

Religious Sources and Dimensions of Human Rights

John Witte, Jr.

Rights talk has become a dominant mode of political, legal, and moral discourse today, and human rights protections and violations have become increasingly important issues in international relations and diplomacy. Most nation-states now have detailed bills or recitations of rights in their constitutions, statutes, and cases. The United Nations, the European Union, and various religious, cultural, and ideological groups also have detailed catalogues of rights set out in treaties, declarations, conventions, and covenants.

Most of the rights and liberties that are in vogue today have millennium-long roots in the Western legal tradition -- a tradition which has been shaped by biblical, classical, Christian, and Enlightenment teachings. Non-Western legal cultures have their own forms and forums of rights talk, too, which have been shaped by Islam, Hinduism, Confucianism, Buddhism, Indigenous Religions, and other faith traditions. These non-Western rights norms are becoming more important to global discussions of human rights today, and promise to bring ample reforms to human rights instruments and implementation in the years ahead. While this chapter focuses on the religious roots and routes of human rights development in the Western tradition, the last section argues that human rights need the resources of all these religious traditions to survive and flourish.¹

Religious Sources of Rights in the West

Over the past three decades, a small cottage industry of important new scholarship has emerged dedicated to the history of rights talk in the Western tradition prior to the Enlightenment. We now know a great deal more about classical Roman understandings of rights and liberties, and their elaboration by medieval and early modern civilians. We can now pore over an intricate latticework of arguments about individual and group rights and liberties developed by medieval Catholic canonists and moralists, and the ample expansion of this medieval handiwork by neo-scholastic writers in early modern Spain and Portugal. We now know a good deal more about

¹ This chapter draws and distills the following books that also include detailed citations to the literature: John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (CUP, Cambridge 2007); John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment* (3d ed, Westview, Boulder, CO 2011); John Witte, Jr. and M. Christian Green (ed) *Religion and Human Rights: An Introduction* (OUP, Oxford 2011); John Witte, Jr. and Frank S. Alexander (ed), *Christianity and Human Rights* (CUP, Cambridge 2010); John Witte, Jr., and Johan D. van der Vyver (ed), *Religious Human Rights in Global Perspective*, 2 vols. (Martinus Nijhoff, The Hague 1996).

classical republican theories of liberty developed in ancient Greece and Rome, and their transformative influence on early modern common lawyers and Protestant revolutionaries on both sides of the Atlantic. We now know, in brief, that the West knew ample “liberty before liberalism,”² and had many human rights in place before there were modern democratic revolutions fought in their name.

Classical Roman Foundations. A deep and enduring source of Western rights talk was the classical Roman law, and the Stoic and Christian ideas that animated it. Both before and after the Christianization of Rome in the fourth century, c.e., the classical Roman jurists used the Latin term “*ius*” to identify a subjective “right.”³ The objective sense of *ius* – to be in proper order, to perform what is right and required, “to give to each his due” (*ius suum cuique tribuere*) – dominated the classical Roman law texts. (*Ius* also meant law or legal order more generally). But these texts also sometimes used *ius* subjectively, in the sense of a person, a subject, “having a right” that could be defended and vindicated.

Many of the subjective rights recognized at classical Roman law involved property: the right to own or co-own property, the right to possess, lease, or use property, the right to build or prevent building on one’s land, the right to gain access to water, the right to be free from interference with or invasion of one’s property, the right or capacity to alienate property, the right to bury one’s dead, and more. Several texts dealt with personal rights: the rights of testators and heirs, the rights of patrons and guardians, the rights of fathers and mothers over children, the rights of masters over slaves. Other texts dealt with public rights: the right of an official to punish or deal with his subjects in a certain way, the right to delegate power, the right to appoint and supervise lower officials. Others dealt with procedural rights in criminal and civil cases.

The classical Roman law also referred to subjective rights using the Latin term “*libertas*,” which roughly translates as liberty, freedom, privilege, or independence. At its most basic level, *libertas* was “the natural ability (*facultas*) to do anything one pleases, unless it is prohibited by force or law.”⁴ One’s *libertas* at Roman law turned in part on one’s status and relationships in Roman society. Men had more *libertas* than women, married women more than concubines, adults more than children, and so on. But each person at Roman law had a basic *libertas* inherent in his or her social status.

² Quentin Skinner, *Liberty Before Liberalism* (CUP, Cambridge 1998).

³ See sources and discussion in Charles A. Donahue, “*Ius* in the Subjective Sense in Roman Law: Reflections on Villey and Tierney,” in *A Ennio Cortese*, ed. D. Maffei, 2 vols. (Il Signo, Rome 2001), 1:506-535; Max Kaser, *Ius Gentium* (Böhlau, Cologne 1993); id., *Ausgewählte Schriften*, 2 vols. (Jovene, Naples 1976-1977); Tony Honoré, *Ulpian: Pioneer of Human Rights*, 2d ed. (OUP, Oxford 2002); Eric Nelson, *The Greek Tradition in Republican Thought* (CUP, Cambridge 2004); C. Wirszubski, *Libertas as a Political Idea at Rome During the Late Republic and Early Principate* (CUP, Cambridge 1950).

⁴ *Justinian’s Institutes*, Latin text, Paul Krueger, trans. Peter Birks and Grant McLeod (Cornell UP, Ithaca, NY 1967), I.III.

This included a basic right to be free from subjection or undue restraint from others who had no right (*ius*) to or possessory claim (*dominium*) over them. Thus the wife had *libertas* from sexual relations with all others besides her husband. The child had *libertas* from the direction of all others save the paterfamilias. Even the slave had *libertas* from the discipline of others besides the master.

