BOOK REVIEW

LIBERALISM'S ERRANT THEODICY

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Theologians and religion scholars use the term "theodicy" to refer to an argument that attempts to reconcile God's omnipotence, omniscience, and goodness with the existence of evil. One of the best-known forms of theodicy invokes free will. Evil exists, the argument goes, as a byproduct of human beings' freedom to make important life-defining choices for themselves.[1]

A central argument of *Ordered Liberty*, the insightful and powerful book by James E. Fleming and Linda C. McClain,[2] appears to invoke a kind of secular theodicy. Fleming and McClain respond to a common set of charges against liberal individual rights made by civic republicans, communitarians, and their fellow travelers. Liberalism, the critics contend, elevates rights over responsibilities and therefore undermines the ability of government to inculcate community-minded virtue in citizens.[3] Not true, Fleming and McClain respond. Liberalism does concern itself with and foster responsibility, albeit of a somewhat different sort from the critics' notion of the concept.[4]

Whereas the critics wish to see individuals held responsible to the community – what Fleming and McClain call "responsibility as accountability" – liberals argue that rights are premised on a conception of "responsibility as autonomy or self-government."[5] Fleming and McClain argue that a legal zone

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[1] *See, e.g.*, SAINT AUGUSTINE, THE CONFESSIONS OF SAINT AUGUSTINE 122 (Edward B. Pusey trans., Random House 1999) (397) ("[F]reewill was the cause of our doing ill . . . ."); THOMAS CHUBB, A VINDICATION OF GOD'S MORAL CHARACTER, AS TO THE CAUSE AND ORIGIN OF EVIL, BOTH NATURAL AND MORAL 24 (1726) ("As to that which properly constitutes vice, or moral evil; this is occasioned by that liberty and freedom of action, which God, by constituting us moral agents, has rendered us capable of.").

[2] JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES (2013).

[3] *Id.* at 1 ("Liberal theories of rights, critics argue, exalt rights over responsibilities, licensing irresponsible conduct and spawning frivolous assertions of rights at the expense of encouraging personal responsibility and responsibility to community.").

[4] *Id.* at 4-7, 18-80 (describing a model of liberalism in which rights and responsibilities are both taken seriously).

[5] *Id.* at 6 ("Communitarian critics of rights like [Mary Ann] Glendon and liberal

of individual autonomy permits each of us to deliberate about our own conception of the good. Or, as the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[6] which figures prominently in *Ordered Liberty*, states: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[7]

The theodicean character of this claim should be apparent. In spiritual matters, the existence of free will excuses God for evil caused by humans, but the argument only works if, in turn, free will serves some vital function. It does, the argument goes, because a deterministic universe – one in which the Creator has scripted each of our actions – would leave no room for autonomy, and thereby leave no room for persons, only automatons.[8] Likewise in the secular realm, for the *Casey* Court as well as for some liberal theorists,[9] a government that too tightly circumscribes our options thereby renders us unable to "define the attributes of personhood."[10]

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champions of rights like [Ronald] Dworkin, we explain, emphasize two different, although related, meanings of responsibility: *responsibility as accountability* to community versus *responsibility as autonomy* or self-government, respectively."); *id.* at 51 (contrasting again "*responsibility as accountability* and *responsibility as autonomy*").

[6] 505 U.S. 833 (1992).

[7] *Id.* at 851.

[8] *See* C.S. LEWIS, MERE CHRISTIANITY 48 (HarperCollins 2001) (1952) ("A world of automata – of creatures that worked like machines – would hardly be worth creating."); *see also* ETIENNE GILSON, THE CHRISTIAN PHILOSOPHY OF SAINT AUGUSTINE 146-47 (L.E.M. Lynch trans., 1960) (arguing that free will is a "necessary condition for the goodness and happiness brought about by its good use").

[9] *See* FLEMING & MCCLAIN, *supra* note 2, at 54 (quoting *Casey*, 505 U.S. at 851) (quoting the statement in *Casey* that "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."); *id.* (citing JOHN LOCKE, A LETTER CONCERNING TOLERATION (Patrick Romanell ed., Bobbs-Merrill Co., Inc. 1955) (1689)) ("This anti-compulsion rationale in constitutional law resonates with John Locke's famous plea for toleration on the ground that compulsion corrupts belief or choice."); JOHN STUART MILL, ON LIBERTY 104 (Edward Alexander ed., Broadview Press 1999) (1859) ("He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation.").

