

DRAFT

For *William & Mary Law Review* 42 (2001): 707-770

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

John Witte, Jr.*

I. Dickensian Paradoxes

"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair...."¹ Charles Dickens penned these famous words to describe the paradoxes of the late eighteenth-century French Revolution fought for the sake of "the rights of man and citizen."² These same words aptly describe the paradoxes of the late twentieth-century world revolution fought in the name of human rights and democratization for all.

The world has entered something of a "Dickensian era"³ in the past two decades. We have seen the best of human rights protections inscribed on the books, but some of the worst of human rights violations inflicted on the ground. We have celebrated the creation of more than thirty new constitutional

* Jonas Robitscher Professor of Law and Ethics; Director of Law and Religion Program, and Director of Center for the Interdisciplinary Study of Religion, Emory University. This essay builds on The Hill Lecture, delivered on Parliament Hill, Ottawa, Canada, on May 12, 2003, and sponsored by the Center for Cultural Renewal in Canada and its director, Iain Benson. This essay updates some of the themes of *Religious Human Rights in Global Perspective*, Vol. I: Religious Perspectives; Vol. II: Legal Perspectives (John Witte, Jr. and Johan D. van der Vyver, eds., 1996) [hereafter *Religious Human Rights I and Religious Human Rights II*] and my *Law, Religion, and Human Rights*, 28 Col. H. Rt. L. Rev. 1-31 (1996).

¹ Charles Dickens, *The Tale of Two Cities* 1 (1859).

² Declaration of the Rights of Man and of Citizen (1789), in Le/on Duguit, *Les constitutions et les principales lois politiques de la France depuis 1789* 1 (7th ed., 1952).

³ The phrase is from Irwin Cotler, *Jewish NGOs and Religious Human Rights: A Case Study*, in *Human Rights in Judaism: Cultural, Religious, and Political Perspectives* 165-272, at 165 (Michael J. Broyde and John Witte, Jr., eds., 1998).

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

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

One cause and consequence of this great awakening of religion around the globe is that the ambit of religious rights has been substantially expanded. In the past two decades, more than 150 major new statutes and constitutional provisions on religious rights have been promulgated -- many replete with generous protections of liberty of conscience and freedom of

⁴ Proselytism and Orthodoxy in Russia: The New War for Souls (John Witte, Jr. and Michael Bourdeaux, eds., 1999).

⁵ Human Rights in Africa: Cross-Cultural Perspectives (Abdullahi Ahmed An-Na'im and Frances Deng, eds., 1990); Proselytization and Communal Self-Determination in Africa (Abdullahi Ahmed An-Na'im, ed. 1999); *Symposium: The Problem of Proselytism in Southern Africa*, 14 Emory Int. L. Rev. 491-1303 (2000).

⁶ Religious Freedom and Evangelization in Latin America: Linking Pluralism and Democracy (Paul E. Sigmund, ed., 1999)

⁷ Susanne Hoeber Rudolph, *Introduction*, in *Transnational Religion and Fading States* 6 (Susanne Hoeber Rudolph and James Piscatori, eds., 1997).

religious exercise, guarantees of religious pluralism, equality, and non-discrimination, and several other special protections and entitlements for religious individuals and religious groups. These national guarantees have been matched with a growing body of regional and international norms, notably the 1981 UN Declaration on Religious Intolerance and Discrimination Based Upon Religion and Belief and the long catalogue of religious group rights set out in the 1989 Vienna Concluding Document and its progeny.⁸

On the other hand, this very same human rights revolution of the world has helped to catalyze new forms of religious and ethnic conflict, oppression, and belligerence, of tragic proportions. In some communities, such as the former Yugoslavia, local religious and ethnic rivals, previously kept at bay by a common oppressor, have converted their new liberties into licenses to renew ancient hostilities, with catastrophic results.⁹ In other communities, such as Sudan and Rwanda, ethnic nationalism and religious extremism have conspired to bring violent dislocation or death to hundreds of rival religious believers each year, and to persecution, false imprisonment, forced starvation, and savage abuses of thousands of others.¹⁰ In other communities, most notably in America and Western Europe, political secularism and nationalism have combined to threaten a sort of civil denial and death to a number of believers, particularly "sects" and "cults" of high religious temperature or of low cultural conformity.¹¹ In still other

⁸ For a good sampling of international and local legal documents on religious liberty, see Natan Lerner, *Religion, Belief, and International Human Rights* 129-147 (2000); *Religion and Human Rights: Basic Documents* (Tad Stahnke and J. Paul Martin, eds., 1998) [hereafter *Religion and Human Rights*]. For analysis, see Kevin Boyle and Juliet Sheen, *Freedom of Religion and Belief: A World Report* (1997); Malcolm D. Evans, *Religious Liberty and International Law in Europe* (1997); Bahiyiyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (1996); *Religious Human Rights I*, supra note *; *Religious Human Rights II*, supra note *.

⁹ See, inter alia, Paul Mojzes, *Yugoslavian Inferno: Ethnoreligious Warfare in the Balkans* (1995); Michael A. Sells, *The Bridge Betrayed: Religion and Genocide in Bosnia* (1996); Julie Mertus, *Kosovo: How Myths and Truths Started a War* (1999).

¹⁰ Frances M. Deng, *War of Visions: Conflict of Identities in the Sudan* (1995).

¹¹ A whole battery of new state reports on sects and cults has recently emerged in Germany, France, Belgium, and Austria, some with a tone approaching xenophobia. The most comprehensive is the *Endbericht der Enquete-Kommission Sogennante Sekten und Psychogruppen*, Deutscher Bundestag 13. Wahlperiode Drucksche 13/10950 (June 6, 1998). See analysis in *New Religious Movements in Europe* (H. Meldgaard and J. Aagaard eds., 1997); Elizabeth Arweck and Peter B. Clarke, *New Religious Movements in Western*

communities, from Asia to the Middle East, Christians, Jews, and Muslims, when in minority contexts, have faced sharply increased restrictions, repression, and, sometimes even martyrdom.¹²

In parts of Russia, Eastern Europe, Africa, and Latin America, this human rights revolution has brought on something of a new war for souls between indigenous and foreign religious groups. This is the most recent, and the most ironic, chapter in the modern Dickensian drama. With the political transformations of these regions in the past two decades, foreign religious groups were granted rights to enter these regions for the first time in decades. In the early 1990s, they came in increasing numbers to preach their faiths, to offer their services, to convert new souls. Initially, local religious groups -- Orthodox, Catholic, Protestant, Sunni, Shi'ite, and Traditional alike -- welcomed these foreigners, particularly their foreign co-religionists with whom they had lost contact for many decades. Today, local religious groups have come to resent these foreign religions, particularly those from North America and Western Europe who assume a democratic human rights ethic. Local religious groups resent the participation in the marketplace of religious ideas that democracy assumes. They resent the toxic waves of materialism and individualism that democracy inflicts. They resent the massive expansion of religious pluralism that democracy encourages. They resent the extravagant forms of religious speech, press, and assembly that democracy protects.¹³

A new war for souls has thus broken out in these regions -- a war to reclaim the traditional cultural and moral souls of these new societies and a war to retain adherence and adherents to the indigenous faiths. In part, this is a theological war -- as rival religious communities have begun actively to demonize and defame each other and to gather themselves into ever more dogmatic and fundamentalist stands. The ecumenical spirit of the previous decades is giving way to sharp new forms of religious balkanization. In part, this is a legal war -- as local religious groups have begun to conspire with their political leaders to adopt statutes and regulations restricting

Europe: An Annotated Bibliography (1997); New Religions and New Religiosity (E. Braker & M. Warburg, eds., 1998); Jonathan Luxmoore and Jolanta Babiuch-Luxmoore, *New Myths for Old: Proselytism and Transition in Post-Communist Europe*, 36 J. Ecumenical Stud. 43-64 (1999).

¹² [Add cites to reports by the State Department, US ambassador for religious freedom, and UN Special Rapporteur for Religious Freedom].

¹³ See sources in notes 4-6, and further *Symposium: Pluralism, Proselytism and Nationalism in Eastern Europe*, 36 J. Ecumenical Stud. 1-286 (1999).

the constitutional rights of their foreign religious rivals. Beneath shiny constitutional veneers of religious freedom for all and unqualified ratification of international human rights instruments, several countries of late have passed firm new anti-proselytism laws, cult registration requirements, tightened visa controls, and various discriminatory restrictions on new or newly arrived religions.

Such Dickensian paradoxes have exposed the limitations of a secular human rights paradigm standing alone. And they have inspired the earnest search for additional resources to deter violence, resolve disputes, cultivate peace, ensure security -- in dialogue, liturgical healing, reconciliation ceremonies and commissions, and more.¹⁴ Human rights are as much the problem as they are the solution in a number of current religious and cultural conflicts. In the war for souls in Russia, for example, two absolute principles of human rights have come into direct conflict: the foreign religion's free exercise right to share and expand its faith versus the indigenous religion's liberty of conscience right to be left alone on its own territory.¹⁵ Or, put in Christian theological terms, it is one group's rights to abide by the Great Commission: "Go ye therefore, and make disciples of all nations" versus another group's right to insist on the Golden Rule: "Do unto others as you would have done unto you."¹⁶ Further rights talk alone cannot resolve this dispute. Likewise, some of the nations given to the most belligerent forms of religious nationalism have ratified more of the international human rights instruments than the United States has, and have crafted more elaborate bills of rights than what appears in the United States Constitution.¹⁷ Here, too, further rights talk alone is insufficient.

¹⁴ See R. Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* 167-308 (2000); Wolfgang Huber and Hans-Richard Reuter, *Friedensethik* 209-352 (1990); Donald W. Shriver, *Religion and Violence Prevention*, in *Cases and Strategies for Prevention Action* 169-197 (Barnett R. Rubin, ed., 1998); id., *The Taming of Mars: Containing Violence in the Coming Century*, in *God, The Powers and Principalities of the Common Life* 140-83 (Max L. Stackhouse, ed., 2000); *Religion: The Missing Dimension of Statecraft* (Douglas Johnston and Cynthia Sampson, eds., 1994).

¹⁵ See *Symposium - Soul Wars: The Problem of Proselytism in Russia*, 12 *Emory Int. L. Rev.* 1-738 (1998).

¹⁶ See Matthew 7:12; 28:19-20; Mark 16:15-18; Acts 1:8. For variant analyses of these texts, see *Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism* (John Witte, Jr. and Richard C. Martin, eds. 1999).

¹⁷ See Johan D. van der Vyver, *Universality and Relativism of Human Rights: American Relativism*, 4 *Buffalo H. Rt. L. Rev.* 43-78 (1998); Louis

These paradoxes of the modern human rights revolution underscore an elementary, but essential, point -- that human rights norms need a human rights culture to be effective. "Declarations are not deeds," John Noonan reminds us. "[A] form of words by itself secures nothing; words pregnant with meaning in one culture may be entirely barren in another."¹⁸ Human rights norms have little salience in societies that lack constitutional processes that will give them meaning and measure. They have little value for parties who lack basic rights to security, succor, and sanctuary, or who are deprived of basic freedoms of speech, press, or association. They have little pertinence for victims who lack standing in courts and other basic procedural rights to pursue apt remedies. They have little cogency in communities that lack the ethos and ethic to render human rights violations a source of shame and regret, restraint and respect, confession and responsibility, reconciliation and restitution. As we have moved from the first generation of human rights declaration following World War II to the current generation of human rights implementation, this need for a human rights culture has become all the more pressing.

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

On the one hand, human rights norms need religious narratives to ground them. There is, of course, some value in simply declaring human rights norms of "liberty, equality, and fraternity" or "life, liberty, and property" -- if for no other reason than to pose an ideal against which a person or community might measure itself, to preserve a normative totem for later generations to make real. But ultimately these abstract human rights ideals of the good life and the good society depend upon 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 the[ir] exercise and concrete manifestation."¹⁹ It is here that religion must play a vital role. Religion is an ineradicable condition of human lives and human communities. Religions invariably

Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int. L. 341 (1995).

¹⁸ John T. Noonan, Jr. *The Tensions and the Ideals*, in *Religious Human Rights II*, supra note *, 593-605, at 594. See further id., *The Lustre of our Country: The American Experience of Religious Freedom* 265-284 (1998).

