"Offending Religion:" Right or Liberty? (Walking Through the Right-Duty Dichotomy with Hohfeld, Finnis, and May)

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I. Introduction

At the time of this writing, the country is buzzing with speculation about the impact of a current movie based on a popular novel claiming among others, that Jesus Christ is not God, but was, in fact, a man, married at that, to Mary Magdalene, by whom he had a daughter.[1] In fact, the Archbishop of Lipa

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had asked the Movie and Television Review and Classification Board (MTRCB)[2] to ban the film because it would "cause injury to the religious sentiments of a majority of Filipinos."[3] Echoing such appeal was the Philippine Alliance Against Pornography, Inc. (PAAP), which called on the President of the Philippines, as well as the United States Ambassador to the Philippines, for assistance in stopping the showing of the film.[4] Responding to such outrage, the City Council of Manila indeed banned its showing in theatres in the city.[5] All these, even as the smoke had not yet settled over the controversial publication by the Danish newspaper, Jyllands-Posten, in September 2005 of a number of cartoons depicting the Prophet Muhammad; which cartoons sparked riots and protests by a good number of Muslims.[6] There then emerges above the fray the question of whether or not, as a corollary to the universal (as well as constitutional) right to "freedom of thought, conscience and religion"[7] as well as to the similarly basic right to

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1. *See* (Bishop) Robert Morlino S.J., *The Da Vinci Code: Serious Cautions About This Book,* MADISON CATHOLIC HERALD, December 18, 2003; reprinted in ASCC Faith Essentials, http://www.catholiccollegestudents.org (last accessed May 11, 2006). As of this writing, the Sony Pictures' movie, "The Da Vinci Code," based on the Dan Brown novel of the same title, was slated for worldwide release on May 18, 2006.
2. This government agency was created under Presidential Decree No. 1986. The writer notes that before the movie's nationwide release on May 18, 2006, the MTRCB gave the movie an "R-18" rating.
3. Edu Punay & Sanford Araneta, *Lipa Bishop Wants "The Da Vinci Code" Banned*, PHIL. STAR, May 10, 2006, at 5.
4. *Id.*
5. Evelyn Macairan & Associated Press, *"Da Vinci" Opens Amid Hoopla, Outrage*, THE PHIL. STAR, May 19, 2006. The local law banning the movie took effect on the second day of its screening.
6. *See* Paul Belien, *Jihad Against Danish Newspaper,* THE BRUSSELS JOURNAL, Oct. 22, 2005; *see also* Hjörtur Gudmundsson, *Danish Imams Propose to End Cartoon Dispute*, THE BRUSSELS JOURNAL, Feb. 7, 2006, http://www.brusselsjournal.com (last accessed May 10 2006).
7. *See* G.A. Res. 217A (III), U.N. Doc. A/180 at 71, art. 18 (1948) [hereinafter UDHR]. ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.").

   But see PHIL. CONST. art. III, §5. ("No law shall be made…prohibiting the free exercise of religion. The free exercise and enjoyment of religious profession and

"freedom of opinion and expression,"[8] there is a fundamental right to "offend" the religious sentiment of believers.[9]

II. RELIGION AND ITS LEGAL SIGNIFICANCE; LEGAL PROTECTION FOR ITS EXERCISE

Given its negative character, the notion of a right to offend stands out as unorthodox, to say the least—most especially in societies which have deep *religious* sentiments. But, before anything else, it is proper to define what religion exactly is. Religion, which is derived from the Latin *ligare*, that is, "to tie or bind,"[10] means a certain way of worshipping God, as when one speaks of Islam or of Roman Catholicism.[11] In a more fundamental sense, it is the moral virtue which inclines a person to give *due*—and it is in this sense that religion is a potential part of the virtue of justice—worship to God as Creator and Lord.[12] It is no surprise then that Constitutional tradition has

worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.").

8. Article 19 of the UDHR, provides that "[e]veryone has the right to freedom of opinion and expression", which includes "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Freedom of speech and of expression is also provided under Article IV, § 4 (Bill of Rights) of the 1987 Philippine Constitution.

9. *See* ZENIT's Interview with Notre Dame law professor Richard Garnett, *The Right to Offend? – First Amendment Scholar Richard Garnett on the Limits of Free Speech*, Mar. 13, 2006, at http://www.zenit.org; also appears as *Offend? The Limits of Free Speech*, Mar. 14, 2006, *available at* http://www.catholic.org (last accessed May 10, 2006).

10. *Cf.* Richard Garnett, *Religion, Division, and the First Amendment*, NOTRE DAME LAW SCHOOL LEGAL STUDIES RESEARCH PAPER, No. 05-23, November 21, 2005, at 5 (citing THE OXFORD ENGLISH DICTIONARY (2nd ed.) and AYTO, J. DICTIONARY OF WORD ORIGIN 438 (1991)).

11. Aside from this more common understanding of the term, religion can also mean: (a) the entire moral life of an individual, and hence, one can refer to a person as very religious; and/or (b) a particular state of an individual in which evangelic perfection is professed, as when one speaks of those entering religion, or of the religious orders, such as the Society of Jesus or the Order of Friars Minor (Franciscans). As will be explained, however, religion is essentially a virtue that regulates man's relationship with God. *See* Enrique Moline, *The Virtue of Religion (The Commandments of the Law of God and of the Church); see also The Theological and Moral Virtues*, II FAITH SEEKING UNDERSTANDING 186 (Belmonte ed. 1997).