Some *libertas* interests recognized at Roman law were cast more generally, and were not necessarily conditioned on the correlative duties of others. A good example was the freedom of religion guaranteed to Christians and others under the Edict of Milan (313) passed by Emperor Constantine. This included “the freedom (*libertas*) to follow whatever religion each one wished”; “a public and free liberty to practice their religion or cult”; and a “free capacity” (*facultas*) to follow their own religion and worship as befits the peacefulness of our times.”⁵

Echoes of both *ius* and *libertas* recurred occasionally in later Germanic texts. By the late ninth and early tenth centuries, for example, Anglo-Saxon texts variously translated these terms as “ryhtes,” “rihtes,” and “rihta(e).”⁶ The careful Roman law differentiation of objective and subjective senses of right, however, seems to have been lost in the last centuries of the first millennium c.e. – though a systematic study of the possible rights talk of the Germanic texts of this period is apparently still a desideratum. And what is also apparently still needed is a close study (at least in a Romance language) of the rights talk of Muslims and Jewish in this same period. After all, Jews and Muslims developed sophisticated legal systems in the 8th to 11th centuries, and had at their disposal the Roman law texts, with their discussions of rights and liberties.⁷

Medieval Catholic Foundations.⁸ The rediscovery of the ancient texts of Roman law in the late eleventh and twelfth centuries – made available to Western

⁵ Lactantius, *De Mortibus Persecutorum* [c. 315], 48.2–12, ed. and trans. J. L. Creed (OUP, Oxford 1984), 71–73.

⁶ O.E.D., s.v. “right”; Alfred Kiralfky, “Law and Right in English Legal History,” in *La formazione storica del diritto moderno in Europa*, 3 vols. (Leo S. Olschki, Florence 1977), 3:1069-1086.

⁷ For early rabbinic rights talk, see David Novak, *Covenantal Rights: A Study in Jewish Political Theory* (PUP, Princeton 2000); id., *Natural Law in Judaism* (CUP, Cambridge, 1998); for a discussion of rights embedded in the Qur’an and Hadith, see Abdullahi An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press, Syracuse 1990); id., *Islam and the Secular State: Renegotiating the Future of Sharia* (HUP, Cambridge, Mass. 2008).

⁸ For this section, see Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Eerdmans, Grand Rapids, MI 1997); id., *Religion, Law, and the Growth of Constitutional Thought, 1150-1650* (CUP, Cambridge 1982); A.S. Brett, *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought* (CUP, Cambridge, 1997); Richard Tuck, *Natural Rights Theories: Their Origins and Development* (CUP, Cambridge, 1979); Michel Villey, *La formation de la pensée juridique moderne* (Montchrestien, Paris 1968); id., *Le droit et les droits de l’homme* (Presses universitaires de France, Paris 1983); id., *Leçons d’histoire de la philosophie du droit*, new ed. (Daloz, Paris 1977); Peter Landau, “Zum Ursprung des ‘Ius ad Rem’ in der Kanonistik,” in *Proceedings of the Third International Congress of Medieval Canon Law* (1971): 81-102.

scholars by Arab Muslim traders -- helped to trigger a renaissance of subjective rights talk in the West. Medieval jurists differentiated all manner of rights and liberties. They grounded these rights and liberties in the law of nature (*lex naturae*) or natural law (*ius naturale*), and associated them variously with a power (*facultas*) inhering in rational human nature and with the property (*dominium*) of a person or the power (*potestas*) of an office of authority (*officium*). Medieval jurists repeated and glossed many of the subjective rights and liberties set out in Roman law – especially the public rights and powers of rulers, the private rights and liberties of property. They also set out what they called the “rights of liberty” (*iura libertatis*), which comprised a whole series of freedoms, powers, immunities, protections, and capacities for different groups and persons.⁹

Among the most important of these were the rights protecting the “freedom of the church” from secular authorities. The church’s lawyers, called canonists, set out in some detail the rights of the church to make its own laws, to maintain its own courts, to define its own doctrines and liturgies, to appoint, support, discipline, and remove its own clergy. They stipulated the exemptions of church property from civil taxation and takings, and the right of the clergy to control and use church property without secular interference or encumbrance. They also guaranteed the immunity of the clergy from civil prosecution, military service, and compulsory testimony, and the rights of parishes, monasteries, religious charities, and guilds to form and dissolve, to accept and reject members, and to establish order and discipline. These early formulations of religious group rights against secular authorities would become axiomatic for the later Western tradition – and now figure prominently in modern concepts of religious autonomy, corporate free exercise rights, and the rights of legal personality for religious groups.

In the twelfth and thirteenth centuries, the canon law gradually refined the internal rights structure of the church and its offices and members as well. 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 lower clergy vis-à-vis their superiors. It defined the rights of the laity to worship, maintain religious symbols, participate in the sacraments, travel on religious pilgrimages, and educate their children. It defined the rights of the poor, widows, and needy to seek solace, succor, and sanctuary within the church. It defined the rights of husbands and wives, parents and children, masters and servants within the household. The canon law even defined the (truncated) rights that Jews, Muslims, and heretics had in Christian society. These medieval canon law rights were enforced by a hierarchy of church courts and other administrative offices, each with distinct rules of litigation, evidence, and judgment, and with procedural rights, including the rights to appeal ultimately to Rome. These internal canon law rules and rights are still at the heart of modern Catholic canon law -- codified first in 1917 and now in the 1983 *Code of Canon Law* that governs world-wide Catholicism. Parallel church law systems, with elaborate internal norms and forms of

⁹ C. 16, q. 3, dictum post c. 15, quoted in Tierney, *Idea of Natural Rights*, 57.

substantive and procedural rights, are also in place in various Eastern Orthodox and Protestant churches today.

These rights set out at medieval Catholic canon law were, in practice, often narrowly defined in scope and limited in application. Medieval Christendom was no liberal democracy -- as the blood of too many martyrs can attest. But a great number of the basic public, private, penal, and procedural rights that are recognized by state and international political authorities today were prototypically formed in this medieval period. And these basic rights formulations gradually came to be seen as “natural rights” – rights inhering in a person’s human nature -- regardless of that person’s status within church, state, or society. This natural rights theory was greatly expanded in the later Middle Ages through the work of such scholars as William of Ockham (ca. 1285 - ca.1349), Bartolomé de las Casas (1484-1566), Francisco de Vitoria (ca. 1486-1546), Fernando Vázquez (ca. 1512 – ca. 1569), Francisco Suarez (1548-1617), and others. Vitoria was especially prescient in pressing for the rights of Indians and other indigenous peoples as well as the rights of soldiers and prisoners of war – both critical topics in the budding international law of the day. His fellow Spanish jurists also worked out an intricate theory of natural rights of marriage, property, contract, and inheritance that would figure prominently in the later rights theories of later Catholic, Protestant, and Enlightenment jurists like.