¹⁹ Jacques Maritain, *Introduction*, in UNESCO, *Human Rights: Comments and Interpretations* 15-16 (1949).

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 -- to enlist their unique resources and to protect their unique rights -- is vital to enhancing the regime of human rights and to easing some of the worst paradoxes that currently beset it.

On the other hand, religious narratives need human rights norms both to protect them and to challenge them. There is, of course, some value in religions simply accepting the current protections of a human rights regime -- the guarantees of liberty of conscience, free exercise, religious group autonomy, and the like. But passive acquiescence in a secular scheme of human rights ultimately will not do. Religious communities must reclaim their own voice within the secular human rights dialogue, and reclaim the human rights voice within their own internal religious dialogues. Contrary to conventional wisdom, the theory and law of human rights are neither new nor secular in origin. Human rights are, in no small part, the modern political fruits of ancient religious beliefs and practices -- ancient Jewish constructions of covenant and mitzvot, original Qur'anic texts on peace and the common good, classic Christian concepts of ius and libertas, freedom and law.²⁰

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

Both these theses -- about the place of religion in human rights and about the place of human rights in religion -- are highly controversial. In the next two sections, I shall try to parse these controversies and press these theses a bit more

²⁰ See respectively Human Rights in Judaism, supra note 3; Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (2d ed., 1996); Brian Tierney, *The Idea of Natural Rights* (1997); *Religious Liberty in Western Thought* (Noel B. Reynolds and W. Cole Durham, Jr., eds., 1996).

concretely. The final section will wrestle with a few of the difficult theological and legal conundrums that are raised by a closer symbiosis between religion and human rights.

II. Religion and Human Rights

My first response to our modern Dickensian paradoxes is that religion, in all of its denominational multiplicity, must play a more active role in the modern human rights revolution. Many would consider this thesis fundamentally misguided.²¹ For even the great religions of the Book do not speak unequivocally about human rights, and none has amassed an exemplary human rights record over the centuries. Their sacred texts and canons say much more about commandments and obligations than about liberties and rights. Their theologians and jurists have resisted the importation of human rights as much as they have helped 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 faiths.

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

The modern human rights movement was thus 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

²¹ This section is a summary of the argument set out in the sources listed in supra note *.

dignity [and] are endowed with reason and conscience"²² -- expounded the primitive truths of Christianity and the Enlightenment with little basis in post-War world reality. Freedom and equality were hard to find anywhere. Reason and conscience had just blatantly betrayed themselves in the gulags, battlefields, and death camps.

Though desperate in origin, the human rights movement grew precociously in the decades following World War II. The United Nations issued a number of landmark documents on human rights in the 1960s. Foremost among these were the two great international covenants promulgated by the United Nations in 1966. The International Covenant on Economic, Social, and Cultural Rights (1966) posed as essential to human dignity the rights to self-determination, subsistence, work, welfare, security, education, and various other forms of participation in cultural life.²³ 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.²⁴ Other international and domestic instruments issued in the later 1960s took particular aim at racial, religious, and gender discrimination in education, employment, social welfare programs, and other forms and forums of public life. Various nations promulgated accompanying particularly in North America. These international instruments 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.²⁵ Academies throughout the world produced a prodigious new literature urging constant reform and expansion

²² United Nations General Assembly Resolution 217A III (December 10, 1948), reprinted in *Religion and Human Rights*, supra note 8, at 57.

²³ United Nations General Assembly Resolution 2200A (XXI) (December 16, 1966), reprinted in *Religion and Human Rights*, supra note 8, at 61.

²⁴ United Nations General Assembly Resolution 2200A (XXI) (December 16, 1966), reprinted in *Religion and Human Rights*, supra note 8, at 69.

²⁵ See detailed analysis in Natan Lerner, "Religious Human Rights Under the United Nations," in *Religious Human Rights II*, supra note *, at 79-134; Lerner, supra note 8, at 9-39.

of the human rights regime. Within a generation, human rights had become the "new civic faith" of the post-War world order.²⁶

Christian and Jewish communities participated actively as midwives in the birth of this modern rights revolution, and special religious rights protections were at first actively pursued. Individual religious groups issued bold confessional statements and manifestoes on human rights shortly after World War II. Several denominations and budding ecumenical bodies joined Jewish 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.²⁷

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 special role and rights of religions from the early-1960s onwards has introduced several distortions into the theory and law of human rights in vogue today.

First, without religion, many rights are cut from their roots. The right to religion, Georg Jellinek once wrote, is "the mother of many other rights."²⁸ For the religious individual, the right to believe leads ineluctably to the rights to assemble, speak, worship, proselytize, educate, parent, travel, or to abstain from the same on the basis of one's beliefs. For the religious association, the right to exist invariably involves rights to corporate property, collective worship, organized charity, parochial education, freedom of

²⁶ Jacques Maritain, *Man and the State*, 110-111 (1951). See also United Nations Charter, Preamble (declaring a "faith in fundamental human rights").

²⁷ See generally Cotler, *supra* note 3; J. Bryan Hehir, "Religious Activism for Human Rights: A Christian Case Study," in *Religious Human Rights I*, *supra* note *, at 97-120; Robert Traer, *Faith in Human Rights* (1991).

²⁸ Georg Jellinek, *Die Erklärung der Menschen- und Bürgerrechte: Ein Beitrag zur modernen Verfassungsgeschichte* 42 (1895).

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.

Second, without religion, the regime of human rights becomes infinitely expandable. The classic faiths of the Book 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.²⁹ 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.

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

Fourth, without religion, the state is given an exaggerated role to play as the guarantor of human rights. The simple state vs. individual dialectic of many modern human rights theories leaves it to the state to protect and provide rights of all sorts. In reality, the state is not, and cannot be, so omniscient. Numerous "mediating structures" stand between the state and the individual, religious institutions prominently among them.³⁰ 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

²⁹ See David Novak, *Covenantal Rights* (2000); Abdullahi Ahmed An-Na'im, *Toward an Islamic Revolution: Civil Liberties, Human Rights, and International Law* (1990); *Human Rights and Christian Responsibility*, 3 vols. (1975) with detailed analysis in Wolfgang Huber and Heinz Eduard Toedt, *Menschenrechte: Perspektiven einer menschlichen Welt* (1977) and *Religious Human Rights I*, supra note *; *Religion and Human Rights* (Sumner B. Twiss and John B. Kelsay, eds., 1996).

³⁰ See various arguments for social pluralism in *Political Order and the Plural Structure of Society* (James W. Skillen & Rockne M. McCarthy, eds., 1991; repr. ed. 1998); Michael Walzer, *Spheres of Justice: An Argument for Pluralism and Equality* (1983).

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.

The challenge of the next century will be to transform religious communities from midwives to mothers of human rights -- from agents that assist in the birth of rights norms conceived elsewhere to associations that give birth 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.³¹

³¹ This is the central thesis of Religious Human Rights I, supra note *.

III. Human Rights and Religion

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

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

Moreover, human rights norms challenge the spirit of religious bodies. Human rights norms, religious skeptics argue, are the creed of a secular faith born of Enlightenment liberalism, humanism, and rationalism. Human rights advocates regularly describe these norms as our new "civic faith," "our new world religion," "our new global moral language."³² The influential French jurist Karl Vasak has pressed these sentiments into a full confession of the secular spirit of the modern human rights movement:

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

³² See Traer, *supra* note 27, at 10-11; van der Vyver, *supra* note 17, at 43-45.

international legislators.... By recognizing the Universal Declaration as a living document ... one can proclaim one's faith in the future of mankind.³³

In demonstration of this new faith, Vasak converted the "old trinity" of "liberte/, equalite/, et fraternite/" taught by the French Revolution into a "new trinity" of "three generations of rights" for all humanity. The first generation of civil and political rights elaborates the meaning of liberte/. The second generation of social, cultural, and economic rights elaborates the meaning of equalite/. The third generation of solidarity rights to development, peace, health, the environment, and open communication elaborates the meaning of fraternite/.³⁴ Such language has become not only the lingua franca but also something of the lingua sacra of the modern human rights movement.³⁵ In the face of such an overt confession of secular liberalism, religious skeptics conclude, a religious body would do well to resist the ideas and institutions of human rights.

Both these skeptical arguments, however, presuppose that human rights norms constitute a static belief system born of Enlightenment liberalism. But the human rights regime is not static. It is fluid, elastic, open to challenge and change. The human rights regime is not a fundamental belief system. It is a relative system of ideas and ideals that presupposes the existence of fundamental beliefs and values that will constantly shape and reshape it. The human rights regime is not the child of Enlightenment liberalism, nor a ward under its exclusive guardianship. It is the ius gentium of our times, the common law of nations, which a variety of Hebrew, Greek, Roman,

³³ Karl Vasak, *A 30 Year Struggle*, The UNESCO Courier 31-32 (November, 1977). In his *Foreword to The International Dimensions of Human Rights* xv (Karl Vasak, ed., 1982), Vasak quotes favorably a UNESCO document: "Human rights are neither a new morality nor a lay religion and are much more than a language common to all mankind." Two years later, however, he published an article more in line with his 1977 views. See Karel Vasak, *Pour une troisième génération des droit de l'homme*, in *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet/Studies and Essays in International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet* 837-845 (Christophe Swinarski, ed., 1984).

³⁴ Ibid.

³⁵ See, e.g., Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s*, 33 Rutgers L. Rev. 435 (1981); Jennifer A. Downs, *A Healthy and Ecologically Balanced Environment: An Argument of a Third Generation Right*, 3 Duke J. Comp. & Intl. L. 351 (1993); and summaries of literature in Burns H. Weston, *Human Rights*, 6 Hum. Rt. Q. 257 (1984); Joy Gordon, *The Concept of Human Rights: The History and Meaning of its Politicization*, 23 Brooklyn J. Intl. L. 689 (1998).

Christian, and Enlightenment movements have historically nurtured in the West and which today still needs the constant nurture of multiple communities, in the West and well beyond. It is beyond doubt that current formulations of human rights are suffused with fundamental libertarian beliefs and values, some of which run counter to the cardinal beliefs of various religious traditions. But libertarianism does not and should not have a monopoly on the nurture of human rights; indeed, a human rights regime cannot long survive under its exclusive patronage.

I use the antique term ius gentium advisedly -- to signal the place of human rights as "middle axioms" in our moral and political discourse.³⁶ Historically, Western writers spoke of a hierarchy of laws -- from natural law (ius naturale), to common law (ius gentium), to civil law (ius civile).³⁷ The natural law was the set of immutable principles of reason and conscience, which are supreme in authority and divinity and must always prevail in instances of dispute. The civil law was the set of enacted laws and procedures of local political communities, reflecting their immediate policies and procedures. Between these two sets of norms was the ius gentium, the set of principles and customs common to several communities and often the basis for treaties and other diplomatic conventions. The contents of the ius gentium did gradually change over time and across cultures -- as new interpretations of the natural law were offered, and as new formulations of the positive law became increasingly conventional. But the ius gentium was a relatively consistent body of principles by which a person and a people could govern themselves.

This antique typology helps us to understand the intermediate place of human rights in our hierarchy of legal and cultural norms today. Human rights are the ius gentium of our time, the middle axioms of our discourse. They are derived from and dependent upon the transcendent principles that religious traditions (more than any other groups) continue to cultivate. And they inform, and are informed by, shifts in the customs and conventions of sundry state law systems. These human rights

³⁶ See comparable comments, from a Muslim perspective, in Abdullahi Ahmed An-Na'im, *Towards an Islamic Hermeneutics for Human Rights*, in *Religion and Human Rights Values: An Uneasy Relationship* 229-242 (Abdullahi Ahmed An-Na'im, et al., eds. 1995), and, from a Catholic perspective, by Robert P. George, *Response*, in *A Preserving Grace: Protestants, Catholics, and Natural Law* 157-172 (Michael Cromartie, ed., 1997); Maritain, *supra* note 26, at 97-101.

³⁷ [add note to ius naturale, ius gentium, ius civile at Roman and canon law]

norms do gradually change over time: just compare the international human rights instruments of 1948 with those of today. But human rights norms are a relatively stable set of ideals by which a person and community might be guided and judged.