12. *See* SUMMA THEOLOGIAE, 2-2, q. 81, a.3; *see also* Enrique Moline, *The Virtue of Religion (The Commandments of the Law of God and of the Church; The Theological*

largely defined religion in theistic terms; in other words, it has "reference to one's views of his relations to his Creator, and to the obligations that they impose of reverence for his being and character, and of obedience to His will."[13]

The imposition of legal sanctions for offending religious sentiments is not new in Philippine law. Under the Revised Penal Code[14] (RPC) for instance, the penalty of *prision mayor* or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, is imposed upon "[t]hose who, in theater, fairs, cinematographs, or any other place, exhibit, indecent or immoral plays, scenes, acts or shows, whether live or in film…(which) offend any…religion."[15] Taking into account that religion refers to the entire moral life of man, the same penalty is imposed by the RPC upon those who shall do any of such acts in order to:

1. glorify criminals or condone crimes;
2. serve no other purpose but to satisfy the market for violence, lust or pornography;
3. tend to abet traffic in and use of prohibited drugs; and in any case;

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and Moral Virtues), II FAITH SEEKING UNDERSTANDING 186 (Belmonte ed. 1997).

13. David v. Beason, 133 U.S. 333 (1890), *cited in* JOAQUIN G. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 320 (2003 ed.) [hereinafter BERNAS]; *see* United States v. Seeger, 380 U.S. 163 (1965) and Torcaso v. Watkins, 376 U.S. 163 (1964), *cited in* BERNAS (parenthetically, as constitutionalist Joaquin G. Bernas, S.J. notes, that there is precedent in American jurisprudence placing within the ambit of religion, and hence of the free exercise and non-establishment clauses (U.S. CONST. First Amendment. PHIL. CONST. art. III, §5), non-theistic views and/or beliefs "which illuminate 'the very ground of one's being' and which give life meaning in direction."); *see also* United States v. Seeger, 380 U.S. 163 [1965] and Torcaso v. Watkins, 376 U.S. 163 [1964], *cited in* BERNAS (given, however, that religion is essentially a moral virtue that regulates the manner by which man deals with, or better still, how he is "bound" to, his Creator, the writer strongly prefers that the mentioned freedoms must always be limited to theistic views and beliefs. In any case, as Fr. Bernas states, the alternative is for non-theistic views and beliefs to find refuge in "the freedom of expression clause, where expression is involved"); *cf.* BERNAS, at 321; U.S. CONST. First Amendment.

14. An Act Revising the Penal Code and Other Laws [REVISED PENAL CODE] (1932).

15. *Id.* (As amended by Presidential Decree Nos. 960 and 969, art. 201 relating to immoral doctrines, obscene publications and exhibitions, and indecent shows.).

4. go against morals (and) good customs.[16]

Similarly punished are those who:

1. publicly expound or proclaim doctrines openly contrary to public morals;
2. author and allow to be published, edit and publish, and sell obscene literature; and
3. sell, give away, or exhibit prints, engravings, sculptures, or literature which are offensive to morals.[17]

In the New Civil Code, the following provision, though more fundamentally grounded in the privacy of a person, is noteworthy:

> Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention, and other relief:
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> x x x
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> (4) Vexing or humiliating another on account of his religious belief...[18]

Then, under Presidential Decree No. 1986,[19] the law creating the Movie and Television Review and Classification Board (MTRCB), the Review Board has been given the following powers:

> To approve or disapprove, delete objectionable portions from and/or prohibit the importation, exportation, production, copying, or distribution, sale, lease, exhibition, and/or television broadcast of the motion pictures, television programs and publicity materials...which, in (its) judgment...applying contemporary Filipino cultural values as standard, are objectionable for being immoral, indecent, contrary to law and/or good customs...or with a dangerous tendency to encourage the commission of violence or of a wrong or crime.[20]

That punitive measures abound in Philippine law against the vilification of religion is not without its socio-anthropological bases. "Religion is so

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16. *Id.*
17. *Id.*
18. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE] art. 26 (1949). *cited in* LUIS V. TEODORO JR. & ROSALINDA KABATAY, MASS MEDIA LAWS AND REGULATIONS IN THE PHILIPPINES 33 (1998 ed.).
19. Creating the Movie and Television Review Classification Board, Presidential Decree No. 1986 (1985).
20. *Id.* § 3(c).

integrated into the life of the average Filipino… that it is difficult to distinguish what is social and what is religious in (his) daily activities."[21] The Filipino sees the divine transparency in nature, in the things and places around him. His relationship with the divine is incarnated in his earthly existence. The supernatural, or Other World, as Leonard M. Mercado, S.V.D. calls it, is, as it were, inseparable from his very life. God's existence is a fact for the Filipino, and it is senseless for him to be preoccupied, unlike occidental philosophers, to prove the said proposition.[22] Rightfully therefore, attacking another's religion, in this context, is not only illegal, but downright immoral and anti-Filipino.

Significantly enough, legal sensitivity to religion is not at all unique to the Philippines. Denmark, for example, where the skirmishes over the alleged anti-Islam cartoons started, actually has a blasphemy statute that punishes, with a fine and up to four months imprisonment, anyone who demeans a so-called "recognized religious community."[23] Similarly, in the United Kingdom, British prosecutors were reported as preparing charges against leaders of the alleged right-wing British National Party for speeches calling Islam a "wicked faith."[24] Easily then, it is practically second nature for various peoples to protect the liberties on faith or religious belief enshrined in the 1948 Universal Declaration of Human Rights.

III. THE NOTION OF A "RIGHT TO OFFEND"

First Amendment[25] advocates Richard Garnett[26] and Charles Haynes,[27] argue that freedom of expression—a freedom separate and distinct from the

21. LEONARDO N. MERCADO S.V.D., ELEMENTS OF FILIPINO PHILOSOPHY (1976) (citing LANDA F. JOCANO, SULOD SOCIETY, A STUDY IN THE KINSHIP SYSTEM AND SOCIAL ORGANIZATION OF A MOUNTAIN PEOPLE IN CENTRAL PANAY 160 (1968 ed.)).

22. *Id.* at 161 and 167.

