The world today is torn by a paradoxical crisis. On the one hand, the world has been witnessing a democratic metamorphosis of almost apocalyptic alacrity. The Berlin Wall has fallen. Eastern Europe is being liberated. The Soviet Empire is no more. African autocracies have crumbled. Apartheid has faded. Latin American dictators have ceded. More than thirty new democracies have been born since 1973. Democratic agitation has reached even Tiananmen Square. On the other hand, the world is beset by tumult and tragedy of diabolic dimensions. With the memories of gulags, world war, and the Holocaust still fresh in our minds, we see the bloody slaughter of Rwanda, Burundi and the Sudan, the deadly explosions of Israel and the Middle East, the tragic genocide of the Balkans, the massive unrest of Central America, Southern Asia, the Korean Peninsula, Northern and Western Africa, Chechenya and other Eurasian republics. Every continent now faces movements of incremental political unification versus radical balkanization, gentle religious ecumenism versus radical fundamentalism, sensible moral pluralization versus shocking moral relativism. Even in the older, more stable democracies of the West, bitter “culture wars” have aligned defenders of various old orders.

---

* Jonas Robitscher Professor of Law and Ethics, Director of Law and Religion Program, Emory University, Atlanta. B.A. Calvin College (1982); J.D. Harvard Law School (1985). This article is based on a lecture delivered at a conference on “Religion and Human Rights: Eastern Europe,” convened by the Center for Human Rights, Columbia University, on March 25, 1996. I would like to thank the conference organizers Paul Martin and Louis Henkin for inviting me to this forum. I also wish to thank Tom Arthur, Hal Berman, Michael Brude, Morgan Cloud, Irwin Cotler, Eliza Ellison, Marjorie Girth, Joan Lockwood O’Donovan, Timothy Jackson, and Charles Reid for their helpful criticisms of an earlier draft, and Tamara McCracken and Joel Nichols for their research assistance.


against an array of new deconstructionists. In America the abyss between city and country, ghetto and suburb, black and white, straight and gay, old and young, rich and poor, the armed and their victims seems to grow constantly deeper.

To parse this paradox of simultaneous democratization and destruction of the local order and the world order presents one of the most pressing challenges of the twenty-first century. Meeting this challenge will certainly require continued cultivation of worldwide science, commerce, and technology, global literature, language, and media, the international environmental, health care, and conservation movements. These are matters beyond cavil—and beyond my ken.

The argument of this article is at once simple and (to some) counterintuitive. The simple part of the argument is that any solution to the world crisis must ultimately be grounded in a global regime of law and human rights. To seek to prove this point would be to belabor the obvious. The counterintuitive part of the argument is that religion must be seen as a vital dimension of any legal regime of human rights.

Modern human rights laws will provide no panacea to the world crisis in the next century, but they will be a critical part of any solution. Religions will not be easy allies to engage, but the struggle for human rights cannot be won without them. For human rights laws are inherently abstract ideals—universal statements of the good life and the good society. They depend upon the visions of human communities and institutions to give them content and coherence, to provide “the scale of values governing the[ir] exercise and concrete manifestation.” Religion is an ineradicable condition of human lives and communities. Religions invariably provide universal sources and “scales of values” by which many persons and communities govern themselves. Religions must thus be seen as indispensable allies in the modern struggle for human rights. Their faith and works must be adduced to give meaning and measure to the abstract claims of human rights norms, to give spirit and sanctity to the legal ideas and institutions of a human rights regime.

I shall develop this argument in three parts. First, I shall argue that all laws, including human rights law, have necessary religious sources, dimensions, and analogues. Second, I shall argue that the modern movement for human rights law has impoverished itself by its conventional deprecation of the roles and rights of religion. Third, I shall argue that religious ideas and institutions need to be drawn into a healthy regime of law, democracy and human rights, and shall give illustrations from various Christian traditions to drive home the point.

I. LAW AND RELIGION

My first argument is that law and religion are two interrelated dimensions of human living, two interlocking sources and systems of value and vision that exist in all human communities, regardless of time, place, and culture. Law and religion, Justice Harry Blackmun once wrote, “are an inherent part of the calculus of how a man should live” and how a society should run. The contents of legal and religious systems, of course, can differ dramatically over time and across cultures; at points, they can converge or contradict each other. But these two systems are always present.

