DIGITAL AUTHORITARIANISM AND THE GLOBAL THREAT TO FREE SPEECH
THURSDAY, APRIL 26, 2018
Congressional-Executive Commission on China
Washington, DC.

The hearing was convened, pursuant to notice, at
10:03 a.m., in room 301, Russell Senate Office Building, Hon.
Senator Marco Rubio, Chairman, presiding.

Present: Representative Smith, Co-Chairman, and Senator
Steve Daines.
Also Present: Sarah Cook, Senior Research Analyst for East Asia
and Editor, China Media Bulletin, Freedom House; Clive Hamilton,
Professor of Public Ethics, Charles Sturt University, Canberra,
and author, Silent Invasion, China's Influence in Australia;
Katrina Lantos Swett, President, Lantos Foundation for Human
Rights & Justice.

STATEMENT OF KATRINA LANTOS SWETT, PRESIDENT, LANTOS FOUNDATION
FOR HUMAN RIGHTS & JUSTICE

Ms. Swett. Thank you. Good morning. I want to thank
Senator Rubio and Congressman Smith for the invitation to
participate in this hearing. And I want to commend you both for
convening a hearing on such an important topic.

I would ask that my full testimony, including relevant
correspondence between the Internet Freedom Coalition that I am
part of and the State Department, BBG and members of Congress,
be included as part of the hearing record.

The French have a wonderful saying, “Plus ca change, plus
c’est la meme chose,” the more things change, the more they
remain the same. I could not help but think of this phrase as I
prepared my remarks for today’s hearing.

Over 10 years ago, my late father, Tom Lantos, then
chairman of the House Foreign Affairs Committee, held a hearing that crystallized the sad truth about the devastating moral compromises so many major companies and countries, including, at times, our own, are willing to make in order to appease the Chinese government and gain access to its vast markets.

And I think perhaps that, Congressman Smith, you might have been at that hearing with my father.

At that time, the chief executive of Yahoo, Jerry Yang, was in my father’s crosshairs that day over his company’s cooperation in giving up the identity of a dissident journalist, Shi Tao, to the Chinese authorities.

After Yahoo disclosed his identity to the government, Mr. Shi was sentenced to prison for 10 years for the crime of engaging in pro-democracy activities.

As these high-tech billionaires and technological whiz kids sat before him, my father, who came to this country as a penniless Holocaust survivor from Hungary, said, “While technologically and financially you are giants, morally you are pygmies.”

On that memorable occasion, Jerry Yang felt so “called out” by my father’s words that he actually turned around and publicly bowed in apology to Mr. Shi’s weeping mother, who was seated behind him. It was a dramatic moment to be sure, but most of the episodes of cowardly cow-towing and quiet collaboration with the bullies, the censors and the persecutors within the Chinese Communist Party occur without public comment or scrutiny.

Furthermore, as today’s hearing demonstrates, China is not content with censoring and controlling its own citizens. It is
using the immense power of its financial resources to reach every corner of the world in an effort to intimidate businesses, universities, publishers, hotel chains, religious institutions, human rights and democracy activists and even governments.

It pains me to have to say this, but right now, China is succeeding in this effort to a shocking degree. Even more shocking, later in my remarks I will expose why I feel our government is doing far too little in the way of internet freedom to truly help the people of China and those imprisoned in other repressive regimes around the world.

One of my fellow witnesses this morning, Mr. Hamilton, has had personal experiences with the long arm of Chinese government and their intimidation and his testimony is a cautionary and a chilling tale.

Just as my father did back in 2007, we must use the power of public naming and shaming to try and restrain the worst impulses of businesses, other organizations, individuals and even our own government agencies who seem all too willing to sell their precious birthright of free speech and democracy for a mess of Chinese pottage.

To be clear, I think we all recognize that the internet is not an unalloyed good when it comes to spreading ideas and expanding the borders of freedom and democracy. As Shakespeare memorably penned, "The web of our life is of a mingled yarn, good and ill together."

It is analogous to our intricate system of modern transportation. While we recognize that it contributes to pollution, congestion, disrupts the environment and, of course,
makes possible terrible accidents involving injuries and fatalities, nonetheless, it is the indispensable circulatory system that makes possible our modern world of travel and commerce.

Similarly, the internet, despite its ability to spread hate, disrupt elections and propagate fake news, is indispensable to our modern system of global communication. And as such, it is central to freedom of expression everywhere in the world.

That is why there was so much enthusiasm and energy eight years ago when then Secretary of State Hillary Clinton delivered a landmark speech on internet freedom. I was sitting in the audience that day and felt the surge of optimism as our nation’s top diplomat laid out a robust vision of America’s central role in tearing down what Secretary Clinton referred to as “the Berlin Wall of our digital age.”

Remember, I am the daughter of the only member of Congress who personally experienced the horrors of living under fascism of the right, the Nazis and the totalitarianism of the left, the communists. It is in my DNA to resist these authoritarian efforts to control free, uncensored access to knowledge.

And I am pretty sure, Senator Rubio and Congressman Smith, that it is in your DNA, too.

The year after that speech, the Lantos Foundation played a leading role in redirecting a good part of our government’s spending on internet freedom to the BBG. Prior to that, almost all funding was inside the State Department, and, frankly, it led to situations where China was able to deftly use the U.S.’s
efforts to open the internet and circumvent their "Great Firewall" as a diplomatic bargaining tool.

Clearly, as a human rights organization, we believe that access to the internet is a modern human right that should not be bargained away, so we sought a "safer" home for the funding and felt the BBG had enough independence to play a leading role in opening the internet across the globe.

In the early years of this adjustment in the way our government funded anti-censorship tools, internet freedom initiatives were not perfect, but our government was funding a number of technologies to provide open access and we were moving in the right direction.

Today, it pains me to sit before you and express my deep disappointment and frustration with the actual results and the current commitment of our country’s internet freedom policy.

I have heard it said that if China herself had been in charge of America’s internet freedom policy, it could hardly have been more favorable to China’s interests. That is an extraordinarily harsh assessment, perhaps harsher than I myself would subscribe to, but let me tell you why I think it is not far off the mark.

Perhaps the single most stunning example of the lengths to which China will go to create an information prison is the "Great Firewall," a massive government censorship apparatus that has been estimated to cost billions of dollars annually and to employ some 2 million people to police the internet use of its citizens.

For this reason, many of us have long believed that
firewall circumvention technologies must be a key component of any effective internet freedom strategy.

Since 2011, the Lantos Foundation, as part of a broad internet freedom coalition, has urged Congress to direct the State Department through DRL and the BBG to provide robust funding to field-tested, scalable circumvention technologies. Recognizing that these technologies have the potential to provide safe and uncensored access to the internet for literally hundreds of millions of people in China and in other closed societies, Congress has responded.

In every recent appropriation bill, Congress has included language directing that not less than $50 million be spent to fund internet freedom programs, including specifically firewall circumvention technology.

This simply has not happened. Call it willful ignorance, call it bureaucratic intransigence and obfuscation, call it what you will, but, in my view, both the State Department and the BBG have failed to faithfully implement the clearly expressed intent of Congress, that significant resources be dedicated to these largescale firewall circumvention technologies, the ones China fears most.

They have funded freedom festivals and training and small-scale technologies that are more directed to driving traffic to their own platforms, in the case of the BBG, than giving free, unfettered access to the vast world of the internet for the hundreds of millions of people trapped behind the digital curtain.

They fund privacy and security apps that are very important
for safety while on the net, but they forget that many cannot even access the internet.

Meanwhile, some of the most effective, proven technologies, the ones China fears the most, technologies that provide unfettered access to all, have received only modest funding and have had curious barriers placed in their paths, making it difficult, if not impossible to qualify for the different grant proposals.

The cost to U.S. interests of these failures at the BBG and DRL were on vivid display during January of this year when protests broke out in Iran. Hundreds of thousands of Iranians took to the streets to protest economic hardship and the oppressive rule of the theocratic dictators.

Among other repressive responses to this popular uprising, the Iranian government acted to block access to the internet. Sadly, because the BBG had earlier cut off all funding to some of the most effective circumvention technologies, our ability to help provide access to the outside world for those brave Iranians was greatly limited.

Only a single U.S. government-funded largescale circumvention technology was available at this moment of crisis. I consider this an inexcusable dereliction of duty. Certainly, the single for-profit vendor who was funded at the time did valuable work, but how many more people could have been helped had the BBG done the job Congress directed them to do?

I confess I am baffled by the failure of both the State Department and the BBG to faithfully execute the directives that Congress has given them.
When I have met with representatives at both agencies, they reassure me of their deep commitment to the goal of broadening access to internet freedom and of the intensity of their efforts to do so. The rhetoric is pleasant enough, but their words are not matched by their deeds.

When our coalition has attempted to drill down and get real facts about where they are directing their resources and why they are not funding proven technologies, we are most often met with obfuscation, opacity and unfulfilled promises.

During the midst of the Iranian protests, I met with the top leadership at the BBG and they personally pledged to me at that time that within three to four weeks at the most, funding would be granted for technologies that could make access available to vastly increased numbers of users around the world.

More than three months have passed since those meetings, and not only has no funding been approved. In fact, they have just now issued a letter saying they will be issuing no funding at this time.

I have reluctantly come to the conclusion that the bureaucrats at DRL and the BBG are relying on what they think is Congress’ inadequate attention span and limited expertise to get away with this pattern of ignoring your clearly expressed intent. What arrogance!

I am hoping and praying that you will prove them wrong.

This issue, internet firewall circumvention, desperately needs champions in Congress. We need leaders who will be vigilant and vigorous in demanding accountability from the agencies responsible for executing our government’s internet
freedom policies, leaders who will not be beguiled by soothing words and, rather than accept heartfelt protestations of good intentions, will demand results.

Above all, we need leaders who know that we must not pacify the oppressors, but instead fortify and strengthen the brave dissidents and ordinary Chinese citizens who are risking everything in their pursuit of freedom.

In other words, we need leaders who are not moral pygmies, but rather moral giants.

I know that both of you are that kind of leader.

And the Lantos Foundation, along with our internet freedom coalition partners, stands ready to assist you in any way possible.

Thank you.

Ms. Swett. I have not.

Ms. Swett. Well, it is my understanding that that provision was added into only the most recent appropriations bill. That is new language that was inserted, it is my understanding, through the intense lobbying efforts of BBG.

And while I have no objection to the BBG wanting to promote access to their content, I think that it is a very flimsy excuse for not funding technologies that enable vast numbers of people to access the internet freely.

I know of a number of other sort of circumvention tool providers who would be quite happy to structure their technologies so that the first place they land is a BBG landing
page. And then from there, they are able to go into the wide internet.

But I think -- and this is the bottom line -- they are spending not $15 million on firewall circumvention technologies, they are spending a small fraction of that, it is my understanding, and this is where I hope that your Commission and that you as individual leaders in Congress can drill down and compel them to give you the answers. Because our internet freedom coalition gets, you know, frankly, blocked and diverted and stymied and sort of pushed off when we try to drill down and get the actual answers.

But it is my understanding that of that $15 million, less than $3 million is actually being given in grants to vendors who are doing the work that Congress wants to see done. They are expending it in a variety of ways, as I indicated in my testimony, for small-scale research and development, small-scale tools, VPNs, which are important, but do not have the ability to resist the largescale attacks launched by China or other repressive regimes.

And at the end of the day, the numbers simply are not there. And it is more than a little disingenuous for BBG to come back and say, well, we are required by law only to promote our content when that is a new provision in the law inserted there by the BBG. You know, it is sort of a different version of, you know, the person who throws themselves on the mercy of the court as a orphan when they are being charged with the murder of their parents.

BBG sought that provision in the latest appropriation bill.
It has not been there previously.

I do not have a huge objection to the notion of wanting to encourage people to access BBG content, but I am a little troubled by the idea that we use internet freedom dollars that Congress has appropriated to force them to read only the material produced by the BBG. It somehow does not sit right with this notion of free access.

And, you know, I think, you know, I do not want to pick a fight with the BBG. I love much of what the BBG does.

As I mentioned, my father, you know, grew up first suffering under the, you know, depredations of the Nazis during the Holocaust, and then experienced what it was to live under communism. Radio Free Europe, Radio Free Asia, Voice of America, Radio Marti, these are valuable services. I want the BBG to continue doing that.

But it is also a reality that increasingly people are seeking out information digitally on the internet, they are not restricted and nor should they be restricted to sort of the information that we are providing through those mechanisms.

So I would say -- and again, you know, some of my language I know is tough, but I feel so passionate about this because we have been so frustrated and so stymied for so long and there is no good explanation as to why that should be the case.

So be very careful when they show you numbers or when they come back with a seemingly very reasonable response. Compel them to provide the actual facts behind the matter.

And I would really encourage you and your staffs, talk to the developers of these circumvention technologies. Find out
from them, what is the problem? What are you being told? Why are you being cut off from funding?

Right now, BBG is funding one technology, to the best of my knowledge. It happens to be a commercial technology, not one developed by dissidents, not one being offered free of charge, but a commercial technology.

There should be -- you know, let a thousand flowers bloom, was that Mao's phrase?

If we were doing what we should be doing, if we were offering on an annual basis not $15 million, but $30 million or $50 million, as Congress has indicated, a funding for this kind of technology, you would not have a handful of five or six or seven developers, most of whom are on the verge of shutting down because they have no funding.

These are dissidents who are providing this at no financial benefit to themselves in order to help their brethren and their sisters left behind in China. And they cannot stay alive as their funding is cut off.

If we were doing $20 million or $30 million or $40 million or $50 million of grant funding for these kinds of groups, we would not have five, four of which are struggling to stay alive. We would have 25 or 30 or more and that is what we want.

Ms. Swett. Thank you.

Ms. Swett. No, we did not get any response back from the embassy, but I must tell you it was a very moving experience for me. We stood there in the rain with over a hundred members of the Uighur community. And what was most heartbreaking was
person after person came to me with pictures of their relatives, their uncles, their aunts, their parents, their spouses, their children. It was truly heartbreaking.

And I think this is -- and I want to commend you, Congressman Smith, and you, Senator Rubio, because I know you have written about this yourselves. This is the most massive incarceration of a minority population in the modern era, you know, certainly since the Second World War. It is staggering. It is absolutely staggering. And it just passes by.

And if I may, it speaks to, I think, a broader problem that I as a human rights activist feel we are dealing with when we are contending with China, and that is that everybody gives China a pass. China does things that are so outrageous and does them on such a scale and the world sort of “tsks” and moves on, moves on to the deals, moves on to the business, moves on to the commerce.

And it is wrong. It is morally wrong, but it is also dangerous because -- and I think you referenced this, Senator Rubio, as did you, Congressman -- they are very consciously trying to say to a whole lot of other countries out there we have a different model, we have another way and we are ready and we are loaded to challenge the United States as the model for the world going forward, and we are going to use our incredible sort of economic might and every tool at our disposal to put this alternate model out there.

You know, I mentioned that my father was a Holocaust survivor from Hungary. It was not that long ago that Hungary -- Hungary, a country in the very center of Europe -- spoke about
wanting to pursue a model of illiberal democracy.

Well, that is a pretty disturbing kind of language to hear from the heart of Europe. And we could look at lots of other examples.

If we do not confront China on the ways in which it is trampling the international standards related to human rights and democracy and free access to information, to say nothing of the way in which they may be abusing the international financial and economic system -- if we do not challenge them, they will continue down this road of saying to a very troubled and very chaotic world we have another way, we have a way that, yeah, maybe it can lead to greater prosperity, yes, maybe it can achieve the laudable goal of bringing large numbers of people out of poverty, but at a price.

And it is a price we should not be willing to pay.

I referenced that Biblical story of selling a birthright for a mess of potage. Our birthright, our values, our profound commitment to our fundamental freedoms, they are what make our society worth defending. They are for us individually what make life worth living.

And what a shame it would be and what a shameful thing it would be were we to not be vigilant in standing up against this effort to, as I say, sell our precious human rights birthright for a mess of economic potage.

Ms. Swett. If I can just -- I think that is a really excellent suggestion, that idea of sort of an emergency fund that can be rapidly deployed as situations arise.
But I did want to respond to one part of your question, Congressman Smith, because, of course, at the end of the day, we cannot entirely protect, we cannot basically protect people in China or in any other country where they are being, you know, brutally repressed.

And we know that the progress of freedom requires courage, it requires people in extraordinarily difficult circumstances who are willing to put their safety, their well-being on the line.

What is inspiring to me again and again and again is how many people in societies are willing to do that, but they are not willing to do it if it appears hopeless. And that is one reason why countries like China are so eager to create this information prison, to cut people off from the knowledge of what their fellow citizens are doing, of what is happening outside, of the criticism of their government, of what has happened in the past, of all of that information, because that sort of knowledge is where people find the courage and the strength to say no, I will not put up with this, I am going to take a stand, I am willing to take this risk.

They are inspired when they know about, you know, the story of Liu Xiaobo or Chen Guangcheng or Gao Zhisheng, some of the other extraordinary people who are sacrificing so much. And that is why information, as you said, Senator Rubio, the free sharing of information amongst people within a country as well as with those outside, is the thing they fear the most.

So we cannot protect them, but we can give them enough access to what is really happening that they are strengthened
and emboldened.

You know, when the Universal Declaration of Human Rights was adopted, Eleanor Roosevelt had a wonderful phrase. And I will not be able to quote it perfectly, but she said that she hoped that through a curious grapevine, news of this document, this extraordinary document that laid out this breathtaking bill of rights for all people everywhere simply by virtue of being human, that through a curious grapevine it would find its way through walls and barbed wire to people in imprisoned nations.

I love that notion of a curious grapevine and the internet is a great big curious grapevine. And we need to open it up for those who do not have free access to it.

Ms. Swett. Thank you.

Ms. Swett. Well, I think the long-term implications are obviously very, very disturbing. And I think that we have to do a better job of sort of shining a very unflattering light on those institutions that are increasingly compromising their own commitment to, as Mr. Hamilton said, the founding principles of the Western university in order to ease their access to China, whether it is access for their scholars, whether it is access to their wealthy, you know, full-tuition-paying students, whether it is access to business opportunities.

At the moment, these insidious sort of infiltrations of Chinese censorship influences into some of our most cherished institutions are not yet widespread, but it is spreading.

And I think, you know, frankly, it is something that the
Congress needs to think about. I do not know whether this would be appropriate and within the brief of this Commission, but I think it would be fascinating to have a hearing with some of the university presidents whose universities have major programs that involve China and ask them some of the tough questions about the compromises they have been making.

I think it was before you joined us, Congressman Daines, but Clive Hamilton spoke about what he was more fearful of, which is the self-censorship, not the obvious, evident, seen hand of China, but the decision by institutions and organizations to preemptively censor themselves, to preemptively make decisions that avoid the issue ever arising because they think that that sort of hides it from public scrutiny. I think in many ways he is right, that that is almost the graver threat.

I did want to say one thing, if I may, about the issue of religious freedom in China. I previously had the great privilege of serving as the chair of the U.S. Commission on International Religious Freedom. And obviously, China is a world-class abuser of religious freedom rights.

And I agree with Sarah that their efforts in that regard run the risk of backfiring, but I also think there, too, we have an area where our government has not spoken out assertively, proactively enough about the importance of defending religious freedom in China.

The reality is that so often when it comes to human rights causes, the most significant weapon we have to wield is the voice of our top leadership. It still has an influence.

And I am concerned that this administration does not seem
to have a particularly active sense of the role that defending human rights and defending fundamental freedoms should play in a whole-of-government approach to advancing our interests, whether it be in relation to China or other countries.

So we need to lean forward, we need to understand that when we play from our strengths, we win. And what are our greatest strengths? It is not our economic might, it is not our military might. They are indispensable, they are awe-inspiring, but they are not our greatest strength. Because guess what? Other countries, other adversaries, if you will, of ours have great economic strength, have great military might.

What has distinguished us, what has made us extraordinary in the world was the way that we grew from values, profound values. And that is where our strength came from.

And I would like to see us remember that and integrate these principles and these tools in a whole-of-government approach in every aspect of our foreign policy.
Thank you – it is truly an honor for me to be with all of you for this historic event. I want to pay particular tribute to Elihu Baver (Hugh) who quite appropriately, I had the good fortune of meeting at a Kristallnacht commemoration in Keene NH just last November.

Hugh who is Chairman (and founder) of Sosua 75 had not only a vision, but one might say an urgent prompting that this anniversary – this sad milestone in history – could not, must not – pass by without proper and necessary reflection on the costs paid and the lessons learned from the tragic failure of the Evian conference of 1938.

He has worked tirelessly to bring this conference to life and the Lantos Foundation is proud to have helped him to do so – so thank you Hugh for your extraordinary efforts to make this symposium a reality.

Our purpose in gathering here in this beautiful venue is as the program suggests, to educate and remember and very importantly to respond to the call to ensure that the excruciating and deadly outcome of Evian be guarded against in the future and as I shall discuss shortly, the future is in some senses, already upon us.

We will be privileged to hear from eminent experts and those with remarkable firsthand accounts of the one small sliver of refuge and salvation that come out of the Evian conference – the Jewish community of Sosua in the most improbable of locations – the Dominican Republic.

My role tonight is to share a little of my own family’s holocaust story and I hope together we can consider some of the lessons and warnings of Evian for our time.

As has been mentioned, I am the daughter of Hungarian Holocaust survivors and my father, Tom Lantos, went on to become the only survivor of the Holocaust ever elected to Congress.

This is a distinction he will keep forever because as we know that generation is now passing from the scene, and with their departure, the urgent awareness of the importance of remembering the lessons of the Holocaust is also fading. Indeed, a survey that was released in April of this year found that shockingly high percentages of American’s lack basic knowledge of the holocaust – indeed 66% of millennials could not say what Auschwitz was! Which is why events like this are so important.

My father during his nearly 3 decades in congress, rose to become the Chair of the House Foreign Affairs committee, but more importantly to me, he was the founder of the Congressional Human Rights Caucus – and one of our nation’s most forceful and eloquent advocates for human rights. Our family was deeply gratified when following my father’s passing, his congressional colleagues honored him by re-establishing the human rights caucus as the Tom Lantos Commission on Human Rights – The US Congress’ premier body focused on advancing universal human rights.

My late father was one of our nation’s most forceful and eloquent advocates for this cause and there can be little doubt that his passion for upholding the dignity and rights of all people, stemmed in part from the searing experience of his youth. But I am also convinced that his valiance in defending human rights sprang from a quality of moral strength and determination – that will do the right thing even when it is dangerous to do so. Two qualities that were so absent in the governments represented at the Evian Conference. I would like to share a story from my father’s life that illustrates this.
My dad was a young Jewish teenager in 1944 when the German’s occupied his native Hungary — an ally that Berlin feared was on the verge of switching allegiances.

The German occupation began the true nightmare for the Jews of Hungary — ultimately nearly 500,000 Hungarian Jews lost their lives during the horrors of that time.

My father like thousands of other Jewish boys was rounded up and sent to a slave labor camp outside of Budapest, where he was conscripted into forced labor under brutal conditions. He rarely spoke of this time but many years later, his closest companion who survived the slave battalion as well, shared this story from those dark days.

The Hungarian commander of my father’s labor group decided to “burnish” his reputation by compelling all the Jewish boys in his barracks to be baptized.

They were frightened, they were essentially helpless, and at his mercy so they all complied... except for two. My father and his friend Nori Kerenyi.

They were badly beaten for their refusal and yet they did not comply.

From what I know of my father back then, he was not an especially religious teenager, although in the few letters that survived from that time, he wrote about his belief in God — a belief that would, over time, give way to a more skeptical agnosticism.

But I don’t think it was so much his deep religiosity that made him refuse to be baptized against his will, as it was his recognition that his invaluable right to possess his own soul was at stake and he was prepared to pay a high price to defend it.

Being willing to pay a high price — to defend innocent victims, to defend human dignity, to defend the reputation and honor of humanity — this willingness and courage was shockingly absent from the Evian Conference in 1938.