[10] *Casey*, 505 U.S. at 851. In response to an abridged version of this Review Essay, *see* Michael C. Dorf, *Liberalism's Errant Theodicy*, BALKINIZATION (Feb. 20, 2013), http://balkin.blogspot.com/2013/02/liberalisms-errant-theodicy.html, McClain and Fleming denied that they intended to make a theodicean argument. *See* Linda McClain & Jim Fleming, Ordered Liberty*: Response to Michael Dorf*, BALKINIZATION (Feb. 21, 2013), http://balkin.blogspot.com/2013/02/ordered-liberty-response-to-michael-dorf.html. They have reprinted their response, plus footnotes, in the pages of this journal. *See* James E. Fleming & Linda C. McClain, Ordered Liberty*: Response to Michael Dorf*, 93 B.U. L. REV. 1481 (2013). Part of their response answers a claim I do not make. They write that they do not attempt "to derive all of our basic liberties or constitutional rights from one basic principle, such as autonomy

The religious version of the free-will argument has an important limitation: much suffering cannot fairly be attributed to the choices and actions of human beings. Diseases, accidents, and natural disasters are features of Creation itself, and efforts to explain them must focus on the character of the Creator rather than the character of His Creation. I have no expertise in theology, so I will not offer anything resembling a comprehensive analysis of the theodicean arguments that do not rely on human free will. In the interest of full disclosure, however, I will say that I share Voltaire's skepticism toward any effort to rationalize suffering. In *Candide*, the character Pangloss, whose views parody those of the German philosopher Gottfried Leibniz, fatuously contends that we live in the "best of all possible worlds," even in the face of the Lisbon earthquake and other calamities.[11]

Theodicean liberalism need not contend with the likes of earthquakes or plagues, but it does face the challenges that the argument from free will faces in its own domain. Those challenges are substantial. Is free will really so valuable as to justify the suffering that apparently comes in its wake? And even if we grant that some measure of freedom is essential to personhood or

." Fleming & McClain, *supra* at 1483. But in charging Fleming and McClain with making a theodicean argument, I do not claim that they attempt to derive any rights *entirely* from the principle of autonomy. I simply contend that taken at face value, their book endorses the theodicean argument as one of the bases for grounding rights. For example, after quoting the *Casey* language also quoted in text here, and connecting it to "Locke's famous plea for toleration on the ground that compulsion corrupts belief or choice," Fleming and McClain characterize the *Casey* language as sounding in their own principle of "responsibility as autonomy." FLEMING & MCCLAIN, *supra* note 2, at 54. Accordingly, I stand by my claim that their book is most naturally read as including a theodicean argument, although I acknowledge that Fleming and McClain appear to have made the argument unintentionally. More important, I am gratified that, upon reflection inspired by my commentary, Fleming and McClain have decided to disavow the theodicean argument unequivocally. Now that they have made clear that they do not endorse the theodicean argument, I am happy to add their voices to the resistance I offer here against the writings of other liberals who do commit the theodicean error. *See* Fleming & McClain, *supra* at 1484 (describing theodicean writings by Ronald Dworkin).

[11] VOLTAIRE, CANDIDE, OR OPTIMISM 17 (Burton Raffel trans., Yale Univ. Press 2005) (1759) ("'I most humbly beg Your Excellency's pardon,' said Pangloss even more politely, 'since the fall of man and the resulting curse are necessary components of the best of all possible worlds.'"); Carolyn Korsmeyer, *Is Pangloss Leibniz?*, 1 PHIL. & LIT. 201, 203 (1977) ("Leibniz's characteristic principles (such as . . . 'best of all possible worlds') . . . are bandied about with enough frequency to keep the reader constantly reminded that the events of the story are intended to present a continual challenge to philosophical optimism."). In fairness, it should be said that Leibniz did not argue that we live in the best of all *conceivable* worlds, only that we live in the best of all *possible* worlds. H.D. Traill, *Et Cetera* (1888), *reprinted in* ENG. ILLUSTRATED MAG., 1887-1888, at 576. We can conceive of worlds that, for reasons beyond our understanding, cannot possibly exist. Reconciling *that* proposition with Divine omnipotence would call for another layer of theodicy, but I have ventured past my philosophical pay grade already.

character development, could not an omnipotent God have created human beings so that we make choices in a domain circumscribed by universal revulsion to evil? To put the point concretely, even if personhood demands that we must have the choice whether or not to give all of our possessions to the poor, it does not follow that we must also have the choice to become Nazis. Such questions make the argument from free will problematic as a defense of God and parallel questions also make the argument from responsibility problematic as a defense of liberalism.

