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FIDES ET LIBERTAS



2010

RELIGION, HUMAN RIGHTS,
AND RELIGIOUS FREEDOM

A SYMPOSIUM ISSUE

International Religious Liberty Association

Printed in partnership with *Liberty Magazine*

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We believe that government is divinely ordained to support and protect citizens in their enjoyment of natural rights, and to rule in civil affairs; and that in so doing, government warrants respectful obedience and willing support.

We believe in the natural and inalienable right of freedom of conscience—to have or not have a religion; to adopt the religion or belief of one's choice; to change religious belief according to conscience; to manifest one's religion individually or in community with others in worship, observance, practice, promulgation, and teaching—subject only to respect for the equivalent rights of others.

We believe that religious liberty also includes the freedom to establish and operate appropriate charitable or educational institutions, to solicit or receive voluntary financial contributions, to observe days of rest and celebrate holidays in accordance with the precepts of one's religion, and to maintain communication with fellow believers at national and international levels.

We believe that religious liberty and the elimination of intolerance and discrimination based on religion or belief are essential to promote understanding, peace, and friendship among peoples. We believe that citizens should use lawful and honorable means to prevent the reduction of religious liberty.

We believe that the spirit of true religious liberty is epitomized in the Golden Rule: *Do unto others as you would have others do unto you.*

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The purposes of the International Religious Liberty Association are universal and nonsectarian. They include:

- 1 Dissemination of the principles of religious liberty throughout the world;
- 2 Defense and safeguarding of the civil right for all people to worship, to adopt a religion or belief of their choice, to manifest their religious convictions in observance, promulgation, and teaching, subject only to the respect for the equivalent rights of others;
- 3 Support for religious organizations to operate freely in every country through the establishment of charitable or educational institutions;
- 4 Organization of local, national, and regional chapters, in addition to holding seminars, symposiums, conferences and congresses around the world.

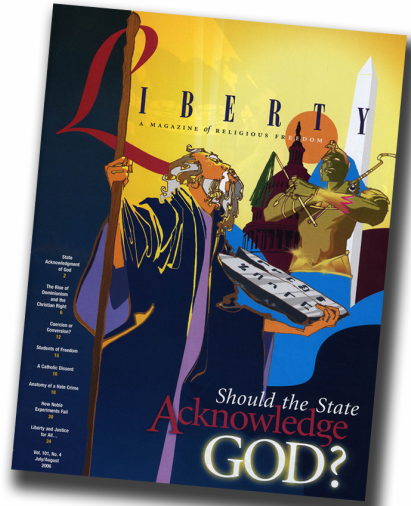
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THE JOURNAL OF THE INTERNATIONAL
RELIGIOUS LIBERTY ASSOCIATION

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EDITORIAL

It is with great satisfaction that we present to you this year's edition of *Fides et Libertas*. In our effort to ensure that this journal becomes a valuable resource for the "Religious Freedom Practitioner"—in other words the scholar, the lawyer, the advocate, the preacher, and the professor with a passion that mankind maintain the freedom of religion for all individuals—we have sought the premier scholars in the field. Professor John Witte, at the Center for the Study of Law and Religion, Emory University was most gracious in offering his assistance to ensure that *Fides et Libertas* became such a resource.

You hold in your hand a spectacular edition. This is not only our largest publication to date but perhaps our most important. The preeminent scholars who present their work in this volume are uniquely qualified for the task. They are people who have thought long and hard about the issues that confront us. Professor Witte has aptly introduced their work and I will not take up further space doing so here. Suffice it to say that you are in for a feast.

As this journal is the flagship of the International Religious Liberty Association we continue to highlight the work of our Secretary-General Dr. John Graz. His yearly report includes some notes on his experience attending the Lutheran World Federation Assembly on July 22, in Stuttgart, Germany. The Lutheran community coming to terms with their past treatment of the Anabaptists is a tremendous example of what benefits flow when there is mutual respect for the religious expressions of others.

Dr. David Trim's book review essay tackles two very meaty works on the framing of the First Amendment to the United States Constitution. Trim's erudite analysis is concise and fair. His reading of the works under review suggests that they "give little comfort to those who confidently affirm that the founders of the American republic clearly and consistently wanted complete and unconditional separation between church and state."

Finally, let me encourage you to spread the word about *Fides et Libertas* we are passionate about our subject and we want to do things better. If you have an article that you want us to consider for our next publication please feel free to contact us at your pleasure. Note our "Submitting Manuscripts" section for all of the details.

Barry W. Bussey
November 15, 2010
Casalaba
Trent Hills, Ontario
Canada

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FIDES ET LIBERTAS



PART ONE

HUMAN RIGHTS, & RELIGIOUS FREEDOM A SYMPOSIUM ISSUE

Edited by John Witte, Jr.
Center for the Study of Law and Religion, Emory University

With funding from
The Henry Luce Foundation, New York City



FOREWORD

JOHN WITTE, JR.¹

Over the past two decades, the Center for the Study of Law and Religion at Emory University has had the privilege of directing fifteen major projects on law, religion, and human rights in international, inter-religious, and interdisciplinary perspective. These projects have explored the contributions of Christianity, Judaism, Islam, and other faiths to the cultivation--and abridgement--of human rights and democratic norms in international and domestic law. They have probed some of the hardest issues of religious persecution and bigotry, religious proselytism and discrimination, rights for women and children, rights within marriage and family, and more. These projects have provided a common table and an open lectern for deep dialogue and debate among antagonists from multiple confessions and professions around the world. And they have sought to anticipate and resource deep cultural debates before they get reduced to media sound bytes or legislative initiatives. Together, these projects have yielded four major international conferences, 50 roundtable conferences, 60 major new publications, and a network of some 1200 scholars from around the world. Appendix 1 lists the projects; Appendix 2 lists some of the main books and journal symposia that they have produced.

The obvious premise of these projects is that democracy, human rights, and religious freedom are indispensable to the establishment of local and world order. The less obvious premise is that religion is a vital dimension of any effective democratic human rights regime. For democracy and human rights are inherently abstract ideals -- universal statements of the good life and the good society. They depend upon the visions and values of human communities and cultures to give them content and coherence. Religion is an ineradicable condition of human persons and communities. Religions invariably provide vital sources and scales of values by which many persons and communities govern and measure themselves. Religions invariably suffuse the cultural, ethnic, and national identity of a person and a people. Religions must thus be seen as indispensable allies in the modern struggle for human rights and democratization. Their faith and works, their cultural and ethnic symbols and structures must be adduced to give meaning and measure to the abstract claims of democratic and human rights laws and norms. The religious freedom of every peaceable person and people must thus be jealously protected.

The articles collected in this symposium issue sample some of the recent scholarship produced in our Center's projects, particularly on issues of American and

¹ Jonas Robitscher Professor of Law, Alonzo L. McDonald Family Distinguished Professor, and Director of the Center for the Study of Law and Religion at Emory University.



international religious freedom. The first three articles by Jeremy Waldron, Kent Greenawalt, and Carolyn Evans sample some of the current hard issues arising under the classic guarantees of freedom of conscience, freedom of religious expression, and religious equality, with illustrations drawn from domestic and international legal tribunals. Douglas Laycock then offers some predictions on how these and other thorny issues will play out in America over the next two decades. Richard Garnett, William Bassett, and Johan van der Vyver then map the modern terrain of religious group rights both under the First Amendment establishment and free exercise clauses, and in international human rights instruments that guarantee the right of religious self-determination and church autonomy. Joel Nichols and I take up one issue on the frontier of religious freedom, the right of religious groups to govern the family law issues of their voluntary faithful who choose to opt out of the state's family law system. David Little provides a systematic overview of the most essential rights and liberties of thought, conscience, and belief in the world today, and their gradual discovery in the Western tradition. Jeremy Gunn concludes the symposium with a review of the appropriate legal grounds that have emerged over time to define when a state may limit the religious freedom claims of an individual or group.

On behalf of my colleagues in the Center for the Study of Law and Religion, I would like to thank the authors of the chapters that follow and their original publishers for their kind permission to reprint these pithy articles in this symposium issue. I would like to thank Barry Bussey and his colleagues at the International Religious Freedom Association for their kindness in soliciting this collection and publishing it in multiple languages. I would like to thank Dr. Michael Gilligan and his colleagues at the Henry Luce Foundation for their generous grant to our Center to develop a new project on "Law, Religion, and Human Rights in International Perspective" that allowed for this publication and a number of others. Finally, I wish to thank our Center's professional staff members—April Bogle, Linda King, Anita Mann, and Amy Wheeler—for their excellent work on this project.





THE IMAGE OF GOD: RIGHTS, REASON, AND ORDER

JEREMY WALDRON¹

And God said, “Let us make man in our image, after our likeness....” So God created man in his own image, in the image of God created he him; male and female created he them” (Gen. 1:26-27).

Imago dei—the doctrine that men and women are created in the image of God—is enormously attractive for those of us who are open to the idea of religious foundations for human rights. It offers a powerful account of the sanctity of the human person, and it seems to give theological substance to a conviction that informs all foundational thinking about human rights—that there is something about our sheer humanity that commands respect and is to be treated as inviolable, irrespective of or prior to any positive law or social convention.

In this chapter I want to do three things. First, I want to survey some of the difficulties that might stand in the way of treating *imago dei* as a foundation for human rights. Some of these have to do with the specifically religious character of the doctrine; the fact that this might disqualify the doctrine in the eyes of secular political liberals. But I shall argue that this objection is perhaps less telling than objections that might arise *within* the tradition of Judeo-Christian thought. We must not assume that a doctrine that seems, at first glance, attractive as a foundation for human rights is actually capable (in light of its specific theological character and the controversies that surround it) of doing the work that a given human rights theorist wants it to do. It may not be appropriate as a ground for rights at all, or if it is looked to as a ground, it may make a considerable difference to the character of the rights theory we erect on its foundation.

Secondly, assuming that we think it is appropriate to persevere with *imago dei* in this context, there is the further question of what work it can do in human rights theory. Is it just an abstract all-purpose premise, a general religious foundation on which rights of all sorts may be erected? Or is it congenial in spirit to some rights rather than others? I shall argue that human rights theory can avail itself of deep

¹ University Professor, NYU Law School; Chichele Professor-Elect of Social and Political Theory, Oxford. An earlier version of this chapter was published in John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Human Rights: An Introduction* (Cambridge: Cambridge University Press, 2010), and is used herein with the permission of the author and publisher.



insights generated by the idea of *imago dei* in a number of different ways, and I shall set out what these are.

The third part pursues one possibility in particular. If *imago dei* is relevant to rights at all, it may be thought especially relevant to our assessment of *political* rights—the right to participate in various ways as a citizen in the governance of one’s society. Humans may be regarded as bearing the image of their Creator in their ability to apprehend and participate in an intelligible order. Such a conception puts front and center the rational and moral capacities of the human being and their role in personal, social, and political life. The conclusion of the first part of my inquiry is that the choice of a specific religious foundation cannot be expected to leave everything as it is so far as the rights theory that is built on the foundation is concerned. At the end of the paper, I shall make good on this point, by tracing some differences that *imago dei* may make in our conception of participatory rights.

IMAGO DEI AS A PROBLEMATIC FOUNDATION

The importance of *imago dei* for religious, social, and political thought is best known from Roman Catholic teaching. But it is not peculiarly Catholic. American evangelical Protestants, white and black, invoke the doctrine, and of course because of its scriptural provenance it extends beyond Christianity. The doctrine that man is created in the image of God and that this makes a difference to how it is permissible to treat us is first stated in the Torah, and it is a mainstay of Jewish as well as Christian social thought.

Though it is attractive to those who are open to religious foundations of human rights, the doctrine excites considerable anxiety among those who reject a religious world view or who are, for other reasons, committed to an approach to rights that can sustain itself in a multi-faith society. The idea of grounding the dignity and the rights of man on *imago dei* may have broad appeal among followers of the Abrahamic religions. But its appeal is far from universal. While its adherents will say that it provides exactly the foundation that a universalist approach to rights requires, others will object that the requisite universalism is not just a matter of the logic of a particular set of foundations. It is a matter of the broad appeal of such foundations, so that the reasons the foundation provides can plausibly be regarded as reasons *for* everyone whose conduct is supposed to be affected. We know that those who formulated some of the most important human rights documents took this view: a proposal to include a reference to man’s creation in the image of God in the Universal Declaration of Human Rights was considered and rejected on the ground that this would undermine the Declaration’s broader appeal.²

² This is based on the Summary Records of Meetings of the Third Committee Sept. 21-Dec. 8, 1948, Official Records of the Third Session of the General Assembly, Part I, at 55, U.N. Doc. (A/C.3/SR.) 84-180 (1948), cited in Courtney W. Howland, “The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter,” *Columbia Journal of Transnational Law* 35 (1997): 271, 341.



Many object to the political use of any deep doctrine of this kind. For some, this is a special case of a Rawlsian commitment to standards of public reason generally: “In discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious or philosophical doctrines—to what we as individuals or members of associations see as the whole truth.” According to John Rawls, any such appeal would problematize the legitimacy of individual rights in the eyes of many citizens: their legitimacy is much better secured if it rests on “plain truths now widely accepted, and available, to citizens generally.”³ Not all liberals share Rawls’s general view, however, and the grounds he has adduced for his “political liberalism” have attracted some criticism.⁴ But even those who embrace some form of foundationalism are likely to be uneasy about using foundations that seem bewildering or worse to atheists or followers of other traditions. After all, *imago dei* is a highly specific and recondite theological doctrine. It is not just a vague expression of respect and concern, and it is not at all clear that it can be given anything remotely resembling a secular translation.

For others the misgivings about *imago dei* reflect a pragmatic confidence in a shared aversion to human rights abuses that has nothing to do with deep philosophical foundations. Anthony Appiah says that “[w]e do not need to agree that we are all created in the image of God ... to agree that we do not want to be tortured by government officials.”⁵ But should this be a reason for *denying* the relevance of *imago dei* (as opposed to not obsessing about it)? Appiah acknowledges “the reason why we do not need to ground human rights in any particular metaphysics is that they are already grounded in many metaphysics.” One might infer from this that in the context of overlapping consensus, there is nothing wrong with some people holding fiercely to this deeper idea or even in their believing (for their part) that this is a more satisfactory foundation than the shallow commitments of their more pragmatic fellow-travelers.

Another set of misgivings about the use of this idea might arise from within the Jewish and Christian traditions themselves. *Imago dei* is far from a straightforward or uncontroversial theological doctrine. Scripturally, it is presented first in the form of a doctrine of creation, and there we find a variety of possible meanings. Humans are said to have been created in the likeness of God and created in the image of God. Also some Jewish rabbinical sources suggest that there might have been two phases of the creation of human being, with the image of God playing a different role in each.⁶

³ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 224-25.

⁴ See, e.g., Ronald Dworkin, “Rawls and the Law,” *Fordham Law Review* 72 (2004): 1387, 1396-99; Joseph Raz, “Facing Diversity: The Case of Epistemic Abstinence,” *Philosophy and Public Affairs* 19 (1990): 3; Jeremy Waldron, “Public Reason and ‘Justification’ in the Courtroom,” *Journal of Law, Philosophy and Culture* 1 (2007): 107.

⁵ K. Anthony Appiah, “Grounding Human Rights,” in Michael Ignatieff, Anthony Appiah, and Amy Gutmann, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2003), 101, 106.

⁶ See also George P. Fletcher, “In God’s Image: The Religious Imperative of Equality Under Law,” *Columbia Law Review*, 99 (1999): 1608, 1615-17.



Do human rights theorists have to take sides in these exegetical debates?

Secondly, there are questions about what *imago dei* means in the light of doctrine of the fall into sin. What is the relation between *imago dei* and our fallen sinful nature? What can human rights theory do with Calvin's doctrine that the image of God in us is now but a "relic" or Martin Luther's teaching that since the Fall we are more "like" the devil than "like" or "in the image of" God?⁷ When we use this doctrine in the context of human rights, are we committing ourselves to saying that Luther and Calvin were wrong?

Thirdly, there are specifically Christian questions about the meaning of *imago dei* in light of the Incarnation. Is the sense in which Christ is the image of the Father (John 14: 8-9; 2 Corinthians 4:4; Colossians 1: 15; and Hebrews, 1:3) the same as or different from the sense in which mere mortals are created in the image of God?⁸

I have neither space nor wit to address these questions. But it is surely worth pausing to ask whether we should be associating human rights with this degree of theological controversy. And this is to say nothing about whether we should expect the theologians to be happy about having the waters of controversy which lap around the doctrine of *imago dei* muddied by the opportunistic enthusiasm of human rights advocates, casting around for something that can serve as a religious foundation (to substantiate their claim that they have the resources to do what their secular brothers and sisters cannot do).

I put these forward as genuine questions about the relation between the theological agenda and the human rights agenda. It is not my intention to refute the interest of *imago dei* for human rights theory. But I want to insist on due caution and counsel against just grabbing at the doctrine because it seems like an impressive bauble to produce as a distinctive religious foundation.

We should remember, too, that this is far from the only theological doctrine that might ground human rights. There are many ways in which "theology plumbs the depths of what it means to be human as a basis for supporting and providing a continuing critique of existing human rights declarations and debates."⁹ One is the idea—less formal and abstruse than *imago dei*—that we are all God's children, and we are required to mirror in our dealings with each other the same concern that He has in his love for us. Or consider John Locke's theory of natural rights. The doctrine of *imago dei* was not unknown to Locke; he used it in some parts of his political philosophy.¹⁰ But he did not cite it as a foundation for his doctrine of natural rights.

⁷ See the discussions of the image of God in fallen man in David Cairns, *The Image of God in Man* (London: SCM Press, 1953), 131-32 (on Luther) and *ibid.*, 137-41 (on Calvin).

⁸ There is useful discussion of this in Claus Westermann, *Genesis 1-11: A Continental Commentary* (Minneapolis: Fortress Press, 1994), 155.

⁹ Charles Villa-Vicencio, "Christianity and Human Rights," *Journal of Law and Religion* 14 (1999-2000): 579, 594.

¹⁰ John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), I, § 30.



He based that, instead, on the premise that we are God's workmanship and created by Him for a purpose:

Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order, and about his business; they are his Property, whose Workmanship they are, made to last during his, not one another's Pleasure. And being furnished with like Faculties, sharing all in one Community of Nature, there cannot be supposed any such *Subordination* among us, that may Authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of Creatures are for ours.¹¹

On this account, what distinguishes us from other creatures, which are also God's workmanship, is not that we bear the image of God but that it is plausible to suppose that we have been sent into the world on God's business and are entitled to protection and respect on that account. I am not saying that this is a better foundation for a rights theory than the doctrine of *imago dei*. But it is important to be aware of the alternatives.

Another possible foundational idea, this one specifically Christian, is the premise that there is something of Christ in every needy person with a claim on us:

For I was an hungered, and ye gave me no meat: I was thirsty, and ye gave me no drink: I was a stranger, and ye took me not in: naked, and ye clothed me not: sick, and in prison, and ye visited me not. Then shall they also answer him, saying, Lord, when saw we thee an hungered, or athirst, or a stranger, or naked, or sick, or in prison, and did not minister unto thee? Then shall he answer them, saying, Verily I say unto you, Inasmuch as ye did it not to one of the least of these, ye did it not to me (Matt. 25: 42-45).

This imagery is commonly associated with *imago dei*, but the relation is by no means straightforward. It is capable at any rate of being grasped independently. Certainly it is more directly normative in its tendency than *imago dei*, for it can be seen as a direct presentation of the sort of moral duties that human rights are supposed to involve.

As we sound these various notes of caution, we should also observe that *imago dei* may play a role in Christian social thought which is not necessarily associated with human rights (as human rights lawyers understand them). In Roman Catholic social thought, there is a very strong link between *imago dei* and the idea of human dignity.¹² Now it is true that many human rights advocates—and many Catholics,

¹¹ *Ibid.*, II, § 6

¹² Cf. John Paul II, *Original Unity of Man and Woman: Catechesis on the Book of Genesis* (1981), cited in John J. Coughlin, "Pope John Paul II and the Dignity of the Human Being," *Harvard Journal of Law & Public Policy* 27 (2003): 65, 72-74.



too—regard dignity as having foundational importance for human rights. But, as I understand it, not all Catholic thinkers who associate *imago dei* with dignity are happy about this next step. Conservative Catholics are suspicious of contemporary human rights rhetoric.¹³ They prefer to give dignity its own normative significance—a significance that (to their mind) points in a rather different direction. So, for example, they will use the idea of human dignity, associated as it is with *imago dei*, to oppose stem cell research or abortion. They might express this in terms of the “rights” of fetuses and embryos or they might not; but they will have considerable difficulty with the idea that dignity, so understood, might also lie at the basis of demands for women’s autonomy or their reproductive freedom. Though the papacy has committed itself to the human rights idea in recent years,¹⁴ still human rights doctrine and theory often move in directions that are incompatible with Catholic religious thought: in their insistence on radical individualism, for example, or in the dogma that rights can be identified without any objective doctrine of the human good or any form of tradition and authority (save perhaps the authority of recent positive law). There might also be some more generalized discomfort at the association of something as deep and distinctive as *imago dei* (or human dignity founded on *imago dei*) with what many regard as the grab-bag of items—due process, freedom of the press, language rights, holidays with pay—that one finds in modern human rights conventions.

I say again that awareness of these various objections and these various alternative possibilities is not fatal to regarding *imago dei* as a foundation for human rights. My arguments at this point are intended just to slow us down, in a way that is consonant with what we all acknowledge is the seriousness with which the foundational question should be approached.

If we do decide to explore further the possibility that *imago dei* provides a grounding for rights, we have to consider the exact shape of its normativity. One idea behind human rights is an emphasis on the value to be accorded each person. This seems straightforward enough in the light of *imago dei*. That doctrine seems to imply that there is something precious, even sacred, in each human being—something which commands respect of the kind that is commanded by the very being of God. I hope it is not pedantic, however, to point out that even this may move too quickly. It is not entirely clear that *imago dei* is a conception of worth or value at all. And certainly the idea that the image of God commands anything like the same respect that *God* commands is not self-evident; on the contrary, it sounds idolatrous at first hearing (though of course that impression may be dispelled in various ways).

Once one moves beyond the idea that each human is precious, there are further questions about the deontic structure and the specific normativity of rights. Rights

¹³ See the discussion in Roger Ruston, *Human Rights and the Image of God* (London: SCM Press, 2004), 10–12.

¹⁴ E.g. John XIII, *Pacem in Terris*, § 11 and John Paul II, *Redemptor Hominis*, §17.



are supposed to be correlative to duties incumbent on persons other than the right-bearer. But I can imagine a strongly pietistic conception of *imago dei* that holds that respect for the divine image in each person is a matter primarily for that person, as he or she endeavors (with God's grace), to live a life more faithful to that image. The one use of the image idea in the Gospels (an indirect but an unmistakable use, as David Cairns points out)¹⁵ emphasizes wholly its use in generating duties of man to God, to render oneself unto God just as one renders coins stamped with the image of Caesar unto Caesar. Admittedly, this may show only that *imago dei* cannot generate rights against God. One could say that, while still insisting "that human dignity ... makes every man an object of reverence to other men, and gives him [a?] right[s?] over against them."¹⁶

Here is another difficulty. It might be thought that *imago dei* is incapable of supporting the sort of radical individualization of moral demands that human rights theory presupposes. In liberal political philosophy, an emphasis on individual rights is at odds with community or at least with communitarian concerns; but is the same true of *imago dei*? Some theologians place great emphasis on the plural formulations used in the biblical texts: "Then God said: 'Let us make human beings in our image, after our likeness'"¹⁷ On this account, the image of God may inhere not in every individual as such but in the love between or other relationality among individuals. Now it is true that human rights, too, are conceived in relational terms—in the correlativity and reciprocity of rights and duties, for example. It is true, too, that rights can be attributed to collectivities not just to individuals. Even so, the question of parsing the relation between the normativity of *imago dei* and the normativity of human rights will be a delicate one. We know that one of the distinctive things about rights-discourse is the endeavor to identify for each right a specific right-bearer (mostly individual, sometimes a group) and distinguish it both from a specific duty-bearer (sometimes individuals, sometimes entities like governments, sometimes both) and from other members of the same moral community (whose interests may have to be subordinated from time to time to a trumping right). Will this answer to the relationality associated with *imago dei* by the sort of theological accounts I mentioned at the beginning of this paragraph? I am not sure. We might try to force some sort of fit, but it is not clear that it can be done without doing violence to human rights or *imago dei* or both.

A further feature of human rights, which may not sit comfortably with *imago dei* is the litigiousness that human rights involve. We are told in the Sermon on the Mount that "if any man will sue thee at the law, and take away thy coat, let him have thy cloak also.... Give to him that asketh thee, and from him that would borrow of thee turn not thou away" (Matt. 5:38-42). The image of the rights-bearer

¹⁵ Cairns, *The Image of God in Man*, 38. See Matthew 22: 21, Mark 12: 17, and Luke 20: 25.

¹⁶ Cairns, *The Image of God in Man*, 283.

¹⁷ See the discussion of Barth's *Dogmatik* in Cairns, *The Image of God in Man*, 24 and 167ff.



is more self-assertive than this. But when we contrast the self-assertiveness of the right-bearer with the self-abnegation recommended by Jesus, to which side should we assign the doctrine of *imago dei*? Or think of Jesus's response to the abuse, perjury, violence, and injustice in his own trial and execution: "Father, forgive them for they know not what they do" (Luke 23: 34). Again: if there is a contrast between sticking up for one's rights and forgiving one's enemies, to which side should we assign *imago dei*?

These questions are not supposed to settle anything, just to make us a little less comfortable than we might be with *imago dei* as a ground of rights. On the other hand, there may be resonances of the doctrine that do accord with some aspects of liberal rights ideology. *Imago dei* is associated in the original Genesis passage with dominion (Gen. 1:26)—God's giving those created in his image dominion over the earth—and of course dominion is an active juridical idea strongly connected with rights in later jurisprudence.¹⁸ More generally, that *imago dei* is not altogether out of place in a legalistic context is indicated by its use later in Genesis to expound the Noahide laws regarding homicide: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man" (Gen. 9: 8).

CONTRIBUTIONS TO HUMAN RIGHTS THEORY

Having considered all these difficulties, if we are still convinced that *imago dei* has something to offer human rights theory, how should we think about its contribution?

Imago dei is a doctrine pertaining to our ontological status (our relation to God and the particular nature of our creation and redemption). As such it presents many aspects—as an image can relate to what it is an image *of* in a variety of ways.¹⁹ And of course human rights is also a multifaceted idea: it embraces moral and legal claims of various kinds (e.g. rights differentiated by subject-matter as liberty rights, protective rights, legal process rights, political rights, socio-economic rights, etc.) as well as moral and legal claims made at various levels (fundamental claims about dignity or autonomy versus quite specific claims about particular freedoms or protections). And human rights are surrounded by almost as much controversy as *imago dei*; so there is a further question about the ways in which its association with human rights will bear upon those controversies.

Probably if *imago dei* does relate to human rights, it does so at a foundational rather than at a derivative level. It might be seen as the basis of our dignity, in the sense that "dignity" means the rank that we hold in creation. We are of higher rank than the animals, "for God created man for incorruption, and made him in the

¹⁸ See Richard Tuck, *Natural Rights Theories: their Origin and Development* (Cambridge: Cambridge University Press, 1979), 86ff.

¹⁹ See Ruston, *Human Rights and the Image of God*, p. 283. Also Fletcher, "In God's Image," pp. 1619-20 (reminding us that the idea of an image is not the idea of a single-property similarity; it is more holistic than that, more of a *gestalt*).



image of his own eternity” (Wisd. 2:23). We are “like” God in our capacity for immortality. And it also contributes to a sense of our equality as the bearers of rights. Now, the proposition that we are each of us created in the image of God is, not strictly speaking, an egalitarian idea. It expresses something momentous about each of us. Still, it has an equalizing tendency, particularly when it is asserted of those who historically have been treated as inferiors. So, for example, in the momentous case of *Dred Scott v. Sandford* (1856), dissenting Justice McLean thought it necessary to remind his colleagues on the United States Supreme Court that “[a] slave is not a mere chattel. He bears the impress of his Maker, and ... he is destined to an endless existence.”²⁰

More recently, in a 2005 decision of the Supreme Court of Israel, which considered the Israeli government’s policy of preventive strikes aimed at killing members of terrorist organizations in the West Bank and the Gaza Strip even when they were not immediately engaged in terrorist activities, President (Emeritus) Aaron Barak prefaced his opinion with this observation:

Needless to say, unlawful combatants are not beyond the law. They are not “outlaws.” God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection ... by customary international law.²¹

The reference here to the image of God is intended to pull us up short and remind us that, although we are dealing with someone who will kill and maim scores of innocent people given the opportunity and one who is justly liable through his actions and intentions to deadly force, still we are not just talking about a wild beast or something that may be killed as though its life did not matter. The unlawful combatant is also *man-created-in-the-image-of-God* and the status associated with that characterization imposes radical limits on how we must treat the question of what is to be done with him.

The foundational work that *imago dei* does for dignity is, in my opinion, indispensable for generating the sort of strong moral constraint associated with rights—and for overriding the temptation to demonize or bestialize “the worst of the worst.” This temptation is so natural that it can only be answered by something that goes beyond our attitudes, even beyond “our” morality, something commanded from the depths of the pre-political and pre-social foundation of the being of those we are tempted to treat in this way. *Imago dei* presents the respect that humans as such are entitled to as something grounded, not in what we happen to care about or in what we happen to have committed ourselves to, but in facts about what humans are actually like, or more accurately, what they have been made by the Creator to be

²⁰ McLean J., dissenting in *Dred Scot v. Sandford*, 60 U.S. 393, at 550 (1856). Also citation to Frederick Douglass in Ruston, *Human Rights and the Image of God*, 269.

²¹ *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and others* (HCJ 769/02) December 11 2005, §25.



like—like unto Himself and by virtue of that likeness sacred and inviolable. We are not just clever animals, and the evil-doers among us are not just good animals gone bad: our dignity is associated with a specifically high rank in creation accorded to us by our creator and reflecting our likeness to the creator. Our status even as wrongdoers is to be understood in relation to this.

Besides this vital work in regard to human dignity in general, *imago dei* may also be used in connection with certain particular rights or particular kinds of rights. I want to briefly summarize three such uses, before turning at greater length in my final section to a fourth.

The first and most obvious relation between *imago dei* and particular human rights derives from the doctrine's use in the Noahide law to express the basic right to life—the sacredness of human life—and the seriousness with which the taboo on killing must be taken. (No doubt, modern human rights advocates will be uneasy with the connection intimated in this passage to capital punishment. Maybe this can be explained away by various interpretive contortions.²² But I guess it indicates a further reason for saying that when we go looking for a rights-foundation, we should be careful what we wish for.)

Secondly, *imago dei* may be used to bolster the case that is made in regard to welfare rights—the most elementary requirements of concern for one another's subsistence. I said earlier that the Gospel account of the presence of Christ in every needy or vulnerable person can, in theory, be understood independently of *imago dei*. But the two doctrines can also be used together, with the account in Matthew's Gospel moving us from the rather abstract idea of the image of God in Genesis to the awfully concrete sense of the incarnate presence of Christ in the Gospel, and in Christ's insistence that in responding in various ways to humanity as it presents itself, it is as though we are responding to Him.

Thirdly, the doctrine has a use in regard to rights not to be subject to degrading treatment. There is an old Talmudic story, known as "The Parable of the Twins," used to illuminate Deuteronomy 21:23.

Two twin brothers dwelt in one city. One was appointed king and the other took to banditry. The king gave an order and they hanged the bandit. But all who saw the bandit said: "The king is hanged!" So the king gave an order and they took his twin down.²³

The implication of the parable—indeed the implication of *imago dei* is that when we treat humans in certain ways, for example when we torture them or mutilate their bodies, we present the image of God within us in a certain ugly light. We do so not only in our own self-presentation of how we think it is appropriate for be-

²² For an interpretation of *imago dei* that is severely restrictive of capital punishment, see Yair Lorberbaum, "Blood and the Image of God: On the Sanctity of Life in Biblical and Early Rabbinic Law, Myth and Ritual" in Kretzmer and Klein, eds., *The Concept of Human Dignity in Human Rights Discourse* 55, 58, 82.

²³ Babylonian Talmud, Sanhedrin 46b. I am grateful to Moshe Halbertal for this reference.



ings like us to behave, but also in the presentation of the tortured body of our victim. Like the mutilation of a valued painting, our actions not only degrade the art object but mock the person whom it portrays.

All these resonances are important. Still, there may be more to the implications of *imago dei* for human rights even than this.

RIGHTS AND REASON

Consistently, for pretty much the whole of the Christian era, *imago dei* has been associated with man's capacity for practical reason, using God-given powers of reason and understanding to apprehend something of God Himself and His order and purpose in the world. According to Augustine, the human soul "is made after the image of God in respect to this, that it is able to use reason and intellect in order to understand and behold God."²⁴ And Aquinas says something similar when he observes that "man is united to God by his reason or mind, in which is God's image."²⁵ Christian thinkers who take this view associate it also with our freedom of will: our reason, in respect of which we resemble God, is not just theoretical but practical reason. It is not only the capacity for rational apprehension of God's order in the world; it involves also the ability to shape our lives and actions in according with that apprehension.

Associating this conception of *imago dei* with human rights gives a particular cast to our understanding of what our rights amount to. Certainly the idea that we have rights in virtue of our reason and our normative agency is a familiar one.²⁶ But *imago dei* seems to privilege not reason as such, but a particular form and orientation of reason. Roger Ruston warns that "[w]hat is not intended is ... 'reason' in the modern sense of the dry, calculative activity of our minds abstracted from everything else that makes life worth living." Instead, he says, "[i]t is a passionate reason, ordered to our ultimate end in the presence of God."²⁷ The idea that we resemble God in the sheer ability to reason and understand with or without regard to ethical good—is rejected by most theorists of *imago dei*. So this conception is going to sit uncomfortably with any understanding of human rights that privileges the free decision of the subject simply on account of that decision's representing an exercise of will. It consorts more comfortably with a conception of rights that understands them partially as responsibilities, so that P's right to do X or receive Y is connected with some responsibility in relation to God's order that it is incumbent on P to discharge. It will, in other words, tend to favor an objective rather than a subjective conception of rights.

It is sometimes thought that human rights ideas could not have emerged from the discourse of natural rights, if the objective understanding of rights as responsibil-

²⁴ Augustine, *De Trinitate*, XIV, 4 (cited by Cairns, *The Image of God in Man*, 117).

²⁵ Aquinas, *Summa Theologica*, 2a, Q100, 2

²⁶ Cf. James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008).

²⁷ Ruston, *Human Rights and the Image of God*, p. 56. See also *ibid.*, 112 and 279.



ities had not been superseded by a more subjective conception. But actually that may be a mistake.²⁸ Early modern ideas of inalienable rights and the Lockean understanding of natural rights as individualized responsibilities for our own flourishing according to God's purpose, a responsibility with which others are not entitled to interfere, represented a resurgence of something like an objective theory of rights. And this is reflected in the content of many modern human rights claims, which are oriented not just to individual freedom but to responsibilities—like rights of family—in which individuals must be assisted and protected. These responsibilities are not just duties, in the sense of specific actions that we must or must not do. They call upon resources of thought and practical reason as they require continual exercises of intelligence to discern what is necessary for ordering the area of human life committed to one's care.

Much the same can be said about those conceptions that use Genesis 1:26 to identify *imago dei* with man's being given dominion over the earth. It is true that subjective rights have, historically, been associated with rights as *dominium*. But it is evident that man's dominion is given for a purpose and conditioned by that purpose. Again, however, the fact that our dominion over the earth is understood as a responsibility does not imply that it is purely a matter of submission to an order that one apprehends only well enough to fall into line with it. There is a political aspect to *imago dei* which amounts, as Hoekema has indicated, to something active, something approaching the exercise of rulership. The award of dominion gives man "an exalted position on the earth," making him in effect "God's viceregent, who rules over nature as God's representative."²⁹

The theme of rulership seems inseparable from *imago dei*. Even apart from our lording it over the animals, there is a political aspect to the powers that *imago dei* suggests for ourselves. *Imago dei* connotes powers of self-mastery and autonomy (in the literal sense: our ability to give law to ourselves). The dominion over nature which is given to us includes dominion over our animal natures, if only we will exercise it.

What are the implications for rights of taking this power seriously? One immediate consequence is a connection between *imago dei* and rights of religious freedom. Our lives need to be ruled in respect of faith and worship; our natural impulse to neglect our Creator in favor of mundane concerns needs to be mastered and suppressed. But *imago dei* implies that we are actually the sort of beings that can master themselves in this way. We can be trusted in these matters. We are capable of the appropriate kind of self-regarding dominion in respect of these momentous matters. We do not need rule imposed from the outside.

There may also be a broader implication for how we think about rights more

²⁸ There is an excellent discussion in Tuck, *Natural Rights Theories*, 143ff.

²⁹ Anthony A. Hoekema, *Created in God's Image* (Eerdmann's, 1994), 78-79, 85. See also Westermann, *Genesis 1-11*, 151.



generally. The attribution of rights to individuals is an act of faith in the capacity for moral thinking of each individual right-bearer. Rights involve choices; and their exercise requires the agent to select which of a number of options he would like to realize in his life and in his dealings with others. Of course, rights may be abused; indeed a right may be exercised wrongly. But we are the sort of beings who can exercise rights responsibly, and who can discern the moral order in whose context particular exercises of rights count as responsible.

Self-mastery includes an ability to discern a moral relation between what can be claimed for oneself and what is claimed for others. This is an old natural rights idea. In the hands of John Locke and others, the idea of natural rights connoted not just the objective existence of certain entitlements that people held and certain constraints on the actions of others, but also an ability in all the persons concerned to figure this out responsibly for themselves. Yet again it was a point about trust: individuals have what it takes to figure out a system of rights in the state of nature. Indeed Lockean natural rights theory holds that it is safer to entrust such decisions to ordinary individuals, safer than trusting to statesmen or philosophers or those whose powers of moral reasoning have been corrupted by the “artificial Ignorance, and learned Gibberish” of legal scholasticism.³⁰ This tends to be downplayed a little in modern notions of human rights, which are given as positive law rather than as products of reasoning available to every man. But positive law does not come out of the air; bills and charters of rights are typically founded (even if indirectly) upon popular sovereignty, so that there is a theoretical commitment to the proposition that those who are to have the rights in question are also in principle capable of thinking them properly through.

This brings us to the question of politics and government and the implications of *imago dei* for our understanding of political rights. Here there seems to be a divide in modern understandings of *imago dei*—a division in the canon of theology between those who pursue the intellectual conception of *imago dei* in a political direction and those who do not. Aquinas does not see any wider political consequences; and Catholic reasoning tends to follow him in this regard.³¹ But in modern Protestant thought, *imago dei* has been associated with participation in politics. The National Association of Evangelicals affirms, in its statement on civic responsibility that

We engage in public life because God created our first parents in his image and gave them dominion over the earth (Gen. 1:27-28)... The responsibilities that emerge from that mandate are many, and in a modern society those responsibilities rightly flow to many different institutions,

³⁰ See Locke, *An Essay Concerning Human Understanding*, Bk. III, Ch. x, para. 9, p. 495. See also the discussion in Jeremy Waldron, *God, Locke and Equality: Christian Foundations in Locke's Political Thought* (Cambridge University press, 2002), 83ff.

³¹ See Ruston, *Human Rights and the Image of God*, 54.



including governments, families, churches, schools, businesses, and labor unions. Just governance is part of our calling in creation.³²

The variety of institutions and organizations cited here connects pretty clearly the implications of *imago dei* for governance of our own lives and its implications for governance in general. The immediate consequence is a connection between our accounts of what humans are like (in light of *imago dei*) and human rights of conscience and association:

Because God created human beings in his image, we are endowed with rights and responsibilities. In order to carry out these responsibilities, human beings need the freedom to form associations, formulate and express beliefs, and act on conscientiously held commitments.³³

Beyond that, however, we look also to specifically political rights: the rights associated with democratic participation and enfranchisement—the right to take part in the government of one’s country, directly or through freely chosen representatives—and the broader rights-based conviction that the will of the people (the will of those created in the image of God) shall be the basis of government. Seen in this light, *imago dei* sponsors a healthy correction of perspective on the nature and function of human rights. Rights are not just rights against government, born of what Judith Shklar called a “liberalism of fear,” a panic about the worst that governments can do.³⁴ They make government possible by empowering the governed to participate in forging the very order they will live by.

We noted in the first section of this chapter that some theologians attribute significance to the fact that the image of God is associated biblically with human plurality. One can imagine a tension between the claim that each human is created in the image of God and the claim that humans are collectively (or in their relationship with one another) created in the image of God. Equally, we know that political philosophers have sometimes discerned a tension between rights that are attributable to isolated individuals and those whose attribution makes sense only in respect of people acting together. Karl Marx, for example, said that the rights of man (in the 1789 *Declaration of the Rights of Man and the Citizen*) emphasize “egoistic man ... an individual withdrawn behind his private interests and whims and separated from the community,” whereas the rights of the citizen, which are “rights that are only exercised in community with other men,” value man “as a communal being” and “as

³² National Association of Evangelicals (NAE), *For the Health of the Nation: An Evangelical Call to Civic Responsibility* (available at http://www.nae.net/images/civic_responsibility.pdf), p. 2. See also David P. Gushee, “Evangelicals and Politics: A Rethinking,” *Journal of Law and Religion* 23 (2007-8): 1.

³³ NAE, *For the Health of the Nation*, p. 10.

³⁴ Judith Shklar, “The Liberalism of Fear,” in Nancy Rosenblum, ed., *Liberalism and the Moral Life* (Cambridge, Mass.: Harvard University Press, 1989), 21.



a moral person.”³⁵ Now, we might not want to accept that a human can be counted as a moral person only when he is exercising rights “in community with other men.” There are important moral dimensions to the exercise of solitary conscience in religious and other matters; and we have already seen that, in the natural rights tradition, even the individual right-bearer is conceived as one who is morally conscious not only of his own entitlements but of others’ rights and the limits on what he is entitled to demand from others. Still, when we are talking about something as momentous as *imago dei*, we have to maintain a careful balance between the privileges of individual judgment and conscience and the modes of action—some morally assertive, some morally deferential to the judgments of others, that are required for responsible political participation.

Some may understand the individualistic attribution of *imago dei* as licensing something like an unqualified right of conscience, even in matters political. Elisha Williams, a New England Protestant minister and legislator, wrote this in 1744:

To submit our Consciences to the Guidance of any Man, or Order of Men is not to reason and act according to our own Understanding.... And in every Instance wherein we thus submit our selves to the Direction of any humane Authority, so far we set aside and renounce all other Authority, our own Light and Reason, and even the Word of God and Christ.... And therefore if our Consciences are under the Direction of any humane Authority as to religious Matters; they cease to be under the Direction of Christ.³⁶

But *imago dei* is not a doctrine of special revelation, by conscience or otherwise. There is no reason to suppose that persons created in the image of God are incapable of succumbing to mistaken or wicked convictions (through the agency of “conscience”) when they cut themselves off from the sort of reasoned interactions with others that have always characterized the proper use of our moral capabilities. Reasoning is something we do mostly together—in the context of organized and disciplined inquiry—and it is not clear at all that *imago dei* privileges individual reasoning when it is deliberately cut loose from these moorings. Not that there is any guarantee that collective or consensual conclusions are wise or good: the point is that we are all fallible, collectively and individually.

In any case, when we are talking about the doctrine’s implications so far as civic participation is concerned, there is no question of individual hegemony. Some biblical scholars note that the Genesis account of *imago dei* turned its back deliberately

³⁵ Karl Marx, “On the Jewish Question,” in Jeremy Waldron, ed., *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987), 137, 140, 144, 147 and 150.

³⁶ Elisha Williams, *A Seasonable Plea for the Liberty of Conscience and the Right of Private Judgment in Matters of Religion, Without any Controul from Human Authority* 12-13 (Boston: S. Kneeland & T. Green 1744), cited in Steven D. Smith, “The Promise and Perils of Conscience,” *Brigham Young University Law Review* (2003): 1057, 1063-64.



on the ancient Babylonian proposition that the king alone was created in the image of God and that this status underwrote his exercise of regal power.³⁷ We now see this regal image in every man. So, to the extent that it is exercised politically, the image of God is necessarily represented by the participation of *millions* in a polity not just one person. This means it has to associate itself with the logic of political action: (1) the need in some circumstances for a common line of action, even when there is disagreement as to what it should be;³⁸ (2) the need for decision-procedures which respect everyone in their inputs, but which nevertheless yield determinate decisions, even in circumstances of controversy; and (3) the importance of our accepting that the order we discern individually or together is also an order for us to live by and, in some sense, submit to. (One way of thinking about this is through the Aristotelian conception of citizenship: “The citizen ... is the person who has a share in ruling and being ruled; in the best system of government a citizen is both able and willing to rule and be ruled in accordance with a life lived with excellence as its aim.”³⁹) Playing one’s part politically is not just a matter of voicing one’s opinion; it is also a matter of responsible submission to, participation in, and self-application of the norms that emerge from collective involvement in government. Philippians 2:5-8 teaches us that there is nothing incompatible with *imago dei* in such submission and that humility as well as the confident exercise of one’s moral capabilities are bound up together in the doctrine.

CONCLUSIONS

Foundations matter; they are not just nailed on to the underside of a theory or a body of law as an after-thought. If we are looking for foundations for our convictions about human rights, we are looking for something that may well make a difference to what it is that we believe about rights. This is particularly true if we say we are looking for religious foundations. It is not their function simply to reassure us or strengthen us in our pre-existing convictions. As I said at the outset, we cannot assume that a religious foundation—let alone a difficult and controversial doctrine such as *imago dei*—will leave everything as it is. I believe that if we build a conception of human rights on the basis that humans are created in the image of God, we must expect to find some differences between our conception and conceptions erected on other foundations or conceptions arrived at pragmatically with no foundations at all. Some of these changes we may find congenial: I think, for example, it is much easier to defend certain rights (like the right not to be tortured) as moral absolutes

³⁷ See, e.g., Westermann, *Genesis 1-11*, 151-54. I am grateful to Nigel Biggar for this reference. For the “democratization” of this idea, see Yair Lorberbaum, “Blood and the Image of God,” 55.

³⁸ See Jeremy Waldron, *Law and Disagreement*, (Oxford: Oxford University Press, 1999), 114-17, on “the circumstances of politics.”

³⁹ Aristotle, *Politics* 1283b42-284a4.



in the light of the doctrine we have been considering,⁴⁰ and I also argued that *imago dei* will license a more insistent emphasis on the humanity and rights of those we have good reasons (good *moral* reasons) to fear and despise than secular conceptions of rights which answer only to our considered judgments in reflective equilibrium. Other changes we may find disconcerting—a greater emphasis on those rights that can be seen also as responsibilities and a greater emphasis on the responsible rather than the willful or disordered exercise of our rights.

I hope I have shown, finally, that *imago dei* is above all an empowering idea, validating and affirming our powers of reason when they are oriented not just to discerning God's order in the world, but participating with others in its realization, both in the modest tasks of ordinary politics and in the broader anticipation of Christ's kingdom. True, as I have emphasized, political rights not conceived in this light as a triumph of conscience or as an anarchy of individual conviction. But they are an empowerment, an empowerment of those, created in His image, to whom Jesus can say: "Henceforth I call you not servants; for the servant knoweth not what his lord doeth: but I have called you friends; for all things that I have heard of my Father I have made known unto you" (John 15: 15).



⁴⁰ See Jeremy Waldron, "What Can Christian Teaching Add to the Debate about Torture?" *Theology Today* 63 (2006): 330.



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RELIGION AND EQUALITY

KENT GREENAWALT¹

The movement toward equality of persons is centuries old, and, despite occasional setbacks, it will continue. It is typically impossible to determine the exact weight of various influences on moral, political, and cultural ideas, but within the Western tradition movements within Christianity have contributed significantly to our concepts of equality. Perhaps the most fundamental insight is that human beings are equal in the sight of God. As Paul wrote in his Letter to the Galatians: “there are no more distinctions between Jew and Greek, slave and free, male and female, but all of you are one in Christ Jesus.”² Of course, in its origins, this understanding was spiritual, not implying that social and legal distinctions, such as that between master and slaves, should disappear. In the history of the Christian church, this basic sense of equality did affect the internal life of some small religious communities; on the other hand, the strong sense of hierarchy in the Roman Catholic Church and the deep convictions that Christianity was true and other religions were false both helped to sustain social and legal distinctions at odds with modern ideals of equality.

The Protestant emphasis on the “priesthood of all believers” and its strong individualism, as well as the powerful equalitarian premises of discrete groups such as the Levellers, helped to lay the foundation for broader notions of political and legal equality that emerged from the Enlightenment. The Enlightenment is often conceived of as predominantly secular, but some of its most influential thinkers, including in England John Locke, and in the United States James Madison, relied partly on religious premises. In terms of actual social struggles for equality within the United States, religious individuals and groups were crucial in movements to abolish slavery in the nineteenth century and to combat racial discrimination from the 1960s forward.

Developments toward equality during the last hundred years have been remarkable in many countries, including the United States. The equality with which this chapter concerns itself is the notion that treatment by the law, basic opportunities in society, and respect for persons should not depend on one’s gender, race, national origin, ethnic background, sexual orientation, and, most important for our purposes,

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² Galatians 3:28 (Jerusalem Bible).



religion.

Three initial cautions are in order. First, this kind of equality has been regarded so far as perfectly consistent with vast disparities in wealth. In the United States, and many other countries, the gap between rich and poor has grown in the last half century, and the most radical social philosophy supporting rough equality of welfare, Marxist Communism, has suffered setbacks that appear to be irreversible. Second, in its general political manifestation, this notion of equality tends to be significantly negative—that certain characteristics should not be taken into account—rather than strongly affirmative—along the lines that all people count equally because of God’s equal love for each human being. Third, a society’s formal commitment to equality hardly means its members have freed themselves of the prejudices that accompanied older notions of unequal status. Still, even in respect to personal attitudes, we have come a long, long way.