The medieval church’s canon law formulations of rights and liberties had some parallels in medieval secular legal sources. Notable were the thousands of treaties, concordats, and charters that were issued from the eleventh to the sixteenth centuries by various authorities in Western Europe. These were often detailed, and sometimes very flowery, statements of the rights and liberties to be enjoyed by various groups of clergy, nobles, barons, knights, municipal councils, citizens, universities, monasteries, and other corporate entities. A famous example was the Magna Carta (1215), the “great charter” issued by the English Crown at the behest of the church and barons of England. The Magna Carta guaranteed that “the Church of England shall be free [*libera*] and shall have all her whole rights [*iura*] and liberties [*libertates*] inviolable” and that all “free-men” [*liberis hominibus*] were to enjoy their various “liberties” [*libertates*]. These guarantees included sundry rights to property, marriage, and inheritance, to freedom from undue military service, and to freedom to pay one’s debts and taxes from the property of one’s own choosing. The Magna Carta also set out various rights and powers of towns and of local justices and their tribunals, various rights and prerogatives of the king and of the royal courts, and various procedural rights in these courts (including the right to jury trial).¹⁰ These medieval charters of rights became important prototypes on which early modern revolutionaries – Catholics and Protestants alike -- would call to justify their revolts against political tyrants.

¹⁰ *The Statutes at Large of England and of Great Britain from the Magna Carta to the Union of the Kingdoms of Great Britain and Ireland*, 20 vols. (G. Eyre and J. Strahan, London 1811), 1:1.

Early Modern Protestant Foundations.¹¹ While “freedom of the church” was the initial manifesto of the twelfth-century Papal Revolution, “freedom of the Christian” was the initial manifesto of the sixteenth-century Protestant Reformation. Martin Luther (1483-1546), Thomas Cranmer (1489-1556), Menno Simons (1496-1561), John Calvin (1509-1564), and other leading sixteenth-century Protestant reformers all began their movements with the Bible. They were particularly drawn to the many New Testament aphorisms on freedom: “For freedom, Christ has set us free.” “You were called to freedom.” “Where the Spirit of the Lord is, there is freedom.” “You will know the truth, and the truth will make you free.” “You will be free indeed.” You have been given “the glorious liberty of the children of God.” They were also drawn to the Bible’s radical calls to equality: “There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female, for you are all one in Christ Jesus.”¹²

These and other biblical passages inspired Luther and his colleagues to unleash the Reformation in Germany in 1517 in the name of freedom from the medieval church and its hierarchies -- freedom of the individual conscience from intrusive canon laws and clerical 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 traditional canon laws and ecclesiastical structures with unprecedented fury, and to urge radical constitutional reforms in the name of Christian freedom.

One important Protestant contribution to Western rights talk was to link human rights with biblical duties. Early Protestants believed that God had given each human the freedom needed to choose to follow the commandments of the faith. Freedoms and commandments, rights and duties belonged together in their view. To speak of one without the other was ultimately destructive. Rights without duties to guide them quickly became claims of self-indulgence. Duties without rights to exercise them quickly became sources of deep guilt. Protestants thus translated the moral duties set out in the Bible into reciprocal rights.

Protestants focused first on the duties set out in the Decalogue, or Ten Commandments, which they took to be the most pristine summary of the natural law. The First Table of the Decalogue, they noted, prescribes duties of love that each person owes to God -- to honor God and God’s name, to observe the Sabbath day of rest and

¹¹ For this section, see Wolfgang Huber and Heinz Eduard Tödt, *Menschenrechte: Perspektiven einer menschlichen Welt* (Kreuz-Verlag, Stuttgart 1977); Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols. (CUP, Cambridge 1978); John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (CUP, Cambridge, 2002); id., *The Reformation of Rights*; William Haller, *Liberty and Reformation in the Puritan Revolution* (Columbia UP, New York, 1963); Walter Klaassen, *Anabaptism in Outline* (Herald Press, Scottdale, PA 1981).

¹² Galatians 3:28, 5:1,13; 2 Corinthians 3:17; John 8:32,36; Romans 8:21 (Revised Standard Version).;

holy worship, to avoid false gods and false swearing. The Second Table prescribes duties of love that each person owes to neighbors -- to honor one's parents and other authorities, not to kill, not to commit adultery, not to steal, not to bear false witness, not to covet. A person's duties toward God can be cast as the rights of religion: the right to honor God and God's name, the right to rest and worship on one's Sabbath, the right to be free from false gods and false oaths. Each person's duties towards a neighbor, in turn, can be cast as a neighbor's right to have that duty discharged. One person's duties not to kill, to commit adultery, to steal, or to bear false witness thus gives rise to another person's rights to life, property, fidelity, and reputation.

Starting with this biblical logic, Protestant writers spun out endless elaborations of rights based on other duties in the Bible. A Christian's duties toward the poor and needy, widows and orphans, slaves and sojourners, the persecuted and imprisoned, the sick and the grieving, in their view, triggered these vulnerable parties' rights to food, shelter, support, nurture, comfort, education, housing, and more. Later Protestant Social Gospel theorists, like Walter Rauschenbush (1861-1918), would build on these early Protestant insights to develop a systematic theory of what we now call welfare rights or second generation rights.

