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EDITORIAL

The material in this issue of the *Journal of Law and Religion*—five articles, a book review roundtable, and two book reviews—covers an impressive array of topics. I want to focus here on the book review roundtable.

We editors consider the journal's book review roundtables, which consist of several relatively short commentaries on a single book, and book-related symposia, which consist of multiple long-form treatments of one or more of an author's books, among the most important ways the journal serves those who are eager to stay current with, and engaged by, the very best contemporary "law and religion" scholarship.

The first issue of the *Journal of Law and Religion* published after the journal relocated from Hamline University School of Law[1] to Emory University's Center for the Study of Law and Religion bears the date February 2014.[2] Later that year, the journal published a symposium on Ronald Dworkin's book, *Religion without God*.[3] The Dworkin symposium was followed a year later by a roundtable on Nicholas Wolterstorff's book, *The Mighty and the Almighty: An Essay in Political Theology*.[4] The roundtable in this issue of the journal will be followed next year by a symposium on four books by Cathleen Kaveny.[5]

The book that is the focus of this issue's roundtable—Kathleen Brady's *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence*[6]—is one of the most

1 Now known as Mitchell Hamline School of Law. See https://mitchellhamline.edu/.

2 The editors of the journal commented on the move from Hamline to Emory in the "Editorial Preface" to the February 2014 issue: *Journal of Law and Religion* 29, no. 1 (2014): 1–4. The journal was previously published by the Editorial Board of the nonprofit Council on Religion and Law (formerly named Journal of Law and Religion, Inc.) and Hamline.

3 See Ronald Dworkin, *Religion without God* (Cambridge, MA: Harvard University Press, 2013); "Ronald Dworkin's *Religion without God* and the Challenge of Theistic Epistemology," *Journal of Law and Religion* 29, no. 3 (2014): 510–47.

4 See Nicholas Wolterstorff, *The Mighty and the Almighty: An Essay in Political Theology* (New York: Cambridge University Press, 2012); "Polycarp's Dilemma: A Discussion of Nicholas Wolterstorff's *The Mighty and the Almighty*," *Journal of Law and Religion* 30, no. 3 (2015): 496–517.

5 The four books by Cathleen Kaveny are *Law's Virtues: Fostering Autonomy and Solidarity in American Society* (Washington, DC: Georgetown University Press, 2012); *A Culture of Engagement: Law, Religion, and Morality* (Washington, DC: Georgetown University Press, 2016); *Prophecy without Contempt: Religious Discourse in the Public Square* (Cambridge, MA: Harvard University Press, 2016); *Ethics at the Edges of Law: Christian Moralists and American Legal Thought* (New York: Oxford University Press, 2017).

While still at Hamline Law, the *Journal of Law and Religion* published a symposium on my book, *The Idea of Human Rights: Four Inquiries* (New York: Oxford University Press, 1998). See "Perry Symposium," *Journal of Law and Religion* 14, no. 1 (1999-2000): 1–163.

6 See Kathleen A. Brady, *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence* (New York: Cambridge University Press, 2015). Brady is a fellow at the Center for the Study of Law and Religion. Her book appears in the Law and Christianity series of books being published by Cambridge University Press, which also publishes the *Journal of Law and Religion*. The principal editor of the Law and Christianity series is John Witte, who is director of the Center for the Study of Law and Religion. The commentaries on Brady's book published in this issue of the journal were first presented at a workshop on Brady's book organized by Richard Garnett and held at Notre Dame Law School.

impressive contributions to Religion Clause scholarship that have been published in the last twenty-five years. On the book's back cover, Andrew Koppelman of Northwestern Law School states that Brady's book "is the best account [of how the law's special treatment of religion became a central issue for First Amendment scholars and others], and offers a bold and original response." Koppelman is echoed on the back cover by Steven Shiffrin of Cornell Law School, who commends Brady for her "rigorous, perceptive, and fair-minded analysis," which, says Shiffrin, "is by far the best guide to [the ongoing debate over religious liberty versus religious equality in American constitutional law]." In my judgment, this praise is well-deserved.