To appreciate this interaction, one must move beyond the positivist concepts of law and the privatist concepts of religion that tend to dominate the modern Western academy. Among many jurists today, law is conceived simply as a body of rules and statutes designed to govern society. Religion is conceived simply as a body of doctrines and exercises designed to guide private conscience and the voluntary religious society. By these definitions, law has no place in the realm of religion; religion has no place in the regime of law.

Such concepts of law and of religion are too narrow for us to see how these two spheres and sciences are related. Viewed in its broadest terms, law consists of all norms that govern human conduct and all


actions taken to formulate and respond to those norms. Such norms include moral commandments, state statutes, ecclesiastical canons, family rules, commercial habits, communal customs, forms of etiquette, and various other social norms. Even viewed in narrower institutional terms, law consists of more than simply the rules of the state. On the one hand, law is the social activity by which certain norms are formulated by legitimate authorities and actualized by persons subject to those authorities. The process of legal formulation involves legislating, adjudicating, administering, and other conduct by legitimate officials. The process of legal actualization involves obeying, negotiating, litigating, and other conduct by legal subjects in response to those norms. On the other hand, numerous institutions besides the state are often involved in this social activity of legal formulation and actualization. The rules, customs, and processes of churches, colleges, corporations, clubs, convents, and other non-state associations are just as much a part of a society’s legal system as those of the state.

Likewise, religion cannot be reduced simply to private belief or ecclesiastical action. Viewed in its broadest terms, religion embraces all beliefs and actions that concern the ultimate origin, meaning, and purpose of life, of existence. Religion involves the responses of the human heart, soul, and mind to revelation, to transcendent values, to what Rudolf Otto once called, the “idea of the holy.” Viewed in narrower institutional terms, religion embraces creeds, cults, codes of conduct, and confessional communities. A creed defines the accepted cadre of beliefs and values concerning the ultimate origin, meaning, and purpose of life. A cult defines the appropriate rites, rituals, 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.

By this definition, a religion can be traditional or very new, closely confining or loosely structured, world-averter or world-affirmative, atheistic, nontheistic, polytheistic, or monotheistic. What is critical to see is that religion consists of both beliefs and the social articulation, implementation, and elaboration of those beliefs.

These broad functional definitions of law and religion provide no bright line tests to resolve penumbral cases. It is not always easy to distinguish between legal and non-legal norms, genuine and spurious religious claims. But these functional definitions of law and religion provide a principled means of differentiating two distinct, but interrelated spheres of ideas and institutions, two overlapping methods and forms of study—legal science and religious science, jurisprudence and theology.

To be sure, the spheres and sciences of law and religion have, on occasion, both converged and contradicted each other. Many religious traditions have known both theonomism and antinomianism—the excessive legalization and the excessive spiritualization of religion. Many legal traditions have known both theocracy and totalitarianism—the excessive sacralization and the excessive secularization of law. But the dominant reality in most eras and cultures is that law and religion stand not in monistic unity, nor in dualistic antinomy, but in dialectical harmony. Every religious tradition strives to come to terms with law by striking a balance between the rational and the mystical, the prophetic and the priestly, the structural and the spiritual. Every legal tradition struggles to link its formal structures and processes with the beliefs and ideals of its people. Law and religion are distinct spheres and sciences of human life, but they exist in dialectical interaction, constantly crossing-over and cross-fertilizing each other.

Various relationships between law and religion can be distinguished. For example, law and religion are conceptually related: both disciplines draw upon the same underlying concepts about the nature of being and order, of the person and community, of knowledge and truth. Both law and religion embrace closely analogous concepts of sin and crime, covenant and contract, redemption and rehabilitation, righteousness and justice that invariably combine in the mind of the legislator, judge, or juror. The modern American legal concept of crime,

---

for example, has been shaped by a Jewish and Christian theology of sin and penance. The modern legal concept of absolutely obligatory contracts was forged in the crucible of early Jewish and later Puritan covenant theology. The modern legal concept of the purposes of punishment is rooted in both Catholic doctrines of penance and Protestant doctrines of the uses of law.

Law and religion are methodologically related. Both have developed analogous hermeneutical methods, modes of interpreting their authoritative texts. Both have developed logical methods, modes of deducing precepts from principles, of reasoning from analogy and precedent. Both have developed ethical methods, modes of molding their deepest values and beliefs into prescribed or preferred habits of conduct. Both have developed forensic and rhetorical methods, modes of arranging and presenting arguments and data. Both have developed methods of adducing evidence and adjudicating disputes. Both have developed methods of organizing, systematizing, and teaching their subject matters. The scholastic dialectical method, for example, was used to organize both medieval theology and canon law. The Protestant topical method was used to organize both the new Protestant dogma and the new civil law.