A second important contribution to Western rights talk was the new Protestant logic of revolution against tyrants who persistently and pervasively violated the people's "fundamental rights." As they faced growing persecution from French, Spanish, German, and English authorities, who were killing them by the tens of thousands after 1550, Protestant jurists and theologians developed a theory of political revolution that was based effectively on a Christian government contract or covenant theory. Every political government, they argued, is formed by a tacit or explicit covenant or contract sworn between the rulers and their subjects before God. In this covenant, God agrees to protect and bless the community in return for their proper obedience of the laws of God and nature summarized in the Decalogue and other biblical texts. The rulers agree to exercise God's political authority in the community and to honor these higher laws and protect the people's natural rights. The people agree to exercise God's political will for the community by electing and petitioning their rulers on God's behalf and by honoring and obeying these rulers so long as they remain faithful to the political covenant. If any of the people violate the terms of this political covenant and become criminals, God empowers the rulers to prosecute and punish them -- and sentence them to death in extreme cases. But, in turn, if any of the rulers violate the terms of the political covenant and become tyrants, God empowers the people to resist and to remove them from office -- and sentence them to death in extreme cases. The power to remove tyrants, however, lies not directly with the people, but with their representatives, the lower magistrates, who are constitutionally called to organize and direct the people in orderly resistance -- in all out warfare and revolution if needed.

The issue that remained for early modern Protestant political theorists was how to determine which rights were so "fundamental," so "inalienable," that, if chronically and pervasively breached by a tyrant, triggered the foundational right to organized resistance and revolt against the tyrant. The first and most important rights, they

reasoned, had to be the people's religious rights. Christians, after all, are first and foremost the subjects of God and called to honor and worship God above all else. If the magistrate breaches these religious rights, then nothing can be sacred and secure any longer. What is essential to the protection of religious rights, they continued catechetically? The ability of the people to live in full conformity with the law of God. What is the law of God? First and foremost the Ten Commandments, which set out the core duties to God and neighbor. Is the Decalogue the only statement of the law of God? No, the Bible and the natural law that God has written on the hearts of all people teaches many other rights that are essential to the protection of a person and a people and to the cultivation of life, liberty, and the pursuit of happiness and holiness. By 1650, Protestants had used this logic to develop and defend almost every one of the "fundamental rights and liberties" that would appear, a century and a half later, in the United States Bill of Rights of 1791. And they set out these fundamental rights in detailed constitutions and bills of rights written for the Netherlands, Scotland, the English Commonwealth and New England in the seventeenth century.

A third major Protestant contribution to Western rights talk was its development of new understandings of the relationship of church and state, and new ways of constructing the rights of the church. The Protestant Reformation permanently broke the unity of Western Christendom under central papal rule, and thereby laid the foundations for the modern constitutional system of confessional pluralism. Particularly prescient was the Anabaptist Reformation idea of building a "*Scheidingsmaurer*," a "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 too divided, they deliberately colonized themselves, eventually spreading the Anabaptist communities from Russia to Ireland to the furthest frontiers of North America.

Also influential was the Calvinist model of governing the church was a democratically-elected consistory of pastors, elders, and deacons. 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 among the offices of preaching, discipline, and charity, and a fluid, dialogical form of religious polity and policing centered around collective worship, the congregational meeting, and the democratic election of religious officials with term limits. Later Calvinists in Europe and North America would use these democratic church polities as prototypes for democratic state polities with separation of powers, democratic election, term limits, and town hall meetings with the right of all members to petition the political authorities. Both Calvinists and Anabaptists were critical in the development of the logic of separation of religion and the state that dominates modern Western constitutionalism.

A final major Protestant contribution to the Western rights talk was its new emphasis to the role of the individual believer in the economy of salvation. The Protestant Reformation did not invent the individual or individual rights. But sixteenth-century Protestant reformers gave new emphasis to the (religious) rights and liberties of individuals at both religious law and civil law. The Anabaptist doctrine of adult baptism, in particular, built on a voluntarist understanding of religion, as opposed to conventional notions of a birthright or predestined faith. The adult individual, Anabaptists believed, 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 in the realm of religion. 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 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 it would come to new expression in twentieth-century international human rights instruments that guaranteed the right freely to choose and change one's religion.

Enlightenment Echoes and Reforms.¹³ While “freedom of the church” drove medieval rights talk, and “freedom of the Christian” drove Protestant teachings, “freedom of the individual” lay at the heart of the Western Enlightenment. Building in part on the ancient ideas of Cicero, Seneca, and other Stoics of a pre-political state of nature, as well as on Protestant covenant theology, John Locke (1632-1704), Jean Jacques Rousseau (1712-1778), Thomas Jefferson (1743-1826) and others argued for a new contractarian of society and state designed to protect the individual's natural rights.

Each individual person, they argued, was, by nature, equal in virtue and dignity, and vested with inherent and unalienable rights of life, liberty, and property. Each person was naturally capable of choosing his or her own means and measures of happiness without necessary biblical warrants or divine commandments. In their natural state, or in “the state of nature,” all persons were free to exercise their natural rights fully. But life in this state of nature was at minimum “inconvenient” -- if not “brutish, nasty, and short.” For there was no means to balance and broker disputes between one person's rights against all others, no incentive to invest or create property or conclude contracts when one's title was not sure, no mechanism for dealing with the needs of children, the weak, the disabled, the vulnerable. As a consequence, rational persons chose to move from the state of nature to a society with stable governments. They did so by entering into social contracts and ratifying constitutions to govern their newly created societies. By these instruments, persons agreed to sacrifice or limit some of their natural rights for the sake of creating a measure of social order and peace. They

¹³ See detailed sources collected in Liberty Fund, *Natural Law and Enlightenment Classics* (Liberty Fund, Indianapolis) and on-line at <http://oll.libertyfund.org/>

also agreed to delegate their natural rights of self-rule to elected officials who would represent and exercise executive, legislative, and judicial authority on their behalf. But, at the same time, these social and political contracts enumerated the various “inalienable” rights that all persons were to enjoy without derogation, and the conditions of “due process of law” under which “alienable” rights could be abridged or taken away. And these contracts also stipulated the right of the people to elect and change their representatives in government, and to be tried in all cases by a jury of their peers.

