

# A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective

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# A DICKENSIAN ERA OF RELIGIOUS RIGHTS: AN UPDATE ON *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE*

JOHN WITTE, JR.\*

## I. DICKENSIAN PARADOXES

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair . . . .<sup>1</sup>

Charles Dickens penned these famous words to describe the paradoxes of the late eighteenth-century French Revolution fought for the sake of "the rights of man and citizen."<sup>2</sup> These same words aptly describe the paradoxes of the late twentieth-century world revolution fought in the name of human rights and democratization for all.

The world has entered something of a "Dickensian era"<sup>3</sup> in the past two decades. We have seen the best of human rights protections inscribed on the books, but some of the worst of human

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1. CHARLES DICKENS, *A TALE OF TWO CITIES* 1 (1859).

2. *Declaration des droits de l'homme et du citoyen* [Declaration of the Rights of Man and of Citizen] (1791), in LEON DUGUIT, *LES CONSTITUTIONS ET LES PRINCIPALES LOIS POLITIQUES DE LA FRANCE DEPUIS 1789* 1 (7th ed., 1952).

3. The phrase is from Irwin Cotler, *Jewish NGOs and Religious Human Rights: A Case Study*, in *HUMAN RIGHTS IN JUDAISM: CULTURAL, RELIGIOUS, AND POLITICAL PERSPECTIVES* 165 (Michael J. Broyde & John Witte, Jr. eds., 1998) [hereinafter *HUMAN RIGHTS IN JUDAISM*].

rights violations inflicted on the ground. We have celebrated the creation of more than thirty new constitutional democracies since 1980, but lamented the eruption of more than thirty new civil wars. We have witnessed the wisest of democratic statecraft and the most foolish of autocratic belligerence. For every South African "spring of hope," there has been a Yugoslavian "winter of despair."

These Dickensian paradoxes of the modern human rights revolution are particularly striking when viewed in their religious dimensions. On the one hand, the modern human rights revolution has helped to catalyze a great awakening of religion around the globe. In regions newly committed to democracy and human rights, ancient faiths once driven underground by autocratic oppressors have sprung forth with new vigor. In the former Soviet bloc, for example, numerous faiths such as Buddhism, Christianity, Hinduism, Judaism, and Islam have been awakened alongside a host of exotic goddess, naturalist, and personality cults.<sup>4</sup> In postcolonial and postrevolutionary Africa, these same mainline religious groups have come to flourish in numerous conventional and inculturated forms alongside a bewildering array of traditional groups.<sup>5</sup> In Latin America, the human rights revolution has not only transformed longstanding Catholic and mainline Protestant communities, but also triggered the explosion of numerous new Evangelical, Pentecostal, and traditional movements.<sup>6</sup> Many parts of the world have seen the prodigious rise of a host of new or newly minted faiths, including Adventists, Bahi'as, Hare Krishnas, Jehovah's Witnesses, Mormons, Scientologists, and Unification Church members, among others—some wielding ample material, political, and media power. Religion today has become, in Susanne Rudolph's apt phrase, the latest "transnational variable."<sup>7</sup>

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4. See PROSELYTISM AND ORTHODOXY IN RUSSIA: THE NEW WAR FOR SOULS (John Witte, Jr. & Michael Bourdeaux eds., 1999) [hereinafter PROSELYTISM AND ORTHODOXY].

5. See HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990); PROSELYTIZATION AND COMMUNAL SELF-DETERMINATION IN AFRICA (Abdullahi Ahmed An-Na'im ed., 1999); *Symposium: The Problem of Proselytism in Southern Africa*, 14 EMORY INT'L L. REV. 491-1303 (2000).

6. See RELIGIOUS FREEDOM AND EVANGELIZATION IN LATIN AMERICA: THE CHALLENGE OF RELIGIOUS PLURALISM (Paul E. Sigmund ed., 1999).

7. Susanne Hoeber Rudolph, *Introduction* to TRANSNATIONAL RELIGION AND FADING STATES 6 (Susanne Hoeber Rudolph & James Piscatori eds., 1997).

One cause and consequence of this great awakening of religion around the globe is that the ambit of religious rights has been substantially expanded. In the past two decades, more than 150 major new statutes and constitutional provisions on religious rights have been promulgated—many replete with generous protections for liberty of conscience and freedom of religious exercise, guarantees of religious pluralism, equality, and nondiscrimination, and several other special protections and entitlements for religious individuals and religious groups.<sup>8</sup> These national guarantees have been matched with a growing body of regional and international norms, notably the 1981 *UN Declaration on Religious Intolerance and Discrimination Based Upon Religion and Belief* and the long catalogue of religious-group rights set out in the 1989 *Vienna Concluding Document* and its progeny.<sup>9</sup>

On the other hand, this very same world human rights revolution has helped to catalyze new forms of religious and ethnic conflict, oppression, and belligerence that have reached tragic proportions. In some communities, such as the former Yugoslavia, local religious and ethnic rivals, previously kept at bay by a common oppressor, have converted their new liberties into licenses to renew ancient hostilities, with catastrophic results.<sup>10</sup> In other communities, such as Sudan and Rwanda, ethnic nationalism and religious extremism have conspired to bring violent dislocation or death to hundreds of rival religious believers each year, and persecution, false imprisonment, forced starvation, and savage abuses to thousands of others.<sup>11</sup> In other communities, most notably in North America and Western Europe, political secularism and nationalism have

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8. For a good sampling of international and local legal documents on religious liberty, see NATAN LERNER, *RELIGION, BELIEF, AND INTERNATIONAL HUMAN RIGHTS* 129-47 (2000); *RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS* (Tad Stahnke & J. Paul Martin eds., 1998) [hereinafter *RELIGION AND HUMAN RIGHTS*].

9. For analysis, see KEVIN BOYLE & JULIET SHEEN, *FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT* (1997); MALCOLM D. EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* (1997); BAHIYIYH G. TAHZIB, *FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION* (1996); *RELIGIOUS HUMAN RIGHTS I*, *supra* note \*; *RELIGIOUS HUMAN RIGHTS II*, *supra* note \*.

10. See JULIE A. MERTUS, *KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR* (1999); PAUL MOJZES, *YUGOSLAVIAN INFERNO: ETHNORELIGIOUS WARFARE IN THE BALKANS* (1995); MICHAEL A. SELLS, *THE BRIDGE BETRAYED: RELIGION AND GENOCIDE IN BOSNIA* (1996).

11. See FRANCIS M. DENG, *WAR OF VISIONS: CONFLICT OF IDENTITIES IN THE SUDAN* 9-31 (1995).

combined to threaten a sort of civil denial and death to a number of believers, particularly "sects" and "cults" of high religious temperature or of low cultural conformity.<sup>12</sup> In still other communities, from Asia to the Middle East, Christians, Jews, and Muslims, when in minority contexts, have faced sharply increased restrictions, repression, and, sometimes, martyrdom.<sup>13</sup>

In parts of Russia, Eastern Europe, Africa, and Latin America, this human rights revolution has brought on something of a new war for souls between indigenous and foreign religious groups. This is the most recent, and the most ironic, chapter in the modern Dickensian drama. With the political transformations of these regions in the past two decades, foreign religious groups were granted rights to enter these regions for the first time in decades. In the early 1990s, they came in increasing numbers to preach their faiths, to offer their services, and to convert new souls. Initially, local religious groups—Orthodox, Catholic, Protestant, Sunni, Shi'ite, and traditional alike—welcomed these foreigners, particularly their foreign co-religionists with whom they had lost contact for many decades. Today, local religious groups have come to resent these foreign religions, particularly those from North America and Western Europe that assume a democratic human rights ethic. Local religious groups resent the participation in the marketplace of religious ideas that democracy assumes. They resent the toxic waves of materialism and individualism that democracy inflicts. They resent the massive expansion of religious pluralism that democracy encourages. They resent the extravagant forms of religious speech, press, and assembly that democracy protects.<sup>14</sup>

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12. A whole battery of new state reports on sects and cults recently emerged in Germany, France, Belgium, and Austria, some with a tone approaching xenophobia. The most comprehensive is the *Endbericht der Enquete-Kommission Sogenannte Sekten und Psychogruppen*, Deutscher Bundestag 13. Wahlperiode Drucksache 13/10950 (June 6, 1998). See also ELIZABETH ARWECK & PETER B. CLARKE, *NEW RELIGIOUS MOVEMENTS IN WESTERN EUROPE: AN ANNOTATED BIBLIOGRAPHY* (1997); *NEW RELIGIONS AND NEW RELIGIOSITY* (E. Braker & M. Warburg eds., 1998); *NEW RELIGIOUS MOVEMENTS IN EUROPE* (H. Meldgaard & J. Aagaard eds., 1997); Jonathan Luxmoore & Jolanta Babiuch-Luxmoore, *New Myths for Old: Proselytism and Transition in Post-Communist Europe*, 36 J. ECUMENICAL STUD. 43 (1999).

13. See *Report of the U.S. Commission on International Religious Freedom* 1-80 (May 1, 2000); United States Commission on Religious Freedom, *Staff Memorandum for the Chairman: Religious Freedom in Sudan, China, and Russia* 1-158 (May 1, 2000).

14. See *infra* notes 160-73 and accompanying text; see also Symposium, *Pluralism*,

A new war for souls has thus broken out in these regions, a war to reclaim the traditional cultural and moral souls of these new societies, and a war to retain adherence and adherents to the indigenous faiths.<sup>15</sup> In part, this is a theological war: rival religious communities have begun to demonize and defame each other and to gather themselves into ever more dogmatic and fundamentalist stands. The ecumenical spirit of the previous decades is giving way to sharp new forms of religious balkanization. In part, this is a legal war: local religious groups have begun to conspire with their political leaders to adopt statutes and regulations restricting the constitutional rights of their foreign religious rivals.<sup>16</sup> Beneath shiny constitutional veneers of religious freedom for all and unqualified ratification of international human rights instruments, several countries of late passed firm new antiproselytism laws, cult registration requirements, tightened visa controls, and adopted various other discriminatory restrictions on new or newly arrived religions.<sup>17</sup>

Such Dickensian paradoxes have exposed the limitations of a secular human rights paradigm standing alone. They also have inspired the earnest search for additional resources to deter violence, resolve disputes, cultivate peace, and ensure security through dialogue, liturgical healing, reconciliation ceremonies, truth commissions and other means.<sup>18</sup> Human rights principles are as much the problem as they are the solution in a number of current religious and cultural conflicts. In the war for souls in Russia, for example, two absolute principles of human rights have come into direct conflict: The foreign religion's free exercise right to share and expand its faith versus the indigenous religion's liberty-

*Proselytism and Nationalism in Eastern Europe*, 36 J. ECUMENICAL STUD. 1 (1999).

15. See, e.g., PROSELYTISM AND ORTHODOXY, *supra* note 4.

16. See RELIGIOUS HUMAN RIGHTS II, *supra* note \*.

17. See, e.g., *id.* at 305.

18. See R. SCOTT APPELBY, THE AMBIVALENCE OF THE SACRED: RELIGION, VIOLENCE, AND RECONCILIATION 167-308 (2000); WOLFGANG HUBER & HANS-RICHARD REUTER, FRIEDENSETHIK 209-352 (1990); RELIGION: THE MISSING DIMENSION OF STATECRAFT (Douglas Johnston & Cynthia Sampson eds., 1994); Donald W. Shriver, Jr., *Religion and Violence Prevention*, in CASES AND STRATEGIES FOR PREVENTIVE ACTION 169, 178-95 (Barnett R. Rubin ed., 1998); Donald W. Shriver, Jr., *The Taming of Mars: Can Humans of the Twenty-First Century Contain Their Propensity for Violence and Globalization*, in GOD, RELIGION AND THE POWERS OF THE COMMON LIFE 140, 148-61 (Max L. Stackhouse & Peter J. Paris eds., 2000).

of-conscience right to be left alone in its own territory.<sup>19</sup> Or, put in Christian theological terms, it is one group's right to abide by the Great Commission ("Go ye therefore, and make disciples of all nations"), versus another group's right to insist on the Golden Rule ("Do unto others as you would have done unto you.").<sup>20</sup> Further rights talk alone cannot resolve this dispute. Likewise, some of the nations given to the most belligerent forms of religious nationalism have ratified more of the international human rights instruments than the United States has and have crafted more elaborate bills of rights than what appears in the United States Constitution.<sup>21</sup> Here, also, further rights-talk alone is insufficient.

These paradoxes of the modern human rights revolution underscore an elementary but essential point that human rights norms need a human rights culture to be effective. "[D]eclarations are not deeds," John Noonan reminds us: "a form of words by itself secures nothing . . . words pregnant with meaning in one cultural context may be entirely barren in another."<sup>22</sup> Human rights norms have little salience in societies that lack constitutional processes that will give them meaning and measure. They have little value for parties who lack basic rights to security, succor, and sanctuary, or who are deprived of basic freedoms of speech, press, or association. They have little pertinence for victims who lack standing in courts and other basic procedural rights to pursue apt remedies. They have little cogency in communities that lack the ethos and ethic to render human rights violations a source of shame and regret, restraint and respect, confession and responsibility, reconciliation and restitution. As we have moved from the first generation of

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19. See generally Symposium, *Soul Wars: The Problem of Proselytism in Russia*, 12 EMORY INT'L L. REV. 1-738 (1998).

20. See *Matthew* 28:19-20, 7:12; *Mark* 16:15-18; *Acts* 1:8. For variant analyses of these texts, see SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM (John Witte, Jr. & Richard C. Martin eds., 1999) [hereinafter SHARING THE BOOK].

21. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); Johan D. van der Vyver, *Universality and Relativism of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43, 43-45 (1998).

22. John T. Noonan, Jr., *The Tensions and the Ideals*, in RELIGIOUS HUMAN RIGHTS II, *supra* note \*, at 593, 594; see also JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 265-84 (1998) [hereinafter NOONAN, LUSTRE OF OUR COUNTRY].

human rights declaration following World War II to the current generation of human rights implementation, this need for a human rights culture has become all the more pressing.

These paradoxes, when viewed in their religious dimensions, further suggest that religion and human rights need to be brought into a closer symbiosis.

On the one hand, human rights norms need religious narratives to ground them. There is, of course, some value in simply declaring human rights norms of "liberty, equality, and fraternity" or "life, liberty, and property"—if for no other reason than to pose an ideal against which a person or community might measure itself, to preserve a normative totem for later generations to make real. But, ultimately, these abstract human rights ideals of the good life and the good society depend on the visions and values of human communities and institutions to give them content and coherence—to provide what Jacques Maritain once called "the scale of values governing [their] exercise and concrete manifestation."<sup>23</sup> It is here that religion must play a vital role. Religion is an ineradicable condition of human lives and human communities. Religions invariably provide many of the sources and "scales of values" by which many persons and communities govern themselves. Religions inevitably help to define the meanings and measures of shame and regret, restraint and respect, responsibility and restitution that a human rights regime presupposes. Religions must thus be seen as indispensable allies in the modern struggle for human rights. To exclude them from the struggle is impossible, indeed catastrophic. To include them, by enlisting their unique resources and protecting their unique rights, is vital to enhancing the regime of human rights and to easing some of the worst paradoxes that currently exist.

Conversely, religious narratives need human rights norms both to protect them and to challenge them. There is, of course, some value in religions simply accepting the current protections of a human rights regime—the guarantees of liberty of conscience, free exercise, religious group autonomy, and the like. But passive acquiescence in a secular scheme of human rights ultimately will

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23. Jacques Maritain, *Introduction to UNESCO, HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS VII* (1948).



not prove effective. Religious communities must reclaim their own voices within the secular human rights dialogue, and reclaim the human rights voices within their own internal religious dialogues. Contrary to conventional wisdom, the theory and law of human rights are neither new nor secular in origin. Human rights are, in no small part, the modern political fruits of ancient religious beliefs and practices—ancient Jewish constructions of covenant and *mitzvot*;<sup>24</sup> original Qur'anic texts on peace and the common good;<sup>25</sup> classic Christian concepts of *ius* and *libertas*, freedom and law.<sup>26</sup>

Religious communities must be open to a new human rights hermeneutic—fresh methods of interpreting their sacred texts and traditions that will allow them to reclaim their essential roots and roles in the cultivation of human rights. Religious traditions cannot allow secular human rights norms to be imposed on them from without: they must rediscover them from within. It is only then that religious traditions can bring their full doctrinal rigor, liturgical healing, and moral suasion to bear on the problems and paradoxes of the modern human rights regime.

