 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 connexion. . . . Before we can make any proper comparison of

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1. See 2 ENCYCLOPEDIA OF ETHICS 775 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed. 2001) (“[Hobbes’] argument is concerned to persuade people to institute and maintain a sovereign. Given Hobbes’s 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)).

2. Id. at 1238 (“The morality of an abundant, creative, and egoistic power that Nietzsche describes at the origin of human evaluation ultimately becomes the norm of his own ethics.” (discussing FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL (1886))).

3. Id. at 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.”).

4. See, e.g., GARRY WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 193–201 (1978) (discussing DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS (1751); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759)).


those opposite interests, we must change our position. We must view them, 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 connexion 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 the contempt and indignation of our brethren. 8

Immanuel Kant’s view of reason is that it compels an individual to “act as if the maxim of [his] action were to become by [his] will a universal law of nature,” 9 and for everyone “to treat others always as end-in-themselves, and not as a means to an end.” 10 This view of reason rejects egotism, and thus is in direct contrast to Nietzsche’s egocentricism. 11 Likewise, John Rawls’s principle that justice derives from individuals agreeing upon rules from “an original position,” where no individual will be favored, rejects Nozick’s egocentric approach. 12 A similar enterprise is John Finnis’s account of basic human goods, such as knowledge and friendship, leading to a rejection of egoism in favor of loving one’s neighbor as part of “integral human fulfillment.” 13 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. 14

8. Smith, supra note 6, at 221, 224–25 (cited in Kelso & Kelso, supra note 6, at 517–18).
10. See id. at 80 (“A human being, however, is not a thing and hence not something that can be used merely as a means, but must in all his actions always be regarded as an end in itself.”)
11. See Encyclopedia of Ethics, supra note 2, at 931 (“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)).
Moral reasoning based on religious traditions adopts 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.”

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 thyself.” 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 neighbour”… 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 of the one commandment about the good of the person, at the level of the many different goods which must not only treat people with concern and respect, but with equal concern and respect.”

15. See generally 1 ISAAC HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW 386 (1936) (“[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.’” (citing Leviticus 19:19, 19:33–34)) (cited in Amihai Radzyner, Between Scholar and Jurist: The Controversy over the Research of Jewish Law Using Comparative Methods at the Early Time of the Field, 23 J.L. & RELIGION 189, 208 (2007–2008)); Mark 12:31 (King James) (“Thou shalt love thy neighbour as thyself.”); 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”); 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.’”); Feisal Abdul Rauf, *What is Islamic 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.”); Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 13 (2008) (“For Jefferson, the fundamental precepts 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 S. WALTERS, RATIONAL INFIDELS: THE AMERICAN DEISTS 181 (1992))).
characterize his identity as a spiritual and bodily being in relationship with God...

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 Ten Commandments, should be interpreted to be consistent with the foundational moral principle of "love of neighbor as thyself." Interpretation of isolated biblical passages that leads to results inconsistent with "love of neighbor as thyself" should be rejected.

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." 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 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.”

Of course, this analysis is inconsistent with the basic biblical imperative that all individuals are created by God, and are 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.

A similar example in twentieth-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.

As the United States Supreme Court stated in *Loving v. Virginia*, such a view is “obviously an endorsement of the doctrine of White
Supremacy," 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, 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 no longer authoritative.

In sum, no major religious or secular tradition today attempts to defend the practices of the past supporting slavery, segregation, anti-miscegenation laws, or opposition to the cosmology of Galileo and Newton. On the other hand, there is still a split among some religious traditions with regard to some historical practices. The Catholic Church, for example, still clings to the historical refusal to ordain women. On the contrary, 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 Christ Jesus," which supports the ordination of women. The Catholic Church has sometimes used the fact that all of the twelve 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

22. Id. at 7 (citation omitted).
23. Mary Jo Weaver & David Brakke, Introduction to Christianity 108 (4th ed. 2008) (discussing theologians' reaction to Galileo's belief that the earth revolved around the sun).
24. See id. ("In 1979, Pope John Paul II suggested that the church may have made a mistake in condemning Galileo, and he appointed a commission to investigate the matter. Four years later, the commission ruled that Galileo should not have been condemned . . . .")
25. See, e.g., Kent Greenawalt, Teaching About Religion in the Public Schools, 18 J.L. & POL. 329, 343 (2002) (discussing how a literal reading of passages in the Bible about the sun moving around the earth are inconsistent with the modern "uncontroversial scientific view" that the "sun is the center" of our solar system, while acknowledging the view that the earth is the center reflects "a history of beliefs on that score.")
27. See id.; Galatians 3:28 (King James).
28. Haskins, supra note 26, at 122 ("Because Jesus chose only male disciples, the Church is adamant that Jesus meant for only men to be ordained into the priesthood.").
there being priests of other ethnicities. Furthermore, 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 Christ Jesus.”