Particularly the American and French constitutions reflected these new Enlightenment views together with traditional Christian views. The Virginia Declaration of Rights (1776), for example, provided in Article I: “That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” The Declaration went on to specify the rights of the people to vote and to run for office, their “indubitable, unalienable, and inalienable right to reform, alter or abolish” their government if necessary, various traditional criminal procedural protections, the right to jury trial in civil and criminal cases, freedom of press, and various freedoms of religion. But the Declaration also reflected traditional Christian sentiments in Articles 15 and 16 by providing that “no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.” And “it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.”¹⁴

The 1791 Bill of Rights, amended to the 1787 United States Constitution, provided a new set of rights of national citizenship to be enforced by the new federal courts. The Bill of Rights guaranteed the freedoms of religion, speech, assembly, and press, the right to bear arms, freedom from forced quartering of soldiers, freedom from illegal searches and seizures, various criminal procedural protections (the right to grand jury indictment and trial by jury, the right to a fair and speedy trial, the right to face accusers and have them compelled to appear, freedom from double jeopardy, the privilege against self incrimination, freedom from excessive bail and cruel and unusual punishment), the right to jury trial in civil cases, the guarantee not to be deprived of life, liberty, or property without due process of law, and the right not to have private property taken for public use without just compensation. This original Bill of Rights was later augmented by several other amendments, the most important of which were the right to be free from slavery, the right to equal protection and due process of law, and the right for all adults, male and female, to vote.¹⁵ The Bill of Rights was defended in its

¹⁴ Quoted in Francis N. Thorpe (ed), *The Federal and State Constitutions, Colonial Charters, and other Organic Acts ... forming the United States of America*, 7 vols. (Government Printing Office, Washington, DC 1909), 7:3813.

¹⁵ U.S. Constitution, preamble; Arts. 1.9, 1.10, IV; Amendments 1-8, 13-15, 19, 24, 26, reprinted with

day on a variety of grounds – with arguments from Enlightenment liberalism among the most well known today. But it is worth noting that every one of the guarantees in the Bill of Rights had already been defined, defended, and died for by Christians in the prior two centuries; that enabled the many Christians of eighteenth-century America to join easily in ratifying these vital rights instruments.

Enlightenment arguments alone proved more singularly decisive in shaping the French Declaration of the Rights of Man and Citizen (1791). This signature instrument, which revolutionized a good deal of Western Europe through the conquests of Napoleon Bonaparte, enumerated various “natural, unalienable, and sacred rights.” These included liberty, property, security, and resistance to oppression, “the freedom to do everything which injures no one else,” the right to participate in the foundation and formulation of law, a guarantee that all citizens are equal before the law and equally eligible to all dignities and to all public positions and occupations, according to their abilities. The Declaration also included basic criminal procedural protections, freedom of (religious) opinions, freedoms of speech and press, and rights to property.¹⁶ Both the French and American constitutions and declarations were essential prototypes for a whole raft of constitutional and international documents on rights that were forged in the next two centuries.

Religion and the Modern International Human Rights Framework

The rights and liberties in vogue today thus have millennium-long roots in various religious, philosophical, and cultural traditions of the West. Their definitive modern formulation for the world, however, came with the promulgation of the Universal Declaration of Human Rights in 1948. The Universal Declaration was born out of desperation in the aftermath of World War II. The world had just stared in horror into Stalin’s gulags and Hitler’s death camps. It had just witnessed the terror of nuclear warfare in Hiroshima and Nagasaki. It had just endured the devastation of sixty million people killed in the bloodiest six years in the history of humankind. It was time to restate the basics of life, freedom, and community. It was time to take up Franklin Roosevelt’s call to protect the “four freedoms” of everyone – “freedom of speech, freedom of religion, freedom from want, and freedom from fear.” It was time to return to the “Ur-Principle” of our lives as persons and peoples – the concept of “human dignity.”¹⁷

many prototypes and defenses in Philip B. Kurland and Ralph S. Lerner, eds., *The Founders’ Constitution*, 5 vols. (U of C Press, Chicago, 1987).

¹⁶ In Léon Duguit, et al., *Les Constitutions et les Principales Lois Politiques de la France Depuis 1789* (7th ed., Librairie générale de droit et de jurisprudence, Paris 1952), 1.

¹⁷ The term “Ur-Principle” is from Louis Henkin, et al., *Human Rights* (Foundation Press, New York 1999), 80.

The United Nations Commission on Human Rights, chaired by Eleanor Roosevelt, took up the task of drafting a definitive declaration on human rights for the world. The drafting committee and the Commission as a whole were broadly inclusive in membership. The main drafters included René Cassin (a Jewish jurist from France and later Nobel Peace Prize winner), Peng-chun Chang (a distinguished Confucian scholar from China), John Peters Humphrey (a leading Canadian jurist who was then part of the UN Secretariat and prepared much of the first draft), Charles Malik (a Maronite Christian from Lebanon), and Jacques Maritain (a prominent French Catholic philosopher and France's ambassador to the Vatican). The Commission itself had representation from countries with majoritarian Atheist, Buddhist, Christian, Confucian, Hindu, and Muslim populations, including India, China, the Philippines, the U.S.S.R., Iran, Egypt, Lebanon, Austria, France, the United States, Panama, and Chile. The Commission further drew on bills of rights from around the world and drew from the expert opinions of sundry scholars, advocates, and NGOs of all manner of professions and confessions.

Jacques Maritain, a member of the Declaration drafting committee, was asked how such a diverse group of participants holding such divergent viewpoints could agree to a definitive list of fundamental rights. He replied: "Yes, we agree about the rights *but on condition no one asks us why.*" The goal, he elaborated, was to agree "not on the basis of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same conception of the world, of man, and of knowledge, but upon the affirmation of a single body of beliefs for guidance in action."¹⁸ That "single body of beliefs" was set out in the Preamble and Article 1 of the Universal Declaration, which affirmed that "the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Respect for human rights and human dignity is essential in all times and places, the drafters of the Declaration insisted, and must be respected by and for all persons and peoples. For human rights are a universal good of and gift to human nature, even if the West have been the first to discover and implement them.