The question in both domains is ultimately one of weight. How *much* freedom must we have in order that we have sufficient choice to act in the world as moral agents? That question applies to moral and political theory, not just theology.

So, what is the answer? Fleming and McClain quite sensibly accept two sorts of limits on autonomy. First, they clearly reject what we might call libertinism or license; they do not contend that everything anyone might be inclined to do is a right or even a presumptive right.[12] Second, they acknowledge that even those liberties that should be designated as constitutional rights or fundamental rights can be limited for sufficiently good reasons.[13] Accordingly, Fleming and McClain do not think that in order to act as responsible persons, all possible choices must be open to us. We do not need the legal freedom to steal, rape, or murder in order to act responsibly by refraining from stealing, raping, or murdering. So a freestanding interest in autonomy is not infinitely strong.

But does it have any strength at all? To answer that question, we would do well to ask what sorts of reasons justify the recognition of a right or the conclusion that some proffered justification for infringing a recognized right falls short. Such reasons may take various forms.

First, the polity, its representatives, or its judges might conclude that some sort of choice is both central to a person's identity or life plan and causes no harm to innocent third parties. The Supreme Court's decision in *Lawrence v. Texas* treats decisions of consenting adults about whom to love as such a choice.[14] Accordingly, the Court finds the state's assertion of an interest in conventional morality insufficient to justify a law forbidding homosexual intimacy.[15]

[12] FLEMING & MCCLAIN, *supra* note 2, at 32-33 (pointing out, approvingly, that Dworkin's liberal conception of "rights as trumps" does not apply to "every constitutional right, much less every right, and certainly not every imaginable 'liberty interest'").

[13] *Id.* at 38-39 (agreeing with Justice Alito that the Westboro Baptist Church's First Amendment rights should not shield it from tort liability for intentional infliction of emotional distress).

[14] Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

[15] *Id.* at 578-79 ("The Texas statute furthers no legitimate state interest which can justify

Second, the polity might be deeply divided over the moral implications, if any, of some action, and the relevant legal players might therefore conclude that the decision whether to take such an action should be left to individual conscience. Fleming and McClain invoke this sort of rationale as part of the justification for a right to abortion, connecting it to the Rawlsian notion that modern democracies such as our own find themselves in conditions of "reasonable pluralism" in which competing conceptions of the good lead different citizens to draw different conclusions about their moral obligations.[16]

Third, the polity might conclude that the use of the apparatus of the state to enforce a prohibition on some activity would cause substantially more harm than the activity itself. The violence associated with Prohibition during the first third of the twentieth century and with the criminalization of narcotic drugs over the last half century could lead one to think that adults ought to be free to decide whether to use alcohol or drugs, but not because we have any doubts about whether they are beneficial. We might think that no reasonable person would choose to use heroin but nonetheless favor its decriminalization on the ground that the cure of prohibition is worse than the disease.[17]

That sort of rationale would not ordinarily lead to our saying that there is a "right" to use drugs or alcohol. In some circumstances, however, enforcement concerns can be relevant to the question of whether to recognize a constitutional right because constitutional rights are legal rights; they are not necessarily moral rights.

For example, one can read *Griswold v. Connecticut* to rest on the proposition that there is a right of married couples to use contraception simply because any effort to enforce the prohibition would intrude on constitutionally protected privacy.[18] Likewise, concerns about enforcement can be invoked in

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its intrusion into the personal and private life of the individual.").

[16] *See* FLEMING & MCCLAIN, *supra* note 2, at 47 ("Linking protection of rights to the diversity of human moral choices . . . appeals to what Rawls calls the 'fact of reasonable pluralism': that it is an inevitable fact (not to be regretted) that, in a society that protects basic liberties such as liberty of conscience and freedom of association, people exercising their moral powers will form and act on divergent conceptions of the good." (quoting JOHN RAWLS, POLITICAL LIBERALISM 36 (1993))).

[17] For an example of the application of this idea, see generally GLENN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL (2009) (examining the Portuguese decriminalization framework and assessing its effects).