Those of us here understand the basic outline of what transpired at Evian.

In response to the increasing number of Jewish refugees fleeing intensifying and vicious persecution in Nazi Germany and beyond, President Roosevelt called for an international conference to seek a solution to the Jewish refugee problem.

Of course there was an obvious, simple, perhaps not easy, but simple solution and that was for the 32 nations represented at Evian to open their doors with compassion and humanity to these desperate people.

As we all know, that did not happen. Only the tiny Dominican Republic, let ironically by the Dictator Trujillo, stepped up with a pledge to offer 100,000 visas to Jewish refugees. In the end only 800 Jews were able to seek refuge in the community of Sosua in the Dominican Republic.

But of all the powerful and “civilized” nations represented at Evian — not one — not one was willing to match their eloquent protestations of sympathy for the persecuted Jew with any actual help to those who were facing the most desperate and deadly of dangers. The delegates could not even bring themselves to issue a joint statement of condemnation of Germany’s abhorrent Nuremberg laws.
Yes, the Evian Conference was a shameful failure but it was much worse than a failure. The utter moral hypocrisy of the United States and the other participating countries became a dark tool in the hands of the Nazis. It was no coincidence that Kristallnacht, the beginning of the end for the Jews, occurred just a few months after the debacle of Evian. Before the conference Hitler had openly mocked the world’s professed concern for the plight of Europe’s Jews saying:

“I can only hope and expect that the other world, which has such deep sympathy for these criminals (by which he meant the Jews) will at least be generous enough to convert this sympathy into practiced aid. We on our part, are ready to put all these criminals at the disposal of these countries, for all I care, even on luxury ships.”

After the refusal of the conference countries to provide an escape route for Europe’s Jews, they were trapped and Hitler knew he had a green light to proceed with his final solution. Thus, the Evian conference to its everlasting shame, stands as an example not only of moral cowardice but of the danger of appeasement – not military appeasement of the Germans as exemplified by Neville Chamberlin’s declaration of “Peace for our time”, no, this was appeasement of the bigotry and fear and yes, selfishness of their own people – the Americans, the French, the British, the Australians, the Swedes, the Swiss, the Brazilians, the Irish and many others.

And it is understanding the consequences of this domestic appeasement that makes the lessons of the Evian conference so relevant to our time.

The great American writer Mark Twain once said “History doesn’t repeat itself, but it rhymes.” It rhymes.

The world is now facing a refugee crisis on a scale not seen since the second world war. It is estimated that over 65 million people have been displaced worldwide. Most of these refugees fleeing war, violence, persecution, and in some cases, extreme poverty, are being hosted in countries that neighbor their nation of origin – Jordan, Turkey, Pakistan, Lebanon, Ethiopia, Kenya, Uganda.

But a significant number of these refugees – especially Syrian refugees have sought asylum and protection and a new life in Europe.

And as Mark Twain observed, history is not exactly repeating itself but there are echoes and there are rhymes.

Of course, there are also big differences between 1938 and 2018. The majority of those seeking to enter Europe are coming from intermediary countries such as Turkey where they face great difficulties and even dangers, but most do not face the existential threat of annihilation that awaited the Jews of Europe.

Another difference – the world in which these refugees are fleeing has a strong and well established rights regime that began with the adoption of the Universal Declaration of Human Rights in 1948 followed by the ICCPR and ICESCR and perhaps most relevant for our gathering today, the 1951 Refugee Conventions which defines who a refugee is (well-founded fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion, outside his country of nationality, unable to or unwilling to return due to well-founded fear) and what rights, protections, and responsibilities they have under international law.
Finally, through the office of the UN high Commissioner for religious Freedom and other international agencies, there are significant resources that exist to help provide for the housing, food, and medical needs of those who have been forced to flee their countries.

Don’t get me wrong, these unfortunate souls face struggles and hardships on a daily basis but still we must recognize how different their circumstances are from that of European Jewry, which faced genocide at the hands of the Nazis.

Now, let us turn our attention to the uncomfortable similarities between the arguments of 1938 and some of the arguments that today are fueling the rise of populist/nationalist and anti-immigrant parties in countries from Hungary, Poland, and Italy to powerful political voices in the United States.

One argument we hear, is that these new immigrants are incapable of assimilating and that they will chance ancient European cultures in dangerous ways – this too was claimed by those who opposed increasing quotas for Jewish immigration from Europe. One writer said:

“let us stop immigration completely for a while and give our present alien population an opportunity to become Americanized before they foreignize us.”

Of course the countries in Europe that are welcoming refugees have the right to insist that those who seek to join their societies accept and embrace the underlying values of tolerance, equality, pluralism, and respect that are the hallmark of the continent.

But it is both wrong and wrong -headed to assume that because the current migrants come from different faith and culture traditions that they cannot become fully part of the fabric of European society.

The concern about economic costs and economic displacement were present in 1938 and are again part of the discussion today. Such concerns cannot be cavalierly dismissed because there are undeniable costs associated with accommodating immigrant populations, but history has shown, pretty decisively, that immigrants who are successfully integrated into a new country end up strengthening economic growth and there are countless examples in America of immigrants who went on to create enormously successful enterprises and pioneer entire new fields of economic expansion that have employed millions of Americans.

Another fear that is often unfairly likened to refugees is the fear of crime and in our day and age, terrorism.

Again, these worries cannot be dismissed out of hand but they are not new. In the late 30’s and 40’s, there was great concern that Nazi spies and communist agitators would try to infiltrate the ranks of genuine refugees.

There have been examples of individuals who came to Europe as refugees who have engaged in violent acts of terror and every country has both the right and the duty to carefully and thoroughly vet all those who seek to settle in their nation.

Indeed, it is my belief that it was the chaotic and initially uncontrolled and un-vetted surge of immigrants in 2015 that gave rise to the current mood of suspicion and hostility that is posing such a grave challenge to the unity and future of Europe.
Finally, in 1938 as now, there is that old undesired and evil companion that seems so hard to leave behind – simple prejudice and bigotry.

And whether it manifests as anti-Semitism which I am sad to say is alive and well, or whether it appears as islamophobia, or hostility to those whose skin color or faith is different from our own – it is wrong. In every way wrong and we must each take it upon ourselves to fight this scourge.

It can be uncomfortable and disquieting to look at the analogies and rhymes from 1938 to our day but it is my hope that this discomfort will lead our societies to do the hard work of finding real, workable solutions to these challenges.

There are many complex causes contributing to today’s massive refugee problem. In addition to the usual suspects of war, national disasters, political oppression and oppressive poverty, the borderless world of the internet where people in remote and struggling parts of the globe can clearly see how the other half lives, has emboldened millions of new people to take great risks to try and secure a better life for themselves and their families.

But whereas the world of the internet may indeed be borderless for much of humanity, the world of countries and nations and languages and political systems is still measured and bound by actual borders and the current wave of the US nationalist and populist successes in Europe make it very clear that anything approximating a world of wide open borders is simply not politically feasible anytime soon – if ever.

At the same time our hearts our minds and our consciences tell us that it is also not sustainable to shrug our shoulders at the vast inequalities that exist across regions and hemispheres and expect those suffering under urgent circumstances to accept these disparities as the unavoidable result of a cosmic roll of the dice.

They will not accept it and neither should we.

Solutions will not be easy, but I believe that both short and long-term solutions must begin with the conviction that our fellow human beings – whether the European Jews of 1938 or the Syrian children of 2018 – are our brothers and sisters and that we have an inescapable duty to be our brothers and sisters keepers.

William Shakespeare – that nearly bottomless fountain of amazing quotable phrase wrote:

“The past is prologue”. As we gather here on the 80th anniversary of the Evian Conference in a world awash in desperate people, Shakespeare’s words can have an ominous ring. But if we read just a little further, what the Bard has to say is profoundly optimistic. For Shakespeare goes on, after he writes the past is prologue, to say:

“What to come. In yours and my discharge.”

What’s to come is in your’s and my discharge – we will decide how, with humanity and decency and justice, this challenge of our day will be met.

The responsibility my friends has been rolled on to our shoulders and I believe we will be equal to it.
Thank you.
Katrina Swett Remarks. Tiananmen Square Anniversary Rally, Washington, DC. 6-4-19.

I am proud and honored to be with you today to remember and honor the heroes of democracy and human rights who lost their lives in the tragic massacre at Tiananmen Square.

We gather here today in an act of remembrance but for the past 30 years, the Chinese government has been engaged in a willful demonstration of forgettance. They trample the truth and dishonor the dead by their pathetic and ultimately futile effort to deny the reality of what happened 30 years ago.

Tiananmen marked a dark turning point in China’s history when the Communist leadership made the calculated decision to turn away from political reform and modest liberalization to double and triple down on repression, persecution, and brute force. Today, we see the ongoing impact of that terrible choice. We see this choice manifested in the assault on the Uyghur community in the XinXiang Province with literally millions of innocent Muslims being disappeared into so-called re-education camps while the entire community is victimized by the most complete surveillance state in history.

We see it in China’s unbelievably brutal war against the Falun Gong community, including the “horror film” reality of forced organ harvesting.

We see it in the ongoing subjugation of Tibet and the despicable effort to crush the unique and extraordinary culture, faith, and spirit of the nation and people that come closest to touching heaven in their mountain peak home.

We see it in the massive crackdown of the growing Christian community of China with perhaps as many as 250 million believers dwarfing the members of the Communist party. They are being persecuted, disbanded, and jailed because China cannot abide and deeply fears the humble, faithful allegiance of these believers to something far, far greater than the communist state.

We see it in the attacks on human rights defenders, lawyers, journalists, writers, activists, and everyone who seeks free inquiry, free debate... in a word, freedom!

What is to be done? What can we do?

Today I have a practical suggestion to offer. We must persuade our government to do much more to support internet freedom and the tools needed for Chinese men and women to tear down the great firewall of China, which the government uses to create a digital / informational prison for its people.

There are brave and brilliant technology innovators who have created the tools that enable millions and millions of Chinese citizens to safely and anonymously circumvent the great firewall – organizations like UltraSرف and Greatfire. However, year after year our government, through the State Dept. and the US Agency for Global Media, has failed to provide the modest funding that would enable these tools to provide an uncensored window to the world for hundreds of millions of people. It is inexplicable, inexcusable, and this must change! It is time to tear down the great firewall of china.

I’d like to close my remarks with a beautiful and hopeful quote from the Pastor of the Early Rain Church, Pastor Wang Yi, who currently languishes in prison. He has said,
“In this war, in XinXiang, in Shanghai, in Beijing, in Changdu, the rulers have chosen an enemy that can never be imprisoned – the soul of man. Therefore they are doomed to lose this war.”

I agree with Pastor Wang Yi. There can be no question about the ultimate triumphs of freedom and human rights in China.

However, a question remains – what side will we be on? Let us worthily engage in this great struggle for freedom. Let us not seek the safety of the sidelines and let us not doubt that the outcome of this struggle will be victory – for freedom, for democracy, for human rights, and for the people of China.

Thank you.
The Imperative of Conscience Rights

This paper tackles critical but neglected questions affecting diverse societies today. What activity does freedom of conscience protect? Why protect this activity in a bill of rights? When can governments limit this freedom? Can governments pressure citizens to adopt beliefs against their conscience? How does freedom of conscience differ from religious freedom? What is the relationship between human dignity and freedom of conscience?

This paper grapples with the current relevance of freedom of conscience and makes the case for robust protection of this fundamental human right.

December 4, 2018
Introduction

Freedom of conscience appears in all major bills of human rights. Besides conscientious refusals to fight in wars, this human right has historically received little attention—but recent actions by governments in Canada and abroad have increased its visibility. Conscientious objection in health care, for example, has become a hot spot of controversy for this human right. Debates on freedom of conscience raise many pressing issues, including whether state power should be used to compel belief. This use of state power may stem from the view that moral convictions which clash with what the state has legalized should not be accommodated in the public square. A related basis for excluding moral convictions that diverge from what is legal may be the idea that what is legal is moral—that the law is our collective conscience. Use of state power to compel belief is especially troubling when it forces citizens to choose between violating their moral commitments or enduring adverse consequences or penalties, such as the loss of a job. This paper grapples with the current relevance of freedom of conscience and makes the case for robust protection of this fundamental human right.

This paper is divided into five parts. Part 1 briefly considers the nature of conscience. Part 2 proposes that freedom of conscience protects the freedom to live in alignment with our moral commitments, while religious freedom deals with faith-based beliefs and practices. Part 3 identifies the reasons for including freedom of conscience in a bill of rights: integrity, identity, and human dignity. Part 4 explores when freedom of conscience can be limited by governments. Finally, Part 5 examines current issues in Canada that engage freedom of conscience.

WHAT IS CONSCIENCE?

Over the centuries, conscience has been the subject of much scholarship and debate. “Conscience” traces to the Latin conscientia, and is related to the Greek synderesis. While conscientia refers to the application of our moral knowledge to particular situations, synderesis refers to the moral awareness built into each person and that urges us to do good and avoid evil. It is, as St. Jerome wrote, the “spark of conscience.” As early as the fifth century before Christ, conscience—understood broadly as moral or ethical self-awareness—appeared in the works of Roman and Greek playwrights. In the third and second centuries before Christ, the Roman comic playwrights Plautus and Terence refer to conscience in the sense of sharing knowledge
with oneself.  

Most scholars subscribe to the idea that matters of conscience relate to a person’s “core moral beliefs.”

Of the major religious traditions, Christianity has deeply studied conscience. In his Epistle to the Romans, Saint Paul notes that when Gentiles (non-Jews) follow God’s law, they “show that what the law requires is written on their hearts, while their conscience also bears witness” (Romans 2:15 RSV Catholic Edition). This statement seems to suggest that moral knowledge is not acquired from an external source (such as God), but rather that it is built into each person. Many centuries later, in his *Summa theologiae*, Saint Thomas Aquinas defined conscience as the application of knowledge to activity. The knowledge Aquinas speaks of is moral knowledge that flows naturally from our built-in moral awareness (*synderesis*). Aquinas situates conscience (*conscientia*) and *synderesis* in our rational dimension. Once individuals grasp the basic principles of moral behaviour from *synderesis*, the exercise of conscience applies these principles to particular situations and is thereby formed over time.

As for modern thinkers, John Locke saw freedom of conscience as a natural right. In his *Letter Concerning Toleration* (1689), he argued that religious tensions in England at the time would only disappear if “churches were obliged to lay down toleration as the foundation of their own liberty, and teach that liberty of conscience is every man’s natural right, equally belonging to dissenters as to themselves.” In his *Essay Concerning Human Understanding* (1690), echoing Aquinas, Locke argued that conscience is governed by reason.

In the twentieth and twenty-first centuries, conscience has remained of interest to academics, politicians, and philosophers, both religious and secular. American legal scholar Robert Vischer, in his book on conscience and the common good, describes a life lived according to conscience as a life lived according to a coherent narrative. Fellow legal scholar Nathan Chapman, in his writing on the relationship between religious freedom and freedom of conscience, views conscience as the “moral judge” of each
person. The idea of conscience as an inner judge or court of morality reflects how philosopher Immanuel Kant understood conscience. Legal philosopher Kimberley Brownlee, in her text on conscience and civil disobedience, writes that living conscientiously offers us a greater capacity to “live much of our life in a range of wholesome states including kindness, compassion, generosity, forgiveness, and love.” Vaclav Havel, the first president of the Czech Republic after the fall of the Iron Curtain, said that to resist totalitarianism, we must “trust the voice of our conscience,” be guided by reason, and serve the truth.

Over the centuries, the idea of a closeness between conscience and assessing the morality of our conduct has endured. Mark Wicclair, the author of a leading text on conscientious objection in health care, acknowledges the difficult questions that surround conscience—such as its nature and how it operates. Nevertheless, he concludes that most scholars subscribe to the idea that matters of conscience relate to a person’s “core moral beliefs.”

This paper proceeds on the basis of this intuitive, widely accepted, and accessible understanding of conscience.

Defining Freedom of Conscience

If conscience refers to our capacity to discern moral right from wrong, what does the human right of freedom of conscience protect? Section 2(a) of the Canadian Charter of Rights and Freedoms guarantees “freedom of conscience and religion.” Freedom of conscience also appears next to freedom of religion in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. There are three major competing interpretations of freedom of conscience: (1) freedom of religious conscience, (2) freedom of secular conscience, and (3) freedom of any conscience.

Interpreting freedom of conscience as protecting only religious conscience (moral judgments stemming from religious formation) enjoys little support in Canadian case law. This interpretation is understandable, however, in light of Canada’s history of providing conscience rights to specific Christian churches: for example, the statutory right of conscientious objection to military service during the two world wars. This interpretation, however, ignores the fact that section 2(a) protects two interests: conscience and religion. It does not give conscience and religion independent meaning.
Understanding freedom of conscience as moral freedom for all individuals respects principles of statutory interpretation and the common understanding of conscience.

The placement of “religion” and “conscience” together in the Charter and most major bills of rights suggests that mundane matters are not the concern of this human right. The Supreme Court of Canada said as much when it noted that the purpose of section 2(a) of the Charter is to “ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.” These beliefs, the court noted, heavily influence a person’s way of life. Martha Nussbaum proposes that liberty of conscience relates to the search for the “ultimate meaning of life.” Charles Taylor and Jocelyn Maclure distinguish between core and less than core commitments: the former play a role in a person’s moral identity and integrity, while the latter do not. This idea does not mean that cases of religious freedom are unrelated to conscience. The case of St. More is, on the surface, a case of religious freedom. More refused to support a schism from the Catholic Church, yet he is one of the most celebrated examples of following conscience. In large part, More’s case is one of forced religious conversion. Today, forced conversions occur in India and some Muslim-majority countries. These cases, like that of More, also implicate conscience.

The idea that freedom of conscience only protects non-religious persons would restrict this freedom to moral commitments inspired by worldviews such as humanism, atheism, and agnosticism. Moral convictions inspired by religion, meanwhile, would be protected by freedom of religion. While this interpretation gives independent meaning to “conscience” and “religion,” it betrays the common understanding of conscience. The idea that conscience only relates to non-religious persons ignores the ordinary sense of this word. While philosophers have debated conscience for centuries, no credible school of thought views conscience as exclusively the domain of non-religious persons.

Canadian judges have endorsed the view that freedom of conscience benefits both religious and non-religious persons. In one Supreme Court ruling, Justice Bertha Wilson stated that “conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience.”
The implication is that freedom of conscience protects convictions of conscience that are inspired by either religious or non-religious sources. While conscience is often interwoven with religion, the view of Justice Wilson reflects the common understanding that everyone has a conscience. Article 1 of the Universal Declaration of Human Rights declares that all humans are “endowed with reason and conscience.” If the Charter had intended to depart from this common understanding of conscience, one would have expected a clear statement by the drafters that such a departure was being made.

Understanding freedom of conscience as moral freedom for all individuals respects principles of statutory interpretation and the common understanding of conscience. On this interpretation, freedom of conscience protects physicians—atheist, agnostic, or religious—who refuse to perform abortions because they deem the procedure to be immoral. They are equally protected by freedom of conscience because their refusal stems from the same moral judgment: the fetus is a human being and it is immoral to kill a human being.

If freedom of conscience protects the conscience of all persons, what is left for freedom of religion? This topic cannot be comprehensively addressed here, but the short answer is that freedom of religion protects faith-based—rather than morality-based—beliefs and practices. The Christian who believes that Jesus Christ is the Son of God does not believe it primarily because of a moral obligation. It is a matter of faith. Likewise, the Catholic does not wear a crucifix in order to follow her conscience. It is an external manifestation of a faith-based belief. The same principle applies to religious worship, liturgy, and rituals. These activities usually represent articles of faith, not moral convictions.

Why Protect Freedom of Conscience?

If moral freedom is what freedom of conscience protects, why we protect this freedom boils down to the fact that this freedom affirms and protects human dignity and the moral commitments that sustain our identity and integrity—who I am and what I stand for.

Integrity refers to the state of being whole or undivided, usually in relation to morality or ethics. It refers to a unity of life—not being one person in some contexts and a different person in others. Opposites of integrity include dishonesty, deceit, hypocrisy, and corruption. Most individuals hold
integrity in high esteem. It is peculiar to call a lack of integrity a positive personality trait or an example of public virtue.

Identity is shaped more by moral judgments than by interests, tastes, or preferences. Matters of conscience often sit at the core of a person's identity. Devotion to a sports team may be deeply important to a person, but it is odd to say that an inability to foster that devotion damages core identity or leads to a violation of conscience. Between the sports fan and the person who abandons his moral compass, the latter is more likely to be described as no longer the same person as before.

Given that integrity and identity are damaged when a person betrays her conscience, it should be no surprise that a person's dignity is also engaged by conscience. The Catechism of the Catholic Church captures the link between dignity and conscience in this way:

The dignity of the human person implies and requires uprightness of moral conscience. Conscience includes the perception of the principles of morality (synderesis); their application in the given circumstances by practical discernment of reasons and goods; and finally judgment about concrete acts yet to be performed or already performed. The truth about the moral good, stated in the law of reason, is recognized practically and concretely by the prudent judgment of conscience. We call that man prudent who chooses in conformity with this judgment. 29

In other words, living conscientiously is both a feature and a demand of human dignity. The Christian understanding of human dignity flows from the belief that the human person is made in the image and likeness of God. The dignity of the human person cannot be erased because the characteristic of being made in the imago Dei cannot be erased. Human dignity is intrinsic to the human person, and our conduct can either uphold or deny it. The intentional termination of human life, for example, is a grave violation of human dignity—while safeguarding human life always affirms human dignity. In a similar vein, to deny freedom of conscience is to deny part of what it means to be truly human. The fact that each person has a conscience supports this idea.

At times the law has grasped the intimate relationship between conscience and dignity. These concepts appear together in article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” In the first ruling of the Supreme Court of Canada on freedom of conscience and religion
under the Charter, the court traced the historical events that led to the inclusion of this freedom in bills of rights. That history, the court noted, originated in European countries in which the dominant religious tradition sought—with the help of the state—to coerce minority religious traditions to join the majority or face punishment. This violation of human dignity, the Supreme Court noted, makes it easy to grasp why freedom of conscience is categorized as a “fundamental freedom” in the Charter.

**In liberal democracies such as Canada...compelled violations of freedom of conscience are more subtle.**

A person that finds herself in a crisis of conscience has two unattractive choices: retreat from the threat to conscience (which might mean the abandonment of a cherished career) or violate conscience—and in so doing commit a harmful act of self-betrayal. The harm that flows from a betrayal of conscience has been termed moral distress. Moral distress can arise where a person is hindered from doing what she believes to be moral. This type of distress seems especially likely where a person is coerced to do what she believes to be immoral, with the threat of some consequence if she fails to do so. While moral distress reveals itself in a variety of ways depending on the person and the nature of the constraint on her conscience, the symptoms of moral distress include “frustration, anger, guilt, anxiety, withdrawal, and self-blame.” The consequences of violating conscience reflect the gravity of such a violation. One author writes that “among the worst fates that a person might have to endure is that he be unable to avoid acting against his conscience—that he be unable to do what he thinks is right.” Building on this point, another writer says that even one violation of conscience can be “devastating and unbearable.”

Moral distress has been investigated in relation to military service. The Moral Injury Project at Syracuse University studies the experiences of members of the armed forces who have suffered moral distress and psychological injury. The project defines moral injury as the damage sustained by a person when the person commits, witnesses, or fails to stop acts that violate his or her moral compass. The US Department of Veterans Affairs has acknowledged that moral injury can occur when a person’s conscience is compromised on the battlefield. In the context of armed conflict, moral injury has been compared to a “deep soul wound that pierces a person’s identity, sense of morality and relationship to society.”
There is a significant body of scholarship on the immorality of war and the duty of governments to respect the wishes of citizens who refuse on moral grounds to participate in armed conflict. In 1921, during the devastating aftermath of World War I, the antiwar organization known as War Resisters' International (WRI) began. WRI's founding declaration labels war as a crime against humanity. Advocacy for conscientious objection to military service is an area of focus for WRI. Devi Prasad, the former general secretary and later chair of WRI, wrote a book on the organization's history. As he put it, World War I erased "any doubt there might have been as to how disastrous and inhuman the institution of war can be, particularly when supported by modern technology." Prasad sees recourse to war as a humankind's failure to follow its conscience.