Both these theses (concerning the place of religion in human rights and the place of human rights in religion) are highly controversial. In the next two sections, I shall try to parse these controversies and press these theses a bit more concretely. The final section will wrestle with a few of the difficult theological and legal conundrums that are raised by a closer symbiosis between religion and human rights.

## II. RELIGION AND HUMAN RIGHTS

My first response to our modern Dickensian paradoxes is that religion, in all of its denominational multiplicity, must play a more active role in the modern human rights revolution. Many would consider this thesis to be fundamentally misguided.<sup>27</sup> Even the

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24. See David Novak, *Religious Human Rights in Judaic Texts*, in HUMAN RIGHTS IN JUDAISM, *supra* note 3.

25. See ABDULLAH AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 1-10 (1990); ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 46-68 (2d ed., 1995).

26. See RELIGIOUS LIBERTY IN WESTERN THOUGHT (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996).

27. This section is a summary of the argument set out in the sources listed in *supra*

great religions of the Book do not speak unequivocally about human rights, and none has amassed an exemplary human rights record over the centuries. Their sacred texts and canons say much more about commandments and obligations than about liberties and rights. Their theologians and jurists have resisted the importation of human rights as much as they have helped cultivate them. Their internal policies and external advocacy have helped to perpetuate bigotry, chauvinism, and violence as much as they have served to propagate equality, liberty, and fraternity. The blood of thousands is at the doors of our churches, temples, and mosques. The bludgeons of pogroms, crusades, jihads, inquisitions, and ostracisms have been used to devastating effect within and among these faiths.

Moreover, the modern cultivation of human rights in the West began in the 1940s when both Christianity and the Enlightenment seemed incapable of delivering on their promises. In the middle of this century, there was no second coming of Christ promised by Christians, no heavenly city of reason promised by enlightened libertarians, no withering away of the state promised by enlightened socialists. Instead, there was world war, gulags, and the Holocaust—a vile and evil fascism and irrationalism to which Christianity and the Enlightenment seemed to have no cogent response or effective deterrent.

The modern human rights movement was thus<sup>28</sup> born of desperation in the aftermath of World War II. It was an attempt to find a world faith to fill a spiritual void. It was an attempt to harvest from the traditions of Christianity and the Enlightenment the rudimentary elements of a new faith and a new law that would unite a badly broken world order. The proud claims of Article I of the 1948 Universal Declaration of Human Rights—"All human beings are born free and equal in dignity and rights [and] . . . are endowed with reason and conscience"<sup>28</sup>—expounded the primitive truths of Christianity and the Enlightenment with little basis in post-War world reality. Freedom and equality were hard to find anywhere. Reason and conscience had just blatantly betrayed themselves in the gulags, battlefields, and death camps.

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note \*.

28. G.A. Res. 217A, U.N. GAOR, 3d Sess. (1948), *reprinted in* RELIGION AND HUMAN RIGHTS, *supra* note 8, at 57 [hereinafter 1948 Universal Declaration].

Though desperate in origin, the human rights movement grew precociously in the decades following World War II. The United Nations issued a number of landmark documents on human rights in the 1960s. Foremost among these were the two great international covenants promulgated by the United Nations in 1966. *The International Covenant on Economic, Social, and Cultural Rights* (1966) posed as essential to human dignity the rights to self-determination, subsistence, work, welfare, security, education, and various other forms of participation in cultural life.<sup>29</sup> *The International Covenant on Civil and Political Rights* (1966) set out a long catalogue of rights to life; security of person and property; freedom from slavery and cruelty; basic civil and criminal procedural protections; rights to travel and pilgrimage; freedoms of religion, expression, and assembly; rights to marriage and family life; and freedom from discrimination on grounds of race, color, sex, language, and national origin.<sup>30</sup> Other international and domestic instruments issued in the later 1960s took particular aim at racial, religious, and gender discrimination in education, employment, social welfare programs, and other forms and forums of public life.<sup>31</sup> Various nations pressed their own human rights movements. In America, the rights revolution yielded a powerful grassroots Civil Rights Movement and a welter of landmark cases and statutes implementing the Bill of Rights and Fourteenth Amendment. In Africa and Latin America, it produced agitation, and eventually revolt, against colonial and autocratic rule. Academics throughout the world produced a prodigious new literature urging constant reform and expansion of the human rights regime. Within a generation, human rights had become the "new civic faith" of the post-War world order.<sup>32</sup>

Christian and Jewish communities participated actively as midwives in the birth of this modern rights revolution, and special religious rights protections were at first actively pursued.

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29. See G.A. Res. 2200A, U.N. GAOR, 11th Sess. (1966), reprinted in RELIGION AND HUMAN RIGHTS, *supra* note 8, at 61.

30. See *id.*, reprinted in RELIGION AND HUMAN RIGHTS, *supra* note 8, at 69.

31. For a detailed analysis of the international community's approach to religious human rights, see LERNER, *supra* note 8, at 9-39; Natan Lerner, *Religious Human Rights Under the United Nations*, in RELIGIOUS HUMAN RIGHTS II, *supra* note \*, at 79.

32. See JACQUES MARTAIN, MAN AND THE STATE, 110-11 (1951); see also U.N. CHARTER preamble (declaring a "faith in fundamental human rights").

Individual religious groups issued bold confessional statements and manifestoes on human rights shortly after World War II. Several denominations and budding ecumenical bodies joined Jewish Non-Governmental Organizations (NGOs) in cultivating of human rights at the international level.<sup>33</sup> The Free Church tradition played a critical role in the Civil Rights Movement in America and beyond, as did the Social Gospel and Christian Democratic Party movements in Europe and Latin America.<sup>34</sup>

After expressing some initial interest, however, leaders of the rights revolution consigned religious groups and their particular religious rights to a low priority. Freedom of speech and press, parity of race and gender, and the provision of work and welfare captured most of the energy and emoluments of the rights revolution. After the 1960s, academic inquiries and activist interventions into religious rights and their abuses became increasingly intermittent and isolated, inspired as much by parochial self-interest as by universal golden rules. The rights revolution seemed to be passing religion by.

This deprecation of the special roles and rights of religions from the later 1960s onward introduced several distortions into the theory and law of human rights in vogue today.

First, without religion, many rights are cut from their roots. The right to religion, Georg Jellinek once wrote, is "the mother of many other rights."<sup>35</sup> For the religious individual, the right to believe leads ineluctably to the rights to assemble, speak, worship, proselytize, educate, parent, travel, or to abstain from the same on the basis of one's beliefs. For the religious association, the right to exist invariably involves rights to corporate property, collective worship, organized charity, parochial education, freedom of press, and autonomy of governance. To ignore religious rights is to overlook the conceptual, if not historical, source of many other individual and associational rights.

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33. See Cotler, *supra* note 3, at 177-87.

34. See J. Bryan Hehir, *Religious Activism for Human Rights: A Christian Case Study*, in RELIGIOUS HUMAN RIGHTS I, *supra* note \*, at 97, 107-17; ROBERT TRAER, FAITH AND HUMAN RIGHTS 23-28 (1994).

35. GEORG JELLINEK, DIE ERKLÄRUNG DER MENSCHEN- UND BÜRGERRECHTE: EIN BEITRAG ZUR MODERNEN VERFASSUNGSGESCHICHTE 42 (1895).

Second, without religion, the regime of human rights becomes infinitely expandable. The classic faiths of the Book adopt and advocate human rights to protect religious duties. A religious individual or association has rights to exist and act not in the abstract, but in order to discharge discrete religious duties.<sup>36</sup> Religious rights provide the best example of the organic linkage between rights and duties. Without them, rights become abstract, with no obvious limit on their exercise or expansion.

Third, without religion, human rights become too captive to western libertarian ideals. Many religious traditions—whether of Buddhist, Confucian, Hindu, Islamic, Taoist, Orthodox, Reformed, or traditional stock—cannot conceive of, nor accept, a system of rights that excludes religion. Religion is, for these traditions, inextricably integrated into every facet of life. Religious rights are, for them, an inherent part of rights of speech, press, assembly, and other individual rights, as well as ethnic, cultural, linguistic, and similar associational rights. No system of rights that ignores or deprecates this cardinal place of religion can be respected or adopted.

Fourth, without religion, the state is given an exaggerated role to play as the guarantor of human rights. The simple state versus individual dialectic of many modern human rights theories leaves it to the state to protect and provide rights of all sorts. In reality, the state is not (and cannot be) so omniscient. Numerous “mediating structures” stand between the state and the individual, religious institutions prominently among them.<sup>37</sup> Religious institutions, among others, play a vital role in the cultivation and realization of rights. They can create the conditions (sometimes the prototypes) for the realization of first generation civil and political rights. They can provide a critical (sometimes the principal) means to meet second-generation rights of education, health care, child care, labor organizations, employment and artistic opportunities,

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36. See AN-NA'IM, *supra* note 25, at 1-10; DAVID NOVAK, COVENANTAL RIGHTS: A STUDY IN JEWISH POLITICAL THEORY 3-12 (2000); 1-3 WORLD COUNCIL OF CHURCHES, HUMAN RIGHTS AND CHRISTIAN RESPONSIBILITY (1975). For detailed analysis, see WOLFGANG HUBER AND HEINZ EDUARD TÖDT, MENSCHENRECHTE: PERSPEKTIVEN EINER MENSCHLICHEN WELT (1977); RELIGION AND HUMAN RIGHTS 61-79 (Sumner B. Twiss & John Kelsay eds., 1996).

37. For various arguments in favor of social pluralism, see POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY (James W. Skillen & Rockne M. McCarthy eds., 1991); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

among others. They can offer some of the deepest insights into norms of creation, stewardship, and servanthood that lie at the heart of third generation rights.

The challenge of the next century will be to transform religious communities from midwives to mothers of human rights—from agents that assist in the birth of rights norms conceived elsewhere, to associations that give birth to and nurture their own unique contributions to human rights norms and practices.

The ancient teachings and practices of Judaism, Christianity, and Islam have much to commend themselves to the human rights regime. Each of these traditions is a religion of revelation, founded on the eternal command to love one God, oneself, and all neighbors. Each tradition recognizes a canonical text as its highest authority—the Torah, the Bible, and the Qur'an, respectively. Each tradition designates a class of officials to preserve and propagate its faith, and embraces an expanding body of authoritative interpretations and applications of its canons. Each tradition has a refined legal structure—the Halacha, the canon law, and the Shari'a—that has translated its enduring principles of faith into evolving precepts of works. Each tradition has sought to imbue its religious, ethical, and legal norms into the daily lives of individuals and communities. Each tradition has produced a number of the basic building blocks of a comprehensive theory and law of religious rights—conscience, dignity, reason, liberty, equality, tolerance, love, openness, responsibility, justice, mercy, righteousness, accountability, covenant, and community, among other cardinal concepts. Each tradition has developed its own internal system of legal procedures and structures for the protection of rights, which historically have and still can serve as both prototypes and complements for secular legal systems. Each tradition has its own advocates and prophets, ancient and modern, who have worked to achieve a closer approximation of human rights ideals.<sup>38</sup>

### III. HUMAN RIGHTS AND RELIGION

This leads to my second response to the Dickensian paradoxes of our modern human rights revolution: human rights must have a

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38. This is the central thesis of RELIGIOUS HUMAN RIGHTS I, *supra* note \*.

more prominent place in the theological discourse of modern religions. Many would consider this second thesis to be as misguided as the first. It is one thing for religious bodies to accept the freedom and autonomy that a human rights regime allows. This at least gives them unencumbered space to pursue their divine callings. It is quite another thing for religious bodies to import human rights into their own politics and theologies. This exposes them to all manner of unseemly challenges.

Human rights norms, religious skeptics argue, challenge the structure of religious bodies. While human rights norms teach liberty and equality, most religious bodies teach authority and hierarchy. While human rights norms encourage pluralism and diversity, many religious bodies require orthodoxy and uniformity. While human rights norms teach freedoms of speech and petition, several religions teach duties of silence and submission. To draw human rights norms into the structures of religion would seem only to embolden members to demand greater access to religious governance, greater freedom from religious discipline, greater latitude in the definition of religious doctrine and liturgy. So why import them?

Moreover, human rights norms challenge the spirit of religious bodies. Human rights norms, religious skeptics argue, are the creed of a secular faith born of Enlightenment liberalism, humanism, and rationalism. Human rights advocates regularly describe these norms as our new "civic faith," "our new world religion," "our new global moral language."<sup>39</sup> The influential French jurist Karel Vasak pressed these sentiments into a full confession of the secular spirit of the modern human rights movement:

The Universal Declaration of Human Rights [of 1948], like the French Declaration of the Rights of Man and of the Citizen in 1789, has had an immense impact throughout the world. It has been called a modern addition to the New Testament, and the Magna Carta of humanity, and has become a constant source of inspiration for governments, for judges and for national and international legislators. . . . [B]y recognizing the Universal

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39. See examples in TRAER, *supra* note 34, at 1-2; van der Vyver, *supra* note 21, at 43-45.

Declaration as a *living* document . . . one can proclaim one's faith in the future of mankind.<sup>40</sup>

In demonstration of this new faith, Vasak converted the "old trinity" of "liberté, égalité, et fraternité" taught by the French Revolution, into a "new trinity" of "three generations of rights" for all humanity.<sup>41</sup> The first generation of civil and political rights elaborates on the meaning of liberty. The second generation of social, cultural, and economic rights elaborates on the meaning of equality. The third generation of solidarity rights to development, peace, health, the environment, and open communication elaborates on the meaning of fraternity. Such language has become not only the *lingua franca* but also something of the *lingua sacra* of the modern human rights movement.<sup>42</sup> In the face of such an overt confession of secular liberalism, religious skeptics conclude, a religious body would do well to resist the ideas and institutions of human rights.

Both these skeptical arguments, however, presuppose that human rights norms constitute a static belief system born of Enlightenment liberalism. But the human rights regime is not static. It is fluid, elastic, and open to challenge and change. The human rights regime is not a fundamental belief system. It is a relative system of ideas and ideals that presupposes the existence of fundamental beliefs and values that will constantly shape and reshape it. The human rights regime is not the child of

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40. Karel Vasak, *A 30-Year Struggle*, UNESCO COURIER, Nov. 1977, at 29; see also Karel Vasak, *Foreword to THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* xv (Karel Vasak ed., 1982) (quoting favorably from a UNESCO document: "Human rights are neither a new morality nor a lay religion and are much more than a language common to all mankind"). Two years later, however, he published an article more in line with his 1977 views. See Karel Vasak, *Pour une troisième génération des droit de l'homme*, in *ÉTUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE EN L'HONNEUR DE JEAN PICTET* [STUDIES AND ESSAYS IN INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET] 837-45 (Christophe Swinarski ed., 1984) [hereinafter Vasak, *Pour une troisième génération*].

41. See Vasak, *Pour une troisième génération*, *supra* note 40, at 837.

42. See, e.g., Joy Gordon, *The Concept of Human Rights: The History and Meaning of its Politicization*, 23 BROOK. J. INT'L L. 689 (1998); Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435 (1981); Burns H. Weston, *Human Rights*, 6 HUM. RTS. Q. 257 (1984); Jennifer A. Downs, Note, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 DUKE J. COMP. & INT'L L. 351 (1993).