23. Charles Haynes, *Inside the First Amendment – In Defense of the Right to Offend*, NORTH COUNTRY GAZETTE, February 16, 2006, http://www.northcountrygazette.org (last accessed May 12, 2006); *see* The First Amendment Center, *at* http://www.firstamendmentcenter.org (last accessed May 10, 2006).

24. *Id.*

25. The First Amendment of the Constitution of the United States of America. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.").

religious freedoms in the Universal Declaration of Human Rights[28]—includes the right to offend religious sentiments and beliefs. According to Garnett:

> [i]t is incorrect to say that the freedom of expression does not include the right to say things that have the effect of offending the religious sentiments of believers… freedom of speech must include the right to criticize, and criticism is sometimes offensive to those who are being criticized.[29]

Haynes, for his part, posits that "freedom of religion does not mean freedom from offense"—reasoning that after all, "full religious liberty is only possible in a society committed to freedom of expression." Haynes further emphasized that "[w]hat is truth to some is blasphemy to others."[30] He then concludes his argument by invoking the landmark U.S. case of *Cantwell v. Connecticut*,[31] which reversed the conviction of a member of the Jehovah's Witnesses for playing before two Roman Catholic gentlemen a phonograph record that contained nasty remarks about the Roman Catholic Church. Haynes quotes the ruling penned by Mr. Justice Owen J. Roberts:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification…But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[32]

The sheer grandeur of the above-quoted appeal to personal liberty in *Cantwell* appears to serve as the final blow to anyone hoping to question the existence of a right to offend. However, a close review of *Cantwell* itself will show that the so-called right to offend that it particularly envisions may not actually exist in certain cases. Though that consideration will have to wait, it may nevertheless be said that, even if reliance on freedom of expression will prove shaky, a logical alternative is to rely on religious freedom itself. The

26. ZENIT, *supra* note 9.

27. MERCADO, *supra* note 21.

28. UDHR, art. 19. ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

29. ZENIT, *supra* note 9.

30. MERCADO, *supra* note 21.

31. Cantwell v. Connecticut, 310 U.S. 296 (1940).

32. MERCADO, *supra* note 21.

expression and exercise of one's faith, most especially given the schismatic and/or "spin-off" origins of many sects and denominations, will unavoidably include, at times, a criticism of an antecedent system of belief. The sheer naturalness of this development suggests that criticism should be no big deal, as it would necessarily be covered under the protection afforded by religious freedom. After all, each and everyone in this world—it is suggested—is free to believe as his or her heart desires.

The temptation is indeed great to just allow the emergence of a religious "supermarket." But this will not solve the problem. Sooner or later the "customers" at this "supermarket" will be quarreling along the aisles about the merits of their respective favorite brand. To put some order then, and after going through relevant aspects of religion and religious freedom, it is only fitting to consider at this point—as a logical antecedent to determining whether or not a right to offend really exists—what a right actually is.

IV. UNDERSTANDING "RIGHT;" PRIMACY OF THE PERSON AS THE SUBJECT OF A RIGHT

The term "right" comes from the German *recht*, which, in turn, derives from the Latin *ius* or *iuris*, meaning what is owed or due (hence, the term "duty," which will be discussed below as a correlative of a right).[33] Right can be considered either in its *objective* or *subjective* sense.

In an objective sense, it is the object of justice or what is due to another.[34] In other words, "right is *what is related* to someone as *belonging* to him."[35] Hence, when a person receives what is due to him, there is *iustitia* or justice.[36] This kind of belonging is the most perfect one[37] because possession of the object is marked by free mastery—*dominum libertatis*. Such free mastery is "the basic characteristic of right," and "implies responsibility, that is, reason and self-determination."[38] According to Augustine, "that in which

33. JOSEPH M. DE TORRE, BEING IS PERSON: PERSONALISM AND HUMAN TRANSCENDENCE IN SOCIO-ECONOMIC AND POLITICAL PHILOSOPHY 92 (2005 ed.).

34. *Id.* (citing SUMMA THEOLOGIAE, II-II, 57, I); *see also* ST. THOMAS AQUINAS: ON LAW, MORALITY AND POLITICS (William Baumgarth, et al., eds., 1988).

35. Emphasis supplied.

36. DE TORRE, *supra* note 33, at 92.

37. De Torre explains that "belonging" is an analogical term for there are many ways of belonging.

38. *See* DE TORRE, *supra* note 33, at 98 and SUMMA THEOLOGIAE, art. II; *see also* CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND

man excels irrational animals is reason, or mind, or intelligence, or whatever appropriate name we like to give it. Therefore, reason, intellect, and mind are one power of the soul."[39] In this connection, Thomas Aquinas went on to distinguish *speculative* reason from *practical* reason. The object of practical reason is the good; while speculative reason has for its object being itself.[40]

In a subjective sense, on the other hand, right is a *"relationship* of someone to something as belonging to him."[41] But, quite importantly, *only* one who is a "possessor with free mastery," that is, the *person*, can be the subject or bearer of a right.[42] In philosophical terms, the classic definition of Boethius[43] comes to mind: "an individual substance of a rational nature—that is, an individual with intellect and will."[44] According to Professor Charles Rice, Thomas Aquinas accepts this definition and applies it to both God[45] and human beings. Thus:

> 'Person' signifies what is most perfect in nature—that is, a subsistent individual of a rational nature. Hence, since everything that is perfect must

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WHY WE NEED IT 115 (1993 ed.) (citing SUMMA THEOLOGIAE, I, II, Q. 94, art. 2).

39. SUMMA THEOLOGIAE, I, Q. 79, art. 8, *cited in* RICE, *supra* note 36.

40. CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 115 (1993 ed.) (citing SUMMA THEOLOGIAE, art. I, II, Q. 94, art. 2).

41. Emphasis supplied.

42. DE TORRE, *supra* note 33.

43. *circa* 475 – 525.