In thirty pithy articles, the Declaration set out the "universal rights" of all human beings: equality and freedom from discrimination; rights to life, liberty, privacy, and security of person; rights to national and cultural identity; freedom from slavery, servitude, and cruel and barbarous treatment; sundry criminal procedural protections; freedom of movement and asylum; rights to marriage and family life with special protections for mothers and children; rights to property; freedom of thought, conscience, religion, opinion, expression, and assembly; freedom to political representation and participation; rights to labor, employment, and social security; rights to healthcare, education, and cultural participation.

¹⁸ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, New York 2001), 77-78 (emphasis added).

In the decades after the Declaration, many of these discrete rights became the subjects of more elaborate covenants, conventions, and declarations on rights. Foremost among these were the two great international covenants promulgated by the United Nations in 1966, each of which confirmed the belief in the "inherent dignity" and "the equal and inalienable rights of all members of the human family," and the belief that all such "rights derive from the inherent dignity of the human person."¹⁹ 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 cultural participation. The International Covenant on Civil and Political Rights (1966) set out a long catalogue of rights to life and to 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. Other international and domestic instruments issued in the later 1960s took close aim at racial, religious, and gender discrimination in education, employment, social welfare programs, and other forms and forums of public life -- viewing all such discrimination as a fundamental betrayal of the "dignity and equality inherent in all human beings."²⁰

Specific Protections for Religion.²¹ While religious parties often can find refuge in sundry rights claims shared with non-religious claimants, a special category of religious rights and freedoms has also emerged to deal with some of the unique needs of religion. Articles 2 and 18 of the Universal Declaration called these the rights of "thought, conscience, and belief" and the freedom from religious discrimination. Four international instruments, elaborating the Declaration, contain the most critical protections of religious rights and liberties: (1) the International Covenant on Civil and Political Rights ("the 1966 Covenant"),²² (2) the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief

¹⁹ Ian Brownlie, *Basic Documents on Human Rights* (3d ed OUP, Oxford, 1992), 114, 125.

²⁰ International Convention on the Elimination of all Forms of Racial Discrimination (1969), preface, in *Basic Documents on Human Rights*, 148. See comparable language in International Convention on Suppression and Punishment of the Crime of Apartheid (1973), in *ibid.*, 162; Convention on the Elimination of all Forms of Discrimination Against Women (1979), in *ibid.*, 169.

²¹ For this section see Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP, Oxford 2005); W. Cole Durham, Jr. and Brent G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Aspen, New York 2010); Malcolm D. Evans, *Religious Liberty and International Law in Europe* (CUP, Cambridge 1997); Natan Lerner, *Religion, Secular Beliefs and Human Rights: 25 Years After the Human Rights Declaration* (Martinus Nijhoff, Leiden 2006); Tore Lindholm, W. Cole Durham, Jr., and Bahia G. Tahzib-Lie, *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, Leiden, 2004); Tad Stahnke and J. Paul Martin, eds. *Religion and Human Rights: Basic Documents* (New York: Center for the Study of Human Rights, Columbia University, 1998); Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, Cambridge 2005)

²² G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. (Dec. 16, 1966).

("the 1981 Declaration on Religion or Belief"),²³ (3) the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe (the "1989 Vienna Concluding Document"),²⁴ and (4) the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities ("the 1992 Minorities Declaration").²⁵

The 1966 Covenant, a binding treaty accepted by 165 countries today, largely repeats the capacious guarantee of religious rights and liberties first announced in the 1948 Universal Declaration. Article 18 of the 1966 Covenant 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.

Article 18 distinguishes between the right to freedom of religion or belief and the freedom to manifest one's religion or belief -- what American law labels as 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 may not be restricted or impaired in any manner. This is a contested issue today among some Muslim groups who recognize the right to enter Islam, but not to exit it; those who choose to leave the Muslim faith are apostates who deserve death. Freedom to manifest or exercise one's religion (individually or collectively, publicly or privately) may be subject only to such

²³ G.A. Res. 36/55, U.N. GAOR Supp. (no. 151), U.N. Doc. A/RES/36/55 (Nov. 25, 1981).

²⁴ 28 I.L.M. 527.

²⁵ G.A. Res. 47/135, Annex, U.N. Doc. A/Res/47/135/Annex, 18 December 1992.

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. The latter provision is an exhaustive list of the grounds allowed to limit the manifestation of religion. The requirement of necessity implies that any such limitation on the manifestation of religion must be proportionate to its aim to protect any of the listed state interests. Such limitations must not be applied in a manner that would vitiate the rights guaranteed in Article 18.²⁶

Article 20.2 of the 1966 Covenant calls for States Parties to prohibit “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.” Articles 2 and 26 further require equal treatment of all persons before the law and prohibit discrimination based, among other grounds, on religion.

The 1981 Declaration on Religion or Belief elaborates the religious liberty provisions that the 1966 Covenant adumbrated. Like the 1966 Covenant, the 1981 Declaration on its face applies to “everyone,” whether “individually or in community,” “in public or in private.” Articles 1 and 6 of the 1981 Declaration set forth a lengthy illustrative catalogue of rights to “freedom of thought, conscience, and religion” — repeating but also illustrating more concretely the 1966 Covenant’s guarantees of liberty of conscience and free exercise of religion. Article 6 enumerates these rights as follows:

- (a) To worship or assemble in connection 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, to 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;

²⁶ See Symposium, “The Permissible Scope of Legal Limitations on the Freedom of Religion and Belief,” *Emory International Law Review* 19 (2005): 465-1320.