Although the idea of equal respect for persons regardless of certain characteristics has owed a good deal to Christian and other religious understandings, it is complicated in a particular way in regard to religion. Many modern citizens are fully comfortable with religious pluralism, believing either that religion is basically a personal matter or that most religions, if not all, have profound insights into a complex and elusive spiritual truth, and that it is pointless to think that one religion alone has got it right. But other people in this country, mainly Christians, continue to believe that their religion alone is true. In the eighteenth century, many American Protestant religious leaders thought the Pope was the Antichrist, and Catholic views about Protestants were hardly more positive. Jews, Muslims, Buddhists, and Hindus were well outside the circle of true religious understanding. Some Christians still feel that way about non-Christians. They can accept non-Christians as political and social equals, and they can respect them as human beings, but they think they are fundamentally unenlightened, in the manner of someone who is ignorant about fundamental facts or who embraces moral views that are understandable but perverse. Such Christians can sincerely say they *respect* people of all religions equally; but non-Christians on the receiving end of messages that they are lost unless they recognize Jesus as their savior often do not *feel* that they are being regarded as equals.

Whatever individuals may believe about the unique truth or insight of their particular religion, it is widely understood that government, whether federal, state, or local, should not take a stand in favor of the truth of any one religion. This is in sharp contrast with much of the nineteenth century in which most public schools were unabashedly Protestant and the Supreme Court occasionally announced that Christianity was part of the common law.

Until the mid-1960s, immigration policy in the United States was powerfully favorable to Europeans. With that approach, the country could remain primarily a haven for people who were from Christian traditions, if not themselves practic-



ing Christians. Reform of our immigration laws has changed that.³ With a large percentage of immigrants now arriving from Asia, the already substantial number of Muslims, Hindus, and Buddhists will continue to rise. The movement toward equality among religions and among citizens of diverse religious origins fits this pluralism well.

EQUALITY AND THE LAW OF RELIGIOUS FREEDOM

The focus of this chapter is some conundrums about how the movement toward equality may, and should, affect the law's treatment of religion. I concentrate on the United States, in which the twin concepts of free exercise of religion and non-establishment of religion are embodied in the Constitution and guide understanding of how equality should be realized. Although major international documents do not include a preclusion of established religions, which still exist in weaker or stronger forms in many countries, they do include protection of religious liberty and broader bans on discrimination. For example, the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religious Belief (1981) provides that no one shall be subject to discrimination "on the grounds of religion or other beliefs."⁴ And the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) includes the right to "profess and practice" one's religion without discrimination.⁵ Christian churches, among other religious groups, have supported the movements toward religious liberty and nondiscrimination.⁶ For the Catholic Church, the Second Vatican Council in 1962-1965 was a watershed, with its approval of individual religious liberty and institutions of liberal democracy.

In what follows, I do not pay primary attention to what have been two of the dominant issues about America's religion clauses, whether legal concessions should be made to religious practices and whether religious groups should get public aid to run soup kitchens, adoption agencies, drug rehabilitation programs, and schools. Rather, I ask whether, and when, religious claims should be treated as special, an issue that is bound to arise under any document that explicitly or implicitly bars discrimination based on religion.

During the last fifty years, questions about equality of ideas and equality of

³ 79 Stat. 911 (1965).

⁴ See Declaration, Art. 2, § 1(1981), reprinted in Tad Stahnke and J. Paul Martin, eds., *Religion and Human Rights: Basic Documents* (New York: Columbia University Press, 1988), 102-04.

⁵ Declaration of U.N. General Assembly, Dec. 18, 1992, Art. 2, § 1, reprinted in Stahnke and Martin, eds., *Religion and Human Rights*, 162-64.

⁶ For an account of efforts of the World Council of Churches contributing toward the 1948 Universal Declaration of Human Rights, see John Nurser, *For All Peoples and All Nations: Christian Churches and Human Rights* (Geneva: World Council of Churches Publications, 2005).



personal convictions have become important.⁷ One central question is this: if people want to behave in a certain way, or believe they should behave in a certain way, should it matter whether their reasons are religious or not? In other words, should nonreligious convictions be treated like religious convictions if they lead to the same consequences? This issue is posed most starkly in the case of conscientious objection. The scope of an exemption from combatant duty, or from military service altogether, is most pressing during a draft; but it still retains some importance as a basis for military personnel, committed to a term of service, who then become conscientious objectors. From the end of the Second World War, the statute setting the conditions for conscientious objection required opposition to war in any form, based on a religious ground that was understood as involving belief in relation to a Supreme Being. During the Vietnam War, the Supreme Court made short work of the Supreme Being clause and the requirement of religion. In 1965 it said that any belief that occupies a place in someone's life parallel to that filled by an orthodox belief in God satisfies the Supreme Being standard.⁸ In other words, someone who does not believe in a Supreme Being can count as believing in a Supreme Being. Five years later, a plurality of justices said that the strong ethical convictions of someone who initially described his beliefs as nonreligious qualified as religious.⁹ In other words, someone who was not religious in any standard sense could count as religious for this purpose. The Court managed to strain the statute beyond recognition in these two cases, but I believe the practical result was right. Whether young men and women count as conscientious objectors should not depend on whether they are religious.

This conclusion raises a yet broader question. Should it *ever* matter for how individuals are treated by the state whether their reasons are religious ones? In terms of treatment by the law, should it *ever* matter whether organizations are religious? And there is a parallel question about messages the state conveys: should there be any sharp distinction between religious messages and other kinds of messages, or should whatever lines between what the state can and cannot say be drawn in other terms?

At first glance one might think that a sweeping version of equality, one that precludes not only distinctions among religions but also legal distinctions between religion and other categories of connections, ideas, and organizations, best fits the conditions of religious pluralism, including non-belief. And some scholars have

⁷ Within the United States, issues about equality of opinions concerning religion are one facet of a broader concern about the government treating ideas equally. A crucial aspect of the modern law of free speech is that when a government establishes a public forum, it cannot discriminate on the basis of viewpoint; it cannot welcome support of keeping troops in Afghanistan and reject speech urging their withdrawal. See *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). I explore the difficult question of what precisely separates viewpoint discrimination from other content distinctions in Kent Greenawalt, "Viewpoints from Olympus," *Columbia Law Review* 96 (1996): 697.

⁸ *United States v. Seeger*, 380 U.S. 163 (1965).

⁹ *Welsh v. United States*, 398 U.S. 333 (1970).



urged such equality.¹⁰ But one doubts whether the most healthy regime for religious pluralism is to cease treating religion itself as distinctive. I explore these questions briefly in terms of some particular aspects of the law's treatment of religion.

Government Speech and Religion. Let me start with ideas the government itself propagates. When they speak for themselves, governments are free to express all sorts of ideas, including, of course, the idea that people are entitled to equal respect regardless of race, religion, etc. Within a wide domain, American governments can make claims about both factual and normative matters. They do so not only in public schools but also in publications aimed at adults. But the government as government cannot make claims about religious truth. (I am putting aside here complex questions about when officials actually speak for their government. I am also putting aside whether certain very general, vague forms of endorsement, such as "under God" the Pledge of Allegiance, are acceptable.¹¹) What would it mean to say that, for government expression, religion should be treated equally with other ideas in this context?

There are two general possibilities. The first is that the power of government to address religious ideas would greatly increase. Localities and states, as well as the federal government, would be able to opine on religious questions, as they now do on many historical, moral, and political questions. This form of equality would amount to a throwback to a much earlier era and, given Christian dominance, would not likely benefit minority religions. This form of equality of ideas would impede equality among religions.

The other possibility is that many other areas would be marked off, along with religion, from assertions of truth by government agencies. We can identify one obvious candidate for such treatment. The government as such should not praise the merits of one political party to the detriment of another. Perhaps one can find in our constitutional scheme an implicit basis for such a restriction. But that would be a very limited restriction, not dealing with a broad range of ideas. Presumably the government should still be able to teach as true factual claims supported by techniques of science and social science. Should it refrain from broad suggestions about what is a good life, or about moral right and wrong?

Some scholars have suggested that government should be agnostic about what is a good life,¹² limiting itself to what are just relations among citizens. Separating questions about the good life from ones of justice is not so simple. For example, discussions of justice towards gays typically involve some moral evaluation of homosexual relations. More to the point, it is misguided in the extreme to suppose that

¹⁰ Christopher Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, Mass., Harvard University Press 2007).

¹¹ I discuss this question at some length in Kent Greenawalt, *Religion and the Constitution, Vol. 2: Establishment and Fairness* (Princeton: Princeton University Press, 2008), 69-121.

¹² See, e.g., Bruce Ackermann, *Social Justice in the Liberal State* (New Haven, Conn., Yale University Press, 1980), 10-11.



public schools should stop teaching that healthy activity is preferable to indolence, that excessive use of drugs and alcohol is destructive, that advanced education not only opens opportunities but can be enriching, that art and literature have value. Those are messages that government appropriately expresses not only in schools but in other fora. In short, there is no broader class of ideas in which ideas about religion fall that should be out of bounds for government in the manner of religious ideas. Governments are incompetent in respect to religion and government support of one set of religious ideas is at odds with an ideal and reality of religious pluralism. In this respect at least, religion warrants the special treatment it has under the Constitution's free exercise and establishment clauses, however hard it may be to say where and how religion differs from other social phenomena.

The government's relation to religious ideas goes beyond whether it can promote a particular religious point of view. By its actions, such as fighting wars or integrating its schools, it indirectly implies the falsity of religious ideas that condemn those actions as against God's will. By teaching the truth of scientific theories such as evolution, it implies the inaccuracy of religious ideas that oppose those theories. No movement toward equality can eliminate these inevitable conflicts.

Government Aid to Religion. A related question concerns conditions the government sets on what the recipients of its aid can teach. In 2002, the Supreme Court upheld an Ohio program to give vouchers to parents whose children were in private schools, mainly private religious schools.¹³ A condition of aid was that the schools not "advocate ... unlawful behavior or teach the hatred of any person or group on the basis of race, ethnicity, national origin, or religion." The state reasonably does not want to fund education that is directly opposed in its teaching to basic values of our liberal democracy. But what amounts to teaching of hatred on the basis of religion is hard to say. As I have mentioned, many American Protestants in the eighteenth century asserted that the Pope was the Anti-Christ. Was this a teaching of hatred of Catholics? Perhaps it was. Governments need to be careful not to impinge more than is really necessary on the messages of religious groups, and concern about overreaching in this respect is one reason to worry about extensive state aid to religious education.

Intrachurch Disputes. Closely related to the principle that government should not involve itself in the truth or falsity of religious claims is an approach American courts have developed in disputes between factions of churches, typically over which faction is entitled to the church property.¹⁴ The dispute may be between a national or regional organization and one of its local churches or between two factions of a local church. According to a rule that I believe still prevails in England and Canada, a court can determine that the officials of a religious organization, or a majority of

¹³ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹⁴ A much longer account is in Kent Greenawalt, *Religion and the Constitution, Vol. 1: Free Exercise and Fairness* (Princeton, Princeton University Press, 2006), 261-89.



members, have departed so far from the basic doctrines of the religion that disputed property should go to the segment that has remained faithful. Building on a nineteenth-century decision,¹⁵ the United States Supreme Court has consistently said that it is unconstitutional in this country for courts to decide cases on the basis of faithfulness to church doctrine or on the basis of disputed claims of authority that rely on doctrine.¹⁶ Rather, courts must rely on neutral principles, that is, principles based on secular documents that set out governing authorities, or they must defer to the highest adjudicative bodies within hierarchical churches and to the majorities within churches organized congregationally.

There is a good deal of complexity to all this that we need not examine, but we can draw two significant conclusions. The first is that this notion of abstention from resolving disputed issues of doctrine and governance is well suited for religious pluralism. For the foreseeable future, most state and federal judges will come from a Christian background, if they have any religious background. However ill suited they may be to settle who is faithful to various Christian traditions, they will be even less competent to resolve similar disputes among Muslims, Hindus, and Buddhists, as these arise. Groups are much better off having to get their own affairs in order according to secular documents than trusting to civil courts to sort things out.

The second point here is more arguable than the analogous point about government expressions in respect to religious truth, and I shall settle for assertion rather than serious explanation. In respect to other groups that are engaged in internal disputes over the control of property or resources—say, trusts created to support modern art or cancer research—it is acceptable for courts to play a more active role in deciding if one faction, or a set of leaders, has deviated too far from underlying purposes. Perhaps groups set up to promote political ideologies, such as the ACLU, should be treated like religious organizations in this respect, but putting that possibility aside, this is another domain in which special treatment of religion is warranted.

Priest-Penitent Privileges. The same may be said about privileges not to disclose information revealed in confidence.¹⁷ The law grants such privileges to lawyers, doctors, and secular therapists, as well as to clergy. But typically there is a difference. The other privileges are not absolute. Doctors and lawyers must reveal particular kinds of disclosures, ones in which the public interest is very strong. In some states clergy are not compelled to reveal communications made in confidence, whatever their nature. In those states, the so-called priest-penitent privilege fits the requirement of secrecy developed by the Catholic Church for its priests over the centuries. The law appropriately accommodates this practice without granting a similar privilege to people whose nonreligious roles do not demand absolute secrecy.

¹⁵ *Watson v. Jones*, 80 U.S. (1 Wall) 679 (1872).

¹⁶ The most recent Supreme Court authority with full opinions is *Jones v. Wolf*, 443 U.S. 595 (1979).

¹⁷ See Greenawalt, *Free Exercise and Fairness*, 246-60.



Accommodation and Discrimination. One way in which religious exercise can be accommodated is to grant people with religious reasons to perform activities a liberty that most other people are denied. During Prohibition, Roman Catholics and some other Christians wanted, needed, to use wine for communion; during wartime conscientious objectors wanted an exemption from a military draft; members of the Native American Church have regarded peyote as the center of their religion and have needed to ingest peyote during worship in order to practice their religion; some Amish communities have wished to withdraw their children from standard schooling before they have reached the age when that would be allowed; some Muslim parents have wanted their children to be free to pray vocally at a time in the school day.

At first glance, it would appear that granting legal concessions to religious practice would benefit minority groups in a pluralist religious culture, and that indeed is what I think after many more glances, but there are some serious concerns. The main concerns are about tests of honesty, assessments of religious importance and public need, and unfairness to nonreligious citizens with similar claims.

First, honesty. If officials or other citizens try to figure out whether someone is telling the truth, isn't this likely to work against unfamiliar minority religions? Members of a draft board may more easily understand and sympathize with a young Quaker who says he cannot fight than with a member of an unfamiliar Eastern religion who takes a similar stance. On examination, the worry about honesty is not serious if a privilege is sought for all members of a group that is not itself formed to evade a legal restriction (or all participants in a group activity) or is one that few people would be tempted to lie about. Wine for communion qualifies on both counts. Only participants in a service get the wine, and they get such a small amount no outsider would want to take the time to participate in order to get that small sip. Many people may wish to avoid jury service, but doing so is not important enough for them to be willing to lie about a religious conviction to achieve that end. When it comes to avoiding military service, however, or to avoid being sent away from one's home and family to a dangerous war one believes the country should never have embroiled itself in, people may lie. Some test of sincerity is needed.¹⁸ Assessments of honesty may be required and these may work somewhat to the disadvantage of the unfamiliar, but what is the alternative?

In 1990, the Supreme Court abandoned a test of religious exercise it had adopted twenty-seven years earlier. According to the earlier test, if a law impinged on someone's religious exercise, the government could not apply the law against that person unless it had a compelling interest in doing so. Thus, a state could not deny unemployment compensation to a Seventh-day Adventist because she was unwill-

¹⁸ The test need not necessarily be whether the applicant is more probably telling the truth than not. There could be a presumption in his favor *or* some special burden to establish that he is not lying.



ing to work on Saturday.¹⁹ In the 1990 case of *Employment Division v. Smith*,²⁰ however, the Supreme Court announced that the Free Exercise Clause of the First Amendment conferred no such privilege on religious believers. Thus, a state law forbidding the use of peyote could be applied against members of the Native American Church. If religious believers have no privileges to be relieved of legal obligations, no test of sincerity is required, but this alternative is hardly more favorable to minority religions than the older approach.

Congress responded to *Smith* by adopting the Religious Freedom Restoration Act, a law that reinstates the older test as a matter of statutory law.²¹ After the Supreme Court said that the law could not be applied against states and localities,²² some states adopted their own similar laws.

One might object that any such law is unfair to nonbelievers, who should be respected along with the wide range of believers in a religiously diverse society. I agree with this critique up to a point; indeed, I think that equal treatment of nonreligious conscientious objectors should be regarded as a constitutional requirement. But there are many claims that people are highly unlikely to make for nonreligious reasons. Strong nonreligious convictions that one needs a small sip of wine in a group or that one should withdraw one's children from school after eighth grade, or that one must not work on Saturday are very rare. I won't go through all the details, but I believe it is alright to limit exemptions to religious claimants, when the likelihood of similar nonreligious ones is very slight or when the danger of fraud if one includes them is great.

I should note that including nonreligious reasons does not eliminate the sincerity problem. Suppose the only test for a conscientious objector is sincere opposition to participation in war in any form. An applicant claims that according to his reading of the Bible, God enjoins us to be nonviolent. Someone still must assess whether the applicant is being honest about his claim to possess that religious conviction.

Even more troubling than questions about honesty are ones about the degree of burden on a religious practice and the strength of the government's interest in not granting an exemption. There are some claims to special treatment that legislatures grant specifically. Thus, the federal government and states may provide that members of religious groups may use peyote in worship services. When this is done, neither executive officials nor courts have to delve into the practices of a religion or the possible government interest in denying an exemption. They just apply the statute. But when the courts have to apply a general standard like that of the Religious Freedom Restoration Act, they do need to make these difficult inquiries.

I shall say little about the strength of the government's interest. Suppose a tax

¹⁹ *Sherbert v. Verner*, 374 U.S. 398 (1963).

²⁰ 494 U.S. 872 (1990).

²¹ 42 U.S.C. § 2000 bb-1-200 bb-4 (2004). Congress subsequently enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000 cc (2004).

²² *City of Boerne v. Flores*, 521 U.S. 507 (1997).



is imposed, and religious citizens claim a right not to pay the tax out of honest religious conviction. Or an area is zoned to be purely residential, and members of a religion claim they should be able to build a church in the area. If the government's interest in uniform application of the law is very great as it is with most taxes, refusing to grant an exemption is alright. If the government's interest is slight, an exemption may be called for. How the test should be formulated and applied is difficult (and that problem would remain even were the possible exemption extended to nonreligious claimants), but I shall focus instead on the issue of the burden on a religious individual or group.

The government should not have to accommodate every trivial religious claim. For example, suppose in the zoning situation, the members have no particular interest in building a church in the forbidden area, except that they can purchase property a little more cheaply. That is very different from members of an Orthodox Jewish congregation wanting to build near residences of their members, who must walk to worship services on the Sabbath.

How can administrators and courts possibly decide how important any particular activity is to a religious individual or congregation,²³ and if officials make such judgments, isn't that likely to work to the disadvantage of misunderstood minority religion? Yes, it is very difficult, and minority religions may suffer by comparison, but again what is the alternative?

We need to begin here with what a court's task should be if it does have to make such judgments. Obviously, judges should not be deciding what religious activities are really important or how any particular religion should really be understood. To do the first would be deciding a subtle question of religious truth; to do the second would be to determine the correct understanding of a religious tradition—inquiries we have already suggested that the state cannot make. Courts must judge importance as it is taken to be by members of the religion itself.

If the legal issue involves the claim of a particular individual—say the claims of a Jehovah's Witness not to work in a factory making turrets for tanks—the Supreme Court has rightly focused on the convictions of the individual involved.²⁴ If the claim is that a group should engage in activity, such as using peyote during worship services, a court must do to the best it can to discern how important the practice is for the members as a group. Judges should not insist that someone's religious conviction actually requires him to do something the state forbids, or forbids him from doing something the state requires, but they should demand proof that an important religious practice is being frustrated or that someone has a strong religious conviction that he perform an act that the government is discouraging.

Just to state this inquiry is to suggest how difficult and debatable the answer may be in many cases. Will it be harder for members of minorities to make their

²³ I explore a range of cases in Greenawalt, *Free Exercise and Fairness*, 201-32.

²⁴ *Thomas v. Review Board*, 450 U.S. 707 (1981).



claims? Probably. A member of an unfamiliar religion *may* actually have one kind of advantage. A Presbyterian judge who supposes she already knows what is important for Christians, or for Presbyterians, may not be responsive to the claims of a Presbyterian with a view that differs from hers. She might actually be more open-minded about religious claims that are new to her. But often a distaste for the unfamiliar may cause judges to underrate the claims of importance of religions they regard as bizarre.

The obvious alternative is for courts and administrators *not* to make judgments about importance. That could mean rewarding those with religious reasons, however trivial, or not making any accommodations to religion. Of these two alternatives, by far the more likely scenario is the latter, the result the *Smith* decision reaches about the First Amendment. A regime of no accommodation to religious claims would be worse for members of minority religions than a legal standard that requires some preliminary investigation of importance.

There are other conceivable alternatives. One is to say that religious claims should be treated like nonreligious claims but that sometimes a general right to be exempted on the basis of conscience should be recognized—this could take care of conscientious objectors to military service. Another alternative is to say that sometimes a refusal to exempt religious claims would constitute forbidden discrimination against religion. (The law could adopt both these alternatives.) Since discerning whether a person has a conscientious objection is in fact one inquiry about how important not participating is for him, not so different from judging the importance of someone's religious claim, I shall concentrate here on the second possibility—discrimination. According to this view, the inquiry in a case like *Smith* should be whether members of the Native American Church suffered discrimination from the law that forbade use of peyote and did not make an exception for them. One claimed advantage of this approach is precisely that it avoids questions of importance and government interest.²⁵ But, unless the category of what counts as discrimination is very limited, this approach admits through the back door what it shuts out in front.

When the law itself is neutral on its face--treating everyone the same by allowing no one to use peyote--we could limit discrimination to circumstances in which lawmakers *intend* to harm a religion or treat its members worse than other citizens. In that event, the Native American Church would lose unless it could show that the failure of state legislators to make an exception for it was the result of their wish, their purpose, to treat their church badly. That is usually a very hard showing to make.

The protection against discrimination would become robust only if it included what we may call reckless or negligent disregard of the interests of a religion. An example of reckless disregard would be when legislators are aware that a law will impinge very badly on a religious minority but don't care—don't care in a way they

²⁵ Eisgruber and Sager, *Religious Freedom and the Constitution*.



would care about the effect on a more popular religion. Negligent disregard is when the legislators are unaware of such an effect although they should be. Thus, the Native American Church could argue that legislators would never have adopted a law with such drastic negative effects on a mainstream religion, and that their failure to show such concern for the Native American Church constitutes a form of discrimination.

I believe looking at these problems from the point of view of a broad notion of discrimination is promising—in part because it is one method to give effect to ideals of equality. But we would be fooling ourselves if we thought this was a way to avoid judgments either about burdens on religious individuals and groups or about government interest. Such judgments are implicated in the very process of assessing possible discrimination.

Judges are rarely going to be able to discern what exactly legislators were thinking when they adopted a general prohibition and did not make an exception. So judges will have to think about average or reasonable legislators. What would one suppose such a legislator would have had in mind? If the religious activity was of trivial importance or the government interest in stopping the activity across the board was very strong, such a legislator would not write an exception into a statute. If the religious activity was very important and the government interest in stopping that manifestation of the forbidden behavior was slight, an astute legislator would make an exception—just what I believe is true about the use of peyote by the Native American Church. But we can see it is just one's judgments about importance to the religion and about the government's interest in the prohibition that now underlie one's judgment about discrimination. That is how these inquiries enter by the back door.

Let me turn briefly to a special, troubling issue about discrimination. How far should religious institutions themselves be able to discriminate on the basis of grounds that are forbidden to other groups? It goes without saying that for positions of leadership, religious groups should be able to use religious criteria of choice. Baptists can choose ministers who embrace Baptist principles. Perhaps Congress has gone too far in allowing religious organizations to use religious criteria in choosing all employees,²⁶ rather than requiring a minimal showing that the religious views of a person in a position—say, a janitor—can matter for the flourishing of the religious endeavor.

The harder questions concern discrimination on other grounds—race, gender, or sexual orientation. At least if they can show some connection to their religious tradition and principles, religious groups should have a legal right to discriminate on these grounds in their core activities. A church that is committed to a male priesthood and that condemns homosexual activity as sinful should not have to hire as a

²⁶ The law was upheld in *Corporation of the Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).



priest a woman or a man who is openly gay.

A more difficult question is raised by tax exemptions. The Internal Revenue Service has decided that a religious university engaged in racial discrimination is not entitled to the status of a charitable activity, and that determination was upheld by the Supreme Court.²⁷ Some believe a similar fate should befall core religious institutions, churches, synagogues, mosques and so on, that engage in discrimination by race or gender. I disagree, but I do think such discrimination should be barred for personnel who are providing a service that is actually financed by government, such as a hospital or school.

These issues may prove most acute in relation to sexual orientation. Some religious groups believe that homosexual relations are sinful; they balk at hiring employees who openly engage in these sinful activities as part of the pattern of their lives. Maximum equality for gays is in conflict with the widest latitude for religious liberty. Federal law does not now bar discrimination according to sexual orientation, but some local governments do. Even in those areas I believe religious groups should be able to practice what they believe by taking an applicant's openly expressed sexual preferences and activities into account. But when a government does bar discrimination of this sort in general, it should not finance activities of religious groups that benefit the public—such as adoption agencies and hospitals—if the groups refuse to hire gays in the organizations that provide these benefits.

Defining Religion. I have, thus far, neglected a final topic that concerns the treatment of religion—deciding what counts as religious. If religion is going to receive special treatment, whether it is receiving a benefit or being subject to restrictions that don't apply to other subjects, courts must be able to say whether a practice or claim is religious, or not. One may reasonably be worried that a definition of religion is itself likely to work to the disadvantage of the unfamiliar. To take a very simple example drawn from some earlier cases, a definition in terms of relation to a Supreme Being works fine for standard American religions but not so well for Buddhism. My own view is that rather than starting from a typical definition, courts should identify characteristics of what are undoubtedly religions in the world and ask whether the disputed instance shares many of the same characteristics.²⁸ This approach, instead of stating necessary and sufficient conditions, understands religion in the way that Ludwig Wittgenstein understood the category of games. A version of this approach was used by Judge Arlin Adams in a case deciding that a course in Transcendental Meditation could not be taught in New Jersey's public schools because it was religious.²⁹ To be sure, even this approach may be applied in a way that could be disadvantageous to the unfamiliar. But, again, what is the alternative? There can be no concessions to religious claims and religious groups as such, unless courts

²⁷ *Bob Jones University v. United States*, 461 U.S. 574 (1983).

²⁸ See Greenawalt, *Free Exercise and Fairness*, 124-56.

²⁹ *Malnak v. Yogi*, 592 F.2d 197, 207-10 (concurring opinion).



can use some approach to say whether or not a claim or practice is religious. And the law's method of categorization must be one that lawyers can feasibly use. This means it may be more or less close to how the boundaries of religion are understood in other disciplines.

CONCLUSIONS

In this chapter, I have offered many specific conclusions on difficult issues, without a full defense. Readers may reasonably disagree with various of these judgments. But the general lessons I draw from these inquiries are the following. First, religious liberty often coalesces with equal treatment. But sometimes aspects of religious liberty are in serious tension with aspects of equality. Second, the special treatment of religion in comparison with other subjects is, on balance, usually beneficial to minority religions, and thus promotes equality among religions. This is illustrated by the rule that government cannot engage in teaching religious truth. Third, the law must often settle for something less than an ideal. Legal standards of all sorts are often applied to favor dominant groups to the disadvantage of outsiders. Inquiries about sincerity, importance, and the boundaries of religion may work to the disadvantage of minority religious movements within a pluralist religious culture. But, by and large, the alternative of not engaging these inquiries will be that members of those groups will be subject to all the rules that apply to ordinary citizens, and they will be worse off. Some likely disadvantage in the applications of these standards is preferable to not having the standards used at all. Fourth, it would be a worthwhile endeavor in the coming decades to study just when the law should treat religion as distinctive and how the necessary legal inquiries may be undertaken as consistently with basic values of equality as is humanly possible.





RELIGION AND FREEDOM OF EXPRESSION

CAROLYN EVANS¹

If freedom of religion were to disappear overnight from the various treaties, constitutions and statutory bills of rights in which it is currently found, much that is currently protected as religion could equally be covered as a manifestation of freedom of expression. While religion certainly has its contemplative, internal dimension, most religions are also communicative in a variety of ways. Religious individuals may pray together, sing or chant, read from holy works, teach their children, write religious works of various kinds, preach, protest and proselytise—all examples of free speech as well as the free exercise of religion. Additionally, religions make use of the realm of symbolic expression in a variety of ways: in religious dress, the display of religious symbols, the performance of religious rituals, and the wearing of religious items and particular hairstyles. These too are covered by the notion of freedom of expression in many jurisdictions.

While some forms of religious expression have remained beyond the realm of legitimate State intervention in democracies, others have proved much more contentious. The current chapter explores several areas of particular contention with respect to the overlap between freedom of expression and religion, in particular, the wearing of religious dress or symbols, hate speech and religious defamation, prayer or religious education in public schools, and religious symbols in public institutions.

WEARING RELIGIOUS CLOTHING OR SYMBOLS

Many religious believers feel either obligated by their religion or have a strong religiously-motivated desire to wear clothing or religious symbols that express their adherence to a particular religion. Practices that some members of a religion may adopt include the wearing of a turban and *kirpan* (religious knife) by Sikh men, wearing a headcovering for Muslim and Jewish women, Rastafarians wearing their

¹ Professor of Law and Deputy Director of the Centre for Comparative Constitutional Studies, Melbourne Law School. This chapter is based in part on research undertaken as part of an Australian Research Council-funded project on freedom of religion and non-discrimination law. My thanks to Duncan Kauffman for his research assistance with this chapter. An earlier version of this chapter appeared in John Witte, Jr. and M. Christian Green, eds., *Religion and Human Rights* (Oxford: Oxford University Press, 2011) and is used herein with permission of the author and publisher.

hair in dreadlocks, Jewish men wearing a yarmulke, and Christians wearing a cross.² Individuals within the same religion may have different conceptions of what is required by their religion in this respect. For example, the English case of *SB v Denbig High*³ involved a Muslim student who wished to wear the stricter *jilbab* rather than the *shalwar kameeze* school uniform for Muslim girls that had been developed in consultation with the school's Muslim community. The case showed up some of the different opinions of Muslims within the school, and within the local and the national community, about what form of religious dress was appropriate or required for an adolescent Muslim girl. In addition to garb adopted by ordinary religious believers, some religious offices may involve the wearing of particular robes, vestments, or symbols of office in a manner that differentiates them from lay members of the same religion. The United Nations Human Rights Committee has recognized that displaying religious symbols or "the wearing of distinctive clothing or headcoverings" is a manifestation of religion and thus protected in international law.⁴

Decisions about whether a form of religious dress or symbolism will be worn should essentially be individual ones. Naturally, various religious organizations and leaders will have particular views about these issues and may seek to convince adherents of their merits (and may even refuse to allow membership of the community to those who do not adhere to them). The state, however, does not have a role in instantiating one form of religious orthodoxy as state law. In some countries, such imposition of orthodoxy is quite overt. Women are forced to veil themselves in countries including Iran and Saudi Arabia regardless of whether or not they believe that this is required of their religion and indeed regardless of their religion. According to the report of the United Nations Special Rapporteur on Freedom of Religion or Belief, for example, the Iranian Chief of Police claimed that "in 2006 more than one million women were stopped relating to the way they wear the *hijab* (Islamic veil) and 10,000 charged for violating the dress code."⁵ Such coercion limits both the religious and expressive freedom of the individuals involved, as well as posing a serious intrusion into liberty and gender rights.

The converse situation is beginning to arise in several countries, particularly in

² See, for example, Homa Hoodfar, "The Veil In Their Minds and On Our Heads: Veiling Practices and Muslim Women," in Elizabeth Castelli, ed., *Women, Gender, Religion: A Reader* (New York: Palgrave, 2001) 420-46; Wasif Shadid and Pieter Sjoerd van Koningsveld, "Muslim Dress in Europe: Debates on the Headscarf," *Journal of Islamic Studies* 16 (2005): 35; Susan Michelman, "Changing Old Habits: Dress of Women Religious and Its Relationship to Personal and Social Identity," *Sociological Inquiry* 67 (1997): 350; Janet Mayo, *A History of Ecclesiastical Dress* (London: BT Batsford, 1984). A number of these sources note the ambivalence towards, and multi-layered meaning attributed to, religious clothing by some of those who wear it.

³ *R (SB) v Governors of Denbig High School* [2007] 1 AC 100.

⁴ UN Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, [4], UN Doc CCPR/C/21/Rev.1/Add.4 (1993) ('General Comment 22').

⁵ Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief—Addendum—Summary of Cases Transmitted to Governments and Replies Received*, UN Doc A/HRC/7/10/Add.1 [125] (28 February 2008).

Europe, where Muslim women who wish to wear the headscarf are increasingly being denied the right to do so.⁶ The space for women wearing the headscarf appears to be diminishing in some European countries, and there have also been moves against wearing the headscarf in schools in countries such as Singapore.⁷ In one of the first cases in the European Court of Human Rights to consider the issue, the Court found that it was reasonable to require a primary school teacher to remove her headcovering, in part because of the vulnerability of her young students to proselytism.⁸ However, in less than ten years, the Court also approved a Turkish law that prevented a medical student from studying at university with her head covered and a French law that prevented a French secondary school student from attending a public school with her head covered, despite the fact that there was no issue of vulnerable students in those cases.⁹ Those cases were notable for the desire to prohibit the headscarf being linked to the messages that it was said to communicate—messages of proselytism, fundamentalism, and gender equality—and little thought appeared to be given by the Court as to whether (even if the significant assumption that such controversial linkages were justified is accepted) there was sufficient justification for banning the expression of such views. The cases instead focused solely on the religious dimension of wearing the head covered.

There have recently been moves towards even more comprehensive limitations that would effectively preclude a woman with wearing a veil that covers her face from entering many public spaces in countries including France, Belgium, and Italy. Political proponents of such laws in some of these countries have also fallen into the error of assuming that they can determine what is required by a religion. For example, the Italian Equal Opportunities Minister Mara Carfagna claimed the prohibition on the wearing of burkas was not a restriction on religious freedom because they were not religious symbols. She referred to pronouncements by Muslim clerics to validate this claim saying that “that is not us saying it, but the top religious authorities of the Islamic world, like the imams of Cairo and Paris.”¹⁰ This claim, however, misses the point. There is certainly a school of thought that says that veiling is not required by Islam, but there are other schools of thought that claim that it is. This is an important internal debate within Islam, but it is not for the Italian government

⁶ Gareth Davies, “Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v Denbigh High School*, Decision of 2 March 2005,” *European Constitutional Law Review* 1 (2005): 511, at 511 notes that “A wave of bans and restrictions on religious clothing is sweeping Europe.”

⁷ See, e.g., BBC News Online, “Singapore Headscarf Ban Faces Lawsuit” (22 April 2002) <http://news.bbc.co.uk/2/low/asia-pacific/1943999.stm>.

⁸ *Dahlab v Switzerland* 2001-V Eur Ct. H.R. 449.

⁹ *Şahin v Turkey*, 2005-XI Eur Ct. H.R. 175; *Dogru v France*, 49 Eur.H.R.Rep 8 (2009).

¹⁰ David Charter, “Belgium Poised to be First in EU to Ban the Burqa,” *The Times* (London), 1 April 2010. For an explanation of moves in Egypt that have been referred to in justifying the banning by a number of European countries, see “Niqab banned at al-Azhar University,” DAWN.com, 9 October 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/world/11-burqas-banned-at-al-azhar-university--il--08>.

to determine the outcome of this religious debate and impose this on Italian Muslims, any more than it is the place of the Iranian government to enforce the opposite religious viewpoint.

However, a range of other reasons have been given to justify restrictions on religious clothing and symbolism. While they cannot be examined in detail here, several of the more significant are worth noting.¹¹ One is public security or safety. Sometimes such limitations are quite specific and justified. For example, a Sikh man who was charged with a violent crime was prohibited from wearing his *kirpan* to court because of the risk that he might use it in a manner that endangered others; this decision was upheld on appeal. By contrast, a Sikh schoolboy who was prohibited from wearing his *kirpan* to school under a general prohibition on knives in school (and despite his willingness to take steps to limit the danger caused by the *kirpan*) was held by the Canadian courts to have had his rights violated.¹² The Canadian experience demonstrates the feasibility of a nuanced approach to the wearing of religious symbols and matters of safety, rather than blanket claims that any or no restrictions are possible. At other times, broader claims are made about the danger that religious clothing poses to national security, particularly about Islamic veils that cover the face. Such veils are sometimes claimed to be associated with fundamentalism or to allow for breaches of national security (generally in an unspecified manner). The French *Conseil d'Etat* recently warned that French proposals to ban such clothing generally on the basis of national security were not proportionate or targeted to a demonstrable threat to public safety and would thus be likely to be in breach of religious freedom as protected under the European Convention on Human Rights.¹³

Another common reason given for banning the Islamic headscarf is that wearing it is inconsistent with women's rights. This question is itself a source of debate within the Muslim community, with some Muslim women's groups supportive of banning some or all forms of veiling in order to promote women's rights and others opposed. In one of the leading European Court of Human Rights cases on the right of a student to wear a headscarf at university, the majority of the Court held that one of the reasons that justified the law forbidding the wearing of headscarves in certain Turkish public institutions was the importance of the equal rights of men and women. However, the Court gave little by way of explanation of whether and how the wearing of a headscarf perpetuated gender inequality. In her dissenting opinion, Judge Tulkens wrote:

¹¹ For a more detailed analysis see Bahia G. Tahzib-Lie, "Dissenting Women, Religion or Belief and the State: Contemporary Challenges that Require Attention," in Tore Lindholm et al, eds., *Facilitating Freedom of Religion or Belief: A Deskbook* (The Hague: Martinus Nijhoff, 2004), 455.

¹² See *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 (school boy case); *Hothi v The Queen* [1985] 33 Man R (2d) 180 (criminal trial case)

¹³ Assemblée Générale Plénière du Conseil d'Etat, *Étude Relative Aux Possibilités Juridiques d'Interdiction du Port du Voile Intégral*, 25 March 2010; Henry Samuel, "French Burka Ban 'Unconstitutional'," *The Daily Telegraph* (London), 31 March 2010.



[The] wearing [of] the headscarf is considered synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say. Indeed, what is the signification of wearing the headscarf? As the German Constitutional Court noted in its judgment of 24 September 2003, wearing the headscarf has no single meaning; it is a practise that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.¹⁴

In some cases, a related concern is that the religious clothing is not being worn voluntarily but because of pressure, possibly even threats of violence, by family or community members. This is particularly relevant in cases involving school girls, and there is evidence that some Muslim girls in some schools are supportive of limits or bans on religious clothing because otherwise they may come under pressure or criticism for failing to comply with stricter religious clothing codes.¹⁵ The relationship between religious freedom and gender rights is a complex and contested one. For present purposes, it is sufficient to note that the promotion of the equal rights of men and women is a permissible ground for limiting religious freedom under international law. But care should be taken to ensure that there is a rational connection between the promotion of women's rights and the protective measures selected and that these measures are proportionate to the harm suffered. Women from minority religious communities, in particular, can suffer from state paternalism and from ignorance or stereotypes that lead to more legal intervention in their lives and greater regulation of their religious expression than occurs for women from majority communities.

RELIGIOUS HATE SPEECH AND DEFAMATION OF RELIGION

Another complex intersection between religion and expression has been the debate about whether (and, if so, how) the state should deal with forms of expression that subject religions, or religious individuals, to hate, contempt, ridicule or negative stereotyping. Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR) requires that: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."¹⁶ States parties are thus obligated to implement laws that prohibit what is sometimes known as religious hate speech or religious vilification.

¹⁴ *Şahin v Turkey*, 2005-XI Eur Ct. H.R. 175, dissenting judgment of Judge Tulkens, [11].

¹⁵ Davies, "Banning the Jilbab," t 518-19.

¹⁶ Opened for signature 16 December 1966, 999 UNTS 171, art 20(2) (entered into force 23 March 1976).



Such laws have a complicated relationship with both freedom of religion and freedom of expression. On the one hand, the advocacy of hatred against minority religions can play a significant role in creating conditions in which discrimination, hostility, or even genocide can thrive. These dangers are particularly acute in deeply divided communities, where religious groups exist in a state of tension with one another, or where religious persecution has been present in the past. When a minority religious community feels threatened and under attack, the capacity of individuals to exercise their religion freely and without fear is undermined. Threats, intimidation, and religious hate speech may also make it difficult for members of minority groups to speak out on issues of importance to them, even limiting their capacity to use speech to stem the hate speech, if they fear that doing so will make them the target of abuse or even violence.

However, overly-broadly enactments of prohibitions of religious hatred may also be problematic from the point of view of both religious freedom and free speech.¹⁷ Religious speech may well itself constitute religious hatred of a very dangerous kind—it has certainly been known for religious leaders to be among those who have whipped up hatred against other religious groups, advocated violence and legitimised discrimination. However, there are forms of religious speech that may well be caught up in religious hatred laws that create concerns for freedom of religion. Within some religious traditions, for example, the denunciation of the errors of other religions and the proclamation of the sole truth of the speaker's religion is an important manifestation of religious conviction. Yet, particularly if religious hatred laws are drafted in wide terms, such speech could be construed as religious hatred. In a controversial case in Australia, for example, two Christian pastors from a small evangelical church had a civil complaint brought against them under the *Racial and Religious Tolerance Act 2001* (Vic) for a variety of statements made at a seminar on Islam and in some publications. The statements made were extensive and wide-ranging. They included the suggestions that in Islam “there is not much value of woman”, that the people we call terrorists are “actually they are true Muslim [sic] because they have read the Qur’an . . . and now they are practising it”; implied that money is derived from drug sales to sponsor Muslim proselytism, and that Muslims in Australia had doubled their population in seven years because they control the Immigration Department.¹⁸ The cumulative effect of these statements was held at first instance to amount to religious vilification. The decision was appealed to the Victorian Court of Appeal which overturned it, but did not determine whether the speech was vilify-

¹⁷ On the complex issues of hate speech generally, see Ivan Hare and James Weinstein, *Extreme Speech and Democracy* (Oxford: Oxford University Press 2008).

¹⁸ *Catch the Fire Ministries Inc and Others and Islamic Council of Victoria Inc* (2006) 15 VR 207 [41], [47],[60], [62]. In this section of the judgment, Nettle JA is critical of the way in which Higgins J paraphrased the claims by the pastors and he sets them out in more detail and with more context, which is not possible to reproduce in this chapter.

ing or not.¹⁹ A particularly problematic feature of the decision at first instance was the reliance by the tribunal on controversial aspects of Islamic law, such as whether Islam was “really” a religion of peace or “really” encouraged discrimination against women. While some of the wilder claims made by the pastors (such as the doubling of the population and taking over of the Immigration Department) were factually untrue and inflammatory, other claims were intemperate but still a matter for debate and discussion rather than a determination by the tribunal as to their “truth.” The case illustrates the problems that can arise with such legislation when judges may be asked to make some difficult decisions as to what is acceptable, robust (maybe even offensive or hurtful) debate on controversial matters, and what crosses the line into creating hate of a kind that may lead to violence or other forms of harm.²⁰

Religious hate laws also run the risk of cutting short passionate but publicly important debates, including debates that would not be caught by the legislation, for fear of breaching it. (This is sometimes known as the “chilling effect” of legislation that restricts freedom of expression; people may self-censor because they fear the possibility of litigation.) When speakers, including both those supportive of a particular religion and those deeply critical of religion in general or a specific religion, are fearful about the consequences of speaking their minds, an important public debate on an important social phenomenon is stifled.

An even more problematic approach to protecting religions from offensive expression has been the development of the notion of the “defamation of religion.” This concept, which appears to build on human rights notions such as the prohibitions of hate speech, racism, and xenophobia, was first put forward in the Commission on Human Rights at its 62nd meeting in April 1999 by Pakistan on behalf of the Organization of the Islamic Conference,²¹ and in the General Assembly at its 81st plenary meeting in December 2006 by Azerbaijan on behalf of the Organization of the Islamic Conference.²² Since that time, non-binding resolutions condemning defamation of religion have been passed many times by the Commission of Human

¹⁹ The Court of Appeal held that the decision of the tribunal contained errors, but because it was an administrative law review the role of the Court was not to make a final determination on the merits of the claim. Rather the Court sent the matter back to the Tribunal to be determined by another member. The parties then came to a settlement of the complaint, so that no final determination was made as to whether the conduct engaged in was in breach of the *Act* or not.

²⁰ See, eg, Rex Ahdar, “Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law,” *University of Queensland Law Journal* 26 (2007): 293; Dermot Feenan, “Religious Vilification Laws: Quelling Fires of Hatred?” *Alternative Law Journal* 31 (2006): 153; Lawrence McNamara, “Salvation and the State: Religious Vilification Laws and Religious Speech,” in Katharine Gelber and Adrienne Stone, eds., *Hate Speech and Freedom of Speech in Australia* (Sydney: Federation Press, 2007), 145-68; Dan Meagher, “The Protection of Political Communication under the Australian Constitution,” *University of New South Wales Law Journal* 28 (2004): 30.

²¹ UN Commission on Human Rights, *Defamation of Religions*, CHR Res 1999/82, 55th sess, 62nd mtg, UN Doc E/CN.4/1999/L.40/Rev.1 (30 April 1999).

²² UN General Assembly, *Combating Defamation of Religions*, GA Res 13/16, UN GAOR, 61st sess, 81st plen mtg, Agenda Item 67(b), UN Doc A/RES/61/164 (19 December 2006).



Rights and its successor, the Human Rights Council, but it has been controversial since its inception. The March 25th 2010 resolution, for example, passed by only 20 votes to 17 with 8 abstentions.²³ Defamation of religion is an amorphous concept and the resolutions relating to it encompass a number of issues on which there is a high degree of international consensus and strong support in international human rights law, for example, the need to combat discrimination, violence, or intimidation of people on the basis of their religion and to protect religious sites from attacks. While the resolutions focus on the protection of individuals or groups from violations of their human rights, they fall within the human rights mainstream. Where they become more controversial is when they recommend that legal measures be taken to protect the reputation of a religion itself. For example, the first resolution on defamation passed by the Human Rights Council expressed concern that the media was inciting “intolerance and discrimination towards Islam and any other religions.” It also expressed deep concern at the “negative stereotyping of religions” and that “Islam is frequently and wrongly associated with human rights violations and terrorism.”²⁴ While such stereotyping of religions certainly can lead to hostility against followers of a religion, there is a danger that such protection of religion as such can protect religions from legitimate criticism, questioning, debate, or internal dissent. A joint statement by three of the United Nations Special Rapporteurs with responsibilities in the area of religion, racism, and speech set out the concern:

the difficulties in providing an objective definition of the term “defamation of religions” at the international level make the whole concept open to abuse. At the national level, domestic blasphemy laws can prove counter-productive, since this could result in de facto censure of inter-religious and intra-religious criticism. Many of these laws provide different levels of protection to different religions and have often proved to be used in a discriminatory manner.²⁵

The concept of the defamation of religion has been the subject of considerable political and scholarly criticism, particularly the concern that it can be seen as a justification for blasphemy and apostasy laws. It has been used in practice to justify punishments by Muslim states for effectively religious crimes such as blasphemy, heresy, and apostasy and to protest about Islamophobia (but not other forms of religious

²³ UN Human Rights Council, *Combating Defamation of Religions*, HRC Res 13/16, 13th sess, 42nd mtg, Agenda Item 9, UN Doc A/HRC/RES/13/16 (25 March 2010).

²⁴ UN Commission on Human Rights, *Defamation of Religions*, CHR Res 1999/82, 55th sess, 62nd mtg, UN Doc E/CN.4/1999/L.40/Rev.1 (30 April 1999).

²⁵ Githu Muigai, Asma Jahangir and Frank La Rue, Joint Statement on Freedom of Expression and Incitement to Racial or Religious Hatred by UN Special Rapporteurs on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Freedom of Religion or Belief, and the Promotion and Protection of the Right to Freedom of Opinion and Expression’ Office of the High Commission for Human Rights Side Event at Durban Review Conference, Geneva, 22 April 2009, <http://www2.ohchr.org/english/issues/opinion/docs/SRJointstatement22April09New.pdf>.

hate) in non-Muslim countries.²⁶ Indeed, the first draft resolution on defamation of religions, which was introduced by Pakistan, only condemned “new manifestations of intolerance and misunderstanding, not to say hatred, of Islam and Muslims,” and there was some debate and resistance to reframing it in more religiously neutral terms.²⁷ The most recent resolution from the Human Rights Council singles out the need to protect Muslims many times but makes no mention of other forms of common religious persecution including that suffered by religious minorities in Muslim states.²⁸ Religious hate laws are intended (even if they do not always succeed) to protect vulnerable religious minorities from the personal consequences of vilification. The extension beyond hate laws to the concept of defamation of religions, however, may be used to shore up the power and authority of the religious majority and its political and religious hierarchy. By adopting the institutions of international human rights and aligning some of the language in the defamation of religion resolutions with the language of human rights, those states that have supported the development of the concept of the defamation of religion have sought to legitimize actions that would otherwise be breaches of freedom of religion and expression. The danger posed by the argument that religious orthodoxy requires state protection is far from hypothetical. In recent reports, the United Nations Special Rapporteur on Freedom of Religion or Belief has noted the widespread use of domestic laws to enforce particular religious viewpoints and to punish those who are seen to deviate from them. Recent reports have described the prosecution of the Ahmadiyya communities in countries including Pakistan and Indonesia for “deviant” teachings of Islam; the widespread use of blasphemy laws in Pakistan against religious minorities and Muslims who question accepted orthodoxy; the introduction of the death penalty in Iran for apostasy; the prohibition on private religious education in Kazakhstan; and the forcing of Christians to destroy their own churches and religious symbols in Myanmar.²⁹ The language of defamation or hurt feelings of religious majorities is increas-

²⁶ Rebecca J. Dobras, “Is the United Nations Endorsing Human Rights Violations? An Analysis of the United Nations Combating Defamation of Religions Resolutions and Pakistan’s Blasphemy Law,” *Georgia Journal of International and Comparative Law* 37 (2009): 339; Julian Rivers, “The Question of Freedom of Religion or Belief and Defamation of Religion,” *Religion and Human Rights: An International Journal* 2 (2007):113.