Enlightenment liberalism, nor a ward under its exclusive guardianship. It is the *ius gentium* of our times, the common law of nations, which a variety of Hebrew, Greek, Roman, Christian, and Enlightenment movements have historically nurtured in the West and that today still needs the constant nurture of multiple communities, in the West and well beyond. It is beyond doubt that current formulations of human rights are suffused with fundamental libertarian beliefs and values, some of which run counter to the cardinal beliefs of various religious traditions. But libertarianism does not and should not have a monopoly on the nurture of human rights; indeed, a human rights regime cannot long survive under its exclusive patronage.

I use the antique term *ius gentium* advisedly to signal the place of human rights as "middle axioms" in our moral and political discourse.<sup>43</sup> Historically, western writers spoke of a hierarchy of laws—from natural law (*ius naturale*), to common law (*ius gentium*), to civil law (*ius civile*). The natural law was the set of immutable principles of reason and conscience, which are supreme in authority and divinity and must always prevail in instances of dispute. The civil law was the set of enacted laws and procedures of local political communities, reflecting their immediate policies and procedures. Between these two sets of norms was the *ius gentium*, which served as the set of principles and customs common to several communities and often the basis for treaties and other diplomatic conventions. The contents of the *ius gentium* gradually changed over time and across cultures as new interpretations of the natural law were offered and as new formulations of the positive law became increasingly conventional. But the *ius gentium* was a relatively consistent body of principles by which a person and a people could govern themselves.

This antique typology helps one to understand the intermediate place of human rights in our modern hierarchy of legal and cultural norms. Human rights are the *ius gentium* of our time, the middle

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43. See comparable comments, from a Muslim perspective, in Abdullahi Ahmed An-Na'im, *Towards an Islamic Hermeneutics for Human Rights*, in HUMAN RIGHTS AND RELIGIOUS VALUES: AN UNEASY RELATIONSHIP 229, 229-42 (Abdullahi Ahmed An-Na'im et al. eds., 1995). For a Catholic perspective, see Robert P. George, *Response*, in A PRESERVING GRACE: PROTESTANTS, CATHOLICS, AND NATURAL LAW 157, 157-61 (Michael Cromartie ed., 1997) [hereinafter A PRESERVING GRACE]; MARITAIN, *supra* note 32, at 97-101.

axioms of our discourse. They are derived from and dependent upon the transcendent principles that religious traditions (more than any other group) continue to cultivate. They also inform, and are informed by, shifts in the customs and conventions of sundry state law systems. These human rights norms do gradually change over time: just compare the international human rights instruments of 1948 with those of today. But human rights norms are a relatively stable set of ideals by which a person and community might be guided and judged.

This antique typology also helps one to understand the place of human rights within religion. My argument that human rights must have a more prominent place within religions today is not an attempt to import libertarian ideals into their theologies and politics. It is not an attempt to herd Trojan horses into churches, synagogues, mosques, and temples to assail secretly their spirit and structure. My argument is, rather, that religious bodies must again assume their traditional patronage and protection of human rights, bringing to this regime their full doctrinal vigor, liturgical healing, and moral suasion. Using our antique typology, religious bodies must again nurture and challenge the middle axioms of the *ius gentium* using the transcendent principles of the *ius naturale*. This must not be an effort to monopolize the discourse, nor to establish by positive law a particular religious construction of human rights.<sup>44</sup> Such an effort must be part of a collective discourse of competing understandings of the *ius naturale*—of competing theological views of the divine and the human, of good and evil, of individuality and community—that will serve constantly to inform and reform, to develop and deepen, the human rights ideals now in place.<sup>45</sup>

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44. For a provocative illustration of this proposed methodology of pluralistic religious witness, see DUNCAN B. FORRESTER, *CHRISTIAN JUSTICE AND PUBLIC POLICY* (1997). Forrester argues that "Christian theology, though it can no longer claim to provide a comprehensive theory of justice, can provide insights into justice—theological fragments—which give illumination, challenge some aspects of the conventional wisdom, and contribute to the building of just communities in which people may flourish in mutuality and hope." *Id.* at 3-4.

45. For a theological perspective, see WOLFGANG HUBER, *GERECHTIGKEIT UND RECHT: GRUNDLINIEN CHRISTLICHER RECHTSETHIK* 252, 366, 446 (1996); Wolfgang Huber, *Human Rights and Biblical Legal Thought*, in *RELIGIOUS HUMAN RIGHTS I*, *supra* note \*, at 47, 59-63; see also Jerome J. Shestack, *The Jurisprudence of Human Rights*, in *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 69, 75 (Theodor Meron ed., 1984); Christina

### A. An Emerging Human Rights Hermeneutic

A number of religious traditions of late have begun the process of reengaging the regime of human rights, of returning to their traditional roots and routes of nurturing and challenging the human rights regime. This process has been incremental, clumsy, controversial, and at times even fatal for its proponents. But the process of religious engagement of human rights is now under way in Christian, Islamic, Judaic, Buddhist, Hindu, and traditional communities alike. Something of a new "human rights hermeneutic" is slowly beginning to emerge among modern religions.<sup>46</sup>

This is, in part, a "hermeneutic of confession." Given their checkered human rights records over the centuries, religious bodies have begun to acknowledge their departures from the cardinal teachings of peace and love that are the heart of their sacred texts and traditions. Christian churches have taken the lead in this process—from the Second Vatican Council's confession of prior complicity in authoritarianism, to the contemporary church's repeated confessions of prior support for apartheid, communism, racism, sexism, fascism, and anti-Semitism.<sup>47</sup> Other communities have also begun this process—from recent Muslim academics'

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M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740, 740-52 (1994); David Tracy, *Religion and Human Rights in the Public Realm*, 112(4) DAEDALUS 237 (1983).

46. For good examples among the three religions of the Book, see AN-NA'IM, *supra* note 25; Riffat Hassan, *Rights of Women Within Islamic Communities*, in RELIGIOUS HUMAN RIGHTS I, *supra* note \*, at 361; HUBER & TÖDT, *supra* note 36, at 158-83, 222-321, 362-419; NOVAK, *supra* note 36; David Novak, *Religious Human Rights in Judaic Texts*, in RELIGIOUS HUMAN RIGHTS I, *supra* note \*, at 175; MAX STACKHOUSE, CREEDS, SOCIETY, AND HUMAN RIGHTS (1984). On emerging rights talk within various Asian and African religions, see WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998); CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore de Bary & Tu Weiming eds., 1998); RELIGIOUS DIVERSITY AND HUMAN RIGHTS (Irene Bloom et al. eds., 1996); THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell eds., 1999).

47. See Luke Timothy Johnson, *Religious Rights and Christian Texts*, in RELIGIOUS HUMAN RIGHTS I, *supra* note \*, at 65, 70-73; John S. Pobee, *Africa's Search for Religious Human Rights Through Returning to Wells of Living Water*, in RELIGIOUS HUMAN RIGHTS II, *supra* note \*, at 391, 411-13; Charles Villa-Vicencio, *From Revolution to Reconstruction: The South Africa Imperative*, in CHRISTIANITY AND DEMOCRACY IN GLOBAL CONTEXT 249-66 (John Witte, Jr. ed., 1993) [hereinafter CHRISTIANITY AND DEMOCRACY]; CHARLES VILLA-VICENCIO, A THEOLOGY OF RECONSTRUCTION: NATION BUILDING AND HUMAN RIGHTS (1992).

condemnations of the politicization of "jihad" to the Dalai Lama's recent lamentations over the "sometimes sorry human rights record" of both his own and rival traditions.<sup>48</sup>

This is, in part, a "hermeneutic of suspicion," to use Paul Ricoeur's phrase. Given the pronounced libertarian tone of many recent human rights formulations, it is imperative that we not idolize or idealize these formulations. We need not be bound by current taxonomies of "three generations of rights" rooted in liberty, equality, and fraternity.<sup>49</sup> Common law formulations of "life, liberty, or property," canon law formulations of "natural, ecclesiastical, and civil rights," or Protestant formulations of "civil, theological, and pedagogical uses" of rights might well be more apt classification schemes. We need not accept the seemingly infinite expansion of human rights discourse and demands. Rights bound by moral duties, by natural capacities, or by covenantal relationships might well provide better boundaries to the legitimate expression and extension of rights. We also need not be bound only to a centralized legal methodology of articulating and enforcing rights. We might also consider a more pluralistic model of interpretation that respects "the right of the [local] community to be the living frame of interpretation for their own religion and its normative regime."<sup>50</sup>

This is, in part, a "hermeneutic of history." While acknowledging the fundamental contributions of Enlightenment liberalism to the modern rights regime, we must also see the deeper genesis and genius of many modern rights norms in religious texts and traditions that antedate the Enlightenment by centuries, if not millennia. We must return to our religious sources. In part, this is a return to ancient sacred texts freed from the casuistic accretions of generations of jurists and freed from the cultural trappings of the communities in which these traditions were born. In part, this is a return to slender streams of theological jurisprudence that have not been part of the mainstream of the religious traditions, or have become diluted by too great a commingling with it. In part, this is a return to prophetic voices of dissent, long purged from traditional

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48. See AN-NA'IM, *supra* note 25, at 171-72; Farid Esack, *Muslims Engaging the Other and the Humanum*, in SHARING THE BOOK, *supra* note 20, at 118, 119-20; Dalai Lama, Commencement Address of the Dalai Lama at Emory University (May 11, 1998).

49. See *supra* note 41 and accompanying text.

50. AN-NA'IM, *supra* note 25, at 235.

religious canons, but, in retrospect, prescient of some of the rights roles that the tradition might play today.

Permit me to illustrate this budding new human rights hermeneutic using my own tradition of Christianity. There are various ways to tell the Christian part of this story. One can analyze the rights contributions of seminal figures from Christ and the early Church Fathers onward. One can sift through the complex patterns of rights talk of various regional and national Christian groups. One can dig into the daily rights narratives of discrete communities of the faithful in different social and political contexts. Ultimately, these and other genres of analysis will need to be pursued and combined to come to full terms with the Christian Church's past and potential contribution to human rights, including religious rights.

To outline the main Christian story here, permit me to analyze briefly the rights contributions of the three main Catholic, Protestant, and Orthodox traditions of Christianity. I have told parts of this story before.<sup>51</sup> But some readers have, quite properly, criticized me for speaking with "too Protestant" an accent.<sup>52</sup> Herewith I commence with at least a partial purgation.

### *B. Human Rights and Catholicism*

The Roman Catholic Church is, paradoxically, the first and the last of the three great traditions of Christianity to embrace the doctrine of human rights. At the opening of the second millennium of the common era, the Catholic Church led the first great human rights movement of the West in the name of "freedom of the church"

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51. See JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 1-56 (2000) [hereinafter THE AMERICAN EXPERIMENT]; *The Biography and Biology of Liberty: Abraham Kuyper and the American Experiment*, in RELIGION, PLURALISM, AND PUBLIC LIFE: ABRAHAM KUYPER'S LEGACY FOR THE 21ST CENTURY 243-62 (Luis Lugo et al. eds., 2000) [hereinafter *The American Experiment*]; John Witte, Jr., *The Development of Herman Dooyeweerd's Concept of Rights*, 110(3) S. AFRICAN L. J. 543-62 (1993); John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41 (1990) [hereinafter Witte, *How to Govern a City on a Hill*]; John Witte, Jr., *Moderate Religious Liberty in the Theology of John Calvin*, 31 CALVIN THEOLOGICAL J. 359 (1996) [hereinafter Witte, *Moderate Religious Liberty*].

52. See Richard W. Garnett, *Francis Bacon Takes on the Ghouls*, 3 GREEN BAG 2d 447, 453-54 (2000).

(*libertas ecclesiae*). During the Papal Revolution of Pope Gregory VII (1073-1085) and his successors, the Catholic clergy threw off their royal and civil rulers and established the church as an autonomous legal and political corporation within western Christendom.<sup>53</sup> For the first time, the church successfully claimed jurisdiction over such persons as clerics, pilgrims, students, Jews, and Muslims. It also claimed jurisdiction over such subjects as doctrine and liturgy, ecclesiastical property, polity, patronage, marriage and family relations, education, charity, inheritance, oral promises, oaths, various contracts, and all manner of moral and ideological crimes.<sup>54</sup> The Church predicated these jurisdictional claims in part on Christ's famous delegation of the keys to St. Peter (Matthew 16:18)—a key of knowledge to discern God's word and will and a key of power to implement and enforce that word and will by law.<sup>55</sup> The Church also predicated these claims on its traditional authority over the form and function of the Christian sacraments.<sup>56</sup> By the fifteenth century, the Church had gathered around the seven sacraments whole systems of canon law rules that prevailed throughout the West.<sup>57</sup>

The medieval canon law was based, in part, on the concept of individual and corporate rights (*iura*). The canon law defined the rights of the clergy to their liturgical offices and ecclesiastical benefices, their exemptions from civil taxes and duties, and their immunities from civil prosecution and compulsory testimony. It defined the rights of ecclesiastical organizations like parishes, monasteries, charities, and guilds to form and dissolve, to accept and reject members, to establish order and discipline, to acquire, use, and alienate property. It defined the rights of church councils and synods to participate in the election and discipline of bishops, abbots, and other clergy. It defined the rights of the laity to worship, evangelize, maintain religious symbols, participate in the sacraments, travel on religious pilgrimages, and educate their

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53. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 94-113 (1983).

54. See *id.*

55. See BRIAN TIERNEY, *ORIGINS OF PAPAL INFALLIBILITY, 1150-1350*, 39-45, 82-121 (1972).

56. See *id.*

57. See *id.*; R.H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* 1-32 (1996); *LEX ET SACRAMENTUM IM MITTELALTER* (Paul Wilpert ed., 1969).

children. It defined the rights of the poor, widows, and the needy to seek solace, succor, and sanctuary within the church. A good deal of the rich latticework of medieval canon law was cast, substantively and procedurally, in the form and language of rights.<sup>58</sup>

To be sure, such rights were not unguided by duties, nor were they available to all parties. Only the Catholic faithful—and notoriously not Jews, Muslims, or heretics<sup>59</sup>—had full rights protection, and their rights were to be exercised with appropriate ecclesiastical and sacramental constraints. But the basic medieval rights formulations of exemptions, immunities, privileges, and benefits, and the free exercise of religious worship, travel, speech, and education have persisted, with ever greater inclusivity, to this day. Many of the common formulations of individual and collective rights and liberties in vogue today were first forged, not by John Locke or James Madison, but by twelfth- and thirteenth-century canonists and theologians.

It was, in part, the perceived excesses of the sixteenth-century Protestant Reformation that closed the door to the Catholic Church's own secular elaboration of this refined rights regime. The Council of Trent (1545-1563) confirmed, with some modifications, the internal rights structure of the canon law. These formulations were elaborated in the writings of Spanish and Portuguese neo-scholastics.<sup>60</sup> But the Church left it largely to nonchurch bodies and non-Catholic believers to draw out the secular implications of the medieval human rights tradition. The Catholic Church largely tolerated Protestant and humanist rights efforts in the later

58. See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625* (1997) [hereinafter *THE IDEA OF NATURAL RIGHTS*]; Brian Tierney, *Religious Rights: An Historical Perspective*, in *RELIGIOUS HUMAN RIGHTS I*, *supra* note \*, at 17; Brian Tierney, *RIGHTS, LAW, AND INFALLIBILITY IN MEDIEVAL THOUGHT* (1997); Charles J. Reid, Jr., *Thirteenth Century Canon Law and Rights: The Word ius and Its Range of Subjective Meanings*, 30 *STUDIA CANONICA* 295 (1996); Charles J. Reid, Jr., *Roots of a Democratic Church Polity in the History of the Canon Law*, 60 *CLSA PROCEEDINGS* 150 (1998); Charles J. Reid, Jr., *Rights in Thirteenth Century Canon Law: An Historical Investigation* (1994) (unpublished Ph.D. dissertation, Cornell Univ.) (on file with author).

59. See SOLOMON GRAYZEL, *THE CHURCH AND THE JEWS IN THE XIII<sup>TH</sup> CENTURY* (1989); JAMES PARKES, *THE JEW IN THE MEDIEVAL COMMUNITY: A STUDY OF HIS POLITICAL AND ECONOMIC SITUATION* 239-66 (2d ed. 1976); *PERSECUTION AND TOLERATION* (W.J. Sheils ed., 1984).