(f) To solicit and receive voluntary financial and other contributions from individuals and institutions;

(g) To train, to appoint, to elect, or to 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 holy days and ceremonies in accordance with the precepts of one's religion or belief; and

(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.²⁷

The 1981 Declaration, in Article 5, also dwells specifically on the religious rights of children and their parents. It guarantees the rights of parents (or guardians) to organize life within their household and to educate their children "in accordance with their religion or beliefs." Such parental responsibility within and beyond the household, however, must be discharged in accordance with the "best interests of the child." At minimum, the parents' religious upbringing or education of their child "must not be injurious to his physical or mental health or to his full development." Moreover, the Declaration provides more generically, "the child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full conscience that his energy and talents should be devoted to the service of his fellow men." The Declaration leaves juxtaposed the parents' right to rear and educate their children in accordance with their own religion and beliefs and the state's power to protect the best interests of the child, including the lofty aspirations for the child's upbringing. Some further guidance on this subject is provided by the 1989 UN Convention on the Rights of the Child -- though the issue of parental rights and state power over their child's religious upbringing and welfare remains highly contested.

The 1981 Declaration includes more elaborate prohibitions than the 1966 Covenant on religious discrimination and intolerance. Article 2 bars religious

²⁷ The 1990 Copenhagen Document adds to the 1981 Declaration "the right of everyone to have conscientious objection to military service" and calls for "various forms of alternative service ... in combatant or civilian service" "which are compatible with the reasons for conscientious objections to military service." Document of the Copenhagen Meeting of Representatives of the Participating States of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (1990), Principle 18, reprinted in OSCE/ODIHR, *Guidelines for Review of Legislation Pertaining to Religion or Belief* (June, 2004), p. 45.

“discrimination by any State, institution, group of persons, or person.” And it defines such discrimination as “any distinction, exclusion, restriction or preference based on religion or belief, and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights or fundamental freedoms on an equal basis.” All such discrimination based on religion or belief, the Declaration insists, is “an affront to human dignity” and a “disavowal” of the “fundamental freedoms” that form the cornerstone of national and international peace and cooperation. Accordingly, the Declaration calls on all States Parties “to take effective measures to prevent and eliminate” such discrimination “in all fields of civil, economic, political, social, and cultural life,” including rescinding laws that foster discrimination and enacting laws that forbid it.

The 1989 Vienna Concluding Document expands the religious liberty norms of the 1981 Declaration. It provides an elaborate catalogue of the rights of religious groups to govern their own polity, property, and personnel, to establish charities, schools, and seminaries, to have access to literature, media, and religious worship items. It obligates nation-states to:

C. grant upon their request to communities of believers, practicing or prepared to practice their faith within the constitutional framework of their states, recognition of the status provided for them in their respective countries;

D. 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;

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

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

G. 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;

H. allow the training of religious personnel in appropriate institutions;

I. 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;

J. allow religious faiths, institutions and organizations to produce and import and disseminate religious publications and materials;

K. favorably consider the interest of religious communities in participating in public dialogue, inter alia, through mass media.

These religious group rights reflect the international “right to self-determination” of religious, cultural, or linguistic communities. The 1992 Minorities Declaration clearly spells out the government’s obligation to each of these groups: protect and encourage conditions for the promotion of the concerned group identities of minorities; afford to minorities the special competence to participate effectively in decisions pertinent to the group to which they belong; do not discriminate in any way against any person on the basis of his or her group identity; take actions to secure their equal treatment at law. The Minorities Declaration further provides that: “States shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.”²⁸ The 2007 United Nations Declaration on the Rights of Indigenous Peoples gives specific elaboration of these rights of self-determination for indigenous, aboriginal, or first peoples and their distinctive sites and rites of religious identity and practice.²⁹

These are the basic international provisions on religious rights on the books. Various regional instruments, notably the European Convention on Human Rights (1950), the American Convention on Human Rights (1969), and the African Charter on Human and People’s Rights (1981), elaborate some of these guarantees for religious parties. Further amplification is provided in religious declarations and treaties involving religious bodies, notably the recent concordats between the Vatican and Italy, Spain, and Israel. Still further amplification is provided in the powerful manifestos on human rights and religious freedom issued by religious authorities, such as the Second Vatican Council’s *Dignitatis Humanae* (1965) and The Universal Islamic Declaration of Human Rights (1981).

²⁸ 1992 Minorities Declaration, art. 4.2.

²⁹ United Nations Declaration on the Rights of Indigenous Peoples, UN GAOR, A/61/L.67/Annex (2007).

These international instruments on religion and human rights – and many others that can adduced -- highlight the hottest religion and human issues that now regularly confront national and international tribunals: How to protect religious and cultural minorities within a majoritarian religious culture -- particularly controversial groups like Muslims, Mormons, Bahias, Jehovah's Witnesses, Scientologists, Unification Church members, and Indigenous peoples who often bring charges of religious and cultural discrimination. How to define limits on religious and anti-religious exercises and expressions that cause offense or harm to others or elicit charge of blasphemy, defamation, or sacrilege. How to adjudicate challenges that a state's proscriptions or prescriptions run directly counter to a party's core claims of conscience or cardinal commandments of the faith. How to balance private and public exercises of religion, including the liberty of conscience of one party to be left alone and the free exercise right of another to proselytize. How to balance conflicts between the rights of parents to bring up their children in the faith and the duties of the state to protect the best interest of the child. How to protect the distinct religious needs of prisoners, soldiers, refugees, and others who don't enjoy ready access to traditional forms and forums of religious worship and expression.

Many religion and human rights issues involve religious groups, for whom the right to organize as a legal entity with juridical personality is itself often a critical issue. How to negotiate the complex needs and norms of religious groups without according them too much sovereignty over their members or too little relief from secular courts in the event of fundamental rights violations by religious tribunals. How to balance the rights of religious groups to self-determination and self-governance and the guarantees of freedom from discrimination based on religion, gender, culture, and sexual orientation. How to balance competing religious groups who each claim access to a common holy site, or a single religious or cultural group whose sacred site is threatened with desecration, development, or disaster. How to protect the relations between local religious communities and their foreign co-religionists. How to adjudicate intra- or interreligious disputes that come before secular tribunals for resolution. How to determine the proper levels of state cooperation with and support of religious officials and institutions in the delivery of vital social services – child care, education, charity, medical services, disaster relief, among others.