²⁷ See Lorenz Langer, “The Rise (and Fall?) of Defamation of Religion,” *Yale Journal of International Law* 35 (2010): 257, at 258.

²⁸ UN Human Rights Council, *Combating Defamation of Religions*, HRC Res 13/16, 13th sess, 42nd mtg, Agenda Item 9, UN Doc A/HRC/RES/13/16 (25 March 2010).

²⁹ Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief—Addendum—Summary of Cases Transmitted to Governments and Replies Received*, UN Doc A/HRC/7/10/Add.1 (28 February 2008), [178]-[182] (treatment of Christians in Myanmar); Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief—Addendum—Summary of Cases Transmitted to Governments and Replies Received*, UN Doc A/HRC/10/8/Add.1 (16 February 2009), [55]-[60] (treatment of the Ahmadiyya community in Indonesia), [95]-[100] (death penalty for apostasy in Iran), [117]-[121] (prohibition on private religious education in Kazakhstan), [158]-[161] (treatment of the Ahmadiyyah community in Pakistan); Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief—Addendum—Summary of Cases Transmitted to Governments and Replies Received*, UN Doc A/HRC/13/40/Add.1 (16 February 2010), [194] (treatment of the Ahmadiyyah community in Pakistan).



ingly being used in such countries to justify and legitimate these repressive actions.

PRAYER AND RELIGIOUS EDUCATION IN SCHOOL

Freedom of religion and expression both take on a different complexion when placed in the context of a public institution, particularly institutions such as schools, prisons, or the armed forces where there may be little freedom for some participants to remove themselves from forms of religious speech or other expression that they find offensive. Schools have proved a particularly controversial battleground for issues of expression and religion. Religious teachers and students who spend a large proportion of their time in schools may wish to express their religion in various ways in school hours. This may include wearing religious clothing or symbols (as discussed above), praying, or participating in other forms of religious expression, such as Bible reading or religious meditation. In addition, parents, or sometimes children themselves, may wish the school to teach religious values or doctrine or to exclude from the curriculum subjects that they feel undermine religious teachings (for example, sexual education or evolution). However, other parents, teachers, or students may be hostile to these forms of religious expression or feel oppressed by them or pressured to participate in them.

International law provides some guidance on this issue. Article 18(4) of the *ICCPR* states: “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.” This provision clearly gives parents the primary right to determine the religious and moral education of children and was developed in response to the odious practices of totalitarian regimes that used the education system to turn children against their parents’ values.

However, the precise way in which this protection plays out in practice, particularly in public schools where children of a range of religions or beliefs must co-exist, is far from straightforward. Courts and tribunals in different jurisdictions have taken a variety of approaches to resolving these tensions. Generally, it is accepted that it is a breach of human rights to force students to participate in overtly religious practices or to impose compulsory participation in sectarian religious education or other forms of religious expression.³⁰ Some countries that have a very strict separation of church and state, such as the United States, put more serious limits on the capacity of public schools to engage with religion, even if that engagement is not compulsory.³¹ For example, in the *McCullum* case, the

³⁰ General Comment 22, [6]: ‘The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.’

³¹ See, e.g., *Illinois ex rel McCollum v. Board of Education* 333 US 203 (1948); *School District of Abingdon Township v. Schempp* 374 US 203 (1963); *Wallace v. Jaffree* 472 US 38 (1985); *Edwards v. Aguillard* 482 US 578 (1987); *Kitzmiller v. Dover Area School District* 400 F. Supp. 2d 707 (2005).



Supreme Court held that an “opt in” school scheme that allowed parents to enroll their children in religious classes, taught by representatives of various religions on school property, was a breach of the establishment clause of the US Constitution. This was because the teaching used tax supported property and required the “close cooperation” of the school and religious authorities.³² The fact that children who did not wish to attend religious education classes could continue other secular studies classes during the time for religious studies was irrelevant to the constitutional issue.³³ Similarly, schools were prohibited from endorsing religion through the use of prayers, even when participation was voluntary. The Supreme Court held that: “School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are non-adherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’.”³⁴

Courts in some other jurisdictions and the United Nations Human Rights Committee have not been quite so prescriptive, probably in part because their focus has been on religious freedom without the complicating factor of a non-establishment clause. They have been prepared to allow for religious education as long as parents or students have a genuine and not unduly onerous way of opting out of those classes. In addition, the subject matter that is taught (including material on religion) does not have to be excluded simply because some parents or students may have religious or philosophical objections to its inclusion. In a challenge to a course in religion and belief conducted in Norwegian public schools, the European Court of Human Rights summarized its case law from the preceding decades.³⁵ The Court noted that religious education classes are not a special case: the religion or belief of parents must be respected “throughout the entire State education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the ‘functions’ assumed by the State.”³⁶ Minority interests cannot simply be subordinated to those of the majority: “a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position,”³⁷ but

³² *McCollum*, 333 US at 464 (Black J., for the Court).

³³ *Id.* at 472-75 (Frankfurter J., concurring).

³⁴ *Santa Fe Independent School District v. Doe* 530 US 290 at 309 (2000) (Stevens J., for the Court) quoting *Lynch v. Donnelly* 465 US 668 at 688 (1984) (O’Connor J., concurring).

³⁵ *Folgerø v. Norway* (2008) 46 EHRR 47 at 1186-7. Some of the key earlier judgments of the Court on this topic include: *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976) 23 Eur Ct. H.R. (ser A); (1976) 1 EHRR 711 (*‘Pedersen v. Denmark’*); *Campbell and Cosans v the United Kingdom* (1982) 48 Eur Ct. H.R. (ser A); (1982) 4 EHRR 293.

³⁶ *Folgerø v. Norway* (2008) 46 EHRR 47 at 1186. This does not commit the school to respecting any passing whim or preference of parents, but only those ‘views that attain a certain level of cogency, seriousness, cohesion and importance’: *ibid.*

³⁷ *Id.*, at 1187.



parents do not have a “right that their child be kept ignorant about religion or philosophy in their education.”³⁸ The European Court has also been more open to the notion that allowing students to opt out of religion classes is sufficient to protect their rights without seeming to take the pressures and social difficulties that this may cause for children with much seriousness.³⁹

RELIGIOUS SYMBOLS IN PUBLIC SPACES

A similar tension to that which arises in schools is caused by the question of whether religious symbols have a place in public spaces or institutions. Cases that have raised this issue include those dealing with crucifixes in Italian classrooms,⁴⁰ displays of the Ten Commandments in a US courthouse⁴¹ and on the grounds of a State Capitol,⁴² refusals to erect monuments to competing religions,⁴³ displays of nativity scenes by local councils,⁴⁴ and the erection of succahs to celebrate the autumn Jewish festival of Sukkot.⁴⁵ Particularly in countries where there is a strong, historical dominance of a particular religious group, there can be a sense from some that the symbols of that group are part of the broader culture, rather than simply religious, and are entitled to be displayed as a recognition of the important role of the particular religion within the culture. However, others find this a breach of the appropriate degree of separation of church and state and are concerned that religious symbols make public institutions hostile or alienating to those from religious minorities and those who are not religious.

Religious clothing may also cause concerns when worn by individuals in public sector employment with respect to whether it inappropriately proselytises or implies that the state adopts or approves of the religion of the wearer. This tends to be the case with employees whose roles bring them into contact with the public and is particularly acute when the wearer has a position of authority such as a teacher or

³⁸ *Id.*, at 1188-9. See also the Office for Democratic Institutions and Human Rights Advisory Council of Experts on Freedom of Religion or Belief, *Toledo Guiding Principles on Teaching About Religions and Beliefs in Public Schools* (2007).

³⁹ Although the Court gave a little more serious consideration to the problems of opting out in *Folgerø v. Norway* (2008) 46 EHRR 47.

⁴⁰ *Lautsi v. Italy* (European Court of Human Rights, Second Section, Application No 30814/06, 3 November 2009). See similarly *Capitol Square Review Board v. Pinette* 515 US 753 (1995).

⁴¹ *McCreary County, Kentucky v. ACLU of Kentucky* 545 US 844 (2005).

⁴² *Van Orden v. Perry* 545 US 677 (2005).

⁴³ *Pleasant Grove City, Utah v. Summum* 129 S.Ct. 1125 (2009).

⁴⁴ *County of Allegheny v. ACLU of Greater Pittsburgh* 492 US 573 (1989); *Lynch v. Donnelly* 465 US 668 (1984).

⁴⁵ *Syndicat Northcrest v. Amselem* (2004) SCC 47.

a judge.⁴⁶ Even when worn on the body of a private individual, clothing worn by public sector employees can raise questions as to whether the clothing is itself an inappropriate imposition of religious symbolism in public spaces.

The passion with which these issues are debated can be seen in the public reaction to the European Court of Human Rights judgment in *Lautsi v. Italy*, the “Italian crucifixes case.”⁴⁷ The case was brought by the mother of two children who were taught in a state school which displayed crucifixes on the walls. The mother objected that this interfered with her freedom of religion and also her right to educate her children according to her own beliefs and values. She also challenged a Ministry of Education directive that recommended that school classrooms have a crucifix on display. The applicant argued that the display of crucifixes “led to pressure being undeniably exerted on minors and the impression given that the State was estranged from those who did not share Christian beliefs. The concept of secularism required the State to be neutral and keep an equal distance from all religions, as it should not be perceived as being closer to some citizens than to others.” By contrast, the government argued that the display of a cross was not a “sign of preference for one religion, since it was a reminder of a cultural tradition and humanist values shared by persons other than Christians.” The state acknowledged that it had a duty of neutrality and impartiality, but argued that it has not been breached in this case. While the European Court of Human Rights accepted that the crucifix had multiple meanings, it held that its predominant meaning was religious. It concluded that the presence of the crucifixes breached the right of the parent to have her child educated in conformity with her beliefs (Article 2 of Protocol 1) in combination with the right to freedom of religion or belief (Article 9).⁴⁸ The Court reasoned thus:

The presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion. What may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religions or those who profess no religion. That risk is particularly strong among pupils belonging to religious minorities. Negative freedom of religion is not restricted to the absence of religious services

⁴⁶ Holly Bastian, “Religious Garb Statutes and Title VII: An Uneasy Coexistence,” *Georgetown Law Journal* 80 (1991-1992): 211; Derek Davis, “Reacting to France’s Ban: Headscarves and Other Religious Attire in American Public Schools,” *Journal of Church and State* 46 (2004): 221; Human Rights Watch, *Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany* (2009); Karl Klare, “Power/Dressing: Regulation of Employee Appearance,” *New England Law Review* 26 (1991-1992): 1395; Sylvie Langlaude, “Indoctrination, Secularism, Religious Liberty and the ECHR,” *International and Comparative Law Quarterly* 55 (2006): 929; Hindy Lauer Schachter, “Public School Teachers and Religiously Distinctive Dress: A Diversity-Centred Approach,” *Journal of Law and Education* 22 (1993): 61.

⁴⁷ *Lautsi v. Italy*, Application No 30814/06 (Unreported, European Court of Human Rights, Second Section, 3 November 2009).

⁴⁸ *Id.*, at [32] (argument of applicant), [40] (argument of respondent government), [51], [57]-[58] (decision of Court).



or religious education. It extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism. That negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice.⁴⁹

The decision of the Court (which has been appealed to the Grand Chamber) was greeted with strong condemnation from Italian politicians, the Vatican, and many members of the Italian public. The heightened rhetoric around the place of religious symbols in public life, and the way in which the issues can be perceived to have significant cultural implications can be seen in the response of the Italian education minister, Maria Stella Gelmini, who was quoted as saying: “No one, not even some ideologically motivated European court, will succeed in rubbing out our identity.” Another government minister added that: “The European court has trodden on our rights, our culture, our history, our traditions and our values.”⁵⁰ Such statements reflect the high cultural stakes that become attached to religious symbols in some contexts; such passions can make a negotiated settlement of differences over such issues difficult to achieve.

CONCLUSION

The relationship between religious freedom and freedom of expression is a complex one. Religious believers express their beliefs in both explicit statements and also in a range of important symbolic ways. Without a robust protection of freedom of expression, many religious practices are threatened. To that extent, the two freedoms have an important, complementary relationship. Yet, some forms of expression are threatening to religious people or to religious freedom. Hate speech, vilification, blasphemy, and other forms of speech directed against religious beliefs can be challenging to some religious believers and lead to calls for restrictions on expression in order to protect religious believers from harm, offense, or hurt. Displays of religious symbols by public institutions or the teaching of religion in public schools may appear to some to be an important acknowledgement of the cultural importance of a particular religion in a society, but to others such expressions can appear oppressive and alienating; associating the state with a particular religious viewpoint at the expense of other forms of religion or belief. The wearing of religious clothing has important religious and expressive dimensions, but may raise complicated issues about women’s rights or national security.

There is no simple or formulaic way to resolve such tensions. Neither freedom of religion or belief nor freedom of expression is given absolute protection in inter-

⁴⁹ *Id.*, at [55].

⁵⁰ John Hooper, “Human Rights Ruling Against Classroom Crucifixes Angers Italy,” *The Guardian* (London), 3 November 2009. See also Richard Owen, “Italy Challenges Ruling That Crucifix in Class Violates Religious Freedom,” *The Times* (London), 3 November 2009.



national law or most domestic bills of rights, which acknowledge that these rights must sometimes give way to other important considerations. When it comes to the practical resolution of particular issues in specific countries, cultural and political factors may be as important as legal and human rights considerations. The issues discussed in this chapter, however, are only likely to become more acute in coming years. Certain forms of religiosity have become intolerant of forms of expression that do not comply strictly with orthodox religious viewpoints and at the same time a divide is growing between those who wish to see more expression of religiosity in the public sphere and those who wish to see less religious symbolism. Globalization means that a dispute about crosses in Italy or cartoons in Denmark can spread across the world in a matter of days and cause serious social disruption in countries far from the origin of the dispute. In such circumstances, societies and courts are likely to have to deal with a wider range of complicated issues at the inter-section of religion and expression with the political and social consequences of such resolutions being increasingly significant.





A CONSCRIPTED PROPHET'S GUESSES ABOUT THE FUTURE OF RELIGIOUS LIBERTY IN AMERICA

DOUGLAS LAYCOCK¹

This is written on the occasion of the 25th anniversary of the Emory Center for the Study of Law and Religion, and I understood that we were especially asked to foresee its second 25 years. Perhaps I took the instructions more literally than other speakers; I am known to be a literal-minded guy. I took the question to be: What will the world of religious liberty look like in 2032? Damned if I know. If I could foretell the future, I would have made a fortune in the stock market by now. This is not a topic I ever would have volunteered to address. All I can do is examine the past, look at current trends, look at what caused changes in past trends, and try to extrapolate a little bit into the future. But I can't see around the next curve, or even know how soon we will reach the next curve.

RELIGIOUS CHANGES DRIVE CHANGES IN THE LAW OF RELIGIOUS LIBERTY

CHANGES IN THE PAST

Throughout American history, changes in the religious beliefs and behavior of the American people have caused changes in the alignment of religious conflict, and these changes have driven much of the law of religious liberty.² Thus the first Great Awakening, beginning in the 1740s, led to disestablishment in the states and to guarantees of free exercise and disestablishment in the federal Constitution.

The large Catholic immigration, beginning in the second quarter of the nineteenth century, led to intense political conflict over religious observances in public schools and over demands for funding of private schools. The modern legal issues over school prayer, and government-sponsored religious observances more generally, and over financial aid to religious schools, and to religious institutions more generally, are directly descended from those nineteenth century conflicts.

The assimilation of Catholics and Jews into the American mainstream, and into its governing elite, and the increased acceptance of religious pluralism more gener-

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² I review these periodic realignments of religious conflict in somewhat more detail in Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 *IND. J. GLOBAL LEGAL STUD.* 503, 507-13 (2006).



ally, led to the school prayer decisions in 1962 and 1963 and to the rule, generally observed but subject to exceptions, that government may not endorse any position on a religious question.³

We have for some time been in the midst of a great outpouring of evangelical religious fervor, which I will call the Fourth Great Awakening, although that characterization is apparently a matter of some dispute among religion scholars. This Great Awakening, which began in the 1970s and continues today, led evangelical Christians to build a set of private schools, and that led them to switch sides on government aid to religious schools. That change of position contributed powerfully to a reframing of the constitutional issues surrounding such aid. Aid to private schools was no longer just a Catholic issue; it had the support of a broad coalition that included Catholics, evangelicals, free marketeers, and black parents frustrated with failing public schools. This reframing of the issue helped lead the swing votes on the Court to change their position from banning most such aid in the 1970s to explaining a constitutional method to deliver as much such aid as a legislature chooses by the early 2000s.⁴

In this Fourth Great Awakening, evangelical religion grew dramatically in activism, visibility, and influence. It probably grew somewhat in numbers as well, but the most important things about this Great Awakening were the evangelical decisions to enter politics and to form litigating organizations to protect religious liberty. This evangelical activism was a reaction to perceived secularization, and of course it provoked a secular counter reaction. The conflict between these two movements has led to a much higher rate of religious liberty litigation, in the courts generally and in the Supreme Court in particular. Evangelical activism was necessary but not sufficient—the support of secular civil libertarians was usually also necessary—to the enactment of the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, the Religious Liberty and Charitable Donations Protection Act, and thirteen state Religious Freedom Restoration Acts.⁵ This evangelical activism

³ *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). For the no-endorsement rule, see, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306–08 (2000).

⁴ Compare *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), with *Lemon v. Kurtzman*, 403 U.S. 602 (1971). For explanations of how and why this change came about, see Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. U. CHI. L.J.* 121 (2001); Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 *B.Y.U. L. REV.* 275; Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 375 (1999).

⁵ See Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* (2000) (protecting exercise of religion from federal regulation); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc *et seq.* (2000) (protecting use of real property for religious purposes and protecting religious exercise of inmates of prisons, mental hospitals, and similar institutions); Religious Liberty and Charitable Donations Protection Act, Pub. L. No. 105-183, 112 Stat. 517 (1998) (amending 11 U.S.C. § 544, 546, 548, 707, 1325 (1994)) (protecting charities from claims of creditors of bankrupt contributors). Citations to state Religious Freedom Restoration Acts are collected in Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 *HARV. L. REV.* 155, 211 n.368 (2004).



has powerfully resisted the Court's view that government should take no position on questions of religion.

In addition to these broad-based changes, we know that a single group can make a large difference. This is most vividly illustrated by the Jehovah's Witness litigation from the late 1930s to the early 1950s.⁶

THE REMARKABLE PERSISTENCE OF THESE ISSUES

The details change; the alignment of factions changes; who's winning changes. But the issues remain. Americans have been fighting over religion in public schools, and over financial aid to religious private schools, since the 1820s.⁷ The intensity of these fights has waxed and waned, and sometimes—especially in time of major wars—the issues faded away as attention was focused elsewhere, but the issues have always returned. Even the arguments haven't changed all that much. One side says the public schools are neutral and acceptable to all, and somewhat inconsistently, that the public schools are essential to socializing children and preserving American values, that government should not support the teaching of religion, and that religious schools are separatist and divisive. The other side says the public schools are not neutral and are unacceptable to important religious minorities, that they instill a politically dominant view about religion, that private schools teach the whole curriculum and not just religion, and that families should not be forced to choose between their faith and their children's right to a free education. We have been fighting over these issues for 180 years now, and I feel fairly confident in saying we will still be fighting over them in 2032.

The battles over free exercise have been more intermittent, but have continued for even longer. Here the central issue is whether and to what extent religiously motivated behavior should be exempted from government regulation. This issue goes back at least to 1669, when the Carolina Colony exempted conscientious objectors from swearing oaths.⁸ There were major and long running political battles over exemption from military service in the colonial period and during the Ameri-

⁶ Citations to these cases are collected in Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 419-20 nn. 60-72 (1986). For a more recent example of successful Jehovah's Witness litigation, see *Watchtower Bible and Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150 (2002).

⁷ See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 220-21 (2002). I rely on Hamburger for his gathering of facts, but not for his analysis, which is often implausible or tendentious. See Kent Greenawalt, *History as Ideology: Philip Hamburger's Separation of Church and State*, 93 CAL. L. REV. 367 (2005) (reviewing Hamburger); Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667 (2003) (same).

⁸ Fundamental Constitutions of Carolina § 100 (1669), reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2772, 2784 (Francis Newton Thorpe ed., 1909).



can Revolution.⁹ There has been constitutional litigation over claims to exemption at least since 1813.¹⁰ And that 1813 case was argued and publicized as a test case, which shows awareness of the issue as one that would recur.¹¹ I expect we will still be arguing over these issues in 2032 as well.

EMERGING TRENDS AND FORESEEABLE CHANGES

The basic legal issues are persistent. Changes in religious belief and behavior yield changes in how these issues are treated. So can we foresee any changes in religious belief and behavior?

THE FOURTH GREAT AWAKENING WILL COME TO AN END

The Fourth Great Awakening will gradually fade away and come to an end. It will likely leave important changes behind it—new universities, new megachurches, new statutes on religious liberty, new litigating organizations—but the religious intensity of the last generation will not continue. I base this prediction on little more than the fact that the first three Great Awakenings all ended. These Awakenings seem to have a life span, and this one is getting long in the tooth. To this outside and theologically unsophisticated observer, the movement seems to be diffusing. The lack of a viable socially conservative candidate in the 2008 Republican primaries is one example; other examples lie in the emergence of a variety of theologies and political commitments.¹² We have controversy over evangelical environmentalists; we have Rick Warren and *The Purpose Driven Life*; we have *The Prayer of Jabez* and other versions of prosperity theology. Of course diffusion does not necessarily indicate lack of energy, and politics are collateral to a religious movement; conservative religious political activism could diffuse or even end without the religious awakening ending. But this Awakening has been distinguished by its political activism, and more fundamentally, there is the experience that all past religious awakenings ended.

The Fourth Great Awakening will end unless, of course, this time it's different. This Awakening arose in reaction to very specific political and moral threats, and perhaps those threats can serve as a focal point that sustains the movement. It was the threat to take away the tax exemption of segregation academies that first roused

⁹ Compare Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1808-25 (2006) (arguing that this debate ended in a legislative win for religious exemptions, subject to a requirement of contributing to the war effort in other ways less burdensome to conscience), with Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603 (2005) (arguing that this debate ended in a legislative defeat for religious exemptions, because pacifist groups did not get the wholly unconditional exemption they sought).

¹⁰ *People v. Phillips* (N.Y. Ct. of Gen'l Sessions, June 14, 1813), excerpted in MICHAEL W. MCCONNELL, JOHN H. GARVEY, & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 103 (2d ed. 2006). See also *Stansbury v. Marks*, 2 U.S. (2 Dall.) 213 (Pa. 1793) (reporting litigation over whether Jewish witness could be compelled to testify on his Sabbath; the case apparently settled and the basis for the claim is not reported).

¹¹ See WILLIAM SAMPSON, *THE CATHOLIC QUESTION IN AMERICA* (photo reprint 1974) (1813).

¹² For a journalistic assessment, see David D. Kirkpatrick, *The Evangelical Crackup*, N.Y. TIMES MAGAZINE 38 (Oct. 28, 2007).



the evangelicals to political action,¹³ but other, more respectable issues soon replaced that one. The most obvious and important is abortion, now joined by same-sex marriage. There is always evolution, but evolution was around for the Third Great Awakening and didn't sustain it. There are issues of sexual morality more generally, and secularism in the public schools, but those are more diffuse. There are the end-of-life issues, but on those, the right-to-life movement will mostly lose; Americans in overwhelming numbers fear being tortured by the medical establishment in their final days on earth.¹⁴ I will come back to same-sex marriage, but in the long run, I think abortion is the principal candidate for a galvanizing opponent for conservative religious activism.

My guess is that abortion will not sustain the Fourth Great Awakening at its current level of intensity, and that quite probably the abortion issue itself will look significantly different by 2032. If *Roe v. Wade* is overruled, or whittled into insignificance, the issue will be returned to legislatures, the present Republican coalition will be destroyed, and in most states, abortion will remain generally legal but somewhat more restricted than it has been. Conversely, new appointments to the Supreme Court may reaffirm *Roe* by a wide margin and put its overruling out of reach. This outcome seems considerably less likely, but if it happens, the right-to-life movement will be harder to sustain. The intensity of the conflict over abortion for the past 35 years has been sustained partly by the profound moral stakes on both sides of the issue, but also by the sense that dramatic change was within reach—often just one Supreme Court appointment away—and the potential or threat of that change motivated both sides to intense effort.

Technological change could also transform the abortion issue. If medical advances make it possible to sustain early term fetuses outside the womb, abortion will no longer be necessary to preserve women's control of their bodies, but taxpayers will be quite unwilling to pay the cost of preserving all those fetuses, and both parties' coalitions will be under intense new pressures. If pharmaceutical advances move abortion into the home or into the offices of ordinary gynecologists and internists, effective regulation will be impossible.

Of course one can over predict dramatic changes just as one can totally fail to see them coming. It is possible that abortion will be one of those persistent issues, still galvanizing religious conservatives in 2032, still performed in clinics surrounded by protestors. I would not be astonished at that outcome, but I would bet against it.

¹³ H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641 (2004).

¹⁴ See James Lindgren, *Death by Default*, 56 L. & CONTEMP. PROBS. 185, 197-207, 231-54 (No. 3, 1993) (collecting polling data). See also Kathryn L. Tucker, *In the Laboratory of the States: The Progress of Glucksberg's Invitation to States to Address End-of-Life Choices*, 106 MICH. L. REV. 1593, 1607-08 (2008) (collecting polls showing super-majority support for a right to assisted suicide); Peter A. Singer, Douglas K. Martin, Merrijoy Kelner, *Quality End-of-Life Care: Patients' Perspectives*, 281 JAMA 163, 165-66 (No. 2, Jan. 13, 1999) (reporting a small-scale study of seriously ill Canadian patients). The senior author of this study is a physician at the University of Toronto, not the bioethicist at Princeton.



RELIGIOUS CONFLICT BETWEEN AMERICANS WILL SUBSIDE

What it means for the Fourth Great Awakening to come to an end is that religious intensity will subside. It follows that religious conflict will also subside, because religious intensity is the principal line of religious conflict in the country.

The dominant religion in the country is low-intensity theism. The middle of the theological spectrum is filled by nominal believers and by serious believers without much fervor. This vast middle tends to be suspicious of—somewhat fearful of and hostile to—both the nonbelievers on one end and the intense and outspoken believers on the other. The sharpest religious conflict is between the two ends of the spectrum—between the intensely religious and the intensely secular. When the intensity is reduced on one end of the spectrum, the resulting religious conflict will also be reduced. I do not say eliminated; just reduced. The Center's second 25 years should be quieter than its first 25 years.

GAY RIGHTS WILL PRESENT SERIOUS RELIGIOUS LIBERTY ISSUES

Even though religious conflict should ameliorate in general, on some specific issues it is likely to intensify. For one, the gay rights movement will continue to make progress. It has momentum, and it has demography: Hostility to same-sex relationships is declining, and young people are more tolerant of same-sex relationships than older people.¹⁵

Differences between young adults and older adults are sometimes age or life-cycle effects and sometimes cohort effects. If a difference is an age or life-cycle effect, the older generation once looked like the younger generation does now, and the younger generation will eventually look like the older generation does now. If it is a cohort effect, the younger generation is genuinely different from the older generation and the difference will persist as the younger generation ages. Distinguishing the two requires sophisticated statistical analysis of data over time or just waiting to see.

It is possible that today's young people will become less tolerant of gays as they get older, but my guess is that they will not; I think this is a genuine cohort difference. The older generation grew up in a time when hostility to gays was endemic. People absorbed those attitudes and often became hardened in them before they were even exposed to the gay rights movement and to the argument that sexual orientation is generally immutable. More gays and lesbians stayed in the closet, so many fewer Americans ever knew that they had gay friends or gay relatives. It seems unlikely that today's older generation ever held the views of today's younger generation. Today's young people are being socialized very differently in many relevant ways. The future should lead to greater tolerance for gays and lesbians and even for

¹⁵ See Karlyn Bowman, *Attitudes about Homosexuality and Gay Marriage* (2008), available at http://www.aei.org/publications/filter.all,pubID.14882/pub_detail.asp (last visited August 2, 2008) (collecting polls over time).



same-sex marriage, with ever increasing pressure to conform to the new mores applied to a shrinking pool of religious dissenters.

The Exemption Issues. There is no very good reason for there to be conflict between religious liberty and gay rights.¹⁶ The only consistent civil libertarian perspective is to support both. Both movements are based on the view that some features of human identity and commitment are so personal and so fundamental that the state should not interfere. I have supported both gay rights and religious liberty throughout my career. What we need are strong gay rights laws with strong religious exemptions.

But almost no relevant political actor thinks that way. The leaders of the gay rights movement, and the leaders of the evangelical religious movement, both want a total win. They don't want to have to litigate over exceptions; they don't want to risk an occasional loss. It was the gay rights movement that rallied the broader civil rights movement to kill the proposed Religious Liberty Protection Act. There, religious groups offered far more in search of compromise than gay groups offered, but still the religious groups could not pass a bill guaranteeing religious liberty. That experience, and experience in state legislatures, leads me to predict with considerable confidence that there will be gay rights laws with absurdly narrow religious exemptions—perhaps eventually with no religious exemptions at all—and there will be conservative believers who oppose enactment, resist compliance, and seek exemptions. As the gay rights movement continues to make progress, we are likely to see more and more serious religious liberty issues arising out of its success.

The Marriage Issues. The problem with marriage is that this is the one major institution of society in which we make absolutely no pretense of separation of church and state—not even institutional separation, which is generally uncontroversial in all other contexts.¹⁷ But with respect to marriage, there is not even a pretense of institutional separation.

Marriage is both a religious institution and a legal institution, but we do not separate the two. Marriage is jointly administered by the state and by religious organizations. The state has delegated to clergy the power to solemnize legal marriages; most Protestant churches have de facto delegated to the state the power to dissolve religious marriages. Catholics and Orthodox Jews persist in refusing to give religious effect to secular divorce, thus showing that it is possible to separate religious marital status from legal marital status if we have the will. But most Americans never distinguish religious marriage from legal marriage; the two institutions are entirely combined in our thought.

This means that the rise of same-sex marriage will be much more difficult than

¹⁶ The argument in this section is elaborated in Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 189-201 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008).

¹⁷ I elaborate this argument *id.* at 201-07.



it needs to be. If we properly distinguished the religious and legal relationships, it would be perfectly clear that the state can authorize legal marriages between persons of the same sex, but that it can say nothing about religious marriages. Clergy do not have to perform same-sex marriage ceremonies, and religious organizations do not have to give religious recognition to same-sex marriages. Similarly where the disagreement is reversed: states do not have to recognize religious marriages between same-sex partners, but neither can they prohibit or penalize religious marriages that lack legal effect.

All this should be clear, but none of it appears to be clear. Already there have been conflicts in both directions and on a vast range of collateral issues involving private citizens who do not want to aid and abet same-sex relationships by renting an apartment, photographing the wedding, artificially inseminating one of the spouses, providing fringe benefits to same-sex spouses, and on and on.¹⁸ The nature of marriage, and the relationship between religious and legal marriage, will be important issues for the Center's second 25 years, provoked by increasing acceptance of same-sex marriage. The only solution will be to begin separating the two statuses, and recognizing the rights of both church and state to make their own rules. But that solution is so contrary to tradition that it may be impossible to implement.¹⁹

THE MUSLIM POPULATION WILL GROW

The Muslim population in the United States will continue to grow, unless we shut down immigration persistently and effectively. Effectively shutting down immigration seems wholly impossible for Latin Americans; it seems possible but unlikely for Muslims. With Muslims worried about active persecution arising from the war on terrorism, they have not been especially active in free exercise litigation. But some such cases have been filed,²⁰ and more are readily foreseeable: litigation over veils and head coverings in employment, in airports, on driver's licenses and identification cards, perhaps in public schools; litigation over regulation of Islamic schools, and if voucher programs get off the ground (which doesn't seem likely at the moment), over more intense regulation of Islamic schools that take government money. There may be litigation over sacrifice at Eid-ul-Adha; fifteen years after the Supreme Court protected animal sacrifice from discriminatory regulation, we have renewed litigation over Santeria sacrifice pending in the Fifth Circuit.²¹

¹⁸ See Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 16, at 1.

¹⁹ See Charles J. Reid, Jr., *Marriage: Its Relationship to Religion, Law, and the State*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 16, at 157.

²⁰ See, e.g., *Freeman v. Dept. of Highway Safety & Motor Vehicles*, 924 So.2d 48 (Fla. Dist. Ct. App. 2006) (rejecting Muslim woman's claim to veiled photo on driver's license); *Ahmad v. Dept. of Correction*, 845 N.E.2d 289 (Mass. 2006) (rejecting Muslim prisoner's claims of right to prayer rug and halal diet).

²¹ Compare *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), with *Merced v. City of Eulless*, No. 08-10358 and No. 08-10506, consolidated, in the United States Court of Appeals for the Fifth Circuit.



VOUCHER PROGRAMS WILL GROW ONLY SLIGHTLY, AND THE FIGHT WILL BE IN THE STATES

The Supreme Court has largely returned the question of vouchers to the states, but no general voucher program has been implemented in any jurisdiction. All existing voucher programs are tied to failing schools or to particular cities known to have many failing schools. There are also charter school programs; these differ from vouchers in a variety of ways, but perhaps most importantly in that they create no entitlement. There is political resistance to vouchers; no voucher plan has yet won approval in a referendum. In November 2007, Utah voters defeated a voucher plan with universal coverage and small payments by 62-38 percent, and an official of the National School Boards Association claimed that this was the eleventh referendum defeat for vouchers in eleven tries.²² Where legislatures enact vouchers or similar programs, there is litigation under state constitutions.²³

I think that this will probably not change. As I said, there is a large coalition in support of vouchers—many Catholics, evangelicals, free marketeers, and black parents. But there is a larger coalition on the other side—the public school lobby, teachers unions, opponents of taxes and government spending, suburban parents happy with their schools and fearful that choice programs might disrupt the status quo with children who are difficult to educate. Republican support for vouchers is half-hearted, because Republicans support vouchers but oppose the means of paying for vouchers. If the Fourth Great Awakening fades away as I have predicted, the evangelical component of the pro-voucher coalition will lose its intensity, and the number of evangelical schools will likely decline, further eroding support for vouchers. Voucher supporters will return to the strategy of trying to enact pilot programs and expanding from there, but that strategy has been around since the beginnings of the Milwaukee program in the early 1990s, and it has not led to much in the way of expansion.

Voucher programs would raise many difficult issues if widely enacted. How intrusively can the state regulate once it is paying the bills? Can some schools be excluded all together, because their curriculum is incomplete (think of schools that teach only or mostly religion, and teach little of the secular subjects), or because

²² For the Utah proposal, see *Utah Voter Information Pamphlet, 2007 Special Election November 6*, § 1 at 4 (2007), available at http://elections.utah.gov/Voter%20Information%20Pamphlet_2007.pdf (last visited Aug. 2, 2008). For the election results, see *2007 Special Election November 6, 2007*, available at <http://elections.utah.gov/2007.Election.Results.pdf> (last visited Aug. 2, 2008). For the claim of eleven straight defeats, see Erik W. Robelen, *Utah's Vote Raises Bar on Choice: Voucher Program's Defeat May Lead to Strategy Shifts*, EDUC. WEEK, Nov. 14, 2007, at 1.

²³ Compare *Kotterman v. Killian*, 972 P.2d 606, 616-25 (Ariz. 1999) (upholding tax credits for gifts to scholarship funds for private schools), *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211-12 (Ohio 1999) (concluding that Cleveland voucher plan could include religious schools), and *Jackson v. Benson*, 578 N.W.2d 602, 620-23 (Wis. 1998) (upholding Milwaukee voucher plan), with *Bush v. Holmes*, 919 So.2d 392, 399-412 (Fla. 2006) (invalidating Florida voucher plan), and *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1121-22 (Wash. 1989) (upholding state's refusal to grant scholarship for the blind to student attending seminary).



they teach intolerance or anti-Americanism or other ideologies that undermine constitutional commitments? If taken seriously, these issues would force courts and legislators to think about a question they have studiously ignored: what are those few things the state has a compelling interest in insisting that every child learn?²⁴

These issues will arise sporadically with respect to the small programs in place, but they will not arise in the sustained and focused way that would follow if a populous state enacted a state-wide voucher program of general applicability. We are likely to continue to duck these questions.

THE COURT

Who will be deciding these cases? Let's start with the easy part. In 2032, Chief Justice Roberts will be 77. Justice Alito will be 82; Justice Thomas will be 84. The average age at which Justices retired or died in office in the last 25 years is just under 82, so it is highly likely that one or two of them, and quite possibly all three of them, will still be sitting in the Court's center seats. Barring some accident or early health failure, all three will be on the Court for all or most of the Center's second 25 years.

Who will be serving with them, and with what predilections? That depends on politics, and politics are even harder to predict than religion.

PRESIDENTIAL ELECTIONS

When I made these remarks orally in the fall of 2007, it was widely assumed that the disasters the nation suffered in the Bush Administration would lead to a Democratic President and to Democratic gains in the House and Senate in 2008. As I finish the written version in the summer of 2008, the Presidential polls are very close, Iraq seems much less of a disaster than it did a year ago, and Afghanistan is beginning to look like a potential disaster that few saw coming. I am not foolish enough to predict political developments; I will only note some possibilities. The outcome of the 2008 election will be known before this article is published. What about 2012 and thereafter?

One possibility is that the conservative movement will be so discredited by the bungling in Iraq and Afghanistan and New Orleans, and by the housing disaster arising from excesses in under regulated mortgage markets, that a long period of Democratic dominance lies ahead. But voters have supported the Republican Party for many reasons, and those reasons will remain. The Republicans seemed totally discredited after Watergate, yet they regained the Presidency and the Senate only six years later. In exceptional situations, a political party can be punished for up to a century—if it bears responsibility for invading a state, destroying or redistributing its physical capital, destroying its social system, and killing and maiming its young men. That is the story of Republicans in the South after the Civil War. Short of that,

²⁴ See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1071-73 (6th Cir. 1987) (Kennedy, J., concurring) (concluding that state has compelling interest in insisting that every student study every part of the curriculum).



political memories are short. Politics is partly about what you have done for me lately, and mostly about what will you do for me next, and long term punishment for serious blunders is not all that likely.

There is also a very different scenario. It is entirely possible that the Democrats will win in 2008, and that they too will turn out to be bunglers, or that one or more of the problems they inherit—in Iraq or Afghanistan, or perhaps in housing, energy policy, or some other domestic issue—will be so insoluble that disaster ensues no matter how skilled the new Administration is. Any such disaster will happen in a Democratic Administration, and in 2012, Republicans will blame the Democrats for it. The Democrats will have lost Iraq, or presided over the final collapse of the housing market, or whatever. The Republicans will say that they would have avoided this; they would have stayed the course; they were on the brink of victory before the Democrats cut and ran. As bizarre as it seems in the wake of the Bush Administration's bungling, it is entirely possible that the Democrats will be the ones worried about long term punishment for disaster in Iraq.

Longer term, Republicans predict future dominance because conservatives have larger families than liberals, because the Electoral College over represents rural states, and because the population keeps moving south and west. Democrats predict future dominance because the knowledge occupations are the fastest growing part of the economy and racial minorities are the fastest growing part of the population. Neither side knows.

I need not venture a guess about which scenario is most likely, because only one outcome would change control of the Court. With Roberts, Thomas, and Alito in place, the liberals need five of the remaining six seats to make a majority. So long as the current ideological division holds, Democrats need long-term dominance to turn the Court around. The other way they could do it is to get very lucky on the timing of deaths and resignations. Under most plausible political outcomes, conservatives will continue to control the Court for most of the next 25 years.

PARTY PERSPECTIVES

Of course the current ideological alignment may not hold. Suppose we knew who would control the White House and the Senate. Would we then know what kinds of Justices will be appointed?

We would certainly have a better idea, but that idea would still be far from a sure thing. The two political parties have competing visions of the Constitution with respect to many issues and with respect to religious liberty in particular.²⁵ This alignment is unusual in our political history, and it has already lasted 40 years, which is in itself unusual for a political alignment. The current party divide on constitutional issues may last for 25 years more, but of course it may break up. Parties shift positions; they sometimes trade positions. Parties realign; coalitions break up; components of

²⁵ See Perry & Powe, *supra* note 13, at 678-88.



coalitions shift allegiances.

The Republican Party is commonly said to be a coalition of economic conservatives, social conservatives, and national security hawks. That is diverse enough, but in fact it is more fractured than that. The economic conservatives include big business, small business, affluent individuals, libertarians, and the tax phobic. The social conservatives' central demand is regulation of abortion and other personal moral decisions—regulation that would be anathema to many of the economic conservatives, especially including libertarians and affluent women. Both social conservatives and national security hawks have expensive agendas that conflict with the resistance to taxes that is central to the economic conservatives. Some commentators think that all the disparate threads are united by a theory of strict-father morality.²⁶ That theory explains much, but it seems to me to work much better for the social conservatives than for the other elements in the Republican coalition. In addition, within each wing of the coalition, there is conflict between more moderate adherents and the more extreme views of much of the base. This unlikely coalition plainly showed signs of strain in the 2008 Presidential primary season. Every element in the coalition has grievances against the others. The current Republican coalition is not as strange as the old coalition of blacks and Southern segregationists in the Democratic Party, but it is close.

The Democratic coalition is so fragmented it is hard to describe, with tension between its secular affluent whites and its deeply religious blacks, between all its identity politics groups and its working class whites and all its other moderate voters who resent identity politics, between its populist base and its dependence on financial contributions from business, between its anti-war base and its need to prove it will protect the country, and as with the Republicans, between its moderate adherents in general and the more extreme views of much of its base. Some Democratic voters don't like the Democrats so much as they fear and despise the current version of Republicans; if part of the Republican coalition breaks off, some of those Democratic voters will be up for grabs.

With respect to religious liberty issues, Republicans for a generation have taken a dim view of the Establishment Clause, but they have been divided on the Free Exercise Clause. Religious conservatives condemned *Employment Division v. Smith*²⁷ and supported RFRA and RLUIPA; secular conservatives generally took the opposite positions. The Reagan Administration quietly hammered at the Free Exercise Clause for most of its time in office, offering a variety of theories to reduce the Clause to

²⁶ See GEORGE LAKOFF, *MORAL POLITICS* 65–107 2d ed. (2002).

²⁷ 494 U.S. 872 (1990) (holding that the Free Exercise Clause provides no protection against “neutral” and “generally applicable” laws that prohibit exercises of religion).



insignificance,²⁸ and got away with it with its base. The Reagan Justice Department is the intellectual godfather of *Smith*, even though it did not hit upon the precise formulation adopted in *Smith*. It was conservatives on the Court who delivered most of the votes for *Smith* and most of the votes to strike down RFRA.²⁹

Democrats have taken an expansive view of the Establishment Clause, and they have supported Free Exercise in principle, but much of the Democratic base views free exercise as a right that benefits only conservative believers, and Democratic legislators are quick to make exceptions to free exercise for civil rights and other more favored causes. By 1998, the coalition that enacted RFRA had broken up and the House was polarized on party lines in its unsuccessful efforts to enact a replacement.

So anything could happen. Probably Republican Presidents will keep appointing judges inclined to shrink the Establishment Clause, and probably Democratic Presidents will keep appointing judges inclined to expand it. Probably views on the Free Exercise Clause will get less publicity, will not affect the appointment process, and will emerge as a surprise after confirmation. If as I have predicted the fourth Great Awakening comes to an end and religious intensity abates, the Establishment Clause may not loom so large in Supreme Court appointments either. But none of this is at all certain. And we don't know which party is going to be doing most of the appointing.

CONCLUSION

Predictions like these are a fool's errand; it's no wonder the other speakers ignored their instructions and refused to address these questions. If I am right, I will get only an old man's bragging rights. I have one thing in common with Justice Thomas; I too will be 84 in 2032. Unlike him, I will be retired. So who would I brag to? My grandchildren will not be impressed if I tell them what a great prophet I was back in ought seven.

If I am wrong, I risk being cited as an example of foolishness; if I am spectacularly wrong (and if anyone remembers what I said), ridicule is inevitable. We have

²⁸ See Brief for the United States as Amicus Curiae Supporting Petitioners 12-26, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (No. 85-1722) (arguing that any restriction on the constitutional rights of prisoners, including free exercise rights, should be upheld if it bears a reasonable relation to a legitimate penological interest); Brief for the United States as Amicus Curiae Supporting Appellees 6-19, *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (No. 85-993) (distinguishing outright prohibitions of religious practice from burdens on religious practice, and arguing that the Free Exercise Clause protects only against the former); Brief for the Appellants 27-41, *Bowen v. Roy*, 476 U.S. 693 (1986) (No. 84-780) (arguing that government's interest should be measured by its interest in maintaining the whole program and not by its interest in refusing a few exceptions); Brief for the Respondents 47-50, *Goldman v. Weinberger*, 475 U.S. 503 (1986) (No. 84-1097) (arguing that absolutely no exceptions of any kind could be permitted in the military); Brief for the United States as Amicus Curiae 4-15, *Jensen v. Quaring*, 472 U.S. 478 (1985) (No. 83-1944) (arguing for the standard urged in *Bowen v. Roy*); compare Brief for the United States, *United States v. Lee*, 455 U.S. 252 (1982) (No. 80-767) (opposing exemption from social security tax on grounds that did not threaten to undermine exemptions more generally, in brief filed by Wade McCree, the Carter Administration's Solicitor General, who had not yet been replaced).

²⁹ *City of Boerne v. Flores*, 521 U.S. 507 (1997).



all heard of the nineteenth-century Commissioner of the Patent Office who said the office should be closed because everything important had already been invented. We have all heard of him—but the story turns out to be entirely false.³⁰ At any rate, I hope and believe that I have done better than that apocryphal Commissioner. If not, remember that I didn't volunteer for the task.



³⁰ Samuel Sass, *A Patently False Patent Myth Still!*, SKEPTICAL INQUIRER (May-June 2003), available at http://findarticles.com/p/articles/mi_2843/is_3_27/ai_100755224?tag=untagged (last visited August 2, 2008).

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RELIGIOUS LIBERTY, CHURCH AUTONOMY, AND THE STRUCTURE OF FREEDOM

RICHARD W. GARNETT¹

We are used to thinking of religion—of religious belief and practice, ritual and worship, expression and profession—as an object of human rights laws; that is, as something that these laws protect, or at least aspire to protect. The leading human rights instruments confirm us in this entirely reasonable, if not quite complete, way of thinking. For example: “Everyone has the right to freedom of thought, conscience, and religion,” the Universal Declaration of Human Rights (1948) proclaims, and political communities should “strive ... to promote respect for [this right]” and “to secure [its] universal and effective recognition and observance.” Similarly, the European Convention on Human Rights (1950) declares its signatories’ resolve to “secure [this right] to everyone within their jurisdiction.” The Constitution of the United States, in typical fashion, frames the issue in terms of constraints on government, rather than charges to or aspirations for government, but it, too, puts religious liberty—the “free exercise” of religion—on the receiving end of the First Amendment’s protection.

Provisions like these reflect a commitment—one that seems broadly shared today even if unevenly honored and imperfectly understood—to protecting the freedom of religion. It is one thing, though, to profess—even to entrench in law—such a commitment; it is another thing to operationalize or make good on that commitment. This latter “walk the walk” task involves at least two related, but distinct, challenges. First, we need to identify the content of the “freedom of religion” that we are resolved to protect. This is easier said than done. “Everyone,” we confidently and proudly declare, “has the right to freedom of religion,” but what, exactly, are we talking about? What is “religion,” anyway, and what does it mean for it to be “free”? Free from what? To do what? What does it mean to “have the right to freedom,” of religion or anything else? What distinguishes “religious liberty” from plain-vanilla “liberty,” and can this distinction be justified, assuming it can be captured in law? And so on.

Assume, for now, that we are able to find our way to plausible, attractive answers to these questions—answers that cohere with human nature, experiences, needs, and

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aspirations. With our “ends” in view, we turn next to the question of “means.” We must decide, in other words, what are the legal and other mechanisms that we expect to sustain and vindicate, in practice, the commitment we have professed. Our hope, after all, is to erect more than what James Madison called “mere parchment barriers” to violations of religious freedom. Some mechanisms might be better (or less well) designed for the purpose and so might work better (or less well) than others; some actors and authorities might be more (or less) reliable and effective protectors than others. Our optimistic expectations for some processes might be unrealistic; our skepticism or even cynicism about others might be unfounded. The point is, the project of protecting human rights—including the right to religious freedom—involves reflecting on human goods and goals, but also wrestling with questions about institutional design and competence.

Now, with respect to the first challenge, it is easy to specify a few—though probably only a few—noncontroversial, heartland propositions, around which we might build our understanding of the “freedom of religion.” It would seem, for example, obviously to include, as the Supreme Court of the United States put it in *Employment Division v. Smith* (1990), “the right to believe and profess whatever religious doctrine one desires.” Fair enough. But, what else? Skipping ahead to the second challenge, we would almost certainly point to judicially enforced, constitutionally entrenched constraints on government—constraints like those set out in the Bill of Rights—as a key means of translating our aspirations into practice. It is true, as Judge Learned Hand wisely warned, that “liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it,”² but there is no need to deny that constitutions, laws, and courts are important to the effort. So far, so good. But again, what else? What other steps might we take, or tools might we use, to help religious liberty to flower, not only in the “hearts of men and women” but also in the rough-and-tumble world of scarcity, self-interest, compromise, and disagreement?