Research on moral injury in the military context sends a clear message that violations of conscience can be harmful. While the harrowing circumstances of armed conflict certainly plays a role, moral injury has been identified in the context of everyday life. A doctor in Ontario, Natalia Novosedlik, revealed in an interview that she violated her conscience by making a referral for a procedure that she considers immoral—a decision that, after the fact, caused a "really internally divisive experience" for her. In the same interview, Novosedlik confessed to being fearful of going to work on account of a legal obligation to provide a referral where she conscientiously refuses to perform a procedure or prescribe a medication.

There is a spectrum of how the state might interfere with freedom of conscience. Mary Anne Waldron, a retired law professor at the University of Victoria, labels state activity that merely prohibits activity which obstructs the pursuit of a moral conviction as less concerning than state activity which compels activity that violates a person's conscience. A person who considers it immoral to kill animals for food and proceeds to burn down a slaughterhouse may be following his conscience, but laws that prohibit trespass and damage to property—and thereby interfere with his ability to live conscientiously—do not force him to violate his conscience. The situation would be different, for example, if the state were to compel all citizens to eat meat or be issued a fine. In that case, the state forces the citizen to violate her conscience or suffer a penalty.

The sort of state action that compels a citizen to do something that violates her conscience or face some sort of sanction is a severe breach of freedom of conscience. Cases of compelled belief and action should, in other words, cause the most concern for this human right. The bureaucrat that is ordered to kill or be killed is a classic example. The person who is jailed simply for expressing a belief that is unpopular or unwelcome in the eyes of a
government is a modern example. Amnesty International identifies such persons “prisoners of conscience.”

In liberal democracies such as Canada, these scenarios in which freedom of conscience is profoundly violated are not seen. Today, compelled violations of freedom of conscience are more subtle. Do X or forfeit access to a government program that is funded by taxpayers. The controversy surrounding the Canada Summer Jobs program, discussed later in this paper, is an example.

Endorse a certain belief through action or possibly lose your job. The case of obligatory referrals in health care, also discussed later, is an example of this scenario. Protection for whistleblowing—alerting the public to abuses of power by corporations or governments—has also been proposed as a matter of conscience. The stakes in these cases may not be as high as life or death, but they are significant nonetheless. Choosing to follow conscience in these cases can lead to fines, exclusion from a profession, or unequal access to taxpayer-funded government programs.

**Limiting Freedom of Conscience**

Freedom of conscience should be robustly protected in light of the interests that it protects: integrity, identity, and human dignity. This does not mean, however, that this human right can never be limited by governments. The conscientious arsonist is an example of when limiting freedom of conscience is justifiable for reasons such as public safety and protection of property.

In what other circumstances is it acceptable for the state to restrict the exercise of freedom of conscience?

No right or freedom in the Charter is exempt from limitation. All are subject to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Freedom of expression is limited by laws that restrict communication which promote violence. Freedom of association is limited by laws that prohibit the formation of criminal organizations. On freedom of conscience and religion, the Supreme Court has ruled that subject to “such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.”
It is intuitive that the state may—indeed should—restrict activity that, though inspired by conscience, harms others or injures their dignity. The person who considers the Canadian state irreparably corrupt and subsequently acts on a perceived moral duty to violently overthrow the government could be said to be following his conscience, but the state would certainly be justified in limiting his freedom of conscience through laws that prohibit such activity and punish citizens for it.

It would also be legitimate to limit freedom of conscience where the expression of that freedom negates the essence of a profession: for example, the pacifist who signs up for the armed forces but later refuses to mobilize during a war in which there is mandatory conscription. This idea, however, only goes so far. Applying it is sensible in the case of a doctor who once specialized in a procedure and now conscientiously refuses to perform it. It is oppressive to apply it in the case of a family doctor who treats countless medical issues but will not refer patients for abortions or prescribe contraception. Where a small-business owner has no general objection to his line of work but refuses to provide services to a cause or event that involves him in activity that he deems immoral, the case for respecting freedom of conscience seems reasonable. If the owner of a printing company is resolutely pro-abortion (and holds that view as a matter of conscience), it would be understandable that she would refuse to print posters for an anti-abortion rally. This scenario works the other way as well: it would be no surprise to see an anti-abortion printer refuse to print posters for a pro-abortion rally. Put simply, the owner of the printing company can not object to printing per se, but can object to printing products of a certain kind that go against her conscience. Likewise, the doctor can not object to providing medical treatment, but can reasonably object to referring for procedures he believes are seriously immoral.

It is reasonable for freedom of conscience to be curtailed by the state where the exercise of the freedom harms others, injures their dignity, or causes undue hardship. The challenge, however, is the unsettled understanding of these concepts today—especially dignity and harm. Beyond obvious forms of harm (such as physical assault) or injury to dignity (such as racist legal regimes), what counts as harm or injury to dignity quickly becomes contested. These concepts are increasingly being used to counter conscience claims. For example, the woman who is denied an abortion might say that the denial injures her dignity in terms of her ability to choose if and when she will bear children. What is lost, however, is the fact that the doctor who refuses does so on account of the dignity of the fetus and a desire to not harm—indeed, to not kill—a human being.
The duty of neutrality only applies to the state—it does not limit individuals from manifesting their religious or conscientious convictions in the public square.

Claims of conscience often make the headlines or arrive at the courtroom because they feature a clash of worldviews with respect to concepts such as harm and dignity. The usual response of a government in a diverse society is to allow a diversity of views rather than compel certain beliefs. The Supreme Court of Canada has recognized that freedom of conscience and religion translates into a constitutional obligation on the state to remain neutral in matters of conscience and religion. Here, neutrality means that the state will neither favour nor hinder any religion or nonreligious worldview. This means that the state would equally violate this duty if it were to recognize a state religion or state atheism. This duty of neutrality only applies to the state—it does not limit individuals from manifesting their religious or conscientious convictions in the public square.

Faced with fundamental disagreements between citizens on what counts as harm and dignity, a free and democratic society favours coexistence. When the Supreme Court of Canada stated in relation to assisted death that the interests of patients must be reconciled with those of physicians, the court alluded to a meaningful coexistence of the beliefs of patients who desire lawful healthcare services and health-care workers who conscientiously refuse to participate in those services. In the leading Canadian case on abortion, Justice Bertha Wilson noted that the “basic theory underlying the Charter” is that the state “will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.” Justice Wilson made these statements from the perspective of the woman who requests an abortion, but surely the principle she endorsed applies to both sides of this issue and others.

Taking conscientious objection in healthcare as a case study, the philosophical and theoretical perspectives that support advocacy against conscientious objection include legal positivism, rigid secularism, and materialism. Legal positivism teaches that the content of laws passed by legislatures are a guide to moral and ethical conduct. This perspective drives the emphasis on the lawfulness of a procedure as a justification for obliging a doctor to perform it. This theory also professes a faith in the
righteousness (and even the morality) of what the state has permitted— that what the law has approved is good and true because it is the law. When scholars label the legalization of abortion or euthanasia as a social good or achievement for humanity, that legal faith reveals itself. Rigid secularism (laïcité) aims to exclude the influence of religion in public life— especially in the context of services that are delivered by the state. This theory surfaces in the rejection of manifesting moral convictions in the provision of health care where those convictions stem from religious formation. Taylor and Maclure contrast this form of secularism (republican secularism) with pluralist-liberal secularism, in which space is made in the public square for the manifestation of religious and conscientious worldviews.

Finally, materialism (also known as physicalism) professes that all that exists is the material or physical world. There is no supernatural or transcendent dimension and so nothing after death. Materialism is associated with the belief that suffering is meaningless and should be avoided at all costs. This perspective appears in advocacy for assisted death. The primary justifications for this procedure—to alleviate suffering and secure a dignified death—are influenced by the ideas that suffering is meaningless and that compassion demands that a life of incurable suffering be ended if the person so wishes. If assisted death enables persons to die with dignity, the implication is that remaining alive in certain circumstances is undignified.

Current Issues

Before the Charter arrived in Canada in 1982, freedom of conscience appeared in Canada primarily in the form of conscientious objection to military service. Statutory exemptions to military service in Canada reach back as far as 1793. They were also granted during World War I and II, often on the condition that conscientious objectors would perform alternative service such as building national parks. These exemptions were largely granted to Christian denominations that professed pacifism, such as Quakers, Mennonites, Doukhobors, and Hutterites.

Freedom of conscience—in the form of an individualized human right—first appeared in 1947 in the Saskatchewan Bill of Rights. It does not appear in the Canadian Bill of Rights of 1960. Before the Charter arrived in 1982, freedom of conscience was generally understood as freedom of religious conscience—not as freedom of secular conscience or the moral freedom of all persons. The historic closeness of conscience to religion played a role in
this understanding. It also explains why the Charter protects, in one provision, freedom of conscience and religion.

Since the Charter arrived in 1982, there has been little case law and scholarship on freedom of conscience in isolation from freedom of religion. The only court ruling on freedom of conscience concerned a request by Jack Maurice, an inmate, for vegetarian meals while in prison. Corrections Canada granted his initial request, made on the basis of his Hare Krishna faith. He later renounced his faith but continued to request vegetarian meals, citing a belief that a non-vegetarian diet is “morally reprehensible and poisonous to society as a whole.” Corrections Canada stopped the vegetarian meals. The judge ruled for Maurice on the basis that freedom of conscience protects the freedom of persons to manifest their moral commitments.

The judge described vegetarianism as a dietary choice “founded in a belief that consumption of animal products is morally wrong.” While he acknowledged that the motivations for choosing vegetarianism depend on the person, its “underlying belief system” can be considered a matter of conscience. The view that how animals are treated engages morality influenced the judge’s decision. The idea that animals have dignity and are therefore owed respect has gained traction in many societies. The topic of moral vegetarianism has generated much scholarship. At the heart of this movement is the view that it is immoral to produce and consume meat. The reasons why range from the pain experienced by animals to environmental concerns related to raising livestock.

Today in Canada, several legal and policy issues raise concerns for freedom of conscience. These issues engage what was earlier described as a serious limitation on this freedom: the use of state power to compel belief through positive action by the citizen, failing which the citizen will face some sort of adverse consequence, penalty, or punishment. What follows is a primer on three of these current cases.

**CANADA SUMMER JOBS**

The Canada Summer Jobs program, an initiative of the federal government, helps to create summer jobs for secondary and post-secondary students by offering funds to entities such as not-for-profit organizations so that they can hire these Canadians. Many churches and religious organizations have
historically relied on the program to hire individuals to support activities such as summer camps and charitable works.

For the 2018 program, any organization that wished to obtain funding for a job was required to attest that “both the job and the organization’s core mandate respect individual human rights in Canada, including the values underlying the Canadian Charter of Rights and Freedoms as well as other rights.” The problem—from a freedom-of-conscience perspective—is that the government insisted that the human rights which applicants for funding must endorse include “reproductive rights” such as “the right to access safe and legal abortions.” As a result, applicants who oppose abortion on moral or religious grounds were denied funding for their summer initiatives. Many chose to not apply for funding. The attestation sparked an uproar across the political spectrum in Canada, attracting sustained media coverage for weeks. To date, the federal government has not amended the text of the attestation. Lawsuits alleging that the attestation is unconstitutional are currently before the courts.

The notion that people who disagree with the state on issues such as abortion must either adopt the state’s view or be excluded is acceptable in totalitarian regimes.

There is a strong, legal argument that the attestation in its current form violates the Charter protections for freedom of conscience and religion, and perhaps also freedom of expression. A government is free to believe and enforce that access to abortion is a human right. If it is also legally bound to protect conscience rights, a government cannot, given the inescapable moral controversy surrounding abortion and the Charter rights of Canadians who profess a different moral view, compel that belief through the attestation. The practical effect is to make access to a taxpayer-funded federal program conditional on agreement with the government's own views on contestable question of conscience. The policy of the federal government regarding the Canada Summer Jobs program amounts to weaponizing the Charter, using it to exclude nonconforming citizens. The federal government, in this case, has forgotten that the Charter is meant to be a shield for citizens against the abuse of state power. The Canada Summer Jobs controversy is also troubling because it requires citizens who do not wish to take a position on issues such as abortion to do so in order to
receive this public benefit. A landscaper that hires extra hands in the summer may have no interest whatsoever in taking a public stand on abortion, but the current policy forces him to do so. As an alternative to the attestation, the federal government could have required applicants to affirm that any funds they receive from the program would be used for lawful purposes. There is nothing objectionable with requiring such an affirmation, and it is unlikely that it would have posed any difficulty for applicants.

The notion that people who disagree with the state on issues such as abortion must either adopt the state’s view or be excluded is acceptable in totalitarian regimes. It is not acceptable in Canada—a country that strives, in the words of the Charter, to be a “free and democratic society.” Using the Charter to legitimize this tactic is disturbing given that Morgentaler, the Supreme Court of Canada’s key decision on abortion, suggested that the state can restrict abortion in certain circumstances. The state’s interest in restricting abortion becomes more compelling the closer the unborn child is to birth. There has been a deliberate distortion of what Morgentaler stands for as a matter of law since its release in 1988. The ruling does not constitutionally guarantee unrestricted access to abortion in Canada. The court’s decision on abortion, “profound as it was, did not create a right to abortion for Canadian women, nor did it offer any resolution of the abortion issue.”

HEALTH-CARE REFERRALS

In Ontario, doctors may refuse to perform procedures or prescribe drugs they deem immoral. However, the public body that regulates these doctors—the College of Physicians and Surgeons of Ontario (CPSO)—has stipulated that they must provide an “effective referral” after such a refusal. An effective referral means that the objecting doctor must find a doctor who does not object to the procedure or drug and subsequently lead the patient to that doctor.

Referrals are morally problematic for some doctors. Imagine if physician-assisted death were still a crime today (as it was until 2016). A doctor would commit the crime not only by directly assisting a suicide but also by indirect involvement—by providing an effective referral, for example. For many physicians, when it comes to procedures such as abortion and assisted death, a referral is the same as saying “I don’t kill people myself but let me tell you about the guy down the street who does.” In other words, a
referral is similar to driving the robber to the bank—a degree of complicity that makes the driver no less a bank robber than the person who forces the teller to empty the safe at gunpoint.

A group of individual doctors and interested organizations have launched a lawsuit against the CPSO in which they allege that this policy violates freedom of conscience and religion in the Charter. In January 2018, an Ontario court upheld effective referrals. The court found that obligatory effective referrals violate the Charter, but deemed the violation justified because referrals facilitate "equitable access" to health care. The case seems destined for the Supreme Court of Canada.

The CPSO referral policy for doctors in Ontario unjustifiably violates their freedom of conscience. Health care is not a freestanding Charter right. As for the notion of a right to procedures such as abortion and assisted death, there is an important—and often overlooked—difference between saying that the Charter precludes the state from criminalizing these procedures in certain circumstances and saying that the Charter obliges the state to deliver these procedures, on demand, through a public health-care system. Canadian courts have said the former, not the latter. There is, in short, only one Charter right at issue: the freedom of conscience of health-care workers.

Yet procedures such as assisted death and abortion are lawful, and the state has chosen to deliver them as health care. The Supreme Court predicted the need to reconcile access and conscience when it opened the door to assisted death in 2015. Certain provinces have taken steps that better reconcile these interests than requiring referrals. Alberta, for example, created a public health office that handles assisted death. In any event, refusals to refer may not even impair access to lawful health-care services. The Ontario court, in its ruling on effective referrals, noted that there is no evidence to demonstrate that conscientious refusals to refer affect access to health care. This finding of the court demands an answer as to why referrals are a justifiable breach of freedom of conscience. The Ontario court neither asked nor answered this question.

While some might say that the essence of a doctor’s job is to provide health care as the state defines it, the substance of health care—the body, life, and death—counsels ample room for moral reflection. There may be no sector of society that is more imbued with moral considerations than health care. The idea of doctors and other health-care workers that are uncritically bureaucratic rather than morally sensitive is unsettling. Banishing conscientious objectors also ignores the link between human dignity and
pursuing one’s chosen profession. This link seems especially strong in a field such as health care. The medical profession existed long before the state involved itself in it. Most people do not consider health care to be just another job. They consider it a vocation that includes a host of moral and ethical considerations encountered each day in practice.

Barriers to lawful health-care services—whether created by geography, funding, competence, or conscience—can cause significant distress for patients. Ian Shearer, who was refused assisted death at a Catholic hospital and suffered on account of the delays associated with his transfer to a hospital that would perform the procedure, is an example. Another is Jessica Leeder, a woman who encountered several regulatory hurdles before she obtained an abortion. These experiences are painful; they must not be trivialized. However, restricting freedom of conscience in the form of requiring referrals is not the appropriate or just solution. This approach downloads the responsibility for preventing these experiences to health-care workers to a degree that is disproportionate to the limit on their freedom of conscience for several reasons—here we highlight three.

First, as already mentioned, there is no Charter right to health care or to specific health-care procedures, but health-care workers are granted freedom of conscience under the Charter. Second, referrals involve a high degree of complicity with the procedure or medication that the health-care worker considers immoral. Even fervent critics of conscientious objection in health care acknowledge the moral dilemma posed by referrals. This dilemma leaves the health-care worker with a cruel choice: violate her conscience (and likely suffer some sort of distress) or leave a cherished profession that she may consider a calling. Forcing this choice is oppressive when one considers that, among the numerous procedures and drugs that are delivered in health care, this worker may conscientiously object to only a very small percentage. Third, there are alternatives to referrals that are feasible, affordable, effective, and that reconcile the interests of patients and health-care workers.

Among these alternatives, the CPSO could have created a public office that manages certain procedures, such as the office in Alberta for assisted death. A related option is to require objecting doctors to inform patients of the office rather than require direct referrals. Quebec adopted this approach for assisted death. Another option is to create an online database that indicates which physicians are willing to perform those procedures to which others object for reason of conscience. The CPSO website already has a searchable database of physicians with customizable search criteria such as the physician’s gender and language. It would not be difficult to add
search criteria for the relatively few procedures and drugs that are widely recognized to provoke conscientious objections. All of these options inflict less harm on the freedom of conscience of health-care workers than obligatory referrals. They are, by all accounts, inexpensive and effective. There is no evidence that these measures impair access to procedures or that they are inferior in this regard when compared to referrals.

**GENDER IDENTITY AND EXPRESSION**

In 2017, the Parliament of Canada enacted Bill C-16, which amended the Canadian Human Rights Act to include “gender identity or expression” as a prohibited form of discrimination under that statute and amended the Criminal Code to (1) criminalize the promotion of hatred or genocide in relation to persons distinguished by gender identity or expression and (2) require judges, when crafting a sentence for a crime, to consider whether bias, prejudice, or hate based on gender identity or expression motivated the offender. Bill C-16 generated heated debate over concerns that it will suppress—and even penalize—certain forms of speech and even views on transgender issues.

At first blush, these concerns are misplaced. Aside from the federal Canadian Human Rights Act, each province and territory has human rights legislation. The purpose of this legislation—often called a human rights code—is to ban certain kinds of discrimination in contexts such as employment, housing, and services available to the public. At this time, all human rights codes in Canada ban discrimination in these contexts on the basis of gender identity or expression (along with other bases such as religion, sex, and sexual orientation). If a transgender person applies for a job or books a room at a hotel, that person cannot be denied the job or the room because of his or her gender identity or expression. If an employee asks for an on-the-job accommodation connected to their gender identity or expression, the employer must grant it unless it would entail undue hardship. The changes to the Criminal Code acknowledge the evil of harming someone out of hatred toward their gender identity or expression—in the same way that the Criminal Code acknowledges the evil of harming someone because of their religion, sex, or sexual orientation.

Targeting a person because of their gender identity or expression is reprehensible, and no person should be subjected to unjustified discrimination on these grounds. An example of justified discrimination is where employment is denied due to a job requirement. A person with
impaired vision who is denied a job as a pilot is discriminated against because of a disability, but we accept—given the nature of the job and interests such as public safety—that the discrimination is justified.

The significance of gender provisions in human rights codes for freedom of conscience is how these provisions will be interpreted by courts and human rights tribunals, particularly with respect to the nature of (and relationship between) sex and gender. It is one thing to acknowledge a conflict between a person’s biological sex and the gender with which they identify—that a person born with male genitalia can identify as a woman, and vice versa. It is an entirely different thing to conclude, for example, that a trans woman is no different from a non-trans woman—that “trans women are women.” To force persons to adopt one of these views, in violation of their moral convictions on the nature of sex and gender, may violate their freedom of conscience.

Targeting a person because of their gender identity or expression is reprehensible...

An example of where this issue might arise is the potential requirement of using gender-neutral pronouns. Professor Jordan Peterson of the University of Toronto brought this issue to the headlines, taking the view that these changes to the law will indeed mandate the use of preferred pronouns. Peterson, who stated he would not use these pronouns in light of the importance he ascribes to free speech, also expressed concern that the amendments to the Criminal Code in Bill C-16 could make refusals to use gender-neutral pronouns a hate crime. The Ontario Human Rights Commission, in its commentary on Ontario’s human rights code, suggests that gender provisions could require an employer to accommodate a transgender employee by using the pronouns that the employee prefers. For some persons, however, the use of these pronouns signifies agreement with a particular view on the nature of sex and gender—one that might betray their conscience.

The tenor of the debate over gender provisions in human rights codes—along with the opinion of bodies such as the Ontario Human Rights
Commission—may signal that these provisions are embedded with ideological teachings on sex and gender. For some, the imperative for protecting gender identity and expression in human rights codes may go beyond ensuring safety, security, and respect for transgender persons—all of which are pressing and legitimate concerns. Arguably, the inclusion of these grounds of discrimination are also meant to reflect certain viewpoints within the ongoing debate on the relationship between gender and sex. The Ontario Hockey Federation announced that coaches must create space for the use of gender-neutral pronouns—and failure to do so may amount to gender discrimination. Barry Neufeld, a school trustee in British Columbia who has criticized curriculum changes concerning sexual orientation and gender identity, is now the subject of a human rights complaint because of that criticism.

Transgenderism touches on issues that are contested and unresolved. But in an era when absolute truth is contested, the law has increasingly become a source of truth. This faith in the law increases the chance that acceptable views on sex and gender will change based on what gender provisions in human rights codes are interpreted to teach about these topics. This is a consequence of legal positivism, one of the forces that is challenging the freedom, on matters of conscience, to profess beliefs that differ from what the law says. If the law is understood to override private conscience, freedom of conscience—a fundamental human right—risks becoming a dead letter.

**Conclusion**

Freedom of conscience is a fundamental human right. It lets us live in alignment with our moral convictions. Like all other human rights, this one is not absolute. But freedom of conscience should be robustly protected given what is at stake when it is threatened. When a person betrays her conscience, she violates her integrity, identity, and human dignity.

Conscientious objectors are often persecuted in their time, but seen in a better light later on. Muhammad Ali conscientiously refused to fight in the Vietnam War. In response, the World Boxing Association stripped him of his world heavyweight championship and banned him from boxing for three years. Ali was arrested, tried, and found guilty of evading military service. The US Supreme Court overturned the conviction, but by then Ali had gone four years without boxing. Desmond Doss, a pacifist who suffered ridicule for refusing to bear arms in World War II, won the US Medal of
Honor for his heroism as a combat medic. The film *Hacksaw Ridge* celebrated his story. Thomas More, the sixteenth-century Chancellor of England, lost his head for refusing to recognize England's split from the Catholic Church. Today pilgrims honour the "man for all seasons" by visiting the place where his head now lies. That place is an Anglican church in Canterbury—a poignant twist of fate, as the Church of England is what More conscientiously refused to recognize.