Concluding Reflections: The Place of Religion in Human Rights Today

A number of distinguished commentators have argued that religion should have no place in a modern regime of human rights. Christianity and other religions might well have been the sources of human rights in earlier eras, these skeptics argue. Certain religious groups might even have helped to inspire the modern human rights revolution. But religion, the argument goes, has now outlived its utility. 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. Religion is also too dangerous, divisive, and diverse in its demands to be accorded special protection. Religion is better viewed as just one another category of liberty and expression and given no more preference than its secular counterparts. Indeed, to

accord religion special human rights treatment is in effect to establish it and to discriminate against non-religious parties in the same position. Purge religion entirely from special consideration, this argument concludes, and the human rights paradigm will thrive.

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. Religion also defied the evil assumptions of Nazis, Fascists, and Communists alike that gulags 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—now global in its sweep and frightening in its power.

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.

For human rights norms and cultures need religious ideas, institutions, and right claims to survive and thrive. First, without religion, many rights are cut from their roots. The right to religion, German jurist Georg Jellinek once wrote, is “the mother of many other rights.”³⁰ For the religious individual, the right to believe leads ineluctably to the rights to assemble, speak, worship, evangelize, 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, and often the historical, source of many other vital individual and associational rights.

Second, without religion, the regime of human rights becomes infinitely expandable. Many religious communities adopt and advocate human rights in order 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. 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 their expansion, with no ontological grounding that keeps them from becoming a simple wish list of individual preferences.

³⁰ Georg Jellinek, *Die Erklärung der Menschen- und Bürgerrechte: ein Beitrag zur modernen Verfassungsgeschichte* (Duncker and Humblot, Leipzig 1895), 42.

Third, without religion, human rights become too captive to Western libertarian ideals. Many religious traditions—whether of Buddhist, Confucian, Hindu, Islamic, Orthodox, or Traditional stock—cannot conceive of, nor accept, a system of rights that excludes, deprecates, or privatizes 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, as is painfully demonstrated by the failed socialist experiments of the twentieth century and the fraying social welfare state of the twenty-first century. Numerous "mediating structures" stand between the state and the individual, religious institutions prominently among them. 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, artistic opportunities, 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.

Finally, without religion, human rights norms have no enduring 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."³¹ 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

³¹ Jacques Maritain, "Introduction," to UNESCO, *Human Rights: Comments and Interpretations* (Columbia University Press, New York 1949), 1.

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 merit in religious believers and groups quietly accepting the current protections of a modern human rights regime—the guarantees of liberty of conscience, freedom of exercise, rights to religious self-determination, and the like. But passive acquiescence in a secular scheme of human rights ultimately will not prove effective. And failure to press the unique rights claims of religious believers and communities will eventually leave many religious beliefs, practices, and communities too vulnerable. 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. 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 (re)discover them from within.

Recommended General Readings

Ahdar, Rex and Ian Leigh. *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005)

An-Na'im, Abdullahi Ahmed, et al., eds. *Human Rights and Religious Values: An Uneasy Relationship* (Grand Rapids, MI: Eerdmans, 2005)

Davis, R. W. ed. *The Origins of Modern Freedom in the West* (Stanford, CA: Stanford University Press, 1995)

Durham, W. Cole, Jr. and Brent G. Scharffs. *Law and Religion: National, International, and Comparative Perspectives* (New York: Aspen, 2010)

Ehler, Sidney Z. and John B. Morrall, eds. *Church and State Through the Centuries: A Collection of Historic Documents with Commentaries* (Newman, MD: Newman Press, 1954)

Evans, Malcolm D. *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997)

Honoré, Tony. *Ulpian: Pioneer of Human Rights*, 2d ed. (Oxford: Oxford University Press, 2002)

Huber, Wolfgang and Heinz Eduard Tödt. *Menschenrechte: Perspektiven einer menschlichen Welt* (Stuttgart: Kreuz-Verlag, 1977)

Lerner, Natan. *Religion, Secular Beliefs and Human Rights: 25 Years After the Human Rights Declaration* (Leiden: Martinus Nijhoff, 2006)

Lindholm, Tore, W. Cole Durham, Jr., and Bahia G. Tahzib-Lie. *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004)

Nurser, John. *For All Peoples and All Nations: Christian Churches and Human Rights* (Geneva: WCC Press, 2005)

Oh, Irene. *The Rights of God: Islam, Human Rights, and Comparative Ethics* (Washington, DC: Georgetown University Press, 2007)

Perry, Michael J. *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge: Cambridge University Press, 2007)

Runzo, Joseph. Nancy M. Martin, and Arvind Sharma, eds. *Human Rights and Responsibilities in the World Religions* (Oxford: Oneworld, 2003)

Stahnke, Tad and J. Paul Martin, eds. *Religion and Human Rights: Basic Documents* (New York: Center for the Study of Human Rights, Columbia University, 1998)

Taylor, Paul M. *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005)

Tierney, Brian. *Religion, Law, and the Growth of Constitutional Thought, 1150-1650* (Cambridge: Cambridge University Press, 1982)

_____. *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Grand Rapids, MI: Wm. B. Eerdmans, 1996)

Tuck, Richard. *Natural Rights Theories: Their Origins and Development* (Cambridge/New York: Cambridge University Press, 1979)

Van der Ven, Johannes A., *Human Rights or Religious Rules* (Leiden: Brill, 2010)

Villey, Michel. *Le droit et les droits de l'homme* (Paris: Presses universitaires de France, 1983)

_____. *Leçons d'histoire de la philosophie du droit*, new ed. (Paris: Dalloz, 1977)

Witte, John, Jr. *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007).

_____ and M. Christian Green eds. *Religion and Human Rights: An Introduction* (Oxford: Oxford University Press, 2011)

Wolterstorff, Nicholas P. *Justice: Rights and Wrongs* (Princeton: Princeton University Press, 2008)