This antique typology also helps us to understand the place of human rights within religion. My argument that human rights must have a more prominent place within religions today is not an attempt to import libertarian ideals into their theologies and polities. It is not an attempt to herd Trojan horses into churches, synagogues, mosques, and temples in order to assail secretly their spirit and structure. My argument is, rather, that religious bodies must again assume their traditional patronage and protection of human rights, bringing to this regime their full doctrinal vigor, liturgical healing, and moral suasion. Using our antique typology, religious bodies must again nurture and challenge the middle axioms of the ius gentium using the transcendent principles of the ius naturale. This must not be an effort to monopolize the discourse, nor to establish by positive law a particular religious construction of human rights.³⁸ Such an effort must be part of a collective discourse of competing understandings of the ius naturale -- of competing theological views of the divine and the human, of good and evil, of individuality and community -- that will serve constantly to inform and reform, to develop and deepen, the human rights ideals now in place.³⁹

³⁸ For a provocative illustration of this proposed methodology of pluralistic religious witness, see Duncan B. Forrester, *Christian Justice and Public Policy* (1997). Forrester argues that "Christian theology, though it can no longer claim to provide a comprehensive theory of justice, can provide insights into justice -- 'theological fragments' -- which give illumination, challenge some aspects of the conventional wisdom, and contribute to the building of just communities in which people may flourish in mutuality and hope." *Ibid.*, 3-4.

³⁹ See esp., from a theological perspective, Wolfgang Huber, "Human Rights and Biblical Legal Thought," in *Religious Human Rights I*, supra note *, 47-64, at 59ff.; id., *Gerechtigkeit und Recht: Grundlinien christlicher Rechtsethik* 252ff., 366ff., 446ff. (1996). See also Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 *Hum. Rt. Q.* 740-752 (1994); Jerome J. Shestack, *The Jurisprudence of Human Rights*, in *Human Rights in International Law: Legal and Policy Issues* 69-113, at 75ff. (Theodor Meron, ed., 1984); David Tracy, *Religion and Human Rights in the Public Realm*, 112(4) *Daedalus* 237 (1983).

A. An Emerging Human Rights Hermeneutic

A number of religious traditions, of late, have begun this process of reengaging the regime of human rights, of returning to their traditional roots and routes of nurturing and challenging the human rights regime. This process has been incremental, clumsy, controversial, at times even fatal for its proponents. But the process of religious engagement of human rights is now under way -- in Christian, Islamic, Judaic, Buddhist, Hindu, and Traditional communities alike. Something of a new "human rights hermeneutic" is slowly beginning to emerge among modern religions.⁴⁰

This is, in part, a "hermeneutic of confession." Given their checkered human rights records over the centuries, religious bodies have begun to acknowledge their departures from the cardinal teachings of peace and love that are the heart of their sacred texts and traditions. Christian churches have taken the lead in this process -- from the Second Vatican Council's confession of prior complicity in authoritarianism to the contemporary church's repeated confessions of prior support for apartheid, communism, racism, sexism, fascism, and anti-Semitism.⁴¹ Other communities have also begun this process -- from recent Muslim academics' condemnations of the politicization of "jihad" to the Dalai Lama's recent

⁴⁰ For good examples among the three Religions of the Book, see An-Na'im, *supra* note 29; Riffat Hassan, *Rights of Women within Islamic Communities*, in *Religious Human Rights I*, *supra* note *, at 361-386; Novak, *supra* note 29; *id.*, *Religious Human Rights in Judaic Texts*, in *Religious Human Rights I*, *supra* note *, at 175-202; Max Stackhouse, *Creeds, Society, and Human Rights* (1984; repr. ed. 1998); Huber and Toedt, *supra* note 29, at 158-183, 222-321, 362-419. On emerging rights talk within various Asian and African religions, see *Confucianism and Human Rights* (Wm. Theodore de Bary and Tu Weiming, eds., 1998); Wm. Theodore de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (1998); *Religious Diversity and Human Rights* (Irene Bloom, J. Paul Martin, and Wayne L. Proudfoot, eds., 1996); *The East Asian Challenge for Human Rights* (Joanne R. Bauer and Daniel A. Bell, eds., 1999).

⁴¹ Luke Timothy Johnson, *Religious Rights and Christian Texts*, in *Religious Human Rights I*, *supra* note *, at 65, 70-73; John S. Pobee, "Africa's Search for Religious Human Rights Through Returning to Wells of Living Water," in *Religious Human Rights II*, *supra* note *, at 391, 411-413; Charles Villa-Vicencio, "From Revolution to Reconstruction: The South Africa Imperative," in *Christianity and Democracy in Global Context* 249-266 (John Witte, Jr. ed., 1993); *id.*, *A Theology of Reconstruction: Nation Building and Human Rights* (1992).

lamentations over the "sometimes sorry human rights record" of his own tradition, as well as rival traditions.⁴²

This is, in part, a "hermeneutic of suspicion" (in Paul Ricoeur's phrase). Given the pronounced libertarian tone of many recent human rights formulations, it imperative that we not idolize or idealize these formulations. We need not be bound by current taxonomies of "three generations of rights" rooted in liberty, equality, and fraternity. Common law formulations of "life, liberty or property," canon law formulations of "natural, ecclesiastical and civil rights," or Protestant formulations of "civil, theological, and pedagogical uses" of rights might well be more apt classification schemes.⁴³ We must not accept the seemingly infinite expansion of human rights discourse and demands. Rights bounded by moral duties, by natural capacities, or by covenantal relationships might well provide better boundaries to the legitimate expression and extension of rights. And we must not be bound only to a centralized, legal methodology of articulating and enforcing rights. We might also consider a more pluralistic model of interpretation that respects "the right of the [local] community to be the living frame of interpretation for their own religion and its normative regime."⁴⁴

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

⁴² An-Na'im, *supra* note 29; Farid Esack, *Muslims Engaging the Other and Humanum*, in *Sharing the Book*, *supra* note 16, at 118-144; Commencement Address of the Dalai Lama at Emory University, May 11, 1998.

⁴³ See examples in my *Religion and the American Constitutional Experiment: Essential Rights and Liberties 11-20* (2000) [hereafter *Experiment*].

⁴⁴ An-Na'im, *supra* note 36, at 235.

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

To outline the main Christian story here, permit me to analyze briefly the rights contributions of the three main Catholic, Protestant, and Orthodox traditions of Christianity. I have told parts of this story before.⁴⁵ But some readers have, quite properly, criticized me for speaking with "too Protestant" an accent.⁴⁶ Herewith at least a partial purgation.

B. Human Rights and Catholicism.

The Roman Catholic Church is, paradoxically, the first and the last of the three great traditions of Christianity to embrace the doctrine of human rights.

At the opening of the second millennium of the common era, the Catholic Church led the first great human rights movement of the West in the name of "freedom of the church" (libertas ecclesiae). During the Papal Revolution of Pope Gregory VII (1073-1085) and his successors, the Catholic clergy threw off their royal and civil rulers and established the church as an autonomous legal and political corporation within Western Christendom.⁴⁷ For the first time, the church successfully claimed jurisdiction over such persons as clerics, pilgrims,

⁴⁵ See my *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 *Emory Law Journal* 41-64 (1990); *The Development of Herman Dooyeweerd's Concept of Rights*, 110(3) *South African Law Journal* 543-562 (1993); *Moderate Religious Liberty in the Theology of John Calvin*, 31 *Calvin Theological Journal* 359-403 (1996); *The Biography and Biology of Liberty: Abraham Kuyper and the American Experiment*, in *Religion, Pluralism, and Public Life: Abraham Kuyper's Legacy for the 21st Century* 243-62 (Luis Lugo, et al. eds. 2000); *Experiment*, supra note 43, at 1-56.

⁴⁶ Richard W. Garnett, *Francis Bacon Takes on the Ghouls*, 3 *Green Bag* 2d 447-456, at 453-454 (2000).

⁴⁷ See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).

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 St. Peter (Matthew 16:18) -- a key of knowledge to discern God's word and will, and a key of power to implement and enforce that word and will by law.⁴⁸ 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.⁴⁹

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 church councils and synods to participate in the election and discipline of bishops, abbots, and other clergy. It defined the rights of the laity to worship, evangelize, maintain religious symbols, participate in the sacraments, travel on religious pilgrimages, and educate their children. It defined the rights of the poor, widows, and needy to seek solace, succor, and sanctuary within the church. A good deal of the rich latticework of medieval canon law was cast, substantively and procedurally, in the form and language of rights.⁵⁰

⁴⁸ See Brian Tierney, *Origins of Papal Infallibility, 1150-1350* 39-45, 82-121 (1972); Thomas Aquinas, *Summa Theologiae* (c. 1253), Supp. qq. 17-18.

⁴⁹ See *ibid.*; Udo Wolter, *Amt und Officium in mittelalterlichen Quellen von 13. bis 15. Jahrhunderts*, 105 *Zeitschrift der Savigny-Stiftung (Kan. Ab.)* 246 (1988); R.H. Helmholz, *The Spirit of Classical Canon Law* (1996); *Lex et Sacramentum im Mittelalter* (Paul Wilpert ed. 1969).

⁵⁰ See sources and discussion in Tierney, *supra* note 21; *id.*, *Rights, Law, and Infallibility in Medieval Thought* (1997); *id.*, *Religion, Law, and the Growth of Constitutional Thought, 1150-1650* (1982); *id.*, *Religious Rights: An Historical Perspective in Religious Human Rights I*, *supra* note *, at 17-46; Charles J. Reid, Jr., *Rights in Thirteenth Century Canon Law: An Historical Investigation* (Ph.D. Diss. Cornell, 1994), with summaries and elaboration in *id.*, *Thirteenth Century Canon Law and rights: The Word ius and its Range of Subjective Meanings*, *Studia Canonica* 30 (1996): 295.; and *id.*,

To be sure, such rights were not unguided by duties. Nor were they available to all parties. Only the Catholic faithful -- and notoriously not Jews, Muslims, or heretics⁵¹ -- had full rights protection, and their rights were to be exercised with appropriate ecclesiastical and sacramental constraints. But the basic medieval rights formulations of exemptions, immunities, privileges, and benefits, and the free exercise of religious worship, travel, speech, and education have persisted, with ever greater inclusivity, to this day. Many of the common formulations of individual and collective rights and liberties in vogue today were first forged not by 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.⁵² But the church 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 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

Roots of a Democratic Church Polity in the History of the Canon Law, 60 CLSA Proceedings 150 (1998).

⁵¹ See *Persecution and Toleration* (W.J. Sheils, ed., 1984); James Parkes, *The Jew in the Medieval Community: A Study of his Political and Economic Situation* (2d ed., 1976); Solomon Grayzel, *The Church and the Jews in the XIIIth Century* (1933).

⁵² See Tierney, *supra* note 21, at 255-315.

the authoritative regimes and policies that governed the European, Latin American, and African nations where Catholicism was strong.⁵³

The Second Vatican Council (1962-1965) and subsequent initiatives transformed the Catholic Church's theological attitude toward human rights and democracy. In a series of sweeping new doctrinal statements -- from *Mater et Magistra* (1961) onward -- the church came to endorse many of the very same human rights and democratic principles that it had 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."⁵⁴ 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. Second, as a corollary, the church advocated limited constitutional government, disestablishment of religion, and the separation of church and state. The vast pluralism of religions and cultures, and the inherent dangers in state endorsement of

⁵³ See documents in *Church and State Through the Centuries 281-355* (Sidney Z. Ehler and John B. Morrall, eds., 1954); Mary Elsbernd, *Papal Statements on Rights: A Historical Contextual Study of Encyclical Teachings from Pius VI-Pius XI (1791-1939)* (Ph.D. Diss., Catholic University of Louvain, 1985). See discussion in John Courtney Murray, S.J., *The Problem of Religious Freedom* (1965); id., *The Problem of Religious Freedom*, 25 *Theol. Stud.* 503-575 (1964); Noonan, *Lustre of our Country* supra note 18, at 331-353; David Hollenbach, *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition* (1979).

⁵⁴ *Pacem in Terris* (1963), paragraph 9, reprinted in *The Gospel of Peace and Justice: Catholic Social Teaching Since Pope John Paul 201* (1976).

any religion, in the church's view, rendered mandatory such democratic forms of government.⁵⁵

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 the papal see, and through the efforts of its local clergy. New democratic and human rights movements in Brazil, Chile, Central America, The Philippines, South Korea, Poland, Hungary, the Czech Republic, Ukraine, and elsewhere owe much of their inspiration to the teaching and activity of the Catholic Church.⁵⁶

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 some one 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,

⁵⁵ See esp. *Dignitatis Humanae* (On Religious Freedom) (1965), reprinted in *The Documents of Vatican II* 675 (Walter M. Abbott and J. Gallagher, eds., 1966).