44. RICE, *supra* note 40 at 214 – 15 *citing* BOETHIUS, *De Duab, Nat.* III (PL 64 1343).

45. The writer asserts that any discussion of the law and the related dynamics of right and duty must necessarily point to the existence of the Divine. All human law is merely a participation in the divine law. Relevantly, the Supreme Law of the Land begins with the Filipino people's appeal to the "aid of Almighty God." (PHIL. CONST. Preamble; *see* BERNAS, *supra* note 13, which noted the choice of the phrase "Almighty God" for being more personal – and hence, "more consonant with Filipino religiosity" – over the 1973 Philippine Constitution's "Divine Providence." Relevantly, the Declaration of Independence (dated July 4, 1776) of the original Thirteen States of the United States of America, the very home of *Cantwell* and known seedbed of the First Amendment-inspired "right to offend" similarly commences with an appeal to the "Laws of Nature and of Nature's God" and acknowledges the "Creator (as having endowed the American people) with certain unalienable Rights." *See* PATRICK RILEY, *Natural Law v. Legal Positivism*, FELLOWSHIP OF CATHOLIC SCHOLARS NEWSLETTER, December 1992, Vol. 16, No. 1; *see also* DOCUMENTATION SERVICE, THEOLOGICAL CENTRUM 16-17 (January 1997).

> be attributed to God, forasmuch as His essence contains every perfection, this name 'person' is fittingly applied to God; not, however, as it is applied to creatures, but in a more excellent way … 'Person' in general signifies the individual substance of a rational [nature]. The individual in (himself) is undivided, but is distinct from others. Therefore 'person' in any nature signifies what is distinct in that nature.[46]

That the term "person" is a matter of distinction is aptly illustrated by its etymology. It is actually derived from the Latin *persona*, which signifies the "mask" which Roman actors regularly wore on stage to represent the individual roles they were portraying. Later, it came to mean either the person whose *character* was portrayed in the play, or the very *actor* who portrayed the said character.[47] The juridical understanding of a person, with its quality of assigning character under the law to another, is consistent with such basic understanding. In a legal sense therefore, a person is "any being, physical or moral, real or juridical and legal, susceptible of rights and obligations, or of being the subject of legal relations."[48] And by juridical or legal person is meant one formed by the association of men, with no physical existence, and given an independent legal existence by law.[49]

Setting aside at this juncture the notion of the juridical person, which is essentially a legal device invented for societal and economic convenience and, to some extent, necessity, it is plain that only those creatures which are by nature rational and free can be the subject or bearer of rights.[50] Consequently, there can be no such thing as animal "rights." One person cannot own another person. But persons do own animals, which are no more than *things*.[51] The following discussion by Dom Ambrose Agius put it so well:

> Man is rational, animal is irrational … Man therefore is a person; animals are non-persons. Man is a person because he is an end in himself, and not a

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46. SUMMA THEOLOGIAE, I, Q. 29, art. I, also art. 3 and art. 4 *cited in* RICE, *supra* note 40 at 215.

47. I ARTURO M. TOLENTINO, COMMENTS AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES, 153 (1994 ed.) (emphasis supplied).

48. *Id.* (citing II Sanchez Roman 110 and I Planiol & Ripert 3).

49. I TOLENTINO, *supra* note 47 at 153.

50. The writer thus makes a distinction between those rights which are fundamental and thus, inherent in the human person as against those which are merely provisions of positive, i.e. man-made, law. What this paper then hopes to achieve is to determine whether or not the suggested "right to offend" is a fundamental right of man, or at least, a necessary adjunct to the right to exercise religion and/or the right to free expression.

51. RICE, *supra* note 40 at 65 (emphasis supplied).

> mere means to the perfection of beings of a higher order. Animals are not persons or moral beings because devoid of reason and free will (and so of responsibility) and because they were created for the service of man, and as a means (if properly used) towards his perfection … *Now a right or 'jus'* (also, *ius*) *is the moral faculty or power of doing, having, exacting, or omitting something. This is a moral, not a physical power derived from eternal law, which is the fount of all laws and rights*. Therefore animals, as non-moral beings, have no 'jus' or right in themselves, no personal rights, as against man, and (thus,) the question of 'injustice' (which means acting against the 'jus') does not arise.[52]

Now, it has been asked if it is necessary for the person to be "actually" free "there and then" to be the subject of a right. Take the case of the unborn in the mother's womb. Can the unborn be denied life, upon a finding that he or she suffers from a grave congenital defect, or because the pregnancy was wrought by rape? The answer is no, because while the unborn may be physically prevented from exercising his freedom, he still retains his power.[53] "The one who will be a man is already one."[54] The right to life, as in the case of any other fundamental right, is inherent in the nature of a person. Needless to state, this fundamental right, per force, merits and warrants protection in civil society.[55]

A. Kinds of Rights; Rights Always in the Context of a "Relation"

It being clear that the subject or bearer of a right must be a person, this discussion must now turn to the kinds of rights. While there is admittedly more than one way of classifying rights, this writer prefers to turn to legal philosopher and Oxford professor John Mitchelle Finnis. According to Finnis, there are three types of rights:

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52. AGIUS (O.S.B.) & AMBROSE (Dom), CRUELTY TO ANIMALS: THE CHURCH'S TEACHING 4-5 (1959 ed.) *cited in* Rice, *supra* note 40 at 67 (emphasis supplied).

53. DE TORRE, *supra* note 33 at 98.

54. *Quaestio de abortu*, SACRED CONGREGATION FOR THE DEFENSE OF THE FAITH (Nov. 18, 1974) (citing TERTULLIAN, APOLOGETICUM IX, 8 *PL* 1, 371 – 72) *appearing in* II VATICAN COUNCIL II 443 (More Postconciliar Documents, ed. by Flannery [O.P]) (2000 ed.).