Suppressing beliefs with which we disagree or that we find offensive in the name of tolerance and liberalism is a contradiction in terms.

Admiration for Ali, Doss, and More today—regardless of whether one shares their convictions—reveals a shared respect for moral courage. While most of us will never be forced to choose between our profession (let alone our life) and our conscience, we all hope—should that scenario ever confront us—to be free to choose the latter. Shortly after Muhammad Ali's death in 2016, a journalist reflected on how Ali's refusal to bear arms demonstrated the "varied bridges he refused to cross at the expense of his dignity, his integrity, his self-worth and self-respect, all which he held up higher than any amount of power, fame and glory."  

The outcomes of the current controversies that engage freedom of conscience will not only signal the extent to which Canadians can conscientiously participate in public life—in other words, whether they can live in alignment with who they are and what they stand for in matters of morality. These outcomes will also speak volumes about who we are and what we stand for— as a society. Suppressing beliefs with which we disagree or that we find offensive in the name of tolerance and liberalism is a contradiction in terms. The fact that the state has deemed something legal does not remove a person's freedom to express her moral opposition to it. This freedom is not absolute, but its roots—integrity, identity, and dignity—are necessary for human flourishing. These roots must therefore be top of mind whenever limitations on freedom of conscience are proposed. We believe that governments should only limit this human right if there is a compelling justification. In our view, this threshold has not been met in the litigation over health-care referrals in Ontario or the attestation for Canada Summer Jobs funding. The fate of these court cases rests in large part on
the sincerity of our commitment to accommodate difference—even when most of us passionately oppose the difference that seeks accommodation. This commitment, though challenging, is a prerequisite to the "free and democratic society" that the Charter declares Canada to be.

CITATIONS


3) Sorabji, Moral Conscience, 15.

4) Sorabji, Moral Conscience, 15.


6) Thomas Aquinas, Summa theologicae, I-II, question 19, article 5. See page 2716 of http://www.documentacatholicomnial.eu/03d/1225-1274_Thomas_Aquinas__Summa_Theologiae_%5B1%5D_EN.pdf


8) Langston, Conscience and Other Virtues, 39.


16) Wicclair, Conscientious Objection in Health Care, 4.


29) Epstein and Baile Hamric, “Moral Distress.”


31) Wicclair, Conscientious Objection in Health Care, 11.


38) See chapter 7 of Mary Anne Waldron, Free to Believe: Rethinking Freedom of Conscience and Religion in Canada (Toronto: University of Toronto Press, 2013).


42) R v Big M Drug Mart.

43) Mouvement laïque québécois v Saguenay (City), [2015] 2 SCR 3.


45) R v Morgentaler, 166.


50) Epp-Buckingham, Fighting over God, 144-147.


Freedom of Conscience

Having been banished from Massachusetts Bay, Roger Williams turned his new community into a model of respect for other beliefs, accepting those with whom he did not agree, in religious and political matters, as long as they were good citizens and worked for the good of the colony.

In addition to founding a place, Roger Williams helped to lay the groundwork for a great principle. For that reason, his legacy matters to people who will never come anywhere near to Rhode Island.
Freedom of conscience – sometimes called “freedom of worship” or “religious freedom” – means simply the freedom to worship in one’s own way, including the right not to worship. It could also be simplified to a single word – co-existence – except that word implies one group, in power, tolerating another. Given how loose the original authority was in Rhode Island, and how much depended on the support given by Native Americans; it is perhaps more accurate to simple focus on the freedom.

Before the founding of Rhode Island, religion had been a tremendously divisive force, separating nations and groups within nations. One of the keenest insights of Roger Williams was that “a wall of separation” could be built between religion and government. The separation of church and state has become a bedrock idea of the United States, enshrined in the first amendment to the Constitution and accepted by billions around the world as a reasonable arrangement that endangers neither religion nor government.

For most of recorded history, it had not been so. Before 1636, nearly every government on earth assumed responsibility for spiritual as well as political concerns. Even the Puritans who founded Massachusetts aspired to fuse them. Although they bitterly resented the way they had been persecuted by religious authorities in England, they never thought to dissolve the connection between church and state, they simply hoped to do it in their own way.

Roger Williams was different. From the moment of his arrival, he raised troubling questions about the new “Bible Commonwealth,” as Massachusetts liked to think of itself, and the way it merged civic and religious authority. He disliked specific beliefs and practices – for example, taking land from Native Americans, refusing to separate from the Church of England, or holding on to rituals inherited from the Church of England.

But he also disliked the way in which these beliefs were enforced by a government that combined religious and political authority into one. Throughout the story of his estrangement from the colony’s leaders, we hear that he was holding meetings in his home at Salem, where he could speak freely on the subjects that bothered him, and preach on religious topics within a structure that was not controlled by anyone else. That kind of free exercise of thinking – freedom of speech as well as of religion – was anathema to the leaders at Boston (who would suppress similar sorts of gatherings led by Anne Hutchinson soon after). It came naturally, however, to a disciple of Sir Edward Coke, whose most famous maxim was, “a man’s home is his castle.”

When he was forced from his, Roger took care to build a stronger architecture of free thinking at Providence. There, people were far freer to worship according to their consciences. Even the groups that Roger Williams found disagreeable – Quakers, for example – were permitted to stay in Rhode Island. By the end of the 17th century, Jews were living in Newport, proving that even non-Christians were welcome in a colony that was noticeably different from its neighbors.

Throughout his long life, Roger Williams stood up for this principle. It was hardly a passing fancy. He proclaimed it before he was banished; he defended it after he was banished (especially in his long set of exchanges with John Cotton), and to the end of his life, he was writing about it in his letters. In one of them, from 1670, he wrote to a governor of Connecticut, proposing a series of debates around New England, and argued that “there is no prudent Christian way of preserving peace in the world but by permission of differing consciences.” To make the point even stronger, he added, “forced worship stinks in God’s nostrils.”
That freedom has never stopped setting an example. Although we cannot say with certainty that Rhode Island affected the thinking of the founders at the time of the Constitution, it did furnish an example of a colony that had survived and even prospered without an established religion. As the United States grew into a world power, this particular freedom (which was not historically supported by the British) grew to be recognized and practiced around the world -- not everywhere, and not with perfect consistency, but often enough to be recognized as a fundamental human right.

In the 20th century, the same idea was written into the founding documents of the United Nations. Article 18 of the Universal Declaration of Human Rights, issued in 1948, proclaims that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

But despite these high-minded principles, religious differences still cause complications for millions of people around the world. We should never minimize how difficult this simple freedom can be. In some countries, it is illegal to worship in a way that is different from the official religion of the state. In other countries, like North Korea, it is illegal to practice religion at all.

Each year, the U.S. Department of State issues a report on religious freedom around the world. We should never minimize the value of this simple freedom.

Even in highly-developed parts of the world, differences can quickly flare up over religious forms of clothing, or public displays of religious symbols on state-owned property. Rhode Island has seen many such controversies, including well-publicized situations involving Christmas trees at the State House and around the state's cities and towns. Some of these cases have gone to the highest levels of the judicial system.

In 1984, in the case of Lynch vs. Donnelly, the Supreme Court ruled narrowly (5-4) that a display of Christmas imagery by the city of Pawtucket did not constitute a violation of the separation of church and state.

In 2012, in Ahlquist vs. Cranston, the U.S. District Court for Rhode Island ruled that a "School Prayer" banner in Cranston West High School did constitute a violation of the separation of church and state.

In other words, Rhode Island continues to be a place where people think hard about these important issues, argue about them, resolve them, and then move on. That seems to be much in keeping with the spirit of Roger Williams.

AUTHOR/CONTRIBUTOR

Ted Widmer
Ted Widmer grew up in Rhode Island. He is the Director of the John W. Kluge Center at the Library of Congress, and a Senior Fellow of the Watson Institute at Brown University. He has written or edited many works of history, including The New York Times Disunion: A History of the Civil War; Listening In: The Secret White House Tape Recordings of John F. Kennedy, Ark of the Liberties: America and the World, and Brown: The History of an Idea.

FIVE PILLARS

› Freedom of Conscience
› Learning from Others
› Learning from the Land
› Imagination
› The Common Good

The Carter Roger Williams Initiative provides annual scholarships to high school seniors, helping Rhode Island students who appreciate and embody Roger Williams’s values attain a college education. The Carter Roger Williams Scholarship is intended to inspire students and their parents to think big about what’s possible for their future and to value the role of education. By providing resources about Roger Williams and his teachings, the Initiative is intended to establish a sense of place and pride for all Rhode Islanders.

The Carter Roger Williams Initiative was conceived of and funded by philanthropists Letitia and John Carter and is managed by the Rhode Island Foundation. Learn more here.

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72ND ANNUAL
GEORGE WASHINGTON LETTER READING

Touro Synagogue Foundation
and
Congregation Jeshuat Israel

Sunday, August 18, 2019
1:00 pm
Touro Synagogue
Newport, Rhode Island
To the President of the United States of America.

Sir:

Permit the children of the Stock of Abraham to approach you with the most cordial affection and esteem for your person and merits — and to join with our fellow citizens in welcoming you to Newport.

With pleasure we reflect on those days — those days of difficulty and danger, when the God of Israel, who delivered David from the peril of the sword, — shielded Your head in the day of battle: — and we rejoice to think, that the same Spirit, who rested in the Bosom of the greatly beloved Daniel enabling him to preside over the Provinces of the Babylonish Empire, rests and ever will rest, upon you, enabling you to discharge the arduous duties of Chief Magistrate in the States.

Deprived as we heretofore have been of the invariable rights of free Citizens, we now with a deep sense of gratitude to the Almighty disposer of all events behold a Government, erected by the Majesty of the People — a Government, which to bigotry gives no sanction, to persecution no assistance — but generously affording to all Liberty of conscience, and immunities of Citizenship: — deeming every one, of whatever Nation, tongue, or language equal parts of the great governmental Machine: — This so ample and extensive Federal Union whose basis is Philanthropy, Mutual confidence and Public Virtue, we cannot but acknowledge to be the work of the Great God, who ruleth in the Armies of Heaven, and among the Inhabitants of the Earth, doing whatever seemeth him good.

For all these Blessings of civil and religious liberty which we enjoy under an equal begin administration, we desire to send up our thanks to the Ancient of Days, the great preserver of Men — beseeching him, that the Angel who conducted our forefathers through the wilderness into the promised Land, may graciously conduct you through all the difficulties and dangers of this mortal life: — And, when, like Joshua full of days and full of honor; you are fathered to your Fathers, may you be admitted into the Heavenly Paradise to partake of the water of Life, and the tree of immortality.

Done and Signed by order of the Hebrew Congregation in Newport, Rhode Island August 17th 1790.

Moses Seixas, Warden.

To the Hebrew Congregation in Newport Rhode Island.

Gentlemen:

While I receive, with much satisfaction, your Address replete with expressions of affection, and esteem I rejoice in the opportunity of assuring you, that I shall always retain grateful remembrance of the cordial welcome I experienced in my visit to Newport, from all classes of Citizens.

The reflection on the days of difficulty and danger which are past is rendered the more sweet, from a consciousness that they are succeeded by days of uncommon prosperity and security. If we have wisdom to make the best use of the advantages with which we are now favored, we cannot fail, under the just administration of a good Government, to become a great and happy people.

The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.

It would be inconsistent with the frankness of my character not to assure that I am pleased with your favorable opinion of my Administration, and fervent wishes for my felicity. May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and fig-tree and these shall be none to make him afraid. May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastinglly happy.

G. Washington.
B. JOHN LOCKE: A LETTER CONCERNING TOLERATION

The English philosopher John Locke has long been recognized as a seminal figure not only in the emergence of liberalism and social contract theory, but also in the framing of modern conceptions of religious freedom. His work corresponds at the level of philosophy to the patterns of toleration that were emerging at the time in society. Many of his most fundamental arguments have become so axiomatic that their provenance and revolutionary nature are almost forgotten.26 In fact, Locke’s writings on the relationship between church and state represented a dramatic departure, at the level of theory, from previous thought on the subject. Throughout history, it was assumed that state implementation of religious belief was necessary for religious truth, and that religious and cultural homogeneity were necessary...

25. Second Test Act (1678), reprinted in 2 Sources of English Constitutional History, supra
for political stability. The idea was that “an established homogeneous reli-
gion . . . could serve as a kind of social glue and ultimate motivation for loyalty
and obedience to the regime.” In Europe, this impression was reinforced by
the religious wars that ravaged the continent.

In his Letter Concerning Toleration, Locke rejected the prevailing notions of
church and state in his time. He offered powerful arguments that state coercion
is ineffective in matters of religion, that the state can force no person to
heaven. At best, state coercion can only derive outward hypocrisy. Moreover,
he contended that rather than destabilizing a regime, toleration and respect
could have the opposite effect, creating of minority groups a source of social
stability rather than social disintegration. Locke profoundly influenced many
American thinkers, most notably Thomas Jefferson and James Madison, who
drew upon his work in building their case for a broad understanding of
religious freedom. Locke’s insights laid the foundations for modern regimes
of religious liberty. The passages that follow express six of his key ideas: 28

[Separation of Civil and Religious Spheres]
I esteem it above all things necessary to distinguish exactly the business of civil
government from that of religion and to settle the just bounds that lie between
the one and the other. If this be not done, there can be no end put to the
controversies that will be always arising between those that have, or at least
pretend to have, on the one side, a concernment for the interest of men’s souls,
and, on the other side, a care of the commonwealth.

The commonwealth seems to me to be a society of men constituted only for
the procuring, preserving, and advancing their own civil interests. Civil inter-
ests I call life, liberty, health, and indolency of body; and the possession of
outward things, such as money, lands, houses, furniture, and the like. It is the
duty of the civil magistrate, by the impartial execution of equal laws, to secure
unto all the people in general and to every one of his subjects in particular
the just possession of these things belonging to this life.

[Civil Power Does Not Extend to the Religious Sphere]
Now that the whole jurisdiction of the magistrate reaches only to these civil
concernments, and that all civil power, right and dominion, is bounded and
confined to the only care of promoting these things; and that it neither can nor
ought in any manner to be extended to the salvation of souls, these following
considerations seem unto me abundantly to demonstrate.

First, because the care of souls is not committed to the civil magistrate, any
more than to other men. It is not committed unto him, I say, by God; because it
appears not that God has ever given any such authority to one man over
another as to compel anyone to his religion. Nor can any such power be vested
in the magistrate by the consent of the people, because no man can so far
abandon the care of his own salvation as blindly to leave to the choice of
any other, whether prince or subject, to prescribe to him what faith or worship
he shall embrace.

27. W. Cole Durham, Jr., Perspectives on Religious Liberty: A Comparative Framework, in
Religious Human Rights in Global Perspective: Legal Perspectives 1, 7 (Johan D. van der Vyver & John
[Second], the care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God.

[Third], the care of the salvation of men's souls cannot belong to the magistrate; because, though the rigour of laws and the force of penalties were capable to convince and change men's minds, yet would not that help at all to the salvation of their souls. For there being but one truth, one way to heaven, what hope is there that more men would be led into it if they had no rule but the religion of the court and were put under the necessity to quit the light of their own reason, and oppose the dictates of their own consciences.

These considerations ... seem unto me sufficient to conclude that all the power of civil government relates only to men's civil interests, is confined to the care of the things of this world, and hath nothing to do with the world to come.

[Religion Not Entitled to Assert Civil Power]
As the magistrate has no power to impose by his laws the use of any rites and ceremonies in any Church, so neither has he any power to forbid the use of such rites and ceremonies as are already received, approved, and practised by any Church; because, if he did so, he would destroy the Church itself. ...

You will say, by this rule, if some congregations should have a mind to sacrifice infants, or (as the primitive Christians were falsely accused) lustfully pollute themselves in promiscuous uncleanness, or practise any other such heinous enormities, is the magistrate obliged to tolerate them, because they are committed in a religious assembly? I answer: No. These things are not lawful in the ordinary course of life, nor in any private house; and therefore neither are they so in the worship of God, or in any religious meeting. But, indeed, if any people congregated upon account of religion should be desirous to sacrifice a calf, I deny that that ought to be prohibited by a law. The part of the magistrate is only to take care that the commonwealth receive no prejudice, and that there be no injury done to any man, either in life or estate.

[Let us inquire, in the next place: How far the duty of toleration extends, and what is required from everyone by it?]

[First, I hold that no church is bound, by the duty of toleration, to retain any such person in her bosom as, after admonition, continues obstinately to offend against the laws of the society. For, these being the condition of communion and the bond of the society, if the breach of them were permitted without any animadversion the society would immediately be thereby dissolved.

Secondly, no private person has any right in any manner to prejudice another person in his civil enjoyments because he is of another church or religion. These are not the business of religion. No violence nor injury is to be offered him, whether he be Christian or Pagan.

[Churches [also] stand, as it were, in the same relation to each other as private persons among themselves: nor has any one of them any manner of jurisdiction over any other; no, not even when the civil magistrate ... comes to be of this or the other communion. For the civil government can give no new right to the church, nor the church to the civil government.

[Ecclesiastical authority] ought to be confined within the bounds of the Church, nor can it in any manner be extended to civil affairs, because the
Church itself is a thing absolutely separate and distinct from the commonwealth. The boundaries on both sides are fixed and immovable.

[Incompetence of State to Ascertain Religious Truth]
Let us suppose two churches; the one of Arminians, the other of Calvinists; residing in the city of Constantinople. Will anyone say that either of these churches has right to deprive the members of the other of their estates and liberty (as we see practised elsewhere) because of their differing from it in some doctrines and ceremonies, whilst the Turks, in the meanwhile, silently stand by and laugh to see with what inhuman cruelty Christians thus rage against Christians? But if one of these churches hath this power of treating the other ill, I ask which of them it is to whom that power belongs, and by what right? It will be answered, undoubtedly, that it is the orthodox church which has the right of authority over the erroneous or heretical. This is, in great and specious words, to say just nothing at all. For every church is orthodox to itself; to others, erroneous or heretical. For whatsoever any church believes, it believes to be true and the contrary unto those things it pronounces to be error. So that the controversy between these churches about the truth of their doctrines and the purity of their worship is on both sides equal; nor is there any judge, either at Constantinople or elsewhere upon earth, by whose sentence it can be determined. The decision of that question belongs only to the Supreme Judge of all men, to whom also alone belongs the punishment of the erroneous. In the meanwhile, let those men consider how heinous they sin, who, adding injustice, if not to their error, yet certainly to their pride, do rashly and arrogantly take upon them to misuse the servants of another master, who are not at all accountable to them.

[Plurality as a Source of Stability]
Let us therefore deal plainly. The magistrate is afraid of other Churches, but not of his own, because he is kind and favourable to the one, but severe and cruel to the other. These he cherishes and defends; those he continually scourges and oppresses. Let him turn the tables. Or let those dissenters enjoy but the same privileges in civils as his other subjects, and he will quickly find that these religious meetings will be no longer dangerous. Just and moderate governments are everywhere quiet, everywhere safe; but oppression raises ferment and makes men struggle to cast off an uneasy and tyrannical yoke. I know that seditions are very frequently raised upon pretence of religion, but it is as true that for religion subjects are frequently ill treated and live miserably. Believe me, the stirs that are made proceed not from any peculiar temper of this or that Church or religious society, but from the common disposition of all mankind, who when they groan under any heavy burdenendeavour naturally to shake off the yoke that galls their necks. There is only one thing which gathers people into seditious commotions, and that is oppression.

Now if that Church which agrees in religion with the prince be esteemed the chief support of any civil government, and that for no other reason (as has already been shown) than because the prince is kind and the laws are favourable to it, how much greater will the security of government where all good subjects, of whatsoever Church they be, without any distinction upon account of religion, enjoying the same favour of the prince and the same benefit of the laws, shall become the common support and guard of it, and where none will have any occasion to fear the severity of the laws but those that do injuries to their neighbours and offend against the civil peace?
[No Obligation to Tolerate Intolerance]

Another more secret evil, but more dangerous to the commonwealth, is when men arrogate to themselves, and to those of their own sect, some peculiar prerogative covered over with a specious show of deceitful words, but in effect opposite to the civil right of the community. For example: we cannot find any sect that teaches, expressly and openly, that men are not obliged to keep their promise; that princes may be dethroned by those that differ from them in religion; or that the dominion of all things belongs only to themselves. For these things, proposed thus nakedly and plainly, would soon draw on them the eye and hand of the magistrate and awaken all the care of the commonwealth to a watchfulness against the spreading of so dangerous an evil. But, nevertheless, we find those that say the same things in other words. What else do they mean who teach that faith is not to be kept with heretics? Their meaning, forsooth, is that the privilege of breaking faith belongs unto themselves; for they declare all that are not of their communion to be heretics, or at least may declare them so whenever they think fit. What can be the meaning of their asserting that kings excommunicated forfeit their crowns and kingdoms? It is evident that they thereby arrogate unto themselves the power of deposing kings, because they challenge the power of excommunication, as the peculiar right of their hierarchy. These, therefore, and the like, who attribute unto the faithful, religious, and orthodox, that is, in plain terms, unto themselves, any peculiar privilege or power above other mortals, in civil concerns; or who upon pretence of religion do challenge any manner of authority over such as are not associated with them in their ecclesiastical communion, I say these have no right to be tolerated by the magistrate; as neither those that will not own and teach the duty of tolerating all men in matters of mere religion.

COMMENTS AND QUESTIONS

1. Does Locke accurately depict the line between civil and religious authority? Is his delineation biased in favor of Christianity or Protestantism?

2. Locke suggests that at least one of the reasons the civil magistrate should not intervene in religious matters is that authentic belief cannot be coerced. At best, a state can coerce outward performance, which amounts only to hypocrisy. Is this argument correct? Can state influence mold religious belief? Even if a state cannot instill belief, can't it block belief formation by preventing the dissemination of beliefs?

3. Is Locke correct in claiming that the state is incompetent in matters of religion? Does this create a jurisdictional bar to state assessment of religion? Is the state competent to assess particularly dangerous forms of religion? What are the limits of state competence?

4. Locke argues that the intolerant need not be tolerated. Is this a workable principle for setting the outside limits of religious freedom? Of liberal theory in general? How wide a circle of protection does this principle draw? Various passages suggest that Locke may have thought Catholics, Muslims, and atheists should not be protected. This seems much too narrow. Could Locke have had the right principle but applied it too narrowly?

5. Our historical experience suggests the notion that respect for difference can yield stability for a much more pluralistic society than Locke imagined.
While the precise doctrines and definitions differ among the varying sects of Islam, total devotion to the faith is a common thread. Professor Gregory Gleason has written, “Muslim believers stress that Islam is not only a religious doctrine but also a way of life. Islam does not make distinctions between doctrine and life, between thought and action, between word and deed. Islam demands total commitment of the individual for it is a living doctrine.”

III. GENERAL JUSTIFICATIONS FOR FREEDOM OF RELIGION AND BELIEF

We now shift our attention from the question of how to define religion to the question of why it deserves protection. The justifications for religious freedom are many, varied, and often contradictory. There are also concerns about some negative features of religion that may argue for curtailing religious freedom. In a large sense, the justifications for freedom of religion or belief, as well as the arguments for setting some limitations, run through virtually all the cases in this book. In this chapter, we are only able to touch on a few of the major arguments. Many of these arguments tend to be made when constitutional provisions are adopted, and are simply assumed in the context of adjudicating constitutional cases. Our hope is that the remainder of this chapter will spark inquiry that may lead to deeper thought concerning the arguments for freedom of religion or belief, and how they affect the breadth of constitutional protections.

A. CLASSIC ARGUMENTS FOR RELIGIOUS FREEDOM

Many of the key, foundational arguments for religious freedom derive from Lockean thought, which was studied in Chapter 1. We now examine some of the arguments championed by early American founders. As you read the passages that follow, you may want to ask yourself how the American arguments relate to the Lockean position. To what extent are the American arguments new and innovative, and to what extent do they draw on Lockean or more general British background?