Law and religion are institutionally related—principally in the relation between church and state, but also in the relations among sundry other religious and political groups. Jurists and theologians have worked hand-in-hand—and combated hand-to-hand—to define the proper relation between these religious and political groups, to determine their respective responsibilities, to facilitate their cooperation, to delimit the forms of support and protection one can afford the other. Many of the great Western constitutional doctrines of church and state—the two cities theory of Augustine, the two powers theory of Gelasius, the two swords theory of the High Middle Ages, the two kingdoms theory of the Reformation era—are rooted in both civil law and canon law, in theological jurisprudence and political theology. Much of our American constitutional law of church and state is the product both of Enlightenment legal and political doctrine and of Christian theological and moral dogma.

Law and religion are professionally related. In many earlier societies, and among certain groups still today, the legal profession and the religious profession are undifferentiated. Legal and sacerdotal responsibilities are vested in one person, be that chieftain, oracle, pontiff, or rabbi. Even when these professions are differentiated, however, they remain closely related. There are close affinities between the mediation of the lawyer and the intercession of the cleric, between the adjudication of the court and the arbitration of the consistory, between the benevolence of the bar and the benevolence of the diaconate. Ideally, both professions serve and minister to society. Both seek to exemplify the ideals of calling and community.

These and other forms of interaction have helped to render the spheres and sciences of law and religion dependent on—and indeed dimensions of—each other. On the one hand, law gives religious lives and religious communities their structure—the order and orthodoxy that they need to survive and to flourish in society. Legal “habits of the heart” structure the inner spiritual life and discipline of religious believers, from the reclusive hermit to the aggressive zealot. Legal ideas of justice, order, atonement, restitution, responsibility, obligation, and others pervade the theological doctrines of many religious traditions. Legal structures and processes, such as the Christian canon law, the Jewish Halacha, and the Muslim Shari’a, define and govern religious communities and their distinctive beliefs and rituals, mores and morals.

15. See Berman, supra note 7, at 120-64.
Without this legal structure, religion would readily decay into shallow spiritualism.

On the other hand, religion gives legal processes and norms their spirit—the sanctity and authority they need to command obedience and respect. Religion inspires the rituals of the court room, the decorum of the legislature, and the pageantry of the executive office, all of which celebrate and confirm the ideal objectivity and uniformity, truth and justice of the law. Religion gives law its structural fairness, its "inner morality," as Lon Fuller once called it. Ideally, legal rules and sanctions are publicly proclaimed and popularly known. Ideally, they are uniform, stable, and understandable, prospectively applied and consistently enforced. Religion gives law its respect for tradition, for the continuity of institutions, language, and practice, for precedent and preservation. Just as religion has the Talmudic tradition, the Christian tradition, and the Islamic tradition, so law has the common law tradition, the civil law tradition, and the constitutional tradition. As in religion, so in law, we abandon the time-tested principles and practices of the past only with trepidation, only with explanation. Religion gives law its authority and legitimacy, by inducing in citizens and subjects a reverence for law and structures of authority, by producing what Harold Berman calls "a popular faith in a truth and a justice that transcends social utility." Like religion, law has written and spoken sources, texts or oracles, which are considered to be decisive in themselves. Religion has the Bible, the Torah, and the Qur'an and the pastors, rabbis, and imams who expound them. Law has the constitutions and the statutes and the judges and agencies that apply them. Without this religious spirit, law would readily decay into empty formalism.

Law and religion, therefore, are two great interlocking systems of value and belief. They have their own sources and structures of normativity and authority, their own methods and measures of enforcement and amendment, their own rituals and habits of conceptualization and celebration of values. These spheres and sciences of law and religion exist in dialectical harmony. They share many elements, many concepts, and many methods. They also balance each other by counterpoising justice and mercy, rule and equity, orthodoxy and liberty, discipline and love. This dialectical harmony gives law and religion their vitality and their strength.


II. RELIGION AND HUMAN RIGHTS

My second argument is that religion, in all its denominational multiplicity, must be included within a legal regime of human rights. Many consider this a foolish argument. For even the great religions of the Book—Judaism, Christianity, and Islam—seem to be controversial candidates for any constructive role in the regime of human rights. None of these religious traditions speaks 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 in their cultivation. 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 great faiths.