55. DE TORRE, *supra* note 33; *see also* RICE, C., NO EXCEPTION: A PRO-LIFE IMPERATIVE [1991] *cited in* his 50 QUESTIONS, *supra* note 40 at 214. ([Professor Rice] laments over American jurisprudence which supports the notion that if an individual's life is subject to termination at the will of another whenever the legislature so decides, that individual in constitutional terms is a non-person with no constitutional right to live.).

1. *The right to do things* — included here is the person's right to speak, to pray, to move about, to migrate, to work, to marry, etc.; also included here is the right not to do things—the individual's right not to remain in a particular locality, the right not to sing praises to any political authority

2. *The right that others shall not do certain things to a person* — examples are the right not to be assaulted, not to be beaten, not to be killed, not to be silenced, not to be subject to expropriation, not to imprisoned, not to be robbed or deceived, among other rights

3. *The right that others shall do certain things for the person* — these are the right of a child, whether born or unborn, to be nourished and cared for, the right of an invalid or an old person to be similarly nourished and cared for, the right to be informed promptly and heard fairly if accused of a crime, the right to be given a share of another's superfluous wealth as relief from poverty and distress in case of misfortune, to name some.[56]

Evidently, a right necessarily exists in the context of a relation and if one may go so far as to make an addition, this relation is necessarily based on the notion of entitlement. The subject or bearer of a right essentially relates *to another*, in other words, one who must deal with his person although it will have to be emphasized that it is not the so-called other's recognition of the personality of the bearer of the right that confers entitlement thereto. Entitlement lies in the nature of the right itself. Prescinding from the above-given case of the unborn afflicted by a grave medical disorder or wrought by unwelcome carnal knowledge, one must consider that:

> There is a definite number of rights which society is not in a position to grant since these rights precede society; but it is society's duty to preserve and to enforce them. These comprise most of what today we call 'human rights' and which our age boasts of having formulated.
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> It does not belong to society, nor does it belong to public authority in any form to recognize this right for some and not for others … It is not recognition by others that constitutes this right. This right is antecedent to its recognition; it demands recognition and it is strictly unjust to refuse it.[57]

A person enters into, and engages in, a relation for the attainment of a perceived good or set of goods either for himself, for another, or for both of them. This "relating" to another must then be ordered toward the good. If

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56. John Mitchell Finnis, *The Foundation of Human Rights*, ICU INTERNATIONAL QUARTERLY COOPERATION IN EDUCATION, reprinted in *Human Rights*, DOCUMENTATION SERVICE Volume X, No. 10, October 1997, Theological Centrum (Manila), at 22 (306).

57. *Quaestio de abortu*, *supra* note 54 at 445.

the relation achieves no authentic good—one which is consistent with the dignity of the human person—then consequently no authentic right can be said to exist.

B. The Concept of Duty; Hohfeldian Jural Relations; Notion of a Claim-Right

That a right demands recognition necessarily leads one to consider the other side of what the writer wants to call the *ius equation*. This is the concept of *duty*. Before the turn of the twentieth century, legal thinkers Hodgson and (Oliver Wendell) Holmes posited that, "to take rights and not the corresponding duties as the ultimate phenomena of law, is to stop short of a complete analysis."[58] This is not surprising given the classical understanding of a right (*ius*) as what is "owed or due."[59] But then again, what will prove to be the most ground-breaking analysis of the right-duty dichotomy is that of Wesley Newcomb Hohfeld (1879 – 1918) in the second decade of the twentieth century.[60]

Hohfeld was then concerned—and the same is true for legal scholars today—that the term "rights" tended to be "used indiscriminately to cover what in a given case may be a privilege, power, or immunity, rather than a right in (its truest and) strictest sense."[61] To solve this problem, Hohfeld came up with a system of basic jural relations, under which "right" and "duty" are correlatives of one another. These relations are in part[62]

58. Daniel H. Cole & Peter Z. Grossman, *The Meaning of Property "Rights:" Law v. Economics? at* http://www.indylaw.indiana.edu/instructors/cole/cole.htm (last accessed May 15, 2006) (citing Oliver Wendell Holmes, *The Arrangement of Law. Privity*, 7 AMERICAN LAW REVIEW 46-65 (1872) (citing II HODGSON 160-70 (1870))).

59. Cantwell v. Connecticut, 319 U.S. 296 (1940).

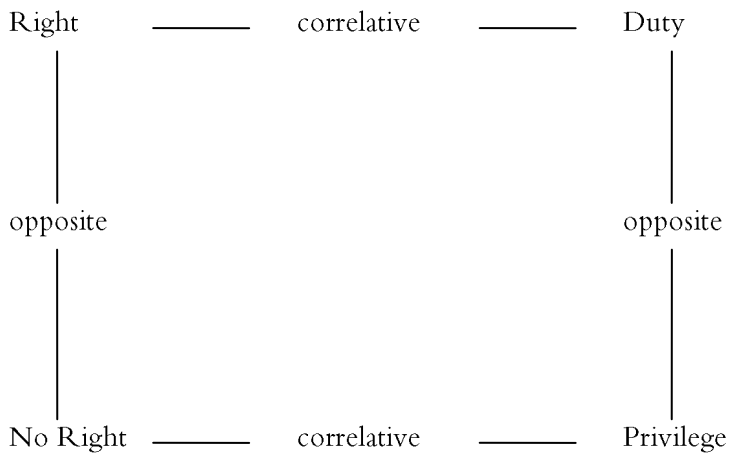
60. Hohfeld was responsible for the formulation of what he referred to as fundamental jural correlatives and opposites (as will be briefly explained in this paper). These appeared in the seminal, though posthumous, work *Fundamental Legal Conceptions, As Applied in Judicial Reasoning and Other Essays*, which is actually a combination, with other works, of two articles he did for Yale Law Journal – *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE LAW JOURNAL 16–59 [1913], and *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE LAW JOURNAL 710 – 70 [1917], both *cited in* Cole & Grossman, *supra* note 56); *see also* Wesley Newcomb Hohfeld *available at* http://www.en.wikipedia.org/wiki/Wesley_Newcomb_Hohfeld (last accessed May 15, 2006).