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 attack.” Instead, the key in each case is consistency
with the foundational principle of “love of neighbor as thyselself.”

Under this view, all rational persons should agree on basic moral
principles, since these principles are not dependent upon the 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. 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 others 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
Pope John Paul II in the passage from Veritatis Splendor quoted above.

29. Galatians 3:28 (King James).
478 U.S. 186, 216 (1986) (Stevens, J., joined by Brennan & Marshall, JJ., dissenting)).
31. See John Paul II, supra note 16 and accompanying text.
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 international courts. These decisions are based on the ideal of “equal concern and respect,” and thus the fact that women deserve equal rights and liberties as men.

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 Grey has noted:

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.

32. DWORKIN, supra note 14, at 272–73.
33. KANT, supra note 9, at 80.
34. See supra note 15 and accompanying text.
[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.36

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 idea of 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.37

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

37. See, e.g., MINORITIES WITHIN MINORITIES (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005) (examining the questions raised by discrimination within minority groups); AYELAT SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS (2001) (recognizing the potential downsides of well-intentioned multicultural accommodation and recommending enhanced autonomy of cultural and religious minorities); THE RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1995) (collecting articles discussing emerging cultural conflicts and their implications for modern political theory).
Western European countries while attending school. The current consensus in European countries is that, in order to protect this next generation of women, such headwear 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.\(^{38}\)

Regarding the Catholic religion, the same reservations about equal concern and respect suggest that there should be reluctance to give equal concern and respect to the aspect of the Catholic religious tradition, discussed in Part II, that denies women the equal right to be a priest.\(^{39}\) More generally, although there should be toleration of different religious beliefs, those beliefs should only be tolerated to the extent that they 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 practices on the ground they do not reflect equal concern and respect is not only permissible, but necessary.\(^{40}\)

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, including homosexuality, contraception, masturbation, etc.\(^{41}\) 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. There are, however, 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’s moral philosophy, as well the traditional doctrines of most religions, view some of these practices as immoral. For example,


\(^{39}\) See supra notes 26–27 and accompanying text.


\(^{41}\) See, e.g., Victor C. Romero, An “Other” Christian Perspective on Lawrence v. Texas, 45 J. CATH. LEGAL STUD. 115 (2006) (comparing the Christian church’s traditional view of homosexuality in light of Lawrence to a view that focuses on concern and respect).
Finnis has concluded that homosexual acts “on a moral analysis are always objectively wrong, like other essentially masturbatory acts.”  

This is 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.”  

Finnis’s argument, however, has been rightly criticized as being based not on a principled extension of equal concern and respect for others, but rather as reflecting traditionally-held biases implicit in Finnis’s account of basic human goods.  

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, they are not advancing the common good of society.  

Of course, some people, and some religious traditions, argue against homosexuality, 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 reject.  

It is unclear what that plausible rational derivation would be. “Activities” do not have “purposes.” Only people have purposes, which people, themselves, define. If any particular individual’s collateral moral belief is that sexual activity should only be for procreation, then 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.  

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43. Id. at 437.  
45. See, e.g., Stacy Stockard, Is Abstinence Still the Best Policy? Modernizing Human Sexuality Instruction in Texas Public Schools, 10 TEX. TECH. ADMIN. L.J. 315, 327 (2008) (“Traditional Protestants, Catholics, Mormons, Jews, and Muslims consider premarital sex a sin, mostly because of the belief that sex is a sacred bond between a husband and a wife for the purpose of procreation.”).
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 Saint Thomas Aquinas's natural law theory, this view still forms part of modern Catholic natural law theory 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 phenomenon 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 was correct that individuals do have purposes for which they act. From the perspective of science, however, "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 was 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