60. See *THE IDEA OF NATURAL RIGHTS*, *supra* note 58.

sixteenth century and beyond, which built, in part, on biblical and canon law foundations. The Church grew increasingly intolerant, however, of the rights theories of the Enlightenment, which built on secular theories of individualism and rationalism. Enlightenment teachings on liberties, rights, and separation of church and state conflicted directly with Catholic teachings on natural law, the common good, and subsidiarity. The Church's intolerance of such formulations gave way to outright hostility after the French Revolution, most notably in the blistering *Syllabus of Errors* of 1864.<sup>61</sup> Notwithstanding the social teachings of subsequent instruments, such as *Rerum Novarum*, in 1891, and *Quadragesimo Anno*, in 1934, the Catholic Church had little patience with the human rights reforms and democratic regimes of the later nineteenth and early twentieth centuries. It acquiesced more readily in the authoritative regimes and policies that governed the European, Latin American, and African nations where Catholicism was strong.<sup>62</sup>

The Second Vatican Council (1962-1965) (Vatican II) and subsequent initiatives transformed the Catholic Church's theological attitude toward human rights and democracy. In a series of sweeping new doctrinal statements, from *Mater et Magistra*, in 1961, onward, the Church came to endorse many of the very same human rights and democratic principles that it had spurned a century before.<sup>63</sup> First, the Church endorsed human rights and liberties—not only in the internal, canon law context, but also now in a global, secular law context.<sup>64</sup> Every person, the Church taught, is created by God “with intelligence and free will” and has rights “flowing directly and simultaneously from his very

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61. See Pope Pius IX, *Syllabus of Errors Concerning the Liberal Ideology* (1864), reprinted in *CHURCH AND STATE THROUGH THE CENTURIES* 281 (Sidney Z. Ehler & John B. Morrall eds., 1954) [hereinafter *CHURCH AND STATE*].

62. See DAVID HOLLENBACH, *CLAIMS IN CONFLICT: RETRIEVING AND RENEWING THE CATHOLIC HUMAN RIGHTS TRADITION* 42 (1979); JOHN COURTNEY MURRAY, *THE PROBLEM OF RELIGIOUS FREEDOM* 3-6 (1965); NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 22, at 331-53; *CHURCH AND STATE*, *supra* note 61, at 281-355; John Courtney Murray, *The Problem of Religious Freedom*, 25 *THEOLOGICAL STUD.* 503-75 (1964); Mary Elsbernd, *Papal Statements on Rights: A Historical Contextual Study of Encyclical Teachings from Pius VI-Pius XI (1791-1939)* (1985) (unpublished Ph.D. dissertation, Catholic Univ. of Louvain).

63. See HOLLENBACH, *supra* note 62, at 62-63.

64. See *id.*



nature."<sup>65</sup> Such rights include the right to life and adequate standards of living, to moral and cultural values, to religious activities, to assembly and association, to marriage and family life, and to various social, political, and economic benefits and opportunities.<sup>66</sup> The Church emphasized the religious rights of conscience, worship, assembly, and education, calling them the "first rights" of any civic order.<sup>67</sup> The Church also stressed the need to balance individual and associational rights, particularly those involving the church, family, and school. Governments everywhere were encouraged to create conditions conducive to the realization and protection of these "inviolable rights" and encouraged to root out every type of discrimination, whether social or cultural, whether based on sex, race, color, social distinction, language, or religion.<sup>68</sup> Second, as a corollary, the Church advocated limited constitutional government, disestablishment of religion, and the separation of church and state.<sup>69</sup> The vast pluralism of religions and cultures, and the inherent dangers in state endorsement of any religion, in the Church's view, rendered mandatory such democratic forms of government.<sup>70</sup>

Vatican II and its progeny transformed not only the theological attitude but also the social actions of the Catholic Church respecting human rights and democracy. After Vatican II, the Church was less centralized and more socially active. Local bishops and clergy were given greater autonomy and incentive to participate in local and national affairs, to bring the Church's new doctrines to bear on matters both political and cultural. Particularly in North America and Europe, bishops and bishops' conferences became active in cultivating and advocating a variety of political and legal reforms. Likewise, in Latin America, the rise of liberation theologies and base communities helped to translate many of the enduring and evolving rights perspectives of the Church into intensely active social and political programs. The Catholic Church

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65. *Pacem in Terris*, para. 9 (1963), reprinted in *THE GOSPEL OF PEACE AND JUSTICE: CATHOLIC SOCIAL TEACHING SINCE POPE JOHN 201, 203* (Joseph Gremillion ed., 1976).

66. See *id.* at 203-08.

67. See *id.* at 203-04.

68. See *id.* at 209-10.

69. See *id.* at 216-18.

70. See *Dignitatis Humanae Declaration [On Religious Freedom]* (1965), reprinted in *THE DOCUMENTS OF VATICAN II* 675 (Walter M. Abbott & Joseph Gallagher eds., 1967).

was thereby transformed from a passive accomplice in authoritarian regimes to a powerful advocate of democratic and human rights reform. The Catholic Church has been a critical force in the new wave of political democratization that has been breaking over the world since the early 1970s, both through the announcements and interventions of the papacy and through the efforts of its local clergy. New democratic and human rights movements in Brazil, Chile, Central America, the Philippines, South Korea, Poland, Hungary, the Czech Republic, Ukraine, and elsewhere owe much of their inspiration to the teaching and activity of the Catholic Church.<sup>71</sup>

The Catholic Church has thus come full circle. The Church led the first human rights movement of the West at the opening of the second millennium. It stands ready to lead the next human rights movement, this time of the world, at the opening of the third millennium—equipped with a refined theology and law of human rights and some one billion members worldwide. The Catholic Church offers a unique combination of local and global, confessional and universal human rights strategies for the next century. Within the internal forum and the canon law, the Church has a distinctly Catholic human rights framework that protects especially the second generation rights of education, charity, and health care within a sacramental and sacerdotal context. Within the external forum of the world and its secular law, however, the Church has a decidedly universal human rights framework that advocates especially first generation civil and political rights for all. Some critics view this two-pronged human rights ministry as a self-serving attempt to advocate equality and liberty without the Church, but to perpetuate patriarchy and elitism within.<sup>72</sup> But this criticism has had little apparent effect. The Catholic Church's human rights ministry, if pursued with the zealotry shown by the current episcopacy, promises to have a monumental effect on law, religion, and human rights in the next century.

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71. See J. Bryan Hehir, *Catholicism and Democracy: Conflict, Change, and Collaboration*, in *CHRISTIANITY AND DEMOCRACY*, *supra* note 47, at 15, 25-28; Hehir, *supra* note 34, at 107-19; GEORGE WEIGEL, *THE FINAL REVOLUTION: THE RESISTANCE CHURCH AND THE COLLAPSE OF COMMUNISM* 16, 77-102, 191-209 (1992).

72. See William Johnson Everett, *Human Rights in the Church*, in *RELIGIOUS HUMAN RIGHTS I*, *supra* note \*, at 121, 125-31.

### *C. Human Rights and Protestantism*

One of the ironies of the contemporary human rights movement is the relative silence of the Protestant churches. Historically, Protestant churches produced some of the most refined theories and laws of human rights. Today, many Protestant churches have been content simply to confirm human rights norms and to condemn human rights abuses without deep corporate theological reflection. To be sure, some leading Protestant lights have taken up the subject in their writings.<sup>73</sup> A number of Protestant groups within the church, particularly new liberationist and feminist groups, have developed important new themes.<sup>74</sup> The American Civil Rights Movement found some of its strongest support among Baptist, Methodist, and other Free Churches. The ecumenical movement, especially the World Council of Churches, consolidated the efforts of many Protestant denominations.<sup>75</sup> But, to date, no comprehensive and systematic human rights theory or program has taken the Protestant field. Twentieth-century Protestantism produced no John Courtney Murray and no Vatican II.

The irony of this is that the Protestant Reformation was, in effect, the second great human rights movement of the West. Prior to the sixteenth century, there was one universal Catholic faith and Church, one universal system of canon law and sacramental life, one universal hierarchy of courts and administrators centered in Rome that ruled throughout much of the West. Martin Luther, John Calvin, Thomas Cranmer, Menno Simons, and other leading sixteenth-century reformers all began their movements with a call for freedom from this ecclesiastical regime—freedom of the individual conscience from intrusive canon laws and clerical

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73. See, e.g., 1-3 HANS DOMBOIS, *DAS RECHT DER GNADE* (1969); FORRESTER, *supra* note 44; HUBER & REUTER, *supra* note 18; HUBER AND TÖDT, *supra* note 36; STACKHOUSE, *supra* note 46; JOHAN D. VAN DER VYVER, *SEVEN LECTURES ON HUMAN RIGHTS* (1976).

74. See VICENCIO, *A THEOLOGY OF RECONSTRUCTION*, *supra* note 47.

75. See *A CHRISTIAN DECLARATION ON HUMAN RIGHTS: THEOLOGICAL STUDIES OF THE WORLD ALLIANCE OF REFORMED CHURCHES* (Allen O. Miller ed., 1977); HUBER AND TÖDT, *supra* note 36; JÜRGEN MOLTSMANN, *ON HUMAN DIGNITY, POLITICAL THEOLOGY AND ETHICS* (M. Douglas Meeks trans. 1984); LUTHERAN WORLD FEDERATION, *THEOLOGICAL PERSPECTIVES ON HUMAN RIGHTS* (1977); NATIONAL COUNCIL OF CHURCHES, *Human Rights Office, LIFE IN ALL ITS FULLNESS: THE WORD OF GOD AND HUMAN RIGHTS* (1998); 1-3 WORLD COUNCIL OF CHURCHES, *HUMAN RIGHTS AND CHRISTIAN RESPONSIBILITY* (1975).

controls, freedom of political officials from ecclesiastical power and privileges, freedom of the local clergy from central papal rule and oppressive princely controls. "Freedom of the Christian" became the rallying cry of the early Reformation. It drove theologians and jurists, clergy and laity, princes and peasants alike to denounce canon laws and ecclesiastical authorities with unprecedented alacrity and to urge radical constitutional reforms.<sup>76</sup>

The Protestant Reformation permanently broke the unity of western Christendom, and thereby introduced the foundations for the modern constitutional system of confessional pluralism.

The Lutheran Reformation territorialized the faith through the principle of *cuius regio, eius religio* (whosever region, his religion), established by the Peace of Augsburg in 1555.<sup>77</sup> Under this principle, princes or city councils were authorized to prescribe the appropriate forms of Evangelical or Catholic doctrine, liturgy, and education for their polities. Religious dissenters were granted the right to worship privately in their homes or to emigrate peaceably from the polity. After decades of bitter civil war, the Peace of Westphalia in 1648 extended this privilege to Reformed Calvinists as well, rendering Germany and beyond a veritable honeycomb of religious plurality for the next two centuries.

The Anglican Reformation nationalized the faith through the famous Supremacy Acts and, the Acts of Uniformity passed from 1534 to 1559. Citizens of the Commonwealth of England were required to be communicants of the Church of England, subject to the final ecclesiastical and political authority of the Monarch. The Toleration Act of 1689 extended a modicum of rights to some Protestant dissenters.<sup>78</sup> But it was not until the Jewish and Catholic Emancipation Acts of 1829 and 1833 that the national identity of the Church and Commonwealth of England was finally formally broken.<sup>79</sup>

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76. The remainder of this section is drawn from *THE AMERICAN EXPERIMENT*, *supra* note 51, at 14-19 and sources cited therein.

77. See Religious Peace of Augsburg, Sept. 25, 1555, *reprinted in* *CHURCH AND STATE*, *supra* note 61, at 164.

78. See *CHURCH AND STATE*, *supra* note 61, at 215-16.

79. See JOSEPH LECLER, 1-4 *TOLERATION AND THE REFORMATION* (T.L. Westow trans., 1960).

The Anabaptist Reformation communalized the faith by introducing what Menno Simons once called the *Scheidingsmauer*: the wall of separation between the redeemed realm of religion and the fallen realm of the world. Anabaptist religious communities were ascetically withdrawn from the world into small, self-sufficient, intensely democratic communities, governed internally by biblical principles of discipleship, simplicity, charity, and Christian obedience. When such communities grew too large or divided, they deliberately colonized themselves, eventually spreading Anabaptist communities from Russia and Ireland to the furthest frontiers of North America.<sup>80</sup>

The Calvinist Reformation congregationalized the faith by introducing the notion of rule by a democratically elected consistory of pastors, elders, and deacons.<sup>81</sup> In John Calvin's day, the Geneva consistory was still appointed and held broad personal and subject matter jurisdiction over all members of the city. By the seventeenth century, however, most Calvinist communities in Europe and North America reduced the consistory to an elected, representative system of government within each church. These consistories featured separation of the offices of preaching, discipline, and charity, as well as a fluid, dialogical form of religious polity and policing centered around collective worship and the congregational meeting.

The Protestant Reformation also broke the primacy of corporate Christianity and placed new emphasis on the role of the individual believer in the economy of salvation. The Protestant Reformation did not invent the individual, as too many exuberant commentators still maintain. Rather, sixteenth-century Protestant reformers, more than their Catholic contemporaries, gave new emphasis to the (religious) rights and liberties of individuals at both religious law and civil law.

This new emphasis on the individual was true even in the more intensely communitarian traditions of Anglicanism and Anabaptism. The Anglican *Book of Common Prayer* was designed,

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80. See ANABAPTISM IN OUTLINE: SELECTED PRIMARY SOURCES (Walter Klaassen ed., 1973); ROBERT FRIEDMANN, THE THEOLOGY OF ANABAPTISM (1973); 1, 2 WILLIAM C. MCLOUGHLIN, NEW ENGLAND DISSENT 1630-1833 (1971); THE RECOVERY OF THE ANABAPTIST VISION (Guy F. Hersberger ed., 1957).

81. See Witte, *Moderate Religious Liberty*, *supra* note 51, at 392-93.

in Thomas Cranmer's words, as a "textbook of liberty."<sup>82</sup> The daily office of the lectionary, together with the vernacular Bible, encouraged the exercise of private devotion outside the church. The choices among liturgical rites and prayers within the Prayer Book encouraged the exercise of at least some clerical innovation within the church, with such opportunities for variation and innovation increasing with the 1662 and 1789 editions of the Prayer Book.

The Anabaptist doctrine of adult baptism gave new emphasis to a voluntarist understanding of religion, as opposed to conventional notions of a birthright or predestined faith. The adult individual was now called to make a conscientious choice to accept the faith—metaphorically, to scale the wall of separation between the fallen world and the realm of religion to come within the perfection of Christ. Later, Free Church followers converted this cardinal image into a powerful platform of liberty of conscience, free exercise of religion, and separation of church and state, not only for Christians but also eventually for all peaceable believers. Their views had a great influence on the formation of constitutional protections of religious liberty in eighteenth-and-nineteenth-century North America and Western Europe.<sup>83</sup>

The Lutheran and Calvinist branches of the Reformation laid the anthropological basis for an even more expansive theory and law of rights.<sup>84</sup> Classic Protestant theology teaches that a person is both saint and sinner. On the one hand, a person is created in the image of God and justified by faith in God. The person is called to a distinct vocation, which stands equal in dignity and sanctity to all others. The person is prophet, priest, and king who is responsible to exhort, minister, and rule in the community. Every person, therefore, stands equal before God and before his or her neighbor. Every person is vested with a natural liberty to live, to believe, and to serve God and neighbor. Every person is entitled to the vernacular Scripture, to education, and to work in a vocation. On the other hand, the person is sinful and prone to evil and egoism. He needs the restraint of the law to deter him from evil and to drive him to repentance. He needs the association of others to exhort,

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82. See, e.g., *THE BOOK OF COMMON PRAYER 1559* (John E. Booty ed., 1976).

83. See Max L. Stackhouse & Deirdre King Hainsworth, *Deciding for God: The Right to Convert in Protestant Perspectives*, in *SHARING THE BOOK*, *supra* note 20, at 201, 201-30.