This chapter is an attempt to take on both of these challenges, that is, to consider both the content of religious freedom and the ways it is protected and promoted. I propose, first, that the “right to freedom of religion” belongs not only to individuals, but also to institutions, associations, communities, and congregations. Just as every person has the right to seek religious truth and to cling to it when it is found, religious communities have the right to hold and teach their own doctrines; just as every person ought to be free from official coercion when it comes to religious practices or professions, religious institutions are entitled to govern themselves and to exercise appropriate authority, free from official interference; just as every person has the right to select the religious teachings he will embrace, churches have the right to select the ministers they will ordain. “Religion” is, Justice William Douglas

² Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* (New York, Knopf, 1952), 189-90.



observed in his *Wisconsin v. Yoder* (1972) opinion, “an individual experience,” and it certainly is, but it is not only that. After all, as Justice William Brennan reminded us, in *Corporation of the Presiding Bishop v. Amos* (1987), “[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.” Such “organic entities” are subjects, not just results or by-products, of religious liberty. At the center of religious freedom, then, is what is called in American constitutional law “church autonomy,” or what the American Jesuit and church-state scholar John Courtney Murray (and many others) called “the Freedom of the Church.”³

This right to church autonomy—one dimension of religious freedom—is, again, an object of human rights law. It is also, however, a means -- a structural mechanism—for protecting both the freedom of religion and human rights more generally. The relationship between the enterprise of protecting human rights and religious communities’ right to self-determination is a dynamic, mutually reinforcing one. Human rights law, in other words, protects church autonomy—it protects the freedom of religious communities to govern and organize themselves, to decide religious matters without government interference, to establish their own criteria for membership, leadership, and orthodoxy, *etc.*—and, in turn, church autonomy promotes the enjoyment and exercise of human rights. This mechanism is, Murray thought, “Christianity’s basic contribution to freedom in the political order.”⁴ If we understand and appreciate this contribution, we will better understand and appreciate that often misunderstood and misused idea, “the separation of church and state.”

THE CONTENT OF RELIGIOUS GROUP RIGHTS

Americans’ thinking and talking about rights is thoroughly individualistic. Rights, we think, attach to particular people, and protect them, their privacy, their interests, and their autonomy from outside authorities. It should come as no surprise, therefore, that American judicial decisions and public conversations about religious freedom tend to focus on matters of individuals’ rights, beliefs, consciences, and practices. However, as Mary Ann Glendon demonstrated almost twenty years ago in her compelling critique of American political discourse and of the legal regime that it reflects and produces, this focus is myopic and distorting.⁵ It causes us to overlook and neglect the social context in which persons are situated and formed as well as the distinctive nature, role, and freedoms of groups, associations, and institutions. We make this mistake, it is worth noting, not only in the religious-liberty context. Frederick Schauer has shown that our law dealing more generally with the freedom of expression, conscience, and belief has been “been persistently reluctant to develop

³ John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (Lanham, MD: Rowan & Littlefield Publishers, 2005), 186-90.

⁴ *Ibid.*, 186.

⁵ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

its principles in an institution-specific manner, and thus to take account of the cultural, political and economic differences among the differentiated institutions that together comprise a society.”⁶

To be sure, the individual human person—every one—matters. He is “infinitely valuable, relentlessly unique, endlessly interesting.”⁷ Every person carries, in C.S. Lewis’s words, the “Weight of Glory.” “There are no ordinary people,” he insisted:

You have never talked to a mere mortal. Nations, cultures, arts, civilizations—these are mortal, and their life is to ours as the life of a gnat. But it is immortals whom we joke with, work with, marry, snub, and exploit—immortal horrors or everlasting splendors.⁸

It is fitting, then, that the image of the lone religious dissenter, heroically confronting overbearing officials or extravagant assertions of state power, armed only with claims of conscience, is for us evocative and timeless. Think of St. Thomas More, as he is depicted in *A Man for All Seasons* (and perhaps also of those dissenters he helped to persecute). No account of religious freedom would be complete if it neglected such clashes or failed to celebrate such courage.

Still, Glendon was right. Something goes missing when the freedom of religion is reduced to the individual’s liberty of conscience, to her freedom of belief, or even to her right to engage in worship or religiously motivated action. A legal regime of human rights that is designed to protect only this reduced notion of religious freedom will leave vulnerable and unprotected important aspects of that freedom. Such a regime will misfire because it describes and categorizes the world in an incomplete and perhaps even distorted way, passing over and leaving out things that matter. We should want our laws -- and perhaps especially our human rights laws—to capture faithfully what is significant, and what really matters, about the real world that these laws govern and to which they speak. We should want, in other words, our human rights laws to “see,” and so to respect and protect, the freedom that belongs rightfully to religious groups, associations, institutions, and communities.

What is this freedom, then, that complements and helps to sustain individuals’ enjoyment of their rights to religious liberty? It makes sense to begin by returning to the basic proposition that, in Murray’s words, the Constitution guarantees religious freedom not only to individual believers but also “to the Church as an organized society with its own law and jurisdiction.”⁹ What the United States Supreme Court has called “ecclesiastical right[s],”¹⁰ no less than individuals’ rights, are protected by

⁶ Frederick Schauer, “Principles, Institutions, and the First Amendment,” *Harvard Law Review* 112 (1998): 84, 110.

⁷ Thomas L. Shaffer, “Human Nature and Moral Responsibility in Lawyer-Client Relationships,” *American Journal of Jurisprudence* 40 (1995): 1, 2.

⁸ Lewis, C.S. *The Weight of Glory and Other Addresses* (rev. ed. 1980): 19.

⁹ Murray, *We Hold These Truths*, 80.

¹⁰ *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952).



the First Amendment, as well as by other human rights instruments. These rights are not—at least, they should not be regarded as—merely derivative of or proxies for individuals’ rights; their protection is not simply a vehicle for securing individuals’ liberties.¹¹

It should be emphasized, also, that the American Constitution’s protections for “ecclesiastical rights” are not idiosyncratic or anomalous. That religious freedom has a communal, corporate aspect, and includes a right to autonomy and self-determination for religious communities, is acknowledged in many other nations’ domestic laws and in international human rights litigation, decisions, and instruments.¹² In fact, it seems -- for a number of historical, cultural, and philosophical reasons -- that the church-autonomy principle sits more easily in European law and practice than in their American counterparts.

Like the human rights project generally, lawyers’ thinking about and legal protection for religious communities’ rights have been shaped heavily by Christianity, and by Christian claims about the person, the church, and the state. Of particular interest is the landmark *Declaration on Religious Freedom*, which Pope Paul VI promulgated at the close of the Second Vatican Council and which famously affirmed the right of the human person to worship in accord with his or her conscience. The Declaration opened with the powerful proposal that “[t]he right to religious freedom has its foundation in the very dignity of the human person[,]” not “in the subjective disposition of the person but in his very nature.”¹³ That is, attached to our “very nature” is the desire—and responsibility—of persons to seek, find, and adhere to the truth and, at the same time, a moral immunity from external coercion in matters of religious conscience. James Madison, in his famous *Memorial and Remonstrance Against Religious Assessments* (1785), advanced a similar claim.

The Declaration did not stop, though, with an affirmation of the freedom of religious conscience, understood as immunity for individuals from external coercion. Nor did it stop with the insistence—though it did insist—that individuals have a right to associate for religious purposes and to express their religious beliefs in community through worship and otherwise. The claim was stronger: “Religious communities,” the document contends, “are a requirement of the social nature both of man and of religion itself.” And, these communities “rightfully claim freedom in order that they may govern themselves according to their own norms, honor the Supreme Being in public worship, assist their members in the practice of the religious

¹¹ Brett Scharffs has noted, however, that—at least in the context of the European Court of Human Rights—“religious institutions still do not have standing in their own rights, but only as an aggregation of the rights of their members.” Brett G. Scharffs, “The Autonomy of Church and State,” *Brigham Young University Law Review* (2004): 1217-1348, at 1277-78.

¹² See generally, e.g., Gerhard Robbers, *Church Autonomy: A Comparative Survey* (Frankfurt am Main: Peter Lang, 2001). As John Witte has observed, the principle of “religious group rights” have “long been recognized as a basic norm of international law[.]” “Introduction: The Foundations and Frontiers of Religious Liberty,” *Emory International Law Review* 21 (2007): 1, 9.

¹³ Pope Paul VI, *Declaration on Religious Freedom (Dignitatis humanae)* ¶ 2 (1965).



life, strengthen them by instruction, and promote institutions whereby they may join together for the purpose of ordering their lives in accordance with their religious principles.” They “also have the right not to be hindered [by law] in the selection, training, appointment, and transferal of their own ministers, in communicating with religious authorities and communities abroad, in erecting buildings for religious purposes, and in the acquisition and use of suitable funds or properties.”¹⁴ It is not—to underscore the point—simply that religious faith and experience have a communal dimension. The freedom to be enjoyed by religious communities is not defended merely as an incident of individuals’ religious exercise, but as these communities’ moral right, a right that is rooted—as the right to religious freedom more generally is rooted—in the dignity of the person and in God’s plan for the world.

So, the law of human rights, in the United States and elsewhere, recognizes and protects the appropriate exercise of religious authority, the autonomy of religious institutions, and the right to self-determination of religious communities. It is not entirely settled what exactly are the content and textual home in the American Constitution for the church-autonomy principle, but it nevertheless seems clear that the freedom of religion which the Constitution protects is enjoyed by institutions as well as individuals. What, then, is the specific content of this protection? What, exactly, is “church autonomy,” and what does it mean, “on the ground” and in practical terms, for a religious community to have the “right to self-determination”? Gerard Bradley has argued that “church autonomy” is the “flagship issue of church and state,” the “litmus test of a regime’s commitment to genuine spiritual freedom.”¹⁵ What would a regime hoping to pass this “test,” and accord appropriate significance to this “flagship issue,” need to do, or refrain from doing?

The church autonomy principle is at least potentially implicated in a wide variety of disputes and contexts: the supervision of diocesan finances by a bankruptcy court or administrative agency, a requirement that religiously affiliated organizations pay for employees’ contraception or that doctors in religiously-affiliated hospitals perform abortions, litigation regarding church discipline proceedings or membership requirements, the division of church property after a schism or split, the application of nondiscrimination laws to churches’ and religious schools’ decisions about the hiring and firing of clergy and teachers, and efforts by governments to control or regulate churches’ selection of their leaders, to mention just a few. The principle is probably not reducible to any single “test,” though there would seem to be several noncontroversial, core propositions around which a broader right to self-determination can be constructed. (Recall the litany of specific applications, mentioned earlier, in the *Declaration on Religious Liberty*.) In many ways, the church-autonomy “doctrine” is less a rule than a grab-bag of holdings, or a collection of themes, ani-

¹⁴ *Dignitatis humanae* ¶ 4.

¹⁵ Gerard V. Bradley, “Forum Juridicum: Church Autonomy in the Constitutional Order,” *Louisiana Law Review* 49 (1987): 1057-1087, at 1061.

mated by a “spirit of freedom for religious organizations.”¹⁶ We know that the First Amendment does not permit state action that creates or requires “excessive entanglement” between the government and religious institutions, practices, teachings, and decisions.¹⁷ It commands that the “secular and religious authorities . . . not interfere with each other’s respective spheres of choice and influence.”¹⁸ The Justices have refused to “undertake to resolve [religious] controversies” because “the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.”¹⁹ The Court has affirmed, time and again, the “fundamental right of churches to ‘decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine’[.]”²⁰ And so on.

In Bradley’s view, “church autonomy” means “the issue that arises when legal principles displace religious communities’ internal rules of interpersonal relations.” The principle has been said to preclude “civil court review” of “internal church disputes involving matters of faith, doctrine, church governance, and polity.”²¹ And Justice Brennan (following Douglas Laycock) put the matter in a particularly helpful way, observing that religious organizations’ “autonomy in ordering their internal affairs” includes the freedom to “select their own leaders, define their own doctrines, resolve their own disputes, and run their own institution.”²² This formulation captures nicely a wide and reasonably complete range of the challenges to religious institutions’ freedom and of the circumstances in which they arise.

THE MEANS OF PROTECTING RELIGIOUS GROUP RIGHTS

I suggested earlier that following through on a stated commitment to the freedom of religion requires thinking both about the content of that freedom—about, in other words, what it is we are committed to protecting—and about the means and mechanisms to be employed. So far, I have tried to make the case that “freedom of religion” has a communal, corporate, public dimension, as well as a private one. It is enjoyed by and safeguards the rights of institutions as well as individuals. How can this freedom, so understood, effectively be preserved and promoted?

One way is obvious (especially to lawyers): Today, most well-functioning political communities both express and advance their commitments to fundamental

¹⁶ Kedroff, 344 U.S. at 116.

¹⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971).

¹⁸ Laurence H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, NY: Foundation Press, 1988), § 14-12, at 1226.

¹⁹ *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).

²⁰ *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 462 (D.C. Cir. 1996) (quoting Kedroff, 344 U.S. at 116).

²¹ *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655 (10th Cir. 2002).

²² *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 341-42 (1987) (Brennan, J., concurring) (quoting Douglas Laycock, “Towards a General Theory of the Religion Clauses: The Case of Church-Labor Relations and the Right to Church Autonomy,” *Columbia Law Review* 81 (1981): 1373-1417, at 1389).



human rights, including the right to religious liberty, by “entrenching” these rights in their constitutions—thereby putting them, at least to some extent, beyond the reach of ordinary politics—and by authorizing courts to declare invalid the actions of governments and officials that invade these rights.²³ Certainly, as was noted at the outset of this Chapter, this approach is reflected in the Constitution of the United States, as well as in foreign nations’ constitutions and in foundational international human rights instruments. The *Declaration on Religious Freedom* also highlighted the importance of “constitutional limits on the powers of government, in order that there may be no encroachment on the rightful freedom of the person and of associations.” It is good advice to “put not our trust in princes,” but it nevertheless makes sense to enlist the political authority, including its judicial arm, in the work of protecting human rights. It takes nothing away from the importance of constitutionally entrenched and judicially enforceable human rights provisions to propose that other, complementary, structural mechanisms are helpful, even necessary, to ensure that religious freedom flourishes. We protect human rights not only by listing various things that governments may not do, but also by designing and situating governments in such a way that they are less likely, and less able, to do such things. Constitutionalism is about more than composing a litany of aspirations; it is also the enterprise of ordering our lives together and promoting the common good by categorizing, separating, structuring, and limiting power in entrenched and enforceable ways.

The American Constitution provides a helpful illustration. As (we should hope) every law student learns, and as Madison famously explained in *The Federalist*, those who designed and ratified the Constitution believed that political liberties are best served through competition and cooperation among plural authorities and jurisdictions, and through structures and mechanisms that check, diffuse, and divide power. The American Constitution is more than a catalogue of rights; our constitutional law is, in the end, “the law governing the structure of, and the allocation of authority among, the various institutions of the national government.”²⁴ The American constitutional experiment reflects, among other things, the belief that the structure of government matters for, and contributes to, the good of human persons. There is no need to belabor even a point as fundamental as this one: “The genius of the American Constitution”—of American *constitutionalism*—“lies in its use of structural devices to preserve individual liberty.”²⁵

In the earlier discussion of “church autonomy,” I said that included in the freedom of religion—in the content of the human right to which we are committed and

²³ Michael J. Perry, *Constitutional Rights, Moral Controversy, and the Supreme Court* (Cambridge/New York: Cambridge University Press, 2009), 23-30.

²⁴ Gary Lawson, “Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction,” *St. Louis University Law Journal* 49 (2005): 885.

²⁵ Steven G. Calabresi & Kevin H. Rhodes, “The Structural Constitution: Unitary Executive, Plural Judiciary,” *Harvard Law Review* 105 (1992): 1153, 1155.



that we aim to protect—is the right of religious institutions to govern themselves and to exercise appropriate authority without interference from governments. This right, no less than the immunity of individuals’ religious conscience from coercion, reflects and is rooted in the dignity of the human person, which is the foundation for the morality of human rights more generally. Add now to this claim another one, namely, that church autonomy is—like federalism, like the separation of powers, like “checks and balances”—a structural principle, whose operation enables self-determining religious communities to play a structural role. These communities are protected, but also protectors; they enjoy and exercise religious freedom rights for themselves, but also—through that enjoyment and exercise—contribute to the enjoyment and exercise of these rights by others. This is true today, and has been true for a millennium.

Not many today know much about an eleventh-century monk named Hildebrand, who eventually reigned as Pope Gregory VII. However, the three days in late January 1077 when the excommunicated German emperor, Henry IV, stood barefoot in the snow doing penance outside the castle at Canossa of Countess Matilda of Tuscany are as important to the development of Western constitutionalism as the later events at Runnymede or Philadelphia. Hildebrand led a “revolution” that, as the great legal scholar Harold Berman described, worked nothing less than a “total transformation” of law, state, and society.²⁶ The battle cry for this papal revolution—the idea that would serve as the catalyst for what Berman regards as “the first major turning point in European history” and as the foundation for nearly a millennium of political theory—was *libertas ecclesiae*, the “freedom of the church.”²⁷

It is, of course, beyond the scope of this Chapter to provide a comprehensive account of the Investiture Crisis, the Papal Revolution, and their aftermath. For present purposes, though, a quick sketch will do. We should begin with what was, as Robert Wilken has observed, a “capital fact of ecclesiastical life in the early Middle Ages . . . [namely,] that the affairs of the church were managed by kings and princes.”²⁸ These authorities—it is probably anachronistic to call them “secular,” given the way we use that word today—did not think of themselves as reaching across a boundary between “religion” and “politics.” The Emperor would have assumed that the care of Christians’ souls and the good functioning of Christ’s Church fit comfortably in his God-given portfolio. Nevertheless, it was this “fact” that was the target of Hildebrand’s ambitious revolution. Building on but moving well beyond a century of reform efforts and attacks on corruption, Pope Gregory VII issued in 1075 a ringing, harsh condemnation of secular control over the selection and investiture of bishops. The Emperor, Henry IV, was unmoved, to say the least, by

²⁶ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), 23.

²⁷ *Ibid.*, 87.

²⁸ Wilken, Robert Louis. “Gregory VII and the Politics of the Spirit,” in Richard J. Neuhaus, ed. *The Second One Thousand Years: Ten People Who Defined a Millennium* (Grand Rapids, MI.: Wm. B. Eerdmans, 2001), 6.

the Pope's claims and legal arguments, and responded, "I, Henry, king by the grace of God, do say unto you, together with all of our bishops: Go down, go down, to be damned throughout the ages."²⁹

The dramatic confrontation at Canossa that followed, after Henry's excommunication, was hardly the end of the matter. The Wars of Investiture soon broke out, and raged for several decades; Henry eventually appointed a pope of his own; and Gregory died in exile, quoting the Psalmist and lamenting, "I have loved justice, and hated iniquity; for that reason I die in exile." The Concordat of Worms, in 1122, calmed things for a time, and represented a kind of compromise; it was a compromise, though, out of which emerged "Western political science—and especially the first modern Western theories of the state and secular law[.]"³⁰ As George Weigel has put it:

Had the emperors succeeded in making the Church an administrative and spiritual subdivision of the empire, more would have been lost than the *libertas ecclesiae*, the capacity of the Church to order its own internal life. The possibility of institutional pluralism in the West might have been lost or, at the very least, delayed.³¹

It takes nothing away from the "revolutionary" character of Gregory VII's claims and achievements to recall that their animating proposition—the "freedom of the church"—was not his own invention. In the year 494, for example, Pope Gelasius had written to the Byzantine Emperor Anastasius I, insisting, "[t]wo there are, august Emperor, by which this world is ruled on title of original and sovereign right—the consecrated authority of the priesthood and the royal power."³² Nor should we think that the idea's importance is diminished by the fact that, just under 100 years after the Pope's challenge to Henry IV, King Henry II and Thomas Becket clashed in England after the former reclaimed royal supremacy over the church, or by the obvious challenges posed to Hildebrand's vision by the Protestant Reformation, the Peace of Augsburg, the French Revolution, and nineteenth-century anti-clericalism.

"Well," we might ask, "so what?" What is the relevance of medieval clashes between ambitious emperors and popes to contemporary conversations about religious liberty or to the present-day enterprise of protecting human rights through law? Just this: The Investiture Crisis, and Pope Gregory VII's aggressive, expansive account of the "freedom of the church," illustrate the crucial connections between pluralism and constitutionalism, between the autonomy of religious institutions and the rights

²⁹ Berman, *Law and Revolution*, 96.

³⁰ *Ibid.*, 111.

³¹ George Weigel, *The Cube and the Cathedral: Europe, America, and Politics Without God* (New York: Basic Books, 2005), 100.

³² The text of this letter is available through the Internet Medieval Source Book, at: <http://www.fordham.edu/halsall/source/gelasius1.html>. John Witte has described this "two powers" passage as "a locus classicus for many later theories of a basic separation between pope and emperor, clergy and laity, regnum and sacerdotium." *Religion and the American Constitutional Experiment*, 2d ed. (Boulder, CO: Westview Press, 2005), 6.



of individuals. John Courtney Murray explored and emphasized these connections with care, and his thinking is reflected in the *Declaration on Religious Liberty*. In his view, we are not really free—none of us, whether a religious believer or not, is really free—if “[our] basic human things are not sacredly immune from profanation by the power of the state[.]” The challenge, then, is and has long been to find the limiting principle that can “check the encroachments of civil power and preserve these immunities.” And, he thought, “[w]estern civilization first found this norm in the pregnant principle, the freedom of the Church.” This principle supplied, in other words, what Murray called the “new Christian theorem,” namely, that the Church “stood between the body politic and the public power, not only limiting the reach of the power over the people, but also mobilizing the moral consensus of the people and bringing it to bear upon the power.” For Murray, it was the freedom of the Church that furnished a “social armature to the sacred order,” within which the human person could be “secure in all the freedoms that his sacredness demands.”³³ He believed that “the protection of ... aspects of life from the inherently expansive power of the state ... depended historically on the freedom of the Church as an independent spiritual authority.”³⁴

SEPARATION OF CHURCH AND STATE

It might seem strange at first, but constitutionalism depends for its success on the existence and activities of non-state authorities. It should protect, but it also requires, self-governing religious communities that operate and evolve outside and independent of governments. It is a mistake, then, to regard “religion” merely as a private practice, or even as a social phenomenon, to which constitutions respond or react. Instead, we should understand the ongoing enterprise of constitutionalism as one to which religious freedom contributes. Human rights depend for protection and flourishing not only on enforceable constraints on government but also on the structure of the social order. The autonomy that religious institutions enjoy, with respect to matters of polity, doctrine, leadership, and membership, contributes to, even as it benefits from, that structure.

All of this goes to show how it is that the “separation of church and state” in fact supports—as many strongly believe but just as many forcefully deny—the freedom of religion. Of course, in contemporary public debates, “separation” is often regarded, both by its opponents and many of its self-styled defenders, as a policy that mandates a public square scrubbed clean of religious symbols, expression, and activism. It is thought, or feared, that the separation of church and state requires religious believers to keep their faith strictly private, to wall off their religious commitments from their public lives and arguments about how we ought to order society. On this

³³ Murray, *We Hold These Truths*, 204-05.

³⁴ Francis Canavan, S.J. “Religious Freedom: John Courtney Murray, S.J. and Vatican II,” in *Faith and Reason* 8 (Summer 1987), reprinted in Robert P. Hunt and Kenneth L. Grasso, eds., *John Courtney Murray and the American Civil Conversation* (Grand Rapids, MI: Eerdmans, 1992), 167-80.



view, separation serves the enterprise of human-rights protection, if at all, by constraining religious believers and institutions, and by reducing the potential for social conflict and persecution.

There is, however, another, better view: The “separation of church and state”, properly understood, is a structural arrangement in which the institutions of religion are distinct from, other than, and meaningfully independent of the institutions of government. It is a principle of pluralism, of multiple and overlapping authorities, of competing loyalties and demands. It is a rule that limits the state and thereby clears out and protects a social space, within which persons are formed and educated, and without which religious liberty is vulnerable. So understood, “separation” is not an anti-religious ideology, but an important component of any worthy account of religious freedom under and through constitutionally limited government. “Fundamental to Christianity,” Pope Benedict XVI recently reaffirmed, “is the distinction between what belongs to Caesar and what belongs to God . . . , in other words, the distinction between Church and State[.]”³⁵ In a similar vein, he has emphasized that it was Christianity that “brought the idea of the separation of Church and state into the world. Until then the political constitution and religion were always united. It was the norm in all cultures for the state to have sacrality in itself and be the supreme protector of sacrality.” Christianity, however, “deprived the state of its sacral nature.... In this sense,” he has insisted, “separation is ultimately a primordial Christian legacy.”³⁶

CONCLUSIONS

Churches and other religious communities enjoy, as they should, a broad freedom to organize, govern, and direct themselves and their affairs, in accord with their own teachings and doctrines. I have suggested that this freedom not only benefits from, but also contributes to, the enterprises of human rights law and of constitutionalism more generally. That said, there is no avoiding the fact that church autonomy principles and premises are vulnerable and, in some contexts, under attack. The right clearly exists, but its scope and foundations are, increasingly, contested.

This vulnerability is connected, no doubt, to the link that is sometimes asserted and that many perceive between church autonomy principles, on the one hand, and, on the other, sexual abuse and corrupt activity by clergy, venality and mismanagement by bishops, and dioceses’ declarations of bankruptcy. It is common for the critics of religious communities’ self-determination rights to misunderstand these rights, and the church autonomy principle, as entailing the implausible and unattractive assertion that churches and clergy are somehow “above the law,” entirely unaccountable for wrongs they do or harms they cause. In addition, the freedom of

³⁵ Pope Benedict XVI, *Deus caritas est* ¶ 28(a) (2005).

³⁶ Joseph Ratzinger, *The Salt of the Earth: The Church at the End of the Millennium* (San Francisco: Ignatius Press, 1997), 238, 240.



religious associations, communities, and institutions is made more precarious by the limited and dwindling appeal in contemporary discourse of the very idea of religious “authority.” To the extent the church-autonomy principle is thought to privilege institutions over individuals, or structures over believers, its purchase diminishes, given that people today tend to think about faith—and, by extension, about religious freedom—more in terms of personal spirituality than of institutional affiliation, public worship, and tradition. To the extent we approach religious faith as a form of self-expression, performance, or therapy, we are likely to regard religious institutions as, at best, potentially useful vehicles or, more likely, stifling constraints and bothersome obstacles to self-discovery. This, however, would be a mistake.





RELIGIOUS ORGANIZATIONS AND THE STATE: THE LAWS OF ECCLESIASTICAL POLITY AND THE CIVIL COURTS

WILLIAM W. BASSETT¹

Readers in the English tradition will immediately recognize in this title the elegant and irenic work of the great Oxford divine, Richard Hooker, published in 1593.² Hooker's *Laws of Ecclesiastical Polity* is the classic exposition of the *via media*, the hallmark of worldwide Anglicanism and by now a literary icon of Christian religious studies. "Polity" in the title means governance, the administration of the church and its decision-making agencies. It carries the distinction between leaders and members, their respective duties and competencies within the church, and how the church internally manages its personnel, resources, and mission. It is a signature term, carrying to a large extent the self-identity, day-to-day life, and distinctive culture of the church, as a unique kind of social organization.

When we discuss the interrelationship between religious organizations and the state, we necessarily draw upon the law of the state as it prohibits or permits, limits or expands the authority of government over the order and discipline, the polity, of the churches and their agencies. In this chapter, I shall focus on the law of the United States, especially as it has been interpreted by the United States Supreme Court and been applied to Christian churches, among other religious organizations. The Supreme Court has used its own idiosyncratic and not always consistent analysis of ecclesiastical polity and administration in a significant number of cases involving churches and other religious organizations. As we shall see, after two forays into construing the meaning of canon law with a later change of mind, the Court set polity as a norm of decision in cases of schisms within churches, re-thought its own conceptualization of the administration of religious schools, judged the pastoral need of a church to expand its facilities as not compelling, and construed a church's right to religious discrimination to depend on job descriptions and roles within churches. Meanwhile, lower courts have superimposed their own ideas of church administration on religious trusts, employee benefit policies, collective bargaining agreements, and ascending liability models in tort litigation. These are civil, not criminal cases, involving allegations of private, not public, injury. And, of course, in each of the

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² Richard Hooker, *The Laws of Ecclesiastical Polity* (1593), vol. 1 of 2, in *The Complete Works of Richard Hooker*, ed. Georges Edelen and William S. Hill (Cambridge, MA: Harvard University Press, 1977-1980).



more than 14,000 instances in which the word “religion” or “religious” appears in federal and state statutes, the government impliedly authorizes the civil court to determine just how religious is “religious” to meet the statutory requirements.³ Without doubt, no strict separation of church and state is involved in this jurisprudence, notwithstanding the jurisdictional coating of “neutral principles of law” adjudication. It is a question of accommodation.

My fundamental postulate in this chapter is that matters of church polity and discipline are an exercise of religious freedom under the First Amendment to the United States Constitution. The Free Exercise of religion entails not only the right to believe, but also the right to worship in common, to preach, teach, assemble, organize, and administer shared resources without governmental interference. State monitoring of the internal governance of the church and its agencies threatens entanglement with religion, ceding unwarranted competency to the civil magistrate. The First Amendment was meant to address and circumvent these grave political problems.

MISSIONS AND ROLES WITHIN THE CHURCHES: AN ISSUE OF RELIGIOUS BELIEF

Richard Hooker explained the episcopal structure, sacramental ceremonies, and rituals of worship and devotion of the established church in sixteenth-century England by appeal to Scripture, ancient tradition, and a reasoned disquisition upon the uses of law. It was these authorities, he explained, that the church used to construct its primary agencies of ministry and support, the dioceses, church courts, parishes, vicarages, vestries and their incumbents, and their charitable and educational agencies. The sixteenth-century Protestant Reformation, Hooker made clear, was about reform of the church as well as reform of doctrine. Both were intertwined matters of intense confrontation and debate on the Continent and in England. Both were settled historically in practical terms, though fundamentally invoking in individuals the most profound issues of religious conscience, especially during the painful specter of civil intervention—whether monarchical intervention in northern Europe or inquisitorial intervention in the Latin world. The spillover of this European system in America was a pervasive fact of social discrimination and discontent roiling in the colonies where churches were often established and financially supported by public funds.

The American constitutional framers of the eighteenth century decided not to leave religious freedom to the competing interests of the plurality of churches of the time. They enacted the First Amendment guarantee that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

³ A LEXIS search through all existing statutes, federal and state (searching with: religio!) (Codes library, AllCde file) will retrieve over 14,000 statutes in which the term “religion” or “religious” appear. Religious exemptions, specifically, appear in over 2,000 statutes (searching with: “religio” w/20 “exempt!” or “except!”).



The topic of this chapter, religious organizations and the state, unites both affirmations of the First Amendment—the jurisdictional restriction upon Congress making laws respecting religious establishment, and the guarantee against laws prohibiting Free Exercise of religion. Organizing and administering communities of faith are as much exercises of religion as are worship and public prayer. The Free Exercise of religion, furthermore, is hollow and almost meaningless without the protected rights of speech and association. Only by consent or in the most exigent social circumstances can the state parse out the elements of religious organizations for what courts may denominate “secular” as distinguished from “religious” functions, that is, acts stripped of the protected exercise afforded to faith-based motivation.

THE MANY FACETS OF CHURCH POLITY

Radical divisions have marked the polities of Christianity from the Reformation to this day. Christianity is split between top-down Catholic-Orthodox episcopal hierarchies and Calvinist-Evangelical bottom-up congregational ecclesiologies, with ancillary variations in connectional, auxiliary structures for support typified by the “gathered churches.” Related to the essentials of church order, of course, and supported by faith-based inspiration, are the myriad affiliated organizations of mission and service—colleges, universities, seminaries, hospitals, healthcare centers, hospices, clinics, schools, research and publication centers, social welfare organizations, retreat and retirement facilities, as well as inter- and intra-church agencies of cooperation and development. These auxiliary religious organizations and agencies that stand alongside worship centers number in the tens of thousands around the world. They figure prominently in the practical life and ministry of all the churches and bear the distinctive charism, culture, spirit, and ethos of their sponsoring religious traditions.

In order to hold title to property and effectively administer their assets with appropriate legal security, churches use various civil forms of association, both for their own incorporation and for the separate creation of auxiliary agencies. In the United States, the requirements and effects of incorporation are matters of state, not federal, law. Few American churches or religious organizations now are unincorporated associations. Most are incorporated under state statutes as nonprofit corporations, as religious corporations, or as corporations sole. Public benefit agencies, such as healthcare and shelter facilities, schools, and the like usually are separately created under federal tax exemption requirements.

Religious organizations consent by implication to regulatory compliance and state surveillance when they serve the general public without discrimination and contract with the government for delivery of social or charitable programs with government funding, licensure, accreditation, or certification. Moreover, churches use the law of the state for their contracts, acquisitions, and divestments, real estate transactions, corporate formation, and other legal transactions. How the church reaches its decisions, however, and who decides for the church are matters of internal



belief. For example, the role of the bishop vis-à-vis his superiors, or the pastor vis-à-vis a parish board, or the preacher vis-à-vis the trustees of a congregation, derives from ancient tradition and practice. Who in the churches may validly execute contracts binding the entire church, then, may become a matter of state law before the court. A similar question of vital importance refers to the persons whose actions or inactions may render the entire church liable for wrongdoing, thus putting into civil jeopardy the material resources and reputations of the churches before the general public.

RELIGIOUS ORGANIZATIONS AT LAW

Churches and their related healthcare, educational, and social welfare agencies have a vital interest in the integrity of titles to real estate, the enforceability of contracts, compliance with health and safety regulations, and fair and full disclosure of information necessary for reliable, legally-binding choices in their administration. No doubt, like corporations generally, religious organizations are entitled to police and fire services, as well as to the advantage of associational formalities and life—the right to “legal personality,” as many legal systems call it. When religious organizations appear in court or before civic agencies, therefore, judges and public officials must know how they are operated, at least for purposes of determining their standing in court, the court’s subject-matter jurisdiction, and the verification of the party’s legal representation. Some level of scrutiny of church polity by the state is inevitable in such cases. Constitutional separation of religion and government was never intended to be absolute, nor can it be.

Beyond participation in neutral public benefits and sharing society’s necessary burdens, however, the relationship of religious organizations to the state becomes a more problematic exercise in line-drawing. Here American courts have woven an asymmetrical net to catch the intrusion of the regulatory state upon the free exercise of religion. To illustrate, I shall discuss briefly four areas in which the courts have probed deeply the polity of religious organizations—with grave civil consequences.

The Law of Trusts. In *Watson v. Jones* (1872),⁴ the United States Supreme Court took diversity jurisdiction over a bitter schism within a Kentucky Presbyterian Church over issues of slavery and abolition. The Walnut Street Church in Louisville had voted itself out of the General Assembly of the Presbyterian Church, and sought affiliation with “The Presbyterian Church of the Confederate States.” The Civil War tore apart the national Presbyterian Church, as well as many others. The dividing issue here turned on refusal of local church members to assent to the General Assembly’s resolution in support of the federal government and for the abolition of slavery as a moral evil. The schism in membership left title to the local parish properties in doubt.

The Circuit Court found the subject matter of the dispute strictly ecclesiastical

⁴ 80 U.S. 679 (1872).



in character. Since the Presbyterian Church was hierarchical in polity, it upheld the jurisdiction and decision of the General Assembly as the highest authority in the church. The United States Supreme Court affirmed, holding that a court may not violate the free exercise rights of a church to decide for itself issues of ecclesiastical polity without civil interference. The Walnut Street Church, the Supreme Court reasoned, belongs rightfully to the loyal members designated by the General Assembly, not to the dissidents. If a church is hierarchical in government, its members by implication consent to the authority of its highest decision-makers. In effect, in hierarchical churches an implied trust exists over property issues essentially turning upon theological controversies, church discipline, ecclesiastical government, or the conformity of the members of the church to its standard of morals. The rule in *Watson v. Jones*, likening churches to civil trustees, required deferral to ultimate church decisions in matters of title and beneficial use of property after a threshold finding of the church's hierarchical polity.⁵

Later, in the chill of the Cold War, the State of New York attempted to preempt litigation over rights to church properties belonging to the Russian Orthodox Church. The state added to its Religious Corporations Law a provision that brought all the churches subject to the Patriarch of Moscow into an administratively autonomous metropolitan district covering all of North America, called the Russian Orthodox Church of All America and Canada. The purpose of the designation was to prevent political use of the churches by the appointee of the Synod in Moscow, which was presumably under Bolshevik Party influence. In a 1952 case that sought to confirm ownership of St. Nicholas Cathedral in New York, the Supreme Court struck down the state law as a violation of the Free Exercise clause of the First Amendment. The state had impermissibly intruded upon a matter of ecclesiastical government, the freedom of a church to select its own clergy.⁶ In a hierarchical church, the Court reasoned, the properly authorized trustees to protect properties are the leaders of the church, not state officials.

This line of cases was capped in 1976 by the Supreme Court's decision in *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*.⁷ Here, the Supreme Court of Illinois had presumed to interpret the canon law of the Serbian Orthodox Church against the highest church authorities themselves. The Holy Assembly of Bishops of the Serbian Orthodox Church in Belgrade had de-

⁵ Denial of jurisdiction to civil courts to decide issues of doctrine or internal church governance was reaffirmed in 1969 in a case of schism within a church caused by dissent in a local congregation against ordination of women: *Presbyterian Church in the United States v. Mary Elizabeth Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). But see the following year the Supreme Court in a per curiam opinion upheld the Maryland Court of Appeals which had settled a church property dispute by use of neutral principles of state laws governing title to property: *Maryland and Virginia Eldership of the Churches of God v. the Church of God at Sharpsburg*, 396 U.S. 367 (1970).

⁶ *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); aff'd., *Kreshnik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960).

⁷ 426 U.S. 696 (1976).



frocked Bishop Dionisije Milivojevich of the American-Canadian Diocese of that church and then proceeded to reorganize the church into three dioceses. Illinois found the proceedings procedurally and substantively defective under the canon law of the church, and therefore declared the church's decision arbitrary and invalid. The Supreme Court reversed, ruling that both the inquiries made by the Illinois Supreme Court into matters of ecclesiastical cognizance and polity as well as the Court's subsequent orders were in contravention of the church's constitutional rights.

Finally, in *Jones v. Wolf* (1979),⁸ the Supreme Court brought to an end its long meditation upon the demands of the First Amendment upon courts seeking to resolve church property disputes. Title to the property of the Vineville Presbyterian Church of Macon, Georgia, was in the trustees of the church. In 1973, a majority of its members, including the pastor, voted to disaffiliate from the Augusta-Macon Presbytery of the Presbyterian Church in the United States and to join another denomination, the Presbyterian Church in America. The minority faction brought a class action suit in state court seeking to establish its right to possession and use of the church property. The Supreme Court of Georgia affirmed the trial ruling for the majority faction, based on "neutral principles of law." The court examined the deeds to the church, the state statutes dealing with implied trusts, and the denomination's *Book of Church Order* to determine whether there was any basis for a trust in favor of the general church. Finding nothing that would give rise to a trust in any of these documents, the Georgia court awarded the property on the basis of its legal title, which was in the local church. Without further elaboration the court decreed that the local congregation was represented by the majority faction.

The Supreme Court found that a civil court could examine property deeds as well as the church's constitution and corporate charter in purely secular terms to avoid entanglement with religion or breach of neutrality. Neutral principles of adjudication avoid both interpretation of doctrine and analysis of polity to seek the locus of authority in churches. *Jones v. Wolf* was the last case in which the United States Supreme Court heard an appeal in an intrachurch property dispute. Thereafter, administrators of religious organizations were put on notice to provide in documents of title the exact rights of ownership should religious differences cause schisms within the churches.⁹

The Supreme Court's mandate to the lower courts to adhere to neutral principles of adjudication and to avoid entanglement in religious controversies continues to pose serious dilemmas where judges wade into property transactions, employment contracts, or charitable donations made to the advancement of religion. Briefly, in the latter case, the most fundamental premise of trust law, namely, that the law will

⁸ 443 U.S. 595 (1979)

⁹ *Jones v. Wolf* is generally followed in state law. See, e.g., *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599 (1981), cert. den., 454 U.S. 864 (1981) ("California has rejected the hierarchical theory as a basis for resolution of church property disputes and has adopted in its place neutral principles of law.")



provide enforcement of the settlor's intent in making a lasting gift to a religious charity, is put into jeopardy. If a trust is settled upon a purpose of advancing religion, or a specific religion, or to be administered according to religious law, without naming a specific civil corporation as trustee or beneficiary, it will be unenforceable for lack of neutral principles adjudication. Neutral principles adjudication holds evidence of the settlor's religious beliefs to be inadmissible.

Public Aid to Religious Schools. The United States Department of Education oversees a vast budget of over 500 programs providing funding to state and local school administrations, accredited colleges and universities, and individual students throughout the United States. In 2007, for example, the Department guaranteed \$62 billion in new student loans. The Department's funding of programs in which religiously-affiliated educational organizations may participate are too numerous to list here. Added to this enormous pool of money are the billions of dollars provided by the separate states, not only to public education but also to separate remedial and enrichment programs more broadly available. The jurisprudence of the Supreme Court respecting First Amendment issues where religious organizations contract for funding with federal or state governments is sufficiently complex to illustrate a significant part of the relationship of law and religion in the arena of public service.

The administration of colleges and universities affiliated with the churches has been profoundly affected by the availability of government funding; that of secondary and elementary parochial schools less so, but still significantly. The cost of dependency upon the state has sometimes resulted in the loss of religious identity by the church. Programmatic funding conditions, as well as subsequent surveillance for compliance purposes, are often more stringent than the demands of licensing and accreditation.

A good example is the Supreme Court case of *Tilton v. Richardson* (1971).¹⁰ To meet a strong nationwide demand for the expansion of college and university facilities to serve the rising numbers of students in need of higher education, Congress in 1963 passed the first major program of federal aid to supply construction subsidies to build and upgrade academic facilities in both private and public colleges and universities. As they had participated in the G.I. Bill earlier without question or legal challenge, religious colleges and universities expected to have a share in this more permanent federal program, too. Title I of the Higher Education Facilities Act of 1963 provided construction grants and guaranteed long-term low interest loans for buildings and facilities used exclusively for secular educational purposes, but not for sectarian instruction, religious worship, or divinity schools or departments. Four small Catholic colleges in Connecticut received funds under the Act. Two used the money to build libraries, one added a science center; another a language laboratory; and the last a music, drama, and theatre building. A coalition of taxpayers sued in federal court to invalidate the appropriations as a violation of the Establishment

¹⁰ 403 U.S. 672 (1971).



Clause of the First Amendment.

The Supreme Court, in a 5-4 decision, over a bitter dissent, affirmed the constitutionality of the federal funding program, with one important caveat. After finding Congressional intent to include in the Act all colleges and universities regardless of religious affiliation, the Court confirmed the facilities were in compliance with its conditions. There had been no religious services or worship in federally-financed facilities, there were no religious symbols or plaques in or on them, and they had been used solely for nonreligious purposes. Regardless of compliance, petitioners urged that the Act itself was unconstitutional to the extent public funds went, directly or indirectly, to religiously-affiliated institutions. The Court disagreed, distinguishing higher education from elementary and secondary schools, for which the ban on funding was absolute.¹¹ Religion does not so permeate the secular education supplied by church-related colleges and universities, the Court reasoned, that their religious and secular functions are, in fact, inseparable. Academic freedom characterized the schools rather than religious indoctrination. All four institutions subscribed to the “Statement of Principles on Academic Freedom and Tenure” endorsed by the American Association of University Professors and the Association of American Colleges. None imposed religious restrictions in admissions, required attendance at religious activities, compelled obedience to doctrines and dogmas of the faith, required instruction in the sponsor’s theology and doctrine, or worked to propagate a particular religion. The single section of the Act the Court found unconstitutional was a twenty-year sunset on the conditions. The Court struck out any limit under which the facilities could ever be converted to religious use. *Tilton v. Richardson* was quickly broadcast, with the Court’s findings in fact and in general turning into a list of compliance factors for religious colleges and universities to use to qualify for federal grant monies. Religious symbolism disappeared from subsidized buildings at religious colleges and universities. Devotional faith slipped from center stage into catalogues of elective courses in “religious studies.”¹²

While the Supreme Court, from 1948 forward, busied itself with purging the nation’s public elementary and secondary schools of every vestige of religion, it also found time to track down for condemnation every measurable trace of public aid it

¹¹ *Tilton* was issued together with *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (banning state salary supplements to teachers in parochial grade and high schools).

¹² In *Hunt v. McNair*, 413 U.S. 734 (1973), the Court approved South Carolina’s creation of an agency to issue state bonds, proceeds of which were to be used by subsidizing religious colleges. In *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976), the Court sanctioned unrestricted annual grants to private colleges, including religious ones, subject only to the condition that funds not so long as no funds were used for “sectarian purposes” to be verified annually by affidavit. .



could find in parochial schools.¹³ In the process, the Court subjected the parochial school systems, administrators, teachers, and textbooks to exacting investigation. The focus of their inquisition ran from state reimbursement of incidental educational costs to parents, to salary supplements for teachers, to textbooks on loan, to possibilities of sharing collateral student services, to use of instructional materials.¹⁴

Some of the Court's decisions had tragic consequences. *Aguilar v. Felton* (1985)¹⁵ is a good case in point. The school district of New York had successfully administered federally-funded remedial education programs on the premises of parochial schools for twelve years before being stopped by a taxpayers' lawsuit. Title I of the Elementary and Secondary Schools Act of 1965 authorized the Secretary of Education to distribute financial assistance to local school districts to meet the needs of educationally-deprived children from low income families. Federal funds paid teachers to staff programs approved by local and state educational agencies in public and private schools. The subject matter of the courses was entirely secular. The Court, however, held that the Establishment Clause constitutes an "insurmountable barrier" to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise. New York's carefully written guidelines to secure neutrality, to separate religious and state personnel, and to strip classrooms of religious symbols were not enough to save the program. The Court based its decision on two considerations: (1) partnering the school board with parochial school administrators to provide for logistics and scheduling would require monitoring, which could lead to excessive entanglement of the state with religion; and (2) impressionable school children may mistake the presence of volunteer public employees in the schools as an endorsement of religion. The salient finding of the Court was that aid would be provided to and in a "pervasively sectarian environment." Thus, nothing could save the program from excessive and enduring entanglement as long as it was conducted on parochial school premises, even after normal school hours. *Aguilar* spawned a new bureaucracy and a multi-million-dollar industry leasing off-premises mobile classrooms to public school districts to keep Title I programs just outside the property line.

A decade later, in *Agostini v. Felton* (1997),¹⁶ the Supreme Court reversed *Aguilar* and vacated the injunction against on-premises Title I instruction, leaving the

¹³ See *Board of Education v. Allen*, 392 U.S. 256 (1968) (secular textbooks loans permitted); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (state salary supplements for parochial school teachers not permitted); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (reimbursement for expenses of state exams not permitted); *Meek v. Pittenger*, 421 U.S. 349 (1975) (loan of textbooks upheld; auxiliary aid struck down); *Wolman v. Walter*, 433 U.S. 229 (1977) (lists of permissible and non-permissible instructional aids); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (costs of correcting state exams non-reimbursable).

¹⁴ Only Minnesota's across-the-board educational expenses tax deduction for parents of both public and private schools survived; see *Mueller v. Allen*, 463 U.S. 388 (1983).

¹⁵ 473 U.S. 402 (1985).

¹⁶ 521 U.S. 203 (1997).



program unchanged except for the location of classes. The Court abandoned the presumption that any aid to a parochial school necessarily aids religion, as well as the suspicion that religious schools are so pervasively sectarian that they cannot teach secular subjects with a neutral perspective.

As to the presence of publicly-salaried personnel on premises of parochial schools, one of the major worries in earlier cases, the Court flinched a bit in an opinion, simply approving their presence where reasonably necessary for the well-being of disabled students. In *Zobrest v. Catalina Foothills School District* (1993), the Court upheld provision to pay a sign-language interpreter, under federal disability law, to accompany a deaf student in a Catholic high school.¹⁷ The Court approved of the aid as part of an overall statute that “distributed benefits neutrally” to students in public, private, and religious schools and simply allowed the family to choose the school for their child. The interpreter would be in the school only as a result of parental decision, not by a direct government grant to the school.¹⁸ She was a conduit of the religious message taught, not an advocate.

Following *Agostini* and depending upon its authority, the Court in *Mitchell v. Helms* (2000)¹⁹ upheld a lending program to parochial schools “of educational and instructional materials, library services and materials, assessments, references, computer software and hardware for instructional use, and other curricular materials” funded by the federal government. In *Zelman v. Simmons Harris* (2002),²⁰ the Court further upheld a state-funded voucher program that allowed parents with children in a chronically failing public school to send their children to alternative public or private schools, including several cooperating Christian schools. The Court found that the voucher program did not have the “purpose” or “effect” of advancing or inhibiting religion, but was a neutral aid program implemented by the pure private choice of the parents. The Court disregarded the danger of “divisiveness” and “religious strife” as an independent factor of Establishment Clause analysis.²¹

Employment Policies of Churches and Religious Organizations. From 1979 to 1986, the Supreme Court handed down decisions in four cases specifically involving religious organizations and religious employers. The lower courts have built upon these cases, adding rules derived from the intrachurch dispute decisions, to emphasize the Free Exercise rights of churches to control ministerial appointments as the “lifeblood” of their missions. In these cases, the civil courts held their jurisdiction in

¹⁷ 509 U.S. 1 (1993).

¹⁸ In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court upheld state vocational rehabilitation assistance to the blind program refused a cash grant to a blind student who was studying for the ministry in a Christian college as a benefit to the person. The Supreme Court upheld the grant as a benefit to the person, not the school directly despite the issuing state program’s argument that the grant benefited the school.

¹⁹ 530 U.S. 793 (2000).

²⁰ 536 U.S. 639 (2002).

²¹ Since *Zelman* the Florida Supreme Court has denied the state constitutionality of school vouchers to pay tuition in parochial schools: see *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).



deference. A short review of the Supreme Court's cases will preface consideration of some newer issues in employment law for religious organizations.