47. See, e.g., Aaron Xavier Fellmeth, State Regulation of Sexuality in International Human Rights Law and Theory, 50 WM. & MARY L. REV. 797, 915 (2008) ("The Catechism of the Catholic Church, which has claimed that the predominant purpose of marriage is procreation at least since the Council of Trent in 1563, still states today: 'The deliberate use of the sexual faculty, for whatever reason, outside of marriage is essentially contrary to its purpose.'") (footnotes omitted).
48. See HERGENHAHN, supra note 46, at 52 (discussing Aristotle's final cause in reference to the idea that "the purpose ... of an acorn is to become an oak tree").
49. See id.
50. See id. ("Aristotle also saw the final cause, or purpose, of something as its essence.").
51. See id. at 54 ("Just as the ultimate goal of an acorn is to become an oak tree, the ultimate goal of humans is to engage in active reason.").
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 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 idea because such sexual 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 also naturally supports a right to access contraception as part of responsible family planning. Since there is no “procreative purpose” of sexual activity, sexual activity for the sake of intimacy and pleasure alone is not immoral. Therefore, rationally, behavior that aims to permit sexual activity without resulting pregnancy is moral. Such rights to family planning are increasingly reflected in constitutional doctrines around the world.53

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 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 . . .”54

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

53. 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).

54. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
of justice can be determined on their own, separate from a political process of deliberation by members in society. Proponents of deliberative democracy, rather, convey 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. Reflecting Richard Rorty’s embrace of ultimate value relativity, however, the proponents of deliberative democracy require each individual to reason in a way in which justifications for actions could be accepted by individuals having different value beliefs, which are viewed as equally appropriate for individuals to have.

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.

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 decision-making, as do Professors Christopher Eisgruber and James Fleming.

The proponents of deliberative democracy also reject a view of what they call “constitutional democracy,” where the underlying principles of that democracy reflect only the concrete customs and

56. Id. at 24–33.
58. GUTMANN & THOMPSON, supra note 55, at 26.
To this extent, proponents of deliberative democracy reflect the view that respect for others does not involve blind deference to multicultural traditions when those traditions deny equal concern and respect to others. To this extent, the conclusions reached by proponents of deliberative 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 byproduct 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 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.

In the economic realm, equal concern and respect supports a concern with free but fair trade in the context of international trade, including the General Agreement on Tariffs and Trade (GATT). 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 and negotiating power, of less industrialized economies and of commodity producer economies." Equal concern and respect also supports the broad notion of good faith bargaining, performance, and enforcement in the European and international contract law context, and supports the

60. See GUTMANN & THOMPSON, supra note 55, at 34.
61. See, e.g., SEYLA BENHABIB, THE CLAIMS OF CULTURE, at x (2002) (arguing that, although democratic equality and cultural distinctiveness can be complementary, if a choice must be made between the two it should be in favor of former).
62. See generally MONIQUE DEVEAUX, CULTURAL PLURALISM AND DILEMMAS OF JUSTICE 81 (2000) ("A more inclusive and deliberative account of democracy that recognizes the importance of cultural identity and membership for many citizens is so far the most promising approach to the dilemma of how to meet the demands of cultural minorities for greater recognition and accommodation.")
International Labor Organization's (ILO) Declaration of Principles "urg[ing] corporations to promote equal opportunity, collective bargaining and deal with other unfair [labor] practices."\(^6\)

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. In *The Wealth of Nations*, Smith used the concept of the "impartial spectator,"—a concept from his *The Theory of Moral Sentiments*,\(^6^7\) which preceded *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.\(^6^8\) Thus, competition would force prices toward their "natural price" through operation of objective supply and demand, not the self-interest of the merchant.\(^6^9\) Such an individual gives other individuals equal concern and respect, "view[ing] them, 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 connexion with either, and who judges with impartiality between us."\(^7^0\) As discussed in *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 behavior.\(^7^1\) 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.\(^7^2\)

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,


\(^{67}\) See SMITH, supra note 6.

\(^{68}\) See ADAM SMITH, WEALTH OF NATIONS 58–67 (Prometheus Books 1991) (1776).

\(^{69}\) See id.

\(^{70}\) SMITH, supra note 6, at 221 (cited in KELSO & KELSO, supra note 6, at 517).

\(^{71}\) See SMITH, supra note 67, at 352.