[18] Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."). The privacy argument is subject to the obvious rejoinder that the Constitution should not shield truly dangerous activity, even if conducted in a marital bedroom, but it does not follow that the interest in marital privacy and the corresponding costs of enforcement play no proper role in defining the scope of substantive rights. *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1695-1700 (1998) (discussing the relation between substantive and

support of the abortion right, as when people say that making abortion illegal will not stop abortion, but will only lead women to seek dangerous "back alley" abortions.[19]

Fourth, regardless of whether some activity can be deemed a right because of the liberty at stake, equality concerns may lead to recognizing a right. Justice O'Connor's concurrence in *Lawrence*, for example, rested on equality grounds.[20] Similarly, following a long line of feminists, Fleming and McClain invoke sex equality as a basis for the abortion right.[21] More broadly, John Hart Ely's representation-reinforcement theory of judicial review would have made concerns about laws burdening politically powerless minorities central to the entire task of recognizing rights.[22]

Fifth, there may be some matters that the state should not decide because constitutional democracy requires some limits on the scope of government decisionmaking. Suppose that the government attempted to assign everybody to a particular career path. Even in our post-*Lochner* era, such a severe limitation on economic freedom would properly be deemed a violation of the rights of the individual, either on Thirteenth Amendment grounds or on the ground that Justice Washington's circuit ruling in *Corfield v. Coryell* remains good law for the proposition that there is a fundamental right to pursue a career path.[23] The point is not so much that there is a fundamental right to engage in

procedural aspects of privacy in *Griswold* and related cases).

[19] Lucinda M. Finley, *Contested Ground: The Story of* Roe v. Wade *and Its Impact on American Society*, *in* CONSTITUTIONAL LAW STORIES 333, 339 (Michael C. Dorf ed., 2d ed. 2009) (explaining that in response to stricter enforcement of abortion restrictions in the 1950s and 1960s, "[t]he rising demand from women, coupled with the reduction in willing physicians, ushered in the proverbial era of the 'back alley'").

[20] *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("[T]he Equal Protection Clause prevents a State from creating 'a classification of persons undertaken for its own sake.'").

[21] FLEMING & MCCLAIN, *supra* note 2, at 52 ("[W]e emphasize the sex equality dimension of these issues. A central premise in *Casey* was that women's ability to participate equally in the life of the nation had been facilitated by the ability to control their reproductive lives.").

[22] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135 (1980) ("Some commentators have suggested that the Court's role in protecting minorities should consist only in removing barriers to their participation in the political process. We have seen, however[,] . . . that the duty of representation that lies at the core of our system requires more than a voice and a vote."). Ely himself thought the abortion right could not be justified on sex-equality grounds because women have more political power than fetuses. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933 (1973) ("Compared with men, very few women sit in our legislatures . . . . But *no* fetuses sit in our legislatures."). However, he arguably misapplied his own theory in that case.

[23] *See* Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (stating that the privileges and immunities of citizens of the several states include "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety" as well as "[t]he right of a citizen of one state to pass

any particular profession or trade. Instead, the idea is that some individual rights may arise simply as the complement to an anti-authoritarian principle of limited government.

The foregoing catalog of factors does not exhaust the sorts of reasons we might have for recognizing a right, but it will suffice for present purposes. The question now arises: does a theodicean argument add anything to such factors? Borrowing and reversing the term coined by Fleming and McClain, let us call the theodicean interest "autonomy as responsibility" to signify that, according to this view, we have some freedom *so that* we can make a responsible choice about whether and how to exercise it.

Suppose we have not yet considered autonomy as responsibility but have otherwise done the math for some putative right and found it lacking. For concreteness, let us imagine that a pedophile claims that his decision to engage in "consensual" sex with a twelve-year-old once per month is an exercise of his constitutional right to sexual privacy. I put "consensual" in quotation marks to indicate that the pedophile claiming the right does not use physical force and the minor regards the sex as consensual, but that broader society (quite appropriately) deems the minor to be legally incapable of consenting. Let us further assume that the hypothetical pedophile knows that the society deems sex with minors wrongful and that he actually agrees, as a cognitive matter, that it is wrongful. That is why he is celibate for all but one day each month, even though it is a great struggle for him. Nonetheless, the pedophile explains that he permits himself to succumb to temptation once each month, making what he fully acknowledges is a decision to act irresponsibly.

Notwithstanding the fact that the ordinary reasons for recognizing a constitutional right come up short, should we nonetheless say that the pedophile's conduct is protected because the legal ability to choose to do wrong is essential to treating him as someone capable of being responsible? Of course not. To say that our best all-things-considered judgment leads to the conclusion that there should be no constitutional right to sex with minors simply *means* that nobody is legally entitled to choose whether to engage in pedophilia. With three caveats I shall explore momentarily, autonomy as responsibility no more counts as a basis for recognizing a right to monthly pedophilia than it counts as a basis for a right to steal, rape, or murder.