In *National Labor Relations Board v. The Catholic Bishop of Chicago* (1979),²² the National Labor Relations Board had taken jurisdiction of lay faculty members in various parochial schools and certified elections preparatory to mandatory collective bargaining. Several high schools challenged the Board's jurisdiction under the First Amendment. Because of the intimate role of teachers in parochial schools in fulfilling the religious mission of the schools, as well as the possibility of impermissible entanglement in adjudication of "unfair labor practices" in administrative decisions in the schools, the Court held the Board lacked jurisdiction absent a clear expression of Congress to the contrary.

United States v. Lee (1992) involved an employer who refused to withhold and remit Social Security payments for employees on the basis of conscientious objection to the national social welfare program. The Court held that the national interest in the integrity of the Social Security system, in which as many workers as possible are enrolled and contributing, prevails over the religious objections of the employer.²³

In *Tony and Susan Alamo Foundation v. Secretary of Labor* (1985), a religious foundation was charged with violating the wages, hours, and reporting provisions of The Fair Labor Standards Act in operating small businesses by the use of services freely contributed by its members. Even though the Foundation sought to prove the religious mission and nature of its overall program of drug and alcohol rehabilitation, the Court refused a religious exemption, finding instead that the secular activities were a predominant part of the Foundation's work.²⁴

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987),²⁵ the Court upheld a federal exemption that allowed religious organizations to discriminate on the basis of religion in all their activities (secular as well as religious). In this case, a maintenance engineer in a church-related recreational center was terminated for failure to observe his religious obligations. The Court reasoned that, without the broadened exemption allowing religious employers to engage in religious discrimination, it would be a "significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider secular."

From these Supreme Court precedents, the Fifth Circuit Court of Appeals has fashioned what is known as the "ministerial exemption" from anti-discrimination laws. In *McClure v. Salvation Army* (1972),²⁶ an ordained minister brought an action

²² 440 U.S. 490 (1979).

²³ 455 U.S. 252 (1982).

²⁴ 471 U.S. 290 (1985). See also *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990), holding that when a religious crusader (taxpayer) chooses to engage in commercial activities (selling books and souvenirs), it should be treated as a business for tax purposes.

²⁵ 483 U.S. 327 (1987).

²⁶ 460 F.2d 553 (5th Cir. 1972).



against the church for wrongful termination, as well as discriminatory employment practices based upon her gender. The Fifth Circuit held that where ministers of religion are concerned, the courts completely lack jurisdiction to object on any of the statutory discriminatory grounds.²⁷ Today, the federal courts and most state courts concur in upholding the “ministerial exception.” The exception, indeed, has been extended beyond the category of ordained ministers to professors of theological subjects, teachers and principals in parochial schools, kosher supervisors, and choir directors. Decisions in all of these cases necessarily require courts to probe the polity of church organizations and distinguish employment roles in them as religious or secular in nature.

Civil Liability. Churches and religious organizations may be sanctioned by the state for crimes committed, even by their representative agents, unknown or without consent of their membership. The First Amendment contains no defense against criminal indictment. This is the meaning of the belief/conduct dichotomy in the Free Exercise clause of the First Amendment announced by the Supreme Court of the United States in the famous *Reynolds v. United States* case in 1879 dealing with criminal liability for polygamy.²⁸

Corporate liability not for crimes but to pay compensation for civil injuries caused by the intentional acts or negligence attributed by law to the entity itself is a complex matter of another kind. These civil cases crowd court dockets regularly. They concern what is known at law as “ascending liability.” Each case turns not only on fault and/or causation, but also on the polity of the institution charged with payment. Who was at fault? What was the person’s role or position in the organization? What is the standard of care, and how did the breach occur? How much of the organization’s resources can be reached for compensation? What are the terms of title or the limits upon insurance coverage? To address these kinds of questions, courts, lawyers, accountants, expert witnesses, insurers, and plaintiffs must know the ecclesiastical law, as well as the charter and by-laws of the civil shell giving anonymity to the personnel administering the religious organization, be it a sanctuary of worship, a school, a hospice, a shelter, or a workplace that is before the court. Where crimes, creditors’ claims, compensation for personal injury, or bankruptcy are at issue, the state combs deeply the organizational fabric of a given religious organization to answer these types of questions.

For example, under what circumstances can the act or omission of an individual render an entire church or religious school liable for satisfaction and compensation? In fact, case law distinguishes the responsible party by *role*, that is, whether the person is an officer, director, an employee, or a volunteer of the church. The law also

²⁷ See also *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F. 2d 1164 (4th Cir. 1985) (gender discrimination claim disallowed in ministerial termination case).

²⁸ *Reynolds v. United States*, 98 U.S. 145, 164 (1879): “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”



determines whether the act or omission falls within a course of conduct *proper* or *beneficial* to the organization, or under its official *control*. Finally, case law finds legal significance in the *expectations* of persons and entities dealing with the church or religious institution. To render these final decisions, the courts must indulge in comparisons and analogies. Judges and juries will see religious organizations and activities through the mirror of their secular counterparts. The more closely they resemble the secular, the more secure the courts are in adjudication of their affairs along entirely neutral, or nonreligious, grounds. Two reported cases will exemplify the central role of ecclesiastical polity and governance in the resolution of civil liability cases brought against churches and religious organizations.

A classic decision is *Barr v. United Methodist Church* (1979),²⁹ involving a failed retirement home located in California and 1,900 claimants seeking recovery of the money they had invested in lifetime retirement contracts. The home itself was separately incorporated and administered, though it bore the name and in its literature professed to follow the mission of the United Methodist Church in caring for the bodily and spiritual needs of its guests. The disappointed claimants urged the California court to take under submission the polity and governance of the national church, which was not a separate corporation, but rather, in California law, an unincorporated association. In state law, an unincorporated business association could be held liable for the obligations of its members. The state court held the rule applicable even though the national Methodist Church had never received any of the claimants' money. Moreover, on the basis of name and literature, the court found that persons investing in the retirement contracts would expect to have those contracts guaranteed by the United Methodist Church itself. Thus determined, the court required the United Methodist Church nationwide to reimburse \$21 million to the contract-holders. In spite of the best efforts of the administration of the retirement home to follow the state law of nonprofit corporations to protect their corporate independence, the court used the Methodist *Book of Discipline* to impose its own notion of church governance on the national church. The court imagined the United Methodist Church to be like a business corporation.

A second case, *John Does 1-9 v. Compcare, Inc.* (1988),³⁰ comes out of the library of reported cases of liability for negligent supervision that are snaring the corporate assets of Catholic dioceses to pay the claims of abuse victims of wandering clergymen. In this case, a priest was placed on leave for therapy, the bishop in good faith doing all he could to protect possible victims as well as assist the priest under the terms of the canon law. The offending priest was incardinated in the Catholic Diocese of Lafayette, Louisiana. His bishop sent him to Spokane, Washington, paid for the expenses of therapy there, entrusting him to the licensed medical facility. After releasing the priest from therapy, the treatment center informed the bishop that

²⁹ 90 Cal. App. 3d 259 (1979), cert. den., 444 U.S. 973 (1979).

³⁰ 763 P. 2d 1237 (Wash. 1988).



the priest should not be assigned to any work with adolescent boys. On his own, the priest obtained a position as a counselor in an alcohol rehabilitation center in Spokane. Several months later he was fired from the center because of complaints of sexual abuse by former patients. In the lawsuit brought by the victims joining the Catholic Diocese of Lafayette with the facility in Spokane, the court interpreted the canon law of the Catholic Church to find that the diocese of incardination had control over the priest in all phases of his life, notwithstanding the suspension and the fact that the priest was no longer on the diocesan payroll. Knowledge of the priest's continued propensities was imputed to the Bishop of Lafayette, with corresponding negligence in supervision. In fact, the canon law provides no such control, nor is there any basis whatsoever in church law for the decision imputing knowledge of the prospect of harm to the bishop. A higher standard of care was imposed on the church than would have been conceivable if the offender had been a public school teacher from Louisiana, changing his domicile and job to Washington.

CONCLUSIONS

Churches and other religious organizations are privileged at state law, not because of the charity they do, the public welfare they provide, the art and education they inspire and underwrite, all of which otherwise would be a charge upon the government, but because of what religion is and was understood to be by the framers of the United States Constitution. Religion can be thought of as the service of God; in this sense, it is a transcendent claim upon personal conscience superior to the government and antecedent to its creation. The Free Exercise of religion is not a right created by the state, capable of being withheld or subdivided as government property. It is the inalienable human right of persons and communities for the protection of which citizens consented to the formation of government originally.

The First Amendment protects religion in this country because it serves in and of itself a transcendent role in personal and social life. The First Amendment religion clauses in both their constitutional affirmations are not esteemed as instrumentalities of the state for the tranquility of order, or used to motivate the greatest sacrifices in hard times, or to gird the purest forms of patriotism. Religion is a supreme value in itself, not a hybrid. It is not because religion or personal spirituality are unimportant that they are separated from the authority of the Congress or the state legislatures. Rather, the opposite is true: the Constitution, without any doubt, deems religion so supremely important that the state is radically limited in its ability to comprehend or control its expression.

The First Amendment protects the religious freedom of both individuals and groups. It withholds from Congress legislative authority not only to establish religion, but also to quell denominational rivalries, or even to provide disincentives to competition and political discourse. The Establishment Clause is used to prohibit Congress from sponsoring, endorsing, funding, advancing, or promoting a church



or a number of churches, or from active involvement in religious activities in general. The purity and greatness of the American experiment with religious liberty is that the Constitution puts religion above legislative authority by separating it as much as humanly possible from the fray of politics or the din of litigation. The protection of religion did not aim to create a secular society stripped of its vitality, but, on the contrary, a society strengthened by its creativity and voluntary call to conscience. Religion engenders, instills, motivates, and sustains values that the state cannot create, not by what it does, but by what it is.

This chapter has outlined some results of the great efforts jurists in the American legal system have made to balance the needs of organized religion with those of society through nearly two hundred years of intense scrutiny of the polity of the churches. The administration, functions, missions, roles, and competencies of Christian churches have never been overlooked by the courts, and, frequently, have been evaluated by analogy to civil counterparts. Out of this legal history has come a peculiar vocabulary of trust law, cast upon a screen of constitutional ambiguity that is the notion of incorporation itself and of its relationship to distinctively American notions of federalism and freedom.





THE RIGHT TO SELF-DETERMINATION OF RELIGIOUS COMMUNITIES

JOHAN D. VAN DER VYVER¹

Sunali Pillay was a teenage South African girl of Hindu extraction. She gained entry into the Durban Girls' High School—one of the most prestigious state schools in South Africa—where she received excellent education. When she reached a certain stage of maturity, a golden stud was inserted in her nose, which is a custom in the Hindu community indicating that a girl has become eligible for marriage. This brought her into conflict with the school authorities. The school's code of conduct, signed by her parents as a condition for Sunali's admission to Girls' High, prohibited the wearing of any jewelry, except earrings and then only under meticulous conditions specified in the code of conduct. Sunali's mother explained to the school authorities that her daughter did not wear the nose stud as a token of fashion but in deference to an age old tradition of the Hindu community. The school management refused to grant Sunali an exemption from its dress code. A complaint was thereupon filed by Mrs. Pillay in the Equality Court, based on discrimination. The Equality Court ruled in favor of the school,² and the matter eventually came before the Constitutional Court of South Africa. The Constitutional Court decided that refusal by the school authorities to grant Sunali an exemption from the jewelry provision in the school's code of conduct amounted to unreasonable discrimination and was therefore unlawful.³

Leyla Şahin was a Muslim student at Istanbul University in Turkey. She was excluded from classes because she wore a headscarf. A Turkish law banned the wearing of headscarfs in all universities and official government buildings, basing the proscription on the fact that Turkey is a secular state. In 1998, Leyla filed a complaint under the European system for the protection of human rights and fundamental freedoms.⁴ The Grand Chamber of the European Court of Human Rights—the court of final instance in the European system of human rights protection—gave judgment in favor of Turkey. It decided that the headscarf ban is based on the con-

¹ This chapter excerpted and adapted in part from Johan D. Van der Vyver, *Leuven Lectures on Religious Institutions, Religious Communities and Rights* (Leuven: Uitgeverij Peeters, 2004), and is used herein with the permission of the author and publisher.

² Pillay v. MEC for Education: KwaZulu-Natal & Others, 2006 (6) SA 363 (EqC) (S. Afr.).

³ MEC for Education: KwaZulu-Natal & Others v. Pillay & Others, 2008 (1) SA 474 (CC) (S. Afr.).

⁴ Leyla Şahin v. Turkey (Appl. No. 44774/98), Eur. Ct. Hum. Rts. (Judgments & Decisions), vol. 2005-XI 173 (Oct. 11, 2005).



stitutional principles of secularism and equality and consequently did not constitute a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Nor did her suspension from the university for refusing to remove the headscarf amount to a violation of the Convention. Ms. Şahin subsequently left Turkey and is now living in Vienna.

The judgment of the South African Constitutional Court was based on the non-discrimination provisions in the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000,⁵ and was more precisely based on the proscription in the Act of discrimination based on religion and on culture.⁶ Basing its decision on the proscription of discrimination was perhaps dictated by the fact that the case came to the Constitutional Court via the Equality Court and therefore under the Promotion of Equality and Prevention of Unfair Discrimination Act, and by referring to discrimination based on religion and culture, the Court avoided the dilemma of deciding whether the wearing of a nose stud was a matter of religion or merely a Hindu custom. Had the matter been raised along a different route, the Court might have been constrained to deal with it under the religion prong of the right of everyone to “freedom of conscience, religion, thought, belief and opinion.”⁷ It is somewhat surprising that, while noting that prohibiting Sunali to wear a nose stud “affects other constitutional rights as well” (besides human dignity), the Court mentioned freedom of expression only, and not freedom of religion.⁸ This omission was perhaps prompted by the Court’s declining to decide definitively whether the wearing of a nose stud by Hindu women was a matter of religion or one of culture. This seems to be an easy case of the right to self-determination of cultural, religious, and linguistic communities, which, under the South African Constitution, includes the entitlement of such communities “to enjoy their culture, practice their religion and use their language”⁹

The case of Sunali Pillay thus illustrates the entanglement of different religion-specific principles: the proscription of discrimination based on religion or belief, freedom of religion, and the right to self-determination of religious communities. Although these principles overlap quite considerably, their application involves in each instance quite unique elements and, consequently, must be clearly distinguished.

The case of Leyla Şahin illustrates that several countries of the world, including Turkey, do not subscribe to the right to self-determination of distinct communities

⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted under Section 9(4) of the Constitution of the Republic of South Africa, Act 108 of 1996 [hereafter “SA Const.”] to prohibit unfair discrimination by persons or institutions other than the State.

⁶ MEC for Education: KwaZulu-Natal & Others, *supra* note 3, at ¶ 68, with reference to The Promotion of Equality and Prevention of Unfair Discrimination Act, art 6.

⁷ SA Const., *supra* note 3, § 15(1).

⁸ MEC for Education: KwaZulu-Natal & Others, *supra* note 2, at ¶ 93.

⁹ SA Const., *supra* note 5, § 15(1).



within their borders, basing their negative attitude on a general denial of, or unwillingness to afford relevance to, ethnic, religious, or linguistic varieties among their respective citizens and residents. Other countries siding with Turkey in this regard include Greece and France. Greece is particularly unaccommodating of the claim to a distinct identity of people of Macedonian extraction in Florina (Northern Greece). As far as France is concerned, President Jacques Chirac on March 15, 2004 signed into law an amendment to the French Code of Education that now prohibits, as a principle of the separation of church and state, “the wearing of symbols or garb which shows religious affiliation in public primary and secondary schools.”¹⁰ And let it also not pass unnoticed that four countries with a prominent indigenous population voted against the adoption of the United Nations Declaration on the Rights of Indigenous Peoples of October 2, 2007, those countries being Australia, Canada, New Zealand, and the United States of America. These countries based their objections in part on (drafting of) the right to self-determination afforded to indigenous peoples.¹¹

The right to self-determination has come to be an important principle of international law. It is mentioned in the Charter of the United Nations (arts. 1(2); and see also art. 73), and has been afforded a special place of prominence in the Covenant on Economic, Social and Cultural Rights (art. 1) and in the Covenant on Civil and Political Rights (art. 1). It is included in the Convention on the Rights of the Child (art. 30) and features prominently in the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (art. 2) and the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations of 1970. On the regional level, it has been endorsed by no less than the *Helsinki Final Act* of 1975 (§ VIII).

HISTORICAL PERSPECTIVES

The concept of self-determination owes its origin to economic socialism. In 1913, Joseph Stalin composed a detailed pamphlet on *Marxism and the National Question* in which he denoted the disposition of political communities within the over-arching and universal economic structures of communism as a matter of “self-determination.” In March, 1916, V.I. Lenin published a more elaborate exposition of the same theme in his seminal work, *Thesis on the Socialist Revolution and the Right of Nations to Self-Determination*—described by one analyst as “the first compelling enunciation of the principle” of self-determination of peoples.¹² Self-determina-

¹⁰ Loi no. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.

¹¹ See S. James, Anaya, *International Human Rights and Indigenous Peoples* (Leiden: Wolters Kluwer, 2009), 71-75 (U.S.A.), 83-84 (Australia), 84-86 (Canada), 86-87 (New Zealand) (2009).

¹² Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 15.



tion of nation states within a non-negotiable economic world order was not where it all ended.

The prominence of the right to self-determination in international law has mostly been attributed to American President, Woodrow Wilson. Robert Friedlander thus accredited President Wilson's Fourteen Points Address of January 8, 1918 as "transforming self-determination into a universal right"¹³—though the President never really used the word "self-determination." He included in those Fourteen Points one that proclaimed "[a] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of government whose title is to be determined."¹⁴ This statement has come to be regarded as the basis of the League of Nations policy for dealing with the future dispensation of nation states that were part of the world empires defeated and dissolved through World War I.¹⁵ But this, too, was not where it all would end.

Leaving aside the connotation attributed to that concept within socialist political thought, the right to self-determination, over time, acquired at least four quite distinct meanings, depending in each instance on the nature and disposition of the peoples claiming that right.¹⁶ First, the post World War I nuance of the term denoted the right to eventual political independence, within the confines of the mandate system of the League of Nations, of nation states that had been part of the Ottoman, German, Russian, and Austro-Hungarian empires. In this context, self-determination vested in "ethnic communities, nations or nationalities primarily defined by language or culture,"¹⁷ and thus denoted the right of "peoples" in the sense of (territorially defined) nations to political independence. Second, following World War II, the emphasis shifted to the principle "of bringing all colonial situa-

¹³ Robert Friedlander, "Self-Determination: A Legal-Political Inquiry," *Detroit College of Law Review* 1 (1975): 71, 73.

¹⁴ *Fourteen Points Address delivered on January 8, 1918 to a joint session of Congress by President Woodrow Wilson*, Point 5, in *1 Public Papers of Woodrow Wilson: War and Peace*, eds. R.S. Baker & W.E. Dodd (New York and London: Harper and Bros., 1927), 1:155-59.

¹⁵ Vernon van Dyke, *Human Rights, the United States, and World Community* (New York: Oxford University Press, 1970), 86.

¹⁶ See Johan D. van der Vyver, "Sovereignty and Human Rights in Constitutional and International Law," *Emory International Law Review* 5 (1991): 321, 395-416; Johan D. van der Vyver, "Self-Determination and the Peoples of Quebec," *J. Transnational Law & Policy* 10 (2000): 1, 14-19; Johan van der Vyver, "Self-Determination and the Right to Secession of Religious Minorities under International Law," in *Protection of the Human Rights of Religious Minorities in Eastern Europe*, eds. Peter G. Dachin & Elizabeth A. Cole (New York: Columbia University Press, 2002), 251, 258-61; J.D. van der Vyver, "Cultural Identity as a Constitutional Right in South Africa," *Stellenbosch Law Review* 14 (2003): 51.

¹⁷ N. Berman, "Sovereignty in Abeyance: Self-Determination and International Law," *Wisconsin International Law Journal* 7 (1988): 51, 53-56, 58, 86-87.



tions to a speedy end,”¹⁸ and here the right to self-determination vested in colonized peoples, while the substance of their right again denoted political independence.¹⁹ The *United Nations Millennium Declaration* extended the principle of decolonization to include “the right to self-determination of peoples which remain under ... foreign occupation.”²⁰

Third, in the 1960’s, yet another category of “peoples” with a right to self-determination came to be identified, namely those subject to a racist regime. Here the concept substantively signified the right of such peoples to participate in the structures of government within the countries to which they belonged. The “self” in self-determination was no longer perceived to be territorially defined sections of the population in multinational empires or colonial dominions, but also came to be identified with the entire population of a territory where the social, economic, and constitutional system was structured on institutionally sanctioned racial discrimination.

Fourth, and finally, in contemporary international law, the right to self-determination has been extended to national or ethnic, religious, and linguistic communities within a political society whose particular entitlements are centered upon a right to live according to the traditions and customs of the concerned group. The right to self-determination of such “peoples” has been defined in compelling terms in the 1966 International Covenant on Civil and Political Rights:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.²¹

The 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities similarly speaks of “the right [of national or ethnic, religious and linguistic minorities] to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public,

¹⁸ Western Sahara (Advisory Opinion), 1975 I.C.J. 1, 31 (May 25, 1975); and see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), 1971 I.C.J. 16, 31 (June 21, 1971) (the Court holding that the right to self-determination was applicable to “territories under colonial rule” and that it “embraces all peoples and territories which ‘have not yet attained independence’”).

¹⁹ Berman, “Sovereignty in Abeyance,” 54; see also Cassese, *Self-Determination of Peoples*, 76; van Dyke, *Human Rights, the United States*, 87; R. Emerson, “Self-Determination,” *American Journal of International Law* 66 (1971): 459, 463; O. Schachter, “The United Nations and Internal Conflict,” in *Law and Civil War in the Modern World*, ed. J.N. Moore (Baltimore, MD: Johns Hopkins University Press, 1974), 401, 406-07; G. Tesfagiorgis, “Self-Determination: Its Evolution and Practice by the United Nations and its Application in the Case of Eritrea,” *Wisconsin International Law Journal* 6 (1987): 75, 78-80.

²⁰ United Nations Millennium Declaration, ¶ 4, G.A. Res 55/2 of Sept. 18, 2000, U.N. Doc. A/RES/55/2 (2000).

²¹ Covenant on Civil and Political Rights, art. 27, G.A. Res. 2200 (XXI) of Dec. 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171; and see in general Felix Ermacora, *The Protection of Minorities Before the United Nations*, in (1983-IV) RECUEIL DES COURS 246.



freely and without interference or any form of discrimination.”²² This, then, is where the right to self-determination or religious communities comes in.

SPHERE SOVEREIGNTY AND SELF-DETERMINATION

The right to self-determination is closely related to, but must be distinguished from, the principle of sphere sovereignty. The distinction is closely related to the difference between a religious community and a religious institution.²³

A religious institution, such as the Episcopal, Baptist, Roman Catholic, or Greek Orthodox Church, is a formally structured or organized group entity, has an identity separate from that of its members, and qualifies for legal personality. A legal institution also has its own internal structures, organization, and activities. A religious institution, as a legal person, can own property, sue and be sued, and exercise other competencies within the legal sphere in its own name. A religious institution has sovereign powers within its own internal sphere in virtue of which it may conduct its internal affairs without undue outside (including state) interference. A very special problem that has been debated at some length is whether a religious institution can also be the beneficiary of rights and freedoms protected through a constitutional bill of rights. The South African Constitution expressly affords to legal persons, including churches and other religious institutions, the rights protected under its Bill of Rights “to the extent required by the nature of the right and the nature of the juristic person,”²⁴ and also makes the Bill of Rights binding on legal persons, including churches and other religious institutions, “taking into account the nature of the right and the nature of the duty imposed.”

The power of a religious institution to regulate its own internal affairs without external interference, including interference through the laws and administrative action of the state, is commonly referred to as sovereignty of the religious institution within its own domestic sphere. This, too, is part and parcel of the South African constitutional dispensation and includes the principle that “in ecclesiastical matters, it was salutary that disputes, as and when they arose, should ideally be resolved through internal mechanisms.”²⁵

As far as the United States is concerned, recent analyses of First Amendment jurisprudence conducted by Paul Horwitz looked beyond the legal norms that may or may not be enacted by Congress under the constraints imposed by the Constitution to uncover the role of institutions functioning within the protected enclave

²² Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2.1, G.A. Res.47/136 of Dec. 18, 1992, 47 U.N. GAOR Supp. (No. 49), at 210, U.N. Doc. A/RES/47/135 (1992).

²³ See Van der Vyver, *Lewen Lectures on Religious Institutions, Religious Communities and Rights*, 3-5.

²⁴ SA Const., supra note 5, § 8(4).

²⁵ *Methodist Church of Southern Africa v. Mtongana*, 2008 (6) SA 69, ¶ 10 (TkHC) (S. Afr.).



of the First Amendment, such as universities, the press, and religious associations.²⁶ Based on the doctrine of sphere sovereignty of the Dutch political philosopher, Abraham Kuyper, Horwitz argued convincingly that such “First Amendment institutions” should be afforded the right to operate on a largely self-regulating basis and beyond the supervision of external legal regimes.

The constitutions of several countries contain provisions that signify what in essence amount to sphere sovereignty of religious institutions. The Constitution of Singapore confines the internal sovereignty of religious groups “to managing their own religious affairs” (art. 15(3)); the Romanian Constitution permits the organization of religious sects “in accordance with their own statutes” but “under the terms defined by the law” (art. 29(3)). The Italian Constitution affords independence and sovereignty, “each within its own order,” to the state and the (Roman) Catholic Church only (art. 7). The Irish Constitution more generously proclaims the right of every religious denomination “to manage its own affairs” (art. 44(2)(5)). In its Charter of Fundamental Rights and Basic Freedoms, the Czech Republic proclaims that “Churches and religious societies govern their own affairs,” “establish their own bodies and appoint their clergy,” and “found religious orders and other church institutions, independent of state authorities” (art. 16(2)). Poland defines the relationship between the state and churches and other religious organizations on basis of “the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as ... the principle of cooperation for the good of the individual and for the common good” ((art. 25(3)).

As far as the United States is concerned, the case of *Kedroff v. St. Nicholas Cathedral* (1952) makes clear that the church has a constitutional right to freedom of religion.²⁷ We may pause here, for a moment, to place this judgment in its proper historical perspective. In 1925, legislation was adopted in New York for the purpose of acquiring a cathedral for the Russian Orthodox Church in North America as a place of worship “in accordance with the doctrine, discipline and worship of the Holy Apostolic Catholic Church of Eastern Confession as taught by the holy scriptures, holy tradition, seven oecumenical councils and holy fathers of the Church.” In consequence of strong anti-Soviet sentiments that prevailed in the United States at the time, Article 5-C was added to the Religious Corporation Law of New York in 1945 (with clarifying amendments being added in 1948) with a view to transferring the control of the New York churches of the Russian Orthodox religion from the central Patriarchate in Moscow to the governing authorities of the Church in

²⁶ See Paul Horwitz, “Universities as First Amendment Institutions: Some Easy Answers and Hard Questions,” *U.C.L.A. Law Review* 54 (2007): 1497; Paul Horwitz, “Churches as First Amendment Institutions: Of Sovereignty and Spheres,” *Harvard Civil Rights and Civil Liberties Law Review* 35 (2009): 79.

²⁷ *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); and see John H. Garvey, “Churches and the Free Exercise of Religion,” *Notre Dame Journal of Law, Ethics & Public Policy* 4 (1990): 567, 578-84 (concluding with reference to *Kedroff* (at 584) that “churches as groups may also claim a right to the free exercise of religion”).



America. The Archbishop of New York was subsequently elected in that capacity by a Sobor of American churches to serve as head of the Metropolitan of All America and Canada. A dispute erupted as to his competence, in virtue of Article 5-C, to occupy the church property in New York. In *Kedroff*, the matter was decided in favor of the Moscow Patriarchate, the Court holding that Article 5-C violated the constitutional right to “the free exercise of an ecclesiastical right, the Church’s choice of its hierarchy.”²⁸ Justice Reed, speaking for the majority, referred to “a spirit of freedom for religious organizations” embracing “power to decide for themselves free from state interference, matters of church government as well as those of faith and doctrine,” which freedom includes the right to select the clergy of the Church.²⁹ An American analyst of *Kedroff* defined the substance of the institutional group rights vesting in the Church as a matter of sphere sovereignty:

The heart of the pluralistic thesis is the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.³⁰

How, then, does the institutional sphere sovereignty of a religious institution differ from the right to self-determination of a religious community?

A religious community is made up of people sharing the same confession of faith. The group comprising a religious community is not structured or organized in any formal way but its members are bound together by a common religious commitment or belief. In the *Greco-Bulgarian Communities Case* of 1930, the Permanent Court of International Justice gave the following definition of the “general traditional conception” of a community, which in contemporary usage would be called a people:

the “community” is a group of persons living in a given country or locality, having a race, religion, language and tradition of their own and united by this identity of race, religion, language and tradition in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.³¹

International law denotes communities with a right to self-determination in the contemporary sense as “peoples”. According to Yoram Dinstein, peoplehood

²⁸ *Kedroff v. St. Nicholas Cathedral*, 119.

²⁹ *Ibid.*, 116.

³⁰ Mark DeWolfe Howe, “Foreword: Political Theory and the Nature of Liberty,” *Harvard Law Review* 67 (1953): 91.

³¹ The *Greco-Bulgarian “Communities”*, P.C.I.J., Series B, Advisory Opinions, vol. 2, No. 17, 21 (July 31, 1930).



comprises two elements: an objective component, designated by the factual contingencies upon which the unity of the group depends; and a subjective component, constituted by a certain state of mind—the consciousness of belonging, and perhaps the will to be associated with the group.³² The right to self-determination belonging to a people, including a religious community, is therefore a group right of a special kind, namely a *collective group right*. A collective group right must be distinguished from an *institutional group right*.

A collective group right is afforded to individual persons belonging to a certain category, such as children, women, or ethnic, religious, and cultural communities. The right of national minorities to peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience, and religion,³³ thus belongs to every member of the group and can be exercised separately or jointly with any other member(s) of the group. An institutional group right, on the other hand, vests in a social institution as such and can only be exercised by that collective entity through the agency of its authorized representative organs.

The religious community has a right to self-determination. Members of the group are entitled to profess and practice their religion without undue constraints imposed on that entitlement by the political powers that be. A collective group right of religious communities to self-determination has been recognized in the United States on various fronts, for example to substantiate the payment of unemployment benefits to Sabbatarians who refused to work on their day of rest,³⁴ or to a Jehovah's Witness who refused, on religious grounds, to accept employment in a factory which produced parts that would be used in military armament;³⁵ or to exempt members of the Old Order Amish religion and of the Conservative Amish Mennonite Church, on religious grounds, from the statutory obligation to cause their children to attend formal high school education to the age of 16.³⁶

The right to self-determination, as a collective group right, involves more than merely an accommodating disposition toward particular sectional beliefs and practices. In virtue of the right to self-determination, governments are required to secure, through their respective constitutional and legal systems, the interests of distinct sections of the population that constitute a people in the above sense. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities clearly spells out that obligation: protect, and encourage conditions for the promotion of, the concerned group identities of minorities under the jurisdic-

³² Yoram Dinstein, "Collective Human Rights of Peoples and Minorities," *International Law Quarterly* 25 (1976): 102, 103.

³³ See European Framework Convention for the Protection of National Minorities, art. 7, E.T.S 157, reprinted in 34 I.L.M. 351 (1995).

³⁴ *Sherbert v. Verner*, 373 U.S. 398 (1963); and see also *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).

³⁵ *Thomas v. Review Board, Indiana Employment Security Division*, 450 U.S. 707 (1981).

³⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).



tion of the duty-bound state (arts. 1(1) and 4(2)); afford to minorities the special competence to participate effectively in decisions pertinent to the group to which they belong (art. 2(3)); do not discriminate in any way against any person on basis of his/her group identity (art. 3), and in fact take action to secure their equal treatment by and before the law (art. 4(1)). The Declaration further provides that:

States shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.³⁷

The Council of Europe's Framework Convention for the Protection of National Minorities specified minority rights in much the same vein: It guarantees equality before the law and equal protection of the laws (art. 4(1)); States Parties promise to provide "the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage" (art. 5(1)); States Parties recognize the right of a person belonging to a national minority "to manifest his or her religion or belief and to establish religious institutions, organizations and associations" (art. 8).

LIMITATIONS OF THE RIGHT TO SELF-DETERMINATION

People are tied up in all kinds of group affiliations, some deriving from biological attributes—sex, race and family ties—and others founded on an historical base—a shared national, cultural, religious, or linguistic alliance. The group affiliation of persons tends to provoke any degree of commitment to traditional beliefs and practices perceived by their constituents as a *sine qua non* for maintaining the identity and interests of the group. Those beliefs and practices may include ones that have come to be discredited in view of contemporary notions of human rights and fundamental freedoms. Such beliefs and practices have brought onto the agenda of sociology, the law, and political science how best to accommodate the group identities represented in a political community within the laws and/or structures of the state. Where to draw the line between practices of, for example, religious communities that ought to be protected under the rubric of a right to self-determination and those that can no longer be tolerated in this day and age of humane governance. There are two quite distinct aspects to the problem posed: the first, to what extent to accommodate group formations in the political structures of the state; and the second, how to respond through legal interventions to religiously-based practices that have come to be identified as a threat to life or limb of vulnerable members of the group.

³⁷ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 4(2).



It must at the outset be emphasized that the right to self-determination recognizes in broad outline the existence of ethnic, cultural, religious, and linguistic diversities within a political society (pluralism) as a salient fact that ought to be accommodated in the political structures and legal arrangements of the state. However, it is equally important that group alliances based on a common ethnic extraction, cultural heritage, religious conviction, or linguistic identity ought not to be afforded a role within the body politic beyond the distinctive attribute that constitutes the bond between members of the group. That is to say, it is of the essence of the right to self-determination that the relevance of group interests are to be cut down the size, dictated by the nature of the group. The protected interests of a cultural group are to be confined to cultural affairs, of a religious group to matters of religion, and so on. To afford *political* representation in the structures of government to a *cultural* or a *religious* group, would amount to affording to those latter modalities that qualify the group a pertinence beyond the confines of their true (and useful) destination in the aggregate of human society.

As to the second question mentioned above, it is important to note that the right to self-determination is not absolute. Self-determination is generally said not to legitimize violations of human rights that might be part and parcel of an ethnic tradition or religious usage. This assessment is somewhat superficial. International law seems to tolerate discrimination against women as a manifestation of a cultural tradition or religious dogma, but is quite vocal in its condemnation of, for example, female genital mutilation—a practice which at least in some communities is founded on religious considerations. The principle applied seems to be that political authorities will not use the long arm of the law to prohibit religious practices which merely amount to (gender-based) discrimination, but will not tolerate, under pretences of a right to self-determination, religious or cultural practices which constitute violations of the right to life or physical integrity.

Withholding life-sustaining medication or therapeutic treatment from a child upon instructions of the parents based on religious conviction presents a very special problem in this regard. In the United States, dealing with this problem has had a checkered history.³⁸ There are, on the one hand, state laws in place that exempt parents who prefer spiritual treatment or faith healing from statutory requirements to furnish health care to a child in their care,³⁹ but this concession to freedom of religion will not absolve a parent from criminal liability for involuntary manslaughter if the child should die in consequence of being denied conventional medical treatment.⁴⁰ Parents will therefore be prosecuted for providing spiritual treatment for their children in lieu of traditional medical care, but only if such treatment turned

³⁸ See Edward Egan Smith, "The Criminalization of Belief: When Free Exercise Isn't," *Hastings Law Journal* 42 (1991): 1491.

³⁹ *Walker v. Superior Court*, 763 P. 2d 852, 858 (1988) (referencing § 270 of the Californian Penal Code).

⁴⁰ *Ibid.*, 878.



out to be ineffective and resulted in death of the child.⁴¹ In South Africa, on the other hand, the High Court as upper guardian of all children can intervene by sanctioning feasible medical procedures while the life of the child can still be saved. It can consequently overrule the decision of parents who, for religious reasons, would not give their consent for a child to receive a blood transfusion (or other therapeutic treatment) considered by a pediatrician to be necessary for the survival of the child.⁴² In South Africa, the constitutionally protected right to life of a child will in all circumstances trump the claim to the exercise of religious liberty of the parent.

As noted in the introductory paragraphs of this essay, the South African Constitutional Court and the European Court of Human Rights, both applying the principle of equal treatment and non-discrimination, came to opposite conclusions as to the legality of regulations/laws prohibiting distinctive symbols or clothing based on religious practices. Applying the principle of equality from the perspective of constitutional secularism in Turkey, the European Court of Human Rights was precluded from accommodating the truism that equal treatment actually demands differentiations for legal purposes based on distinct group formations in cases where the differentiations are truly relevant to that which distinguishes the one group from the other. Mindful of the plural composition of the South African population and the concomitant constitutional right to self-determination of religious communities, the South African Constitutional Court, by contrast, decided that not upholding the distinct practices of the Hindu community would amount to unbecoming discrimination.

Failure of national systems to provide such protection to sectional interests of peoples within their area of jurisdiction, or merely the perception of being marginalized, must be seen as an important contributing cause of the tireless aspirations toward the establishment of homogenous states for sections of the political community with a strong group consciousness: the Muslim community of Kashmir, the Basques in Northern Spain, the Hindu factions in Sri Lanka, the Catholic minority in Northern Ireland, the Christian community in Southern Sudan, the Kurds in Iraq and Turkey, people of Macedonian extraction in Florina (Northern Greece), and many others.

THE RIGHT TO SELF-DETERMINATION AND SECESSION

The right to self-determination vesting in ethnic, religious, or linguistic communities does not include a right to secession or political independence—even in cases where a government, in breach of international law, does not uphold the right to self-determination of sections of its subordinates. International law is quite explicit in proclaiming that self-determination of ethnic, religious, and linguistic communi-

⁴¹ See John Dwight Ingram, "State Interference with Religiously Motivated Decisions on Medical Treatment," *Dickinson Law Review*. 93 (1988): 41, 59.

⁴² *Hay v. B*, 2003 (3) SA 492 (W) (S. Afr.)



ties must co-exist with “the territorial integrity of states”—a phrase denoting the sanctity of existing national borders. The right to self-determination, furthermore, vests in a people while a new state created through secession is essentially territorially defined (it is a defined territory that secedes from an existing state and not a people).

General definitions of the right to self-determination, such as the one contained in the Declaration on the Granting of Independence to Colonial Countries and Peoples proclaiming the right of peoples to “freely determine their political status” and the right to “freely pursue their economic, social, and cultural development” should therefore not be seen as a general sanction of a right to political independence but must be limited and understood in the context of the subject-matter of the document from which they derive: peoples subject to colonial rule or foreign domination do have a right to political independence; national or ethnic, religious and linguistic communities in an existing state do not. It is unfortunate that the substance of the right as applied to colonial countries and peoples is sometimes cited in instruments dealing with the right to self-determination of national or ethnic, religious, or linguistic peoples. The 2007 United Nations Declaration on the Rights of Indigenous Peoples thus proclaims that, by virtue of their right to self-determination, indigenous peoples are entitled to “freely determine their political status and freely pursue their economic, social and cultural development.”⁴³ But lest this provision be interpreted to denote political independence, the Declaration stipulates that “[n]othing in this Declaration may be ... construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”⁴⁴ The United Nations’ 1993 World Conference on Human Rights similarly said it all when the right of peoples to “freely determine their political status, and freely pursue their economic, social and cultural development” was expressly made conditional upon the following proviso:

This [definition of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.⁴⁵

In 1996, the Supreme Court of Canada was instructed to consider, amongst other things, whether or not there is a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect secession of Quebec from Canada unilaterally. The Canadian

⁴³ Declaration on the Rights of Indigenous Peoples, art. 3, G. A. Res. 61/295 of Oct. 2, 2007, U.N. Doc. A/RES/62/295 (2007).

⁴⁴ *Id.*, art. 46(1).

⁴⁵ Vienna Declaration and Program of Action, U.N. Doc. A/CONF.157/24, Part I, ¶ 2 (June 22, 1993).



Supreme Court for several reasons answered the question in the negative.⁴⁶ It should be evident to everyone that the inhabitants of Quebec, being composed of a variety of ethnic or cultural, religious and linguistic population groups, do not constitute a people as defined in international law, and for that reason alone cannot claim a right to self-determination. Sections of the population of Quebec, united by a common ethnic extraction, cultural heritage, religious affiliation, or linguistic preference could of course lament the denial of their right to self-determination on the grounds that they are not permitted to accede to a life-style dictated by their national or ethnic, religious or linguistic identities. But that is *de facto* not the case—at least not as far as (Francophone) Quebecois are concerned.

There are many compelling reasons why the destruction of existing political communities harboring a plural society should be avoided at all costs: First, a multiplicity of economically non-viable states will further contribute to a decline of the living standards in the world community. Second, the perception that people sharing a common language, culture or religion would necessarily also be politically compatible is clearly a myth, and disillusionment after the event might provoke profound resentment and further conflict. Third, movement of people within plural societies across territorial divides has greatly destroyed ethnic, cultural, or religious homogeneity in regions where it might have existed in earlier times, and consequently, demarcation of borders that would be inclusive of the sectional demography which secessionists seek to establish is in most cases quite impossible. Fourth, affording political relevance to ethnic, cultural, or religious affiliation not only carries within itself the potential of repression of minority groups within the nation, but also affords no political standing whatsoever to persons who, on account of mixed parentage or marriage, cannot be identified with any particular faction of the group-conscious community, or to those who—for whatever reason—do not wish to be identified under any particular ethnic, religious or cultural label. And, fifth, in consequence of the above, an ethnically, culturally, or religiously defined state will more often than not create its own “minorities problem.” Because of the ethnic, cultural or religious incentive for the establishment of the secession state, such a development will almost invariably result in profound discrimination against those who do not belong, or worse still, a strategy of “ethnic cleansing.”

CONCLUDING OBSERVATIONS

Scholarly endeavors to find a feasible answer to the question of group alliances within the body politic has thus far rendered a rich variety of socio-political theories and practices, ranging from strict individualism to any number of totalitarian designs. The most extreme manifestations of individualism deny the relevance—if not the very existence as part of empirical reality—of institutional group entities and tend to devaluate the community interests of the persons who make up a distinct

⁴⁶ Reference Re Secession of Quebec, [1998] 2 S.C.R. 217.



community to a subordinate and insignificant part of the human make-up. Totalitarianism, on the other hand, attributes to a particular group—be it the state, or to a racial, ethnic, or religious community—an inflated significance and dominant disposition over individuals within, and often beyond the constituency of, the concerned group. It aspires toward homogeneity or, alternatively, subordination, repression and/or persecution of the other. It cultivates a sense of group-defined superiority and domination, exploits a sense of xenophobia within its number, and might on the fringes culminate in genocide or lesser forms of “ethnic cleansing.”

The right to self-determination, on the contrary, appreciates and seeks to accommodate the group identities of sections of a political community. It promotes pride in one’s cultural extraction and religious affiliation. It is patron to a political dispensation comprising, in the celebrated words of Archbishop Desmond Tutu, “a rainbow people.” Accommodating, and indeed protecting, the right to self-determination of religious communities within the political structures of the body politic is after all also in the interest of the state.

The South African Constitutional Court has on several occasions emphasized the vital importance of religion as a component of South Africa’s constitutional democracy. In *Christian Education South Africa v. Minister of Education*, Justice Albie Sachs had this to say:

There can be no doubt that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer’s view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.⁴⁷

In a case that afforded legality to same-sex marriages, Justice Sachs, delivering the unanimous decision of the Court, emphasized the importance of religion for the

⁴⁷ *Christian Education South Africa v. Minister of Education*, 2000 (4) SA 757; 2000 (10) BCLR 1051 (CC) ¶ 36 (S. Afr.).



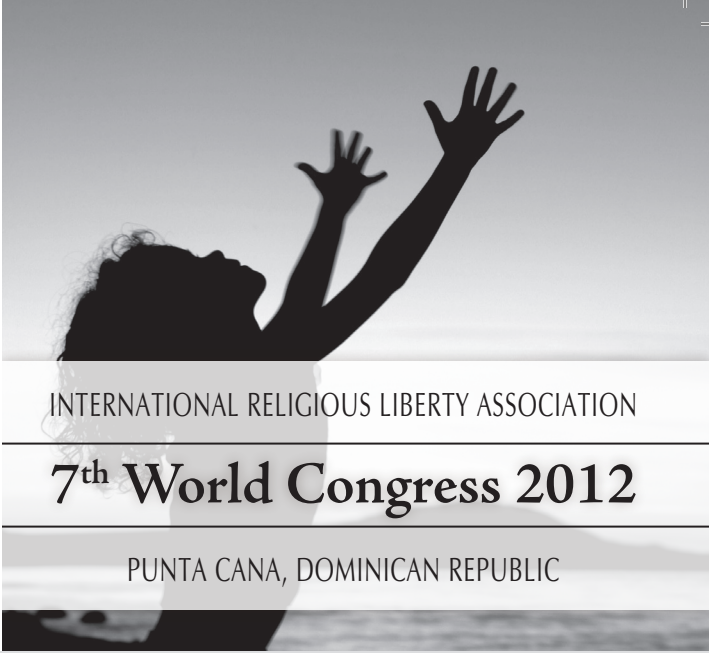
state:

Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes [sic]. They command ethical behaviour [sic] from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre [sic]; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of the people's temper and culture, and for many believers a significant part of their way of life. Religious organizations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.

He went on to say that the Court must recognize the distinctive spheres which the secular and the sacred occupies and not force the one into the sphere of the other; it must “accommodate and manage [the] difference of intensely-held world views and lifestyles in a reasonable and fair manner” and not impose the religious views of one section of the population on the other, and it must in particular protect minorities against discrimination through majority opinions.⁴⁸ This, then, in the final analysis, is what upholding of the right to self-determination of religious communities within the social, political and legal structures of a nation is all about.



⁴⁸ Minister of Home Affairs v. Fourie; Lesbian and Gay Equality Project v. Minister of Home Affairs, 2006 (1) SA 524; 2006 (3) BCLR 355, ¶ 93-95 (CC) (S. Afr.).



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FAITH-BASED FAMILY LAWS IN WESTERN DEMOCRACIES?

JOHN WITTE, JR. AND JOEL A. NICHOLS¹

Anglican Archbishop Rowan Williams set off an international firestorm on February 7, 2008 by suggesting that some “accommodation” of Muslim family law was “unavoidable” in England.² His suggestion, though carefully qualified, prompted more than 250 articles in the world press within a month, the vast majority denouncing it. England, his critics charged, will be beset by “licensed polygamy,” barbaric procedures, and brutal violence against women encased in suffocating burkas. Critics proclaimed that Muslim citizens of a Western democracy will be subject to legally ghettoized Muslim courts immune from civil appeal or constitutional challenge. Consider Nigeria, Pakistan, and other former English colonies that have sought to balance Muslim Shari’a with the common law, other critics added. The horrific excesses and chronic human rights violations of their religious courts—even ordering the faithful to stone innocent rape victims for dishonoring their families—prove that religious laws and state laws on the family simply cannot coexist. Case closed.

This case won’t stay closed for long, however. The Archbishop was not calling for the establishment of independent Muslim courts in England, let alone the enforcement of Shari’a by English courts. He was, instead, raising a whole series of hard but “unavoidable” questions about marital, cultural, and religious identity and practice in Western democratic societies committed to human rights for all. What forms of marriage should citizens be able to choose, and what forums of religious marriage law should state governments be required to respect? How should Muslims and other religious minorities with distinctive family norms and cultural practices be accommodated in a society dedicated to religious liberty and self-determination, and to religious equality and non-discrimination? Are legal pluralism and even “personal federalism” necessary to protect Muslims and other religious believers who are conscientiously opposed to the liberal values that inform modern state laws on sex, marriage, and family? Is every constitutional accommodation of Muslim family law

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² “Archbishop’s Lecture—Civil and Religious Law in England: A Religious Perspective,” (Feb. 7, 2008), available at <http://www.archbishopofcanterbury.org/1575#>.



and Shari'a courts a dangerous step on the slippery slope toward empowering that faith, some of whose leaders subvert the very democratic and human rights values that now offer them protection? These and other hard questions are becoming "unavoidable" for many modern Western democracies with growing and diverse Muslim communities, each making new and ever louder demands. If current growth rates of Muslim communities in the West continue, a generation from now the Danish cartoon "crisis" is going to seem like child's play.