Moreover, the modern cultivation of human rights (in the West at least) began in earnest fifty years ago 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 born out 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—"That all men are born free and equal in
rights and dignity [and] are endowed with reason and conscience—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 blatantly betrayed themselves in the previous decades.

Though desperate in origin, the human rights movement grew precociously in the decades following World War II. Indeed, after the 1950s a veritable "human rights revolution" erupted. In America and Europe, this rights revolution yielded a powerful grassroots civil rights movement and a welter of landmark cases and statutes. In Africa and Latin America, it produced agitation, and eventually revolt, against colonial and autocratic rule. At the international level, the Universal Declaration of 1948 inspired new declarations, covenants, and conventions on more discrete rights, most notably the great 1966 Covenants. Academies 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 or secular faith" of the post-War world order.

Jewish and Christian communities participated actively as midwives in the birth of this modern rights revolution, and special religious rights protections were at first actively pursued. Individual religious groups issued bold confessional statements and manifestoes on human rights shortly after World War II. Several denominations and the budding ecumenical church joined Jewish NGOs in the cultivation of human rights at the international level. 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 movements in Europe and Latin America.

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, 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 role and rights of religion was not simply the product of calculated agnosticism or callous apathy, though there was ample evidence of both. Leaders of the rights revolution were often forced, by reason of political pressure or limited resources, to address the most glaring rights abuses. Physical abuses—torture, rape, war crimes, false imprisonment, forced poverty—are easier to track and to treat than spiritual abuses, and often demand more immediate attention. In desperate circumstances, it is sometimes better to be a Good Samaritan than a good preacher, to give food and comfort before sermons and catechisms.

The relative silence of religious communities seemed to lend credence to this prioritization of effort. With some notable exceptions, religious groups after the 1960s made only modest contributions to the theory, law, and activism of human rights. The general principles set out in their post-War manifestoes on rights were not converted to specific precepts or programs. Their general endorsement of human rights instruments was not followed by specific lobbying and litigation efforts. Whether most mainline religions were content with their own condition, or intent to turn the other cheek or look the other way in the face of religious rights abuses, their relative silence did considerable harm to the human rights revolution.

The deprecation of the special role and rights of religions from the early-1960s to the early-1980s has introduced several distortions into the theory and law of human rights in vogue today. First, this deprecation has "impoverished" the general theory of human rights embraced by the rights revolution. On the one hand, it has cut many

---

24. The phrase is from R.J. Vincent, Human Rights and International Relations 93 (1986).
rights from their roots. The right to religion, Georg Jellinek wrote a century ago, is “the mother of many other rights.”

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, if not historical, source of many other individual and associational rights. On the other hand, this deprecation of religious rights has abstracted rights from duties. The classic faiths of the Book adopt and advocate religious 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 responsibilities. Without the example of religious rights readily at hand, leaders of the rights revolution have tended to lose sight of these organic connections and to treat rights as the abstract (and seemingly boundless) claims of autonomous individuals.

Second, this deprecation of the roles and rights of religion has sharpened the divide between Western and non-Western theories of rights. Many non-Western traditions, particularly those of Islamic, Hindu, Buddhist, Taoist, and 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. Since Western notions of rights dominate international law, many non-Western societies have neither accepted nor adopted the basic international declarations and covenants on human rights.

Third, this deprecation of religion has exaggerated the role of the state as the guarantor of human rights. The simple state vs. individual dialectic of modern human rights theories leaves it to the state to protect rights of all sorts—“first generation” civil and political rights, “second generation” social, cultural, and economic rights, and “third generation” environmental and developmental rights. In reality, the state is not, and cannot be, so omnicompetent—as the recently failed experiments in socialism have vividly shown. A vast plurality of “voluntary associations” or “mediating structures” stands 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 all rights, including religious rights. They create the conditions (if not the prototypes) for the realization of first generation civil and political rights. They provide a critical (and sometimes the principal) means to meet second generation rights of education, health care, child care, labor organizations, employment, artistic opportunities, among others. Religious institutions 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, therefore, 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 and nurture to 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. 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 canon. 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 human rights—conscience, dignity, reason, liberty, equality, tolerance, love, openness, responsibility, justice, mercy, righteousness, accountability, covenant, 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 to 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 for themselves and others.