84. See Law, Religion and Human Rights, *supra* note \*, at 22.

minister, and rule him with law and with love. Every person, therefore, is inherently a communal creature. Every person belongs to a family, a church, and a political community.

These social institutions of family, church, and state, Protestants believe, are divine in origin and human in organization. They are created by God and governed by godly ordinances. They stand equal before God and are called to discharge distinctive godly functions in the community. The family is called to rear and nurture children, to educate and discipline them, and to exemplify love and cooperation. The church is called to preach the word, administer the sacraments, educate the young, and aid the needy. The state is called to protect order, punish crime, and promote community. Though divine in origin, these institutions are formed through human covenants. Such covenants confirm the divine functions—the created offices—of these institutions. Such covenants also organize these offices so that they are protected from the sinful excesses of officials who occupy them. Family, church, and state are thus organized as public institutions, accessible and accountable to each other and to their members. Specifically, the church is to be organized as a democratic congregational polity, with a separation of ecclesiastical powers among pastors, elders, and deacons, election of officers to limited tenures, and ready participation of the congregation in the life and leadership of the church.

Protestant groups in Europe and America cast these theological doctrines into democratic forms designed to protect human rights. Protestant doctrines of the person and society were cast into democratic social forms. Given that all persons stand equal before God, they must stand equal before God's political agents in the state. Given that God vested all persons with natural liberties of life and belief, the state must ensure them of similar civil liberties. Given that God has called all persons to be prophets, priests, and kings, the state must protect their freedoms to speak, to preach, and to rule in the community. Given that God has created persons as social creatures, the state must promote and protect a plurality of social institutions, particularly the church and the family.

Protestant doctrines of sin were cast into democratic political forms. The political office must be protected against the sinfulness of the political official. Political power, like ecclesiastical power,

must be distributed among self-checking executive, legislative, and judicial branches. Officials must be elected to limited terms of office. Laws must be clearly codified and discretion closely guarded. If officials abuse their offices, they must be disobeyed; if they persist in their abuse, they must be removed, even if by force.

These Protestant teachings helped to inspire many of the early modern revolutions fought in the name of human rights and democracy.<sup>85</sup> They were the driving ideological forces behind the revolts of the French Huguenots, Dutch pietists, and Scottish Presbyterians against their monarchical oppressors in the later sixteenth and seventeenth centuries. They were critical weapons in the arsenal of the revolutionaries in England, America, and France. They were important sources of the great age of democratic construction in later eighteenth and nineteenth-century America and Western Europe. In this century, Protestant ideas of human rights and democracy helped to drive the constitutional reformation of Europe in the post-War period, as well as many of the human rights and democratic movements against colonial autocracy in Africa and fascist revival in Latin America.

These cardinal Protestant teachings and practices have much to offer the regime of human rights in the twenty-first century. Protestant theology avoids the reductionist extremes of libertarianism, which sacrifices the community for the individual, and totalitarianism, which sacrifices the individual for the community. It avoids the limitless expansion of human rights claims by grounding these norms in the creation order, divine callings, and covenant relationships. And it avoids uncritical adoption of human rights by judging their civil, theological, and educational uses in the lives of both individuals and communities. On this foundation, Protestant theology strikes unique balances between liberty and responsibility, dignity and depravity, individuality and community, politics and pluralism.

To translate these theological principles into human rights practices is the great challenge facing the Protestant churches in the immediate future. The Protestant tradition needs to have its own Vatican II, its own comprehensive and collective assessment of

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85. See HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 83-139 (1993).



its future role in the human rights drama. Of course, Protestant congregationalism militates against such collective action, as do the many ancient animosities among Protestant sects. But this is no time, and no matter, for denominational snobbery or sniping. Protestants need to sow their own distinct seeds of human rights while the field is still open. Else, there will be little to harvest and little room to complain in this new century.

#### *D. Human Rights and the Orthodox Tradition*

The Orthodox churches, rooted in Eastern Christianity and the Byzantine Empire, ground their human rights theology less in the dignity of the person and more in the integrity of natural law and the human community. To be sure, some of the earliest Greek Fathers sounded familiar western themes of liberty of conscience, human dignity, and free exercise of religion. For example, Lactantius, the great fourth-century sage of the Orthodox tradition, wrote: "[I]t is only in religion that liberty has chosen to dwell. For nothing is so much a matter of free will as religion, and no one can be required to worship what he does not will to worship."<sup>86</sup> Such sentiments have echoed in the Orthodox tradition ever since—especially in the modern transplanted Orthodox communities of Western Europe and North America.

What has rendered the Orthodox human rights understanding unique, however, is its distinct natural-law foundation.<sup>87</sup> The Orthodox Church emphasizes that God has written His natural law on the hearts of all persons and rewritten it on the pages of Scripture.<sup>88</sup> This natural law, which finds its most sublime source and summary in the Ten Commandments, prescribes a series of

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86. J.P. MIGNE, *PATROLOGIA LATINA*, (1844-91) 6:516.54.

87. See S.L. FRANK, *THE LIGHT SHINETH IN DARKNESS: AN ESSAY IN CHRISTIAN ETHICS AND SOCIAL PHILOSOPHY* 112-89 (Boris Jakim trans., 1989); STANLEY S. HARAKAS, *LET MERCY ABOUND: SOCIAL CONCERN IN THE GREEK ORTHODOX CHURCH* (1983); Ion Bria, *Evangelism, Proselytism, and Religious Freedom in Romania: An Orthodox Point of View*, 36 J. ECUMENICAL STUD. 163 (1999); Stanley S. Harakas, *Christian Ethics in Ecumenical Perspective*, 15 J. ECUMENICAL STUD. 631-41 (1978); Stanley S. Harakas, *Human Rights: An Eastern Orthodox Perspective*, 19 J. ECUMENICAL STUD. 13 (1982) [hereinafter Harakas, *Human Rights*]; Anastasios Yannoulatos, *Eastern Orthodoxy and Human Rights*, 73 INT'L REV. OF MISSION 454-66 (1984).

88. See Harakas, *Christian Ethics in Ecumenical Perspective*, *supra* note 87, at 640-41.

duties that each person owes to others and to God, such as not to kill, not to steal, not to bear false witness, not to swear falsely, not to serve other gods.<sup>89</sup> Humanity's fall into sin has rendered adherence to such moral duties imperative to the survival of the human community. God has called church and state alike to assume responsibility for enforcing by law those moral duties that are essential to such survival.

According to classic Orthodox theology, human rights are the reciprocals of these divinely ordained moral duties. One person's moral duties not to kill, steal, or bear false witness give rise to another person's rights to life, property, and dignity. A person's moral duties not to serve other gods or swear falsely give rise to his right to serve the right god and to swear properly. For every moral duty taught by natural law, there is a reciprocal moral right.<sup>90</sup>

On the strength of this ancient biblical ethic, Orthodox churches endorse a three-tiered system of rights and duties: (1) a Christian or "evangelical" system of rights and duties based on the natural law principles of Scripture, which are enforced by the canon law and sacramental theology of the church; (2) a "common moral" system of rights and duties based on universal natural-law principles accepted by rational persons in all times and places, which are enforced by moral agents within the community; and (3) a legal system of rights and duties based on the constitutional laws and social needs of the community, which are enforced by the positive laws of the state.<sup>91</sup> The church not only has a responsibility to maintain the highest standards of moral right and duty among its subjects, but also to serve as a moral agent in the community, to cultivate an understanding of "common morality" and to admonish pastorally and prophetically those who violate this common morality.<sup>92</sup>

Particularly during the long winter of Marxist-Leninist rule, Orthodox Churches throughout the world let their pastoral and prophetic voices be heard in endorsement of human rights and in condemnation of their violation.<sup>93</sup> The World Congress of Orthodox

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89. See Harakas, *Human Rights*, *supra* note 87, at 18-19.

90. See *id.* at 13-18.

91. See *id.* at 14-15.

92. See Harakas, *Christian Ethics in Ecumenical Perspective*, *supra* note 87, at 631-46.

93. See Harakas, *Human Rights*, *supra* note 87, at 20.

Bishops (1978), for example, greeted the 30th anniversary of the United Nations Declaration of Rights with the call:

We urge all Orthodox Christians to mark this occasion with prayers for those whose human rights are being denied and/or violated; for those who are harassed and persecuted because of their religious beliefs, Orthodox and non-Orthodox alike, in many parts of the world; for those whose rightful demands and persistence are met with greater oppression and ignominy; and for those whose agony for justice, food, shelter, health care and education is accelerated with each passing day.<sup>94</sup>

In 1980, the 25th Clergy-Laity Congress of the Greek Orthodox Archdiocese of North and South America pronounced, on the strength of "a universal natural law," that:

human rights consist of those conditions of life that allow us fully to develop and use our human qualities of intelligence and conscience to their fullest extent and to satisfy our spiritual, social and political needs, including freedom of expression, freedom from fear, harassment, intimidation and discrimination and freedom to participate in the functions of government and to have the guarantee of the equal protection of law.<sup>95</sup>

They further called upon "totalitarian and oppressive regimes to restore respect for the rights and dignity of the individual and to insure the free and unhindered exercise of these vital rights by all citizens, regardless of racial or ethnic origin, or political or religious espousal."<sup>96</sup> "All people," the Orthodox Congress later declared,

have the God-given right to be free from interference by government or others in (1) freely determining their faith by conscience, (2) freely associating and organizing with others for religious purposes, (3) expressing their religious beliefs in

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94. ARCHDIOCESAN ARCHIVES (Dec. 1978) (statement by Standing Conference of Canonical Orthodox Bishops in the Americas), *quoted in* Harakas, *Human Rights*, *supra* note 87, at 21.

95. *Minutes, Decisions, Resolutions and Statements of the 25th Clergy-Laity Congress of the Greek Orthodox Archdiocese of North and South America in Atlanta, Georgia* 114-15 (June 27 - July 5, 1980), *quoted in* Harakas, *Human Rights*, *supra* note 87, at 26.

96. *Id.*

worship, teaching and practice, (4) and pursuing the implications of their beliefs in the social and political community.<sup>97</sup>

The Orthodox churches have also begun to move gradually toward a greater separation of church and state, though seemingly more out of political necessity than theological conviction. Classically, the Orthodox Church had no concept akin to the political dualisms that prevailed in the West. There was no Augustinian division between the city of God and the city of Man, no medieval Catholic doctrine of two powers or two swords, no Protestant understandings of two kingdoms or two realms and no American understanding of a wall of separation between church and state.<sup>98</sup> After the fourth century, the prevailing Orthodox view was that church and state are part of an organic religious and political community, bonded by blood, soil, and confession.<sup>99</sup>

To be sure, this symbiosis of church and state subjected the Orthodox Church to substantial state control over its politics and properties, and substantial restrictions on its religious ministry and prophecy. This arrangement, however, also gave the Orthodox clergy a strong and singular spiritual voice in civil society. It allowed the clergy to teach the community through Orthodox schools and monasteries, through Orthodox literature and preaching, often supported by generous state patronage. It allowed them to nurture the community through the power and pathos of the Orthodox liturgy, icons, artwork, prayers, and music. It allowed them to advise officials on the moral dimensions of positive law.<sup>100</sup>

This symbiotic relationship between church and state worked well enough when state authorities were themselves Orthodox, or at least openly supportive of Orthodoxy. Such was the case for much of the history of Russia and other parts of Central Eurasia before

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97. ALEXANDER F.C. WEBSTER, *THE PRICE OF PROPHECY: ORTHODOX CHURCHES ON PEACE, FREEDOM, AND SECURITY* 148 (2d ed. 1995) (quoting the Orthodox Congress).

98. On the development of these doctrines, see *RELIGIOUS LIBERTY IN WESTERN THOUGHT*, *supra* note 26.

99. See *SOCIAL AND POLITICAL THOUGHT IN BYZANTIUM* (Ernest Barker trans., Oxford Univ. Press 1961) (1957).

100. See Harold J. Berman, *Freedom of Religion in Russia: An Amicus Brief for the Defendant*, in *PROSELYTISM AND ORTHODOXY*, *supra* note 4, at 265, 270-71.

the Bolshevik Revolution of 1917.<sup>101</sup> This relationship did not work well, however, when political authorities had no Orthodox allegiances. Such was the case for most other Orthodox communities after the fifteenth century.<sup>102</sup> With the Islamic conquest of the Byzantine Empire in the 1450s and the expansion of the Ottoman Empire thereafter, the Orthodox Church could no longer readily depend upon the state for protection and support. Often consigned to restricted millets, local Orthodox communities turned to the increasingly stretched Patriarchate of Constantinople for their principal support. After the great wars of nationalist liberation in Greece, Bulgaria, Romania, and the Balkans in the eighteenth and nineteenth centuries, the depleted Patriarchate of Constantinople finally broke the church into autocephalous national churches, which cooperated with local governments as best they could. Many of these new Orthodox churches saw separation from state control and state support as the safest policy, even if not the best theology. Similarly, after the great emigrations of Orthodox believers to North America at the turn of the twentieth century, the transplanted autocephalous Orthodox communities were forced to survive with little support from local state officials. Here, too, separation of church and state became an expedient principle of ecclesiastical living. Similarly, after the Bolshevik Revolution of 1917 and the gradual sovietization of Eastern Europe, the church came to endorse the Marxist-Leninist doctrine of separation of church and state, mostly out of a sheer need to survive. Although individual theologians have sought to draw a new theology of separatism from these disparate experiences of Orthodox churches, no such systematic theory seems to have yet captured the field.

Today, the Orthodox Church's commitment to human rights and democratic principles is being tested more severely than ever before, particularly in Russia and parts of Eastern Europe. The remarkable democratic revolution of the Soviet bloc in the past two decades has brought not only new liberty to these long-closed

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101. See Firuz Kazemzadeh, *Reflections on Church and State in Russian History*, in PROSELYTISM AND ORTHODOXY, *supra* note 4, at 227, 227-38; Philip Walters, *The Russian Orthodox Church and Foreign Christianity: The Legacy of the Past*, in PROSELYTISM AND ORTHODOXY, *supra* note 4, at 31, 32-41.

102. For this paragraph, see Vigen Gurioan, *Evangelism and Mission in the Orthodox Tradition*, in SHARING THE BOOK, *supra* note 20, at 231-46.

societies, but also new license. These societies now face moral degradation, economic dislocation and human suffering of massive proportions. They face the renewal of ancient animosities among religious and cultural rivals previously kept at bay by the Communist Party. They face an enormous influx of foreigners, whether religious, cultural, or economic, that offer beliefs and practices radically different from those held by either the fallen socialist state or the struggling Orthodox churches.

The leadership of the Orthodox Church of late, while continuing to endorse democratic and human rights principles, has bitterly condemned the corrosive libertarian values that often accompany these principles. Aleksii II, Patriarch of Moscow and All Russia, put the matter crisply in 1996:

Orthodox consciousness is currently being eroded away by extreme liberalism, capable of leading to tragic consequences for the Church—to schism, division in the church, the undermining of Orthodox beliefs and to ultimate destruction. We must stand against this destructive process by our constancy in faith and belief in the traditions and living Orthodox religious experience of Christian love and concern for each individual believer and for Russia as a whole.<sup>103</sup>

“[F]reedom does not mean general license,” Patriarch Aleksii pronounced a few months later.

The truth of Christ which sets us free (John 8:32) also places upon us a great responsibility, to respect and preserve the freedom of others. However, the aggressive imposition [on Russia] of views and principles which come from a religious and cultural environment which is strange to us, is in fact a violation of both religious and civil rights.<sup>104</sup>

Bartholomew, Orthodox Ecumenical Patriarch of Constantinople, has pressed this critique further, suggesting that western Catholics

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103. *Address of the Patriarch to the Councils of the Moscow Parishes at the Episcopal Gathering, 12 December 1996*, 6 TSEKOVNO-OBSHESTVENNYI VESTNIK 7, col. 1.