Even democratic countries that share a common law heritage and common commitment to human rights and religious freedom have taken quite different approaches to these questions. England, with the largest groups of Muslim minorities, has been the most accommodating of Muslim schools, charities, banks, and arbitration tribunals that govern the family, financial, and other private issues of their voluntary faithful. In particular, English courts have regularly upheld the arbitration awards of Muslim tribunals in marriage and family disputes, so long as all parties consent to participate and so long as all arbitration takes place without physical coercion or threat. The same deference is accorded to the marital arbitrations of Jewish, Christian, Hindu, and other peaceable religious authorities. Canada, although considered quite Constitutionally liberal, debated seriously the development of Shari'a marital tribunals in Ontario, but ultimately rejected religious arbitration in favor of a single provincial marriage law for its citizens. Canadian Muslims, however, enjoy ample religious freedom to engage in their own worship, education, banking, and religious rituals and apparel. Australia, with smaller and more scattered Muslim minorities, grants Muslims general religious freedom. But it is only beginning to grapple with how to accommodate Muslim demands for state enforcement of Muslim marriage contracts and state deference to Muslim religious arbitration of family law and other disputes. The United States, though with sizeable and diverse Muslim populations, has become the least accommodating of its Muslims citizens. Like Muslims in France, Turkey, and elsewhere, American Muslim litigants have not fared well of late when they have challenged state denials of charters or exemptions for their schools, charities, or mosques. Nor have they often succeeded in challenging prohibitions to wear traditional religious apparel while teaching in public schools, testifying in state courts, or serving in public places. American states have also not readily accommodated Muslim family law, let alone Shari'a courts. Most American state courts have only sporadically upheld private Muslim marriage contracts. They have often sided with non-Muslim spouses in divorce and child custody cases involving mixed marriages. They have held a firm line against Muslim polygamy, and have granted little deference to arbitration awards or mediation settlements by Muslim marital tribunals or religious officials. But American Muslims have continued to agitate for greater religious freedom, autonomy, and self-determination in marriage and other

subjects.³

THE LAW OF MARRIAGE AND RELIGION

It is no surprise that it is the law of marriage and family life that has triggered this new contest between law and religion in Western democracies. For marriage has long been regarded as both a legal and a spiritual institution—subject at once to special state laws of contract and property, and to special religious canons and ceremonies. Marriage has also long been regarded as the most primal institution of Western society and culture. Aristotle and the Roman Stoics called the marital household the “foundation of the republic” and “the private font of public virtue.” The Church Fathers and medieval Catholics called it “the seedbed of the city,” “the force that welds society together.” Early modern Protestants called it a “little church,” a “little state,” a “little seminary,” the first school of love and justice, charity and citizenship. John Locke and the Enlightenment philosophers called marriage “the first society” to be formed as men and women moved from the state of nature to an organized society dedicated to the rule of law and the protection of rights.⁴

Because of its cultural importance, marriage was also one of the first institutions to be reformed during the decisive battles between church and state in the history of the West. In the fourth century, when Constantine and his imperial successors converted the Roman Empire to Christianity, they soon passed comprehensive new marriage and family laws predicated directly on Christian teachings. In the later eleventh and twelfth centuries, when Pope Gregory VII and his successors threw off their civil rulers and established the Catholic Church as an independent legal authority, the church seized jurisdiction over marriage, calling it a sacrament subject to church courts and to the church’s canon laws. In the sixteenth century, when Martin Luther, Henry VIII, and other Protestants called for reforms of church, state, and society, one of their first acts was to reject the Catholic canon law of marriage and the sacramental theology that supported it, and to transfer principal legal control over marriage to the Christian magistrate. In the later eighteenth century, when the French revolutionaries unleashed their fury against traditional institutions, they took early aim at the Catholic Church’s complex marital rules, roles, and rituals, consigning marriage to the rule of secular state authorities. And, in the early twentieth century, when the Bolsheviks completed their revolution in Russia, one of Lenin’s first acts was to abolish the legal institution of marriage, as a bourgeois impediment to the realization of true communism.

³ See Pascale Fournier, *Muslim Marriage in Western Courts: Lost in Transplantation* (Williston, VT: Ashgate, 2010); David Pearl & Werner F. Menski, *Muslim Family Law*, 3d ed. (London: Sweet & Maxwell, 1998), 65-83; and the articles in Nichols, ed., *Marriage and Divorce in a Multicultural Society* and Rex Ahdar and Nicholas Aroney, eds., *Shari’a in the West* (Oxford: Oxford University Press, 2010).

⁴ See quotes in John Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2d ed. (Louisville, KY: Westminster John Knox Press, 2011).



Modern Western democracies have not abolished marriage as a legal category, but they have dramatically privatized it and thinned out many of its traditional elements. Half a century ago, most Western states treated marriage as a public institution in which church, state, and society were all deeply invested. With ample variation across jurisdictions, most Western states still generally defined marriage as a presumptively permanent monogamous union between a fit man and a fit woman with freedom and capacity to marry each other. A typical state law required that engagements be formal and that marriages be contracted with parental consent and witnesses after a suitable waiting period. It required marriage licenses and registration and solemnization before civil and/or religious authorities. It prohibited sex and marriage between couples related by various blood or family ties identified in the Mosaic law. It discouraged, and sometimes prohibited, marriage where one party was impotent or had a contagious disease that precluded procreation or endangered the other spouse. Couples who sought to divorce had to publicize their intentions, to petition a court, to show adequate cause or fault, to make provision for the dependent spouse and children. Criminal laws outlawed fornication, adultery, sodomy, polygamy, contraception, abortion, and other perceived sexual offenses. Tort laws held third parties liable for seduction, enticement, loss of consortium, or alienation of the affections of one's spouse. Churches and other religious communities were given roles to play in the formation, maintenance, and dissolution of marriage, and in the physical, educational, and moral nurture of children.

Today, by contrast, a private contractual view of sex, marriage, and family life has come to dominate the West, with little constructive role left to play for parents or peers, religious or political authorities. Marriage is now generally treated as a private bilateral contract to be formed, maintained, and dissolved as the couple sees fit. Prenuptial, marital, and separation contracts that allow parties to define their own rights and duties within the marital estate and thereafter have gained increasing acceptance. Implied marital contracts are imputed to longstanding lovers in some states, supporting claims for maintenance and support during and after the relationship. Surrogacy contracts are executed for the rental of wombs. Medical contracts are executed for the introduction of embryos or the abortion of fetuses. Requirements of parental consent and witnesses to the formation of all these contracts have all largely disappeared. No-fault divorce statutes have reduced the divorce proceeding to an expensive formality, and largely obliterated the complex procedural and substantive distinctions between annulment and divorce. Payments of alimony and other forms of post-marital support to dependent spouses and children are giving way to lump sum property exchanges providing a clean break for parties to remarry. Court-supervised property settlements between divorcing spouses are giving way to privately negotiated or mediated settlements, confirmed with little scrutiny by courts. The functional distinctions between the rights of the married and the unmarried couple and the straight and the gay partnership have been considerably narrowed by an



array of new statutes and constitutional cases. Marriages, civil unions, and domestic partnerships have become veritable legal equivalents in many states. The roles of the church, state, and broader community in marriage formation, maintenance, and dissolution have been gradually truncated in deference to the constitutional principles of sexual autonomy, laïcité, or church-state separation.

These exponential legal changes in the past half century have, in part, been efforts to bring greater equality and equity within marriage and society and to stamp out some of the patriarchy, paternalism, and plain prudishness of the past. These legal changes are also, in part, simple reflections of the exponential changes that have occurred in the culture and condition of Western families—the stunning advances in reproductive and medical technology, the exposure to vastly different perceptions of sexuality and kinship born of globalization, the explosion of international and domestic norms of human rights, the implosion of the traditional nuclear family born of new economic and professional demands on wives, husbands, and children. But, more fundamentally, these legal changes represent the rise of a new theory of private ordering of the domestic sphere and the growth of a new “democracy of desire.” A fantastic range of literature—jurisprudential, theological, ethical, political, economic, sociological, anthropological, and psychological—has emerged in the past four decades vigorously describing, defending, or decrying these legal changes.

MUSLIM RESPONSES AND ARGUMENTS FOR ACCOMMODATION

Many Muslims living in the West decry these massive changes to prevailing state laws of sex, marriage, and family—and they want out. Some Muslims have just gone back to their Muslim-majority homelands shaking their heads in dismay of what Western libertinism has wrought. Others have stayed put and just quietly ignored the state’s marriage, and family law, using the shelter of constitutional laws of privacy and sexual autonomy to become, in effect, a law unto themselves. Others have developed elaborate premarital contracts that seek to exempt Muslim couples from much of the state law in favor of the internal norms and practices of their religious communities. Still others have led bi-cultural lives, dividing their time between Western homes and Muslim-majority lands that allow them to form Muslim marriages and families, including those that license polygamy, patriarchy, and primogeniture.

All of these informal methods of cultural and legal coexistence, however, can only be temporary expedients. Not only do some of these arrangements put in jeopardy many of the state’s rights and privileges for spouses and children that depend on a validly contracted marriage. But these creaky accommodations and concessions that now exist in various Western lands can easily fall apart. Eventually a Muslim citizen will appeal to the state for relief from a marriage contract, religious family practice, or worship community that he or she cannot abide but cannot escape. Eventually an imam or (shadow) Shari’a court will overstep by using force or issuing a fatwa that draws the ire of the media and the scrutiny of state courts. Eventually,



an aggressive state case worker or prosecutor will move upon a Muslim household, bringing charges of coerced or polygamous marriage. Eventually, a Muslim school or charity will find itself in court faced with a suit for gender discrimination or with child abuse owing to its practice of corporal punishment and single-sex education. Eventually, another major media event like that surrounding the Ontario Shari'a court of 2005 or the Rowan Williams "unavoidable accommodation" comment of 2008 will bring a bright spotlight back on Western Muslim communities. And, once such a major case or controversy breaks and the international media gets involved, many of these informal and temporary arrangements might well unravel—particularly given the cultural backlash against Muslims prompted by 9/11, 7/7, Fort Hood, or the bloody and unpopular wars against Islamicist extremists in Iraq, Afghanistan, and beyond.

It is precisely this vulnerability that advocates of faith-based family law and Shari'a courts want to avert. They want to put Shari'a, and its voluntary use by Muslim faithful, on firmer constitutional and cultural ground in the West. Rather than denouncing Western liberalism, however—and the sexual, moral, and marital lassitude it has occasioned—sophisticated advocates now press their case for Shari'a in and on the very terms of Western constitutionalism and political liberalism.

Part of the case for Shari'a is an argument for religious freedom. Both Western constitutional laws and international human rights norms give robust protection to the religious freedom of individuals and groups. Why should peaceable Muslim citizens not be given freedom to opt out of state laws on sex, marriage and family that run afoul of their core claims of conscience and central commandments of their faith? Why should they not have the freedom to choose to exercise their domestic lives in accordance with the norms of their own voluntary religious communities? Why doesn't freedom of religion provide a sincere Muslim with protection against a unilateral divorce action or a child custody order by a state court that directly contradicts the rules of Shari'a? Why doesn't freedom of religious exercise empower a pious Muslim man to take four wives into his loving permanent care in imitation of the Prophet, particularly when his secular counterpart can consort and cavort freely with four women at once and then walk out scot free?

And, in turn, why shouldn't Muslim religious authorities enjoy the autonomy and freedom to apply their own internal laws and procedures for guiding and governing the private domestic lives of their voluntary faithful? Religious groups in the West have long enjoyed corporate free exercise rights to legal personality, corporate property, collective worship, organized charity, parochial education, freedom of press, and more. Why can't Muslim religious groups also get the right to govern the marriage and family lives of their voluntary members—particularly when such domestic activities have such profound religious and moral dimensions for a Muslim's life and identity? Moreover, in America, many states now have options of contract versus covenant marriage, straight versus gay marriage, traditional marriage versus civil

unions or domestic partnerships. These are all off-the-rack models of marriage and intimate union that the state holds out for parties to choose. Why can't Muslims and other religious parties choose their own religious marriage system as well?

Part of the case for Shari'a is an argument for religious equality and non-discrimination. After all, many Western Christians do have religious tribunals to govern their internal affairs, including some of the family matters of their faithful, and state courts will respect their judgments even if their cases are appealed to Rome or Canterbury, Moscow or Constantinople. No one is talking of abolishing these church courts, or trimming their power, even after recent discoveries of grave financial abuses and cover-ups of clerical sexual abuse of children in some churches. No one seems to think these Christian tribunals are illegitimate when some of them discriminate against women in decisions about ordination and church leadership. Similarly, Jews are given wide authority to operate their own Jewish law courts to arbitrate marital, financial, and other disputes among the Orthodox Jewish faithful. Indeed, in New York State by statute, and in several European nations by custom, courts will not issue a civil divorce to a Jewish couple unless and until the *beth din* issues a religious divorce, even though Jewish law systematically discriminates against the wife's right to divorce. And again, Amish, Mennonites, Hutterites, and other ascetic religious minorities have been exempted from compliance with general laws concerning education, child labor, workplace and employment relations and more, and have had their laws of excommunication and banishment upheld by the courts. If Christians can have their canon laws and consistory courts, if Jews can have their Halacha and *beth din*, and if even indigenous peoples can have their ancestral laws and tribal rulers, why can't Muslims be treated equally in their use of Shari'a and Islamic courts?

And part of the case for Shari'a is an argument from political liberalism. One of the most basic teachings of classic liberalism is that marriage is a pre-political and pre-legal institution. It comes before the state and its positive laws, both in historical development and in ontological priority. As John Locke put it famously in *Two Treatises on Government* (1689), the marital contract was "the first contract" and "the first society" to be formed as men and women came forth from the state of nature. The broader social contract came later, presupposing stable marital contracts. And contracts to form state governments, churches, and other voluntary associations within this broader society came later still.⁵ Why, on this simple contractarian logic, should the state get exclusive jurisdiction over marriage? After all, it was sixteenth-century Protestants, not eighteenth-century Enlightenment philosophers, who first vested the state with marital jurisdiction. Why is state jurisdiction over marriage mandatory, or even necessary? Before the sixteenth-century Protestant Reformation—and in many Catholic lands well after the Reformation, too—the Catholic canon law and

⁵ John Locke, *Two Treatises of Government* [1689], ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), II:77-83.



Catholic church courts governed marriage. Moreover, even in Protestant England until the nineteenth century, the state delegated to ecclesiastical courts the power to treat many marriage and family questions. There is evidently nothing inherent in the structure of Western marriage and family law that requires that it be administered by the state. And there is nothing ineluctable in liberalism's contractarian logic that requires marital couples to choose the state rather than their own families or their own religious communities to govern their domestic lives—particularly when the state's liberal rules diverge so widely from their own beliefs and practices. On this latter argument, conservative Muslims sometimes join hands with selected conservative Christians and critical liberals who call for exemption from, or the abolition of, state marriage law—conservative Christians because the state has betrayed traditional Christian teachings on marriage, critical liberals because the state is encroaching on individual privacy and sexual autonomy.

THE LIMITS AND LESSONS OF ACCOMMODATION

The problem with the pro-Shari'a argument from religious freedom is that it falsely assumes that claims of conscience and freedom of religious exercise must always trump. But this is hardly the case in modern democracies, even though religious freedom is cherished. Even the most sincere and zealous conscientious objectors must pay their taxes, register their properties, answer their subpoenas, obey their court orders, swear their oaths (or otherwise prove their veracity), answer their military conscriptions (even if by non-combat duty), and abide by many other general laws for the common good that they may not in good conscience wish to abide. Their eventual choice if they persist in their claims of conscience is to leave the country or go to prison for contempt. Even the most devout religious believer has no claim to exemptions from criminal laws against activities like polygamy, child marriage, female genital mutilation, or corporal discipline of wives, even if their particular brand of Shari'a commands it or if their particular religious community commends it. The guarantee of religious freedom is not a license to engage in crime.

Muslims who are conscientiously opposed to liberal Western laws of sex, marriage, and family are certainly free to ignore them. They can live chaste private lives in accordance with Shari'a and not register their religious marriages with the state. That choice will be protected by the constitutional rights of privacy and sexual autonomy so long as their conduct is truly consensual. But that choice also leaves their family entirely without the protections, rights, and privileges available through the state's complex laws and regulations of marriage and family, marital property and inheritance, social welfare and more. And if minor children are involved, the state will intervene to ensure their protection, support, and education, and will hear nothing of free exercise objections from their parents or community leaders. Western Muslims enjoy the same religious freedom as everyone else, but some of the special accommodations pressed by some Muslim advocates today in the name of religious



freedom are simply beyond the pale for most Western democracies.

Even further beyond the pale is the notion of granting a religious group sovereignty over the sex, marriage, and family lives of their voluntary faithful. Allowing religious officials to officiate at weddings, testify in divorce cases, assist in the adoption of a child, facilitate the rescue of a distressed family member, and the like are one thing. Most Western democracies readily grant Muslims and other peaceable religious communities those accommodations. Some democracies also will uphold the religious arbitration awards and mediation settlements over discrete domestic issues. But that is a long way from asking the state to delegate to a religious group the full legal power to govern the domestic affairs of their voluntary faithful in accordance with their own religious laws. No democratic state can readily accommodate a competing sovereign to govern such a vital area of life for its citizens—especially since family law is so interwoven with other state public, private, procedural, and penal laws, and especially since so many other rights and duties of citizens turn on a person's marital and familial status. Putting aside the formidable constitutional obstacles to such a delegation of core state power to a private religious body, surely a democratic citizen's status, entitlements, and rights cannot turn on the judgments of a religious authority that has none of the due process and other procedural constraints of a state tribunal. Moreover, the proud claim of Muslim advocates that Shari'a provides a time-tested and comprehensive law governing all aspects of sex, marriage, and family life for the Muslim faithful is, for some, an even stronger strike against its accommodation. Once a state takes the first step down that slippery slope, skeptics argue, there will eventually be little to stop the gradual accretion of a rival religious law over sex, marriage, and family life, particularly as Muslim communities grow larger and more politically powerful. Some Western states thus resist even religious arbitration and mediation of marital disputes by Muslim tribunals.

The pro-Shari'a argument from liberal contractarian logic—since marital contracts are pre-political, coming before the contracts that form the society, the state, or religious associations, marital parties should be free to choose whose laws govern them—is clever but incomplete. It ignores another elementary teaching of classical liberalism, namely, that only the state and no other social or private unit can hold the coercive power of the sword. The government contract does grant this coercive power over individuals but only in exchange for strict guarantees of due process of law, equal protection under the law, and respect for fundamental rights. A comprehensive system of marriage and family law—let alone the many correlative legal systems of inheritance, trusts, family property, children's rights, education, social welfare, and more—cannot long operate without coercive power. It needs police, prosecutors, and prisons; subpoenas, fines, and contempt orders; material, physical, and corporal sanctions. Moral suasion and example, communal approbation and censure can certainly do part of the work. But a properly functioning marriage and family law system requires resort to all these coercive instruments of government.



And only the state, not a religious body, can properly use these instruments in a modern democracy.

The pro-Shari'a argument from religious equality and non-discrimination takes more effort to parry. A useful starting point is the quip of United States Supreme Justice Oliver Wendell Holmes, Jr.: "The life of the law has not been logic but experience."⁶ This adage has bearing on this issue. The current accommodations made to the religious legal systems of Christians, Jews, First Peoples, and others in the West were not born overnight. They came only after decades, even centuries of sometimes hard and cruel experience, with gradual adjustments and accommodations on both sides.

The accommodation of and by Jewish law to Western secular law is particularly instructive. It is discomfiting but essential to remember that Jews were the perennial pariahs of the West for nearly two millennia, consigned at best to second class status, and periodically subject to waves of brutality—whether imposed by Germanic purges, medieval pogroms, early modern massacres, or the twentieth-century Holocaust. Jews have been in perennial diaspora after the destruction of Jerusalem in 70 c.e., living in a wide variety of legal cultures in the West and well beyond. One important legal technique of survival they developed after the third century c.e. was the concept of *dina d'malkhuta dina* ("the law of the community is the law"). This meant that Jews accepted the law of the legitimate and peaceful secular ruler who hosted them as the law of their own Jewish community, to the extent that it did not conflict with core Jewish laws. This technique allowed Jewish communities to sort out which of their own religious laws were indispensable, which more discretionary; which secular laws and practices could be accommodated, which had to be resisted even at the risk of life and limb. This technique not only led to ample innovation and diversity of Jewish law over time and across cultures. It also gave the Jews the ability to survive and grow legally even in the face of ample persecution.

Western democracies, in turn—particularly in the aftermath of the Holocaust and in partial recompense for the horrors it visited on the Jews—have gradually come to accommodate core Jewish laws and practices. But it is only in the past two generations, and only after endless litigation and lobbying in state courts and legislatures, that Western Jews have finally gained legal ground to stand on, and even that ground is still thin and crumbles at the edges at times. Today, Western Jews generally have freedom to receive Sabbath day accommodations, to gain access to kosher food, to don yarmulkes, distinctive grooming, and other forms of religious dress in most public places, to gain zoning, land use, and building charters for their synagogues, charities, and Torah schools, to offer single-sex and bilingual education, and more. And Jewish law courts have gained the right to decide some of the domestic and financial affairs of their faithful who voluntarily elect to arbitrate their disputes before them rather than suing in secular courts. These Jewish law courts are attrac-

⁶ *The Common Law* (Boston: Little Brown, 1881), 1-2.



tive to Jewish disputants because they are staffed by highly trained jurists, conversant with both Jewish and secular law, and sensitive to the bicultural issues that are being negotiated. Unlike their medieval and early modern predecessors, these modern Jewish law courts claim no authority over all of Jewish sex, marriage, and family life, leaving many such issues to the state. These Jewish law courts have also abandoned their traditional authority to impose physical coercion or sanctions on the disputants; in particular, they claim no authority beyond persuasion to stop a disputant from simply walking out of court and out of the Jewish community altogether.

The modern lessons in this story for Shari'a advocates are four. First, it takes time and patience for a secular legal system to adjust to the realities and needs of new religious groups and to make the necessary legal accommodations. The hard-won accommodations that modern Jewish law and culture now enjoy are not fungible commodities that Muslims or any others can claim with a simple argument from equality. They are individualized, equitable adjustments to general laws that each community needs to earn for itself based on its own needs and experiences. Muslims simply do not have the same history of persecution that the Jews have faced in the West, and simply do not yet have a long enough track record of litigation and lobbying. Concessions and accommodations will come, but only with time, persistence, and patience.

Second, it takes flexibility and innovation on the part of the religious community to win accommodations from secular laws and cultures. Not every religious belief can be claimed as central; not every religious practice can be worth dying for. Over time, and of necessity, diaspora Jewish communities learned to distinguish between what was core and what more penumbral, what was essential and what more discretionary to Jewish legal and cultural identity. Over time, and only grudgingly, Western democracies learned to accommodate the core religious beliefs and practices of Jewish communities. Diaspora Muslim communities in the West need to do the same. Islamic laws and cultures have changed dramatically over time and across cultures, and modern day Islam now features immense variety in its legal, religious, and cultural practices. That diversity provides ample opportunity and incentive for Muslim diaspora communities to make the necessary adjustments to Western life, and to sort out what is core and what is more discretionary in their religious lives. Cultural adaptation, not assimilation, is what is needed to win the accommodations of the state.

Third, religious communities, in turn, have to accommodate, or at least tolerate, the core values of their secular host nations if they expect to win concessions for their religious courts and other religious practices. No Western nation will long accommodate, perhaps not even tolerate, a religious community that cannot accept its core values of liberty, equality, and fraternity, or of human rights, democracy, and rule of law. Those who wish to enjoy the freedom and benefits of Western society have to accept its core constitutional and cultural values as well. So far, only a small



and brave band of mostly Western-trained Muslim intellectuals and jurists have called for the full embrace of democracy and human rights in and on Muslim terms. These are highly promising arguments. But so far these arguments can hardly be heard amidst all the loud denunciations of them from sundry traditional Muslims in and beyond the West. Moreover, even liberal Muslims are hard pressed to point to modern examples of a Shari'a-based legal system that maintains core democratic and human rights values. Until that case can be reliably made out, deep suspicion will remain the norm. Western-based Muslims have an ideal opportunity to show that Shari'a and democracy can co-exist and complement each other.

Finally, Muslim tribunals must become more legally sophisticated and procedurally equitable to be both attractive to voluntary Muslim disputants and acceptable to secular state courts. Like the Jewish beth din that sits in New York or London, the Muslim law court needs to be staffed by jurists who are well trained both in religious law and in secular law, and who maintain basic standards of due process and representation akin to those in secular courts or arbitration tribunals. A single imam pronouncing legal judgments in an informal proceeding at the local mosque will get no more deference from a state court than a single priest or rabbi making legal pronouncements in a church or synagogue. And, Western state courts will have little patience with claims that this lack of deference violates the religious liberty of the mosque or its imam and members. The court's suspicions will be the opposite: that the disputing parties who appeared before the imam either did not understand the full legal options available to them at state law, or were coerced to participate in the internal religious procedures. It's much harder for a court to have such suspicions when educated Muslim parties, eyes wide open, choose a legally sophisticated Muslim arbitration tribunal over a secular court that does not share their core values but still offers them a serious jurisprudential option to state marriage law.

Lest the foregoing seem like an unduly patronizing argument for religious minorities to "wait-and-see" or "change-and-hope-for-the-best," it's worth remembering that majority Christians, too, went through much of the same exercise in the area of religion and education. The American story offers a good illustration of how this developed, and how common educational standards were eventually raised and maintained. In the later nineteenth century, a number of American states wanted a monopoly on education in public (that is, state run) schools. Some of this agitation was driven by anti-Catholicism, some by anti-religious animus altogether. For half a century, churches, schools, and religious parents struggled earnestly to protect their rights to educate their children in their own private religious schools. In the landmark case of *Pierce v. Society of Sisters* (1925),⁷ the United States Supreme Court finally held for the churches and ordered American states to maintain parallel public and private education options for their citizens. But in a long series of cases thereafter, courts also made clear that states could set basic educational requirements for all

⁷ 268 US 510 (1925).



schools—mandatory courses, texts and tests, minimal standards for teachers, students and facilities, common requirements for laboratories, libraries, gymnasias and the like. Religious schools could add to the state's minimum requirements, but they could not subtract from them. Religious schools that sought exemptions from these requirements found little sympathy from the courts, which instructed the schools either to meet the standards or lose their accreditation and licenses to teach.

This compromise on religion and education, forged painfully over more than half a century of wrangling, has some bearing on questions of religion and marriage. Marriage, like education, is not a state monopoly, even if marriage law must be a state prerogative. Religious parties in the West have long had the right to marry in a religious sanctuary, following their religious community's preferred wedding liturgy. Religious officials have long had the right to participate in the weddings, annulments, divorces, and custody battles of their voluntary members. But the state has also long set the threshold requirements of what marriage is and who may participate. Religious officials may add to these threshold state law requirements on marriage but not subtract from them. A minister may insist on premarital counseling before a wedding, even if the state will marry a couple without it. But if a minister bullies a minor to marry out of religious duty, the state could throw him in jail. A rabbi may encourage a bickering couple to repent and reconcile, but he cannot prevent them from filing for divorce. An imam may preach of the beauties of polygamy, but if he knowingly presides over a polygamous union, he is an accessory to crime.

If religious tribunals do eventually get more involved in marriage and family law, states might well build on these precedents and set threshold requirements in the form of a license—formulating these license rules through a democratic process in which all parties of every faith and non-faith participate. Among the most important license rules to consider: No child or polygamous marriages or other forms of marital union not recognized by the state. No compelled marriages or coerced conversions before weddings that violate elementary freedoms of contract and conscience. No threats or violations of life and limb, or provocations of the same. No blatant discrimination against women or children. No violation of basic rules of procedural fairness, and more. Religious tribunals may add to these requirements but not subtract from them. Those who fail to conform will lose their licenses and will find little sympathy when they raise religious liberty objections.

This type of arrangement worked well to resolve some of the nation's hardest questions of religion and education. And it led many religious schools slowly to transform themselves from sectarian isolationists into cultural leaders. Muslims in the West have already begun some of this exercise, too, in the development of grade and high schools, which are now sometimes attractive to non-Muslims because of their discipline and high academic standards. This should continue, and eventually give rise to major colleges and universities on the order of Notre Dame, Brigham Young, Wheaton, or Pepperdine.



A similar arrangement holds comparable promise for questions of religion and marriage in Muslims diaspora communities. It not only prevents the descent to licensed polygamy, barbaric procedures, and brutal violence that the Archbishop's critics feared. It also encourages today's religious tribunals to reform themselves and the marital laws that they offer. Even hardened and prejudiced local communities in democratic lands eventually will find room for new Muslim minorities who are skilled at "cultural navigation" and who are both consistent and persistent in pressing their main case for accommodation. And, in the process of adjusting to the legal and cultural realities of their new homes, Muslim religious minorities may eventually become legal and cultural leaders in succeeding generations of the West.





RELIGIOUS LIBERTY, WESTERN FOUNDATIONS, INTERNATIONAL DIMENSIONS

DAVID LITTLE

Religious liberty as currently understood is the condition in which individuals or groups are permitted without restraint to assent to and, within limits, to express and act upon religious convictions and identity free of coercive interference or penalty imposed by outsiders, including the state. So conceived, the topic is an explosive one, both historically and at present. Severe theoretical disputes surround it, and have for a long time. Why do religious convictions and identity deserve special protection? Where, exactly, do we draw the line between religious and other sorts of conviction and identity? What are the limits of proper expression and practice, and what constitutes “coercive interference” or penalty as imposed by the state or others?¹

In addition, violations of religious liberty have, throughout history, “brought, directly or indirectly, wars and great suffering to mankind,” in the words of the 1981 *UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*. Though examples involve more than just religious oppression, the inquisition and the religious wars of post-medieval Europe, together with the practices of Western colonialists and the Ottomans, especially in the Armenian case, as well as of fascists, state socialists, and ultranationalists in the twentieth century and after, all illustrate the fearsome effects of punishing and degrading individuals or groups because of their religious convictions and identity.

In fact, just because of such baleful circumstances, the human rights system, adopted as a consequence of fascist malefactions in the middle of the last century, includes elaborate provisions for the protection of religious liberty. Since these provisions, as expressed in the relevant documents, especially the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) and the *Declaration on the Elimination of Intolerance and Discrimination*, are considered binding by fully three-fourths of the nations of the world, they constitute the appropriate starting point for a contemporary approach to religious liberty.

Accordingly, the first task of this chapter is to exposit the prevailing human rights provisions in the light of relevant jurisprudence, particularly the “general comments” of the United Nations Human Rights Committee, which is authorized

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to interpret the ICCPR. We may do that by identifying salient features and highlighting important points of controversy. The second task is to excavate the historical background, mainly in the West, out of which the human rights understanding has emerged. The objective in both cases is mainly descriptive. The elucidation of existing standards, as well as the explanation of where they came from, leaves open, for the most part, the subject of how the standards ought to be construed and implemented, though it is not always possible to abstain completely from suggesting preferences.

HUMAN RIGHTS UNDERSTANDING OF RELIGIOUS LIBERTY²

Context and Exposition. The whole edifice of human rights standards is based on the imperative to protect individuals against collective domination and the license for arbitrary abuse thereby entailed. Such was the basic lesson after World War II of the effects of fascist pathology, whose root is the absolute subjection of the individual to the will of the state. As Hitler put it, National Socialism gives priority neither to the individual nor humanity, but to protecting *das Volk*, “even at the expense of the individual.”³ Revulsion against such views gave rise to the human rights revolution, and to what Mary Ann Glendon, in her book on the subject, calls “A World Made New.”⁴

At the heart of fascist ideology was the impulse to prevent by all means necessary any dissent or independence in matters of religious conviction and identity. Together with their notorious policies of liquidating millions of Jews and “undesirable” religious minorities, like the Jehovah’s Witnesses, the Nazis harassed Catholics, curtailing and suppressing most of their practices, and eventually came to dominate the Protestant Church by means of “terroristic methods.”⁵ In particular, fascism, especially in its German and Japanese versions, constituted a direct, comprehensive, and systematic assault on the four categories of the right to religious liberty that were subsequently guaranteed in the documents, and that were explicitly formulated against the background of fascist offenses.

1. *“Everyone shall have the right to freedom of thought, conscience and religion. The right shall include freedom to have or to adopt a religion or belief of his choice.... No one shall be subject to coercion which would impair his freedom to have or to adopt a religion*

² This section is drawn from my “Culture, Religion, and National Identity in a Post-Modern World,” in *Anuario del Derecho Eclesiástico del Estado* 22 (2006): 19-35, and “Religion, Human Rights, and Secularism: Preliminary Clarifications and Some Islamic, Jewish, and Christian Responses” in *Humanity Before God: Contemporary Faces of Jewish, Christian, and Islamic Ethics*, ed. William Schweiker, Michael A. Johnson, and Kevin Jung (Minneapolis: Wm. B. Eerdmans Publishing, 2006), 256-85.

³ Cited in Alan Bullock, *Hitler* (New York: Harper and Row, 1962), 401.

⁴ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

⁵ Arcot Krishnaswami, “Study of Discrimination in the Matter of Religious Rights and Practices,” in *Religion and Human Rights: Basic Documents*, ed. Tad Stahnke and J. Paul Martin (New York: Center for the Study of Human Rights, Columbia University, 1998), 10.

*or belief of his choice.*⁶ This is a liberty right. It does not allow “any limitation whatsoever” in regard to harboring thoughts of any kind or choosing and holding beliefs, either religious or not, that have the same fundamental or “conscientious” status that a religious belief has for a believer. This conclusion may be inferred from the fact that the right to freedom of thought, conscience, and religion “protects theistic, nontheistic and atheistic beliefs,” as well as “the right not to profess any religion or belief.” Furthermore, fundamental or conscientious beliefs, as distinct from other thoughts and beliefs, appear to be privileged in a special way. They may serve as the basis for legal exemptions, as, for example, in the case of conscientious objection to military service. Accordingly, human rights law may be said to be especially deferent to conscientious belief.⁷

Also guaranteed is the freedom, “either individually or in community with others and in public and private, to manifest ... religion or belief in worship, observance, practice and teaching.” “The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head covering,” among other practices. The only allowable limitations are those that governments may impose on manifesting, or overtly expressing or acting on, a religion or belief, for the purpose of protecting “public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁸

At the same time, the burden of proof clearly rests with the government in regard to such actions. For one thing, what constitutes a “manifestation” of religion or belief should be left primarily to believers, and not to the state. For another, the government must show that any limitation on the manifestation of conscientious belief is both “necessary” and “proportionate”; that is, the limitation must be designed and administered so as to impose the least restrictive burden consistent with protecting a truly compelling state interest. It should be noted that limitations on the freedom of religion or belief are *not* permitted for unspecified considerations, such as national security.⁹ Since fascists justified the abridgement of any and all rights on grounds of national security, this is an important exclusion.

2. “No one shall be subject to discrimination by any State, group of persons or person on the grounds of religion or other beliefs.”¹⁰ This is an equality right, which also

⁶ *International Covenant of Civil and Political Rights*, art. 18, pars. 1 and 2 [hereafter ICCPR]. For similar wording, cf. *Declaration on the Elimination of Intolerance and Discrimination*, art. 1, par. 1 (hereafter DEID).

⁷ *Ibid.* and United Nations Human Rights Committee General Comment No. 22 (48) (Article 18), par. 2, 11 in *Religion and Human Rights: Basic Documents*, 92, 94 [hereafter UNRC General Comment No. 22]. See further See David Little, “Studying ‘Religious Human Rights’: Methodological Considerations,” in *Religious Human Rights in Global Perspective: Legal Perspectives*, eds. Johan D. van der Vyver and John Witte, Jr. (The Hague: Martinus Nijhoff Publishers, 1996), 50-52, including n. 12.

⁸ ICCPR, Article 18, par. 1, 3; cf. DEID, art. 1, par. 3; UNHRC General Comment No. 22, par. 4, p. 92.

⁹ Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief*, E/CN.4/2006/5 (9 January 2006), par. 41, p. 13; UNHRC General Comment No. 22, par. 8, p. 93.

¹⁰ DEID, art. 2, par. 1.



includes provisions against “intolerance based on religion or belief.” Discrimination has a clear legal meaning in the documents, namely, “any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.” While intolerance is sometimes equated with discrimination in certain sections of the documents, elsewhere it is not, leaving the concept open to interpretation.¹¹

According to the right against intolerance and discrimination, a state or official religion is not ruled out as such; nevertheless, its existence may not be used as a basis for “any discrimination against adherents of other religions or non-believers.” For example, any “measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths” are prohibited. Moreover, this right is broadly inclusive and not limited to protecting “traditional” or majority religions. It prohibits discrimination against “any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that are the subject of hostility by a predominant religious community.”¹²

3. “Persons belonging to [ethnic, religious or linguistic] minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, and to use their own language.”¹³ Authoritative interpretation of this right by the Human Rights Committee has gone some way toward overcoming the weakening of this provision that took place at the time of the drafting of the UDHR, mainly at the urging of representatives of the United States, Canada, and Australia, who were concerned to reduce the scope of cultural autonomy for minorities in favor of a policy of assimilation. The recent pronouncements by the Committee suggesting that in the interest of “correcting conditions which prevent or impair the enjoyment” of minority rights, “positive measures by States may ... be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion...” recall more robust formulations of the right of minority protection that were rejected at the time of drafting.¹⁴ It is also worth mentioning that in the 1990s the UN has produced a number of documents aimed at substantially expanding minority protection, such as the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1993) and the *Draft Declaration*

¹¹ DEID, art. 2, par. 2, art. 4, par. 2. Cf. ICCPR, arts. 2 and 27; and *Universal Declaration of Human Rights*, arts. 2 and 7 [hereafter UDHR]. See David Little, “Rethinking Religious Tolerance: A Human Rights Approach,” in David Little and David Chidester, *Religion and Human Rights: Toward An Understanding of Tolerance and Reconciliation* (Emory Humanities Lectures, No. 3, 2000-01), 9ff.

¹² UNHRC General Comment No. 22, par. 9, p. 94; *ibid.* par. 2, p. 92.

¹³ ICCPR, art. 27; cf. UDHR, art. 27, par. 1.

¹⁴ See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, University of Pennsylvania Press, 1999), 269-80; Stahnke and Martin, *Religion and Human Rights: Basic Documents*, par. 6.2., p. 99; Morsink, *The Universal Declaration of Human Rights*, esp. 272-274.

on the *Rights of Indigenous Peoples* (1994).

4. *The right against “religious ... hatred that incites to discrimination, hostility or violence.”*¹⁵ Considerable perplexity surrounds this right. Against the background of fascist practice, it makes good sense to “prohibit by law” actions aimed at and capable of producing discrimination and violence against religious and other groups and individuals. There is no lack of vivid examples of impermissible behavior from the Nazi time. Moreover, bringing about discrimination (as defined above under right #2) is by now indisputably a violation of human rights, as is inciting violence (except as an expression of “the sovereign right of self-defense or the right of peoples to self-determination”¹⁶).

On the other hand, it is particularly difficult, for legal purposes, to specify the meaning of “religious hatred” and “hostility,” as referred to in the provision. Hatred and hostility, which are largely matters of attitude and emotion, are notoriously hard to police, and, because of that, invite conflicts with the rights of free speech and expression, as was already clear from the debates surrounding the drafting of this provision. It is predictable that this right, however indispensable, will continue to generate considerable debate around the edges.¹⁷

Controversial Points of Interpretation. Among the States Parties to the 1966 ICCPR, there are, currently, two highly sensitive examples of disagreement concerning the interpretation of religious liberty rights. One concerns minority protection, which touches on the first three rights, and the other is hate speech, which touches, of course, on the fourth right, but also on the first two.

The French law banning the wearing of Muslim headscarves and other visible religious symbols in state schools was adopted by Parliament in March 2004, and upheld by the European Court of Human Rights in June, as a measure believed to be necessary for several reasons. Lawmakers contended that displaying religious attire or symbols in public schools violates the principle of *laïcité*, or the idea of the French secular state, according to which public life, in the interest of separating church and state, must be shielded from “conspicuous” forms of religious expression. In addition, supporters argued that the law upholds public order and the human rights of children, and thus constitutes a legitimate limitation on the right to free exercise. The law at once guards the state against the threat of Islamic fundamentalism, and protects Muslim girls against undue family or community coercion regarding their attire.

In opposition, human rights groups and others have vigorously challenged the law as a violation of the right to manifest religion or belief free of coercion. They argue that the government fails to prove that there exists a state interest compelling

¹⁵ ICCPR, art. 20, par. 1. Cf. UDHR, art. 7.

¹⁶ Stahnke and Martin, eds., *Religion and Human Rights: Basic Documents*, par. 2, p. 96.

¹⁷ Morsink, *The Universal Declaration of Human Rights*, 69-72; Natan Lerner, *Religion, Beliefs, and International Human Rights* (Maryknoll, NY: Orbis Books, 2000), ch. 3; David Little, “Rethinking Religious Tolerance.”



enough to override the strong presumption in favor of the freedom to manifest one's religion or belief in public, including "the wearing of distinctive clothing or head covering." Moreover, the government, it is claimed, has not given adequate evidence that Muslim girls are, in large numbers, being compelled against their will to wear head coverings. Opponents also describe the law as discriminatory, and, by implication, to be a violation of the right of minorities "to profess and practice their own religion," since the impact of the law, however neutrally phrased, "will fall disproportionately on Muslim girls," and leave them no choice but to bear the extra financial burden of attending private school. In partial support of the opposition, a recent report of the UN Special Rapporteur for Freedom of Religion or Belief cites with approval concerns that the law banning religious symbols in public schools "may neglect the principle of the best interests of the child and the right of the child to access to education." It also supports a proposal that the French government consider "alternative means" to law, such as mediation and student participation in policy making, as a way of balancing state interests with the rights of children to religious liberty.¹⁸

A landmark decision in 1990 by the United States Supreme Court, *Employment Division, Department of Human Resources of Oregon v. Smith*, represents a second example of conflicting interpretation over minority protection in the light of a human rights understanding of religious liberty. The Court denied unemployment compensation to two members of the Native American Church, who had been fired from their jobs with a private drug rehabilitation center because they ingested peyote for sacramental purposes in a religious ceremony. Under the religious free exercise clause of the First Amendment to the U.S. Constitution, the defendants claimed a right of exemption from a state law that criminalized all use of controlled substances, including peyote, except if prescribed by a physician. The Court majority argued that there is absolutely no constitutionally required protection from generally applicable laws. Whatever religious exemptions are allowed must be left to state legislatures, who are fully entitled to ignore and override any conscientiously-held beliefs of citizens, so long as the laws passed do not specifically single out one individual or group for discriminatory treatment. There is an admission that failing to give constitutional protection to "religious practices that are not widely engaged in"—namely, by minority religions like the Native American Church—"will place them at a relative disadvantage." Nevertheless, that is an "unavoidable consequence," since otherwise "anarchy" would result from a system where "each conscience is a law unto itself or in which judges weigh the social impact of all laws against the centrality of all religious beliefs."¹⁹

¹⁸ For example, Human Rights Watch, "France: Headscarf Ban Violates Religious Freedom. By Disproportionately Affecting Muslim Girls, Proposed Law is Discriminatory" http://hrw.org/english/docs/2004/02/26/france7666_txt.htm; see further pages 2-3 above and Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief*, E/CN.4/2006/5 (9 January 2006), par. 46, p. 14.

¹⁹ 494 U.S. 872, 881, 888-890 (1990) (rehearing denied 496 U.S. 913 (1990))



A storm of protest from religious groups, as well as from other non-governmental organizations and civil libertarians, arose over the *Smith* decision. Opposition forces gathered momentum and eventually coalesced around the Religious Freedom Restoration Act (RFRA), passed by Congress in 1993. The act declared that the government “may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person, (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” The act held until 1997 when the Court partially overturned it in *City of Boerne v. Flores* for exceeding Congress’s authority by trying to tell the Court how to rule on religious freedom issues. Still, widespread disagreement with *Smith* continues to exist, and there is some indication the Court may be moving away from it.²⁰

The dissenters in the *Smith* case took strong exception to the majority arguments. They held that the two-fold test of RFRA—determining the least restrictive means in support of a compelling state interest—epitomizes “the First Amendment’s command that religious liberty is an independent liberty, and that it occupies a preferred position,” and that it is the responsibility of the Court “to strike sensible balances between religious liberty and a compelling state interest.” The dissenters also added that were the protection of religious liberty rights left to the legislative process, that would contradict the clear purpose of the First Amendment, which is “precisely to protect the rights of those whose religious practices are not shared by the majority, and may be viewed with hostility.” They concluded: “The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah’s Witnesses or the Amish,” and, it might be added, the Native American Church.²¹

Hate speech laws are another highly sensitive subject of controversy bearing on the interpretation of a human rights understanding of religious liberty. Restricting hate speech is directly addressed by the fourth religious liberty right, though the subject also prompts conflicting opinions concerning the ranking of the rights to liberty and equality of religion or belief (rights #1 and #2). Countries like South Africa, Canada, Hungary, the Netherlands, Germany, Austria, France, and the United Kingdom, to mention a few, have all adopted laws against utterances or publications that slander, insult, or threaten a group of persons on the basis of their nationality, color, race, or religion. Such laws have generally been upheld by the European Court of Human Rights so long as they are necessary to protect a democratic society and are proportionate to the threat. By contrast, the United States, while experimenting in its history with hate speech laws, including campus speech codes, has eventually tended to turn away from them, thereby creating considerable tension between the

²⁰ *Religious Freedom Restoration Act*, U.S. Code 42 (1993) § 2000bb-1; Garrett Epps, *To An Unknown God: Religious Freedom on Trial* (New York: St. Martin’s Press, 2001), 239-40.

²¹ 494 U.S. 904-913.



U.S. and the Europeans and others over the meaning of religious liberty in this matter.

One vexing problem as between the two sides focuses, as mentioned, on the difficulty of specifying for purposes of legal enforcement the meaning of “religious hatred” and “hostility,” including the link between them, implied in article 20.2 of the ICCPR. Generally speaking, both sides agree that it is permissible to prohibit the expression of religious and other forms of hatred that constitute incitement to discrimination or violence. But proponents of hate speech laws argue that, however delicate the task, failing to place legal restrictions on the free exchange of religious beliefs and attitudes has the effect of undermining equal protection. To subject individuals or groups to spoken, written, or symbolic expressions of religious hatred that insult them, “whether by suggesting they are inferior in some respect or by indicating that they are despised or not welcome for any other reason,” is to discriminate against them, and is, in effect, to violate the religious right to equality.²²

For their part, opponents object that expanding the regulations on free expression in the name of equality produces an ominous and potentially unlimited threat to the rights of free expression and tolerance, a threat that may well, in fact, double back and undermine equality. That happens when, repeatedly, the very minorities who are presumably protected against the incitement of hostility are themselves held liable under such laws for employing abusive language. These problems are caused, as the opponents see it, because of the insuperable difficulty of framing coherent, consistent, and reliable laws capable of governing attitudes or communications that are disconnected from an explicit act of inciting discrimination or violence.

RELIGIOUS LIBERTY IN THE WESTERN TRADITION

The Enlightenment Setting. The prevailing view that human rights language, and in particular the emphasis on “freedom of conscience, religion or belief,” is a simple product of the Western Enlightenment, is at best a half-truth. For one thing, such a conclusion overlooks the historical context in which the human rights instruments were adopted. The fascist experiment of the last century, vivifying as it did the ominous imbalance in modern life between the technology of force and the institutions of restraint, was global in character, enveloping not just Europe and environs, but also the Far East. The worldwide catastrophe caused by the doctrine of collective domination gave urgent impetus everywhere to the cause of individual protection, starting with personal conviction and identity, no matter which country or culture was involved.

That common experience helps explain the universal resonance of human rights ideas, despite the strong traces of culture-specific language, as well as why human

²² Eric Neisser, “Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence,” *South African Journal on Human Rights* 10, no. 3 (1994): 337.



rights documents were, in fact, open both to significant intercultural influence, and to continuing efforts to anchor the documents in a variety of cultural settings.²³ Beyond that, and just as consequential, the Western cultural roots of a human rights understanding of religious liberty (as well as other of other provisions), go back well before the Enlightenment, and can only adequately be understood when looked at against a broader tradition.

To be sure, there is clear evidence in Enlightenment literature of the crucial conjunction between the idea of a “subjective right”—the existence of a sovereign sphere of individual authority protected from coercive interference—and religious liberty. The contributions of English and American Enlightenment figures, like John Locke, Thomas Jefferson, and James Madison are unmistakable, even though here and there, particularly in Locke’s case, there is some ambiguity in their writings on religious liberty.

Representatives of the French Enlightenment, like Pierre Bayle and Jean-Jacques Rousseau, were also proponents in their own way of religious liberty, even though, among Enlightenment figures, the balance of influence on modern human rights language must go to the Anglo-American tradition. While Bayle, for example, developed a view of the freedom of conscience and the importance of tolerance based on his experience of the persecution of French Huguenots, he was nevertheless deeply fearful of “the great concepts of law, liberty, and the limitations of the king’s sovereignty”²⁴ so central to the development of modern human rights ideas. Similarly, Rousseau’s belief in the omnipotence of the general will threatens to undercut the priority of individual rights.²⁵ Two provisions in the *French Declaration of the Rights of Man and Citizen* of 1789, which bear Rousseau’s stamp, raise deep questions about the compatibility of French conceptions of religious liberty with the individualistic assumptions of human rights language: “3. The source of all sovereignty resides essentially in the nation; no group, no individual may exercise authority not emanating expressly therefrom.” “6. Law is the expression of the general will; all citizens have the right to concur personally, or through their representatives in its formation.”²⁶

Many of Jefferson’s views are consonant with a human rights understanding of religious liberty, as is made clear in his Statute for Religious Freedom passed by the Virginia legislature in 1786. “No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of

²³ See Glendon, “Universality Under Siege,” in *A World Made New*, ch. 12.

²⁴ Walter Rex, *Essays on Pierre Bayle and Religious Controversy* (The Hague: Martinus Nijhoff, 1965), 252.

²⁵ Georg Jellinek, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* (Westport: CN, 1901), 11-12. Jellinek also argues convincingly that the French Declaration of Rights drew much of its language from the state declarations of rights of the American colonies.

²⁶ *The Declaration of the Rights of Man* (approved August 26, 1789), trans. Avalon Project at Yale Law School. <http://www.yale.edu/lawweb/avalon/rightsof.htm> (accessed June 18, 2007).



his religious opinions or belief.” It goes on to state “that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities,” and that “the rights hereby asserted are of the natural rights of mankind.” “It is time enough for the rightful purposes of civil government, for its offices to interfere when principles break out into overt acts against peace and good order.” When magistrates intrude on matters of religion they invariably corrupt both religion -- “by bribing, with a monopoly of worldly honors and emoluments those who will externally profess and conform to it,” and state -- by permitting public officials to abuse their office by making their opinions “the rule of judgment, and approve or condemn the sentiments of others only as they shall square or differ” from that rule.²⁷

The underlying idea is the sovereignty of conscience. “Our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit.” Accordingly, the “legitimate powers of government extend to such acts only as are injurious to others. But it [should do] me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.”²⁸ Uniformly enforced religion is neither necessary nor desirable since human beings share a common moral capacity independent of religious conviction or identity. “Some have made the love of God the foundation of morality.... [But] if we did a good act merely from the love of God and a belief that it is pleasing to him, whence arises the morality of the Atheist[s]?... Their virtue must have some other foundation.” These sentiments should be emphasized, even though Jefferson, in these as in other opinions, was not altogether consistent.²⁹

The doctrine of the sovereignty of conscience, so central to Jefferson’s thinking, is forcefully supplemented in the writings of James Madison. In his famous Memorial and Remonstrance, published in 1785 in defense of Jefferson’s proposed Statute for Religious Freedom, Madison puts the doctrine with unforgettable clarity: “Man’s duty to his Creator is precedent both in order of time and degree of obligation to the claims of civil society.” Moreover, in the subsequent debates in 1789 over the proposed Bill of Rights, Madison’s suggested draft of the First Amendment included the following wording: “...nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed....” He even went so far as to propose additional wording to what became the Second Amendment in favor of an exemption from

²⁷ “An Act for Establishing Religious Freedom,” in *The Life and Selected Writings of Thomas Jefferson*, eds. Adrienne Koch and William Peden (New York: Modern Library, 1944), 312-13.