\(^{72}\) Id. 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).
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 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 caveat emptor. The impartial spectator calls to us when caveat emptor is used to legitimate an unfair bargain that "we value ourselves too much and other people too little." 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." 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 that help workers in those countries get equal rights, so that

73. See Robin Paul Malloy, Adam Smith in the Courts of the United States, 56 LOY. L. REV. 33, 54 (2010).
74. SMITH, supra note 6, at 225. See supra note 7 and accompanying text.
75. SMITH, supra note 67, at 65.
76. Id. at 104.
comparative productivity advantages will determine trade outcomes, not exploitation. Smith noted, in The Wealth of Nations, regarding 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 some of our manufactures into their country. There may be good policy in retaliations of this kind.

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 let the punishment fit the crime—/ The punishment fit the crime." 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.

This principle of proportionality sensibly applies not only to criminal punishment, but also 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 concerns that support the regulation.

79. See Lance Compa & Jeffrey S. Vogt, Labor Rights in the Generalized System of Preferences: A 20-Year Review, 22 COMP. LAB. L. & POL'Y J. 199, 201–02 (2001) ("Further, lower labor costs should not result from the deliberate suppression of wages and working conditions below levels that worker's productivity should yield to them, while small economic and political elite reaps the benefits of their labor. . . . Moreover, they must have a voice in shaping economic development policies and social protection through trade unions and political participation.").

80. Smith, supra note 67, at 363–64.


82. See Harmelin v. Michigan, 501 U.S. 957, 997–1001 (1991) (Kennedy, J., joined by O'Connor & Souter, JJ., concurring) (maintaining that the Eighth Amendment Cruel and Unusual Punishment Clause prohibits punishments that are "grossly disproportionate" to the crime); Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 COLUM. J. TRANSNAT'L L. 72, 75 n.5 (2008) ("In criminal law, the severity of 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.").
The notion of proportionality to measure the constitutionality of government action is an emerging concept in the world in a number of contexts.\textsuperscript{83}

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.\textsuperscript{84} Article 51 makes an exception when force is used as a countermeasure to an attack.\textsuperscript{85} It has been noted that, “[i]n 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{86}

The principle of proportionality also has been applied to a state’s choice of weapons and tactics under the Hague and Geneva Conventions.\textsuperscript{87} It has also been applied in the context of disproportionate actions against individuals that may constitute war crimes, crimes against humanity, or violations of human rights.\textsuperscript{88} For example, regarding the jurisprudence of personal criminal liability for violations of the law of armed conflict, it has been noted that “the general lawfulness of destroying the life or limb of an enemy combatant is restricted by the principles of necessity and proportionality.”\textsuperscript{89}

The principle of proportionality can also apply to nonmilitary countermeasures taken by one state against another.\textsuperscript{90} For example, while a state that unlawfully transgresses against another is obliged to make restitution, the developing doctrine is that “restitution may not impose a burden ‘out of all proportion to the benefit.’”\textsuperscript{91} The principle


\textsuperscript{84} See U.N. Charter art. 2, para. 4. (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

\textsuperscript{85} See U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . .”); Franck, supra note 83, at 719–20.

\textsuperscript{86} Franck, supra note 83, at 720.

\textsuperscript{87} Id. at 723–34.

\textsuperscript{88} Id. at 734–37.


\textsuperscript{90} Franck, supra note 83, at 738–42.

\textsuperscript{91} Id. at 738 (quoting Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 35(b), in Report of the International Law Commission on the Work of Its
of proportionality also applies to countermeasures taken in trade disputes challenged before a World Trade Organization panel under the GATT; and to cases involving state action against individuals claimed to infringe disproportionately on 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 other, 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. Although 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

92. Id. at 742–52.
93. Id. at 752–62.
94. See., e.g., Isabel Kershner, Netanyahu Offers Conciliation, but Not Concessions, N.Y. TIMES, Apr. 1, 2009 at A13 (“Mr. Netanyahu said his new government would ‘work toward peace on three tracks: economic, security and political.’”).
95. Naturally, attempts to coerce outcomes by terrorist activity or military coercion, whether by individuals or state entities, do not constitute legitimate moral dialogue. Similarly, appeals to religious dogmas not shared by others do not reflect a commitment to treating other individuals, including individuals of other religions, with equal concern and respect.