61. Cole & Grossman, *supra* note 58 at 3 (inclusion supplied).

62. Aside from those represented in the obligational square that follows, there are other fundamental legal concepts which figure in equally fundamental jural

represented in the Hohfeldian obligational square constructed by Professor Giovanni Sartor:

Figure 1



[63]

According to Hohfeld, in order to establish a "right," one must able to identify some corresponding duty that someone else possesses. For him then, "a legally enforceable right presumes a legally enforceable duty. If there be

relations. These are power, liability, disability, and immunity. Though these do not have a direct bearing on this paper, any discussion on Hohfeldian thought warrants some space therefore. Power (i.e., the "[c]apacity of a person to change the legal status of another) and liability (defined as the "[s]ubjectivity of a person to the power of another") are correlatives of one another. Disability (which is the "[a]bsence of power in a person to change the legal status of another") is the jural opposite of power. Immunity, which is the "[a]bsence of subjectivity of a person to the power of another" is correlative with disability and the opposite of liability. *See* George Goble, *A Redefinition of Basic Legal Concepts*, University of Illinois.

63. Giovanni Sartor, *Fundamental Legal Concepts: A Formal and Teleological Characterisation*," EUI WORKING PAPER LAW NO. 2006/11, EUROPEAN UNIVERSITY INSTITUTE, Badia Fiesolana, Italy; *cf.*, *at* http://www.cirsfid.unibo.it/~sartor/GSCirsfidOnlineMaterials/GSOnlinePublications/GSPUB2006AILawNormativeOntologyNew.pdf, (last accessed May 15, 2006). (Professor Sartor is a Marie-Curie Professor of Legal Informatics and Legal Theory at the Department of Law, European University Institute, Florence, Italy.).

no such duty, then what the subject may only have is a mere liberty, or as Hohfeld calls it, 'privilege.'"[64] Cole and Grossman explain:

> (In contrast to a 'right,') to claim a 'freedom,' 'liberty,' or 'privilege,' with respect to some activity is not necessarily to argue that anyone or everyone else has some 'duty' to refrain from interference; indeed, everyone else may possess the same 'freedom,' 'liberty,' or 'privilege.' Similarly, in the Hohfeldian scheme, a claim that you have no 'duty' *not* to refrain from doing something is not the same as a claim of a right to do something; rather, it is merely to claim that no one else has the 'right' to prevent you from doing it.[65]

Clearly then, the sheer notion of liberty or privilege necessarily requires, for purposes of distinction, a more fundamental concept of "right." This fundamental concept is what Hohfeld calls "right *strictu senso*," or right in the strictest sense, which is also referred to as a "claim-right."[66] *It is to which a clear and authentic duty attaches.* Given the frequent and indiscriminate labeling of what are mere liberties as rights, making this fine distinction becomes imperative. No wonder Finnis stated it so emphatically: "[E]very claim of right can be wholly translated into the language of duty, and to the extent that it cannot be so translated, it is empty, fraudulent, intellectually irresponsible."[67]

C. Claim-Right and Duty Must Always Go Together (Finnis and May on Hofeldian Thought)

To resolve the conundrum as to the existence of an authentic and fundamental right to offend religious sensibilities, it is actually helpful, if not imperative, to view Hohfeld's jural postulates from the philosophical lenses of both Finnis and Professor William E. May.[68] Professor May quotes Finnis' discussion of Hohfeldian thought:

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64. *Cf.* William E. May, *The Difference between a "Right" and a "Liberty," and the Significance of this Difference in Debates over Public Policy on Abortion and Euthanasia, at* http://www.christendom-awake.org/pages/may/may.html (last accessed May 31, 2006).

65. Cole & Grossman, *supra* note 58 at 3 (inclusion supplied).

66. May, *supra* note 64. *See also* DUDLEY KNOWLES, POLITICAL PHILOSOPHY 138-45 (2001).

67. Finnis, *supra* note 56 at 23 (307).

68. Professor May is the Michael J. McGivney Professor of Moral Theology at the John Paul II Institute for Studies on Marriage and the Family, Washington, D.C.

> [A]ll assertions or ascription of rights can be reduced without remainder to ascriptions of one or some combinations of the following four 'Hohfeldian rights': (a) 'claim-right' (called by Hohfeld 'right stricto senso'); (b) 'liberty' (called by Hohfeld 'privilege'); (c) power; and, (d) immunity.
>
> [T]o assert a Hohfeldian right is to assert a three-term relation between one person, one act-description, and one other person.[69]

Finnis, according to Professor May, goes on to present three simple logical relations, where "A" and "B" signify persons, and Φ represent a description signifying a particular act, to wit:

1. A has a *claim-right* that B should Φ, if and only if B has a *duty* to A to Φ.
2. B has a *liberty* (relative to A) to Φ, if and only if A has *no-claim-right* (that is, a "no-right") that B should not Φ.
3. B has a liberty (relative to A) not to Φ, if and only A has no-claim-right (that is, a "no-right") that B should Φ.[70]

Relevant in this regard is the use of the phrase "if and only if," which signifies that logical relation called *coimplication*. A coimplication is a conjunction of two particular implications, otherwise known as "if-then" statements. In this type of relationship, the consequent proposition will admit of *no other* antecedent than the *particular* antecedent proposition appearing with it. Indeed, if it were merely an implication—for example, "if P, then Q," then it is possible that facts other than P can logically be held to imply Q. In the case of an "if and only if P, then Q" logical relation, Q will follow *only when* the required fact P is established.[71] Thus, taking as an example the first simple logical relation spelled out by Finnis above, "A" will only have a claim-right that "B" should do Φ, for example, pay him a just and living wage, if it is established, to the exclusion of all other antecedents, that "B" has indeed the duty to pay "A" a just and living wage.[72]

Finnis' appreciation of Hohfeld's system is reprised by Professor May, thus:

> The most important of the aids to clear thinking provided by Hohfeld's schema is the distinction between A's claim-right (which has its correlative

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69. JOHN MITCHELL FINNIS, NATURAL LAW AND NATURAL RIGHTS 199 (1980 ed.) *cited in* May, *supra* note 64.