1. Early American Arguments

As noted in Chapter 1, eighteenth-century Virginia was a honing ground for early American arguments justifying or curtailing various dimensions of religious freedom. In particular, Patrick Henry’s assessment bill, James Madison’s Memorial and Remonstrance, and Thomas Jefferson’s religious liberty statute are three of the most significant documents leading up to the adoption of the First Amendment.

Following the Revolutionary War, prior to the assessment bill, many Americans feared that their newly founded society was degenerating, resulting in a decline in public virtue, which many regarded as critical to the success of

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the republican government. Some pointed to the decreasing influence of religion as one of the primary problems. One idea that quickly gained momentum was to strengthen the impact of religion through state support, thereby helping to cultivate a more virtuous citizenry. As mentioned in Chapter I, Patrick Henry, one of the state’s most powerful politicians, joined this movement, proposing that the state legislature adopt a general assessment to support churches in Virginia, with taxpayers free to select the specific church that would receive their funds.40

After Patrick Henry presented the assessment bill, opponents delayed the final vote on the measure so they could have time to mount a public attack. James Madison, one of the most prominent challengers, began working on a petition to rally public opposition. The result, Madison’s Memorial and Remonstrance, was circulated throughout the state, leading to the bill’s demise and paving the way for the passage of Jefferson’s Virginia Statute for Religious Freedom. This critical document outlines some of the most forceful arguments in support of church-state separation, many of which remain highly relevant and persuasive today.41

**James Madison, Memorial and Remonstrance Against Religious Assessments (1785)**

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled “A Bill establishing a provision for Teachers of the Christian Religion,” and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, “that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.” The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: it is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that

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41. Id. at 71.
in matters of Religion, no man’s right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

2. Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power be inviolably maintained; but more especially, that neither of them be suffered to overlap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. …

4. Because, the bill violates the equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If “all men are by nature equally free and independent,” all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an “equal title to the free exercise of Religion according to the dictates of Conscience.” Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. …

5. Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world; The second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human
laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence. 

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. 

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be necessary to civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights by any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from the generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. ... Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain repose from his troubles.

10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. ...
12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of leveling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority?

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured.

15. Because, finally, “the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience” is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the “basis and foundation of Government,” it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may control the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; may say that they may depose us of our very right of suffrage, and erect themselves into an independent and hereditary assembly: or we must say, that they have no authority to enact into law the Bill under consideration.

We the subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their Councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his blessing, may rebound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth.
COMMENTS AND QUESTIONS

1. In many ways, the Memorial and Remonstrance draws on reasoning advanced by Locke. In particular, Madison draws upon a line of thought going back to arguments in Locke's *A Letter Concerning Toleration* to explain that, contrary to the common assumption that endorsing or supporting religion would give added stability to a country, a broad understanding of religious freedom that treats all citizens equally gives greater legitimacy and stability to a nation. Not only does such a nation gain a "lustre to [the] country" by taking in religious refugees, but the "moderation and harmony" gained will increase support for a government, promote health and prosperity, and prevent animosities and jealousies over government preference and support.42 What other Lockeans views does Madison allude to? How do arguments in the Memorial and Remonstrance relate to Locke's social contract theory?

2. Over the last century, American courts have often turned to the Memorial and Remonstrance to try to decipher how the Founders understood concepts of church-state separation and establishment. In Everson v. Board of Education, a foundational Establishment Clause case, Justice Rutledge wrote in his dissenting opinion that because Madison's Remonstrance "reflect[s] not only the many legislative conflicts over the Assessment Bill and the Bill for Establishing Religious Freedom but also, for example, the struggles for religious incorporations and the continued maintenance of the glebes" that the document "is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.'" 330 U.S. 1, 37-38 (1947). How could arguments from the Remonstrance be used in debating for or against contested measures such as school prayer, parochial school vouchers, and public monuments associated with religion?

2. Contemporary Empirical Justification

BRIAN J. GRIM, RELIGIOUS FREEDOM: GOOD FOR WHAT AILS US?43

To judge from international survey data, people the world over want to be able to practice their religion freely. . . .

Yet at the same time, religion is implicated in many of today's most urgent security problems. Millions have been killed or displaced due to religion-related conflicts in the first years of the 21st century alone. Such conflicts lead to political instability, prevent the consolidation of democracy, and feed terrorism.

This raises a critical question: While the global public may want religious freedom, is it risky to give it to them? Or alternatively, could religious freedom in fact be an essential part of the solution to socio-political problems?

Is Religious Freedom Correlated with Socio-economic Well-being?

... According to a recent study of 101 countries conducted by the Hudson Institute's Center for Religious Freedom, the answer is yes. The presence of religious freedom in a country mathematically correlates with the presence of other fundamental, responsible freedoms (including civil and political liberty, press freedom, and economic freedom) and with the longevity of democracy.

The study [also] found that wherever religious freedom is high, there tends to be fewer incidents of armed conflict, better health outcomes, higher levels of earned income, and better educational opportunities for women. Moreover, religious freedom is associated with higher overall human development, as measured by the human development index.

Does Religious Freedom Lead to Socio-economic Well-being?

Religious freedom, then, is associated with better social outcomes, but can we say there is a causal relationship? More advanced statistical tests suggest that there is indeed a critical independent contribution that religious freedom is making. A growing body of research supports the proposition that the religious competition inherent in religious freedom results in increased religious participation; and religious participation in turn can lead to a wide range of positive social and political outcomes, as discussed below. Furthermore, as religious groups make contributions to society and become an accepted part of the fabric of society, religious freedom is consolidated. This can be conceptualized as a religious freedom cycle.

In recent years, many studies have looked at the benefits of the social capital and spiritual capital generated through active civic and religious involvement. As more people actively participate in religion, religious groups increasingly bring tangible benefits such as literacy, vocational, and health training, marital and bereavement counseling, poverty relief, and more. Faith-based organizations, for example, are the major providers of care and support services to people living with HIV/AIDS in the developing world, and there is a growing scientific evidence of the health benefits associated with religious participation itself. Some studies suggest that the advent of new religious forms can help to improve the lives of women and activate greater civic participation.

Established religions, however, often act to curtail competition from new religious groups by preventing proselytism, restricting conversion, and putting up barriers that make it difficult for new religions to gain a foothold. My colleague Roger Finke and I recently published a study in the American Sociological Review which found that the attempt to restrict fair religious competition results in more violence and conflict, not less. Specifically, we found that social restrictions on religious freedom lead to government restrictions on religious freedom and the two act in tandem to increase the level of violence related to religion—which in turn cycles back and leads to even higher social and government restrictions on religion. This creates what we call the religious violence cycle.

Our research on 143 countries finds that when governments and religious groups in society do not erect barriers to religious competition but respect and
protect such activities as conversion and proselytism, religious violence is
less.

A clear current example of the religious violence cycle can be seen in Iraq. The U.S. State Department concluded in 2007 that the religious freedom situation has dramatically deteriorated. In pre-invasion Iraq, life for many religious and ethnic communities was certainly dire, especially for Shiites and Kurds. However, in the years after the invasion, the Shi'a, who were previously targeted for violence, acquired the political reins, and with their newfound power, religiously oriented Shi'a parties successfully lobbied for the insertion of the so-called repugnancy clause in the recent Iraqi constitution, which requires that no law can contradict Islam. It essentially gives Islam, and advocates of Shi'a Islam in particular, veto power over any law in Iraq, lessening the power of any other religious group in the political process. This new political environment has exacerbated religious sectarian violence. In the process, minority religious groups ranging from Christians to Yazidis have been targeted. Now, the economy cannot get on its feet, democracy is not functioning, and women, especially in Baghdad by the account of many, have become virtual prisoners in their own homes for fear of unmentionable violence.

B. NATURAL LAW, NATURAL RIGHTS, AND RELIGIOUS FREEDOM

Another major strand of reasoning in support of religious freedom flows from the tradition of natural law and natural rights. These ideas rest on the belief that certain values, rights, and principles of morality are universally applicable and can be identified through human reason. The classic example of such thought is found in the opening lines of the American Declaration of Independence:

When in the Course of human events it becomes necessary for one people to
dissolve the political bands which have connected them with another and to
assume among the powers of the earth, the separate and equal station to which
the Laws of Nature and of Nature’s God entitle them, a decent respect to the
opinions of mankind requires that they should declare the causes which impel
them to the separation.

We hold these truths to be self-evident, that all men are created equal, that
they are endowed by their Creator with certain unalienable Rights, that among
these are Life, Liberty and the pursuit of Happiness.

The assertion that “the Laws of Nature and of Nature’s God” and “certain
unalienable Rights” are “self-evident” truths reflects the belief in the natural
right foundation of religious freedom, as well as of many other rights.

James Madison, as a legislator and polemicist, contributed writings that
reflect his deep-seated belief that religious liberty is a natural right. When the
Virginia Declaration of Rights was first drafted by George Mason, Madison
revised the promise of religious tolerance by government to employ language
that more powerfully enshrined religious liberty as a natural and absolute
right: “all men are equally entitled to the free exercise of religion.” Ultimately,
on the strength and conviction of Madison’s arguments during the founding period,

[The axiom emerged (shall we say) that liberty of conscience stands above and apart from the power of the state to legislate as a God-given, inalienable natural right of every individual person. It is antecedent to citizenship and independent of it, woven into human nature as inseparable from man’s very being or specific essence. This is the high ground theoretically claimed and politically won in the struggle for religious liberty, as the victory was conceived by Madison, his supporters, and associates.]

Though philosophical and political liberalism have largely moved on to other justifications of religious freedom, the idea of a natural right to religious liberty remains part of today’s philosophical debate. For example, Robert George argues for religious freedom based on the intrinsic value of religion, a value that by its very nature cannot be achieved coercively:

I maintain that the right to religious freedom is grounded precisely in the value of religion, considered as an ultimate intelligible reason for action, a basic human good. Is religion a value? . . . Irrespective of whether unaided reason can conclude on the basis of a valid argument that God exists — indeed, even if it turns out that God does not exist — there is an important sense in which religion is a basic human good, an intrinsic and irreducible aspect of the well-being and flourishing of human persons. Religion is a basic human good if it provides an ultimate intelligible reason for action. But agnostics and even atheists can easily grasp the intelligible point of considering whether there is some ultimate, more-than-human source of meaning and value, of enquiring as best one can into the truth of the matter, and of ordering one’s life on the basis of one’s best judgment. Doing that is participating in the good of religion . . .

For the sake of religion, then, considered as a value that practical reason can identify as an intrinsic aspect of the integral good of all human beings, government may never legitimately coerce religious belief; nor may it require religious observance or practice; nor may it forbid them for religious reasons. (To that extent, freedom of religion is absolute.) Moreover, government, for the sake of the good of religion, should protect individuals and religious communities from others who would try to coerce them in religious matters on the basis of theological objections to their beliefs and practices.

COMMENTS AND QUESTIONS

1. What grounds can you see for the Declaration’s assertion of self-evident rights? Do you consider them really self-evident, or is it possible for reasonable people to disagree about them?
2. Do you accept George’s argument that religion is intrinsic to human well-being and flourishing? How might a religious freedom regime based on

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George's arguments differ from one based merely on concerns about enhancing social cohesion?

3. Natural law arguments have lost traction in many settings. Do they have greater plausibility in the international human rights arena? Many human rights activists would continue to assert that the rights they defend are universally valid. Is this the contemporary version of a natural rights claim? Or are claims that human rights lack genuine universality more persuasive, thereby providing a refutation at the international level of the validity of natural law claims?

C. HUMAN DIGNITY

We next consider "the remarkably thoughtful justification put forward by the founding mothers and fathers of modern human rights: the drafters of the Universal Declaration of Human Rights 1947-1948," as explained by Norwegian scholar Tore Lindholm.⁴⁶

Pointing to Articles 1 and 29 as well as the Preamble of the Universal Declaration of Human Rights, Lindholm asserts two basic premises. First, "Every human being is born free and equal in dignity; human beings are, furthermore, presumed to be sufficiently reasonable and conscientious to observe a decent public order defined in terms of human rights."⁴⁷ Second, "If peoples organized as sovereign states, under such global circumstances for human freedom and dignity as prevail in the world now and in the foreseeable future, are not to disregard their moral commitment proclaimed in [the first premise], they are obliged to seek to agree on and establish an international regime for the domestic protection of people's dignity and freedom, by means of legally and politically codified rights, to be called 'human rights'."⁴⁸

Lindholm goes on to pose the question "[H]ow are human rights 'derived' from human dignity?"⁴⁹ His own response is that "[a] good beginning to an answer is... to make the notion of inherent human dignity operational for human rights as it were, by saying that if all humans have inherent dignity, then there is something about each and every human being such that certain things ought not to be done to her and certain other things ought to be done for her."⁵₀

However, Lindholm posits, "[W]e are still several steps away from justifying human rights, that is, justifying universally applicable entitlements that trump other political and moral interests."⁵¹

The first step is to be clear about "the circumstances of rights." It is not a self-evident universal truth that people have rights in virtue of their inherent dignity. In a flourishing closed, small, prosperous, and morally harmonious

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⁴⁷ Id.
⁴⁸ Id.
⁴⁹ Id. at 48.
⁵₀ Id.
⁵¹ Id.
society where people are oblivious of rights and lead fulfilling lives without rights, the very introduction of rights could bring moral decline, perhaps by aggravating interpersonal conflicts. The costs of rights are not just financial, but possibly moral. Nozick’s proposition, “individuals have rights and there are things no person or group may do to them (without violating their rights)” is an important truth in any modern, complex, and plural society. It is not a universal moral truth, not true in all social worlds. A social world in which Nozick’s proposition is true is one in which the circumstances of rights obtain.

A next step is to elucidate what goods and benefits people shall have secure access to by means of rights. The interest or values to be protected by a right must, for a morally justified human right to exist, be of great importance to people either generally or in significant cases and be significantly linked with people’s chance to lead lives answering to human dignity. Moreover, a good or benefit, even if deemed very important for a dignified human life, should not by right be protected as a human right unless general and minimally effective and even-handed protection is, or can be made, socially feasible. Hence, to be dearly loved; to avoid early sudden death or severe conflicts; or to have a happy family life are some very cherished goods that are unsuitable for protection by rights. Jefferson in the Declaration of Independence, when enumerating the most important goods to be protected by natural rights, included “life, liberty and the pursuit of happiness.” It would have been improper to proclaim a natural right to happiness since happiness whether as a full-fledged morally successful life or as a felicitous feeling cannot properly be safe-guarded by means of rights.

A reasonable counterargument to a proposal for something to be a human rights-protected good would be to show that there are alternative ways of protecting the good in question that are more suitable for the purpose, or less costly, or more efficient, than rights.

Finally, in this rudimentary checklist of considerations pertaining to “the derivation of human rights from human dignity,” I mention that the addressees of modern human rights, saddled by internationally binding law with the burden of implementing human rights protection for all human beings everywhere in the world, had to be modern territorial states, each state catering to people under their respective jurisdictions. In our world only states could have the requisite legitimacy, power, coercive apparatus, and other resources it takes. But for that reason, only norms and mechanisms that can attract reasonably broad international support can attain human rights status.

Lindholm considers human dignity to be a justification for religious freedom both basic and broad enough to encompass many and perhaps all different justifications of religious freedoms. Working out the implications of human dignity is therefore not a purely logical or philosophical exercise, then, but a political one, involving debate and compromise between all parties involved that will leave many important differences unsettled while still leading to a stable consensus in favor of religious freedom. This process will be discussed in more depth below as a possible solution to the problem of multiple incompatible justifications.

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53. Lindholm, supra note 46, at 48-49.
COMMENTS AND QUESTIONS

How do you interpret “human dignity”? How might it differ from the interpretations of human dignity by those with different political beliefs? Do you think the phrase “human dignity” has real content, or do you think that it can be stretched and twisted infinitely to fit one’s agenda?

IV. RELIGIOUS ARGUMENTS FOR FREEDOM, TOLERANCE, AND MUTUAL RESPECT

Religious believers often view their own faith traditions as being rooted in love, respect, and persuasion. However, nearly every religious tradition of which we are aware, certainly those with a long history, has a mixed record with respect to religious freedom. Most religious traditions are complex and have multiple sources of what is regarded as authoritative or sacred. Most religious traditions have been utilized by adherents to justify coercion. This takes a variety of forms, including forcing people to convert, often in the name of saving their souls, or establishing or preserving national identity, solidarity, and stability. It has also involved various aggressive forms of proselytism and cultural hegemony.

Others who are critical of religion see faith as one, if not the dominant, source of evil and wrongdoing in the world. These views, too, are an oversimplification and tend to exaggerate and distort the role that religion has played in political and economic events.

At the same time, there is near unanimity of opinion among almost all religions that each person should treat others in a decent manner. Almost all religions have passages in their holy texts, or writings by their leaders, that promote this ethic of reciprocity. The most commonly known version in North America is the Golden Rule of Christianity. It is often expressed as “Do unto others as you would have them do unto you.” The Golden Rule thus provides a basis for recognition of and respect for religious freedom within religions, as this principle is embedded in the doctrine of nearly every religion. Within Buddhism, for example, “... a state that is not pleasing or delightful to me, how could I inflict that upon another?”

Since World War II, a number of organizations (including both religious groups and non-believers) have adopted policy statements that express support for religious freedom. These include the Baptist World Alliance, the World Council of Churches, and many others. A particularly significant example is the Catholic Church’s Second Vatican Council Declaration on Religious Freedom, Dignitatis Humanae, adopted in 1965. Consider the following passages from that Declaration:

This Vatican Council declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs.

The council further declares that the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself. This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed and thus it is to become a civil right.

It is in accordance with their dignity as persons—that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility—that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom. The right to this immunity continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it and the exercise of this right is not to be impeded, provided that just public order be observed.

The declaration of this Vatican Council on the right of man to religious freedom has its foundation in the dignity of the person, whose exigencies have come to be more fully known to human reason through centuries of experience. What is more, this doctrine of freedom has roots in divine revelation, and for this reason Christians are bound to respect it all the more conscientiously. Revelation discloses the dignity of the human person in its full dimensions. It gives evidence of the respect which Christ showed toward the freedom with which man is to fulfill his duty of belief in the word of God and it gives us lessons in the spirit which disciples of such a Master ought to adopt and continually follow.

Professor of Canon Law, Reverend Father David-Maria Jaeger has explained the significance of this Declaration by the Catholic Church.

The Catholic religion is a “universal religion,” in the sense that the belief is essential to it that it is meant for all human beings, everywhere, that it—and it alone—is the true religion; that it—and it alone—represents the direct revelation of God; that it—and it alone—represents the definitive revelation of God, that it is through adhering to it—and to it alone—that God wishes human beings to worship him, and to find fulfillment and everlasting happiness; and conversely, that all other religions, beliefs or convictions, to the extent that they diverge from the Catholic religion, are to that extent false or at least deficient, and even possibly harmful to persons and society. That they may—and often do—contain more or less numerous elements of truth does not alter the inadequacy of these systems as a whole.

This is a bold statement to make, and today's exigencies of "political correctness," so to speak, mean that it is not often made in this stark manner by "responsible" speakers. Yet it is a statement that does go to the heart of the matter, and that is necessary to explain the Catholic Church's understanding of religious freedom. What it means then, for the present purpose, is that however the Catholic understanding of religious freedom may be expounded, it cannot possibly rest on any kind of atheism, religious relativism or indiffer-entism. It cannot be referred to a conviction that there is no God. It cannot be due to an assumption that "one religion is as good as another," and that, "non-religion is as good as this or any religion," or that, "any religion would be pleasing to God." It cannot be based on a conviction that, "religion does not matter to persons or societies," or else that, "it is impossible, or it may well be
impossible, for human beings to know the truth about God, to know which is the true religion.” Finally, the Catholic understanding of religious freedom cannot be based on the theory that religion is a purely private matter, to be confined within the sphere of individual and family life, or at most within circumscribed communities of believers, and that religion does not give rise to obligations binding upon civil government.53

Yet the Dignitatis Humanae describes freedom of religion as having “roots in divine revelation” and having its foundation in “the very dignity of the human person.” Father Jaeger poses the question “Is there not an antithesis between the religious conviction concerning the one true religion, and the similarly religious conviction concerning the moral—not just the physical—inviolability of the human person and therefore of the rights inherent in human personality?” In answering this question, Father Jaeger points out that

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the Declaration goes on to give a seemingly complex, very subtle, and progressively developing rationale, which . . . might be described as resting on twin pillars, as it were: There is the inviolability of the human conscience, with which none may interfere. This constitutes an absolute barrier to any pretension by any human power. Any pretension to control a human being can never go beyond the line that demarcates this absolutely inviolable and morally and legally impenetrable sphere. But—and this is the second pillar—matters do not stop here. Respect for the freedom of conscience is essential to the divine purpose to draw human beings to an intelligent and free recognition of revealed divine Truth. Because of the very nature of faith, according to the Catholic religion itself, there would be little point to embracing it except it be a truly human choice, a choice made by the human being as God created him, namely as a free acting subject, employing the uniquely and specifically human faculties of intellect and will and governed by his conscience alone. Human beings as created by God have the capacity and the moral duty to seek the true religion—which is objectively one—and once found to embrace it and follow where it leads. However, this capacity and the value of actualising it properly are intrinsically fatally damaged by any kind of coercion.56

Professor Khaled Abou El Fadl, one of the leading authorities in Islamic Law in the United States and Europe, offers insight into the perception of religious freedom within the Islamic tradition.

At the most rudimentary level, the Qur’an itself is explicit in prohibiting any form of coerced conversions to Islam. It contends that truth and falsity are clear and distinct, and so whomever wishes to believe may do so, but no duress is permitted in religion: “There is no compulsion in matters of faith.” Of course . . . this response is incomplete—even if forced conversions to Islam are prohibited, aggressive warfare to spread Islamic power over non-believers might still be allowed. Does the Qur’an condone such expansionist wars?

56. Id. at 456.
Interestingly, Islamic tradition does not have a notion of holy war. Jihad simply means to strive hard or struggle in pursuit of a just cause, and according to the Prophet of Islam, the highest form of jihad is the struggle waged to cleanse oneself from the vices of the heart. Holy war (al-harb al-mujaddasah) is not an expression used by the Qur'anic text or Muslim theologians. . . . The Qur'anic text does not recognize the idea of unlimited warfare, and does not consider the simple fact of the belligerent's Muslim identity to be sufficient to establish the justness of his cause. In other words, the Qur'an entertains the possibility that the Muslim combatant might be the unjust party in a conflict... Ultimately, the Qur'an, or any text, speaks through its reader. . . . Consequently the meaning of the text is often only as moral as its reader. If the reader is intolerant, hateful, or oppressive, so will be the interpretation of the text.

It would be disingenuous to deny that the Qur'an and other Islamic sources offer possibilities of intolerant interpretation. Clearly these possibilities are exploited by the contemporary puritans and supremacists. But the text does not command such intolerant readings.57

COMMENTS AND QUESTIONS

Some of the foregoing justifications for religious freedom and tolerance have secular sources; others are rooted in religious traditions. Which are likely to be more persuasive? Does the audience make a difference? Which justifications seem most appropriate in judicial settings? In legislative settings? In private settings? To what extent can individuals in one tradition understand and appreciate the justifications advanced in another?

Additional Web Resources:
Declarations, policy statements, and teachings in support of religious freedom drawn from various religious traditions

V. THE VALUE OF MULTIPLE JUSTIFICATIONS

Plurality is the practical reality of life in modern states. There are no functioning states without religious minorities and the presence of at least some religious diversity. This is not surprising when one considers that even within most families there is at least some degree of difference in religious or non-religious attitudes. This means that deeply rooted difference is something that every state must be able to address. The difficulty is that not only do the basic belief systems differ; the conceptions of the types of political structures needed to address difference and the justification of rights within these systems differ as well. Faced with such theoretical divergence, how is social stability to be achieved?