In the past few years, the great religions of the Book have begun to transform themselves from midwives to mothers of human rights. The changes are awkward, incremental, controversial, and sometimes fatal. But the transformation seems to be inevitable and irreversible. In the Judaic tradition, Yoram Dinstein, Natan Lerner, David Novak, Asher Maoz, and others have taken the lead. In the Islamic tradition, Abdullahi An-Na'im, Riffat Hassan, Mohammad Talbi, and many others are hard at work. I know just enough about the important rights work within these two traditions to know that I cannot summarize it adequately. I do know something about the human rights transformation within my own tradition of Christianity, and it is to this subject that I turn in the final section.

III. LAW, RELIGION, AND HUMAN RIGHTS: SOME CHRISTIAN EXAMPLES

The Christian church must take two steps to transform itself from a “mid-wife” to a “mother” of human rights. First, given its checkered human rights record, the church must confess its past wrongs against rights. This first step the modern church has already taken many times—from the Second Vatican Council’s confession of prior complicity in authoritarianism to the contemporary church’s repeated confessions of prior support for apartheid, racism, sexism, fascism, and anti-Semitism. For the church to wallow in guilt for its past rights violations is neither necessary nor constructive. For the church to confess past sin, to make restitution, and to sin no more, however, are essential first steps for any credible rights witness.

Second, given the new prominence and urgency of rights talk today, the church must be open to a new “human rights hermeneutic”—fresh methods of interpreting its sacred texts and traditions that will recover and transplant those religious teachings and activities that are conducive to human rights. This second step the church has taken more gingerly. The Roman Catholic Church has stepped boldly in the aftermath of the Second Vatican Council (1962–1965) to develop a refined human rights theology and advocacy. Mainline Protestant and Orthodox churches have been more cautious, tepidly endorsing the benefits of the human rights movement without developing a refined human rights theology or uniform human rights advocacy. The recent liberation of the Eurasian Orthodox churches and


the recent explosion of Protestant involvement in Latin American, African, and East European politics suggests that these traditions might soon step more boldly down the rights path.

A “human rights hermeneutic” allows us to see that Catholic, Protestant, and Orthodox traditions alike have had, and still have, much to offer to a human rights regime. Contrary to conventional wisdom, the theory and law of human rights is neither new nor secular in origin. Human rights in the Western tradition are, in substantial part, the modern political fruits of classic Christian theologies. A “human rights hermeneutic” allows us to reclaim long-observed roles that the Christian traditions have played in the cultivation of human rights in the past. It also allows us to rename familiar principles and practices within these traditions that are conducive to the development of human rights in the future. The following sub-sections take up in turn the past and potential contributions to human rights offered by the Catholic, Protestant, and Orthodox traditions. While each of these traditions builds on common biblical and patristic precedents, each offers a unique human rights perspective and practice which needs to be part of the church’s legal ministry in the next century.

A. Human Rights and the Roman Catholic Tradition

The Roman Catholic Church is, paradoxically, the first and the last tradition within 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” (libertas ecclesiae). During the Papal Revolution of Pope Gregory VII (1073–1085) and his successors, the Catholic clergy threw off their royal and civil oppressors and established the Church as an autonomous legal and political corporation within Western Christendom. For the first time, the Church successfully claimed jurisdiction over such persons as clerics, pilgrims, students, Jews, and Muslims and over such subjects as doctrine and liturgy; ecclesiastical property, polity, and patronage; marriage and family relations; education, charity, and inheritance; oral promises, oaths, and various contracts; and all manner of moral and ideological crimes. The Church predicated these jurisdictional claims in part on Christ’s famous delegation of the keys to Saint 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. The Church also predicated these new claims on its traditional authority over the form and function of the Christian sacraments. By the fifteenth century, the Church had gathered around the seven sacraments whole systems of canon law rules that prevailed throughout the West.

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, 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 religious conformists to worship, evangelize, 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

38. See Max L. Stackhouse & Steven E. Healey, Religion and Human Rights: A Theological Apologetic, in Religious Human Rights 1, supra note 4, at 485, 489–92. See generally, Carl Schmitt, Politische Theologie 32 (1916) (“All the pregnant ideas and institutions of modern political thought are in essence secularized forms of theological doctrines and institutions.”).


church. A good deal of the rich legal latticework of medieval canon law was cast, substantively and procedurally, in the form of rights. To be sure, such rights were not unguided by duties, nor indiscriminately available to all parties. Only the Catholic faithful—and notoriously not Jews, Muslims, or heretics—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 rights and liberties in vogue today were first forged not by a John Locke or a 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, and these formulations were elaborated in the writings of Spanish and Portuguese neo-scholastics. But the pope and prelates left it largely to non-church bodies and non-Catholic believers to draw out the secular implications of the medieval human rights tradition. The Catholic Church hierarchy largely tolerated Protestant and humanist rights efforts in the later sixteenth century and beyond, which built 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. Notwithstanding the social teachings of subsequent instruments such as Rerum Novarum (1891) and Quadragesimo Anno (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.