²⁸ Thomas Jefferson, “Notes on Virginia,” in *The Life and Selected Writings of Thomas Jefferson*, 275.

²⁹ “Jefferson to Thomas Law, June 13, 1814,” in *The Life and Selected Writings of Thomas Jefferson*, 637; see David Little, “Religion and Civil Virtue in America,” in *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History*, ed. Merrill D. Peterson and Robert C. Vaughan (New York: Cambridge University Press, 1988), 238-241.



military service for “religiously scrupulous” persons.³⁰

In most respects, John Locke is the major proximate inspiration for Jefferson and Madison’s views on religious liberty. The most important similarity, of course, is the belief, as Locke put it, “that liberty of conscience is every man’s natural right, equally belonging to dissenters as to themselves; and that nobody ought to be compelled in matters of religion either by law or force.” There is also the common emphasis on the distinction between what Locke calls “the outward and inward court,” or “the magistrate and conscience,” with the magistrate’s jurisdiction being confined to the “civil interest,” or “bodies and goods” -- namely, “life, liberty, health and indolency of the body” [by which Locke meant, freedom from arbitrarily inflicted pain]; and the possession of outward things, such as money, lands, houses, furniture, and the like.”

Locke’s doctrine of what may be called “the sovereignty of conscience,” according to which, “every man ... has the supreme and absolute authority of judging for himself,” illuminates the position of Jefferson and Madison. “Such is the nature of the understanding that it cannot be compelled to the belief of anything by outward force. Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgment that they have framed of things.... The magistrate’s power extends not to the establishing of any articles of faith or forms of worship by force of his laws. For laws are of no force at all without penalties, and penalties in this case are absolutely impertinent, because they are not proper to convince the mind.”

The key point for Locke, as for Jefferson and Madison, is that “to believe this or that to be true does not depend on our will.” That is why “the business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular man’s goods and person.” It follows that while the magistrate may rightfully punish behavior that violates “the public good” and the rights of others, as, for example, the sacrifice of infants even on grounds of conscience, citizens are not obliged to obey laws “against their consciences,” “concerning things that lie not within the [limits] of the magistrate’s authority (as, for example, that the people, or any party amongst them, should be compelled to embrace a strange religion and join the worship and ceremonies of another church).” The affairs of conscience stand above the affairs of state, except where the dictates of conscience violate a compelling public interest, including the rights of equal freedom.

To be sure, Locke was not totally consistent on these matters. The most striking anomaly in his writings on religious liberty concerns his argument against tolerating atheists. “Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all.” Here Locke forsook his critical distinction between inward belief and

³⁰ Cited in *Conscience in America: A Documentary History of Conscientious Objection in America, 1757-1967*, ed. Lillian Schlissel (New York: E.P. Dutton, 1968), 47.



outward action, and attacked atheists for their beliefs, however they may behave. This conclusion, however at odds with other things Locke said, appears to rest on a divine law conception of ethics, according to which morality necessarily presupposes a belief in a divine law giver.

As regards other groups, like Muslims and Roman Catholics against whom he also preached intolerance, Locke's views are somewhat more understandable. Insofar as they harbor allegiance to a foreign power, whether the Mufti of Constantinople or the Pope in Rome, and thus intend, if able to take power, to incite violence and discrimination against others, they cannot be accommodated. But in those cases, it is the threat of sedition that is the reason for intolerance, not the beliefs themselves. Even here, of course, it fair to wonder whether Locke was sufficiently sensitive to the need for safeguards against unwarranted attribution. Still, except for the atheist, the conscience, religion or belief of everyone is, at least in theory, to be protected against undue coercive interference or penalty.³¹

The Seventeenth-Century Moment. The decisive historical locus of the idea of a right to religious liberty generally consonant with a human rights understanding was not the Enlightenment, however, but mid-seventeenth-century England and America.³² Around the time of the English Civil War (1642-1648), claims for expanding the scope of religious liberty were widely heard. But it was mainly the more radical voices of the period, and, most prominently, that of Roger Williams, by then transplanted to the New World, that definitively filled out the foundations of the modern view. Locke's ideas, and by extension Jefferson and Madison's, derived from Williams and from the supporting figures of the period.³³

Roger Williams was one of the founders in 1635 of the Rhode Island colony, an experiment rightly called "the first commonwealth in modern history to make religious liberty ... a cardinal principle of its corporate existence and to maintain the separation of church and state on these grounds." Williams wound up in Rhode Island in the first place because, with the help of some Indian friends, he escaped there after being officially banished from Massachusetts Bay and condemned to punishment in England.

He affirmed an array of offending beliefs, which eventually provoked his expulsion. One was his challenge to the right of the English monarch to allocate colonial land, a conclusion apparently inferred from his belief in the "natural and civil rights and liberties" of all human beings. Since, according to a presumed "natural right,"

³¹ John Locke, *Letter Concerning Toleration* (New York: Liberal Arts Press, 1955), 17-18, 39, 45-48, 52. See further See David Little, "A Christian Perspective on Human Rights," in *Human Rights in Africa*, eds. Abdul-lahi Ahmed An-Na'im and Francis M. Deng (Washington, DC: Brookings Institution, 1990), esp. 51-56, 71.

³² Brian Tierney, "Religious Rights: An Historical Perspective," in Witte and Van der Vyver, eds., *Religious Human Rights in Global Perspective* (The Hague: Martin Nijhoff Publishers, 1996), 35ff.

³³ See Edwin S. Gaustad, *Sworn on the Altar of God: A Religious Biography of Thomas Jefferson* (Grand Rapids, MI: Wm. B. Eerdmans Publishing, 1996), 72; David Little, "Roger Williams and the Separation of Church and State," in *Religion and the State*, ed. James E. Wood, Jr. (Waco, TX: Baylor University Press 1985), 7ff.



Native Americans, and not the king, are the true owners of the lands of the new world, it is from the natives alone that land must be acquired. Another was his claim that the English flag should be shorn of the prominent red cross at its center because, as a religious symbol, its presence serves to confuse civil and spiritual spheres. Related to that was his opposition to public oaths, particularly when imposed on unbelievers, together with his belief in a very stringent restriction of the jurisdiction state to the “bodies and goods” of human beings, namely, to their “outward state,” and *not* to their spiritual affairs.

These and other highly controversial views all touched on Williams’s radical commitment to the right of “soul liberty,” as he called it. His position was simply an elaboration and reinterpretation of a distinction in the Christian tradition between the internal forum and external forum, or conscience and civil authority, which are parallel in some ways, if differently administered and enforced. The one is governed by the “law of the spirit,” and the other by the “law of the sword.”

There are, in Williams’s mind, several grounds on which to draw this distinction. One is clearly religious. He spent considerable time interpreting Christian scripture, and particularly the image and impact of Jesus, to prove that authentic Christianity favors a distinction between spirit and sword. But he also relied on reason and experience. To try to convince a person of the truth of something by threatening injury or imprisonment is to make a mistake about how the mind and spirit work. It is futile, wrote Williams, to try “to batter down idolatry, false worship, and heresy” by employing “stocks, whips, prisons, swords” because “civil weapons are improper in this business and never able to effect anything in the soul.” Civil efforts to coerce conscience lead either to defiance and thus the probability of extensive bloodshed and suffering, or to hypocrisy, neither of which advances the cause of conscience.

There are various compelling reasons, then, for believing in the existence of an internal forum and its right to freedom: “Only let it be their soul’s choice, and no enforcing sword, but what is spiritual in their spiritual causes . . . I plead [on the part of the civil authority] for impartiality and equal freedom, peace, and safety to [all] consciences and assemblies, unto which the people may as freely go, and this according to each conscience,” in keeping of course with the requirements of civil order.

Williams invoked the idea of a universal moral law available to all, regardless of religious identity, as the proper basis for protecting the “common rights, peace and safety” of all citizens, which is, he said “work and business, load and burden enough” for political officials without presuming “to pull down, and set up religion, to judge, determine and punish in spiritual controversies.” There exist common moral standards that are available to all sorts of people other than Christians, so that “civil places need not be monopolized [by] church members, (who are sometimes not fitted for them), and all other [people] deprived of their natural and civil rights and liberties.” Indeed, Williams’s theory of government is remarkably modern. Particular governments, he said, “have no more power than fundamentally lies in the [body of



people who appoint them], which power, might or authority is not religious, Christian, etc., but natural, humane and civil.” In addition, he was as concerned with the corruption caused in the civil order by confusing temporal and spiritual matters as he was with the corruption such confusion produced religious communities: It is “against civil justice for the civil state or officers thereof to deal so partially in matters of God....”

These common and naturally available moral standards place important limits on tolerable religious practices. Williams held that civil magistrates are entitled to punish religiously authorized behavior that violates what he took to be the fundamental conditions of public safety and order. For example, he approved of the outlawing of human sacrifice, even though practiced for conscience’s sake. But beyond the protection of the “common rights, peace and safety” of all citizens, Williams exhibited a remarkable degree of religious and cultural tolerance. So long as Jews, Roman Catholics, and “Mohammedans” were willing to accept citizenship on Williams’s terms of equal freedom, they were all welcome. It is “known by experience,” he said, that “many thousands” of Muslims, Roman Catholics and Pagans “are in their persons, both as civil and courteous and peaceable in nature, as any of the subjects in the state they live in.”

Despite his own fervent Christian convictions, he resolutely refrained from evangelizing Native Americans because, among other reasons, they mostly lived under colonial legal systems which denied them genuine freedom in matters of religion and conscience. Based on his commitments to “impartiality and equal freedom,” as well as “peace and safety” for all “consciences and assemblies,” he attempted to deal honestly and equitably with native Americans, seeking unsuccessfully to achieve what one historian has called a “bicultural” solution to the relations between colonists and native Americans.

Also worth mentioning in this connection was Williams’s extraordinary willingness not only to promote freedom *of* religion, but freedom *from* religion as well. Even atheists and people altogether indifferent or hostile to religion, should be equally respected. He considered the objection, undoubtedly widespread at the time, that if the state does not enforce religion, people are likely to drift away from religion and “turn atheistical and irreligious,” as he put it. Such an outcome, he conceded, is a risk that must be run; “however it is infinitely better, that the profane and loose be unmasked, than to be muffled up under the veil and hood as of traditional hypocrisy, which turns and dulls the very edge of all conscience either toward God

or man.”³⁴

Earlier Christian Foundations. As to what would come after, Williams’s theory of religious liberty—its elements and the way they were assembled—was clearly formative. But Williams hardly invented those elements, nor did he weave them together without regard to where they came from. Throughout their history, Christians had disagreed, sometimes violently, over the meaning and application of religious liberty. Williams knew that well enough. What he could not understand was why they had such difficulty choosing the right side.

The idea of conscience and its freedom was important to the early Christian church, particularly as expressed in the Pauline literature. The influential notion of conscience as a private, internal tribunal, adjudicating the probity of an individual’s religious and moral beliefs and practices, is referred to in Romans 2:14-15. The passage speaks of non-Jews possessing “by nature” a moral law “written on their hearts,” to which their “conscience” (*syneidesis*) “bears witness,” and in relation to which their “conflicting thoughts accuse or perhaps excuse them,” all under the authority of God who “judges the secrets of everyone.” The idea that this moral law is universal, according to which “the whole world may be held accountable,” is affirmed in Romans 3:19-20. In the context of a discussion in First Corinthians about tolerating conscientious differences, there is the additional suggestion that the conscience is fundamentally free, since one person’s conscience cannot control anyone else’s.³⁵

Furthermore, given that God is understood to be the ultimate judge of conscience, the conviction arises in early Christian experience that an important part of the freedom of conscience is its independence from and superiority to human judgments, including those of the civil authority. Some have even interpreted Paul’s words in Romans 13:5, enjoining political obedience “for the sake of conscience,” to imply a right to stand in judgment concerning the behavior of governments, particularly in the light of his preceding claim that “rulers are not a terror to good conduct, but to bad” (Romans 13:3).

Classical texts used to support what later came to be known as the doctrine of the “sovereignty of conscience” are Acts 5:29: “We must obey God rather than human beings,” and Mark 12:17: “Render unto Caesar the things that are Caesar’s, and to God the things that are God’s.” Conflicting opinions of how to interpret and apply these ideas would punctuate the life of the church ever after.

The interpretations of these fundamental ideas by thirteenth-century Catholic

³⁴ Roger Williams, *Complete Writings of Roger Williams*, 7 vols. (New York: Russell and Russell, 1963), 3:148, 363, 398; 4:251; 7:154-55, 181; Roger Williams, *A Key into the Language of America* (Bedford, MA: Applewood Books, 1936) (originally published in 1643), 95. See further quotes and discussion in Edward S. Gaustad, *Liberty of Conscience: Roger Williams in America* (Grand Rapids, MI: Wm. B. Eerdmans Publishing, 1991), 31-44; James C. Davis, *The Moral Theology of Roger Williams: Christian Conviction and Public Ethics* (Louisville: Westminster John Knox Press, 2004), 94; Russell Bourne, *the Red King’s Rebellion: Racial Politics in New England, 1675-1678* (New York: Oxford University Press, 1990); Sydney E. Ahlstrom, *A Religious History of the American People* (New Haven, CT: Yale University Press), 1972), 182.

³⁵ 1 Corinthians 10:29: “For why should my liberty be determined by another’s conscience?” (my translation).



theologian Thomas Aquinas and sixteenth-century Protestant reformer John Calvin were particularly important in paving the way for Williams's definitive articulation in the seventeenth century. Though Thomas did not work out a developed notion of a right to the freedom of conscience, he elaborated some significant features. Since unwilling belief is, he said, an impossibility, the idea of trying to compel belief by force is disallowed. If force is excluded in such matters, then "the state is guilty of injustice if it interferes with a person's [obeying] conscience in matters of religious choice, profession and worship."³⁶ Conversely, the state would appear to be acting justly by enforcing the free exercise of conscience. This is, in effect, to argue for a subjective right of conscience -- that is, an enforceable title, individually claimable, against coercive interference with conscience.

Thomas proceeded to develop an elaborate and very influential theory of conscience, which thereafter kept reappearing in discussions of religious liberty in the Western tradition. Nevertheless, in keeping with general attitudes of the medieval Roman Catholic Church, he applied his theory in a way that drew the limits of religious liberty very narrowly, compared to Williams and his successors. Thomas drew a sharp distinction between uninitiated unbelievers and apostates and heretics. Since the latter at one time accepted Christian faith in the act of baptism, they are subject to civil punishment upon their defection. According to Thomas, since the state has the authority to enforce contracts, it may properly intervene when a religious pledge of faith is broken.

Calvin made a great deal of the doctrine of the sovereignty of conscience, even if he, like Thomas, extensively narrowed its scope. On the one side, he proclaimed a sharp distinction between the "spiritual power" and the "power of the sword," notions linked to the idea of two forums or tribunals so important to Williams and the Anglo-American tradition, and he, like them, gave pride of place to the conscience. Conscience, he said, is "higher than all human judgments," and "human laws, whether made by magistrate or church, even though they have to be observed (I speak of good and just laws), still do not of themselves bind conscience."

On the other side, Calvin veered in the opposite direction. Speaking both as a theologian, and as a community organizer frustrated with widespread insubordination and religious dissent, he assigned to the Genevan authorities the right to impose on the unruly masses "the outward worship of God" and "sound doctrine of piety and the position of the church." And then, having declared that the "church does not have the right of the sword to punish or to compel, not the authority to force, not imprisonment, nor the other punishments, which the magistrate commonly inflicts," he contrived an arrangement with Genevan officials to use none other than

³⁶ Eric D'Arcy, *Conscience and Its Right to Freedom* (London: Sheed and Ward, 1961), 153-54.



the “sword, force, and imprisonment” to enforce his doctrines across the city.³⁷

CONCLUSIONS

A central part of the social and political devastation caused by a grim succession of collectivist ideologies, beginning in the middle of the last century, was the systematic and worldwide assault on religious belief and identity. As a result, the protection of religious liberty as a universal and fundamental human right took on new urgency. The equal right to hold and express religious and other conscientious beliefs has been authoritatively elaborated in a series of broadly ratified international documents, which now set the stage for understanding and applying that right.

The natural rights tradition provided, often against strong resistance, much of the terminology and some critical parts of the rationale for human rights, including religious liberty. Although the tradition was nurtured and conveyed by certain segments of Western Christianity, a key assumption—also essential for human rights language—is that the rights of individual conscience neither depend on nor require prior religious or other comprehensive commitments, just as they neither depend on nor require being born in one place or another, or having this or that gender, culture, or ethnic identity. That such rights are believed to be independent of such considerations is what it means to call them “natural,” or in the human rights idiom, “inherent” or “inalienable.”

What was distinctive about the Christian contribution was the disposition of figures like Roger Williams to forswear any special claim by Christians or others to civil authority in regard to enforcing religious belief and action. Instead, Christian proponents of natural rights, in varying degrees, held everyone, including fellow Christians, accountable to a common human standard of political order, a proposition believed to be thoroughly consonant with their faith.

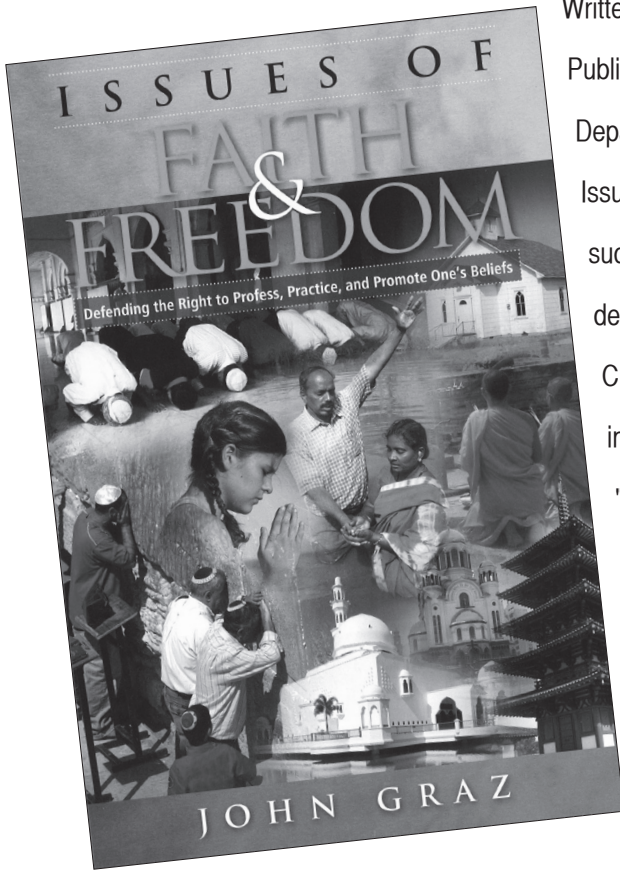
This principle of what might be called self-abnegation in regard to the religious control of civil and political life, one partially based on theological conviction, constitutes a compelling model for the implementation of religious liberty. The principle is of course highly controversial, within Christianity as well as other religions, but there is evidence that it is finding increasing resonance in religions around the world, as it has found resonance, historically, in at least one segment—often a besieged minority—of Western Christianity.



³⁷ John Calvin, *Institutes of the Christian Religion*, ed. John T. McNeill, trans. Ford Lewis Battles, 2 vols. (Philadelphia: Westminster Press, 1960), bk. 3, ch. 19, par. 15, pp. 847-848; bk. 4, ch. 10, pp. 1183-1184; bk. 4, ch. 20, par. 2, p. 1487, par. 3, p. 1215. See further John Witte, Jr. *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007).

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PERMISSIBLE LIMITATIONS ON RELIGION

T. JEREMY GUNN¹

Although laws recognizing the right of religious freedom may go back at least as far as the proclamation of Cyrus the Great in Babylon in 539 BCE (the Cyrus Cylinder) or to treaties between states in the sixteenth century, the most important international conventions, treaties, and instruments emerged following the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. During the first phase of the modern human rights movement beginning in 1948, the principal focus of public attention was on the language in human rights texts that identified the rights of people. These included, for example, the freedom of expression, the freedom of association, and the freedom of religion and belief. Over time, attention has increasingly shifted from the description of rights to the language in conventions that identifies the restrictions that states may impose on the exercise of rights. These portions of human rights conventions that set out the circumstances under which a state may restrict the exercise of rights are commonly referred to as “limitations clauses.” This chapter provides an overview of the principal issues that arise under the limitations clauses related to the freedom of religion and belief.

THE MEANING OF “LIMITATIONS CLAUSES”

Granting Clauses. International human rights conventions and constitutions of countries of the world often include protections for the freedom of religion and belief. Such rights are identified in what may be called freedom of religion “granting clauses,” which identify the scope and breadth of the right.² The granting clause for freedom of religion in Article 18 of the 1948 UDHR provides, for example, that:

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

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² Although called here a “granting clause,” this does not necessarily mean that the clause itself creates the right. Depending on the theory of rights reflected in the document, it may be that the granting clause merely identifies a natural right that exists regardless of whether it is included in the document. The ninth amendment of the United States constitution, for example, specifically assumes that the people possess other rights not identified in the constitution.

manifest his religion or belief in teaching, practice, worship and observance. (UDHR, art. 18)

The relevant granting clause of the 1966 International Covenant on Civil and Political Rights (ICCPR) similarly provides in Article 18 that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice....

Constitutions of countries of the world typically contain granting clauses for freedom of religion as well. The German *Grundgesetz* of 1949 provides in Article 4 that: “(1) Freedom of creed, of conscience, and freedom to profess a religious or non-religious faith are inviolable. (2) The undisturbed practice of religion is guaranteed.” The first amendment to the constitution of the United States, drafted a century and a half earlier in 1789, provides that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” Most constitutions of countries of the world will include some type of granting clause related to the freedom of religion. These clauses typically use broad language that speaks of the inviolability of the freedom to hold religious beliefs or of the right of a person to manifest religion through worship and practice. It is likely that most people when they think of rights of religion (or of any other right for that matter) focus on granting clauses as the principal articulation of the freedom.

Limitations Clauses. Although granting clauses are a fundamental component of human rights texts, they are only half of the story. Human rights conventions and constitutions contain not only granting clauses, as explained above, but “limitations clauses” as well that identify the circumstances under which a state or a government legitimately may restrict the exercise of the right. One example of a limitations clause is found in one of the oldest and most famous documents identifying the right to freedom of conscience, the French Declaration of the Rights of Man and Citizen of 1789, which has subsequently been incorporated into the current French constitution. Article 10 of the Declaration of the Rights of Man provides that: “No one may be disturbed on account of his opinions, even religious ones, *as long as the manifestation of such opinions does not interfere with the public order established by law.*”³ The italicized portion of the text is a “limitations clause” that explains that the manifestation of religious and other opinions, which otherwise should not be

³ “Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi.”

infringed, may be restricted by the state in order to guarantee the public order. Although what is meant by “public order” is not explained in the Declaration, the text presumes that the greater interests of society may in some circumstances be grounds for restricting religious expression.

While human rights activists and religious believers are likely to focus on the freedoms that they wish to exercise, states and public authorities are more likely to be concerned with what they see as potential harms to the public order that are caused by religious actors, particularly when those actors engage in what are seen as extreme or excessive manifestations of religion. State officials are likely to be concerned about the political dangers of religious radicalism (or violence) or the destabilizing effects that religious activists might provoke in society. Some of the more dramatic examples of states attempting to suppress the activities of religious (or quasi-religious) actors include the U.S. government’s attack on the Branch Davidians in 1993 at the Mount Carmel Center near Waco, Texas, or Central Asian states efforts to suppress the literature of the radical Hizb-ut-Tahrir, or French authorities attempting to ban the wearing of the Muslim headscarf (*hijab*) in French public schools. Even when there are no real dangers of political extremism, state officials may nevertheless focus on the possible harm that religion might inflict on the young, the vulnerable, or those who are susceptible to undue influence by charismatic religious leaders. States may thus use limitations clauses to restrict religions that rely on faith-healing, or that isolate believers from the larger society, or that promote excessive loyalty to religious leaders.⁴

Explicit and Implicit Limitations. Limitations clauses may be inextricably connected to a particular granting clause, or may be inserted in an entirely separate section of the instrument that applies generally to all granting clauses, or it may even be implicit and not be found anywhere in the written text. The conscience provision of the French Declaration of the Rights of Man, quoted above, is an example where the granting clause and limitations clause are tied inextricably together. The ICCPR offers another version of the first type, and now represents the most typical approach to inserting limitations clauses. The first two sections of Article 18 of the ICCPR, quoted above, are granting clauses. The immediately following section, 18.3, however, is the limitations clause that identifies the circumstances where a state legitimately may restrict the rights explained in the first two clauses: “Freedom

⁴ A legal issue that is closely related to, but is different from “limitations clauses,” is that of “derogation clauses.” Derogations pertain to the rare emergency circumstances when a state may ignore certain human rights obligations in order to protect the life of the nation. Examples of derogation clauses may be found in the International Covenant for Civil and Political Rights, article 4 and the [European] Convention for Human Rights, article 15. Notably, the ICCPR does not allow a derogation for freedom of religion or belief, although the ECHR does. For interpretations of derogations clauses see United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984) and United Nations Human Rights Committee, General Comment No. 29: States of Emergency (article 4): 08/31/2001. CCPR/C/21/Rev.1/Add.11.

to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Although the third clause of the ICCPR's article provides greater detail than the French Declaration, it similarly provides little clear guidance.

The UDHR, also referenced above, provides an example of the second type of placement of a limitations clause. Rather than being connected directly to a particular granting clause, as in the French Declaration and the ICCPR, the UDHR contains a limitations clause at its end that applies generally to all of the preceding granting clauses of the text. It is located at the end in Article 29.2:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Similar to the ICCPR, the UDHR contains language that is somewhat more detailed than the French Declaration, though it, too, provides relatively little guidance on how the limitations clause should be interpreted.

Finally, a limitations clause may be implicit rather than explicit. The constitution of the United States offers a case in point. According to the text of the first amendment itself, the United States Congress had no power to enact *any* law whatsoever that would interfere with the free exercise of religion. When the U.S. Congress enacted a statute in the 1870s prohibiting the practice of polygamy in federal territories, members of the Church of Jesus Christ of Latter-day Saints (Mormons) challenged the law as an infringement on their religious practice of engaging in plural marriage. The law was indeed a legislative attempt by Congress that targeted the Mormon practice of polygamy. Although the text of the first amendment itself would have appeared to support the Mormon position, the Supreme Court found an implicit but unwritten "limitations clause" in the first amendment to explain that the right of free exercise of religion was not absolute. Thus almost 100 years after the absolutist language of the first amendment was first adopted, the Supreme Court interpreted it to provide that while the Congress "was deprived of all legislative power over mere *opinion*" or belief, it nevertheless was legitimate to restrict "*actions which were in violation of social duties or subversive of good order.*"⁵ Another sixty years later, in 1940, the Supreme Court reaffirmed this same basic belief/action distinction in more contemporary language when it held that the free exercise of religion "embraces two concepts, -- freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation

⁵ *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (emphasis added),

for the protection of society.”⁶ Thus the first amendment has been interpreted to be less absolutist than its language suggests, and it permits the state to limit manifestations of religion that are believed to be harmful to society.

While granting clauses in human rights conventions and constitutions may contain broad and even absolutist language protecting manifestations of religion or other human rights, limitations clauses—whether explicitly or implicitly—allow the state to restrict manifestations of those rights that are interpreted as being harmful to “public order” or to other important values of the state. Whereas human rights activists and religious actors may seek to promote an expansive interpretation of granting clauses, states and public authorities are more likely to emphasize an expansive reading of limitations clauses and their responsibility limit manifestations of religion that they believe are not in the interest of the state or the public.

THE DISTINCTION BETWEEN THE “ABSOLUTE FREEDOM OF BELIEF” AND THE “LIMITED FREEDOM TO MANIFEST BELIEFS”

The U.S. Supreme Court has held that there a difference in constitutional protections for beliefs as opposed to constitutional protections for actions as described in the nineteenth- and twentieth-century cases described above. There should be an *absolute* protection for the freedom of belief, but only a *qualified* protection for the free exercise of religion, even though the text of the U.S. constitution itself does not itself offer any basis for the distinction. This belief/action distinction explained by the United States Supreme Court has, under different terminology, been broadly accepted in international human rights jurisprudence.

The limitations clause Article 18.3 of the ICCPR, quoted above, provides that the freedom to manifest one’s religion or beliefs may be subject to limitations under certain specified conditions (to be discussed more fully in the next part below). The text can be read as implicitly providing that the right to hold beliefs is not subject to any control by the state. The absolute freedom to hold beliefs without limitations has been explicitly stated by the United Nations Human Rights Committee, the body created for the purpose of interpreting and applying the ICCPR. In its General Comment 22.3, the Human Rights Committee made this clear:

Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. *It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice.* These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference.... No one can be compelled to reveal his thoughts or adherence to a religion or belief. (emphasis added)

The 1950 [European] Convention on Human Rights (ECHR), the human

⁶ *Cantwell v. State of Connecticut*, 310 U.S. 296, 303-304 (1940).



rights treaty that has been the subject of the most detailed judicial interpretation due to the extensive jurisprudence of the European Court of Human Rights, makes an identical distinction. Article 9 of the European Convention is divided into two clauses, the first of which is the granting clause and the second is the limitations clause.

1. 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 worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.⁷

The limitations clause, Article 9.2, explains that there may be limitations on the manifestations of religion although, like the ICCPR, it implicitly suggests that there may be no limitation on beliefs. The European Court of Human Rights in agreement with the United Nations Human Rights Committee has made explicit what is implicit in the text of the European Convention: “the freedoms of thought, conscience and religion ... are absolute. The Convention leaves no room whatsoever for interference by the State.”⁸ The Law Lords in Great Britain have made a similar distinction.⁹ The term that is widely used in international law to identify the “internal” realm of beliefs that are absolutely protected from state interference is the “*forum internum*,” while the external realm of manifesting beliefs, which may be restricted by states, is identified as the “*forum externum*.”

The obvious question that arises once the “internal/external” or “belief/action” distinction is made is what exactly is included within the scope of “beliefs” (the *forum internum*) that lies beyond the authority of the state to restrict? It is broadly accepted that “beliefs” include the right to have or not to have beliefs. Thus the state may not interfere with a person’s right to believe in a monotheistic God or a polytheistic universe, or to be an atheist. All of these beliefs should be free from any state interference. Most international human rights bodies, including the European Court and the United Nations Human Rights Committee, similarly argue that “belief” includes the right of individuals to change their beliefs. An individual may convert

⁷ In the European Convention, the limitations clause for freedom of religion or belief, article 9.2, is quite similar to limitations clauses for other freedoms, including article 8 (rights of private family life), article 10 (freedom of expression), and article 11 (right of peaceful assembly).

⁸ *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (Ser. A) (1993), para. 14.

⁹ The Law Lords have similarly accepted absolute freedom with regard to belief, and limited freedom with regard to manifestations. Session 2001–02 [2005] UKHL 15. *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others*.

to Islam, to Christianity, or to Sikhism—all without being confronted by state intervention.¹⁰ A widely accepted additional aspect of this absolute right to hold beliefs is the right of individuals not to be forced to disclose their beliefs to others. Thus there is understood to be the right to privacy in beliefs. The state also should not be able to coerce a change in beliefs.¹¹

In a proper limitations clause analysis, the threshold question is whether the proposed state limitation purports to restrict beliefs, in which case it is necessarily illegitimate. If the restriction targets manifestations only, the next step is to subject the limitation to a three-step analysis.

THE STANDARD THREE-STEP ANALYSIS OF LIMITATIONS CLAUSES

Once it has been determined that a state restriction on religious activities targets manifestations only and not beliefs themselves, international human rights law typically introduces a three-step test to determine whether the particular restriction on manifestations is permissible. This three-step analysis is specifically identified in the two most influential human rights instruments: the ICCPR and the ECHR. Both conventions require that a state satisfy each of the three requirements in order for the limitation to be legitimate. If a state is able to satisfy only one or two, its restriction on the manifestation of a religion is impermissible.

The limitations clause of article 9.2 of the ECHR, which closely resembles the ICCPR, provides that the state may restrict manifestations of religious activity only when each of three specified conditions is met. First, the limitation must be “prescribed by law.” Second, the limitation must be in furtherance of at least one of five specifically identified interests: public safety, public order, health, morals, or the protection of the rights of others. Finally, the limitation on the manifestation must be “*necessary* in a democratic society.” These three conditions will be considered in turn.

First, the limitation must be “prescribed by law.” The “prescribed by law” condition under international law generally, and the ECHR specifically, itself contains three requirements. First, the restriction must be based upon a *law* and not simply on a practice or an act of state authorities. Actions by authorities that restrict manifestations must be based upon a law and not on their own discretion. Second, the law that restricts the manifestation of religion or belief must be *accessible*, meaning that the law containing the restriction must have been published and be available for the public to consult it. This means that secret laws or unpublished administrative regulations, for example, cannot be used as the basis for interfering with the right to manifest religion. The third and final “prescribed by law” requirement is that the law

¹⁰ It is of course well known that many Muslim countries deny the right of Muslims to convert to a religion different from Islam. Muslim-majority countries often have laws and practices that impose penalties—sometimes including death—on Muslims who convert to other religions, although they welcome Christian converts to Islam.

¹¹ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 23 Eur. Ct. H.R. (Ser. A) (1976); *Buscarini and others v. San Marino*, 1999-I Eur. Ct. H.R.



limiting religious activity must be written in such a way as to be sufficiently understandable so that a person reading it could know whether or not the actions in questions are prohibited by the law. Another way of saying this that is often used is that a person consulting the laws must be able to “foresee” that an action is a violation of the law. Thus laws restricting manifestations of religion may not be vague, unclear, arbitrary, or give unfettered discretion to state authorities.¹²

Second, the limitation must be in furtherance of a legitimate state interest. The second condition that must be satisfied to limit a manifestation of religion is that the limitation must be in furtherance of at least one of five identified legitimate state interests. The ECHR like the ICCPR, identifies the five legitimate grounds upon which a state may restrict manifestations of religion: the protection of (1) public safety, (2) public order, (3) public health, (4) public morals, or (5) the rights and freedoms of others. Other grounds, such as “national security” or “protecting traditional religions” do not satisfy the condition.¹³ Examples of state interests that would satisfy the requirements could possibly include preventing a provocative demonstration that sought to denounce another religion in a place where the event might provoke violence. A “religious” cemetery could be obligated to comply with sanitary rules involving disposal of bodies. A state might prohibit parents from relying on “faith healing” for sick children, either on the grounds of health or protection of the rights and freedoms of others.

A problem that necessarily arises in trying to identify the scope of any of these “legitimate state interests” is that states may readily argue that almost any restriction they wish to impose could be justified on at least one of the five grounds. Based upon this requirement alone, a state could undertake very extreme measures with a plausible justification that it was consistent with the “legitimate state interest.” An extreme example would be a state prohibiting all religious gatherings whatsoever on the grounds that it seeks to protect the public health against communicable diseases. Because international tribunals have been sufficiently deferential to states with regard to this second condition, it ultimately has played almost no role in limitations clause adjudication. Of course if tribunals were to look at this condition more critically and to require states to provide a solid justification rather than make a mere appeal to “public order,” the condition could play a much more substantial role than it has thus far. For all practical purposes, however, the European Court of Human Rights and the UN Human Rights Committee have been highly deferential and accepting

¹² *Hasan and Chaush v. Bulgaria*, Application no. 30985/96 (2000), para. 86. Special Rapporteur on Freedom of Religion or Belief, Abdelfattah Amor, provided several examples of overly vague laws providing too much discretion to government officials in his 1998 report on Vietnam. E/CN.4/1999/58/Add.2 (para. 107).

¹³ It should be noted that the grounds of “national security” is *not* one of the grounds for restricting manifestations of religion, even though both the European Convention and the ICCPR provide that national security is a recognized under both. (ICCPR, art. 19; ECHR, art. 10) This of course creates the anomaly that if “religious speech” were re-categorized as “expression,” which is not a difficult task, it could be restricted on national security grounds.

of the rationales offered by states to justify limitations on religious practices.¹⁴ To the extent that limitations clauses impose practical limits on state actions, the “legitimate purpose” requirement is the weakest prong.

Third, the limitation must be “necessary” (or “proportional”). The third limitations clause condition according to the ICCPR is that legitimate restrictions on a manifestation of religion must be “necessary.” The ECHR requires that the limitation be “necessary in a democratic society.” While it generally has not been difficult for a state to satisfy the first two conditions described above (“prescribed by law” and “in furtherance of a legitimate state interest”), satisfying the third condition—“necessity”—typically has been much more challenging. While there are some examples of a state not satisfying one of the first two conditions when pressed by international tribunals, it is the third that is taken most seriously and is the condition that states are most likely to fail. When the European Court of Human Rights finds that a state’s action is not consistent with the requirements of the limitations clause of Article 9, it has almost always done so under the “necessary in a democratic society” prong.

Unfortunately, the meaning of “necessary” is not explained in the texts of the ECHR and the ICCPR. The word “necessary” itself suggests something absolute, a *sine qua non*, or something that is essential or required. The plain meaning of “necessary in a democratic society” would seem to be that the restriction on manifesting religion would either be something that must be imposed in order to preserve democracy or that a democratic society concludes is necessary to protect itself. The sense of the term is something much stronger than being merely a “good idea” or “beneficial” or “helpful” or “appropriate” or “reasonable” or “desirable” or “advantageous” or “having a long-term positive effect.” “Necessary” is a strong term suggesting that no other option is possible or that the consequences will be dire if the restriction is not imposed. Although international tribunals do not emphasize the word “necessary,” they do state as a general principal that limitations should be seen as the exception to the rule and that limitations clauses should not be employed in a way that undermines the basic right. The UN Human Rights Committee has stated that limitations pursuant to ICCPR art. 18.3 should “be strictly interpreted.”¹⁵ A symposium convened by the International Commission of Jurists developed what are called the “Siracusa Principles” for interpreting limitations clauses and derogations clauses. The Siracusa Principles state that limitations may not be undertaken in such a way as “to jeopardize the essence of the right concerned” and that “[a]ll limitation clauses shall be interpreted strictly and in favor of the rights at issue.”¹⁶

However absolutist the term “necessary” might seem to be in the language of the conventions, neither the European Court nor other tribunals have interpreted it

¹⁴ For a criticism of the excessive deference to states, see Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge, UK: Cambridge University Press, 2005), 301-05.

¹⁵ Gen. Comment 22, para. 8.

¹⁶ Siracusa Principles, I.A.2, 3.



in such a strong or uncompromising manner. In order to avoid the consequences of giving “necessary” an overly robust interpretation that would lead to striking down state restrictions that were somewhat less than absolutely necessary, international tribunals have substituted an entirely different term that does not appear anywhere in the text: “*proportional*.” Thus, rather than asking whether a state restriction was in fact “necessary,” the European Court asks instead whether the restriction is “proportional” to the harm that the state seeks to avoid. The following section probes the meaning of “proportionality” in limitations clause analysis.

PROPORTIONALITY IN LIMITATIONS CLAUSE ANALYSIS

In many ways, the most important element for adjudicating limitations clauses is not provided in the texts of limitations clauses themselves: the appropriate standard of review. The language of limitations clauses do not explain, for example: (1) how deferential courts should be to state authorities; (2) how important the right to manifest religion should be in comparison to state interests; (3) what evidence should be considered in resolving competing claims; (4) which party has the responsibility for providing what evidence; and (5) which party bears the “burden of proof.” The answers to these basic “standard of review” questions are not arcane or academic; the answers are likely to determine the outcome of the case. In the European Court case evaluating Turkey’s prohibition of women students wearing the headscarf (*hijab*), for example, the Court deferred to the Turkish state’s assertions that the wearing of the headscarf would harm the state’s secularist principles without requiring any evidence that this was so.¹⁷ Nor did the European Court take seriously the religious claims of the university student (Leila Sahin) who was prohibited from wearing the headscarf. With exactly the same evidence presented before the Court, the decision could have been in favor of Ms. Sahin rather than the Turkish state if the Court had assumed the fundamental right to wear religious attire and had demanded proof (rather than the mere assertion) from Turkey that headscarves are disruptive. Although we cannot know the personal attitudes of the European Court judges towards the wearing of the *hijab*, it is quite clear that the Court majority deferred to the Turkish state and accepted at face value the state’s unproven claims. Thus it may be imagined that the standard of review applied in a particular case may not only influence the outcome, it may indeed be outcome determinative.

Although the meaning of “proportionality” in law has ancient origins, its introduction into modern law has been most influenced by German jurists.¹⁸ The concept of proportionality is best known in the common law of England and the United States in relationship to punishments for crimes. It is now generally accepted that a

¹⁷ *Sahin v. Turkey*, Application no. 44774/98, Grand Chamber Judgment (2005).

¹⁸ I have discussed elsewhere some of the origins of the judge-created term “proportional” in jurisprudence. For most practical purposes, it generally comes from the civil law rather than the common law and specifically from German jurisprudence. See T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, *Emory International Law Review* 19 (Summer 2005): 465-98.

punishment should be proportional to the crime that was committed. Perhaps the most common example used to illustrate the point is that the death penalty is now easily understood as being a disproportionately severe punishment for the crime of pick-pocketing.

Moving beyond the “punishment should fit the crime” explanation of proportionality, a metaphor that is frequently used to describe it is that “a sledge hammer should not be used to crack a nut.” While no doubt employing such a heavy tool would be effective in breaking even the hardest of walnut shells, it would be at the cost of crushing the meat inside. The force is sufficient to accomplish the necessary task of breaking the shell but with the unacceptable consequence of making the nut worthless. The hypothetical example offered above of a state permanently forbidding all religious meetings in order to slow the spread of communicable diseases would be an example of the unacceptable and disproportionately severe sledge-hammer approach.¹⁹

Proportionality analysis in limitations clause jurisprudence assumes that there should be a proportionate correlation between the seriousness of the harm that the state seeks to prevent when imposing the restriction on the manifestation of religion and the severity of the infringement on the liberty that the restriction imposes. To the extent that a state restriction prevents a great harm and the infringement on the liberty is slight, the restriction presumably is justifiable. For example, the state might delay the opening of a new building for religious worship for a few days until after a fire inspection is complete. To the extent that the state interest is low, and the infringement on liberty is high, the state action presumably is not justifiable. For example, the state’s refusal to allow religious groups to meet without prior authorization of the state presumably is not justifiable, particularly when the state imposes long delays on registration.

The proportionality cases identified in the preceding paragraph are relatively easy to analyze. The more difficult cases are those where there are strongly competing interests of the state and of people seeking to manifest their religion. Should pacifists be permitted to distribute anti-war literature at the entrance to a military base when a country is at war? Should a state official be permitted to proselytize his employees during non-working hours? Should Hindus be permitted to hold a religious celebration in the city of Ayodhya, India, near the site where Hindu nationalists had earlier destroyed the Babri mosque if the celebration might provoke a communal clash? Should the state be able to force children to receive medical treatment that will save their lives if both the children and their parents do not want the treatment? Should state prison authorities in the United States and Canada be required to allow the building of ritual sweat lodges inside prisons for Native Americans? Should women wearing the face-covering burka be required to remove it for state identification

¹⁹ Of course there might be certain circumstances, as in the case of an influenza pandemic, where the state might reasonably impose such limitations during the course of the pandemic.



photos? May women wearing the burka be prohibited from driving automobiles or testifying in court in against a criminal or before a jury? May Sikh motorcyclists be required to wear helmets that would force them to remove their turbans? Courts and legislators have been required to answer each of these questions, with the inevitable result that either a legitimate state interest or a form of legitimate religious manifestation has been compromised.

Proportionality analysis has now become the principal method judges employ for evaluating whether state restrictions on particular manifestations of religion are permissible under the ICCPR and the ECHR. Unfortunately, proportionality has been applied by the European Court of Human Rights in a relatively ad hoc way with judges evaluating the criteria in somewhat different ways in each case. The fact that the underlying factors have been given such varying weights in different cases has led to the inevitable criticism that proportionality “analysis” is, in reality, a results-oriented exercise that uses the language of proportionality simply to justify the preferred outcome. Although it is not possible to eliminate all discretion and all vagaries in proportionality analysis, it would be valuable to standardize and clarify as many of the steps as possible rather than leave it as open ended as it has become. The following elements are inherent to proportionality analysis, regardless of whether they are actually or consciously identified during the evaluation process. It would be helpful if courts could be clearer, more consistent, and more transparent with regard to the following four important and inter-related issues when making their proportionality analyses.²⁰ These issues will be examined with reference to the decision of the European Court of Human Rights in the *Sahin v. Turkey* case, in which the Court upheld the decision of the Turkish state to prohibit women from wearing the *hijab* headcover at state universities.²¹

First, the tribunal should identify its role clearly. In some cases, international human rights tribunals identify themselves as institutions created for the purpose of ensuring that rights are fully protected. On other occasions, they suggest that their responsibility is to defer to the judgments of state authorities. In the *Sahin v. Turkey* case, for example, the European Court of Human Rights gave no serious analysis to the felt religious needs of Muslim women who wear the *hijab*, nor to the consequences of prohibiting intelligent, veiled women from obtaining a university education. The Court deferred completely to the unproven assertions of the Turkish state that “secularism” demanded that the wearing of the *hijab* be prohibited at state universities. The Court showed much greater interest in defending the ideology of “secularism”—a term which appears nowhere in the ECHR—rather than in defending the right to manifest a religion, which is a core element of freedom of religion.

Second, the tribunal should identify the “burdens of proof” of the parties. Parties

²⁰ The following four points are among the most important. For a much more detailed discussion of these issues, see Gunn, “Deconstructing Proportionality,” 476-94.

²¹ *Sahin v. Turkey*, Application no. 44774/98, Grand Chamber Judgment (2005).

coming before a tribunal offer various assertions and evidence to support their claims. It is important that consistent and coherent rules be applied to each party and that the rules clarify the evidentiary obligations and the types of evidence that will be admitted in proof of the claims. In a general way, it presumably should be the burden of the applicants in religious freedom cases to prove that the actions limited by the state were manifestations of their religious beliefs and, depending on the significance of the state's need to restrict the manifestations, that the manifestations were important, central, or critical to their religious beliefs rather than merely incidental. The state, on the other hand, should be obligated to prove that the threats to the public order, public health, and the like were real and measurable rather than merely speculative or ideological, as well as that the restrictions imposed actually reduced the real danger. Leila Sahin, for example, should have been required to prove that wearing the *hijab* was mandated by her religious beliefs and that she believed it to be a religious obligation.²² The Turkish state should have been required to prove that the *hijab* itself is inherently dangerous or that it was being used for the purpose of disrupting university education.²³

Third, the tribunal should consider less restrictive alternatives, with appropriate evidentiary obligations being placed on both parties. It may be the case that the state can prove that there is a harm associated with a particular manifestation of religion that it wishes to restrict and that the procedures it employs are effective in reducing or eliminating the harm. The question remains, however, whether there is some less restrictive alternative action that the state could have employed that similarly would have eliminated the real harm but have had less of an impact on the human right in question. If an alternative is in fact available that satisfies the state's legitimate interests but that poses less of a burden on the human right in question, the doctrine of proportionality would suggest that the less burdensome alternative should be employed. But this creates an evidentiary problem: Whose obligation is it to prove that no less restrictive alternative is available? While this might at first glance seem to be the obligation of the state, it nevertheless would be unfair to place the burden on the state of proving that no other alternative was available, as it may be impossible to prove a negative (i.e. in this case to prove that there was no less restrictive alternative available).

There is a reasonably practical solution to this problem that could be made by shifting the burdens of proof at strategic points. To illustrate this we can return to the walnut-cracking example as if it were a case before a tribunal. In such this case the state could of course present compelling evidence (as required by the second

²² Of course many Muslim women and men believe that wearing the *hijab* is not a religious obligation. It is not the business of the tribunal to interpret Islamic law and reach a judgment on this issue—but to inquire as to whether the applicant seriously and sincerely believed that it was an obligation.

²³ The fact that secular students or faculty might be offended by the *hijab* or that they might cause a disturbance in reaction to its being worn should be irrelevant. In this case the disruption is due not to those who wear the *hijab*, but by others, and it is they who should be restrained by the state.



point above) that the shell of the nut is hard and that the sledge-hammer will effectively be able to breaking it. The applicant to the court would then counter by arguing that there is a less harmful alternative: the nutcracker. Once evidence of a less restrictive alternative has been provided, the burden of proof should then shift back to the state to prove that the nutcracker will not work for one reason or another. By establishing a rule something like outlined here, it would allow tribunals to be more precise and careful in making their proportionality judgments.²⁴

Fourth, the tribunal should identify the relevant degree of scrutiny (or clarify the relevant standards of proof). It was explained above that the term “necessary” in limitations clauses as well as the statements that limitations should be the “exception rather than the rule” suggest that states should resort to limiting human rights only in the most compelling and pressing cases. This is not, however, how tribunals have applied limitations clauses in the two leading human rights conventions, the ICCPR and the ECHR. The tribunals have shown themselves to be much more deferential to states than the strong language would imply, and frequently the tribunals defer to states without pressing them to provide compelling evidence or to consider seriously less restrictive alternatives.

It would be appropriate, particularly given the high standards that in theory should apply to state limitations on manifestations of religion and belief, for international tribunals to identify clearly the standards to which they hold states accountable by outlining exactly the evidentiary standards that states should satisfy and to explain directly the degree of scrutiny that they believe should be applied to state assertions. Under the current regime, the tribunals largely let such questions go without comment. Appropriate standards should be set, articulated, and applied consistently.



²⁴ There are, of course, important refinements that ultimately should be made to this basic rule. The most obvious case is where one of the parties, and probably most frequently the state, has access to information and evidence that the applicant does not have. In such cases the state should perhaps either be required to make the data available or be required to prove the negative for at least some specified alternatives.