⁵⁶ See J. Bryan Hehir, *Catholicism and Democracy: Conflict, Change, and Collaboration*, in *Christianity and Democracy*, supra note 41, at 25-28; Hehir, supra note 27, at 107-119; George Weigel, *The Final Revolution: The Resistance Church and the Collapse of Communism* (1992).

charity, and health care within a sacramental and sacerdotal context. Within the external forum of the world and its secular law, however, the church has a decidedly universal human rights framework that advocates especially first generation civil and political rights for all. Some critics view this two-pronged human rights ministry as a self-serving attempt to advocate equality and liberty without the church, but to perpetuate patriarchy and elitism within.⁵⁷ 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.

C. Human Rights and Protestantism.

One of the ironies of the contemporary human rights movement is the relative silence of the Protestant churches. Historically, Protestant churches produced some of the most refined theories and laws of human rights. Today, many Protestant churches have been content simply to confirm human rights norms and to condemn human rights abuses without deep corporate theological reflection. To be sure, some leading Protestant lights have taken up the subject in their writings.⁵⁸ A number of Protestant groups within the church, particularly new liberationist and feminist groups, have developed important new themes.⁵⁹ The American civil rights movement found some of its strongest support among Baptist, Methodist, and other Free Churches. The ecumenical movement, especially the World Council of Churches, consolidated the efforts of many Protestant denominations.⁶⁰ But, to date, no comprehensive and systematic human rights theory or program has taken the Protestant field. Twentieth-century Protestantism produced no John Courtney Murray and no Vatican II.

⁵⁷ See sources and discussion in William Johnson Everett, "Human Rights in the Church," in *Religious Human Rights I*, supra note *, at 121-142.

⁵⁸ See, e.g., Forrester, supra note 38; Huber, supra note 14, 29; Huber and Todt, supra note 29; Stackhouse, supra note 40; Hans Dombois, *Das Recht der Gnade*, 3 vols. (1969); Johan D. van der Vyver, *Seven Lectures on Human Rights* (1977).

⁵⁹ See sources and discussion in Villa-Vicencio, supra note 41.

⁶⁰ A Christian Declaration on Human Rights (Allen O. Miller, ed., 1977); Lutheran World Federation, *Theological Perspectives on Human Rights* (1977); *Human Rights and Christian Responsibility*, 3 vols. (1975). See detailed analysis in Huber and Toedt, supra note 29; Juergen Moltmann, *On Human Dignity, Political Theology and Ethics* (M. Douglas Meeks, trans. 1984); Wolfgang Voegele, *Menschenwuerde zwischen Recht und Theologie: Begrueendungen von Menschenrechte in der Perspektive oeffentlicher Theologie* (Habilitationsschrift, University of Heidelberg, 1999).

The irony of this is that the Protestant Reformation was, in effect, the second great human rights movement of the West. Prior to the sixteenth century, there was one universal Catholic faith and Church, one universal system of canon law and sacramental life, one universal hierarchy of courts and administrators centered in Rome that ruled throughout much of the West. Martin Luther, John Calvin, Thomas Cranmer, Menno Simons, and other leading sixteenth-century reformers all began their movements with a call for freedom from this ecclesiastical regime -- freedom of the individual conscience from intrusive canon laws and clerical controls, freedom of political officials from ecclesiastical power and privileges, freedom of the local clergy from central papal rule and oppressive princely controls. "Freedom of the Christian" became the rallying cry of the early Reformation. It drove theologians and jurists, clergy and laity, princes and peasants alike to denounce canon laws and ecclesiastical authorities with unprecedented alacrity, and to urge radical constitutional reforms.

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

The Lutheran Reformation territorialized the faith through the principle of cuius regio, eius religio (whosever region, his religion) established by the Peace of Augsburg (1555).⁶¹ Under this principle, princes or city councils were authorized to prescribe the appropriate forms of Evangelical or Catholic doctrine, liturgy, and education for their polities -- with religious dissenters granted the right to worship privately in their homes or to emigrate peaceably from the polity. After decades of bitter civil war, the Peace of Westphalia (1648) extended this privilege to Reformed Calvinists as well, rendering Germany and beyond a veritable honeycomb of religious plurality for the next two centuries.

The Anglican Reformation nationalized the faith through the famous Supremacy Acts and the Act of Uniformity (1559) of the Church and Commonwealth of England. Citizens of the Commonwealth were required to be communicants of the Church of England, subject to the final ecclesiastical and political authority of the Monarch. The Toleration Act (1689) extended a modicum of rights to some Protestant dissenters. But it was not until the Jewish and Catholic Emancipation Acts of 1829 and 1833

⁶¹ Reprinted in Church and State, supra note 53, at 164-173.

that the national identity of the Church and Commonwealth of England was finally broken.⁶²

The Anabaptist Reformation communalized the faith by introducing what Menno Simons once called the Scheidingsmaurer - the wall of separation between the redeemed realm of religion and the fallen realm of the world. Anabaptist religious communities were ascetically withdrawn from the world into small, self-sufficient, intensely democratic communities, governed internally by biblical principles of discipleship, simplicity, charity, and Christian obedience. When such communities grew too large or too divided, they deliberated colonized themselves, eventually spreading the Anabaptist communities from Russia to Ireland to the furthest frontiers of North America.⁶³

The Calvinist Reformation congregationalized the faith by introducing rule by 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, 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 and the congregational meeting.⁶⁴

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

⁶² See generally Joseph Lecler, *Toleration and the Reformation* (1960), 4 vols.; G.R. Elton, *The Tudor Constitution*, 2d ed. (1982).

⁶³ See sources and discussion in *Anabaptism in Outline: Selected Primary Sources* (Walter Klaassen, ed., 1973); Robert Friedmann, *The Theology of Anabaptism* (1973); *The Recovery of the Anabaptist Vision* (Guy Hershberger, ed., 1957); William C. McLoughlin, *New England Dissent 1630-1833*, 2 vols. (1971).

⁶⁴ See sources and discussion in *Moderate Religious Liberty*, supra note 45.

This new emphasis on the individual was true even in the more intensely communitarian traditions of Anglicanism and Anabaptism. The Anglican Book of Common Prayer was designed, in Thomas Cranmer's words, as a "textbook of liberty." The daily office of the lectionary, together with the vernacular Bible, encouraged the exercise of private devotion outside the church. The choices among liturgical rites and prayers within the Prayer Book encouraged the exercise of at least some clerical innovation within the church, with such opportunities for variation and innovation increasing with the 1662 and 1789 editions of the Prayer Book.⁶⁵

The Anabaptist doctrine of adult baptism gave new emphasis to a voluntarist understanding of religion, as opposed to conventional notions of a birthright or predestined faith. The adult individual was now called to make a conscientious choice to accept the faith -- metaphorically, to scale the wall of separation between the fallen world and the realm of religion to come within the perfection of Christ. Later Free Church followers converted this cardinal image into a powerful platform of liberty of conscience, free exercise of religion, and separation of church and state -- not only for Christians but eventually for all peaceable believers. Their views had a great influence on the formation of constitutional protections of religious liberty in eighteenth and nineteenth century North America and Western Europe.⁶⁶

The Lutheran and Calvinist branches of the Reformation laid the anthropological basis for an even more expansive theory and law of rights. Classic Protestant theology teaches that a person is both saint and sinner. On the one hand, a person is created in the image of God and justified by faith in God. The person is called to a distinct vocation, which stands equal in dignity and sanctity to all others. The person is prophet, priest, and king and responsible to exhort, minister, and rule in the community. Every person, therefore, stands equal before God and before his or her neighbor. Every person is vested with a natural liberty to live, to believe, to serve God and neighbor. Every person is entitled to the vernacular Scripture, to education, 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,

⁶⁵ See *The Book of Common Prayer* (John E. Booty, ed., 1976).

⁶⁶ See sources and discussion in Max L. Stackhouse and Deirdre King Hainsworth, *Deciding for God: The Right to Convert in Protestant Perspectives*, in *Sharing the Book*, supra note 16, at 201-230.

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, 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, aid the needy. The state is called to protect order, punish crime, 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.⁶⁷

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 persons with natural liberties of life and belief, the state must ensure 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

⁶⁷ See in my *How to Govern a City on a Hill*, supra note 45.

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.

These Protestant teachings helped to inspire many of the early modern revolutions fought in the name of human rights and democracy. They were the driving ideological forces behind the revolts of the French Huguenots, Dutch pietists, and Scottish Presbyterians against their monarchical oppressors in the later sixteenth and seventeenth centuries. They were critical weapons in the arsenal of the revolutionaries in England, America, and France. They were important sources of the great age of democratic construction in later eighteenth and nineteenth century America and Western Europe. In this century, Protestant ideas of human rights and democracy helped to drive the constitutional reformation of Europe in the post-War period, and some of the human rights and democratic movements against colonial autocracy in Africa and fascist revival in Latin America.⁶⁸

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 avoids the limitless expansion of human rights claims by grounding these norms in the creation order, divine callings, and covenant relationships. And it avoids uncritical adoption of human rights by judging their "civil, theological, and educational uses" in the lives of both individuals and communities. On this foundation, Protestant theology strikes unique balances between liberty and responsibility, dignity and depravity, individuality and community, politics and pluralism.

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

⁶⁸ See Michael Walzer, *The Revolution of the Saints: A Study in the Origins of Radical Politics* (1965); Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* 103-125 (1993).

denominational snobbery or sniping. Protestants need to sow their own distinct seeds of human rights while the field is still open. Else, there will be little to harvest, and little room to complain, in this new century.

D. Human Rights and the Orthodox Tradition.

The Orthodox churches, rooted in Eastern Christianity and the Byzantine Empire, ground their human rights theology less in the dignity of the person and more in the integrity of natural law and the human community. To be sure, some of the earliest Greek Fathers have sounded familiar Western themes of liberty of conscience, human dignity, and free exercise of religion. For example, Lactantius, the great fourth-century sage of the Orthodox tradition, wrote: "[I]t is only in religion that liberty has chosen to dwell. For nothing is so much a matter of free will as religion, and no one can be required to worship what he does not will to worship."⁶⁹ Such sentiments have echoed in the Orthodox tradition ever since -- particularly in the modern transplanted Orthodox communities of Western Europe and North America.

What has rendered the Orthodox human rights understanding unique, however, is its distinct natural law foundations.⁷⁰ The Orthodox Church emphasizes that God has written His natural law on the hearts of all persons and rewritten it on the pages of Scripture. 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 church and state alike to assume responsibility for enforcing by law those moral duties that are essential to such survival.

⁶⁹ Migne, *Patrologia Latina*, 6:516.54.

⁷⁰ S.L. Frank, *The Light Shineth in Darkness: An Essay in Christian Ethics and Social Philosophy* (Boris Jakim trans., 1989), 112-189; Stanley Harakas, *Human Rights: An Eastern Orthodox Perspective*, 19 *J. Ecumenical Stud.* 13-24 (1982); id., *Christian Ethics in Ecumenical Perspective*, 15 *J. Ecumenical Stud.* 631-646 (1978); id., *Let Mercy Abound: Social Concern in the Greek Orthodox Church* (1983); Paul Mojzes, *Religious Human Rights in Post-Communist Balkan Countries*, in *Religious Human Rights II*, supra note *, at 263-284; Anastasios Yannoulatos, *Eastern Orthodoxy and Human Rights*, 73 *Intl. Rev. of Mission* 454-466 (1984); Ion Bria, *Evangelism, Proselytism, and Religious Freedom in Romania: An Orthodox Point of View*, 36 *J. Ecumenical Stud.* 163-183 (1999).