70. *Id.*

71. *See* Layman E. Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, 66 YALE LAW JOURNAL 832, 840 – 42.

72. *Cf.* May, *supra* note 64.

> B's duty) and A's liberty (which is A's freedom from duty and thus has as its correlative the absence or negation of the claim-right that B would otherwise have). *A claim-right is always either, positively a right to be given something (or assisted in a certain way) by someone else, or negatively, a right not to be interfered with or dealt with or treated in a certain way, by someone else. When the subject-matter of one's claim of right is one's own act(s), forbearance(s), or omission(s), that claim cannot be to claim-right, but can be to only a liberty.*[73]

D. Relating to Others as Essence of Personhood; Pursuit of Basic Goods

Clearly then, when a claim-right or a right *stricto sensu* is at stake, the action in question (the Φ) is an act on the part of another or of others. When what is at stake is a liberty, the action in question must perforce be an act on the part of the person or persons claiming that liberty.[74] But is that all that has to be considered in evaluating the relation between a person who claims some form of entitlement and another who is being "required" to recognize such entitlement and act accordingly? Certainly not. Taking off from the classic definition of personhood, and as Polish philosopher Wojtyla has taught, "*relation to others*" "*is of the essence of the human person.*"[75] The right-duty dichotomy—in order to be understood as pertaining to only the fulfillment of a claim-right—must necessarily then be for the good of the person—both the person who is the subject of a right and the other person who has the duty, as a matter of *iustitia*, of rendering that particular good to which the former is entitled.

Upon the fulfillment of his duty by the one to whom the subject of a right relates, the latter achieves a measure of well-being—the degree and intensity of which is dependent on the type or character of the particular good attained. Human well-being may be defined by its various aspects. Termed by Finnis as *basic goods*, these are equally valuable intrinsic goods (in other words, they are valued for their own sake). In his seminal work, Natural Law and Natural Rights, Finnis listed the following as basic goods: life, health, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness (including freedom and authenticity), and

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73. *Id.* (citing JOHN MITCHELL FINNIS, NATURAL LAW AND NATURAL RIGHTS 200 (1980 ed.)) (emphasis supplied).

74. *Cf.* May, *supra* note 62.

75. *Cf.* Karol Wojtyla (Cardinal) (later Pope John Paul II), *Subjectivity and the Irreducible in Man*, THE HUMAN BEING IN ACTION (Anna-Teresa Tymienicka, ed. 1978), *cited in* RICE *supra* note 40 at 216.

significantly enough, religion.[76] On the other hand, the one who fulfills his duty toward the bearer of the right, by the sheer act of relating to the other, makes a gift of his very self.[77] With such emptying, this person actually fulfills himself and achieves, as it were, a certain fullness of life—another basic good.

Finnis' basic goods actually serve as bases for determining whether or not what is perceived to be a duty is indeed one which serves an authentic right. These basic goods are in reality principles of natural law and at the same time, may be the ends served by particular positive laws. Finnis wrote:

> These propositions (referring to 'basic forms of human good') identifying the fundamental aspects of human flourishing are in fact the basis of all our thinking about what to do, and what sort of persons to be even when we are evading our responsibilities and engaged in wrongdoing. These basic principles of all rational (even wrongful) human actions *(and hence, done only by the human person—endowed with intellect and will naturally ordered toward the good)* were given a name by the classic European philosophers and the theologians of the Church: 'the first principles of natural law.' They are the principles that identify all forms of well-being of any being with a nature like yours or mine … And *they are 'law' insofar as they indicate what is to be done, that is to say, what should be pursued and what avoided.*[78]

That having been said, how does then a person figure out his duties? Finnis addressed this matter, by speaking in the first person no less, to wit:

> And to what do you appeal (referring to justify your claims of right) when I fail to recognize or live up to my responsibilities? Well, some of my responsibilities derive from … laws made by 'the State' … And some of my responsibilities I have, not because of the terms of any positive laws or of any promises, but because I am a human being who has the opportunity to bring about some good or to avert some evil. I may not have sought this opportunity … but what matters is the sheer fact that by my action, or inaction, I can achieve, or actually destroy, some good. And *when that good is the well-being, or an aspect of the well-being of some other person, then it is that*

76. Brian Bix, *Natural Law Theory (on John Finnis)*, A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 228-29 (Patterson ed. 1999). *See also* Finnis, *supra* note 56 at 24 (308).

77. *Cf.* Wojtyla, *supra* note 75; Joseph Ratzinger, (Cardinal) (now Pope Benedict XVI), *Retrieving the Tradition: Concerning the Notion of Person in Theology*, 17 COMMUNIO 439, 444 – 47 (Fall 1990); *see also* RICE, *supra* note 40 at 217.

78. Finnis, *supra* note 56 at 24 (308) – 25 (309) (emphasis and inclusion supplied).

> *other person's right that I should do my duty*, live up to my responsibility—not perhaps his legal right, or contractual right, but his human right.[79]

V. IS THERE REALLY A RIGHT TO OFFEND?

With the above, it is high time to consider whether or not there is a fundamental and authentic claim-right to "offend" the religious sentiments of another,[80] as well as the corresponding duty to respect such suggested "right."