104. *The Report to the Bishops Council in Moscow, 18-23 February 1997, Section 11: Interconfessional and inter-faith relations; participation in the activity of international Christian organizations*, Pravoslavnaia Moskva (Mar. 1997), No. 7 (103), 4.

and Protestants have become too beholden to Enlightenment liberalism and too willing to propagate such views under the guise of Christian theology. In a series of speeches to American audiences in the fall of 1997, Bartholomew declared that western Christianity has fallen under "the shadow of the Enlightenment." Orthodox Christianity has not. The Enlightenment provides too little room for faith and too much room for freedom.

Since the Enlightenment, the spiritual bedrock of Western civilization has been eroded and undermined. Intelligent, well intentioned people sincerely believed that the wonders of science could replace the miracles of faith. But these great minds missed one vital truth—that faith is not a garment to be slipped on and off; it is a quality of the human spirit, from which it is inseparable.<sup>105</sup>

"There are a few things America [and the rest of the West] can learn from the Orthodox Church," the Patriarch declared.<sup>106</sup> Foremost is the lesson "that, paradoxically, faith can endure without freedom, but freedom cannot long abide without faith."<sup>107</sup> A balance must be struck between freedom and faith, as the transplanted Orthodox churches of the West have only recently come to realize.

Orthodox Christians, who live in a country where full religious freedom reigns and where adherents of various religions live side by side, . . . constantly see various ways of living and are in danger of being beguiled by certain of them, without examining if their way is consonant with the Orthodox Faith. Already, many of the old and new Orthodox . . . are stressing different, existing deviations from correct Orthodox lives.<sup>108</sup>

Where such a critical stand on human rights will lead the Orthodox Church is very much an open question. Orthodoxy has a strong, ancient foundation for an alternative Christian theology of duty-based rights and rights-based social action that holds great

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105. PROSELYTISM AND ORTHODOXY, *supra* note 4, at 20.

106. *Id.*

107. *Id.*

108. *Id.*

intellectual and institutional promise. Moreover, as James Billington has brilliantly shown, the Orthodox Church has immense spiritual resources, whose implications for human rights are only now beginning to be seen.<sup>109</sup> These spiritual resources lie, in part, in Orthodox worship—the passion of the liturgy, the pathos of the icons, and the power of spiritual silence. They lie, in part, in Orthodox church life—the distinct balancing between hierarchy and congregationalism through autocephaly; between uniform worship and liturgical freedom through alternative vernacular rites; between community and individuality through a trinitarian communalism, which is centered on the parish, on the extended family, on the wizened grandmother (the “babushka” in Russia). These spiritual resources lie, in part, in the massive martyrdom of millions of Orthodox faithful in the twentieth century—whether suffered by Russian Orthodox under the Communist Party, by Greek and Armenian Orthodox under Turkish and Iranian radicals, by Middle Eastern Copts at the hands of religious extremists, or by North African Orthodox under all manner of fascist autocrats.<sup>110</sup>

These deep spiritual resources of the Orthodox Church have no exact parallels in modern Catholicism and Protestantism. How the Orthodox Church can apply them to the nurture of human rights is one of the great challenges, and opportunities, of this new century. At minimum, it would be wise for us Westerners to lay aside our simple caricatures of the Orthodox Church as a politically corrupted body that is too prone to clerical indiscipline, mystical idolatry, and nominal piety to have much to offer to a human rights regime. A church with more than 250 million members scattered throughout the world defies such broad generalizations. It would be wise to hear what an ancient church, newly charred and chastened by decades of oppression and martyrdom, considers essential to the regime of religious rights. It would be enlightening to watch how ancient Orthodox communities, still largely centered on the parish and the family, will reconstruct social and economic rights. It would be prudent to see whether a culture, more prone to beautifying than to analyzing, might transform our understanding of cultural rights.

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109. See James H. Billington, *Orthodox Christianity and the Russian Transformation*, in *PROSELYTISM AND ORTHODOXY*, *supra* note 4, at 51-65; James H. Billington, *The Case for Orthodoxy*, *NEW REPUBLIC*, May 30, 1994, at 24.

110. Billington, *supra* note 109, at 63.



It would be instructive to listen to how a tradition that still celebrates spiritual silence as its highest virtue might recast the meaning of freedom of speech and expression. It would be illuminating to feel how a people that have long cherished and celebrated the role of the woman—the wizened babushka of the home, the faithful remnant in the parish pews, the living icon of the Assumption of the Mother of God—might elaborate the meaning of women's rights.

#### IV. THE PROVINCE AND PROBLEMS OF RELIGIOUS RIGHTS TODAY

Thus far, I have pressed the twin theses that religion must have a greater role in the cultivation of human rights and that human rights must have a larger place in the calculations of religious bodies. This greater interaction between religion and human rights, I submit, will ultimately strengthen both the regime of human rights and the protection of religious bodies. But this greater interaction with religion will also challenge and complicate some of the current formulations of religious rights. To illustrate this point, permit me to sketch the broad outline of the province of religious rights, as currently defined by international human rights instruments, and then touch on a few of the most controversial provisions that have increasingly beset this regime as religions have become more actively involved.

##### A. *The Basic Law*

Three international instruments contain the most critical protections of religious rights and liberties: (1) the *International Covenant on Civil and Political Rights* (1966) (the 1966 Covenant);<sup>111</sup> (2) the *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) (the 1981 Declaration);<sup>112</sup> and (3) the *Concluding*

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111. G.A. Res. 22004, U.N. GAOR, 11th Sess. (1966), reprinted in RELIGION AND HUMAN RIGHTS, *supra* note 8, at 69. [hereinafter ICCPR].

112. *United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/RES/36/55 (1981), reprinted in RELIGION AND HUMAN RIGHTS, *supra* note 8, at 102 [hereinafter 1981 Declaration].

*Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe* that was promulgated in 1989 (the Vienna Concluding Document).<sup>113</sup>

### 1. 1966 Covenant

The 1966 Covenant on Civil and Political Rights repeats the capacious guarantee of religious rights and liberties first announced in the 1948 Universal Declaration of Human Rights. Article 18 reads:

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.
3. Freedom 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.
4. 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.<sup>114</sup>

Article 18 distinguishes between the right to freedom of religion and the freedom to manifest one's religion—the analogies to the American-law concepts of liberty of conscience and free exercise of religion, respectively. The right to freedom of religion—the freedom to have, to alter, or to adopt a religion of one's choice—is an absolute right from which no derogation may be made and which

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113. Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe [selections], 28 I.L.M. 527 (1989), reprinted in RELIGION AND HUMAN RIGHTS, *supra* note 8, at 154 [hereinafter Vienna Concluding Document].

114. ICCPR art. 18, *supra* note 111, at 74.

may not be restricted or impaired in any manner. Freedom to manifest or exercise one's religion—individually or collectively, publicly or privately—may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others. The latter provision is an exhaustive list of the grounds allowed to limit the manifestation of religion. Legislatures may not limit the manifestation of religion on any other grounds.<sup>115</sup>

The requirement of necessity implies that any such limitation on the manifestation of religion must be proportionate to its aim to protect one or more of these specific state interests. Such limitation must not be applied in a manner that would vitiate the rights guaranteed in Article 18. In American constitutional law terms, Article 18 upholds the requirement that, to pass muster, a law burdening the exercise of religion must be in service of a compelling state interest and use the least restrictive a means to achieve that interest.<sup>116</sup>

Articles 2 and 26 of the 1966 Covenant require equal treatment of all persons before the law and prohibit discrimination based on religion. According to international case law, unequal treatment of equal cases is allowed only if that treatment serves an objective and reasonable purpose and the inequality is proportionate to that purpose.<sup>117</sup>

The Human Rights Committee, established under the 1966 Covenant, has made it explicit in its General Comment No. 22(48) concerning Article 18 that:

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115. See *United Nations Human Rights Committee General Comment No. 22*, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in *RELIGION AND HUMAN RIGHTS*, *supra* note 8, at 92, 93-94 [hereinafter Comment 48(2)].

116. See Alexandre Charles Kiss, *Permissible Limitations on Rights*, in *THE INTERNATIONAL BILL OF RIGHTS*, 290, 305-08 (Louis Henkin ed., 1981) [hereinafter *INTERNATIONAL BILL OF RIGHTS*]; Natan Lerner, *Religious Human Rights Under the United Nations*, in *RELIGIOUS HUMAN RIGHTS II*, *supra* note \*, at 79, 91-93; Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in *THE INTERNATIONAL BILL OF RIGHTS*, *supra*, at 209, 210-12.

117. For analysis of the international case law, particularly from the European Community, see T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in *RELIGIOUS HUMAN RIGHTS II*, *supra* note \*, at 305, 305-30 [hereinafter Gunn, *Adjudicating Rights*]; LERNER, *supra* note 8, at 40-50; T. Jeremy Gunn, *Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations*, 12 *EMORY INT'L L. REV.* 43, 67 (1998).

The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.<sup>118</sup>

In this same General Comment, the Human Rights Committee has further clarified that the freedom to manifest one's religion includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools, and the freedom to prepare and distribute religious texts or publications.<sup>119</sup>

## 2. 1981 Declaration

The 1981 Declaration elaborated what the 1966 Covenant adumbrated. The Declaration includes (1) prescriptions of religious rights for individuals and groups; (2) proscriptions on religious discrimination, intolerance, or abuse; (3) provisions specific to the religious rights of parents and children; and (4) explicit principles of implementation.<sup>120</sup> Like the 1966 Covenant, the 1981 Declaration on its face applies to "everyone," whether "individually or in community," "in public or private."<sup>121</sup>

Articles 1 and 6 of the 1981 Declaration set forth a lengthy illustrative catalogue of rights to "freedom of thought, conscience, and religion"—illustrating more concretely the ambit of what American law calls "liberty of conscience" and "free exercise of religion."<sup>122</sup> Such rights include the right:

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118. Comment 48(2), item 2, *supra* note 115, at 92.

119. *See id.* item 4, at 92-93.

120. *See* 1981 Declaration, *supra* note 112, at 102-04.

121. *Id.* art. I.1, at 103.

122. *Id.* at 103-04.

- (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.<sup>123</sup>

Like the 1966 Covenant, the 1981 Declaration allows the "manifestation of religion" to be subjected to "appropriate" state regulation and adjudication.<sup>124</sup> The 1981 Declaration permits states to enforce against religious individuals and institutions general regulations designed to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.<sup>125</sup> It is assumed, however, that in all such instances the grounds for such regulation are enumerated and explicit and that such regulations abide by the international legal principles of proportionality, necessity, and nondiscrimination.<sup>126</sup>

The 1981 Declaration includes more elaborate provisions concerning the religious rights of children and their parents.<sup>127</sup> It

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123. *Id.* art. 6, at 104.

124. *See id.* art. 1, at 103.

125. *See id.*

126. *See id.* art. IV, at 103; *see also* LERNER, *supra* note 8, at 15-32 (providing a detailed analysis of the 1966 Covenant and the 1981 Declaration).

127. *See* 1981 Declaration art. 5, *supra* note 112, at 83.

guarantees the right of parents (or guardians) to organize life within the household and to educate their children in accordance with their religion or beliefs. Such parental responsibility, however, must be discharged in accordance with the "best interests of the child."<sup>128</sup> At minimum, the parents' religious upbringing or education "must not be injurious to his physical or mental health or to his full development."<sup>129</sup> Although the drafters debated at length the potential conflicts between the parent's right to rear and educate their children in accordance with their religion and the state's power to protect the best interests of the child, they offered no specific principles to resolve these disputes.

The 1981 Declaration includes suggested principles of implementation and application of these guarantees. It urges states to take all "effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life."<sup>130</sup> It urges states to remove local laws that perpetuate or allow religious discrimination and to enact local criminal and civil laws to combat religious discrimination and intolerance.<sup>131</sup>

The 1981 Declaration, though not a binding legal instrument, provides a principled reference for monitoring a nation's compliance with international standards of religious liberty. It sets a baseline for guiding diplomatic relations and treaties among nation-states. It provides a common ground for nongovernmental and intergovernmental organizations to report and register complaints of religious rights violations. It also charges the United Nations Special Rapporteur, appointed by the United Nations Commission on Human Rights, to provide a general survey and specific onsite evaluations of Member States of the United Nations. The United States was among the States under evaluation in 1998.<sup>132</sup>

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128. *Id.*

129. *Id.* art. 5.5, at 104.

130. *Id.* art. 4.1, at 103.

131. *See id.* art. 4.2, at 103.

132. *See* Abdelfattah Amor, *The Mandate of the UN Special Rapporteur*, 12 EMORY INT'L L. REV. 945, 947-50 (1998).

### 3. 1989 Vienna Concluding Document

The 1989 Vienna Concluding Document, which applies to the participating states in the OSCE, extends these norms, particularly for religious groups. Principles 16 and 17 provide a clear distillation of principles that is worth quoting in full:

16. In order to ensure the freedom of the individual to profess and practice religion or belief the participating States will, *inter alia*,

16a. take effective measures to prevent and eliminate discrimination against individuals or communities, on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and ensure the effective equality between believers and non-believers;

16b. foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers;

16c. grant upon their request to communities of believers, practising or prepared to practise their faith within the constitutional framework of their states, recognition of the status provided for them in their respective countries;

16d. respect the right of religious communities to —establish and maintain freely accessible places of worship or assembly,—organize themselves according to their own hierarchical and institutional structure,—select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State—solicit and receive voluntary financial and other contributions;

16e. engage in consultations with religious faiths, institutions and organizations in order to achieve a better understanding of the requirements of religious freedom;

16f. respect the right of everyone to give and receive religious education in the language of his choice, individually or in association with others;

16g. in this context respect, *inter alia*, the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions;

- 16h. allow the training of religious personnel in appropriate institutions;
- 16i. respect the right of individual believers and communities of believers to acquire, possess, and use sacred books, religious publications in the language of their choice and other articles and materials related to the practice of religion or belief;
- 16j. allow religious faiths, institutions and organizations to produce and import and disseminate religious publications and materials;
- 16k. favorably consider the interest of religious communities in participating in public dialogue, *inter alia*, through mass media;
- 17. The participating States recognize that the exercise of the above-mentioned rights relating to the freedom of religion or belief may be subject only to such limitations as are provided by law and consistent with their obligations under international law and with their international commitments. They will ensure in their laws and regulations and in their application the full and effective implementation of the freedom of thought, conscience, religion or belief.<sup>133</sup>

These are the basic international provisions on religious rights on the books. Regional instruments, notably the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), the *American Convention on Human Rights* (1969), and the *African Charter on Human and People's Rights* (1981), elaborate some of these guarantees.<sup>134</sup> International treaties involving religious bodies, such as the recent Concordats between the Vatican and Italy, Spain and Israel, as well as the *Universal Islamic Declaration of Human Rights* (1981), and the *Cairo Declaration on Human Rights in Islam* (1990), give particular accent to the religious concerns and constructions of their cosigners.<sup>135</sup> The three main instruments, summarized above, however, capture the common lore of current international human rights norms on religious rights and liberties.

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133. Vienna Concluding Document, arts. 16 & 17, *supra* note 113, at 155-56.

134. See W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS II, *supra* note \*, at 1, 25-33; EVANS, *supra* note 8, at 262; Gunn, *Adjudicating Rights*, *supra* note 117, at 305, 308.

135. These documents are contained in RELIGION AND HUMAN RIGHTS, *supra* note 8, at 185-89.



## B. *The New Problems*

### 1. *Delimiting Religion*

The most difficult, and most ironic, problem is that the more religion is included in the regime of human rights, the more important it will be to set limits to the regime of religious rights. If religion is to be assigned a special place in the human rights pantheon—if religion is in need of special protections and privileges not afforded by other rights provisions—some means of distinguishing religious rights claims from all others must be offered. Fairness commands as broad a definition as possible, so that no legitimate religious claim is excluded. Prudence counsels a narrower definition, so that not every claim becomes religious and, thus, no claim becomes deserving of special religious rights protection. To define “religion” too closely is to place too much trust in the capacity of the lexicon or the legislature. To leave the term undefined is to place too much faith in the self-declarations of the claimant or the discernment of local judges and administrators.