According to classic Orthodox theology, human rights are 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 right to serve the right god and to swear properly. For every moral duty taught by natural law there is a reciprocal moral right.⁷¹

On the strength of this ancient biblical ethic, Orthodox churches endorse a three-tiered system of rights and duties: (1) a Christian or "evangelical" system of rights and duties, based 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.⁷²

Particularly during the long winter of Marxist-Leninist rule, Orthodox Churches throughout the world let their pastoral and prophetic voices be heard in endorsement of human rights and in condemnation of their violation. The World Congress of Orthodox Bishops (1978), for example, greeted the 30th anniversary of the United Nations Declaration of Rights with the call: "We urge all Orthodox Christians to mark this occasion with prayers for those whose human rights are being denied and/or violated; for those who are harassed and persecuted because of their religious beliefs, Orthodox and non-Orthodox alike, in many parts of the world; for those whose rightful demands and persistence are met with greater oppression and ignominy; and for those whose agony for justice, food, shelter, health care and education is accelerated with each passing day."⁷³ In 1980, the 25th Clergy-Laity Congress of the Greek Orthodox Archdiocese of North and South America pronounced, on the strength of "a universal natural law," that "human rights

⁷¹ Harakas, *Human Rights*, supra note 70, at 13-18.

⁷² Harakas, *Christian Ethics*, supra note 70, at 631-646.

⁷³ Quoted by Harakas, *Human Rights*, supra note 70, at 21.

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."⁷⁴ "All people," the Orthodox Congress later declared, "have the God-given right to be free from interference by government or others in (1) freely determining their faith by conscience, (2) freely associating and organizing with others for religious purposes, (3) expressing their religious beliefs in worship, teaching and practice, (4) pursuing the implications of their beliefs in the social and political community."⁷⁵

The Orthodox churches have also begun to move gradually toward a greater separation of church and state -- though seemingly more out of political necessity than theological conviction. Classically, the Orthodox Church had no concept akin to the political dualisms that prevailed in the West -- no Augustinian division between the City of God and the City of Man, no medieval Catholic doctrine of two powers or two swords, no Protestant understandings of two kingdoms or two realms, no American understanding of a wall of separation between church and state.⁷⁶ After the fourth century, the prevailing Orthodox view was that church and state are part of an organic religious and political community, bonded by blood, soil, and confession.⁷⁷

To be sure, this symbiosis of church and state subjected the Orthodox Church to substantial state control over its politics and properties, and substantial restrictions on its religious ministry and prophecy. But this arrangement also gave the Orthodox clergy a strong and singular spiritual voice in civil society. It allowed the clergy to teach the community through Orthodox schools and monasteries, Orthodox literature

⁷⁴ Quoted by *ibid.*, 21-22.

⁷⁵ Quoted by F.C. Webster, *The Price of Prophecy: Orthodox Churches on Peace, Freedom and Security* 148 (2d ed., 1995).

⁷⁶ On the development of these doctrines, see discussion and sources in *Religious Liberty in Western Thought*, *supra* note 20.

⁷⁷ See sources and analysis in *Social and Political Thought in Byzantium* (Ernst Barker, ed., 1957).

and preaching, often supported by generous state patronage. It allowed them to nurture the community through the power and pathos of the Orthodox liturgy, icons, artwork, prayers, and music. It allowed them to advise officials on the moral dimensions of positive law.⁷⁸

This symbiotic relationship between church and state worked well enough when state authorities were themselves Orthodox, or at least openly supportive of Orthodoxy. Such was the case for much of the history of Russia, and other parts of Central Eurasia before the Bolshevik Revolution of 1917.⁷⁹ This relationship did not work well, however, when political authorities had no Orthodox allegiances. Such was the case for most other Orthodox communities after the fifteenth century. With the Islamic conquest of the Byzantine Empire in the 1450s, and the expansion of the Ottoman Empire thereafter, the Orthodox Church could no longer readily depend upon the state for protection and support. Often consigned to restricted millets, local Orthodox communities turned to an increasingly stretched Patriarchate of Constantinople for their principal support. After the great wars of nationalist liberation in Greece, Bulgaria, Romania, and the Balkans in the eighteenth and nineteenth centuries, the depleted Patriarchate of Constantinople finally broke up the church into autocephalous national churches, which cooperated with local governments as best they could. Many of these new Orthodox churches saw separation from state control and state support as the safest policy, if not the best theology.⁸⁰ Similarly, after the great emigrations of Orthodox believers to North America at the turn of the twentieth century, the transplanted autocephalous Orthodox communities were forced to survive with little support from local state officials. Here, too, separation of church and state became an expedient principle of ecclesiastical living. And similarly, after the Bolshevik Revolution of 1917 and the gradual Sovietization of Eastern Europe, the church came to endorse the Marxist-Leninist doctrine of separation of church and state, mostly out of the sheer need to survive. While individual theologians have sought to draw from these disparate

⁷⁸ See Harold J. Berman, "Freedom of Religion in Russia: An Amicus Brief for the Defendant," in *Proselytism and Orthodoxy*, supra note 4, at 265-283.

⁷⁹ See Firuz Kazemzadeh, *Reflections on Church and State in Russian History*, in *Proselytism and Orthodoxy in Russia*, supra note 4, at 227-238; Philip Walters, *The Russian Orthodox Church and Foreign Christianity: The Legacy of the Past*, in *Proselytism and Orthodoxy in Russia*, supra note 4, at 31-50.

⁸⁰ See sources and discussion in Vigen Gurioan, *Evangelism and Mission in the Orthodox Tradition*, in *Sharing the Book*, supra note 16, at 231-246.

experiences of Orthodox churches a new theology of separatism, no such systematic theory seems to have yet captured the field.

Today, the Orthodox Church's commitment to human rights and democratic principles is being tested more severely than ever before -- particularly in Russia and Eastern Europe. The remarkable democratic revolution of the Soviet bloc in the past two decades has brought not only new liberty to these long closed societies, but also new license. These societies now face moral degradation, economic dislocation, and human suffering of massive proportions. They face the renewal of ancient animosities among religious and cultural rivals previously kept at bay by the Communist Party. They face an enormous influx of foreigners -- religious, cultural, and economic -- offering beliefs and practices that are radically different from those held out by the fallen socialist state and the struggling Orthodox churches.

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

Orthodox consciousness is currently being eroded away by extreme liberalism, capable of leading to tragic consequences for the Church -- to schism, division in the church, the undermining of Orthodox beliefs and to ultimate destruction. We must stand against this destructive process by our constancy in faith and belief in the traditions and living Orthodox religious experience of Christian love and concern for each individual believer and for Russia as a whole.⁸¹

"[F]reedom does not mean general license," Patriarch Aleksii pronounced a few months later. "The truth of Christ which sets us free (John 8:32) also places upon us a great responsibility, to respect and preserve the freedom of others. However, the aggressive imposition [on Russia] of views and principles which come from a religious and cultural environment which is strange to us, is in fact a violation of both religious and civil rights."⁸²

⁸¹ *Address of the Patriarch to the Councils of the Moscow Parishes at the Episcopal Gathering, 12 December 1996*, Tsekovno-obschestvennyi Vestnik, No. 6 (26 December 1996), 7, col. 1.

⁸² The Report to the Bishops Council in Moscow, 18-23 February 1997, Section 11: Interconfessional and inter-faith relations; participation in the

Bartholomew, Orthodox Ecumenical Patriarch of Constantinople, has pressed this critique further, suggesting that Western Catholics and Protestants have become too beholden to Enlightenment liberalism and too willing to propagate such views under the guise of Christian theology. In a series of speeches to American audiences in the fall of 1997, Bartholomew declared: Western Christianity has fallen under "the shadow of the Enlightenment." Orthodox Christianity has not. The Enlightenment provides too little room for faith and too much room for freedom. "Since the Enlightenment, the spiritual bedrock of Western civilization has been eroded and undermined. Intelligent, well intentioned people sincerely believed that the wonders of science could replace the miracles of faith. But these great minds missed one vital truth -- that faith is not a garment to be slipped on and off; it is a quality of the human spirit, from which it is inseparable." "There are a few things America [and the rest of the Christian West] can learn from the Orthodox Church," the Patriarch declared. Foremost is the lesson "that, paradoxically, faith can endure without freedom, but freedom cannot long abide without faith." A better balance must be struck between freedom and faith, as the transplanted Orthodox churches of the West have only recently come to realize. "Orthodox Christians, who live in a country where full religious freedom reigns and where adherents of various religions live side by side, ... constantly see various ways of living and are in danger of being beguiled by certain of them, without examining if their way is consonant with the Orthodox Faith. Already, many of the old and new Orthodox ... are stressing different, existing deviations from correct Orthodox lives."⁸³

Where such a critical stand on human rights will lead the Orthodox Church is very much an open question. Orthodoxy has a strong, millennium-old foundation for an alternative Christian theology of duty-based rights and rights-based social action that holds great intellectual and institutional promise. Moreover, as James Billington has brilliantly shown, the Orthodox Church has immense spiritual resources, besides this, whose implications for human rights are only now beginning to be seen. These spiritual resources lie, in part, in Orthodox worship -- the passion of the liturgy, the pathos of the icons, the power of spiritual silence. They lie, in part, in Orthodox

activity of international Christian organizations," *Pravoslavna Moskva* (March, 1997), No. 7 (103), 4.

⁸³ See sources and further quotes in *Proselytism and Orthodoxy in Russia*, supra note 4, at 19-27.

church life -- the distinct balancing between hierarchy and congregationalism through autocephaly, between uniform worship and liturgical freedom through alternative vernacular rites, between community and individuality through a trinitarian communalism, centered on the parish, on the extended family, on the wizened grandmother (the "babushka" in Russia). And these spiritual resources lie, in part, in the massive martyrdom of millions of Orthodox faithful in this century -- whether suffered by Russian Orthodox under the Communist Party, by Greek and Armenian Orthodox under Turkish and Iranian radicals, by Middle Eastern Copts at the hands of religious extremists, or by North African Orthodox under all manner of fascist autocrats.⁸⁴

These deep spiritual resources of the Orthodox Church have no exact parallels in modern Catholicism and Protestantism. How the Orthodox Church can apply them to the nurture of human rights is one of the great challenges, and opportunities, of this new century. At minimum, it would be wise for us Westerners to lay aside our simple caricatures of the Orthodox Church as a politically corrupted body, too prone to clerical indiscipline, mystical idolatry, and nominal piety to have much to offer to a human rights regime. A Church with 250 million plus members scattered throughout the world defies such simple caricatures. It would be wise to hear what an ancient church, newly charred and chastened by decades of oppression and martyrdom, considers essential to the regime of religious rights. It would be enlightening to watch how ancient Orthodox communities, still largely centered on the parish and the family, will reconstruct social and economic rights. It would be prudent to see whether a culture, more prone to beautifying than to analyzing, might transform our understanding of cultural rights. It would be instructive to listen how a tradition, that still celebrates spiritual silence as its highest virtue, might recast the meaning of freedom of speech and expression. And it would be illuminating to feel how a people, that has long cherished and celebrated the role of the woman -- the wizened babushka of the home, the faithful remnant in the parish pews, the living icon of the Assumption of the Mother of God -- might elaborate the meaning of women's rights.

⁸⁴ See James H. Billington, *Orthodox Christianity and the Russian Transformation*, in *Proselytism and Orthodoxy in Russia*, supra note 4, at 51-65; id., *The Case for Orthodoxy*, *The New Republic* (May 30, 1994): 24.

IV. The Province and Problems of Religious Rights Today

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

A. The Basic Law

Three international instruments contain the most critical protections of religious rights and liberties: (1) the International Covenant on Civil and Political Rights (1966) (the 1966 Covenant);⁸⁵ (2) the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) (the 1981 Declaration);⁸⁶ and (3) the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe that was promulgated in 1989 (the Vienna Concluding Document).⁸⁷

1. 1966 Covenant. The 1966 Covenant on Civil and Political Rights repeats the capacious guarantee of religious rights and liberties first announced in the 1948 Universal Declaration of Human Rights. Article 18 reads:

⁸⁵ Reprinted in Religion and Human Rights, supra note 8, at 69-82 [hereafter ICCPR].

⁸⁶ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted 25 November 1981, G.A. Res. 55, 36 U.N. GAOR Supp. (No. 51), U.N. Doc. A/RES/36/55 (1982), reprinted in Religion and Human Rights, supra note 8, at 102-104 [hereafter 1981 Declaration].

⁸⁷ Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-Up to the Conference, Jan. 17, 1989, 28 I.L.M. 527, reprinted in Religion and Human Rights, supra note 8, at 154-156 [hereafter Vienna Concluding Document].