Of course, praise for a book, even well-deserved praise, does not entail that the book is immune to serious challenge. Each of the nine contributors to the roundtable—Thomas Berg, Gerard Bradley, Angela Carmella, Marc DeGirolami, Frederick Gedicks, Anna Moreland, Michael Moreland, Vincent Muñoz, and John Witte—articulate one or more concerns about some of what Brady argues, or about some of what her argument presupposes. Brady, who introduces the roundtable with a precis of her book, concludes the roundtable with a brief response to the nine contributors.

Let me seize the opportunity to state, briefly, a concern I myself have about a central aspect of Brady's argument.

Consider the matter of conscientious objection to doing what a law commands or to refraining from doing what a law forbids: Should government provide stronger protection for conscientious objection that is religiously based than for conscientious objection that is not religiously based? (Let us call the former "religious conscientious objection" and the latter, "secular conscientious objection.") Brady argues in her book that although government should provide some protection for secular conscientious objection, it should provide greater—stronger—protection for religious conscientious objection. More precisely, Brady argues that although government should bear a prima facie obligation to exempt one from the legal duty to comply with a law if one conscientiously objects to complying, government should bear a stronger such obligation—the prima facie right to a conscience-protecting exemption should be "more robust"—if the conscientious objector "has shown a substantial burden on a practice essential to their relationship with the divine however they understand this relationship."[7]

Brady fully understands that any *religious* argument for privileging religious conscientious objection relative to secular conscientious objection is problematic. She quotes, with approval, Douglas Laycock: "[E]xplanations of religious liberty based on beliefs about religion cannot possibly persuade persons who do not hold the same religious beliefs, and so these explanations have little ability to explain or maintain support for religious liberty."[8] Accordingly, Brady emphasizes that her argument in support of "more robust" protection for religious conscientious objection than for secular conscientious objection is not a sectarian argument; it is not an argument "based on beliefs about religion [that] cannot possibly persuade persons who do not hold the same religious beliefs" and that therefore have "little ability to explain or maintain support for religious liberty." And it is certainly true that one need not accept any religious (or otherwise sectarian) premise in order to conclude, with Brady, that it is admirably humane for government to go out of its way—assuming that, all things considered, government can afford to do so—to avoid imposing suffering on religious believers, and to go even further out of its way if the suffering would be especially severe.

7 Brady, *Distinctiveness of Religion*, 250; see also ibid., 222, 289.

8 Ibid., 56, quoting Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues* 7, no. 2 (1996): 313–56, at 316. Brady also quotes, with approval, this passage by Laycock: "Theistic arguments for religious liberty can neither persuade nontheists nor speak equally to all varieties of theistic religious experience." Ibid., 27n63, quoting Laycock, "Religious Liberty as Liberty," 324.

However, there is no reason to suppose that the suffering experienced by someone complying with a law while believing that her compliance impairs her relationship with the divine is necessarily more severe than the suffering experienced by someone complying with a law while believing that her compliance impairs or even destroys her moral integrity. Brady acknowledges the point: "Nonreligious views can be just as important to persons who hold them as religious views, just as sensitive, just as powerful. … The convictions of secular moral conscience seem just as deep, just as central to self-identity[, as the convictions of religious conscience.]"[9] Indeed, Brady develops the point at length, and powerfully, in a section of her book titled "The Difficulty of Distinguishing Religion and Nonreligion."[10]

Why, then, does Brady argue "that we limit a strongly protective right to situations where the government has burdened practices that are essential to the believer's relationship to the divine however the believer understands that connection"?[11] Why, that is, does she argue that religious conscientious objection merits stronger protection than secular conscientious objection?

Brady acknowledges that there "are some belief systems that nearly everyone would identify as religious that do not envision liberation or fulfillment in terms of a divine-human connection."[12] She then explains:

> [T]he right of religious exemption I defend in this book should extend to these belief systems. There are not many traditions like this … However, excluding [such] a tradition … would raise serious concerns about religious equality as well as administrative problems for courts. Of course, where a belief system does not envision human liberation or fulfillment in terms of a divine-human connection of some sort, we cannot require [in order to qualify for an exemption] a burden on a practice that is essential to such a connection. The appropriate question in these circumstances is whether the practice at issue is essential to human liberation, fulfillment, or salvation as the claimant understands it.[13]

Now, imagine two conscientious objectors: one who is religious but does not "envision human liberation or fulfillment in terms of a divine-human connection of some sort," and one who is not religious. It is difficult to the point of impossible—or so it seems to me—for a truly nonsectarian argument to succeed in justifying the claim that the "strongly protective right" of exemption Brady defends in her book should be extended to the former objector but not to the latter.