International human rights instruments provide very broad definitions of “religion.” Article 18 of the 1948 Universal Declaration of Human Rights makes a sweeping guarantee: “Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>136</sup> The Declaration’s conflation of the terms “religion,” “thought,” “conscience” and “belief” continues in subsequent instruments—most notably in the 1966 Covenant and the 1981 Declaration.<sup>137</sup> The Declaration’s recognition of religion as individual and communal, internal and external, private and public, permanent and transient, likewise persists.

The capacious definition of religion at international law has left it largely to individual states and individual claimants to define the boundaries of the regime of religious rights.<sup>138</sup> No common

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136. ICCPR art. 18, *supra* note 111, at 59.

137. See 1981 Declaration art. I.1, *supra* note 112, at 103.

138. See Dinah Shelton & Alexandre Kiss, *A Draft Model Law on Freedom of Religion, with Commentary*, in RELIGIOUS HUMAN RIGHTS II, *supra* note \*, at 559, 568-72.

definition or uniform method has been forthcoming. Indeed, the statutes, cases and regulations of many countries embrace a bewildering array of definitions of "religion," which neither local officials nor legal commentators have been able to integrate. Some courts and legislatures make a simple "common sense" inquiry as to the existence of religion. Others defer to the good faith self-declarations of religion by the claimant. Others seek to find sufficient analogies between existing religions and new religious claimants. Others insist on evidence of a god or something transcendent, that stands in the same position as a god. And yet others analyze the motives for formation of the religious organization or adoption of a religious belief, the presence and sophistication of a set of doctrines explicating the beliefs, the practice and celebration of religious rites and liturgies, the degree of formal training required for the religious leaders, the strictures on the ability of members to practice other religions, the presence and internal enforcement of a set of ethical rules of conduct, as well as other factors.<sup>139</sup>

These are not idle academic exercises in religious taxonomy. The answer to the threshold legal question of "What is religion?" determines whether a particular claim or claimant, person or group, is entitled to a range of special rights and liberties that are reserved for religion alone. It is a question of particular importance to newly-arrived religious minorities (such as Santerians or Scientologists), to growing breakaway faiths (such as the Bah'ais, the Ahmadis, or the Mormons), or to the many traditional religions and new sects that are emerging throughout the world.

In my view, the functional and institutional dimensions of religion deserve the strongest emphasis in defining the boundaries of religious rights. Of course, religion viewed in its broadest terms embraces all beliefs and actions that concern the ultimate origin, meaning, and purpose of life, of existence. It involves the responses of the human heart, soul, mind, conscience, intuition, and/or reason to revelation, to transcendent values, to fundamental questions. But such wide definitions of religion applied at law would render everything (and thus nothing) deserving of religious rights

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139. For recent international efforts, see *id.* at 569; Haim H. Cohn, *Religious Human Rights*, 19 *Dine Israel: An Annual of Jewish Law Past and Present* 101-26, at 102-09 (1998).

protection. Viewed in a narrower, institutional sense, religion embraces, what Leonard Swidler calls, a creed, a cult, a code of conduct, and a confessional community.<sup>140</sup> A creed defines the accepted cadre of beliefs and values concerning the ultimate origin, meaning, and purpose of life. A cult defines the appropriate rituals, liturgies, and patterns of worship and devotion that give expression to those beliefs. A code of conduct defines the appropriate individual and social habits of those who profess the creed and practice the cult. A confessional community defines the group of individuals who embrace and live out this creed, cult, and code of conduct, both on their own and with fellow believers.<sup>141</sup> By this definition, a religion can be traditional or very new, closely confining or loosely structured, world-avertive or world-affirmative. Religious claims and claimants that meet this definition, in my view, deserve the closest religious rights consideration.

This is also part of the reason that I stand by the phrase "religious (human) rights" despite the well-meaning and well-taken criticisms of some that this term is idiosyncratic and too restrictive.<sup>142</sup> It must be said that the phrase "religious rights" is not my idiosyncratic invention. It is a rather common traditional term—used in Europe since the fifteenth century, and in America since the seventeenth century—to describe the body of special liberties, entitlements, immunities, and exemptions that a person or a group can claim on the basis of religion alone. These liberties go beyond the generic freedoms of speech, press, or assembly and the general guarantees of equal protection and due process of law.<sup>143</sup> To be sure, it was unduly churlish in earlier centuries to restrict

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140. See Leonard Swidler, *Introduction to Human Rights and Religious Liberty—From the Past to the Future*, in RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS vii (Leonard Swidler ed., 1986).

141. See *id.* The former UN Special Rapporteur, Elizabeth Odio-Benito, has written similarly that religion is "an explanation of the meaning of life and how to live accordingly. Every religion has at least a creed, a code of action, and a cult." U.N. Doc. E/CN.4/Sub.2/1987/26 (1987), at 4.

142. See David Little, *Studying "Religious Human Rights": Methodological Foundations*, in RELIGIOUS HUMAN RIGHTS II, *supra* note \*, at 49-52; Malcolm D. Evans, Book Review 46 INT'L & COMP. L. Q. 728 (1997) (reviewing RELIGIOUS HUMAN RIGHTS I & II); David Little, *Religion and Human Rights: A Review Essay on Religion, Relativism, and Other Matters*, 27 J. RELIGIOUS ETHICS 151, 154 n.1. (1999).

143. For European sources, see Karl Schwarz, *Der Begriff Exercitium Religionis Privatum*, 105 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (Kan. Ab.) 495 (1988).

these claims only to members of one established religion. Many legitimate religious claims and claimants were thereby foreclosed from legal recourse in state courts.<sup>144</sup> But it is unduly charitable today to allow religious claims to be predicated on the almost boundless basis of thought, conscience, or belief. Many legitimate claims of thought, conscience, or belief that are not "religious," as defined above, are amply protected by other rights norms. Claimants should be encouraged to seek their legal recourse there, rather than allowed to stretch the pale of religious rights ever more widely to cover themselves. In the abstract, this may sound elitist and traditionalist. But, unless some clear limit is assigned to the ambit of, and the access to, the regime of religious rights, such rights will be in danger of becoming open to everyone, but protective of nothing.

Religion is special: it has been, and must continue to be, accorded special protection in a human rights regime. Religion is more than simply another form of speech and assembly, privacy, and autonomy. It requires more than simply the freedoms of speech and assembly, equality and nondiscrimination to be effectively protected. Religion is a unique source of individual and personal identity and activity, involving "duties that we owe to our Creator, and the manner of discharging them," as James Madison once put it.<sup>145</sup> Religion is also a unique form of public and social identity, involving a vast plurality of sanctuaries, schools, charities, missions, and other forms and forums of faith. Both individual and corporate, private and public entities and exercises of religion—in all their self-defined varieties—deserve the protection of a human rights regime. Generic human rights guarantees are not protective enough. Even generously defined, freedom of speech cannot protect many forms of individual and corporate religious exercise—from the silent meditations of the sages to the noisy pilgrimages of the saints, from the corporate consecration of the sanctuary, to the ecclesiastical discipline of the clergy. Even expansively interpreted, guarantees of equality cannot protect the special needs of religious individuals and religious groups to be exempted from certain state

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144. See, e.g., Brian Tierney, *Religious Rights: A Historical Perspective*, in *RELIGIOUS LIBERTY IN WESTERN THOUGHT*, *supra* note 26, at 29.

145. James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), in 8 *THE PAPERS OF JAMES MADISON* 298, 299 (Robert A. Rutland et al. eds., 1973).

prescriptions or proscriptions that run afoul of the core claims of conscience, or the central commandments of the faith. Hence, the necessity for a special category and concept called religious rights.

## 2. *The Problem of Conversion*

A second human rights problem that has been exacerbated by the greater inclusion of religion concerns the right to change one's religion.<sup>146</sup> How does one craft a legal rule that at once respects and protects the sharply competing understandings of conversion among the religions of the Book? Most western Christians have easy conversion into and out of the faith. Most Jews have difficult conversion into and out of the faith. Most Muslims have easy conversion into the faith, but allow for no conversion out of it.<sup>147</sup> Whose rites get rights? Moreover, how does one craft a legal rule that respects Orthodox, Hindu, Jewish, or traditional groups that tie religious identity not to voluntary choice, but to birth and caste, blood and soil, language and ethnicity, sites and sights of divinity?<sup>148</sup>

International human rights instruments initially masked over these conflicts, despite the objections of some Muslim delegations. The 1948 Universal Declaration included an unequivocal guarantee: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief . . . ."<sup>149</sup> The 1966 Covenant, whose preparation was more highly contested on this issue, became more tentative: "This right shall include freedom to have or to adopt a religion or belief of his choice

146. See Natan Lerner, *Proselytism, Change of Religion, and International Human Rights*, 12 EMORY INT'L L. REV. 477 (1998), updated in LERNER, *supra* note 8, at 80-118; see also EVANS, *supra* note 9, at 201-02, 221-22; J.A. Walkate, *The Right of Everyone to Change His Religion or Belief*, 30 NETHERLANDS INT'L L. REV. 146 (1983).

147. See Donna E. Arzt, *The Treatment of Religious Dissidents Under Classical and Contemporary Islamic Law*, in RELIGIOUS HUMAN RIGHTS I, *supra* note \*, at 387, 406-08; David Novak, *Proselytism in Judaism*, in SHARING THE BOOK, *supra* note 20, at 17, 17-44; Joel A. Nichols, *Mission, Evangelism, and Proselytism in Christianity: Mainline Conceptions as Reflected in Church Documents*, 12 EMORY INT'L L. REV. 563, 563-64 (1998).

148. See, e.g., Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74 (James Davison Hunter & Os Guinness eds., 1990).

149. 1948 Universal Declaration art. 18, *supra* note 28, at 59.

...<sup>150</sup> The 1981 Declaration repeated this same more tentative language. The dispute over the right to conversion, however, contributed greatly to the long delay in the production of this instrument, and to the number of dissenters to it.<sup>151</sup> The 1989 Vienna Concluding Document did not touch the issue at all, but simply confirmed "the freedom of the individual to profess and practice religion or belief" before turning to a robust rendition of religious group rights.<sup>152</sup> Today, the issue has become more divisive than ever as various soul wars have broken out between and within Christian and Muslim communities around the globe.

"A page of history is worth a volume of logic," Oliver Wendell Holmes, Jr. once said.<sup>153</sup> And, on an intractable legal issue such as this, recollection might be more illuminating than ratiocination.

It is discomfoting, but enlightening, for western Christians to remember that the right to enter and exit the religion of one's choice was born in the West only after centuries of cruel experience. To be sure, a number of the early Church Fathers considered the right to change religion an essential element of the notion of liberty of conscience. Such sentiments have been repeated and glossed continuously until today.<sup>154</sup> In practice, though, the Christian Church largely ignored these sentiments for centuries. As the medieval church refined its rights structures in the twelfth and thirteenth centuries, it also routinized its religious discrimination, reserving its harshest sanctions for heretics. The communicant faithful enjoyed full rights. Jews and Muslims enjoyed fewer rights, but full rights if they converted to Christianity. Heretics—those who voluntarily chose to leave the faith—enjoyed still fewer rights and had little opportunity to recover them, even after full confession. Indeed, in the heyday of the inquisition, heretics faced not only severe restrictions on their persons, properties, and professions, but also sometimes unspeakably cruel forms of torture and punishment.<sup>155</sup> Similarly, as the Lutheran, Calvinist, and Anglican Churches routinized their establishments in the sixteenth

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150. ICCPR art. 18.1, *supra* note 111, at 74.

151. See 1981 Declaration art. 1.1, *supra* note 112, at 103.

152. Vienna Concluding Document, Principle 16, *supra* note 113, at 155.

153. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

154. See *supra* notes 146-47 and accompanying text.

155. See *supra* note 146 and accompanying text.

and seventeenth centuries, they inflicted all manner of repressive civil and ecclesiastical censures on those who chose to deviate from established doctrine, including savage torture and execution in a number of instances.<sup>156</sup>

It was, in part, the recovery and elaboration of earlier patristic concepts of liberty of conscience, as well as the slow expansion of new Protestant theologies of religious voluntarism, that helped to end this practice. It was also the new possibilities created by the frontier and by the colonies, however, that helped to forge the western understanding of the right to change religion. Rather than stay at home and fight for one's faith, it became easier for the dissenter to move away quietly to the frontier, or later to the colonies, to be alone with his conscience and his co-religionists. Rather than tie the heretic to the rack or the stake, it became easier for the establishment to banish him quickly from the community with a strict order not to return. Such pragmatic tempering of the treatment of heretics and dissenters eventually found theological justification. By the late sixteenth century, it became common in the west to read of the right, and the duty, of the religious dissenter to emigrate physically from the community whose faith he or she no longer shared.<sup>157</sup> In the course of the next century, this right of physical emigration from a religious community was slowly transformed into a general right of voluntary exit from a religious faith. American writers in particular, many of whom had voluntarily left their European faiths and territories to gain their freedom, embraced the right to leave—to change their faith, to abandon their blood, soil, and confession, to reestablish their lives, beliefs, and identities afresh—as a veritable *sine qua non* of religious freedom.<sup>158</sup> This understanding of the right to choose and change religion—patristic, pragmatic, and Protestant in initial inspiration—has now become an almost universal feature of western understandings of religious rights.

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156. See *supra* note 146 and accompanying text.

157. The most famous formulation of the right (and duty) of the dissenter to emigrate peaceably from the territory whose religious establishment he or she cannot abide, came in the *Peace of Augsburg* (1555), and its provisions are repeated in the *Edict of Nantes* (1598), and the *Religious Peace of Westphalia* (1648). See CHURCH AND STATE, *supra* note 61, at 164-98.

158. See Stackhouse and Hainsworth, *Deciding for God: The Right to Convert in Protestant Perspectives*, in SHARING THE BOOK, *supra* note 83, at 86-100.

To tell this peculiar western tale is not to resolve current legal conflicts over conversion. Rather, it is to suggest that even hard and hardened religious traditions can and do change over time, in part out of pragmatism, in part out of fresh appeals to ancient principles long forgotten. Even those schools of jurisprudence within Shi'ite and Sunni communities that have been the sternest in their opposition to a right of conversion from the faith have resources in the Qur'an, the early development of Shari'a, and in the more benign policies of other contemporary Muslim communities, to rethink their theological positions.<sup>159</sup>

Moreover, the western story suggests that there are halfway measures, at least in banishment and emigration, that help to blunt the worst tensions between a religious group's right to maintain its standards of entrance and exit and an individual's liberty of conscience to come and go. Not every heretic needs to be executed. Not every heretic needs to be indulged. It is one thing for a religious tradition to insist on executing its charges of heresy, when a mature adult, fully aware of the consequences of his or her choice, voluntarily enters a faith, and then later seeks to leave. In that instance, group religious rights must trump individual religious rights, with the limitation that the religious group has no right to violate, or to solicit violation of, the life and limb of the wayward member. It is quite another thing for a religious tradition to press the same charges of heresy against someone who was born into, married into, or coerced into the faith and now, upon opportunity for mature reflection, voluntarily chooses to leave. In that case, individual religious rights trump group religious rights.

Where a religious group exercises its trump by banishment or shunning and the apostate voluntarily chooses to return, he does so at his peril. He should find little protection in state law when subject to harsh religious sanctions, unless the religious group threatens or violates his life or limb. Where a religious individual exercises her trump by emigration, and the group chooses to pursue her, it does so at its peril. It should find little protection from state

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159. See Donna E. Arzt, *Jihad for Hearts and Minds: Proselytizing in the Qur'an and First Three Centuries of Islam*, in *SHARING THE BOOK*, *supra* note 20, at 79, 85-94; Arzt, *supra* note 147, at 108; Esack, *supra* note 48; Richard C. Martin, *Conversion to Islam by Invitation: Proselytism and the Negotiation of Identity in Islam*, in *SHARING THE BOOK*, *supra* note 20, at 95, 95-117.



law when charged with tortious or criminal violations of the individual.