More specifically, the question is asked as to whether or not the universally-recognized rights "to freedom of thought, conscience, and religion"[81] and "to freedom of opinion and expression"[82] include a concomitant "right" to offend believers. First Amendment champions, argue that the first mentioned freedoms necessarily "include the right to criticize, and criticism is sometimes offensive to those being criticized."[83] It is also opined that tolerance in this regard actually protects those with deep religious sentiments, if and when they will have to strongly express their beliefs with the effect of offending others.[84] Evidently then, what "right to offend" advocates seek to protect is speech or action which may be incidental to the exercise of religion or of free speech. What is thus at stake here is the act of the one who claims that he is the bearer of the suggested right.

Following Hohfeld and Finnis, when the subject matter of one's claim of right is one's own act—as in this case, that claim cannot be "claim-right" or a right *strictu senso*. It is merely a liberty, which by its nature is limited by the

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79. *Id.* at 24 (308) (emphasis supplied). In regard to laws made by the State, the writer believes, and thus must qualify, that not all such laws – philosophically speaking – create authentic duties based on rights in a strict sense. These create authentic duties only insofar as they serve the good of the human person, consistent with the principles of natural law. Certainly, any law allowing abortion or providing for contraception – literally, "against the inception of life" and thus, violates man's natural orientation toward life and the preservation of the species – cannot create any authentic duties and consequently, any claim-rights.

80. "Another" could refer to an individual or group of individuals, like a congregation, a local church, or even the entire membership of a particular faith.

81. UDHR, art. 18.

82. *Id.* art. 19.

83. Garnett, *supra* note 10.

84. *Id.*; *see also cf.* Haynes, *supra* note 23.

subject's duties or obligations, moral or otherwise, as well as the claim-rights of others.[85] To illustrate, the claim that a cartoonist can licitly portray the founder of a world religion as a superstar cavorting with women of ill repute is merely a liberty because the act in question is one of the part of the cartoonist. There is no rendering of what is strictly "due" to the cartoonist, consistent with the cartoonist's human well-being and dignity, by any of the followers of this world religion. In the same vein, any form of non-interference on the part of the affected believers does no good to their own well-being. In fact, it would be like shooting themselves in the foot, so to speak, as regards the free and undisturbed practice of their faith.

Theoretically, the cartoonist may still do as he pleases, but subject to certain restrictions like applicable libel or similar laws, or the ethical standards of his trade or of his publication. The claim-right of the world religion's followers to be respected in regard to their "teaching, practice, worship and observance"[86] also, and more fundamentally, limits cartoonist's exercise of his liberty. In this connection, the writer must state that the *Cantwell* ruling, is not, as advocates of the purported "right to offend" would want to believe, a blanket authority to go around and "offend" the religious sentiments of others. *Cantwell*, on the contrary, and although finding for accused Newton Cantwell, conceded that offensive conduct can still be subject to legal sanction:

> No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect.
>
> One may ... be guilty of the offense if he commits acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort [to] epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.[87]

It appears then that for abusive speech or conduct to be actionable, *Cantwell* requires that said speech or conduct must be of such character as to likely provoke violence or any disturbance of the public order. But that is

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85. May, *supra* note 64.

86. Finnis, *supra* note 56.

87. Cantwell v. Connecticut, 310 U.S. 296 (1940) (emphasis supplied).

only *Cantwell* speaking. Speech and/or conduct critical of a particular faith, even if it is wont to provoke only spiritual or moral violence can be subject to criminal as well as civil sanction, as exemplified by the above-quoted provisions under the Revised Penal Code, the Civil Code, and Presidential Decree No. 1986. How a particular society will deal with such liberty will be determined though by its religious *ethos*. Considering the deep religious sentiments of Filipinos regardless of sect or denomination, the abovementioned legal sanctions against conduct offensive to religion, interpreted by the Filipino as a direct affront to his very self,[88] come as no surprise.

VI. AUTHENTIC RIGHT-DUTY DICHOTOMY MUST BE GROUNDED ON THE GOOD OF THE HUMAN PERSON

Still and all, any inquiry as to whether there exists an authentic right-duty correlation must be founded on the conviction that "relation to others is of the essence of the human person."[89] Necessarily, to be truly human is "to relate" —provided that the relation produced is ordered, consistent with the rational nature of man, toward the good of both parties. And is there any better good than the achievement of the earlier mentioned first principles of natural law? None, except for that participation in the divine, which fortunately for man, happens as a result of adhering to natural law.

The encounter between believer and offender is downright destructive for both persons. Offensive speech or conduct in this respect not only violates the freedom of the right-bearer to live his faith, but also degrades the offender himself. The latter's lack of charity, respect and sensitivity, manifested in grave intolerance and abusive criticism, turns him away from the good which he must be pursuing. A sad caricature, nay a mockery, is made of human relations which are naturally ordered to be the font of mutual personal well-being.

Religion, as its etymology signifies, is meant to bind, to bring persons together under one belief. Coincidentally, and quite significantly, the term *lex* or law similarly comes from the Latin *ligare*.[90] Offending the religious sentiments of others, especially when disguised as a "*legal right*," actually

88. Indeed, the Filipino's view of the supernatural is that it is inseparable from his very life. This incarnational orientation toward the sacred and the divine is opposite to that of the Westerner's dualist view of religion; *see* MERCADO, *supra* note 21 at 161 – 62.

89. RICE, *supra* note 40 at 216; *cf.* Wojtyla, *supra* note 75.

90. DE TORRE, *supra* note 33 at 93.

divides[91] and worse, may even *destroy*—rendering for naught every believer's search for that fulfillment, peace, and harmony that only faith can bring. Certainly, no law can legitimize such end.

91. This, in effect, would be a fine-tuning of Garnett's observation that many regard religion as divisive. The writer submits that it is not religion *per se* which divides. Rather, it is those acts inimical to human harmony – for instance, offending the religious sentiments of others – which can cause alienate individuals and societies from one another.