Unlike Brady, most scholars who address the issue agree that secular conscientious objection merits equal protection with religious conscientious objection. They agree, that is, that as a matter

9 Brady, *Distinctiveness of Religion*, 2, 3.

10 Ibid., 57–69. Brady writes, at 102,

> scholars seeking to defend special treatment for religion under the First Amendment have often emphasized religion's special importance as a justification for its special protection. They have argued both that religious beliefs are especially important to those who hold them and that religion is itself an especially important and valuable activity. However, none of these arguments have been broadly persuasive. The problem with the first argument has been that nonreligious beliefs can be very important to their adherents as well. They can be deeply and intensely held just like religious beliefs, and they too can have compelling force. Nonbelievers can also experience great psychic harm and suffering when forced to violate their consciences. The problem with the second argument is that it has had little force for nonbelievers who reject the existence or accessibility of a divine reality and find meaning and value in nonreligious sources.

11 Ibid., 230.

12 Ibid.

13 Ibid.

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of sound political morality, government's prima facie obligation to accommodate those who conscientiously object to complying with a law is no less strong when the conscientious objection is not religiously based than when it is religiously based.[14]

This disagreement about whether, as a matter of sound political morality, secular conscientious objection merits equal protection is not a mere academic debate. What is at stake is whether the global political morality of human rights gets it right—whether, that is, the global political morality of human rights is on the right side of the controversy.

The human right to religious freedom that is a core constituent of the global political morality of human rights is a right not just to religious freedom; it is a right to moral freedom as well as to religious freedom. The right—the canonical articulation of which is Article 18 of the International Covenant on Civil and Political Rights—protects *both* the freedom to live one's life in accord with one's religious convictions and commitments, including one's religiously based moral convictions and commitments, *and* the freedom to live one's life in accord with one's nonreligious moral convictions and commitments. Although some human rights, such as the right not to be tortured, are absolute in the sense that they afford unconditional protection, the right to religious and moral freedom appropriately affords only conditional (prima facie) protection. A law or other policy that *implicates* the right by interfering with conduct protected by the right *violates* the right if, and only if, this condition is not satisfied. The law is the least restrictive way to serve a legitimate government interest, and the importance of what the law achieves is so weighty that it warrants the particular interference at issue. I discuss all this at length in my recent book, *A Global Political Morality*; in particular, I explain why the human right to religious and moral freedom not only appropriately protects secular as well as religious conscientious objection but also appropriately protects secular conscientious objection *as strongly as it protects religious conscientious objection*.[15] In giving an affirmative answer to the question whether secular conscientious objection merits equal protection, the global political morality of human rights gets it right.

Whatever concerns one might have about Kathleen Brady's *The Distinctiveness of Religion in American Law*, the book is a tour de force and, as such, required reading for anyone seriously interested in the very best Religion Clause scholarship. The roundtable on the book in this issue of the *Journal of Law and Religion* is invaluable complementary reading.

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14 In her book, Brady cites several of the most important scholarly works supporting that position. See Brady, *Distinctiveness of Religion*, 4n5. In my recent book, *A Global Political Morality*, I cite several more such works. Michael J. Perry, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism* 71–74 (New York: Cambridge University Press, 2017). Brian Leiter has gone so far as to write that "there may really be no serious argument on the other side"—no serious argument, that is, for not treating secular conscientious objection as on a par with religious conscientious objection. See Brian Leiter, "Why Tolerate Religion, Again? A Reply to Michael McConnell," University of Chicago Public Law Working Paper No. 580, May 8, 2016, http://dx.doi.org/10.2139/ssrn.2777208. (The quoted language appears in the final paragraph of Leiter's reply to McConnell.)

15 Perry, *A Global Political Morality*, 63–87. See also Michael J. Perry, "On the Constitutionality and Political Morality of Granting Conscience-Protecting Exemptions Only to Religious Beliefs," in *Religious Exemptions*, ed. Kevin Vallier and Michael Weber (Oxford: Oxford University Press, 2018), 21–36.