The Second Vatican Council (1962–1965) and its progeny transformed the Catholic Church’s theological attitude toward human rights and democracy. In a series of sweeping new doctrinal statements—from Mater et Magistra (1961) to Centesimus Annus (1991)—the Church came to endorse many of the very same human rights and democratic principles that it had hotly spurned a century before. 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. Every person, the church taught, is created by God with “dignity, intelligence and free will . . . and has rights flowing directly and simultaneously from his very nature.” 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. The Church emphasized the religious rights of
conscience, worship, assembly, and education, calling them the "first rights" of any civic order. 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. 51 Second, as a corollary, the Church advocated limited constitutional government, disestablishment of religion, and separation of the institutions of church and state. 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. 52

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 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 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 its papal see and curia, 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, and elsewhere owe much of their inspiration to the teaching and activity of the Catholic Church. 53

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 Church's next human rights movement of the world at the opening of the third millennium—equipped with a refined theology and law of human rights and nearly a billion members world-wide. 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. 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. 54 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.

B. Human Rights and the Protestant Tradition

One of the ironies of the contemporary human rights movement is the relative silence of the Protestant churches. Historically, Protestant churches produced the most refined theories of human rights and worked tirelessly to effectuate legal reforms that would safeguard such rights. Today, many Protestant churches have been content simply to confirm human rights norms and condemn human rights abuses without deep corporate theological reflection. To be sure, some leading

---

51. Pacem in Terris, supra note 50.
54. See sources and discussion in William Johnson Everett, Human Rights in the Church, in Religious Human Rights I, supra note 4, at 121-42.
themes.

The American civil rights movement found some of its theory or program has taken the field.

COLUMBIA HUMAN RIGHTS LAW REVIEW

liberationist and feminist groups, have developed important new number of Protestant groups within the church, particularly A Protestant lights have taken up the subject in their writings. A number of Protestant groups within the church, particularly liberationist and feminist groups, have developed important new themes. The American civil rights movement found some of its strongest support among Baptist, Methodist, and other free churches. But, to date, no comprehensive systematic Protestant human rights theory or program has taken the field.

The irony is that the Protestant Reformation was, in effect, the second great human rights movement of the West. Martin Luther, John Calvin, Thomas Cranmer, Menno Simmons, and other sixteenth-century reformers all began their movements with a call for freedom—freedom of the individual conscience from intrusive canon laws and clerical controls, freedom of political officials from ecclesiastical power and privilege, freedom of the local clergy from central papal rule and oppressive princely controls. As the radicality of the Reformation gave way to reconstruction, the reformers put in place a number of cardinal teachings that were (and still are) pregnant with implications for the birth of human rights in a democratic political order.

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 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, 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, 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. Particularly 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 of office, 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. Since all persons stand equal before God, they must stand equal before God’s political agents in the state. Since God has vested all

55. See, e.g., Huber & Todt, supra note 37; Stackhouse, supra note 37; Hass Dombois, Das Recht der Gnade, 3 vols. (1969); Johan D. van der Vyver, Seven Lectures on Human Rights (1977); Herman Dooyeweerd, Grundproblemen in de leer der rechtspersoonlijkheid, Rechtsges. Magazijn Themis 199, 367 (1937).

56. See sources and discussion in Villa-Vicencio, supra note 37.

57. The following paragraphs are adapted from Christianity and Democracy, supra note 27, at 5-7; Witte, supra note 18, at 43-57; John Witte, Jr., How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism, 39 Emory L.J. 41 (1990). Within the vast literature on Protestant political thought, see Religious Liberty and Western Thought, supra note 18; John Tonkin, The Church and the Secular Order in Reformation Thought (1971); Thomas G. Sanders, Protestant Concepts of Church and State: Historical Backgrounds and Approaches for the Future (1964); and a provocative, synthetic article, Douglas Laycock, Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century, 80 Minn. L. Rev. 1047 (1996). On discrete Protestant denominational developments and their implications for the development of law and rights, see Berman and Witte, supra note 18; Frederick J. Shirley, Richard Hooker and Contemporary Political Ideas (1949); Joan Lockwood O’Donovan, The Theology and Law of Authority in the English Reformation (1991); Josef Bohatec, Calvins Lehre von Staat und Kirche (1961).

persons with natural liberties of life and belief, the state must assure them of similar civil liberties. Since 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. Since 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 office, they must be disobeyed; if they persist in their abuse, they must be removed, even if by force.