Equally, appeal to the fact that, at some time in the past, the land was held by ancestral kings under a non-democratic, monarchial form of government does not provide moral support for territorial occupation today. This is so because the fact of an ancient monarchial rule says nothing about giving currently-existing individuals equal concern and respect in determining how they should be governed today. For example, the reign of King Henry IV of the Holy Roman Empire in the eleventh century over much of central Europe provides no moral support for the Nazi concept in the 1930s of a “Greater Germany,” the German annexation (“anschluss”) of Austria, or the policy of occupying Poland on grounds of living space (“lebensraum”). The fact that ancient monarchies of King Solomon and King David presided over the ancient lands of Palestine similarly provides no moral support today for the
security arise. That debate can happen at both official and unofficial levels, by individuals or groups. 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 decision-making. 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 rather 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 eighteenth century, such as David Hume, Frances Hutcheson, and Adam Smith, rejected Hobbes’s rational self-interest in favor of “moral sense” reasoning. Because this “moral sense” reasoning was not explicitly grounded in a foundational

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96. See supra notes 2–16 and accompanying text.
97. See supra note 5 and accompanying text.

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moral principle of “equal concern and respect,” however, any individual 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,” which 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 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’s 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

98. RONALD DWORdKIN, 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.”).
99. See supra note 30 and accompanying text.
100. RAWLS, supra note 12, at 17–22.
101. Id.
103. FINNIS, supra note 13, at 59–126 (discussing life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion as the seven basic human goods, and a coherent plan of life, no arbitrary preferences amongst values, no arbitrary preferences amongst persons, detachment and commitment, the (limited) relevance of consequences: efficiency, within reason, respect for every basic value in every act, the
the product of Finnis's 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-egotistic 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-egotistic 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 filter through whichever prism they have constructed for affirming this moral principle, whether Dworkin's "best justification"; Rawls's "original position"; or Kant's "principle of universalizability," which present 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's "original position"—the authors disagree on these other dilemmas. Each author then attempts to convince the reader that the author's prism is correct, 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 must be said about these attempts at trying to provide non-egotistic principles of moral judgment. First, given our contemporary understanding of modern physics, no proposed scheme of moral justification—whether Dworkin's "best justification"; Rawls's "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."

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requirements of the common good, following one's conscience, and morality as the nine aspects of practical reasonableness).

104. See KANT, supra note 9, at 73.
This is true because reason, or rational thought, is thought that 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.106 To be rational in an Einsteinian universe, therefore, requires rejection of an egotistic preference for one’s own frame of reference.107

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 four to seven are at a cognitive developmental stage called preoperational thought.108 In this stage, the child is able to represent objects and events symbolically, and not just act towards them, but also think about them.109 The child’s thought, however, is characterized by egocentricism.110 The child finds it difficult to understand how anyone can see things from a point of view different than the child’s own view.111 As has been noted, “the 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.”112 At this stage, “[t]he 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.”113

107. Id.
110. See id. at 160 (“[I]ntuitive thought, which is dominant up to the end of early childhood (7 years) . . . always evinces a distorting egocentricity . . . .”).
111. JEAN PIAGET, THE CHILD’S CONCEPTION OF THE WORLD 33 (Joan Tomlinson & Andrew Tomlinson trans., Littlefield, Adams & Co. 1972) (1929) (“So long as the child supposes that every one necessarily thinks like himself, he will not spontaneously seek to convince others, nor to accept common truths, nor, above all, to prove or test his opinions.”).
112. Id.
Moral philosophers during the seventeenth- to nineteenth-century Age of Enlightenment, operating in a Newtonian world, typically began their analysis with a similar initial assumption that rational thought was self-interested.\(^1\) They then either affirmed that assumption as a principle of morality, like Hobbes and Nietzsche, or created a prism to alter that principle.\(^2\) 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.\(^3\) 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 that emerged from Jean Piaget's studies of cognitive development: formal operational thought. The defining feature of formal operational logic is the ability to put oneself fully 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.\(^4\) As Piaget phrased it, "the child, after having regarded his own point of view 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."\(^5\) 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."\(^6\)

This understanding, that rational thought is non-egocentric, and based on the principle of equal concern and respect, combined with the

\(^{114}\) ENCYCLOPEDIA OF ETHICS, supra note 2, at 775, 1238.

\(^{115}\) Id.

\(^{116}\) Id.; see also KANT, supra note 9, at 73.


\(^{118}\) JEAN PIAGET, THE CHILD'S CONCEPTION OF PHYSICAL CAUSALITY 247 (Marjorie Gabain trans., The Humanities Press, Inc. 1951) (1930).

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 thyself,” 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 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). In modern terminology, this view supports “five faces of freedom,” defined as “self-individuating liberalism” of personal development and expression, combined with the “homeostatic-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.