The Center *for the Study of Law and Religion*
at Emory University

APPENDIX 1

Projects on Law, Religion and Human Rights **Center for the Study of Law and Religion at Emory University**

“Christianity and Democracy in Global Context” (1988-1992), on the past and potential contributions of Christianity to the precocious rise of new democratic movements in various parts of the world (sponsored by The Pew Charitable Trusts, Inc.)

“Religious Human Rights in Global Perspective” (1991-1996), on the past, present, and potential contributions of Judaism, Christianity, and Islam to the cultivation and protection of human rights, particularly religious rights and liberties, in international law and in various nation-states in the Americas, Africa, and Europe, as well as in Russia and India (sponsored by The Pew Charitable Trusts, Inc.)

“Religious Liberty in Russia” (1993-1997), on the eroding protections of religious liberty in post-glasnost Russia, particularly for religious minorities and foreign faiths, judged by standards of international human rights and Russian constitutional law (sponsored by The Pew Charitable Trusts, Inc.)

“Cultural Transformation in Africa: Legal, Theological, and Human Rights Perspectives” (1995-2003), on various types of cultural transformation in post-colonial Africa, with particular emphasis on the improvement of women’s rights to and control over land as a vital economic resource and as a vindication of second generation rights (sponsored by The Ford Foundation)

“The Problem and Promise of Proselytism in the New Democratic World Order” (1995-2000), on the new war for souls breaking out among local faiths and foreign proselytizing faiths in various new democracies in the former Soviet bloc, Africa, and Latin America (sponsored by The Pew Charitable Trusts, Inc.)

“Islamic Family Law” (1998-2005), on the state of Islamic family law in diverse Muslim communities around the world, and the prospect of legal reforms in light of international and domestic human rights norms (sponsored by The Ford Foundation)



“Islam and Human Rights Fellowship Program” (2000-2005), a residential program for a dozen Muslim scholars and activists to explore the relationship of human rights and Islam (sponsored by the Ford Foundation)

“Religious Freedom and Limitations Clauses in International and Constitutional Law” (2003-2006), on permissible limitations of religious liberty guarantees in international law and comparative constitutional laws (sponsored by The Pew Charitable Trusts, Inc.)

“Competing Paradigms of Rights and Responsibilities in the Discourse of Religion and Children’s Rights” (2003-2007), on the rights of the child in domestic law, and on the role of religious communities in their cultivation and obstruction (sponsored by The Pew Charitable Trusts, Inc.)

“What’s Wrong with Rights for Children?” (2004-2006), on the legal, political, social, and theological arguments for and against the UN Convention on the Rights of the Child (sponsored by The Pew Charitable Trusts, Inc.)

“Toleration and Truth” (2005-2008), on how liberal societies and religious communities affect each other and the political implications of this interaction (sponsored by The Lilly Endowment, Inc.)

“Frontiers of Religious Liberty in the Commonwealth” (2006-2008), on the current state of religious liberty in selected Commonwealth countries around the world, judged against the standards of the 1981 U.N. Declaration on Religious Tolerance (sponsored by The Pew Charitable Trusts, Inc.)

“Christian Foundations of Religious Freedom and Rule of Law” (2007-), on the past, present, and potential contribution of Catholic, Protestant, and Orthodox Christianity to the cultivation of human rights, democracy, and rule of law (sponsored by The Alonzo L. McDonald Family Foundation and Lilly Endowment, Inc.)

Law, Religion, and Human Rights in International Perspective (2007-) on the current state and frontier issues of religion and human rights and religious freedom issues around the world (sponsored by The Henry Luce Foundation).



The Center *for the Study of Law and Religion*
at Emory University

APPENDIX 2

Publications on Religion, Human Rights, and Religious Freedom
Center for the Study of Law and Religion at Emory University

Abdullahi Ahmed An-Na'im, *African Constitutionalism and the Role of Islam*
(University of Pennsylvania Press, 2006)

Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari`a* (Harvard University Press, 2008)

Abdullahi Ahmed An-Na'im, ed., *Cultural Transformation and Human Rights in Africa* (Zed Books, 2002)

Abdullahi Ahmed An-Na'im, ed., *Islam and Human Rights: Advocacy for Social Change in Local Contexts* (Global Media Publications, 2006)

Abdullahi Ahmed An-Na'im, ed., *Proselytization and Communal Self-Determination in Africa* (Orbis Books, 1999)

Abdullahi Ahmed An-Na'im, et al. eds., *Human Rights and Religious Values: An Uneasy Relationship?* (Eerdmans, 1995)

David J. Bederman, *The Classical Foundations of the American Constitution*
(Cambridge University Press, 2008)

David J. Bederman, *Custom as a Source of Law* (Cambridge University Press, 2010)

Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press, 2003)

Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Wm. B. Eerdmans, 1993)

Martha A. Fineman and Karen L. Worthington, eds., *What is Right for Children? The Competing Paradigms of Religion and Human Rights* (Ashgate Publishing, 2009)

T. Jeremy Gunn, *Spiritual Weapons: The Cold War and the Forging of an American National Religion* (Praeger Publishers, 2008)

Timothy P. Jackson, *The Priority of Love: Christian Charity and Social Justice*



(Princeton University Press, 2002)

Mark D. Jordan, ed., *Authorizing Marriage? Canon, Tradition, and Critique in the Blessing of Same-Sex Unions* (Princeton University Press, 2006)

Mark D. Jordan, *Telling Truths in Church: Scandal, Flesh, and Christian Speech* (Beacon Press, 2002)

Douglas Laycock, *Religious Liberty: Collected Works*, 4 vols. (Wm. B. Eerdmans, 2009-)

Natan Lerner, *Religion, Beliefs, and International Human Rights* (Orbis Books, 2000)

R. Jonathan Moore, *Suing for America's Soul: John Whitehead, the Rutherford Institute, and Conservative Christians in the Courts* (Wm. B. Eerdmans, 2007)

Mary E. Odem and Elaine Lacy, eds., *Mexican Immigration to the U.S. Southeast: Impact and Challenges* (Instituto de Mexico, 2005)

Mary E. Odem and Elaine Lacy, eds., *Latino Immigrants and the Transformation of the U.S. South* (University of Georgia Press, 2009)

Judd Owen, *Religion and the Demise of Liberal Radicalism: The Foundational Crisis of the Separation of Church and State* (Chicago: University of Chicago Press, 2001)

Michael Leo Owens, *God and Government in the Ghetto: The Politics of Church-State Collaboration in Black America* (University of Chicago Press, 2007)

Michael J. Perry, *Constitutional Rights, Moral Controversy, and the Supreme Court* (Cambridge University Press, 2008)

Michael J. Perry, *The Political Morality of Liberal Democracy* (Cambridge University Press, 2010)

Michael J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press, 2007)

Michael J. Perry, *Under God? Religious Faith and Liberal Democracy* (Cambridge University Press, 2003)

Charles J. Reid, Jr., *Power Over the Body, Equal Rights in the Family: Rights and Domestic Relations in Medieval Canon Law* (Wm B. Eerdmans, 2004)

Noel B. Reynolds and W. Cole Durham, Jr., eds., *Religious Liberty in Western Thought* (Wm. B. Eerdmans, 1996)

Paul Sigmund, ed., *Religious Freedom and Evangelization in Latin America: The Challenges of Religious Pluralism* (Orbis Books, 1999)

Symposium, "The Foundations and Future of Law, Religion and Human Rights in Africa," *African Journal of Human Rights* 8(2) (2008): 337-535

Symposium, "Frontiers of Religious Liberty: A Commonwealth Celebration of the 25th Anniversary of the 1981 UN Declaration on Religious Freedom," *Emory International Law Review* 21 (2007): 1-460

Symposium, "The Future of Religious Liberty in Russia: Report of the DeBurght Conference on Pending Russian Legislation Restricting Religious Liberty,"



Emory International Law Review 8 (1994): 1-66, updated in Symposium, "Liberté, de religion et confessionnalité: Les projets de revision de la loi de 1990 de la Republique de Russie," *Praxis juridique et religion* 13 (1997): 3-81

Symposium, "Limitations of Freedom of Religion or Belief: International Law Perspectives," *Emory International Law Review* 19 (2005): 465-1320

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Symposium, "Soul Wars: The Problem of Proselytism in Russia," *Emory International Law Review* 12 (1998): 1-738

Symposium, "The State of Religious Human Rights in the World Today," *Emory International Law Review* 10 (1996): 52-186, translated in *Gewissen und Freiheit* 23 (1996): 3-175; *Coscienza e libertà* 51 (1996): 3-121; *Conscience et liberté* 27 (1996): 7-191

Symposium, "What's Wrong with Rights for Children? U.S. Ratification of the Convention on the Rights of the Child," *Emory International Law Review* 20 (2006): 1-239

Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150-1625* (Wm. B. Eerdmans, 1997)

Glenn Tinder, *Liberty: Rethinking an Imperiled Ideal* (Wm. B. Eerdmans, 2007)

Steven M. Tipton, *Public Pulpits: Methodists and Mainline Churches in the Moral Argument of Public Life* (University of Chicago Press, 2007)

Johan D. van der Vyver, *Implementations of International Law in the United States* (Peter Lang Publishers, 2010)

Johan D. van der Vyver, *Leuven Lectures on Religious Institutions, Religious Communities and Rights* (Uitgeverij Peeters, 2004)

L. Muthoni Wanyeki, ed., *Women and Land in Africa: Culture, Religion, and Realizing Women's Rights* (Zed Books, 2003)

Lynn Welchman, *Women's Rights and Islamic Family Law: Perspectives on Reform* (Zed Books, 2004)

John Witte, Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Wm. B. Eerdmans, 2006)

John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge University Press, 2007)

John Witte, Jr., *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* (Cambridge University Press, 2009)

John Witte, Jr., ed., *Christianity and Democracy in Global Context* (Westview Press, 1993)

John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment*, 3d ed. (Westview Press, 2011)

John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Human Rights: An Introduction* (Cambridge University Press, 2011)



John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Law: An Introduction* (Cambridge University Press, 2008)

John Witte, Jr. and Frank S. Alexander, eds., *The Teachings of Modern Christianity on Law, Politics, and Human Nature*, 2 vols. (Columbia University Press, 2005, 3 vols. paperback, 2007)

John Witte, Jr. and M. Christian Green, eds., *Religion and Human Rights: An Introduction* (Oxford University Press, 2011)

John Witte, Jr. and Michael J. Broyde, eds., *Human Rights in Judaism: Cultural, Religious and Political Perspectives* (Jason Aronson, 1998)

John Witte, Jr. and Michael Bourdeaux, eds., *Proselytism and Orthodoxy in Russia: The New War for Souls* (Orbis Books, 1999)

John Witte, Jr. and Johan D. van der Vyver, eds., *Religious Human Rights in Global Perspective*, 2 vols. (Martinus Nijhoff/Wm. B. Eerdmans, 1996)

John Witte, Jr. and Richard C. Martin, eds., *Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism* (Orbis Books, 1999)

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FIDES ET LIBERTAS



PART TWO BOOK REVIEW



RETHINKING THE FRAMING OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION & HISTORICISING ITS JURISPRUDENCE: REVISIONIST SCHOLARSHIP ON THE ESTABLISHMENT CLAUSE

D. J. B. TRIM

Vincent Phillip Muñoz, *God and the founders: Madison, Washington, and Jefferson*. New York & Cambridge: Cambridge University Press, 2009. 252pp. Cloth: \$85.00, ISBN 9780521515153. Paper: \$24.99, ISBN 9780521735797.

Donald L. Drakeman, *Church, State, and original intent*. New York & Cambridge: Cambridge University Press, 2010. 371pp. Cloth: \$90.00, ISBN 9780521119184. Paper: \$29.99 ISBN 9780521134521.

Whenever Americans debate, legislate, or litigate, about church-state relations and issues arising from the First Amendment's establishment and free exercise clauses, at some point somebody (if not many bodies) will ask: "What would the Founders do?" or "What did the Founders want?" This privileging of the "original intent" of the founders of the American republic is very striking.

What is even more striking is that it is, so to speak non-partisan. Strict separationists *and* those who prefer to blur the line dividing Church and State, *both* invoke "the Founding Fathers" in support of sometimes radically differing approaches to church-state relations.

In light of the enduring and ongoing relevance of the late-eighteenth century to twenty-first-century American politics and jurisprudence, these two monographs, which aim to reshape the separation debate significantly, are very welcome. But it is perhaps worth stressing, firstly, that I am a subject of Queen Elizabeth II and thus have no vested interest in the outcome of this debate; and secondly that I am an historian, not a lawyer. However, as an historian of religious violence and liberty of conscience, I am particularly interested in the debates over church and state in Revolutionary-era America. In addition, my nationality is both British and Australian—that is, I am a citizen of another federal nation–state (Australia) whose judges have grappled with the question of whether the views of the writers of the national constitution ought to be taken into account in constitutional jurisprudence.

Both these books engage with the issue of original intent in rather different ways, but their approaches complement, rather than duplicate each other. Each



book is an exercise both in the history of ideas and in legal history. Both monographs attempt to elucidate (in somewhat different ways) what the founders of the United States originally intended concerning the relationship of church and state in the new republic (and especially the original intent of the First Amendment); to this end they each examine material from the late eighteenth century. Both monographs also, however, examine the jurisprudence of church-state (and especially First Amendment) cases, starting in the late-nineteenth century and continuing through to the early twenty-first century, though focusing on the middle and later twentieth century.

Vincent Muñoz's *God and the Founders* is primarily a careful, scholarly analysis of what James Madison, George Washington and Thomas Jefferson wrote and thought about church-state relations. But it then speculates how the judgments of Supreme Court justices in a series of well-known First Amendment cases might have differed, had the justices ruled in accordance with what each founding father actually thought (according to Muñoz) rather than what the justices thought the founders thought. Donald Drakeman's *Church, State, and original intent* is part analysis of seminal court cases on the Establishment Clause, and part examination of original debates around the First Amendment, and what the imprecise words "an Establishment of religion" were truly intended to proscribe.

Muñoz and Drakeman are aware of each other's work; the blurbs for Drakeman's book at amazon.com include one by Muñoz, which begins "This devastating critique of the Supreme Court's use of history should be read by everyone concerned with religious freedom in particular and jurisprudence in general." Drakeman's index includes seven page references to Muñoz (none in the bibliography), and though Drakeman's name doesn't appear in Muñoz's index, articles of his are cited approvingly in the latter's footnotes. Some reviewers on internet websites have implied that both authors are part of an attempt at a kind of Catholic revisionism of separation of church and state, but there is certainly nothing in either monograph to suggest anything more than the usual degree of awareness and informal collaboration of scholars working on a similar area.

This review article briefly surveys and summarizes each monograph in turn, before pointing out some collective weaknesses, not only of these two books, but also in the wider historiography of the Establishment Cause and scholarship on church-state relations in the United States.

GOD AND THE FOUNDERS

Muñoz is particularly strong on showing how misguided have been attempts to shoehorn the views of Madison, Jefferson and Washington into modern notions of separation. The late-eighteenth century was a very different world to even that of the late nineteenth century, and the presumptions of the men Muñoz examines were so different, especially to ours, that it is usually pointless to attempt to make them fit



into present-day concepts.

Muñoz places too much emphasis, I think, on Madison's later writings and particularly on what he calls "Madison's most mature and philosophical defense of religious liberty", the "Memorial and Remonstrance against Religious Assessments" of 1785 (20). I was mostly persuaded the argument that Madison's fundamental principle of religious liberty is "that the state must remain noncognizant of religion" (20), which also draws on analysis of Madison's proposed revisions of the Virginia Declaration of Rights, and the Bill of Rights, and his attitudes as President. However, the implication that Madison's "principle of state noncognizance of religion" (48) emerges only from his explicit engagement with religious-liberty issues is unfortunate. It means, I suggest, that we don't get a full sense of his thought on church-state relations.

Madison's contributions to *The Federalist* (especially *Federalist Papers* 10 and 51), with their ingenious argument that the best defense of liberty actually lay not in suppression of "factions" but in their multiplication, deserves more attention in the church-state context. In Madison's thinking: "Dispersion of the power of the majority was the essential protection of corporate and individual rights." And this was not a marginal or tangential concept—it was fundamental to his political philosophy, based on his reading of Enlightenment thinkers.¹ Thus, the necessity that no one church be elevated above others, either at the state or national level, would surely have been a vital point for Madison—one bound up with his whole underlying political philosophy, rather than only arising when he gave specific thought to religious liberty. My suggestion, then, is not that Muñoz is wrong, but that his arguments could be better located within Madison's thought as a whole. However, Madison's concern that, in each area of life, different and competing viewpoints flourish, for the good of society as a whole, raises the intriguing possibility that he would not have wanted the state to be *entirely* noncognizant of religion. Rather, he might have wanted to encourage proliferation of sects (or religions). I suggest this only as a possibility, rather than an actual hypothesis; however, until Madison's thought on church-state affairs is located in his broader political philosophy, it can be neither invalidated nor validated.

Muñoz's own studied noncognizance of Madison's wider corpus (or disinterest therein) is all the more frustrating since, with George Washington, Muñoz does engage in a more broad-based study of Washingtonian thought. The fact that Washington, unlike Madison and Jefferson, never composed a treatise "on religious liberty" is arguably a blessing, because it obliges Muñoz to analyze Washington's "political practice", including "the letters and writings that belong to it" (50). The first president's attitudes are thus very firmly located in a broader context. Muñoz argues that Washington's approach was a civic one, rather than a theoretical one like that

¹ Roy Branson, "James Madison and the Scottish Enlightenment", *Journal of the History of Ideas* 40 (1979): 235-50 (quotation at 250).



of Madison: the first president supported “government noninterference grounded on natural rights for religious matters beyond the civic good”, but held the government need not invariably tolerate “religious actions that contravene good citizenship” (68). In addition, Muñoz shows, Washington approved “of government *support* of religion”, on the grounds that “the state *may* ... take action to foster the civic good of the community.... He thought it proper for the state to *support* and *endorse* those religious sentiments that supported the civic good” (69, italics supplied). In a community characterized by widespread religious belief, activities that foster the wider good will inevitably include some religious activities. Thus, if “original intent” should indeed be normative in present-day jurisprudence, Washington’s views would be extremely significant—and potentially in harmony with the approach of the self-styled “Moral Majority”, and its hostility to absolute separationism.

Interestingly, Muñoz uses the term “anticlerical politics” to characterize the views of Thomas Jefferson. Placing Jeffersonian thought in the context of anticlericalism (a well-known phenomenon in European history) is ingenious and convincing, but the result will be very troubling to many readers. For Muñoz argues that, while “Jefferson did seek to establish a wall of separation”, his purpose for it was:

... not to separate religion from government generally, but rather to impede a specific type of religious belief and to suppress a particular type of religious influence. He sought to subjugate the “church,” ... and to replace it with what he considered to be the “rational” religion of reason and enlightenment.... Jefferson believed both political and religious liberty required freedom from clerical ... influence and the mental tyranny he believed it imposed on individuals and society. (72)

The fact that most of his contemporaries did not want this kind of religious liberty was neither here nor there! Indeed, Jefferson was prepared to use “state power to nurture” one kind of religion over another (116). The wall he wanted to build, in sum, was an “anticlerical wall”, designed to reduce “clerical influence on American society”, rather than a barrier intended to keep religion on the one hand and the state on the other in discrete spheres (72, 114).

Jefferson’s perspective was similar to Washington’s in the sense that he was convinced that what he saw as “rational” religion “supported reason and freedom”, whereas, he thought that “irrational dogmas and institutions ... [were] hostile to liberty” (116). In other words, state power could intrude into the area of religion *if* it was for the greater civic good. But whereas Washington, convinced that “religion [was] not only a moral duty for the individual but also a potential public good for the polity” (69), was willing to countenance limited use of state power to aid religion, Jefferson, hostile to the clergy and to established Churches, was willing to use state power to promote one kind of religion over another. As with Washington’s views, then, “a contemporary application of Jefferson’s thought would not necessar-



ily extol the idea of state neutrality toward all religions or among different religions” (116). However, in contrast to Washington, Jefferson could be enlisted by the kinds of radical separationists who seek to ban the Pledge of Allegiance or remove crosses from war memorials.

Yet this is not quite the end of the story of Jeffersonian thought, for, as Muñoz also shows, Jefferson nevertheless advocated “that individuals should not be punished for their religious beliefs and that civil rights should not be affected by individuals’ religious opinion”. In this sense, Jefferson was truly an advocate for religious freedom, broadly conceived. “The difficulty that envelops Jefferson’s thought”, as Muñoz points out, “is that these two positions sometimes contradicted each other” (72). But certainly it is clear that Jefferson was not the straightforward, strict separationist often portrayed, for example, by Americans United for Separation of Church and State.²

In the least convincing (though still interesting and potentially useful) part of the book, Muñoz suggests how the church-state doctrines of Madison, Washington and Jefferson would have been applied in Supreme Court First-Amendment cases, had the justices ruled according to the real attitudes (according to Muñoz) of the three founders, rather than the distorted concepts that actually obtained. Muñoz examines thirty-five cases involving both the establishment and free exercise clauses, from the seminal *Reynolds v. United States* (1879) onwards. The subjects of these cases range from prayer in public schools, to public displays of religious symbols, to direct and indirect state burdens upon religion. Muñoz graphs how Madison’s noncognizance, Washington’s civic-minded religion, and Jefferson’s anticlericalism, would have influenced the different justices in all these cases, and how the cases would have been decided. This is intriguing, even a little entertaining, but highly speculative, since while Muñoz believes that Madisonian, Washingtonian and Jeffersonian views on church-state relations can be systematically converted into “legal doctrines” (p.119), it is Muñoz himself who does the “converting” here; we have no idea of how the three founders would actually have applied their thinking in legal judgments—nor any idea of how Supreme Court justices would really have ruled in any of the cases, even had they accepted the interpretations in *God and the founders*. This is purely counter-factual, then; but is still thought-provoking, to say the least.

CHURCH, STATE, AND ORIGINAL INTENT

Some reviewers have focused on Drakeman’s analysis of what the founders meant by the Establishment Clause.³ Thus it is worth highlighting that he begins, not with history, but rather with an examination of three Supreme Court cases familiar to church–state scholars: *Reynolds v. United States* (1879), *Everson v. Board of*

² E.g. see the selective quotations at <http://www.au.org/resources/history/old-docs/with-sovereign-reverence.pdf>.

³ E.g. James Hitchcock, review in *Journal of Church and State*, 52 (2010): 363-65.



Education (1947), and *McCullum v. Board of Education* (1948)—with greater attention to the first two cases. Only then does he move onto historical analysis.

In *Reynolds v. United States* and *Everson v. Board of Education*, the Supreme Court turned to the Founders; the justices concluded that the First Amendment's prohibition in of an establishment of religion was intended to create, in Thomas Jefferson's words, "a wall of separation between church and state." The "wall of separation", found in a letter from Jefferson, while President, to a Baptist congregation, has been more influential on interpretation of the First Amendment than any other metaphor or figure of speech—and probably more than many entire treatises. And yet, as we have seen, Muñoz shows that Jefferson actually had a rather different approach to the Establishment clause and to church-state relations more generally, than his "wall" figure of speech implies.

What Drakeman shows is that that the judges who authored the opinions in *Reynolds* and *Everson* innovated in turning to history, yet did not truly seek to establish original intent. The innovation was their willingness to interpret the religion clauses of the First Amendment in the light of claims about what they were originally intended to achieve, in "an era during which the Supreme Court rarely consulted the Founding Fathers on constitutional issues" (22). However, beginning with *Reynolds v. United States* (1879), in which the Church of Jesus Christ of Latter-day Saints tested US anti-polygamy laws, influential justices of the Supreme Court repeatedly turned to the most distinguished historians of the era to buttress their judgments. Yet what was significant was not only that judgments began to be based on putative original historical intent. It was also, or so Drakeman argues (and, I think, convincingly) the fact that, once justices had decided to turn to history, the historians who influenced them were scholars who privileged "colonial Virginia, as well as Jefferson and Madison, as the crux of the religion clauses" (81). In consequence, the Virginia experience of church-state relations, and Jefferson's celebrated "wall of separation", were wrongly taken to be normative as regards general attitudes in the early republic.

Furthermore, Drakeman also contends that, at least in *Reynolds* (1879), Justices Hugo Black and Wiley Rutledge "set off on a premeditated search-and-employ mission to locate historical events" that would allow them to justify judgments based on their "strong feelings about the case" (79-80), rather than genuinely seeking to understand what the founders truly intended or wanted. It is hard not to agree with Drakeman, that "professional historians aided and abetted the justices' efforts via a goal-oriented, Whiggish approach to historical interpretation" (80). More controversial is his contention that, from 1879 onwards, "establishment clause jurisprudence clearly owes a considerable debt to Whiggish myth-making by a number of respected historians in the nineteenth and early twentieth centuries" (11-12). Drakeman's thesis now needs to be checked against detailed analysis of judgments in other First Amendment cases. But regardless of whether one is convinced by his arguments or not, as other reviewers have rightly observed, Drakeman's analysis "in these early



chapters is superb” and “represents a genuine contribution to both historical and legal scholarship that ought to be of interest to those working on law and religion from a number of different methodological perspectives.”⁴

Having begun with the way the Establishment Clause has been interpreted in the nineteenth and twentieth centuries, Drakeman then moves backwards in history, to a consideration of what really *was* the original intent behind it. If he had not ruffled feathers before, he definitely will do so here, with his well-researched and well-argued case that the very silence of most of the Founding Fathers is one of the best clues as to their understanding of the Establishment Clause. As he points out, one of the most striking, indeed puzzling, facts about the provision that “Congress shall make no law ...” was that it was approved with very little debate. Yet as he points out, the idea that the Constitution was intended to erect an impenetrable wall between the churches and politics would have aroused fierce opposition if openly proposed during the 1780s. Unlike Muñoz, who works primarily from theoretical political treatises and private correspondence to assess the views of Madison, Washington and Jefferson, Drakeman draws heavily on debates in the constitutional convention and then within state legislatures over the Bill of Rights, and also on the journalism of the period.

Drakeman argues, very persuasively, that the framers of the US constitution and First Amendment originally intended that amendment’s establishment clause solely as a prohibition against a national church such as existed in, for example, England, Scotland and the Dutch Republic—the Protestant quasi-democracies which were the chief model for the constituent documents of the American republic. A new consensus emerged in First-Amendment jurisprudence and American historiography only, or so Drakeman posits, when Supreme Court justices first started to consider what the original intention of the Establishment Clause was; but, because they were really interested, not in the historical reality, but rather in finding grounds to buttress their prejudices, they got their history wrong. And judges ever since have continued to get the historical facts wrong.

WEAKNESSES IN CURRENT SCHOLARSHIP

The chief weaknesses, on which I will focus for much of the rest of this article, are neither only nor even primarily weaknesses of Muñoz and Drakeman, but of the general scholarship in their area. So careful and insightful are these two monographs in other respects that the apparent blind spot they share with most other works is brought into starker relief.

The whole “original intent of the founders” project is deeply problematic for several reasons. First, as Muñoz and Drakeman powerfully argue, the historical understanding, at least of US judges, is grounded in too narrow, too black-and-white, and probably too distorted, an understanding of the conditions when the Constitu-

⁴ Zachary R. Calo, review in *Journal of the American Academy of Religion* 78 (2010): 827-30.



tion and First Amendment were drafted and adopted. Originalism demands that judges conduct detailed and honest historical analysis. Yet even if they are honest (and Drakeman's analysis of *Everson* shows that, at least in terms of historical inquiry, this cannot be taken for granted for even Supreme Court justices), in general, most judges will always lack the necessary skills to explore the history of eighteenth-century political thought and government with the necessary sophistication and in the necessary detail. Law involves historicised understanding, but it is not history and it is foolish to require judges to be historians.

Second, however, the whole paradigm of originalism presumes that the intention of the founding fathers can actually be determined. It is too often taken for granted that the founders were consistent. This is where Muñoz is particularly valuable, highlighting that even so close allies as Madison and Jefferson disagreed on a fundamental right, that of freedom of religious observance. What is also probable, however, is that we will find inconsistency even within the thought or writings of the same founder. Muñoz resists this, at least as regards Madison. He categorically, but to my mind unconvincingly denies the suggestions of some scholars that Madison's views developed and changed in some respects. Yet, his arguments for absolute consistency in Madison's thinking on church and state are not persuasive. It seems entirely credible to me that Madison's thinking, while broadly similar across his career, did develop—nor is this a criticism, just the contrary. Surely it would have been odd if his thinking did not evolve, for the challenges in the area of church-state relations that faced the new republic, and its constituent states, naturally differed, in some respects, from those facing British colonies.

The third problem with originalism is the one least examined, because it is perhaps the most systemic. It assumes that we know the answer to a simple question: Who *were* “the founders”? But do we know this? Is it even a question to which an answer is possible?

Muñoz only considers three men: Madison, Washington, and Jefferson. But many people would probably also accord “founding father” status at least to Benjamin Franklin and John Adams. In a literal sense, surely all those who signed the Constitution were founders? But one can hardly stop there, because, after all, such a definition would exclude both John Adams and Thomas Jefferson (and, indeed, George Mason). There is surely a strong case for arguing that those who signed the Declaration of Independence were literally the founders of the United States, whose independence was declared on 4 July 1776 and which thus arguably did not exist as a nation before that date. However, my experience teaching the political thought of the American Revolution to college students over ten years is that most instinctively classed Thomas Paine as a “founding father”—yet he signed neither Declaration nor Constitution.

One of the most problematic issues, then, in trying to base jurisprudence “on what the founders wanted” is that there is no clear definition of who the founders



were. But it is an open question as to just who made up this body of men (for they are all males), whose views must, so advocates of original intent argue, be taken into account in judicial decisions today. It is also, unfortunately, a question with which scholars, whether historians, lawyers or political scientists, insufficiently engage, and that is also the case with Muñoz. To be fair, he is only claiming to consider three founders, rather than all of them; but his whole work is based on the assumption that there was a clear-cut, discrete body of “founders”. And do all of their views count equally in trying to determine original intent? Or ought the most significant founders’ views carry disproportionate weight?

This might be thought to be implicit in the fact that Muñoz is looking at three of the most influential founders. Yet it is by no means clear that his three were more influential than Adams and Hamilton Now, to be sure, at no stage does Muñoz suggest that *only* the views of Madison, Washington, and Jefferson mattered, nor even that they mattered *above all*. He takes well over 200 pages to analyze their views and map them against the views of modern Supreme Court justices, and so clearly other founding fathers must be left for other books. However, it is striking that, while Muñoz does set out grounds for selecting his three out of the others, he takes for granted that there is a body of founders. What are his criteria for being considered a founding father?

To be fair, this is not only a problem with Muñoz. The issue is usually elided in scholarship, not least because of the typical assumption is that, whoever the founders were, they all wanted the same thing(s) anyway. And yet anyone who has studied American political thought at college level knows that George Mason refused to sign the Constitution. It is fairly easy to show that Paine’s attitudes to constitutions (expressed in *Rights of Man*) as temporary and mutable are very much at odds with what the Constitution itself provides, much less the views of most of those at the constitutional convention or the authors of the hugely influential *Federalist Papers*. And of course, Adams and Jefferson disagreed so substantially about what, in broad terms, the Constitution intended that they founded rival political parties, which proceeded to revise (if not to pervert) what seems to have been the originally intended mode of choosing a chief executive.

In other words, anyone who is pleading or judging a case based on the US Constitution and its First Amendment will know that in fact the “founders” were very far from unanimous. Of course, it is very likely that in many cases there was a consensus among those present at the constitutional convention about at least the narrow meaning of many, if not most, clauses in the constitution and Bill of Rights. Nevertheless, it still seems that many jurists, historians and political scientists fail to problematize the very concept of “original intent”.

It is an issue that has only very rarely been addressed. Steven H. Jaffe’s engaging *Who were the Founding Fathers?*, asks the right question, but what is basically a



high school textbook by definition will not reshape scholarship.⁵ Richard D. Brown was concerned with the identity of the Founding Fathers in his pioneering prosopographical study, but only in the most obvious sense. He was not much interested in definition, though he does provide one *en passant*, by limiting his study to “the signers of the Declaration of Independence and the members of the Constitutional Convention.”⁶ But this begs the question of why not limit it to *signers* of the Constitution, too—presumably because Edmund Randolph, George Mason and Elbridge Gerry were too interesting to leave out! But this is not exactly a rigorous criterion. The assumption that “the founders” are an obvious, almost self-defining body is ubiquitous, and simply taken for granted.

Drakeman does engage with this problem, but only for a moment in a one-and-a-half-page section headed “The Founding Fathers” (259-60). He highlights the fact that Jefferson “was in France during the Bill of Rights’ gestation period” and that his famous “wall of separation” between church and state thus cannot be taken as indicative of the thinking that produced the First Amendment. Drakeman provocatively characterizes “Madison and Jefferson ... not as ‘authoritative’ spokesmen by virtue of any special authorial, representative, or inspirational role, but more generally as prominent public figures in the Enlightenment Era who occasionally published views on how church and state should interact.” This has doubtless prompted gasps from many readers of *Church, State, and original intent* and may prompt some from a few readers of this review. But he performs a valuable function, as likewise when he suggests the need to look also at the “quite different views” of such obscure Revolutionary-era New Englanders as Theophilus Parsons, Fisher Ames and Benjamin Huntington. These are not suggested by Drakeman as “founders” but as other significant “public intellectuals” (as it were) at the time the First Amendment was being drafted, and thus as being potentially as worthy of analysis as Jefferson and Madison, given Drakeman’s limited view of their role in formulating the constitutional provisions on church and state.

The problem is that this section is too condensed. Drakeman, I suggest, is correct, but this smacks of a deliberate attempt to provoke. What is needed is more sustained analysis of whose views merit attention when we want to know what the First Amendment was intended to achieve: a wide range of theorists and pamphleteers? Or only founders? But if only the latter, their identity needs to be defined, rather than assumed. And in that case, *why* only “founders”? Drakeman begins this process of rethinking whose views matter when we think about original intent, but does not take it very far.

⁵ Steven H. Jaffe, *Who were the Founding Fathers? Two hundred years of reinventing American history* (New York: Henry Holt & Co., 1996).

⁶ Richard D. Brown, “The Founding Fathers of 1776 and 1787: A Collective View”, *The William and Mary Quarterly*, Third Series, 33 (1976: 465-80 (quotation at 465).



CONCLUSION

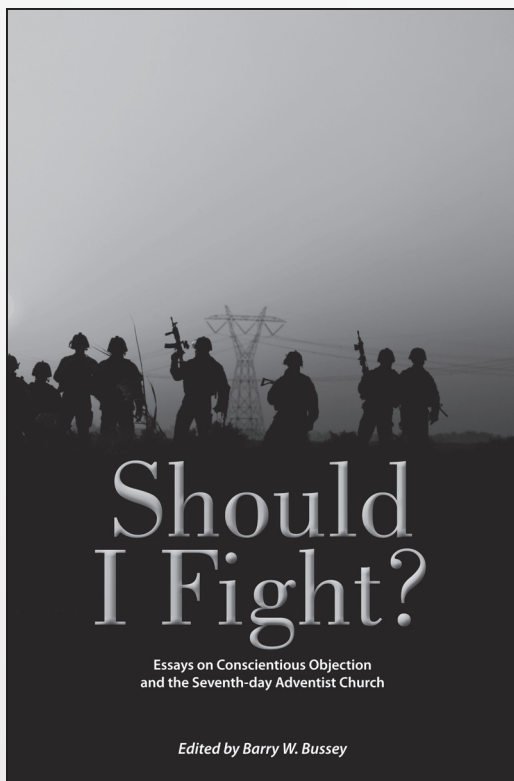
These two books—superbly researched, well written, and the fruit of deep reflection—bring out very well the weaknesses both in First Amendment jurisprudence in the United States and in the historical and legal scholarship dealing with it. When we do not know who the founders were; when they themselves disagreed on key points; and when, in at least some cases, the thinking of individual founders evolved and developed: how, then, can anyone assert with any confidence what the “original intent” of the founders was? The question of whether present-day judges ought to take original intent into account is one on which there will probably never be unanimity. For what it is worth, my own instinct is that original intent ought to matter. But until we have a much clearer idea of what “original intent” actually was—which includes defining whose views matter, and much more careful elucidation of what their view really were—then no judge can rule on original intent with any confidence.

These two erudite, lucid and thought-provoking deserve the attention of scholars of political science, government, legal history, the history of ideas, religious history, and constitutional law. They deserve to change the terms of debate about church-state relations in the United States. In particular, it is to be hoped that they will prompt more—and more wide-ranging—analysis of just what is, or ought to be, meant by “founders” and “original intent”.

Such scholarship might not bridge the deep divisions among Americans over separation of church and state, and might not resolve the question of how much weight should be put on eighteenth-century intentions in twenty-first-century judgments. Yet it might, in the end, result at least in a consensus as to what was the “original intent” on church-state relations—and that would be a great step forward.

There is a final point to make. Both books will give little comfort to those who confidently affirm that the founders of the American republic clearly and consistently wanted complete and unconditional separation between church and state. Both Muñoz’s exegesis of the thinking of key figures, and Drakeman’s analysis of public debates, suggest that the *present-day* concept of separation would not have been recognized by most people in the United States in the late-eighteenth century—including the men who drafted the Declaration of Independence, US Constitution and Bill of Rights, influenced their creation, and defended them. This need not be an argument against a modern-day notion of strict separation! But the notion that it is “what the founding fathers wanted” is now so palpably problematic that separationists would be well advised, in their own interest, to stop using it.





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“But what emerges clearly from all the essays is that the answer to the question, ‘Should I fight?’ can never be a simple and straightforward “Yes”. Bussey’s call to Christians to take a stand on conscience, rather than easily fit in with what society expects or the state wants, is timely and vital, and needs to be heard far and wide among those who acknowledge Jesus as Lord.”

- Dr. David J. B. Trim, University of Reading, U.K.

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FIDES ET LIBERTAS



PART THREE

REPORT OF IRLA ACTIVITIES



LUTHERANS REPENT

DR. JOHN GRAZ, SECRETARY GENERAL

Many readers will ask why I have chosen the title, “Lutherans Repent.” Repent of what? What did the Lutherans do wrong and when? It is a long story, going back to the 16th century.

I took my title from the Lutheran World Federation’s journal *Lutheran World Information*. It could not have been more explicit. In fact, the original title was: “Lutherans Repent Anabaptist Persecution.”¹

The official ceremony of repentance took place on July 22, 2010 in Stuttgart, Germany during the Lutheran World Federation (LWF) Assembly. The LWF is a network of 145 Lutheran churches from 79 countries representing 70 million members. The Anabaptists were represented by the leaders of the Mennonite World Conference (MWC) which represents fewer than two million members.

It was an honor to be in Stuttgart for the ceremony where the Rev. Dr. Ishmael Noko, LWF General Secretary, and Dr Larry Miller, MWC General Secretary, discussed the treatment of the Anabaptists in the Augsburg Confession. The Augsburg Confession was written by Philipp Melanchthon with Martin Luther’s counsel and was presented to Emperor Charles V at the Diet of Augsburg in 1530, providing official recognition of Lutherans in Europe and becoming the permanent Lutheran Confession. Of its 28 articles four condemned the “Anabaptists”. Two years prior to the Confession, the Anabaptists were condemned to death by the First Imperial Mandate after the Reformation on January 4, 1528.

What was the problem? The Anabaptists were condemned because they did not accept Luther’s teachings about: ministry of the church (Article V); infant baptism (Article IX); and church involvement in civil affairs (Article XVI). Anabaptists favored separation of church and state and they believed in the end of torments for the wicked when Christ returned (Article XVII).

After almost 10 years in the making, the repentance ceremony this past July began during a meeting of the Conference of Secretaries of the Christian World Communions. Turning back to this page of history and to officially declare that the founders and great reformers were wrong in their treatment of the Anabaptists was not easy. The Lutherans were not only wrong in what they said about the Anabaptists but they legitimized torture and persecution for religious reasons.

¹ “. . .and forgive us: Lutherans Repent Anabaptist Persecution,” *Lutheran World Information*, 2010, Vol 6.



During the 16th century, Lutherans were not the only ones to persecute Anabaptists. They may even have persecuted them less than did Catholics and some other official state churches. But having a founding document, which is still their reference point and which openly condemns other Christians in several of its articles, the Lutherans recognized that with their church so involved in the promotion and the defense of human rights, something had to be done—something visible.

One might question the value of such “repentance.” In this case, those who repented are innocent of the crime committed by their ancestors, and those who received the repentance and offered their forgiveness in return have not themselves been persecuted. It would have been better if Luther and Melanchthon had asked for forgiveness and if the victims of their intolerance had forgiven them.

Throughout their history the Anabaptists have forgiven their enemies. They have refused to use violence to protect themselves and to defend their rights. Would Luther, Melanchthon, Calvin, and the Popes at the time of the Reformation repent? Keeping in mind that it was a long time ago and that the cultural and religious context were very different from those of today, it is argued that they were all sons and daughters of their time. However, such an argument of contextualization does not excuse the intolerance. The Anabaptists who chose to be persecuted rather than to persecute were also sons and daughters of that same period! There were others – some Lutheran pastors and some friends of John Calvin who disagreed openly with using force against those who were considered heretics.

Thus it is not at all convincing to argue that the abusers were simply “people of their time.” If that was a legitimate excuse we would have to ignore all those who refused to use violence. There were other Reformers who recognized the right of everyone, in the matter of religion, to decide their religion according to their own conscience. As a believer I would say, “They were sons of the Kingdom of God.”

In the worst of periods of history for human rights and in every religion and tradition around the world, there were men and women who stood for the rights of those who were persecuted.. Willing to risk their lives for the persecuted. There were always at least a tiny minority who were not on the side of power or the side of the majority, but on the side of truth and right.

Was it easy? No! Was it costly? Yes! Most of them were marginalized. Some lost their positions or their jobs, and some were executed.

Having the privilege of saying a few words at the Lutheran World Federation Assembly as an ecumenical guest, I took the opportunity to commend them for their courage and their honesty. Why? Not because they took a risk in publicly repenting, but because they officially recognized and accepted the fact that their great founding fathers—Luther and Melanchthon—were wrong. Those great men were right in many ways, but they were wrong in the way they treated the Anabaptists. Though right in opening up a new era of grace and freedom in the Christian world, they were wrong in persecuting the Anabaptists and others. When we persecute people



we are always wrong. When Christians persecute people because they don't have the same religion or the same understanding, they are always wrong.

The Lutherans' repentance was a great event for religious freedom in 2010. Not only did they repent, but they committed themselves to respect religious diversity and the right of free choice of everyone.² They committed to never again use the power of the State to force people in matters of religion.

IRLA PRESIDENT AWARDED

A few days after the Lutheran World Federation Assembly, I flew to the Baptist World Alliance Assembly in Honolulu, July 28 to August 1. The Baptist World Alliance (BWA) is a network representing 105 million Baptists around the world. What a great pleasure it was to see their General Secretary, Dr Neville Callam, and their former General Secretary, Dr Denton Lotz, currently our IRLA President.

The Baptists have always been committed to religious freedom and church-state separation. During their assembly they honored the ministry of Denton and Janice Lotz by presenting Denton with the Award for Human Rights and Freedom. In a simple but moving ceremony, Denton reaffirmed his belief in religious freedom for all people everywhere. He asked the assembly to have the courage of Moses to say to the modern Pharaohs: "Let my people go!" For many years Denton Lotz has been a powerful voice on behalf of religious freedom, participating in many international conferences and using his speeches to stand for religious freedom.

FIRST MEETING OF EXPERTS IN THE MIDDLE EAST

In Washington, D.C., in 1998, Dr Bert Beach and I welcomed the Director of the Religious Affairs Department of the Spanish government, Professor Alberto de la Hera, and his associate, Dr Rosa Maria Martinez de Codes. At this meeting we decided to gather experts in the field of religious freedom and meet together for several days. We had previously invited them to congresses and symposiums but we needed to spend more concentrated time with them in another setting, which, we decided, would be a non-public meeting during which a particular issue would be studied. The proposed outcome would be a statement and articles which could be published. As a good complement to the World Congress, my ambition was to hold one Meeting of Experts every five years.

Professor de la Hera invited Dr Martinez de Codes and me to work on the program. In a beautiful Center in El Escorial near Madrid, Spain in 1999, the theme of that first meeting was about religious freedom and proselytism. More than 30 experts came from Europe, Russia, Latin America, and the United States, includ-

² "We commit ourselves: . . . in repudiating the use of the state's power to exclude or enforce particular religious beliefs; and to work towards upholding and maintaining freedom of religion and conscience in political orders and societies." From the statement approved by the LWF assembly on July 2010 titled "Actions on the Legacy of Lutheran Persecution of 'Anabaptists.'" http://www.lwf-assembly.org/uploads/media/Mennonite_Statement-EN_04.pdf



ing officials from Spain and UNESCO. It was an excellent beginning with all the experts wanting to have a follow-up meeting the next year. The second meeting was held in Magalia, Spain, in which we were privileged to have the United Nations Special Rapporteur on Religious Freedom, Professor Abdelfatha Amor with us. Year number three was hosted by the University of Extremadura, in Carceres, Spain. At this time I was not sure we would find the resources to keep meeting every year, but we did. Some of the subsequent hosts included the Catholic University of Leuven, the Goethe Center near Strasbourg, the University of Aix Marseille, and the First Freedom Foundation in Richmond, Virginia.

This year was our 12th meeting, planned for September 6 to 10, in Amman, Jordan. When I visited Jordan in January with Dr William Johnsson, we met Judge Amjad Shammout and other leaders of the Arab Bridge Center for Development and Human Rights. They were interested in cooperating with the IRLA, so we decided to partner in several events, the first was the IRLA Meeting of Experts with the theme, "Teaching Respect for Religion." In spite of some last minute problems the meeting was successful. Because of this partnership with the Arab Bridge Center opening the IRLA to the Muslim world, we now plan to have a symposium in 2011 and perhaps have an international congress in the Middle East by 2015.

A few of the experts were still in Amman on September 11 when a misguided pastor in the United States made sure that the whole world, and especially the Middle East, knew about his plan to burn copies of the Koran which, fortunately, was canceled. Nothing happened against Americans or other westerners in Jordan. This incident showed how much we, as bridge builders between religions and cultures, are affected by irresponsible and provocative acts performed in far away places by people who represent very few, but who have attracted the attention of the media. What should have been an isolated and insignificant act could have turned the world upside down and put the lives of innocent people at risk. Fortunately, it did not happen. There is no time to waste as we seek to build bridges.

NEXT IRLA MEETING OF EXPERTS

The next IRLA Meeting of Experts will be in Sydney, Australia and we will work with the University there. More information will be given through our website: www.irla.org.

NEXT IRLA WORLD CONGRESS

After returning from my second trip this year to the Dominican Republic, my focus is now to prepare for the 2012 IRLA World Congress. The date of this major event will be April 24-27 at Punta Cana. Our goal is to have 800 attendees for a three-day congress, followed by a Festival of Religious Freedom on the 28th with 20,000 people in Santo Domingo.

Prior to the World Congress, we will continue with other important events to



promote religious freedom such as the annual Liberty Award Dinner in Washington DC, the TV Show *Global Faith & Freedom*, several international congresses, symposiums, festivals, lectures, and international meetings. These events are part of the IRLA life, and they are part of our mission to promote and defend religious freedom for all people everywhere.

We hope that by promoting and defending religious freedom today, people of our generation will not have to leave to their sons and daughters, or their grandchildren, the task of publicly asking for forgiveness.



FIDES ET LIBERTAS SUBMITTING MANUSCRIPTS

Fides et Libertas encourages the submission of manuscripts by any person, regardless of nation or faith perspective, wishing to make a scholarly contribution to the study of international religious freedom. *Fides et Libertas*, as the scholarly publication of the International Religious Liberty Association, seeks to obtain a deeper appreciation for the principles of religious freedom that IRLA has enunciated including the following: religious liberty is a God-given right; separation of church and state; government's role of protecting citizens; inalienable right of freedom of conscience; freedom of religious community; elimination of religious discrimination; and the Golden Rule. *Fides et Libertas* is open to a wide perspective in upholding those principles including

- historical studies;
- articles that deal with theoretical questions of theology and freedom;
- essays on the meaning of such concepts as human rights, and justice;
- works focused on politics and religion; law and religion.

Articles should be accessible to the well-educated professional as well as to the lay person who seeks to know more. It is to be seen as a means of continuing a scholarly conversation of the subject at hand. Therefore it is incumbent on the author to bring a new insight or knowledge to the conversation.

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FIDES ET LIBERTAS



CALL FOR PAPERS

The Secular Challenge to Religious Freedom

A special issue of Fides et Libertas is being planned, working in conjunction with the International Religious Liberty Association meeting of the Board of Experts in Sydney, Australia in August 2011, and in preparation of the 7th World Congress in Punta Cana, Dominican Republic in April 24-28, 2012, you are invited to make submissions, from diverse disciplinary backgrounds and methodological orientations, for the discussion of The Secular Challenge to Religious Freedom.

These projects over the next year and a half are designed to:

1. To study the interaction of the practice of religious freedom and secular society: from a holistic perspective taking into account the wide range of disciplines including, theology, law, history, political science, and philosophy.
2. To examine ways of reaffirming the commitment to maintaining religious freedom as enunciated in Article 18 of the Universal Declaration of Human Rights.
3. To explore strategies of sharing the importance of maintaining religious freedom of the individual.

Possible topics for consideration include but are not limited to:

- secularization, progress and modernity
- religious freedom and human rights in international law
- religion, nationalism and community
- jurisprudence and philosophy of religious freedom
- religious institutions and the secular state
- pluralism and tolerance
- knowledge and faith
- religious group rights and individual rights
- political theology and public religions
- religion and national security

Please send your submissions to the Editor at: busseyb@irla.org. The deadline for submissions is May 15, 2010. In the body of the e-mail, please include the following information: name, affiliation(s)—corporate or university and department, level of graduate study, and title of paper. Be sure to pay attention to the “Submitting Manuscripts” in this journal for reference of what we expect from our authors.