A. OVERLAPPING CONSENSUS

In his work Political Liberalism, John Rawls argues that, in a society where there exists a plurality of reasonable comprehensive doctrines, there is no comprehensive doctrine sufficient to provide social unity. In such a society, "[social unity is based on a consensus on the political conception; and stability is possible when the doctrines making up the consensus are affirmed by society's politically active citizens and [are reasonably consistent with] the requirements of justice."58 In essence, the theory is that for political liberalism to be possible, individuals must not insist on the enforcement of their own comprehensive doctrine, no matter how true they believe it to be, but rather should separate political values upon which all can agree from nonpolitical values upon which several groups may reasonably disagree.

According to Rawls, political liberalism is possible only if fundamental questions of justice and constitutional essentials are settled by political values and those values are sufficient "to override all other values that may come in conflict with them."59 In other words, since it is a permanent fact that, in a pluralistic society, individuals will reasonably disagree without compromise on certain values, such as religion, the political power, or power of the collective body, should not be used to enforce the nonpolitical values of only one group. This is possible as long as political values, as distinguished from nonpolitical values, are sufficient to answer the fundamental questions "in ways that all citizens can reasonably be expected to endorse in light of their common human reason,"60 and as long as there are ways for people to hold reasonable nonpolitical values in concert with the political values espoused by the citizenry as a whole. Rawls concludes that history shows that this arrangement is indeed possible.

A major problem with Rawls's conception of overlapping consensus is that it is difficult to distinguish genuine consensus from a mere modus vivendi—that is, a state of affairs that appears to be stable, but in reality is contingent on circumstances that make the arrangement beneficial to the interests of all involved. Once the circumstances change, the apparent stability disappears. Rawls argues that overlapping consensus is more than a modus vivendi because of three inherent features.

First, the object of consensus, the political conception of justice, is itself a moral conception. And second, it is affirmed on moral grounds. ... An overlapping consensus, therefore, is not merely a consensus on accepting certain authorities, or on complying with certain institutional arrangements, founded on a convergence of self- or group interests. All those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides.61

The third feature is that the consensus, unlike a modus vivendi, will be stable. Since the principles contained in the overlapping consensus are included in all

59. Id. at 138.
60. Id. at 140.
61. Id. at 147.
of the reasonable comprehensive doctrines represented, they will not be abandoned even if one comprehensive view becomes dominant.

The political conception will still be supported regardless of shifts in the distribution of political power. Each view supports the political conception for its own sake, or on its own merits. The test for this is whether the consensus is stable with respect to changes in the distribution of power among views. This feature of stability highlights a basic contrast between an overlapping consensus and a modus vivendi, the stability of which does depend on happenstance and a balance of relative forces.\textsuperscript{62}

In many respects, the idea of religious freedom provides a model of how Rawlsian overlapping consensus might work. Differing comprehensive religious views might vary in their beliefs about the nature of deity, man's place in the world, ethical obligations, and so forth, but have a shared conception of how the political order should be structured. (Among other things, the constitutional protections would likely include a commitment to freedom of religion or belief, and would be attractive to religious groups in part for that reason.) This set of political beliefs would be affirmed on moral and/or religious grounds. The overlapping consensus would be stable because commitment to the political conception would rest on principle, and not merely on the interests of religious groups.

**B. OVERLAPPING JUSTIFICATION**

If freedom of religion really entails freedom to believe whatever one wants about important questions of life, it certainly must entail freedom to believe in whichever justification for religious freedom one finds most convincing or most compatible with one's religious beliefs. As Norwegian philosopher Tore Lindholm points out, however, this raises two dilemmas. The first can be stated briefly: "How can I reasonably respect proponents of doctrines and practices that contradict my own serious commitments without, somehow, renouncing those commitments?"\textsuperscript{63} The second is more complex:

Once a comprehensive set of internally well-grounded but particular validations of freedom of religion or belief as a universal entitlement is in place, each validation will be grounded in a religious or life-stance doctrine which is incompatible or at least more or less at odds with other justificatory platforms. How can the entire set of rival justificatory platforms constitute a reasonable grounding of the right to freedom of religion or belief and, hence, a trustworthy and stable basis for its general observance? The dilemma is this: A plurality of sets of incompatible premises, each of which may constitute internally well-grounded support for freedom of religion or belief, appears as a whole to be incoherent and hence not a reasonable public grounding. [This] dilemma calls attention to the stability hazards of plural societies that have failed to spell out

\textsuperscript{62} Id. at 148.

\textsuperscript{63} Tore Lindholm, Philosophical and Religious Justifications of Freedom of Religion or Belief, in *Facilitating Freedom of Religion or Belief: A Deskbook* 19, 23 (Tore Lindholm, W. Cole Durham, Jr., and Bahia Tahzib-Lie, eds., Martinus Nijhoff 2004).
and entrench a shared public understanding of the basis for moral solidarity across religious and life-stance divides.  

To address these dilemmas, Lindholm develops a theory of "overlapping justification" of freedom of religion or belief. In his view, human rights derive from the public global commitment to heed the inherent dignity of every human being but only by way of complex processes of deliberation and negotiation with moral, religious, cultural, political, economic, diplomatic, and other inputs. Human rights are not deduced by philosophy professors and theological doctors. They are generated in complex international and transnational processes of argument, bargaining, and compromise—processes to which philosophers and clerics have made significant but not always decisive contributions.  

The public moral legitimacy of modern human rights may be expressed by saying they have survived and are reasonably expected to survive unobstructed and informed public discussion. Though much disputed and criticized, the framework of modern human rights has so far proven its mettle under open public scrutiny. . . . Hence the burden of proof is on the shoulders of their detractors. Critics of the project of universally applicable human rights can easily point to weaknesses, shortcomings, inconsistencies, and gaping double standards of implementation. But the challenge to critics and detractors is to come up with feasible alternative political, legal, and institutional measures that are arguably superior to what we already have as a globally entrenched regime.  

Justification of a problematic moral norm, at the level of the individual, does not require that the norm be deduced from unproblematic (or "certain" or "self-evident") higher principles. This ideal of justification is beautifully neat, but hardly ever reasonably practicable. We surely have moral principles that we are not willing to compromise, but their reasoned acceptance is often dependent on the wealth of moral implication we draw from them in the light of the totality of other values and beliefs we hold to, and they are often entrenched in the moral or religious traditions to which we belong. Reasonable justification has to be holistic and fallibilist: we have good reason to accept only what "best" fits into the totality of our knowledge, values, commitments, and beliefs (remembering that among our cherished commitments we may include open-mindedness, taking arguments seriously, and respect for fellow human beings and their plights).  

Assuming that human beings will continue for the foreseeable future to be divided by deep difference, he maintains that the question is how we can reasonably secure both principled solidarity based on mutual respect across religious and life-stance divides and unflinching doctrinal integrity of, and commitment to, our differing normative traditions. Reasoning in a virtuous circle [Lindholm's] answer draws on the established modern tradition of internationally recognized human rights, rooted in an emerging worldwide public commitment to heed as inviolable the inherent dignity of every human being. . . .

64. Id. at 23–24.
65. Id. at 49.
66. Id. at 50.
67. Id.
68. Id. at 51.
What is needed is not a “fully realized” version of an overlapping justifi-
cation for freedom of religion or belief, in which “competent and serious
adherents of each set of rival religious or life-stance traditions reasonably
hold this universally applicable human right to be well-supported by each
of the separate normative traditions” at issue. Rather, all that is needed is
that “each party ha[ve] knowledge and understanding of the internal ground-
ing of his or her own belief system” and that “he or she have reasonable trust in
the cogency of the other party’s espousal of the right.”

Where such “overlapping justification” is present, mutual respect and sol-
olidarity is doctrinally secure for the following reason:

If my faith requires me to respect and stand up for your religious freedom and
I know yours requires the same from you, and you and I know that we share
this knowledge, then you and I stand in a relation of friendship to one another.
Of course, our comprehensive religious doctrines clash, and we know this
well. . . . [There may be reason for] serious interreligious argument. [But
good], civil and candid polemics are not off limits between people who
know they are friends.

As to the dilemma of “having a reasonable justification of religious free-
dom based on a plurality of incompatible grounds,” Lindholm notes that
where all members of society “have reasonable and strongly held grounds for
embracing the human right to freedom of religion or belief,” and have suf-
ficient ability to verify the beliefs of others in this regard, they will have at a
minimum “reasonable trust that they share a binding normative foundation
for the human right to freedom of religion or belief. Their respective grounds
for this sharing are not shared, but are publicly available for all to sort out.”

Note that overlapping justification goes beyond mere overlapping consensus
by requiring each party not only to adhere to but also to be knowledgeable
about the grounding of the right in his or her own normative tradition.

C. INCOMPLETELY THEORIZED AGREEMENTS

Lindholm’s “overlapping consensus” solution is similar to what Cass
Sunstein calls “incompletely theorized agreements”—agreements between
people of differing views that leave room for a substantial amount of disagree-
ment while still providing some common basis for government and society.
Consider the following excerpt:

Incompletely theorized agreements play a pervasive role in law and society.
It is rare for a person, and especially for a group, to theorize any subject
completely—that is, to accept both a highly abstract theory and a series of
steps that relate the theory to a concrete conclusion. In fact, people often reach
incompletely theorized agreements on a general principle. Such agreements

69. Id.
70. Id.
71. Id. at 53.
72. Id.
73. Id.
74. Id.
75. Id. at 49–51.
are incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases. People know that murder is wrong, but they disagree about abortion. They favor racial equality, but they are divided on affirmative action. Hence there is a familiar phenomenon of a comfortable and even emphatic agreement on a general principle, accompanied by sharp disagreement about particular cases.

This sort of agreement is incompletely theorized in the sense that it is incompletely specified—a familiar phenomenon with constitutional provisions and regulatory standards in administrative law. Incompletely specified agreements have distinctive social uses. They may permit acceptance of a general aspiration when people are unclear about what the aspiration means, and in this sense, they can maintain a measure of both stability and flexibility over time. At the same time, they can conceal the fact of large-scale social disagreement about particular cases.

There is a second and quite different kind of incompletely theorized agreement. People may agree on a mid-level principle but disagree both about the more general theory that accounts for it and about outcomes in particular cases. They may believe that government cannot discriminate on the basis of race, without settling on a large-scale theory of equality, and without agreeing whether government may enact affirmative action programs or segregate prisons when racial tensions are severe. The connections are left unclear, either in people’s minds or in authoritative public documents, between the mid-level principle and general theory; the connection is equally unclear between the mid-level principle and concrete cases. So too, people may think that government may not regulate speech unless it can show a clear and present danger, but fail to settle whether this principle is founded in utilitarian or Kantian considerations, and disagree about whether the principle allows government to regulate a particular speech by members of the Ku Klux Klan.

My special interest here is in a third kind of phenomenon—incompletely theorized agreements on particular outcomes, accompanied by agreements on the low-level principles that account for them. These terms contain some ambiguities. There is no algorithm by which to distinguish between a high-level theory and one that operates at an intermediate or low level. We might consider Kantianism and utilitarianism as conspicuous examples of high-level theories and see legal illustrations in the many (academic) efforts to understand such areas as tort law, contract law, free speech, and the law of equality to be undergirded by highly abstract theories of the right or the good. By contrast, we might think of low-level principles as including most of the ordinary material of legal doctrine—the general class of principles and justifications that are not said to derive from any particular large theories of the right or the good, that have ambiguous relations to large theories, and that are compatible with more than one such theory.76

Basing religious freedom on such understandings of agreement—on overlapping justifications or on incompletely theorized agreements—protects both religious freedom rights in practice and the very important theoretical right for believers to choose that justification of religious freedom that best fits their religion. By doing so, they accomplish a difficult but all-important task: fulfilling the secular purposes of religious freedom (autonomy, social

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cohesion, etc.) while not requiring believers to subordinate their beliefs to those purposes. With such a solution, religious believers can continue to affirm their beliefs as the most important part of their lives while living and participating in society, tolerating others, and obeying the laws of the land.

COMMENTS AND QUESTIONS

1. To what extent must those holding different views agree in order to achieve a stable and peaceful society? In this regard, what differences do you see between Rawls’s overlapping consensus, Lindholm’s overlapping justifications, and Sunstein’s incompletely theorized agreements?

2. In Rawls’s view, political liberalism can be achieved as a stable order only if fundamental questions of justice and constitutional essentials are settled by political values and those values are sufficient “to override all other values that may come in conflict with them.” What if religious doctrines on certain issues are inconsistent with what others hold to be “constitutional essentials and matters of basic justice”? This might be the case if religious doctrine required establishment of a particular (and non-liberal) political order. But it might also be the case if there were a certain, relatively small number of issues on which the religious community had very strong views. (Consider abortion, military service, willingness to take blood transfusions, etc.). Does the fact that religious communities cannot compromise on some of these issues preclude their consenting to a liberal regime? How strong must the religious freedom protections be to secure their support?

3. In recent years, one of the major debates about international human rights is whether they are indeed universal, as explicitly claimed in the “Universal Declaration of Human Rights,” or whether they are infected with a Western bias, and may even constitute a form of neo-imperialism. How do the discussions of overlapping consensus, overlapping justifications, and incompletely theorized agreements fit into this debate? Do they simply take plurality of views for granted and assume that human rights are not universal, or do they constitute a way of reinterpreting what older claims to universality were really about?

Additional Web Resources: A variety of sources addressing the debate on the universality of human rights

77. Rawls, supra note 58, at 138.
78. Id. at 137–138.
The Right to Religious Freedom in International Law
Between group rights and individual rights

Anat Scolnicov
2 Why is there a right to freedom of religion?

2.1 Introduction

It is my purpose in this book to explain how international law should interpret the right to freedom of religion or belief, and how it should protect this right. The right to freedom of religion or belief should be understood and protected, first and foremost, as an individual right and only in furtherance of individual rights should it be protected as a group right. In this chapter this argument is based on a theoretical analysis of the right. The following chapters will argue for a coherent interpretation of international law based on the principles introduced in this chapter.

Other themes emerge throughout the discussion, in particular the meaning of religion and its role in society and in individual life is culture-specific. More than the subjects of other human rights, such as ‘torture’ (Universal Declaration of Human Rights [UDHR], Article 5) or ‘slavery’ (UDHR, Article 4), ‘religion’ is a concept defined by the culture to which it belongs. This concept loses much of its meaning outside its cultural context. Therefore, more than other human rights, freedom of religion can be interpreted differently by different cultures. Indeed, the different interpretations of this right were evident during the drafting of the article guaranteeing its protection in the Universal Declaration.¹

According legitimacy to disparate policies regarding freedom of religion, as well as other rights, is at the centre of the debate between adopting a cultural approach to human rights or a universalist approach to human rights². However, relativistic interpretations of the right to freedom of religion are intrinsically problematic,³ as claims to such an interpretation of this right often clash with the rights of individuals, including those of women, children and dissenters, as will be illustrated in later chapters.

The law on freedom of religion must be interpreted in light of the unique role religion plays as a source of authority independent of and competing with state authority. Historically, of course, the process was the opposite one: it was the secular state that was set up as a rival source of power to religion through the mechanism of separation of state from church. Because of this, religion occupies a place in law distinct from other civic organizations, and guaranteeing its freedom is a more complex legal matter than ensuring other freedoms.

A state might deal with religion as a competing source of authority in one of two ways: on the one hand, it may view religion as a threat to itself, one that
must be curtailed; on the other hand, it may co-opt religion for its own needs. History provides numerous examples of both these processes. Religion may serve an important part in the formation of national identity and cohesiveness, and, indeed, may underwrite nationalism. This continuing struggle and engagement of religion and state is reflected, in different ways, in almost all modern constitutions.3

This chapter explores the justifications of religious freedom. Understanding the reasons for the recognition of freedom of religion as a human right is necessary for the resolution of legal conflicts surrounding the application of this right. First, the difference between a group right and an individual right is explained (section 2.2). I argue that the dual nature of the right to religious freedom creates a tension between liberty and equality, a tension that is manifested in the legal protection accorded to this right (section 2.3). I then examine the reasons given in liberal theory for protecting religious freedom in order to find which interpretation of the right to religious freedom they support. I examine the concept of liberal religious neutrality and the claim that this concept is not, in fact, neutral between religious and non-religious doctrines, and may conflict with how some religions view their own role and that of the state (section 2.4). The different reasons offered for promotion of religious freedom are reviewed, focusing on approaches which centre on the individual’s relationship to community and culture (section 2.5). These are contrasted with views of religious freedom espoused by religions themselves (section 2.6). In view of the tensions inherent in the different conceptions of the right to religious freedom, I consider the problem of applying liberal theory to legal protection of religious freedom regarding two issues: the treatment of undemocratic religious parties and the legitimacy of the use of religious reasons for legislation (section 2.7). This chapter concludes that religious freedom can only be an individual right, but exposes the difficulties that must be overcome in such an approach because of the group aspects of this right.

2.2 Can freedom of religion be a group right?

In this section, it is argued that religious freedom can only be an individual right, because rights, as such, cannot be attributed to groups. Rights are limits on a collective goal. Group power over individuals, like state power over individuals, may be justified in certain cases by other reasons, but not by assertion of rights. The exercise of rights depends on recognizable decisions by autonomous individuals. There is no one obvious way to recognize group members and identify legitimate processes of decision making. Saying that what will be recognized is whatever the group decides concerning its membership and procedures is not helpful, being nothing more than circular reasoning. Rights cannot be said to belong to groups because there is no undisputed way in which the bearer of the right (the group) may exercise the right. It is argued alternatively, and shown in the following chapters, that even if rights, including religious freedom, can be attributed to groups, rights of groups to religious freedom should not be allowed to override individual rights.
2.2.1 What would a group right be?

To understand how a group right to religious freedom could be conceived, we should first clarify what such a right is not: it is not an aggregate of individual rights, even individual rights that are exercised communally. Religion is a case in point. Religion is a social institution, and its practice implies the existence of more than one participant. A single person may hold a belief, but not a religion. Therefore, one may think that the right to freedom of religion is a group right (even if the right of freedom of belief is an individual right).

However, this conclusion is based on a faulty understanding of the distinction between an individual right and a group right. The mere fact that more than one person is needed for the exercise of a given right is not a sufficient condition for making that right a group right. Thus, freedom of association is an individual right, although it cannot be practised alone. Freedom of expression is an individual right, although it, too, cannot be meaningfully practiced alone. The speaker needs an audience, as the worshipper needs his co-religionists, but the respective rights to express and to worship are theirs as individuals.

The concept of a group right must mean something more: it must mean a right of the group as such. A group right would supervene on the rights of individuals but would not be reducible to an aggregate of individual rights (just as water is wet, but the molecules of which it is comprised are not). An obvious example of a group right is a right of the group that, by its nature, must override the rights of the group's individual members. For instance, a group could have a right to a legal system with jurisdiction over internal legal disputes. A legal system, in order to operate, must override the freedoms of its litigants in that they must accept its verdict. The right to a legal system is properly a right of the group, not reducible to rights of individuals within it. So it is these types of right, rights that belong to the group as a whole and whose exercise may impact individuals within the group, that must be justified by those arguing for recognition of group rights.

However, while such putative rights might be accorded to groups by states or international law, there is no justification for considering them to be rights as such. As Waldron points out, 'if the whole point of rights for individuals is to place limits on the pursuit of some communal goal, it will hardly do to characterize that goal as a community right which may then conflict with, and possibly override, the rights of individuals.' Rights are promoted as a way to counter the defects of utilitarianism, but giving the group the power to exercise rights, necessarily overriding individual choices, is itself utilitarian. It would be absurd to set up rights as a response to a communal goal, and then define the communal goal as a right.

Indeed, as Sieghart warned, rights given to 'a people' are given to an abstraction. Rights given to abstractions (like 'the state' or 'the true faith') encompass a danger that they will be used as a pretext for violation of human rights. Sieghart's pertinent concern was that individual rights should never become subservient to the rights of individual people.
2.2.2 How to identify a group

The concept of group rights also creates a problem of recognition. In order to recognize a group right we must have a rule for identifying group membership, and a rule for identifying the legitimate decision-making process for exercising this right.\(^\text{10}\)

2.2.2.1 Self-identification

A seemingly straightforward solution is to make self-identification the criterion for membership of the group. The UN Committee on the Elimination of All Forms of Racial Discrimination\(^\text{11}\) stated that identification of individuals as members of racial or ethnic groups shall be based on self-identification. This might seem to be an equally applicable criterion for defining membership of religious groups. There is however an important difference between race and religion. Religious groups often claim as part of their doctrine the defining criteria of membership.\(^\text{12}\) Indeed, religious doctrine creates the group in the first place. Thus, this is a controversial solution to the question of defining membership of a religious group.\(^\text{13}\) If a legal criterion of self-identification is accepted, then acceptance of religious freedom as an individual right over group rights is necessarily implied.

2.2.2.2 Identification by the group

A different possible principle is that of definition of the group by the group itself. Such an approach was taken by the US Supreme Court in *Santa Clara Pueblo v. Martinez*\(^\text{14}\) (relating to a tribal rather than religious group). The Supreme Court decided that a Federal Court had no authority to intervene in the decision of the Pueblo, pursuant to its Membership Ordinance, which discriminated against women, granting membership to children of a Santa Claran father and a non-tribe mother, but not to children of a Santa Claran mother and a non-tribe father. The principled argument behind the case, as given by the first instance District Court, was that the membership rules were "no more or less than a mechanism of social... self-definition... basic to the tribe's survival as a cultural and economic entity."\(^\text{15}\) The Court asserted that "the equal protection guarantee... should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival... [S]uch a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, ... [but because] to abrogate tribal decisions, particularly in the delicate area of membership... is to destroy cultural identity under the guise of saving it."\(^\text{16}\)

The District Court, and eventually the Supreme Court, which affirmed its decision, upheld the discriminatory tribal decision. A comparable decision of state or federal authorities would have been viewed as discriminatory and would not have been upheld. Thus, a principle recognizing an unrestricted group right to definition of its membership has unacceptable consequences by means of its self-definition,
the group can infringe the recognized human rights of members. In this case a recognized right to equality between the sexes was infringed.

2.2.2.5 Objective identification

A third approach to the definition of group membership is one of external definition by means of objective criteria. This approach was used by the UN Human Rights Committee (HCR) in its Lovelace decision. Sandra Lovelace was born and registered as ‘Maliiseet Indian’ but had lost her rights and status as an Indian after having married a non-Indian, in accordance with section 12(1)(b) of Canada’s Indian Act. She claimed her rights to membership of an ethnic and linguistic minority under Article 27 of the ICCPR were infringed.

The Committee decided that ‘persons who are born and brought up on a reserve who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliiseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as “belonging” to this minority and to claim the benefits of Article 27 of the Covenant.’

Thus, the HRC chose to define membership of a group, for the purposes of Article 27, not according to the group's definition and not according to self-definition but according to what the Committee saw as objective criteria. Of course, such ‘objective’ criteria could also be subject to controversy. Such criteria are particularly controversial when defining a religious group. A religion, by its nature, is always defined from within. Any imposition of external criteria can itself be perceived as an infringement of religious freedom.

Thus, even the preliminary step of deciding who belongs to a group is highly controversial and open to manipulation, an unsafe platform upon which rights can be distributed.

How to recognize legitimate decisions of the group for exercising its right to religious freedom is also problematic. McDonald suggests a rule on decision making according to which group rights can only be exercised through group decision making. This suggestion is unhelpful: it is not clear how to define the members who may or may not consider themselves part of the group against the group’s rules, or who disagrees with its process of decision making. If there is no recognized legitimate way for a group to exercise its rights, this casts doubt on the possibility of recognizing group rights at all.