There are numerous analogous tensions—generally with lower stakes—between the religious rights claims of a group and its individual members. These will become more acute as religion and human rights become more entangled. Particularly volatile will be tensions over discrimination against women and children within religious groups; enforcement of traditional religious laws of marriage, family, and sexuality in defiance of state domestic laws; maintenance of religious property, contract, and inheritance norms that defy state private laws. On such issues, the current categorical formulations of both religious group rights and religious individual rights simply restate the problems, rather than resolve them. It will take new arguments from history and experience and new appeals to internal religious principles and practices, along the lines just illustrated, to blunt, if not resolve, these tensions.

### 3. *The Problem of Proselytism*

The corollary to the modern problem of conversion is the modern problem of proselytism—of the efforts taken by individuals or groups to seek the conversion of another. How does the state balance one person's or community's right to exercise and expand its faith versus another person's or community's right to be left alone to its own traditions? How does the state protect the juxtaposed rights claims of majority and minority religions, or of foreign and indigenous religions? These are not new questions. They confronted the drafters of the international bill of rights from the very beginning. On this issue, the international instruments provide somewhat more nuanced direction.<sup>160</sup>

Article 18 of the 1966 International Covenant on Civil and Political Rights protects a person's "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.*"<sup>161</sup> But the same Article allows such manifestation of religion to be

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160. See LERNER, *supra* note 8, at 80-118; Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251.

161. ICCPR art. 18.1, *supra* note 111, at 74 (emphasis added).

subject to limitations that “are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>162</sup> It prohibits outright any “coercion” that would impair another’s right “to have or to adopt a religion or belief of his [or her] choice.”<sup>163</sup> It also requires state parties and individuals to have “respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with [the parents’] convictions”—a provision underscored and amplified in more recent instruments and cases on the rights of parents and children.<sup>164</sup>

Similarly, Article 19 of the 1966 Covenant protects the “*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*”<sup>165</sup> Article 19, however, also allows legal restrictions that are necessary for “respect of the rights or reputations of others; for the protection of national security or of public order (*ordre public*), or of public health or morals.”<sup>166</sup> As a further limitation on the rights of religion and religious expression guaranteed in Articles 18 and 19, Article 26 of the 1966 Covenant prohibits any discrimination on grounds of religion. Furthermore, Article 27 guarantees to religious minorities the right “to enjoy their own culture” and “to profess and practice their own religion.”<sup>167</sup>

The literal language of the mandatory 1966 Covenant (and its amplification in more recent instruments and cases) certainly protects the general right to proselytize—understood as the right to “manifest,” “teach,” “express,” and “impart” religious ideas for the sake, among other things, of seeking the conversion of another. The Covenant provides no protection for coercive proselytism; at minimum this bars physical or material manipulation of the would-be convert and, in some contexts, even more subtle forms of

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162. *Id.* art. 18.3.

163. *Id.* art. 18.2.

164. *Id.* art. 18.4; see also Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, reprinted in RELIGION AND HUMAN RIGHTS, *supra* note 8, at 128.

165. ICCPR art. 19.2, *supra* note 111, at 74 (emphasis added).

166. *Id.* art. 19.3.

167. *Id.* art. 27, at 75; see also Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, U.N. GAOR 135, Article 2.1 (1992), reprinted in LERNER, *supra* note 8, at 140.

deception, enticement, and inducement to convert. The Covenant also casts serious suspicion on any proselytism among children, or among adherents to minority religions. Outside of these contexts, however, the religious expression inherent in proselytism is no more suspect than political, economic, artistic, or other forms of expression and should have, at minimum, the same rights.

Such rights to religion and religious expression, of course, are not absolute. The 1966 Covenant and its progeny allow for legal protections of "public safety, order, health, or morals," "national security," and "the rights and reputation of others," particularly minors and minorities. All such legal restrictions on religious expression, however, must always be imposed without discrimination against any religion and with due regard for the general mandates of "necessity and proportionality." General "time, place, and manner" restrictions on all proselytizers, applied without discrimination against any religion, might well be apt. Categorical criminal bans on proselytism, however, or patently discriminatory licensing or registration provisions are *prima facie* a violation of the religious rights of the proselytizer—as has been clear in the United States since *Cantwell v. Connecticut*<sup>168</sup> and in the European community since *Kokkinakis v. Greece*.<sup>169</sup>

To my mind, the preferred solution to the modern problem of proselytism is not so much further state restriction as further self-restraint on the part of both local and foreign religious groups. Again, the 1966 International Covenant on Civil and Political Rights provides some useful cues.

Article 27 of the Covenant reminds us of the special right of local religious groups, particularly minorities, "to enjoy their own culture, to profess and practice their own religion."<sup>170</sup> Such language might well empower and encourage vulnerable minority traditions to seek protection from aggressive and insensitive proselytism by missionary mavericks and "drive-by" crusaders who have emerged with alacrity in the past two decades. It might even have supported a moratorium on proselytism for a few years in places like Russia so that local religions, even the majority Russian Orthodox Church,

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168. 310 U.S. 296 (1940).

169. 260-A Eur. Ct. H.R. (ser. A) 18 (1993). For a detailed analysis, see Gunn, *Adjudicating Rights*, *supra* note 117, at 305-30.

170. ICCPR art. 27, *supra* note 111, at 75.

had some time to recover from nearly a century of harsh oppression that destroyed most of its clergy, seminaries, monasteries, literature, and icons. But Article 27 cannot permanently insulate local religious groups from interaction with other religions. No religious and cultural tradition can remain frozen. For local traditions to seek blanket protections against foreign proselytism, even while inevitably interacting with other dimensions of foreign cultures, is ultimately a self-defeating policy. It stands in sharp contrast to cardinal human rights principles of openness, development, and choice. Even more, it belies the very meaning of being a religious tradition. As Jaroslav Pelikan reminds us: "Tradition is the living faith of the dead, traditionalism is the dead faith of the living."<sup>171</sup>

Article 19 of the Covenant reminds us further that the right to expression, including religious expression, carries with it "special duties and responsibilities."<sup>172</sup> One such duty, it would seem, is to respect the religious dignity and autonomy of the other, and to expect the same respect for one's own dignity and autonomy. This is the heart of the Golden Rule. It encourages all parties, especially foreign proselytizing groups, to negotiate and adopt voluntary codes of conduct, restraint, and respect of the other. This requires not only continued cultivation of interreligious dialogue and cooperation—the happy hallmarks of the modern ecumenical movement and of the growing emphasis on comparative religion and globalization in our seminaries. It also requires guidelines of prudence and restraint that every foreign mission board would do well to adopt and enforce: Proselytizers would do well to know and appreciate the history, culture, and language of the proselytizee; to avoid westernization of the Gospel and first amendmentization of politics; to deal honestly and respectfully with theological and liturgical differences; to respect and advocate the religious rights of all peoples; to be Good Samaritans as much as good preachers; to proclaim their Gospel both in word and in deed.<sup>173</sup> Moratoria on

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171. JAROSLAV PELIKAN, *THE VINDICATION OF TRADITION* 65 (1984).

172. ICCPR art. 19.3, *supra* note 111, at 74.

173. See Anita Deyneka, *Guidelines for Foreign Missionaries in the Former Soviet Union*, in PROSELYTISM AND ORTHODOXY, *supra* note 4, at 331, 332-33; SHARING THE BOOK, *supra* note 20; Lawrence A. Uzzell, *Guidelines for American Missionaries in Russia*, in PROSELYTISM AND ORTHODOXY, *supra* note 4, at 323-26, 329-30.

proselytism might provide temporary relief; but moderation by proselytizers and proselytizees is the more enduring course.

#### *4. Religion and State*

A final human rights problem that will be exacerbated by the greater inclusion of religion concerns is the relation of religion and state government, or "church and state" as we say in the United States. American writers, armed with the Establishment Clause of the First Amendment, often emphasize that true religious liberty requires the separation of church and state and the cessation of state support for religion. Only the secular, or neutral, state can guarantee religious liberty, it is argued, and only separation can guarantee neutrality. Many Europeans, Africans, and Latin Americans, for whom a disestablishment clause is largely foreign, emphasize that religious liberty requires the material and moral cooperation of religion and government. Indeed today, a number of religious groups in the former Soviet bloc and sub-Saharan Africa regard restitution and affirmative state action towards religion as a necessary feature of any religious rights regime—if nothing else, to undo and overcome past state repression of religion. Similarly, some Catholic groups in Latin America urge cooperation of religious and political bodies to preserve the "Catholicization" of public life and culture. Some Islamic revivalists, from Algeria to Indonesia, urge similar arrangements to enhance the "Islamicization" of the community. Some Jewish groups argue similarly to protect the Jewish character of the State of Israel. Such arguments have long been used in the United Kingdom and Scandinavia to defend their ancient religious establishments.<sup>174</sup> To cooperate or to separate, to aid or to avoid one another, is a fundamental question that will confront religions and states around the world with increasing urgency in this new century.

On this fundamental legal problem, categorical platitudes avail us less than concrete experiences. American readers might be surprised to learn that international human rights instruments do not mandate the disestablishment of religion or the separation of

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174. For the foregoing, see the country and region studies in RELIGIOUS HUMAN RIGHTS II, *supra* note \*.

church and state. They might be further surprised to learn that American constitutional law today no longer mandates the kind of strict separationism suggested by Jefferson's "wall of separation between church and state." Today's American state is not the distant, quiet sovereign of Jefferson's day, from whom separation was both natural and easy. Today's state, whether for good or ill, is an intensely active sovereign from whom complete separation is nearly impossible. Few religious believers and bodies can now avoid contact with the state's pervasive network of education, charity, welfare, child care, health care, family, construction, zoning, workplace, taxation, and other regulations. Both confrontation and cooperation with the modern American welfare state are almost inevitable for any religion. American constitutional law has moved, chaotically but ineluctably, toward this reality. When a state's regulation imposes too heavy a burden on a particular religion, the First Amendment Free Exercise Clause provides a pathway to relief. When a state's appropriation imparts too generous a benefit to particular religions alone, the First Amendment Establishment Clause provides a pathway to dissent. But when a general government scheme provides religious groups and activities with the same benefits afforded to all other eligible recipients, few constitutional objections are now effective.

Again, this is not to suggest that the American constitutional story of religious rights must now be writ large upon the world. Rather, it is to suggest that a single law on the books can give rise to a wide range of laws in action. Legal traditions do change over time and across cultures. The notion that there is but one proper application of international religious rights norms—be it American, European, or African—cannot be countenanced. We can afford an ample "margin of appreciation" for local variations on international human rights themes without succumbing to charges of relativism.<sup>175</sup>

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175. See Little, Studying "Religious Human Rights," *supra* note 142, at 52-55; van der Vyver, *supra* note 21.

## FINAL REFLECTIONS

A number of distinguished commentators have recently encouraged the abandonment of the human rights paradigm altogether—as a tried and tired experiment that is no longer effective, a fictional faith whose folly has now been fully exposed.<sup>176</sup> Others have bolstered this claim with cultural critiques—that human rights are instruments of neocolonization that the West uses to impose its values on the rest, even toxic compounds that are exported abroad to breed cultural conflict, social instability, religious warfare and, thus, dependence on the West.<sup>177</sup> Others have added philosophical critiques—that rights talk is the wrong talk for meaningful debate about deep questions of justice, peace, and the common good.<sup>178</sup> Still others have added theological critiques—that the secular beliefs in individualism, rationalism, and contractarianism inherent in the human rights paradigm cannot be squared with cardinal biblical beliefs in creation, redemption, and covenant.<sup>179</sup>

Such criticisms properly soften the overly-bright optimism of some human rights advocates. They properly curb the modern appetite for the limitless expansion and even monopolization of human rights in the quest for toleration, peace, and security. They also properly criticize the libertarian accents that still too often dominate our rights talk today. Such criticisms do not, however, support the conclusion that we must abandon the human rights paradigm altogether—particularly when no viable alternative global forum and no viable alternative universal faith is yet at hand. Instead, these criticisms support the proposition that the

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176. See, e.g., ALASDAIR MCINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 69-70 (2d ed., 1984) ("[T]he truth is plain: there are no such rights, and belief in them is one with belief in witches and in unicorns . . . . Natural or human rights . . . are fictions."). For a critical analysis of these views, of those of Richard Rorty, Jean-Francois Lyotard, and others, see Max L. Stackhouse & Stephen E. Healey, *Religion and Human Rights: A Theological Apologetic*, in *RELIGIOUS HUMAN RIGHTS I*, *supra* note \*, at 485.

177. For a critical discussion of this thesis, and its manifestations in recent debates about the cultural and moral relativity of human rights, see Little, *supra* note 142.

178. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

179. See Joan Lockwood O'Donovan, *The Concept of Rights in Christian Moral Discourse*, in *A PRESERVING GRACE*, *supra* note 43, at 143; David M. Smolin, *Church, State, and International Human Rights: A Theological Appraisal*, 73 *NOTRE DAME L. REV.* 1515 (1998).

religious sources and dimensions of human rights need to be more robustly engaged and extended. Human rights norms are not a transient libertarian invention, or an ornamental diplomatic convention. Human rights norms have grown out of millennium-long religious and cultural traditions. They have traditionally provided a forum and focus for subtle and sophisticated philosophical, theological and political reflections on the common good and our common lives. And they have emerged today as part of the common law of the emerging world order. We should abandon these ancient principles and practices only with trepidation, only with explanation, only with articulation of viable alternatives. To use our tenured liberties to deconstruct human rights without posing real global alternatives is to insult the genius and the sacrifice of their many creators. For now, the human rights paradigm must stand—if nothing else as the “null hypothesis.” It must be constantly challenged to improve. It should be discarded, however, only on cogent proof of a better global norm and practice.

A number of other distinguished commentators have argued that religion can have no place in a modern regime of human rights. Religions might well have been the mothers of human rights in earlier eras, perhaps even the midwives of the modern human rights revolution. Religion has now, however, outlived its utility. Indeed, the continued insistence of special roles and rights for religion is precisely what has introduced the Dickensian paradoxes that now befuddle us. Religion is, by its nature, too expansionistic and monopolistic, too patriarchal and hierarchical, too antithetical to the very ideals of pluralism, toleration, and equality inherent in a human rights regime. Purge religion entirely, this argument concludes, and the human rights paradigm will thrive.<sup>180</sup>

This argument proves too much to be practicable. In the course of the twentieth century, religion defied the wistful assumptions of the western academy that the spread of Enlightenment reason and science would slowly eclipse the sense of the sacred and the sensibility of the superstitious.<sup>181</sup> Religion defied the evil assumptions of Nazis, Fascists, and Communists alike that gulags

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180. For a critical analysis of this “standard secularist account” of human rights, see Max L. Stackhouse, *The Intellectual Crisis of a Good Idea*, 26(2) J. RELIGIOUS ETHICS 263 (1998).

181. See Martin E. Marty, *Religious Dimensions of Human Rights*, in RELIGIOUS HUMAN RIGHTS I, *supra* note \*, at 1-2.



and death camps, iconoclasm and book burnings, propaganda and mind controls would inevitably drive religion into extinction. Yet another great awakening of religion is upon us—one now global in its sweep.

It is undeniable that religion has been, and still is, a formidable force for both political good and political evil, that it has fostered both benevolence and belligerence, peace and pathos of untold dimensions. But, the proper response to religious belligerence and pathos cannot be to deny that religion exists, or to dismiss it to the private sphere and sanctuary. The proper response is to castigate the vices and to cultivate the virtues of religion, to confirm those religious teachings and practices that are most conducive to human rights, democracy, and rule of law.<sup>182</sup>

Religion is an ineradicable condition of human lives and human communities. Religion will invariably figure in legal and political life—however forcefully the community might seek to repress or deny its value or validity, however cogently the academy might logically bracket it from its political and legal calculus. Religion must be dealt with, because it exists—perennially, profoundly, pervasively—in every community. It must be drawn into a constructive alliance with a regime of law, democracy, and human rights.

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182. See, e.g., APPLEBY, *supra* note 18.