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 that 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 and the freedom to manifest one's religion - the roughly equivalents of the American law concepts of liberty of conscience and free exercise of religion, respectively. The right to freedom of religion -- the freedom to have, to alter, or to adopt a religion of one's choice -- is an absolute right from which no derogation may be made and which may not be restricted or impaired in any manner. Freedom to manifest or exercise one's religion -- individually or collectively, publicly or privately -- may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, 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. Legislatures may not limit the manifestation of religion on any other grounds.⁸⁸

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

⁸⁸ See U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in Religion and Human Rights, supra note 8, at 92-95 [hereafter Comment 48(2)].

interests. Such limitation must not be applied in a manner that would vitiate the rights guaranteed in Article 18. In American law terms, Article 18 upholds the requirement that to pass constitutional muster, a law burdening the exercise of religion must be in service of a compelling state interest and use the least restrictive alternative to achieve that interest.⁸⁹

Articles 2 and 26 of the 1966 Covenant require equal treatment of all persons before the law and prohibit discrimination based, among other grounds, on religion. According to international case law, unequal treatment of equal cases is allowed only if that treatment serves an objective and reasonable purpose and the inequality is proportionate to that purpose.⁹⁰

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

The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.⁹¹

In this same General Comment, the Human Rights Committee has further clarified that the freedom to manifest one's religion

⁸⁹ See Natan Lerner, "Religious Human Rights Under the United Nations," in *Religious Human Rights II*, supra note *, 79-134, at 91-93; Karl Josef Partsch, *Freedom of Conscience and Expression and Political Freedoms*, in *The International Bill of Rights: The Covenant on Civil and Political Rights* 209-245 (Louis Henkin, ed., 1981); Alexandre C. Kiss, "Permissible Limitations on Rights," in *ibid.*, 290-310.

⁹⁰ For analysis of the international case law, particularly from the European community, see T. Jeremy Gunn, *Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations*, 12 *Emory Int. L. Rev.* 43-100, at 67ff. (1998); *id.*, *Adjudicating Rights of Conscience Under the European Convention of Human Rights*, in *Religious Human Rights II*, supra note *, at 305-330; Lerner, supra note 8, at 40-50.

⁹¹ Comment 48(2), item 2, reprinted in *Religion and Human Rights*, supra note 8, at 92.

includes acts integral to the conduct by religious groups of their basic affairs, such as, inter alia, the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.⁹²

2. 1981 Declaration. The 1981 Declaration elaborated what the 1966 Covenant adumbrated. The Declaration includes (1) prescriptions of religious rights for individuals and groups; (2) proscriptions on religious discrimination, intolerance, or abuse; (3) provisions specific to the religious rights of parents and children; and (4) explicit principles of implementation. Like the 1966 Covenant, the 1981 Declaration on its face applies to "everyone," whether "individually or in community," "in public or in private."⁹³

Articles 1 and 6 of the 1981 Declaration set forth a lengthy illustrative catalogue of rights to "freedom of thought, conscience, and religion" -- illustrating more concretely the ambit of what American law calls "liberty of conscience" and "free exercise of religion." Such rights include the right (1) to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; (2) to establish and maintain appropriate charitable or humanitarian institutions; (3) to make, to acquire, and to use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; (4) to write, to publish, and to disseminate relevant publications in these areas; (5) to teach a religion or belief in places suitable for these purposes; (6) to solicit and receive voluntary financial and other contributions from individuals and institutions; (7) 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; (8) to observe days of rest and to celebrate holy days and ceremonies in accordance with the precepts of one's religion or belief; and (9) to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.⁹⁴

Like the 1966 Covenant, the 1981 Declaration allows the "manifestation of religion" to be subjected to "appropriate"

⁹² Ibid., item 4, in Religion and Human Rights, supra note 8, at 92-93.

⁹³ 1981 Declaration, Article I.1, in Religion and Human Rights, supra note 8, at 103.

⁹⁴ Articles 1, 6, in ibid., at 102, 104.

state regulation and adjudication. The 1981 Declaration permits states to enforce against religious individuals and institutions general regulations designed to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. It is assumed, however, that in all such instances, the grounds for such regulation are enumerated and explicit, and that such regulations abide by the international legal principles of proportionality, necessity, and non-discrimination.⁹⁵

The 1981 Declaration includes more elaborate provisions concerning the religious rights of children and their parents. It guarantees the right of parents (or guardians) to organize life within the household and to educate their children in accordance with their religion or beliefs. Such parental responsibility, however, must be discharged in accordance with the "best interests of the child." At minimum, the parents' religious upbringing or education "must not be injurious to his physical or mental health or to his full development."⁹⁶ Although the drafters debated at length the potential conflicts between the parent's right to rear and educate their children in accordance with their religion and the state's power to protect the best interests of the child, they offered no specific principles to resolve these disputes.

The 1981 Declaration includes suggested principles of implementation and application of these guarantees. It urges states to take all "effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life."⁹⁷ It urges states to remove local laws that perpetuate or allow religious discrimination, and to enact local criminal and civil laws to combat religious discrimination and intolerance.

The 1981 Declaration, though not a binding legal instrument, provides a principled reference for monitoring a nation's compliance with international standards of religious liberty. It sets a baseline for guiding diplomatic relations and treaties among Nation States. It provides a common ground for non-governmental and intergovernmental organizations to report and register complaints of religious rights violations.

⁹⁵ Articles I.3, II-IV, in *ibid.*, at 103. See detailed analysis in Lerner, *supra* note 8, at 15-33.

⁹⁶ Article V.5, in *ibid.*, 104.

⁹⁷ Article IV.1, in *ibid.*, 103.

It also provides the United Nations Special Rapporteur, appointed by the United Nations Commission on Human Rights, to provide a general survey, and specific on-site evaluations of Member States of the United Nations. The United States was among the States under evaluation in 1998.⁹⁸

3. 1989 Vienna Concluding Document. The 1989 Vienna Concluding Document, which applies to the 54 participating states in the OSCE, extends these norms, particularly for religious groups. Principles 16 and 17 provide a clear distillation of principles that is worth quoting in full:

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

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

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

(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;

⁹⁸ See Abdelfattah Amor, *The Mandate of the UN Special Rapporteur*, 12 Emory International Law Review 945-950 (1998); Report Submitted by Mr. Abdelfattah Amor . . . Addendum: Visit to the United States, E/CN.4/1999/58/Add.1.

(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.

17. The participating States recognize that the exercise of the above mentioned rights relating to the freedom of religion or belief may be subject only to such limitations as are provided by law and are consistent with their obligations under international law and with their international commitments. They will ensure in their laws and regulations and in their application the full and effective implementation of the freedom of thought, conscience, religion or belief.

These are the basic international provisions on religious rights on the books. Regional instruments -- notably the European Charter 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.⁹⁹ International treaties involving religious bodies -- notably the recent Concordats between the Vatican and Italy, Spain, and Israel as well as the Universal Islamic Declaration of Human Rights (1981) and the Cairo Declaration on Human Rights in Islam (1990) -- give particular accent to the religious concerns and constructions of their co-signers.¹⁰⁰ But the foregoing three instruments capture the common lore of current international human rights norms on religious rights and liberties.

B. The New Problems

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

International human rights instruments provide very broad definitions of "religion." Article 18 of the 1948 Universal Declaration of Human Rights makes a sweeping guarantee: "Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance." The Declaration's conflation of the terms "religion," "thought," "conscience," and "belief" continues in subsequent instruments -- most notably in

⁹⁹ See W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in *Religious Human Rights II*, supra note *, at 1-44; Gunn, *Adjudicating Rights*, supra note 90, at 305-330; Evans, supra note 4, at 262ff.

¹⁰⁰ See these texts in *Religion and Human Rights*, supra note 8, at 185-189, 221-244.

the 1966 Covenant and the 1981 Declaration.¹⁰¹ The Declaration's recognition of religion as individual and communal, internal and external, private and public, permanent and transient likewise persists.

This capacious definition of religion at international law has left it largely to individual states and individual claimants to define the boundaries of the regime of religious rights. No common definition or uniform method has been forthcoming. Indeed, the statutes, cases, and regulations of many countries embrace a bewildering array of definitions of "religion," which neither local officials nor legal commentators have been able to integrate. Some courts and legislatures make a simple "common sense" inquiry as to the existence of religion. Others defer to the good faith self-declarations of religion by the claimant. Others seek to find sufficient analogies between existing religions and new religious claimants. Others insist on evidence of a god or something transcendent that stands in the same position as a god. Others analyze the motives for formation of the religious organization or adoption of a religious belief, the presence and sophistication of a set of doctrines explicating the beliefs, the practice and celebration of religious rites and liturgies, the degree of formal training required for the religious leaders, the strictures on the ability of members to practice other religions, the presence and internal enforcement of a set of ethical rules of conduct, and other factors.¹⁰²

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

¹⁰¹ ICCPR, Article 18, in *Religion and Human Rights*, supra note 8 at 59; 1981 Declaration, Article I.1, in *ibid.*, at 103.

¹⁰² For recent international efforts, see Dinah Shelton and Alexandre Kiss, *A Draft Model Law on Freedom of Religion, With Commentary*, in *Religious Human Rights II*, supra note *, at 559-592, 569ff.; Haim H. Cohn, *Religious Human Rights*, 19 *Dine Israel: An Annual of Jewish Law Past and Present* 101-126, at 102-109 (1998).

In my view, the functional and institutional dimensions of religion deserve the strongest emphasis in defining the boundaries of religious rights. Of course, religion viewed in its broadest terms embraces all beliefs and actions that concern the ultimate origin, meaning, and purpose of life, of existence. It involves the responses of the human heart, soul, mind, conscience, intuition, and/or reason to revelation, to transcendent values, to fundamental questions. But such wide definitions of religion applied at law would render everything (and thus nothing) deserving of religious rights protection. Viewed in a narrower institutional sense, religion embraces, what Leonard Swidler calls, a creed, a cult, a code of conduct, and a confessional community. A creed defines the accepted cadre of beliefs and values concerning the ultimate origin, meaning, and purpose of life. A cult defines the appropriate rituals, liturgies, and patterns of worship and devotion that give expression to those beliefs. A code of conduct defines the appropriate individual and social habits of those who profess the creed and practice the cult. A confessional community defines the group of individuals who embrace and live out this creed, cult, and code of conduct, both on their own and with fellow believers.¹⁰³ By this definition, a religion can be traditional or very new, closely confining or loosely structured, world-averse or world-affirmative. Religious claims and claimants that meet this definition, in my view, deserve the closest religious rights consideration.

This is also part of the reason that I stand by the phrase "religious (human) rights" -- despite the well-meaning and well-taken criticisms of some that this term is idiosyncratic and too restrictive.¹⁰⁴ It must be said that the phrase "religious rights" is not my idiosyncratic invention. It is a rather common traditional term -- used in Europe since the fifteenth century, and in America since the seventeenth century -- to describe the body of special liberties, entitlements, immunities and exemptions that a person or a group can claim on the basis of religion alone and that go beyond the generic freedoms of

¹⁰³ Leonard W. Swidler, *Introduction*, in *Religious Liberty and Human Rights in Nations and in Religions* vii (Leonard W. Swidler, ed. 1986). The former UN Special Rapporteur, Elizabeth Odio-Benito, has written similarly that religion is "an explanation of the meaning of life and how to live accordingly. Every religion has at least a creed, a code of action, and a cult." U.N. Doc. E/CN.4/Sub.2/1987/26, at 4.

¹⁰⁴ David Little, *Studying "Religious Human Rights": Methodological Foundations*, in *Religious Human Rights II*, supra note *, 45-77, at 49ff.; *id.*, *Religion and Human Rights: A Review Essay on Religion, Relativism, and Other Matters*, 27 *J. Religious Ethics* 151-177, 154ff. (1999); Malcolm D. Evans, 46 *International and Comparative Law Quarterly* 728-729 (1997).

speech, press, or assembly and the general guarantees of equal protection and due process of law.¹⁰⁵ To be sure, it was unduly churlish in earlier centuries to restrict these claims only to members of one established religion. Many legitimate religious claims and claimants were thereby foreclosed from legal recourse in state courts. But it is unduly charitable today to allow religious claims to be predicated on the almost boundless basis of "thought, conscience, or belief." Many legitimate claims of thought, conscience, or belief that are not "religious," as defined above, are amply protected by other rights norms. Claimants should be encouraged to seek their legal recourse there, rather than allowed to stretch the pale of religious rights ever more widely to cover themselves. In the abstract, this might sound elitist and traditionalist. But unless some clear limit is assigned to the ambit of, and the access to, the regime of religious rights, such rights will be in danger of becoming open to everyone but protective of nothing.