What are the three caveats? First, extensive experimental data confirm a psychological fact about human beings that most of us know from our own experience: people do not like to be forced to do things. External sanctions "crowd out" intrinsic motivation.[24] Thus, purely as a strategic matter, a polity

through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise").

[24] *See generally* Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURV. 589 (2001) (summarizing the extensive empirical evidence for the proposition that motivating people to engage in certain behavior by the promise of tangible rewards or the fear of punishments can reduce their intrinsic motivation to engage in that behavior,

that concludes that it wants its citizens to refrain from some harmful conduct or to engage in some beneficial conduct may nonetheless refrain from imposing legal obligations on the ground that they could do more harm than good by undermining individual conscience or social sanctions. But this consideration is a caveat rather than a persuasive theodicean argument because such a strategic decision not to deploy legal sanctions does not rest on respect for autonomy as responsibility.

Second, allowing autonomy in personal matters may serve an educative function. At least when the stakes are low, parents will sometimes permit their children to "make their own mistakes" so that the children learn to act responsibly. Likewise, we might think that in a democracy, some measure of personal freedom is necessary for adult citizens because the capacities they develop in their own internal deliberations about how to live their lives are also needed when they come together to make collective choices for the society. *Ordered Liberty*, like Fleming's earlier solo work, connects what he calls "deliberative autonomy" to deliberative democracy in this way.[25]

To the extent that the state allows some measure of deliberative autonomy in order to foster deliberative democracy, the withholding of legal sanction is strategic, and thus provides no direct support for autonomy as responsibility. To the extent that the state allows deliberative autonomy so that individuals may practice deliberative autonomy itself for its own sake, however, this second caveat lends some measure of modest support for the theodicean claim.

Third, many people (myself included) believe that autonomy is somewhat valuable for its own sake, regardless of the particulars. Other things being equal, adults, even more than children, want the freedom to make their own mistakes.

Yet it is not clear that this shared belief counts as a normative proposition. The intuition that autonomy is valuable in itself may simply be a restatement of the psychological fact that I discussed in my first caveat. Moreover, our intuitions and beliefs do not exist in a vacuum. Culture shapes them, and American culture is, relative to other liberal democracies, libertarian.[26] That is the very fact that communitarians lament and wish to change. For example, Mary Ann Glendon, who serves as one of the chief communitarian foils for

contrary to the predictions of conventional economic theory).

[25] FLEMING & MCCLAIN, *supra* note 2, at 3-4, 9, 111; *see also* JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 3 (2006) ("ground[ing] autonomy in a theory of constitutional democracy" according to which people have closely related capacities for deliberating about justice for the polity and for "deliberating about and deciding how to live their own lives").

[26] *See* Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1407 (2006) (contrasting "the fiercely libertarian United States" with Europe, while also noting the former's greater religiosity).

Fleming and McClain, specifically contrasts American liberalism with what she regards as a more appropriately communitarian western Europe.[27]

Suppose that we nonetheless credit the libertarian intuition as having normative force. We still must confront a puzzle in tying it to the liberal theodicean claim. The puzzle is this: if legal compulsion is thought to disrespect the autonomy of persons because compulsion reflects distrust of persons to choose to act responsibly, the disrespect is at its worst in precisely those cases when the conduct in question is undoubtedly wrongful because those are just the circumstances in which even minimally responsible persons would act responsibly. If banning abortion disrespects women's moral capacities, banning what would count for everyone as unambiguously murder disrespects all people's moral capacities even more. Accordingly, if we really thought that legal compulsion showed disrespect for the moral capacities of persons, we would worry most about the disrespect communicated by laws forbidding crimes like torture, rape, and murder. Yet nobody thinks anything of the sort. The notion that legal compulsion disrespects personal autonomy only seems to have any traction at all when we are either collectively uncertain or divided about the morality of the relevant conduct, or when we are collectively certain that any of a range of personal choices would be morally permissible. Autonomy as responsibility appears to have no weight or only such slight weight as to count as a tie-breaker.