But if we do not recognize group rights, including religious group rights, are we not being inconsistent? Can one deny the acceptability of group rights without rejecting the legitimacy of states? The state itself, according to this argument, exercises collective rights, rights that may override individual liberties (such as through the powers of the criminal justice system). However, this argument for group rights must be rejected. Historically, rights were defined as rights of the citizens against the state. The liberal concept of rights was developed primarily as a defense of the individual against the exercise of state power. State sovereignty
and the justification of the state’s legitimacy in wielding power against its citizens are not rights-based. While the concept of rights has been broadened (for instance, to rights against private actors), using it to mean the exact opposite of its original meaning renders it void of any meaning at all.

2.2.3 Can group rights ever be recognized?

In view of such objections to the possibility of recognition of group rights, can group rights ever be recognized? It has been suggested by some writers that some concerns of groups are not addressed by the classic formulations of human rights and therefore merit recognition as group rights. Nettheim identifies land ownership, cultural identity and socio-economic disadvantage as concerns of groups meriting group rights protection, with which international law has started to engage. These could have relevance to religious freedom.

A number of bases advocated for advancing group rights merit closer examination. As will be seen, these arguments, in general, are not necessarily inconsistent with the argument advanced in this study, that a group right to religious freedom should not be recognized except as a right derivative of individual rights and never paramount to them. Crucially, these arguments and the examples given to support them support recognition of external group rights directed against the state. At the core of the demands for religious group rights, however, are internal group rights, directed against individuals within the group. In such cases, I argue and show that these arguments cannot justify recognition of group rights.

2.2.3.1 Historical considerations

Rectification of historical wrongs is one consideration that may be taken into account when interpreting and according rights such equality asreligious freedom. In cases based on historical justifications, it can be argued that the right in question can only be accorded to the wronged group. An important manifestation of a group right is the communal right to land. This could be a right to ownership but could also be a right to spiritual use, particularly relevant to the discussion of religious freedom. Kingsbury criticizes the US Supreme Court decision in Lyng v. Northwest Indian Cemetery Protective Association, in which a claim by Native Americans that a road built on public land would breach their religious freedom to meditate in this traditional religious area was rejected. The group’s religious freedom, just like the religious freedom of anyone else, was deemed by the Court not to extend to control of public lands. Kingsbury argues that the historical loss of control of Indian lands should have been seen as a relevant factor leading to recognition of the Native Americans’ right. Such a right based on historical considerations can only be attributed to a community, not an individual. But this is a community right against a state, and thus presents no conflict with the rights of individuals within the community. Therefore, it can be accepted even alongside the thesis advanced in this work.
2.2.3.2 Community survival

A further justification for recognition of group rights in certain cases is that otherwise the community will assimilate and cease to exist. Indeed, this reason was mentioned by the US court in *Santa Clara Pueblo v. Martinez*, discussed in section 2.2.2.2, for preferring the rights accorded by law to the group over gender equality. Kingsbury argues that domestic courts should allow group rights that cause discrimination on the basis of gender when dealing with small indigenous groups departing from the universal arrangement (as Navajo in the USA), but not allow them for one of a number of major groups in a state based on a plurality of customary law systems (as in Tanzania). I find this distinction incoherent. Individuals' rights (in this case, women's rights) within the group should not be more or less important depending on the position of the group within the state. Women (or, indeed, other individuals whose rights require legal protection) should not have to pay the price, that is sacrifice their individual rights, for cultural survival of the group. The justification of community survival is relevant also to religious freedom. Religious law and the religious legal system are often claimed to be essential to the survival of the religion in question. Indeed, they are an inherent component of some religions. The counterargument that this justification should not override individual rights would also apply to religious groups. Religious legal systems, as will be seen throughout this study, especially in Chapters 4 and 6 (regarding, respectively, the rights of women and dissenting speech), often do not adhere to internationally accepted human rights norms.

2.2.3.3 Cultural interpretation of rights

Another deficiency of recognized rights in human rights instruments, it has been argued, is that they exclude different, especially non-Western, cultural interpretations of concepts used. A suggested solution has been to interpret existing rights within a cultural context, thus effectively recognizing group rights. In *Ho'opai and Bessert v. France*, the Human Rights Committee accepted that the rights to family and privacy of Tahitians were violated when the French government allowed the building of a hotel over an ancient Polynesian grave. This was so even though the authors of the communication were not direct relatives of those buried. Thus, in effect, a communal right over the use of the land was recognized as part of the right to respect for family life.

This reading of Covenant rights as according communal rights creates a right against the state, not against individuals within the community. This type of recognition of group rights is not, in any way, incompatible with the thesis of this work, namely that there are no group rights to religious freedom which can trump individual rights. However, in other cases in which a cultural context interpretation would cause group rights to become paramount to individual rights, the criticism would be the same as that raised previously. Such a definition of rights would merely transfer power over individuals from the state to other groups, whose use of power is not checked by the human rights obligations which states are obligated to uphold. There is a danger that rights to family and to privacy,
for example, would be interpreted as allowing the group to exclude state intervention which protects the rights of weaker members of the group. Under the thesis advanced in this work, such an interpretation must be avoided.

2.2.3.4 Protection of the rights of individual members of minorities is not sufficient for the special protection needed for minorities

Leuprecht[13] argues that particular rights beyond the rights of individuals, including administrative autonomy and special forms of participation in public decision making, are needed to protect minorities. These, indeed, would be paradigmatic group rights. Applied to religious groups, such rights would give the religious group an enhanced position in the law-making sphere, either over its own members or in the formation of law over all citizens. As will be demonstrated in this study, such rights unavoidably conflict with individual rights. Administrative autonomy (such as over marriage and divorce) will be seen in this study (Chapters 3 and 4) to affect adversely individual rights, particularly the rights of dissenting groups within the religions recognized by the state, and in the case of some major religions will affect adversely the rights of women. According special forms of participation in public decision making to religious, other than through the general democratic process, will also be seen to be problematic, potentially breaching the human rights of individuals (see the discussion of abortion legislation in Chapter 4).

Waldron suggests a solution, according to which group rights may be asserted externally (against claims from outside the group) but not internally (when there is a direct conflict between group and individual).[22] This solution must be faulted for pragmatic reasons. While Waldron’s approach may have use regarding other rights, it is especially unsatisfactory in the context of religious freedom in which a large part of the group’s demands is directed internally. Religions, by definition, mostly address themselves and their precepts to their members. Recognizing religious group rights except when directed internally takes out a large part of what having a group right means for religious groups. The position of religious groups can be contrasted with that of other groups, such as racial or ethnic groups. Precepts directing how members must behave are not an inherent part of racial or ethnic groups, but are part and parcel of religious groups.

The suggestion of limiting recognition of group rights to external rights would solve some of the problems associated with group rights. However, even if a compromise recognizing externally directed group rights is a useful solution for recognizing the rights of other groups, it is certainly not so for religious groups. As will be seen in the cases examined in this study, individual and group rights were in sharp conflict, a conflict which must be coherently resolved by giving paramountcy to individual rights.

The uneasy basis for group rights in general, and for religious group rights in particular is evident also in international law, as will become apparent in this study. Although some mention of collective rights appears in international legal documents, this has been done without satisfactory theoretical debate as to the existence and meaning of the concept of collective rights prior to their inclusion.
The concept of a group right is difficult to justify. This is because the concept of a group right is antithetical to the idea of rights as a limit to collective power. The means of recognizing the group and its legitimate decisions are undecidable. Even if the concept of a group right has been recognized in international law, it application regarding religious freedom is incoherent and raises unique problems and conflicts which must be addressed and will be addressed in this work.

2.3 Freedom of religion: between liberty and equality

Religious freedom is a unique right, a double-sided right based on two aspects of religion: one conception of religion for the purposes of this right stresses the expressive activity of belief, criticism and inquiry. This derives from an individualist perception of religion, which relates to the liberal view, and entails freedom of religion. The second conception of religion, related to a communitarian view, stresses the identity aspect of religion. This entails equality between religions, and relates religion to groups, although equality is not necessarily thereby conceived of as a group right. The conception, and protection, of religion as an attribute that marks membership of a group is becoming ever more prevalent in international human rights law and discourse.

Religion is both similar to, and different from, other characteristics that define groups. The similarities between religion and other group-defining characteristics, such as race, are highlighted by those who wish to accord them similar protection, whether in national or international law. One difference between race and religion is obvious. While race is immutable, religion is not. In fact, one of the justifications given for upholding a right to religious freedom is to enable everyone who wishes to do so to change their religion. The right to do this is legally protected in international law. But the mutability of religion does not mean religious affiliation is less deserving of legal protection than immutable characteristics. A person's right to change religion is protected, but so is his right to keep his religion. Religion is as much a part of identity, of personhood, as race or nationality.

Freedom of religion is unique. There is no correlative right regarding race or nationality. It is not possible to choose race, and there generally is no right to choose nationality, but there is a right to choose religion or belief. Religion is both a subject of liberty (like freedom of speech), and a subject of equality, a characteristic of the individual which merits the protection of the law (like gender, race or nationality). One can be of a certain race and be entitled to protection from discrimination based on race, just as one can be of a certain religion and be entitled to protection from discrimination based on religion. But it is meaningless to speak of 'freedom of race', while it is meaningful to protect freedom of religion. This is because religion is not only an identity. It is also an activity of thought, criticism and speech, an activity that merits protection in its robust and open manifestations.

Because religious freedom has two equally important aspects, religion as key to critical thought and religion as identity, both liberal and communitarian theories may offer important insights in their perceptions of religion. On this duality, the right to religious freedom should be constructed. This dual conception has
important implications in current legal debate. These can be seen clearly in two examples of importance in international law: the prohibition of incitement to religious hatred and the prohibition of discrimination.

2.3.1 Liberty or equality: prohibition of incitement

The unique treatment accorded to religion, stemming from the tension between religious equality and religious liberty, can be seen in the framing of international law provisions prohibiting hatred and incitement. The argument in support of prohibition of incitement to religious hatred highlights the group-identity aspect of religion and frames the right in terms of equality of religions. A member of a religion cannot effectively exercise his right to be treated as a citizen equal to members of other religions in the public place if his religion is constantly denigrated and vilified. The only way to guarantee such equality is by prohibition of, at least, the most injurious religious hate speech.

The argument against such prohibition highlights the individual-inquisitive expressive aspect of religion: since freedom of religion is about questioning and defending beliefs, doctrines and ideas, a robust exchange of ideas, even one which some people may find insulting or injurious, is important for society. The right to call non-believers infidels who will burn in hell, for example, is as integral to religious freedom as any other part of this right. Curtailing such religious debate would arguably infringe the right to free religious expression, an important component of religious freedom.

International law (like domestic legal systems) exemplifies both conceptions: that which treats religion like all other group characteristics on which incitement can be based, and that which sees religion as different from all other group characteristics. The International Covenant on Civil and Political Rights makes no distinction in its provision on incitement between religious hatred and racial hatred. Article 20(2) mandates that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' Likewise, the Proposal for a European Union Framework Decision on Combating Racism and Xenophobia does not deal differently with race and religion. It defines 'racism and xenophobia', which its provisions prohibit, as 'the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor in determining aversion to individuals or groups'.

However, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which deals with discrimination on the grounds of race, colour, descent, or national or ethnic origin, but not religion, has a much broader provision mandating that states prohibit acts and organizations promoting incitement and theories of superiority (Article 4). While a ban on organizations advocating theories of racial superiority is deemed acceptable under CERD, such a ban on religious organizations and theories is not. Indeed, a ban on religious theories that claim superiority over other religions or beliefs may contravene the right to religious freedom. Many religions claim to be the one true religion, claiming superiority over other religions which are false (as indeed atheism claims that
all religions are false). Such claims may be of core doctrinal importance to their believers. Why is there such a distinction between religion and race? The distinction seems to relate again to the analysis of religion as idea rather than identity. Religion is seen as a collection of ideas while a race is seen as a collection of people. It is acceptable to vilify ideas, not to vilify people, as vilifying people infringes upon their right to equality. But of course religions are both collections of ideas and of people. There is nothing wrong with claiming superiority of one doctrine over another, but much wrong with holding people who belong to one religious group to be better than others. International law might attempt to separate those two aspects, but, in practice, the difference between the two will not be so clear.

This is a problem not only of international law, but of domestic law as well, especially as state parties to the conventions mentioned above are obliged to implement their provisions. The debate over the dual character of religion was reflected in the controversy in the United Kingdom regarding a legal amendment to broaden the existing prohibition on incitement to racial hatred to cover religious hatred as well. Initially the amendment proposed by the government was not approved by Parliament, and the law passed by Parliament, the Anti-Terrorism, Crime and Security Act 2001, did not include this proposed controversial measure. The government re-introduced the measure in Section 19 of the Serious Organised Crime and Police Bill, and by the Racial and Religious Hatred Act 2006 broadened the offence of incitement to racial hatred under the Race Relations Act 1965 and Part III of the Public Order Act 1986 to cover religious hatred (Section 29B). Thus, it is the duality of the right to religious freedom, although it has not been so perceived, which causes difficulty in addressing religious incitement. The issue of incitement will be revisited in Chapter 6, where an approach to this offence will be suggested, based on this analysis.

2.3.2 Group or individual: implementation of religious equality

A dual perception of religion, as giving rise to a group right or to an individual right, can be seen in another example, namely the way international human rights law interprets the right to non-discrimination on the basis of religion. The right to equality, or non-discrimination, on the grounds of religion is complementary to the right to freedom of religion. Without the right to freedom of religion is worthless. Currently non-discrimination on the grounds of religion is becoming the focus of religious rights in international law. The right to non-discrimination based on religion in international law is drafted similarly to those based on race, nationality or gender. Religion is seen as a subject of the universal prescription of equal treatment, like other characteristics whose bearers merit the same protection. The right not to be discriminated against on religious grounds is generally framed as an individual right in international law. Every person has the right to be treated equally to others regardless of their religion. The claim of each individual to equality is to be assessed independently of the claims of other individuals.
who belong to the same or other groups. This is the approach that arises from the liberal interpretation of the right to religious freedom.

From a point of view that examines the effect of equality on society, especially a society in religious conflict, other considerations may be raised. A unique provision in the EU Directive on Equal Treatment pertaining to Northern Ireland (the only state-specific provision of this Directive) allows differential treatment in recruitment to police and teaching positions to redress religious imbalance, as specified by national legislation. In this case, the parties agreed to sacrifice equality of religion as an individual right in order to achieve equality between religious groups (Catholics and Protestants). Under this provision a qualified individual may be treated unjustly and less favourably based solely on his religion. Of course, this measure is intended to achieve a worthwhile cause—an end to historic conflict and a just peace between religious communities, in which policing and education are key issues. In one sense, this furthers equality. Members of both religious communities must feel equal to each other, and feel that they are treated equally, especially in their ability to influence their co-religious society through education and access to implementation of government policy (in this case through policing). In its individual sense, equality is sacrificed in order to achieve group equality.

Such an exception in a human rights document raises complicated questions. Conflict between religious groups is not unique to Northern Ireland. When, if at all, is it legitimate for international law to substitute a group-equality approach for an individual-equality one? It was precisely prevention of religious conflict that set in motion the movement to recognition of a principle of religious freedom in Enlightenment liberalism. But a return to group-based equality can jeopardize our protection of individual rights. The important theoretical debate over the dual conception of religious freedom has, therefore, very practical legal implications. The tension between individual and group demands in the application of this right must be addressed by any legal system which accords this right. This is true for domestic legal systems and for international law.

As exemplified in this section, the right to religious freedom, more than other recognized human rights, is one that sees the individual and the group at odds. Theories which have tried to define and justify this right were confronted with the need to address the two competing aspects of this right. How they have fared is discussed in the following section.

2.4 Religious freedom in liberal political theory

An understanding of how the right to freedom of religion should be interpreted can be gained by analysing the different rationales for the right advanced by the political theories which were influential in developing our current understanding of this right. A principle of religious tolerance was not unrecognized in ancient cultures. It is neither a modern nor a Western phenomenon. Thus, it has been suggested, that Ashoka's Rock Edicts, dating from the 3rd century BC, aimed at resolving the conflict between Brahmanism and Buddhism, were the first laws to
recognize the principle of religious toleration. The edicts embody the Buddhist spirit of toleration, which has its origins in Hinduism, a religion in which no one view is held as the one true view. The Jewish tradition, too, has accorded an important role to tolerance of others. In the Bible, the Noahcille Covenant sets basic moral rules for non-Jews, thus accepting the morality of those who are not Jewish as long as they adhere to a basic moral code not related to a particular belief.

2.4.1 Justifications for religious freedom in liberal thought

While other and earlier philosophies embodied a principle of religious toleration, the idea of religious freedom as a right is most developed in liberal thought. It was first articulated under liberal philosophy as part of a set of rights. It is therefore especially relevant to understand the justifications for a right to religious freedom in liberal theory, and hence how this right should be coherently interpreted in law.

The idea of freedom of religion was an important force in the formation of liberal theory itself. From the liberal literature of the Enlightenment and of the present-day debate, several important reasons for upholding freedom of religion emerge. While the basis for the right is individualistic, it is also related to a demand for the co-existence of religious groups. Out of liberal writings at least three different individualistic justifications for religious freedom are discernible as well as justifications that are based not on the rights of the individual but rather on the relations between religious groups. Each of these justifications has different implications for the legal right that religious freedom should protect. Each of them also has severe shortcomings in the protection of religious freedom as will be discussed later.

2.4.1.1 Individual religious freedom as critical capacity

The first reason for according a right to religious freedom is embedded in one of the central ideas of Enlightenment-era liberalism. Freedom of religious belief is key to the existence of men as rational free-thinking individual citizens in the state. It emanates directly from a normative premise of equality, the demand that every doctrine should be open to scrutiny, and a belief that no dogma can be held with certainty. Thus, religious toleration is one of the hallmarks of the liberal state.

This highly individualistic reason for religious freedom emphasizes religious belief, personal decision and individual choice, rather than other aspects of religion (such as worship, ritual or institutions). If this is the reason for upholding religious freedom, then the legal right to religious freedom must be interpreted accordingly. If religious freedom is protected because no religious dogma can be held with certainty, then those who challenge the existing dogma should be encouraged and not punished. It follows that activities such as blasphemy and proselytism, which do exactly what must not be criminalized. Critique, discussion and a robust exchange of ideas are best promoted when individuals are free to convince others to convert to their belief, and to speak for and against religions, even in ways that may be deemed by some inappropriate, free from fear of prosecution. The implications of
the conception of religious freedom as freedom of thought for the legal regulation of conversion, proselytism and blasphemy are explored in Chapter 6.

It further follows that if the ability to question dogma is the ultimate reason for religious freedom, then it should not be possible for the right holder himself or herself to waive, or to compromise, his or her capacity to continue to be able to think and make religious choices as an individual. A legal approach which attempts to preserve this critical ability can be seen in the implementation of religious freedom in France, in the concept of laïcité active. This concept was deployed to justify a recently enacted French anti-cult law. The French government justified the law on the grounds of promotion of freedom of belief over freedom of religion. It explained that the purpose of the law was to limit the religious liberty of the 'cult', in order to protect each individual's freedom to formulate belief free from constraint, such as that imposed by 'cults'. This reasoning demonstrates a preference for the critical-individualistic aspect of religious liberty — a person must retain his ability to formulate and criticize any belief — over the aspect of religious liberty which promises freedom to identify with any religious persuasion and belong to a religious group. Even someone who wishes to exercise his religious freedom by relying on the decisions of the 'cult' is not permitted to waive his continuing individual capacity.

Such a strictly individualist conception of religious freedom leads to a regime that advances freedom of certain religions and beliefs but hinders the freedom of others. As seen in the last example, religions which are deemed by the authorities to be 'brainwashing' or to reduce the critical capacity of individuals, that is, usually new and unknown religions, will be adversely affected. But such a limited view of religious freedom, which effectively excludes certain religions, has its base in early liberal thinking.

The conception of freedom of religion as an individualist charter of freedom of thought carried with it a severe limitation on religious freedom. Locke, the major proponent of this approach, who addressed the subject in his **Letter on Toleration** and other works, did not extend the right to atheists and Catholics. According to Locke, atheists could not be trusted because they would not take an oath on the Bible; Catholics could not be trusted because they owed a double loyalty, a political theology at odds with liberal principles. This reasoning reveals the very individualistic approach of Locke's liberal theory. This approach is actively opposed to a group approach to religious liberty, excluding from the ambit of this right a religion whose doctrine contains a collective political element; a competing power to state authority is not to be recognized. The same exception, which Locke uses against extending religious freedom to Catholics, could be used against extending religious freedom to Jews or Muslims. Judaism, although highly decentralized at Locke's time, and certainly not as institutionalized politically as Catholicism, is also not merely a religion but a social-normative regime for its members. Liberalism is very much a political approach best suited to one religion, Protestantism, and, indeed, historically was entwined with it.

But Locke's view of religious freedom, individualistic to the extent of exclusion of any group components, does not necessarily render freedom of religion an
empty shell. The extreme but logically possible conclusion would be that all religions based on institutions and not merely on individual belief should be excluded from the scope of protection. This, indeed, is Locke’s conclusion. But such a conclusion is, of course, discriminatory and, as such, is unacceptable.

However, we can derive more moderate conclusions from Locke’s exclusively individualistic view of religious freedom, for instance, that protection of a right to freedom of religion will be granted to adherents of all beliefs but not to religious institutions. This conclusion, too, is unsatisfactory. Protection of only the individual aspects of all religions does not necessarily translate to equal protection of all religions. Institutional aspects of religion are central to some religions, peripheral to others, and non-existent in yet others. For practical reasons, too, such a rule will be hard to implement, as the dividing line between the individual and institutional aspects of a religion is not always clear cut.

The highly individualistic view of religious freedom, grounded in the importance of guaranteeing the capacity for criticism, would thus entail extensive, non-vaivable legal protection of the individual aspects of religious freedom, particularly those maintaining the ability to change religion and to influence others to do so. However, such a view may lead not only to a lack of protection of the collective and institutional aspects of religion, but also may prove highly discriminatory towards some religions.

2.4.1.2 Individual religious freedom as equal liberty

Other rationales for an individualistic interpretation of religious freedom can be discerned from the work of other liberal theorists with different implications for the legal protection of this right. The second individualistic justification for religious freedom is premised not on the importance of the individual faculty for criticism, but rather on a principle of equality. This justification emanates from the egalitarian strand of liberalism, which followed from the work of Rousseau, who, among the early liberals, emphasized the need for equal political liberties. It is currently exemplified primarily in the work of John Rawls and Ronald Dworkin. They emphasize the danger to liberty from a society that is unequal and unjust and the need for positive action for the realization of social freedom. Dworkin defines liberalism through a principle of ‘rough equality’: resources and opportunities should be distributed in roughly equal shares to accommodate different personal preferences. This is so not just for material goods, but also for political decisions. Political decisions must reflect some accommodation of the differing personal preferences everyone has for themselves, but may not reflect preferences people have about what others shall do or have. Rawls formulated liberal political theory so as to incorporate a principle of equality into liberal theory. The first principle of his theory of justice is that each person is to have an equal right to the most extensive liberty compatible with similar liberty for others.

What are the implications of these approaches for religious freedom? Dworkin’s approach, by virtue of its egalitarian principles, clearly entails an individualistic interpretation of all basic rights, including religious freedom. Because it disallows
preferences people have about what others shall do or have, it will disallow exercises of group rights which override individual preferences. Rawls includes liberty of conscience in the basic liberties comprised in the first principle. By mentioning freedom of conscience rather than freedom of religion, it seems that Rawls emphasizes the internal, individual right over the institutional right. In his later writing on "political liberalism", though, he refers to liberty of conscience as a liberty that both protects individual against Church and protects Church (= any religious association) against state. As we shall see, these two types of liberty will often be antagonistic to each other. If the Church demands that the state respect its liberty even when its actions override individual rights, which liberty prevails?

Although Rawls leaves this question unanswered, his first principle is compatible with only one option. The demand that persons enjoy an equal right to religious liberty is important in solving this conflict of liberties. This is because it will be impossible to claim a right to religious liberty which is incompatible with equal liberties for each person. This principle, therefore, places limitations on group rights when they are incompatible with equal individual rights, and places religious liberty on a strong footing as an individual right.