In the past, these Protestant teachings helped to inaugurate what R.R. Palmer once called the "age of the democratic and human rights revolutions." 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 inspiration and instruction during 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, and some 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 to the regime of human rights in the twenty-first century. Protestant theology avoids the reductionist extremes of both libertarianism that sacrifices the community for the individual and totalitarianism that sacrifices the individual for the community. It also avoids the limitless expansion of human rights claims by grounding these norms in the creation order, divine callings, and covenant relationships. 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 perhaps the greatest 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 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 the next century.

C. Human Rights and the Orthodox Tradition

The Orthodox churches ground their human rights theology more in the integrity of natural law and the human community than in the dignity of the person. To be sure, some of the earliest Eastern Church Fathers sounded familiar themes of liberty of conscience, human dignity, and free exercise of religion, which have been echoed in the Orthodox tradition ever since. Lactanatius, the great fourth century father of the Orthodox tradition, wrote, for example: "[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." And, to be sure, many dispersed Orthodox communities, particularly those in North America and Western Europe, have in recent years embraced the fruits, if not joined the cause, of the modern human rights revolution.

What has rendered the Orthodox human rights prophecy unique, however, is its distinctive natural law foundation. Orthodox
churches emphasize that God has written his natural law on the hearts of all persons and rewritten it on the pages of Scripture. This natural law, which finds its most sublime source and summary in the Ten Commandments, prescribes a series of duties that each person owes to others and to God—not to kill, not to steal, not to bear false witness, not to swear falsely, not to serve other gods, and others. Humanity’s fall into sin has rendered adherence to such moral duties imperative to the survival of the human community. God has called clerics and magistrates 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 simply the reciprocals of these divinely-ordained moral duties. One person’s moral duties not to kill, to steal, or to 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 to swear falsely give rise to his rights to serve the right god and to swear properly. For each moral duty taught by natural law there is a reciprocal or corollary moral right. On the strength of this ancient biblical ethic, many Orthodox churches endorse a three-tiered system of rights and duties: (1) a Christian or “evangelical” system of rights and duties, based upon 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 upon 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 upon the constitutional laws and social needs of the community, which are enforced by the positive laws of the state. The church is responsible not only 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.

Particularly during the Marxist-Leninist era in the Soviet Union and Eastern Europe, Orthodox Churches throughout the world let their pastoral and prophetic voices be heard in endorsement of human rights and in condemnation of their violation. The World Congress of Orthodox Bishops in 1978, for example, greeted the 30th anniversary of the Universal Declaration of Human 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.

Two years later, 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 function of government and to have the guarantee of the equal protection of the law.

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 and ethnic origin, or political or religious espousal.  

Since the turn of the twentieth century, the Orthodox churches of Russia, the Balkans, and Greece have also moved toward a doctrine of separation of religious bodies from the state as well as religious toleration, if not liberty, for all. Traditionally, Orthodox theology taught that church and state are part of an organic religious community, with each institution called to serve God, each other, and their subjects, "without causing the subordination of one to the other." Such an organically unified arrangement had given the Orthodox clergy a unique moral voice in the community. But it had also subjected the established Orthodox church to substantial state control over its polity and property and subjected non-established religions to all manner of civil restrictions. With the fresh rise of Muslim states in the Middle East and atheistic states in the Soviet Union and Eastern Europe, the Orthodox clergy have moved slowly in this century toward a doctrine of separation of religion and state, and protection of peoples of all faith. Initially, this shift in perspective was driven pragmatically by the sheer need to survive. Over time, however, the Orthodox churches have come to endorse more openly religious rights and liberties for all members of the community. The 1980 Clergy-Laity Congress of the Greek Orthodox Church, for example, proclaimed:

All people 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 worship, teaching and practice, (4) pursuing the implications of their beliefs in the social and political community.