Religion is special; it has been, and must continue to be, accorded special protection in a human rights regime. Religion is more than simply another form of speech and assembly, privacy and autonomy, and it requires more than simply the freedoms of speech and assembly, equality and non-discrimination to be protected. Religion is a unique source of individual and personal identity and activity, involving "duties that we owe to our Creator, and the manner of discharging them," as James Madison once put it.¹⁰⁶ Religion is also a unique form of public and social identity, involving a vast plurality of sanctuaries, schools, charities, missions, and other forms and forums of faith. Both individual and corporate, private and public entities and exercises of religion -- in all their self-defined varieties -- deserve the protection of a human rights regime. Generic human rights guarantees are not protective enough. Even generously defined, freedom of speech cannot protect many forms of individual and corporate religious exercise -- from the silent meditations of the sages to the noisy pilgrimages of the saints, from the corporate consecration of the sanctuary to the ecclesiastical discipline of the clergy. Even expansively interpreted, guarantees of equality cannot protect the special needs of religious individuals and religious groups to be exempted from certain state prescriptions or proscriptions that

¹⁰⁵ For European sources, see Karl Schwarz, *Der Begriff Exercitium Religionis Privatum*, 105 *Zeitschrift der Savigny-Stiftung* (Kan. Ab.) 495 (1988). For American sources, see Witte, *supra* note __, at 20-86.

¹⁰⁶ James Madison, *Memorial and Remonstrance Against Religious Asssments* (1785), in 8 *The Papers of James Madison* 298 (W.T. Hutchinson, William E. Rachel and Robert Rutland eds. 1962).

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

2. The Problem of Conversion. A second human rights problem that has been exacerbated by the greater inclusion of religion concerns the right to change one's religion.¹⁰⁷ How does one craft a legal rule that at once respects and protects the sharply competing understandings of conversion among the religions of the Book. Most Western Christians have easy conversion into and out of the faith. Most Jews have difficult conversion into and out of the faith. Most Muslims have easy conversion into the faith, but allow for no conversion out of it.¹⁰⁸ Whose rites get rights? Moreover, how does one craft a legal rule that respects Orthodox, Hindu, Jewish, or Traditional groups that tie religious identity not to voluntary choice, but to birth and caste, blood and soil, language and ethnicity, sites and sights of divinity?¹⁰⁹

International human rights instruments initially masked over these conflicts, despite the objections of some Muslim delegations. The 1948 Universal Declaration included an unequivocal guarantee: "Everyone has the right to freedom of thought, conscience, and religion; this right includes the right to change his religion or belief...."¹¹⁰ The 1966 Covenant, whose preparation was more highly contested on this issue, became more tentative: "This right shall include to have or adopt a religion or belief of his choice...."¹¹¹ The 1981 Declaration repeated this same more tentative language. But the dispute over the right to conversion contributed greatly to the long delay in the production of this instrument, and to the

¹⁰⁷ See the comprehensive study of Natan Lerner, *Proselytism, Change of Religion, and International Human Rights*, 12 *Emory Intl. L. Rev.* 477-561 (1998), updated in Lerner, *supra* note 8, at 80-118, and more briefly Evans, *supra* note 4, at 201ff., 221ff.; J.A. Walkate, *The Right of Everyone to Change his Religion or Belief*, 2 *Netherlands Intl. L. Rev.* 146 (1983).

¹⁰⁸ See respectively, Joel A. Nichols, *Mission, Evangelism, and Proselytism in Christianity: Mainline Conceptions as Reflected in Church Documents*, 12 *Emory Intl. L. Rev.* 563-656 (1998); David Novak, *Proselytism and Conversion in Judaism*, in *Sharing the Book*, *supra* note 16, at 17-44; Donna E. Arzt, *The Treatment of Religious Dissidents under Classic and Contemporary Islamic Law*, in *Religious Human Rights I*, *supra* note *, at 387-453.

¹⁰⁹ See, e.g., Michael J. Sandel, *Freedom of Conscience or Freedom of Choice*, in *Articles of Faith, Articles of Peace* 74-92 (James Davison Hunter and Os Guinness, eds., 1990).

¹¹⁰ Article 18.

¹¹¹ Article 18.1.

number of dissenters to it.¹¹² The 1989 Vienna Concluding Document did not touch the issue at all, but simply confirmed "the freedom of the individual to profess or practice religion or belief" before turning to a robust rendition of religious group rights.¹¹³ Today, the issue has become more divisive than ever as various soul wars have broken out between and within Christian and Muslim communities around the globe.

"A page of history is worth a volume of logic," Oliver Wendell Holmes, Jr. once said.¹¹⁴ And, on an intractable legal issue such as this, recollection might be more illuminating than ratiocination.

It is discomfiting, but enlightening, for Western Christians to remember that the right to enter and exit the religion of one's choice was born in the West only after centuries of cruel experience. To be sure, a number of the early Church Fathers considered the right to change religion as essential to the notion of liberty of conscience, and such sentiments have been repeated and glossed continuously until today. But in practice the Christian Church largely ignored these sentiments for centuries. As the medieval church refined its rights structures in the twelfth and thirteenth centuries, it also routinized its religious discrimination, reserving its harshest sanctions for heretics. The communicant faithful enjoyed full rights. Jews and Muslims enjoyed fewer rights, but full rights if they converted to Christianity. Heretics -- those who voluntarily chose to leave the faith -- enjoyed still fewer rights, and had little opportunity to recover them even after full confession. Indeed, in the heyday of the inquisition, heretics faced not only severe restrictions on their persons, properties, and professions, but sometimes unspeakably cruel forms of torture and punishment.¹¹⁵ Similarly, as the Lutheran, Calvinist, and Anglican Churches routinized their establishments in the sixteenth and seventeenth centuries, they inflicted all manner of repressive civil and ecclesiastical censures on those who chose to deviate from established doctrine -- savage torture and execution in a number of instances.¹¹⁶

It was, in part, the recovery and elaboration of earlier patristic concepts of liberty of conscience as well as the slow

¹¹² Article 1.1.

¹¹³ Principle 16.

¹¹⁴ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

¹¹⁵ See sources, *supra* note ____.

¹¹⁶ See sources and discussion in *Religious Liberty in Western Thought*, *supra* note 20.

expansion of new Protestant theologies of religious voluntarism that helped to end this practice. But, it was also the new possibilities created by the frontier and by the colony that helped to forge the Western understanding of the right to change religion. Rather than stay at home and fight for one's faith, it became easier for the dissenter to move away quietly to the frontier, or later to the colony, to be alone with his conscience and his co-religionists. Rather than tie the heretic to the rack or the stake, it became easier for the establishment to banish him quickly from the community with a strict order not to return. Such pragmatic tempering of the treatment of heretics and dissenters eventually found theological justification. By the later sixteenth century, it became common in the West to read of the right, and the duty, of the religious dissenter to emigrate physically from the community whose faith he or she no longer shared.¹¹⁷ In the course of the next century, this right of physical emigration from a religious community was slowly transformed into a general right of voluntary exit from a religious faith. Particularly American writers, many of whom had voluntarily left their European faiths and territories to gain their freedom, embraced the right to leave -- to change their faith, to abandon their blood, soil and confession, to reestablish their lives, beliefs, and identities afresh -- as a veritable sine qua non of religious freedom.¹¹⁸ This understanding of the right to choose and change religion -- patristic, pragmatic, and Protestant in initial inspiration -- has now become an almost universal feature of Western understandings of religious rights.

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

¹¹⁷ The most famous formulation of the right, and duty, of the dissenter to emigrate peaceably from the territory whose religious establishment he or she cannot abide, comes in the Peace of Augsburg (1555), and its provisions are repeated in the Edit of Nantes (1598) and the Religious Peace of Westphalia (1648). See Church and State, *supra* note 53, at 164-198.

¹¹⁸ See Stackhouse and Hainsworth, "Deciding for God," __ and further sources on the nineteenth century American experience in Experiment, *supra* note 43, at 96-100.

policies of other contemporary Muslim communities, to rethink their theological positions.¹¹⁹

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

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

There are numerous analogous tensions -- generally with lower stakes -- between the religious rights claims of a group and its individual members. These will become more acute as religion and human rights become more entangled. Particularly volatile will be tensions over discrimination against women and children within religious groups; enforcement of traditional religious laws of marriage, family, and sexuality in defiance of state domestic laws; maintenance of religious property, contract, and inheritance norms that defy state private laws. On such issues, the current categorical formulations of both

¹¹⁹ See Esack, *supra* note 42; Richard C. Martin, *Conversion to Islam by Invitation*, in *Sharing the Book*, *supra* note 16, at 95-117; Arzt, *supra* note 108 and Donna E. Arzt, *Jihad for Hearts and Minds*, in *Sharing the Book*, *supra* note 1679-94.

religious group rights and religious individual rights simply restate the problems, rather than resolve them. It will take new arguments from history and experience and new appeals to internal religious principles and practices, along the lines just illustrated, to blunt, if not resolve, these tensions.

3. The Problem of Proselytism. The corollary to the modern problem of conversion is the modern problem of proselytism - of the efforts taken by individuals or group to seek the conversion of another. How does the state balance one person's or community's right to exercise and expand its faith versus another person's or community's right to be left alone to its own traditions? How does the state protect the juxtaposed rights claims of majority and minority religions, or of foreign and indigenous religions? These are not new questions. They confronted the drafters of the international bill of rights from the very beginning. On this issue, the international instruments provide somewhat more nuanced direction.¹²⁰

Article 18 of the 1966 International Covenant on Civil and Political Rights protects a person's "freedom, individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching."¹²¹ But the same article allows such manifestation of religion to be subject to limitations that "are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others."¹²² It prohibits outright any "coercion" that would impair another's right "to have or adopt a religion or belief of [his or her] choice."¹²³ It also requires State parties and individuals to have "respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with [the parents'] convictions" -- a provision underscored and amplified in more recent instruments and cases on the rights of parents and children.¹²⁴

¹²⁰ Lerner, *supra* note 8, at 80-118; Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, Brigham Young University Law Review 251(1999).

¹²¹ ICCPR, Article 18.1, reprinted in Religion and Human Rights, *supra* note 8, at 74 (emphasis added).

¹²² *Ibid.*, Article 18.3, reprinted in Religion and Human Rights, *supra* note 8, at 74.

¹²³ *Ibid.*, Article 18.2, reprinted in Religion and Human Rights, *supra* note 8, at 74.

¹²⁴ *Ibid.*, Article 18.4, reprinted in Religion and Human Rights, *supra* note 8, at 74. See further Convention on the Rights of the Child (November 20, 1989), 28 I.L.M. 1448.

Similarly, Article 19 of the same 1966 Covenant protects the "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his choice."¹²⁵ But Article 19, too, allows legal restrictions that are necessary for "respect of the rights and reputation of others; for the protection of national security or of public order (ordre public) or of public health or morals."¹²⁶ As a further limitation on the rights of religion and (religious) expression guaranteed in Articles 18 and 19, Article 26 of the 1966 Covenant prohibits any discrimination on grounds of religion. And Article 27 guarantees to religious minorities "the right to enjoy their own culture" and "to profess and practise their own religion."¹²⁷

The literal language of the mandatory 1966 Covenant (and its amplification in more recent instruments and cases) certainly protects the general right to proselytize -- understood as the right to "manifest," "teach," "express," and "impart" religious ideas for the sake, among other things, of seeking the conversion of another. The Covenant provides no protection for coercive proselytism; at minimum this bars physical or material manipulation of the would-be convert, and in some contexts even more subtle forms of deception, enticement, and inducement to convert. The Covenant also casts serious suspicion on any proselytism among children or among adherents to minority religions. But, outside of these contexts, the religious expression inherent in proselytism is no more suspect than political, economic, artistic, or other forms of expression, and should, at minimum, the same rights.