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.” A focus on reason will be based on the demands of rational thought alone, and will understand that although reality, and thus rational thought, is the same for all individuals, there is no fixed “human nature” applicable to all individuals equally given each individual’s unique combination of DNA. Furthermore, 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. The better approach, however, 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

120. On this point regarding “possessive individualism” and “altruism,” see Kelso, supra note 106, at 852–55.


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, such as advanced cognitive thought, are more “human” than other aspects, such as 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 must defend why that philosopher’s prism, despite going beyond the rational principle of “love of neighbor as thyself,” 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 “pi,” which is an irrational number not capable of fractional representation.

In the twentieth century, Gödel’s Theorem has provided the corresponding mathematical proof of the impossibility of rationally justifying any particular moral prism. Gödel’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. Gödel’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

124. MORRIS KLINE, MATHEMATICS IN WESTERN CULTURE 50 (1953).
125. Id.
126. Id. at 51.
127. See DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 17 (Vintage Books 1980 (1979) (noting that Gödel’s Theorem proves that “[a]ll consistent axiomatic formulations . . . include undecidable propositions.”).
128. The proof of Gödel’s Theorem involves showing that no system of propositions can justify the meta-proposition on which it is based (such as because something is, therefore it ought to be). Hofstadter notes: “It is in the nature of any formalization of number theory that its metalanguage is embedded within it.” Id. at 270. It is this fact, which Hofstadter then phrases as “to arithmoquine some formula which itself is talking about the notion of arithmoquining!” id. at 446, that is central to proving the incompleteness of any system of propositions, including moral propositions. See Kelso, supra note 106, at 831–33.
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 Gödel’s Theorem.\textsuperscript{129}

Despite the view of some to the contrary, Gödel’s Theorem does not prove that agreements on what thought is rational are impossible.\textsuperscript{130} It is possible to determine the contours of rational thought. Gödel’s Theorem does caution, however, that it is impossible to prove that rational thought is moral.\textsuperscript{131} The most one can say is that any moral system different than the one imposed by rational thought is necessarily irrational. Furthermore, because of Gödel’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 thyself,” 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 reject, as long as those principles do not conflict with the principle of “love of neighbor as thyself.”

\textsuperscript{129} See Kelso, supra note 106, at 832 (“What Gödel’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”].”); Hare, supra note 105, at 16 (“Hume’s Law (‘No “ought” from an “is”’)”) (footnote omitted) (discussing David Hume, A Treatise of Human Nature (1739)). For two entertaining descriptions of this problem, see Louis Michael Seidman, This Essay is Brilliant/This Essay is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory, 46 UCLA L. REV. 501, 502–06, 538–75 (1998); and Arthur Allen Leff, Unspeakable Ethics, Unnatural Law, 1979 DUKE L.J. 1229, 1249 (1979).

\textsuperscript{130} For one such view that Gödel’s Theorem proves that rational thought is impossible, see John M. Farago, Intractable Cases: The Role of Uncertainty in the Concept of Law, 55 N.Y.U. L. REV. 195, 205–06, 225–27 (1980).

\textsuperscript{131} As discussed at Kelso, supra note 106, at 833–36, Gödel’s theorem places no limits on the ability of a system of propositions to be complete and consistent absent a metaphysical reference problem. Thus, one cannot make the category jump from “is” to “ought,” but one can develop a complete and consistent system of what “is.” Id. at 834–35 (“Once reality is assumed to exist, however, Gödel’s theorem places no limits on the ability of a system of legal rules or principles to be complete and consistent. A rational ordering of propositions could provide the basis for a natural law theory in such a world.”) (footnotes omitted).
This view mandates tolerance of other individuals' practices to the extent they do not violate the principle of "love of neighbor as thyself," 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. It has also discussed the emerging trend among constitutional courts and other actors around the world to adopt non-egocentric thought as the basis for moral and legal decision-making. 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 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."

132. See Felix S. Cohen, Field Theory and Judicial Logic, 59 YALE L.J. 238, 271 (1950) ("The true significance of Einstein's general theory of relativity . . . is not that it calls attention to the long-recognized diversity of physical perspectives, but that it makes possible a translation from any perspective into any other perspective."); id. at 243 ("The real importance of Einstein is his development of formulae by which many different accounts of the same physical event may be correlated with each other, so that from the position and direction of an event in any physical system we can calculate its position and direction in any other system.") (footnote omitted).