68. Id. at 21-22.
69. Stanley Harakas, Orthodox Church-State Theory and American Democracy, 21 Greek Orth. Theological Rev. 399 (1978); see also, Ernst Barker, Social and Political Thought in Byzantium (1937); Steven Runciman, The Byzantine Theocracy (1977).
70. See Steven Runciman, Orthodox Churches and the Secular State (1972); Harold J. Berman, The Challenge of Christianity and Democracy in the Soviet Union, in Christianity and Democracy, supra note 27, at 287; Harold J. Berman, Atheism and Christianity in the Soviet Union, in Freedom and Faith: The Impact of Law on Religious Liberty 127 (1962); Yannoulatos, supra note 63.
71. Webster, supra note 62, at 148 (quoting the proclamation of the Clergy-Laity Congress of the Greek Orthodox Church).

The greatest human rights challenge facing the Orthodox tradition in the next century will be to help guide the cultural and constitutional reconstruction of post-socialist societies in Eastern Europe and the Commonwealth of Independent States. The remarkable revolution unleashed by Mikhail Gorbachev's calls for perestroika, glasnost, and demokratizatsiia in the 1980s has brought not only new liberty to these long closed societies, but also new license. These societies now face moral degradation, economic dislocation, and human suffering on an unprecedented scale. They face the renewal of ancient animosities among religious and cultural rivals previously kept at bay by a common oppressor. They face a massive influx of foreign missionaries, both religious and economic, offering belief systems and practices that are radically different from those held out by the fallen socialist state and the struggling Orthodox churches. A veritable war for souls has thus broken out in the former Soviet bloc—a fight to reclaim the traditional cultural and moral souls of these new societies and a fight to retain adherence and adherents to the ancient Orthodox churches. In the course of this "war for souls," some Orthodox church leaders have begun to retreat toward their traditional organic views of a unitary church, state, and society bound together by faith, blood, and culture. Some Orthodox clergy have also begun to gather themselves into increasingly dogmatic and fundamentalist stands, which has left shrinking space for religious pluralism, toleration, and free exercise for all.

The abstract doctrines of modern human rights will have little salience in these societies absent a strong constitution and consistent practice of constitutionalism. Whatever their local forms, these new constitutional developments will ultimately profit much from the traditional theology of duty-based rights and rights-based social action taught by the Orthodox churches.

Conclusions

Conventional accounts of law, human rights, and democracy afford little space to religious ideas and institutions. Laws are generally
viewed as rules and statutes promulgated by the sovereign, not as
temporal elaborations of a divine or natural law. Human rights norms
are generally viewed as secular claims to a good life, not as corollaries
to divine duties for right living. Political rulers are generally viewed as
representatives of public opinion and vindicators of human rights, not
as vice-regents of God or champions of divine justice. To be sure, most
writers today would agree that religious believers must be guaranteed
liberty of conscience and free exercise of religion and that religious
institutions must be guaranteed collective worship and corporate
organization. But religion, according to conventional accounts, is
fundamentally a private matter with little constructive role to play in
the drama of law, human rights, and democracy.

This conventional account does not properly consider the
natural and necessary religious sources and dimensions of law, human
rights, and democracy. Law, by its nature, is rooted in the ritual,
tradition, and authority of religion, and draws in part on religious ideas,
institutions, and methods for its spirit and substance. Human rights
norms are, by design, abstract statements of individual and
associational living that depend upon the religious visions of persons
and communities to give them content and coherence. Democracy, by its
nature, is a relative system of social organizations and political
structures, which presupposes the existence of a body of beliefs and
values that will constantly shape and reform it to the needs and ideals
of the people. Religion is a natural and necessary source and dimension
of any regime of law, democracy, and human rights.

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 is not to
deny that religion exists or to denigrate 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.
T.S. Elliott once wrote: "Religions run wild must be tamed, for they
cannot be long caged." Religion is an ineradicable condition of human
lives and communities. Religion will invariably figure in the legal and
political life of society—however forcefully the society might seek to
repress or deny its value or validity, however cogently the academy
might bracket it from political and legal calculus. Religion must be
dealt with, because it exists—pervasively and perennially. It must be
drawn into a constructive alliance with a regime of law, democracy, and
human rights.

The regime of law, democracy, and human rights needs religion
to survive. "Politicians at international forums may reiterate a
thousand times that the basis of the new world order must be universal
respect for human rights [and democracy]," Czech President Václav
Havel declared in 1994 after receiving the Liberty Medal in
Philadelphia. "[B]ut it will mean nothing as long as this imperative does
not derive from the respect of the miracle of being, the miracle of the
universe, the miracle of nature, the miracle of our own existence. Only
someone who submits in the authority of the universal order and of
creation, who values the right to be a part of it, and a participant in it,
can genuinely value himself and his neighbors, and thus honor their
rights as well."