One may be tempted to respond that prohibitions on torture, rape, and murder justifiably prioritize the autonomy of innocent potential victims of torture, rape, and murder over the autonomy of torturers, rapists, and murderers. Indeed, they do, but that is not all that they prioritize. Persons have a right against torture, rape, and murder because torture, rape, and murder inflict harms quite apart from (or in addition to) any impact they have on the moral autonomy of the victims. Surely we think it no less criminal to torture, rape, or murder infants or incompetents who are not capable of making moral choices (but who are capable of suffering as a result of such crimes) than to commit such crimes against adults who are capable of acting as moral agents. The judgment that the harm caused by torture, rape, and murder readily justifies the prohibition of these acts cannot be defended on the ground that it simply reflects the prioritization of the autonomy as responsibility of one set of persons (victims) over the autonomy as responsibility of another set of persons (perpetrators). For the victims, autonomy as responsibility simply does not enter the picture. The judgment to maintain these prohibitions thus simply

[27] *See* FLEMING & MCCLAIN, *supra* note 2, at 56 (discussing Mary Ann Glendon's view in ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES (1987), and describing how "[Glendon] contrasted America's 'extreme and isolating version of individual liberty' (as endorsed in *Roe*) of a pregnant woman who has no responsibilities to others and to whom nothing is owed by society, with Western European laws striking a balance between women's liberty and their responsibilities as members of society who are carrying unborn life").

reflects the fact that autonomy as responsibility counts for precious little when weighed in the balance against serious harms.

Accordingly, I am left to conclude that some liberals mischaracterize their own argument when they suggest that basic liberties are in any substantial way *derived from* respect for the capacity of humans to make moral choices.[28] Liberalism presupposes such a capacity and, as Fleming and McClain argue in chapter five of *Ordered Liberty*, liberalism allows government to play some role in fostering this capacity.[29] The justification for protecting particular individual rights, however, mostly comes from other arguments of the sort I cataloged above.

To say that Fleming and McClain may have mischaracterized their argument as theodicean is not to say that their argument fails. On the contrary, I think it responds effectively to the charge that liberalism focuses on rights to the exclusion of responsibilities. Fleming and McClain should be understood to say – correctly – that liberalism takes for granted that persons are moral agents capable of exercising their rights responsibly. That is all that is needed to rebut this particular communitarian charge. Liberals do not need to make the further theodicean claim that we have any of the freedoms we have *in virtue of* a freestanding principle that respectful treatment of persons requires granting them autonomy as responsibility.

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Ordered Liberty responds to the communitarian challenge to liberalism on multiple fronts. In this Review Essay, I have focused on just one aspect of the challenge and the response, albeit on a question of great importance to the contest between communitarianism and liberalism. I shall conclude by connecting what I have said thus far with another ground of contestation.

Communitarians commonly complain that liberalism rests on an unrealistic picture of persons, what some communitarians call the "unencumbered self."[30] Understood in its best light, Fleming and McClain's argument about the place of responsibility in liberalism should be conceived as turning the tables on communitarianism by critiquing the latter's view of human nature. In trusting

[28] Arguably, Fleming and McClain may have once been counted among the liberals who thus mischaracterize their argument in this way. *See id.* at 46 ("Leading liberal justifications of rights derive basic liberties from a conception of persons as having certain moral powers or capacities . . . ."). We may exclude them from the list of liberals who err in this way, however, because they have now disavowed the theodicean character of their argument. *See supra* note 10.

[29] FLEMING & MCCLAIN, *supra* note 2, at 113 (arguing that the ideal of liberal toleration, properly understood, "does not bar government's efforts to foster citizens' capacities for democratic and personal self-government and to promote public values").

[30] *See* Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 85-87 (1984) (describing and criticizing the liberal conception of the individual as "prior to and independent of experience").

individuals to act responsibly, liberals like Fleming and McClain affirm their faith in humans as fundamentally connected and other-regarding. By contrast, in seeking to expand the domain of permissible government coercion, communitarians tacitly but unmistakably signal that people cannot be trusted to make responsible choices.

To repeat my main point, affirming our belief in people's capacity to act responsibly does not count for much as a justification for individual rights, but it is a necessary feature of such rights as we do recognize. Thus, although I favor removing the theodicean argument from the defense of liberalism, I would note that the debate between communitarians and liberals should properly be understood to parallel a different theological dispute – between those who say that without fear of Divine punishment in the afterlife, human beings will have no incentive to act morally in this life and those who say that, properly nurtured, the internal moral compass is a sufficient guide to right action. Fleming and McClain's argument about responsibility places them squarely on the latter side of that debate, which should be a comfortable place for secular liberals to come to rest.