Such rights to religion and religious expression, of course, are not absolute. The 1966 Covenant and its progeny allow for legal protections of "public safety, order, health, or morals," "national security" and "the rights and reputation of others," particularly minors and minorities. But all such legal restrictions on religious expression must always be imposed without discrimination against any religion, and with due regard for the general mandates of "necessity and proportionality" --

¹²⁵ Ibid., Article 19.2, reprinted in Religion and Human Rights, supra note __, at 74 (emphasis added).

¹²⁶ Ibid., Article 19.3, reprinted in Religion and Human Rights, supra note 8, at 74.

¹²⁷ Ibid., Article 27, reprinted in Religion and Human Rights, supra note 8, at 75. See further Declaration on The Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, United Nations General Assembly Resolution 135 (December 18, 1992), Article 2.1, reprinted in Lerner, supra note 8, at 140, and analyzed in *ibid.*, 33-35.

the rough international analogues to the "compelling state interest" and "least restrictive alternative" prongs of the strict scrutiny test of American constitutional law. General "time, place, and manner" restrictions on all proselytizers, applied without discrimination against any religion, might thus well be apt. But categorical criminal bans on proselytism, or patently discriminatory licensing or registration provisions are prima facie a violation of the religious rights of the proselytizer -- as has been clear in the United States since Cantwell v. Connecticut (1940)¹²⁸ and in the European community since Kokkinakis v. Greece (1993).¹²⁹

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

Article 27 of the Covenant reminds us of the special right of local religious groups, particularly minorities, "to enjoy their own culture, and to profess and practise their own religion." Such language might well empower and encourage vulnerable minority traditions to seek protection from aggressive and insensitive proselytism by missionary mavericks and "drive by" crusaders who have emerged with alacrity in the past two decades. It might even have supported a moratorium on proselytism for a few years in places like Russia so that local religions, even the majority Russian Orthodox Church, had some time to recover from nearly a century of harsh oppression that destroyed most of its clergy, seminaries, monasteries, literature, and icons. But Article 27 cannot permanently insulate local religious groups from interaction with other religions. No religious and cultural tradition can remain frozen. For local traditions to seek blanket protections against foreign proselytism, even while inevitably interacting with other dimensions of foreign cultures, is ultimately a self-defeating policy. It stands in sharp contrast to cardinal human rights principles of openness, development, and choice. Even more, it belies the very meaning of being a religious tradition. As Jaroslav Pelikan reminds us: "Tradition is the living faith of the dead; traditionalism is the dead faith of the living."¹³⁰

¹²⁸ Cantwell v. Connecticut, 310 U.S. 296 (1940).

¹²⁹ Kokkinakis v. Greece, 260-A Eur. Ct. H. R. (ser. A) 18, with detailed analysis in Gunn, *supra* note 90.

¹³⁰ Jaroslav Pelikan, The Vindication of Tradition 68 (1984).

Article 19 of the Covenant reminds us further that that the right to expression, including religious expression, carries with it "special duties and responsibilities."¹³¹ One such duty, it would seem, is to respect the religious dignity and autonomy of the other, and to expect the same respect for one's own dignity and autonomy. This is the heart of the Golden Rule. It encourages all parties, especially foreign proselytizing groups, to negotiate and adopt voluntary codes of conduct of restraint and respect of the other. This requires not only continued cultivation of interreligious dialogue and cooperation -- the happy hallmarks of the modern ecumenical movement and of the growing emphasis on comparative religion and globalization in our seminaries. It also requires guidelines of prudence and restraint that every foreign mission board would do well to adopt and enforce: Proselytizers would do well to know and appreciate the history, culture, and language of the proselytizee; to avoid Westernization of the Gospel and First Amendmentization of politics; to deal honestly and respectfully with theological and liturgical differences; to respect and advocate the religious rights of all peoples; to be Good Samaritans as much as good preachers; to proclaim their Gospel both in word and in deed.¹³² Moratoria on proselytism might provide temporary relief; but moderation by proselytizers and proselytizees is the more enduring course.

4. Religion and State. A final human rights problem that will be exacerbated by the greater inclusion of religion concerns the relation of religion and state government ("church and state" as we say in the United States). American writers, armed with the disestablishment clause of the First Amendment, often emphasize that true religious liberty requires the separation of church and state, and the cessation of state support for religion. Only the secular or neutral state can guarantee religious liberty, it is argued, and only separation can guarantee neutrality. Many Europeans, Africans, and Latin Americans, for whom a disestablishment clause is largely foreign, emphasize that religious liberty requires the material and moral cooperation of religion and government. Indeed, a number of religious groups in the former Soviet bloc and sub-Saharan Africa today regard restitution and affirmative state action towards religion as a necessary feature of any religious

¹³¹ ICCPR, Article 19.3, reprinted in Religion and Human Rights, supra note 8, at 74.

¹³² See Anita Deyneka, *Guidelines for Foreign Missionaries in the Soviet Union*, in Proselytism and Orthodoxy in Russia, supra note 4, at 331-340; Lawrence A. Uzzell, *Guidelines for American Missionaries in Russia*, in *ibid.*, 323-330; Sharing the Book, supra note 16, passim.

rights regime -- if nothing else, to undo and overcome past state repression of religion. Similarly, some Catholic groups in Latin America urge cooperation of religious and political bodies to preserve the "Catholicization" of public life and culture. Some Islamic revivalists, from Algeria to Indonesia, urge similar arrangements to enhance the "Islamicization" of the community. Some Jewish groups argue similarly to protect the Jewish character of the State of Israel. Such arguments have long been used in the United Kingdom and Scandinavia to defend their ancient religious establishments. To cooperate or to separate, to aid or to avoid one another, is a fundamental question that will confront religions and states around the world with increasing urgency in this new century.

On this fundamental legal problem, too, categorical platitudes avail us less than concrete experiences. American readers might be surprised to learn that international human rights instruments do not mandate the disestablishment of religion or the separation of church and state. They might be further surprised to learn that American constitutional law today no longer mandates the kind of strict separationism suggested by Jefferson's "wall of separation between church and state."¹³³ Today's American state is not the distant, quiet sovereign of Jefferson's day, from whom separation was both natural and easy. Today's state, whether for good or ill, is an intensely active sovereign from whom complete separation is nearly impossible. Few religious believers and bodies can now avoid contact with the state's pervasive network of education, charity, welfare, child care, health care, family, construction, zoning, workplace, taxation, and other regulations.¹³⁴ Both confrontation and cooperation with the modern American welfare state are almost inevitable for any religion. And American constitutional law has moved, chaotically but ineluctably, toward this reality. When a state's regulation imposes too heavy a burden on a particular religion, the First Amendment free exercise clause provides a pathway to relief. When a state's appropriation imparts too generous a benefit to particular religions alone, the First Amendment establishment clause provides a pathway to dissent. But when a general government scheme provides religious groups and activities with the same benefits afforded to all other eligible recipients, few constitutional objections are now effective.

¹³³ See case analysis in *Experiment*, supra note 43, at 149-184.

¹³⁴ Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, in Berman, supra note 68, at 231.

Again, this is not to suggest that the American constitutional story of religious rights must now be writ large upon the world. But, it is to suggest that a single law on the books can give rise to a wide range of laws in action. Legal traditions do change over time and across cultures. The notion that there is but one proper application of international religious rights norms -- be it American, European, or African -- cannot be countenanced. We can afford an ample "margin of appreciation" for local variations on international human rights themes, without succumbing to charges of relativism.¹³⁵

V. Final Reflections

A number of distinguished commentators have recently encouraged the abandonment of the human rights paradigm altogether -- as a tried and tired experiment that is no longer effective, even a fictional faith whose folly has now been fully exposed.¹³⁶ Others have bolstered this claim with cultural critiques -- that human rights are instruments of neo-colonization which the West uses to impose its values on the rest, even toxic compounds that are exported abroad to breed cultural conflict, social instability, religious warfare and thus dependence on the West.¹³⁷ Others have added philosophical critiques -- that rights talk is the wrong talk for meaningful debate about deep questions of justice, peace, and the common good.¹³⁸ Still others have added theological critiques -- that the secular beliefs in individualism, rationalism, and contractarianism inherent to the human rights paradigm cannot be squared with cardinal biblical beliefs in creation, redemption, and covenant.¹³⁹

¹³⁵ See van der Vyver, *supra* note 17; Little, *supra* note 103.

¹³⁶ See, e.g., Alasdair McIntyre, *After Virtue: A Study in Moral Theory* 69-70 (2d ed., 1984) ("[T]he truth is plain: there are no such rights, and belief in them is one with belief in witches and unicorns.... Natural or human rights ... are fictions."). See critical analysis of these views, of those of Richard Rorty, Jean-Francois Lyotard, and others in Max L. Stackhouse and Stephen Healey, *Religion and Human Rights: A Theological Apologetic*, in *Religious Human Rights I*, *supra* note *, at 485-516.

¹³⁷ See critical discussion of this thesis, and its manifestations in recent debates about the cultural and moral relativity of human rights, in Little, *supra* note 104.

¹³⁸ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

¹³⁹ See esp. Joan Lockwood O'Donovan, *The Concept of Rights in Christian Moral Discourse*, in *A Preserving Grace*, *supra* note 36, at 143-156; David Smolin, *Church, State, and International Human Rights*, 73 *Notre Dame Law Review* 1515 (1998).

Such criticisms properly soften the overly-bright optimism of some human rights advocates. They properly curb the modern appetite for the limitless expansion and even monopolization of human rights in the quest for toleration, peace, and security. And they properly criticize the libertarian accents that still too often dominate our rights talk today. But such criticisms do not support the conclusion that we must abandon the human rights paradigm altogether -- particularly when no viable alternative global forum and no viable alternative universal faith is yet at hand. Instead, these criticisms support the proposition that the religious sources and dimensions of human rights need to be more robustly engaged and extended. Human rights norms are not a transient libertarian invention or an ornamental diplomatic convention. Human rights norms have grown out of millennium-long religious and cultural traditions. They have traditionally provided a forum and focus for subtle and sophisticated philosophical, theological, and political reflections on the common good and our common lives. And they have emerged today as part of the common law of the emerging world order. We should abandon these ancient principles and practices only with trepidation, only with explanation, only with articulation of viable alternatives. To deconstruct human rights without posing real global alternatives is to insult the genius and the sacrifice of their many creators. For now, the human rights paradigm must stand -- if nothing else as the "null hypothesis." It must be constantly challenged to improve. But it should be discarded only on cogent proof of a better global norm and practice.

A number of other distinguished commentators have argued that religion can have no place in a modern regime of human rights. Religions might well have been the mothers of human rights in earlier eras, perhaps even the midwives of the modern human rights revolution. But religion has now outlived its utility. Indeed, the continued insistence of special roles and rights for religion is precisely what has introduced the Dickensian paradoxes which now befuddle us. Religion is, by its nature, too expansionistic and monopolistic, too patriarchal and hierarchical, too antithetical to the very ideals of pluralism, toleration, and equality inherent in a human rights regime. Purge religion entirely, this argument concludes, and the human rights paradigm will thrive.¹⁴⁰

¹⁴⁰ For a critical analysis of this "standard secularist account" of human rights, see Max L. Stackhouse, *The Intellectual Crisis of a Good Idea* 26(2) *Journal of Religious Ethics* 263 (1998).

This argument proves too much to be practicable. In the course of this century, religion has 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.¹⁴¹ Religion has also defied the evil assumptions of Nazis, Fascists, and Communists alike that gulags and death camps, iconoclasm and book burnings, propoganda and mind controls would inevitably drive religion into extinction. Yet another great awakening of religion is upon us -- now global in its sweep.

It is undeniable that religion has been, and still is, a formidable force for both political good and political evil, that it has fostered both benevolence and belligerence, peace and pathos of untold dimensions. But the proper response to religious belligerence and pathos cannot be to deny that religion exists or to dismiss it to the private sphere and sanctuary. The proper response is to castigate the vices and to cultivate the virtues of religion, to confirm those religious teachings and practices that are most conducive to human rights, democracy, and rule of law.¹⁴²

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

¹⁴¹ See Martin E. Marty, *Religious Dimensions of Human Rights*, in *Religious Human Rights I*, supra note *, at 1-16.

¹⁴² See esp. Appleby, supra note 14.