Following the principle of liberty as equality should have implications for the legal interpretation of the right to religious liberty. If equality of opportunity or equality of treatment are seen as key to religious liberty, then international law should impose minimum standards ensuring equality of enjoyment of basic human rights, including religious freedom to everyone, especially to members of groups that are underprivileged in society such as women, children, homosexuals and religious dissenters, even where this entails intervention in group or state policy. In contrast with the reasoning of rights ownership, which will be discussed in the next section, the political-equality reasoning mandates at least a basic level of protection of individual religious freedom, even when the individual who chooses to become or remain a member of a religious group waives his/her right. Equality of opportunity can only be achieved in a society in which everyone has a basic level of political freedoms that cannot be relinquished to the group.

Rawls further individualizes religion by introducing to his political theory a principle of neutrality, which demands that states should be neutral between the various conceptions of 'the good'. This principle renders religion an individual, rather than a group, concern by displacing it from the legitimate realm of public affairs and maintaining it in the realm of personal affairs. One important legal implication of this demand regarding the use of religious reasons for legislation will be discussed in section 2.7.1.

The principle of neutrality was introduced not in order to deal particularly with religions, but rather as a principle relating to all doctrines of the good; however, it has particular importance with regard to religion. This is because religions, more than other civic institutions, prescribe complete moral and ethical programmes of the good in all areas of personal and public life, and these programmes often conflict with liberal assumptions about the same issues.

The principle of neutrality has been attacked from within liberal debate. Crucially, Barry shows that the principle of neutrality may not be a sound basis for
guaranteeing religious freedom. He argues that in order to accept the principle of neutrality, one must have accepted already many tenets of liberalism. Neutrality is not a position that can easily be reconciled with a religious position. Many religions will view the principle that every view of the good must be treated equally in the public sphere as morally reprehensible. Doctrines that call on the state to take a position on the public good are central to their tenets. The Catholic Church, for instance, does not see its teachings as something for individual belief only, not to be used in the public sphere. So, in fact, many non-liberals will not be able to accept the principle of neutrality.

In an attempt to respond to his critics, Rawls introduced the distinction between comprehensive liberalism and political liberalism. Comprehensive liberalism includes, besides a political component, a prescription for the culture of civil society. Political liberalism is more minimalistic, and assumes that society may contain a plurality of reasonable yet incompatible comprehensive doctrines, religious as well as non-religious. This further attempt to reconcile liberalism with the plurality of non-liberal opinion has been countered by the criticism that a political theory that has no claim to any view of the good is an impossibility.

A more fundamental criticism of the idea of liberal neutrality has been waged inside the liberal camp by perfectionists, such as Halsar, who claims that liberal political theory must take a stand as to whether humans fare better under liberal institutions or under non-liberal ones. He argues that liberalism cannot and must not treat all value choices as equal, because some value choices are intrinsically better than others.

Political liberalism not only may be unworkable but also undesirable. Elshtain rejects Rawls' political liberalism, which demands that religious reasons not be brought into the public policy debate. She wants to acknowledge religious plurality and opposes the monist liberal stand. She rejects the view that this is neutrality. In her view, the separation of Church from state does not require the separation of Church from politics. The neutrality that disallows religious reasoning from the public political debate silences free religious expression rather than enhances it.

The place of religion in the public sphere and its uneasy relationship with individual liberty have remained a contentious point of the liberal programme. Many liberal states have refrained from adopting a principle of neutrality. As discussion of US Supreme Court cases in Chapter 5 will show, it is not clear if, and to what extent, such a principle can be implemented. Unsurprisingly, the discussion of neutrality by Rawls, Dworkin and Ackerman is concurrent with important developments in US Supreme Court jurisprudence concerning non-establishment of religion.

As seen, basing religious freedom on a principle that demands equality will entail legal protection of equality of opportunity in utilization of this right for everyone. This will mean rights of individuals should be protected even within groups, such as those of members, employees or students of religious organizations. Equal liberties in society can be maintained only if individuals are never deemed to have waived fundamental liberties, even by joining an organization voluntarily. The introduction of a principle of neutrality, which is intended to
further a society of equal liberties, will be seen by some as, in fact, curtailing liberties of freedom and belief in a discriminatory manner. Introducing a demand for neutrality in the state will limit lawmakers, public officials, judges and even citizens, in the legal decisions which they make if they rely on religious grounds as the basis for those decisions. This is a limitation whose implications and difficulties will be discussed in a later section of this chapter.

2.4.1.3 Individual right as property of the right holder

A third individualistic justification for religious freedom in liberal theory is offered by libertarian-liberal theory. It is based neither on the importance of individual critical capacity nor on a principle of equal religious liberties, but rather is rooted in the principle of minimal intervention by the state, as the perceived danger to liberty emanates from the state. This strand of liberal thinking is notably expressed by Nozick in his development of Lockean liberalism.

Although Nozick's theory is based on individualistic principles that put individual choice above all other aspects of religious freedom, his theory ends up protecting the group over the individual. In his view, although the framework of the state is libertarian and laissez faire, individual communities within it need not be. Many communities may choose internal restrictions that the libertarian would condemn if they were enforced by a central state apparatus. In a free society, people may contract into various restrictions that the government may not legitimately impose on them.

Nozick's theory emanates from a perception of rights ownership that implies that rights can be waived at will. Locke (whose ideas form the foundation of Nozick's theory) saw rights as non-alienable, so that no one can contract away his rights. Nozick's reading of Locke as an ultra-libertarian may be wrong on the issue of ownership and waivability of rights. Nozick believes personal religious freedom is owned by the individual, and can be used by him in any way he wishes, including by giving this right away. However, from our previous reading of Locke, it can be seen that according to Locke's view, personal religious freedom is not absolutely waivable. At the least, it appears that under a Lockean analysis an individual cannot waive unto the group his right to make his own choices in matters of religion, especially not to a group whose governing principles compete with the liberal state, such as the Catholic Church. Rights cannot be sold or bargained away like property, as an individual cannot sell his freedom away to become a slave. Even in a proprietary model of rights, a different relation between the right holder and the right is possible. For example, Waldron supports the understanding, based on the philosophy of Locke and Thomas Jefferson, that rights are not owned but held in trust by the right bearer.

Nozick argues that if one contracts into the community one buys the whole 'package'. But the reality, especially in the case of religious communities, is more complex. An individual's affiliation with a religious community may be a product of circumstance, of deep-rooted belief, or of choice. In some cases, an individual may not effectively be able to leave – his or her home, family, and social
connections belong to the religious community. In other cases, an individual may not want to leave. It is precisely because of the importance of religion to the person that one should not be made to choose, on an all or nothing basis, between belonging to a religion and enjoying basic rights.

Nozick's approach results in harming individual freedoms. This radical liberal approach, which is generally perceived as ultra-individualistic, achieves a similar outcome to the communitarian approach, in contrast to other liberal approaches. Allowing people to contract away their freedoms unrestrained gives more power to the underlying forces operating in the community at the expense of individual liberties. Even the contractual argument — that members choose voluntarily to belong to a community and so have waived their right — is misleading. Often people are born into a community and face costly (not just economic) barriers of exit. This analysis of Nozick's argument shows that ultra-liberalism in fact diminishes the aggregate freedom of individuals rather than enhancing it.

If freedom of action and freedom of contract are the fundamental principles underlying religious freedom, and the state should not intervene in the exercise of this right, as the libertarian approach claims, then people are to be respected in their choice of living in communities that do not uphold principles of religious freedom. If we accept that it is illegitimate for the state to intervene in the functioning of religious communities, then we must also accept that it will also be illegitimate for international law to intervene. But, as I have argued, these assertions, based on a fiction of contractual freedom, must be criticized. This approach will have practical legal implications regarding restrictions imposed by religious communities on their members, in particular restrictions on women's rights, analysed in Chapter 4.

Thus, liberal thought propounded important justifications for religious freedom: that of rational criticism, that of equality in according liberties, and that based on a principle of non-intervention of the state. This last basis will be criticized in subsequent chapters.

2.4.2 Justifications based on relations between religious groups

An important reason given by Enlightenment liberalism for religious freedom was an individualistic reason, the encouragement of critical debate. No less important in the development of the liberal project was the Enlightenment liberals' group-based reasoning for religious freedom: the prevention of conflict between religious groups and the advancement of toleration. These are utilitarian justifications, but they are not to be separated from the rights debate. Not only were these arguments historically intertwined, but also, to this day, the separation of Church from state which follows from this reasoning both complements the principle of religious freedom in liberal ideology and sits uneasily with it.

The group-based justification that emerges from Enlightenment liberalism for religious freedom is that disentangling the people's choice of faith from the
coercive power of the state will prevent violent conflict. Rousseau saw this as key to solving the conflicts which plagued the ancient world in which:

Since each religion was thus attached exclusively to the laws of the state which prescribed it, and since there was no means of converting people except by subduing them, the only missionaries were conquerors; and since the obligation to change faith was part of the law of conquest, it was necessary to conquer before preaching conversion.

The important aspect of religious freedom, under this reasoning, is separation of religion from state as a required constitutional principle. This demand was not accepted by many liberal states or by current international law, as discussed in Chapter 3. The controversial proposal of separation of Church from state as prerequisite to religious freedom is a direct consequence of the particular nature of religion as a competitor to state authority. Such a structural constitutional imposition forming an essential aspect of a human right is unique to the right of religious freedom. There is no correlative demand regarding any other right; for instance, freedom of speech does not imply, under any political theory, that groups which engage in organized expressive activity will take no part in the governance of the state.

If religion as a source of law is incompatible with religious freedom, there are even more far-reaching implications than separation of religion from state. Not only is the attachment of religion to the state problematic, but so is the attachment of religion to political debate. The demand for the separation of religion and political debate was linked to the reasoning that resolution of conflict could only rely on accessible rational means, and not on external divine authority. As Stout explains:

Any point of view in which religious considerations or conceptions of the good remained dominant was, in the early modern context, incapable of providing a basis for the reasonable and peaceful resolution of social conflict. Incompatible appeals to authority seemed equally reasonable, and therefore equally suspect, as well as thoroughly useless as vehicles of rational persuasion.

This controversy over the involvement of religious argumentation in politics remains as pertinent today as it was then, as will be discussed in a later section of this chapter on religious reasoning in politics.

The justification for religious freedom which is based on the attempt to prevent conflict and the futility of coercion is closely related to the idea of toleration. The concept of religious toleration in Enlightenment liberalism had two distinct meanings: toleration as the best way to discover the one true course (Locke’s meaning) and toleration as a way to accept different ways as valid and to co-exist with them (Hobbes’ approach). These two approaches may well be precursors of two different goals for the current liberal project, in Rawls’ terminology comprehensive
liberalism and political liberalism. They re-appear in a new guise in the debate over liberalism's claim to neutrality.

But the problem with defining religious freedom in terms of toleration is that toleration is extended to something which is to some degree undesirable but where there is a reason to tolerate.\textsuperscript{58} Tolerance is considered a virtue precisely because the tolerant person refrains from curtailling some thing he believes is unworthy.\textsuperscript{59} In the case of religious toleration, the reason is the collective good: harmonious relations between religious groups and the prevention of social strife.

This is an instrumental, pragmatic reason for recognizing religious freedom and therefore is problematic. States will respect it as long as it fulfills their social goals, but will infringe this freedom when they find it socially expedient to do so, for instance when the religious dissenters are a small and socially insignificant minority.\textsuperscript{60} The weakness of the toleration argument is that it does not establish an independent value of a human right to freedom of religion. In the words of Thomas Paine: 'Toleration is not the opposite of intolerance, but it is the counterfeit of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it.'\textsuperscript{61} A social justification for religious freedom in lieu of an individual-rights justification cannot be the basis for effective protection of religious freedom.

But the justification of religious freedom as a way to prevent conflict and harmonize relations between groups has important legal implications. As we have seen, this view justifies interpreting equality on the basis of religion as equality between groups, rather than equality between individuals. If the object is to promote harmonious relations between groups, then each group must be treated equally, even if individuals are treated less favourably than they would be without regard to their religion. Conversely, if utilitarian reasons are unacceptable as a basis for human rights, group equality must be rejected in favour of a universal standard of individual equality.

2.5 Community and identity

2.5.1 Communitarian approaches

The liberal view of religious freedom has come under attack from writers, broadly classed as communitarians, who challenge liberalism's view of man as autonomous and place religion within its social context. All such approaches explore the concept of religion as identity and emanate from communitarian criticism of liberal theory.\textsuperscript{62} While communitarian analysis may be thought to lead to an interpretation of religious freedom founded on the group rather than the individual, I argue that analysis of communitarian writers leads to a more complex conclusion.

While we have seen that group justifications were present in liberal conceptions of religious freedom, these were utilitarian justifications, which justified religious freedom based on advancement of the general public good rather than based on rights. Communitarians, however, offer a more direct right's basis for religious
freedom that is derived from group affiliation. In the discussion that follows, I draw a distinction between a communitarian approach of self-identity, which forms a basis for individual rather than group rights, and a different communitarian approach of group identity, which forms a basis for group rights.

One explanation of the shift from viewing religion as choice to viewing religion as social affiliation is an historic one. The liberal theorists of 17th-century England saw religion as the product of individual decision. Glazer claims that such an approach was applicable for a community that was homogeneous except for differences of religion. He questions why, however, this approach should still guide contemporary liberals such as Rawls, since nowadays religion is determined more by the community in which a person is born than by individual decision. Protecting the communal rather than the individual aspects of religion is therefore more conducive to safeguarding religious liberty today.

Religion also plays another important role, according to the communitarian account, as a social bond which provides a goal for society. Taylor views civic freedom, complementary to the 'liberal' freedom of lack of government intervention in private life, as the freedom of a society to govern itself free from despotism. He argues that for such civic freedom to exist, a sense of cohesion or shared morality is required, something that can be given by religion. Liberal freedom in itself is a 'hollow' freedom. The conception of a positive freedom, a freedom beyond merely a lack of government interference in life, shares something with the post-liberal critique of liberalism, which also demands a substantive, positive freedom. But here these two critiques of liberalism diverge. While feminists, other post-liberals, and even egalitarian liberals demand a positive freedom that provides opportunity for self-realization of the individual, Taylor's approach demands a substantive freedom that is exercised by society as a group.

However, while having common goals may be of worth to society, the individuals and the groups that make up society often do not have a common goal, as Taylor himself concedes. The whole point of freedom is that we are allowed to pursue our own goals. Furthermore, it is not clear, both historically and conceptually, that religion leads to the sort of civic freedom that fosters a society capable of staving off despotism. Quite the contrary: shared goals (such as religion or nationalism) are just as capable of promoting tyrannies in society. Taylor's emphasis is on finding a common goal in society, besides the complementary freedom from government imposition of religion, which is part of the 'liberal' freedom. Such a position neither promotes the religious freedom of individuals nor of groups within society.

Religion may also be seen as an issue of identity in a different sense, not of communal identity but of personal identity. Although this conception of religion has been offered as part of communitarian philosophy, I wish to distinguish this reason from the reasoning that views religion as forming communal identity and constituting a person's identity through membership in the community. The role religion plays in constituting personal identity is an individualistic justification for respecting freedom of religion. In protecting freedom of religion we are protecting and assisting people in holding on to and cultivating their spiritual identity.
Such a view of religion can be discerned from Sandel's criticism of the liberal approach. Religion (and sometimes the lack of it) comprises part of a person. Demanding neutrality concerning religion on any level may require the denial of one's innermost convictions. This relates to Sandel's general criticism of liberalism as a deontological view of the person, whose purpose, desires and morals are deemed to be a product of choice. According to his view, the problem with liberalism is that it claims we must view ourselves as independent, in the sense that our identity is never tied to our aims and attachments; however, living by these aims and attachments is inseparable from understanding who we are as persons. Applied to the issue of religious freedom, this might mean that religion should be accorded some kind of 'trump' value when it is in conflict with other considerations, because it is not just a rational or deliberative choice of a person, like political affiliation, but part of the person's constitution.

The idea of religion as self-identity rather than community identity that defines the individual is inherent in Sandel's strand of communitarianism. Although the community (family, religion, school) shapes and even constitutes the person, there is a personal, subjective conception of personhood, which includes contemplation of self-identity and personal commitments as well as relationship to society. Under this view, the person is not identical with his communal or social connections. This version of communitarianism can be distinguished from a 'stronger' conception of communitarianism (such as that of MacIntyre, who views individuals as inheriting a specified social space) in which the self is almost entirely a product of circumstances (including religion).

Sandel claims that belief is not a product of choice, like lifestyle, but is constitutive, a deeply rooted component of the individual. That is why freedom of conscience is unalienable. However, he refers to the source of belief as conscience, not social position but individual conscience, something that is influenced by, but also distinct from, social context. This view does not stand in contradiction to the claim that religious freedom is an individual right, although it may have ramifications on how that right is to be implemented.

Thus, there are two principal views of religion as identity in communitarian writing: that of religion as group identity and that of religion as individual identity. It appears that some communitarian writing obscures the difference between religion as community dentity and religion as self-identity. The relationship between a person and his/her community is crucial precisely because he/she forges his/her self-identity through confrontation with his/her surrounding community and attempts to differentiate himself/herself from it. As object relations theory of psychoanalysis suggests, individual identity is based on the separation of self from others. Although initially this concept refers to separation from the mother (real or symbolic), it also refers, more importantly for our purpose, to separation from family and community.

The interpretation of religion as constitutive of individual identity will be important in the discussion of legal issues in later chapters, such as that of children's religious freedom and the rights of the parents over the religious choice and education of their children, and in the discussion of proselytism.
2.5.2 Freedom of religion as protection of minorities in a multicultural society

An important reason to protect freedom of religion as a human right is the protection of minority religions in society. By guaranteeing all aspects of freedom of religion, we guarantee the preservation of these religious cultures and communities, and prevent their disappearance by assimilation into mainstream society. Two separate reasons justify this approach: One is that preservation of a variety of cultures, social systems, and religions, and maintenance of the social dialogue between them will reap benefit to society as a whole (a public good argument). The other is based on the intrinsic right of each cultural (or religious) group to exist with equal respect. This last reason can also be couched in terms of individual rights. If minority cultures no longer existed, minority members' choices of culture would become restricted, and their freedoms would be curtailed.

While these reasons apply equally to minority and majority religions, the emphasis is placed on minority religions as they are the ones likely to be adversely affected without this protection. Furthermore, historically, adherents of minority religions bore the brunt of persecution and discrimination. Thus it is justified that the protection of the rights of adherents of minority religions may be different from that accorded to the majority religion. (In the international context, of course, 'minority' is a relative term. A majority religion in one state may be a minority religion in another.) The different treatment may not only be a function of majority/minority status, but of the inherent differences between the religions themselves. If we accept these arguments, we must tailor the interpretation of religious freedom to fit disparate religions residing together. Parekh argues that '[e]quality between cultures is logically different from and cannot be understood along the lines of equality between individuals ... It is not enough to appeal to the general right to equality. One also needs to show that there is equality in the relevant feature of the context and that it entails identical treatment.'

The case of Ahmed v. UK illustrates what equality between cultures entails. A Muslim employee of a UK school asked to be given time off a regular workday to attend religious services and was denied. Following his failed domestic litigation, his application to the European Court of Human Rights, in which the applicant argued that his Article 9 (religious freedom) rights were breached, was also denied. If the cultural context is ignored, Ahmed indeed is seen as asking not for equal treatment but for preferential treatment. He is asking to work four and a half days a week, while his colleagues work five days. However, the context in which this case took place creates inequality between cultures. The days of rest, Saturday and Sunday, conform to a Judeo-Christian tradition. To redress this inequality, an exception to the rule must be made for those whose religions require other rest days and the right under the Convention should be interpreted accordingly.

Parekh believes religious equality is an individually exercised collective right. I disagree: although a correct analysis of equality should assess equality in the relevant cultural context, it is an individual right to equality of religious freedom that is protected. Ahmed's right and his choice to exercise it, and incur the risks
associated with doing so, are his own. The fact that other devout employees of the same faith did not make the same demands, or even did not think this exemption was warranted by their faith, does not detract from the legitimacy of his claim. Religious freedom and religious equality should be understood and assessed in their cultural context, but this does not make them rights of the group rather than the individual.

My first disagreement is conceptual. Parekh argues collective rights do and should exist, and may sometimes trump individual rights. These include rights, such as the right of the Catholic Church, recognized by states, to grant or refuse divorce to its members. This is properly a group right (in his terms, a collectively exercised collective right), because it overrides the rights of individuals. But such a right is problematic precisely for this reason, even if individuals submit freely to the Church’s power over them. Parekh dismisses the argument that groups should not be granted rights because such rights will threaten individual rights. He argues that individuals can misuse their rights against others as well, yet we recognize individual rights; why then should we not recognize group rights?

This argument seems to miss the point. Of course individual rights can be misused, but granting rights to groups essentially entails granting the group power over individuals. States have power over individuals; indeed states are defined as having a monopoly of such power. A state may have legitimate reasons to divest power to other institutions, but it is not clear why transfer of such power over individuals from state to group, including religious groups, constitutes a right of the group.

My second disagreement is policy based. Parekh relies on the shared doctrine the group wishes to maintain as a justification for community rights, particularly pertinent to religious group rights. This, he maintains, is why most states respect the Catholic Church’s right to excommunicate its members or deny them divorce, and grant it exemption from sexual discrimination laws, even though this severely restricts individual liberties. These examples illustrate the problems created by recognition of religious group rights. The powers of the Catholic Church, which are recognized in liberal states, raise the question of how such erosion of individual rights can be justified within a liberal framework. One answer is that in any state that recognizes the right to freedom of religion, every member is free to leave the Church. But this is not a sound justification: it is precisely because men and women are part of the society in which they live that the Church should not be able to override indiscriminately members’ rights, even if the membership of the individual in the Church is voluntary. Voluntariness is a question of degree. Just because someone lives in a Catholic community does not mean that they agree that a refusal to grant divorce should be outside the realm of the law. While refusing to grant divorce may or may not contravene the Church member’s rights, the fact that membership is voluntary should not automatically exempt the Church from scrutiny of the law.

Religious institutions, although they are private institutions, operate in the public realm. For instance, by allowing religious institutions the power to create legally recognized marriage and grant legally recognized divorce, the state is transferring to them regulatory power in a crucial area of public life. The distinction between
organs of the state belonging to the public realm and religious institutions belonging to the private realm does not represent reality. When a church hires or fires employees or excommunicates its members, it is not just a private institution that is enforcing its doctrine; it is a public organization implementing a system of morality that must stand up to generally accepted principles of human rights.

While accepting the premise of the communitarian approach, namely that the individual is part of a social context, my conclusion is not that religious communities should be left alone to formulate their own rules, but rather that basic human rights provisions should apply to them albeit adapted to their dual character.

2.5.3 Groups that violate the human rights of their own members

A lingering dilemma with no satisfactory resolution from any approach that advocates acceptance of a plurality of cultural doctrines while upholding basic principles of human rights is that of a group that discriminates against some of its own members or against non-members who are reliant on the group. The latter case concerns, for instance, employees who do not belong to the religious group but work in its schools, hospitals or other institutions.

The issue of groups that violate the human rights of their own members (especially socially weak members and dissenters) is nowhere more evident than in the context of religious communities and religious ethical codes. Kymlicka, who attempts to reconcile liberal theory with communitarian challenges, deals directly with the dilemma of how liberalism should treat groups that violate liberal principles. He argues that the fact that some group systems are deficient from a liberal point of view does not mean that liberals can impose their principles on them. This is obvious to him in the transnational context: liberal states will not intervene in how an illiberal state is run. Kymlicka argues that national minorities (we may add, religious minorities) deserve to be treated similarly to foreign states, namely that liberal principles should not be imposed on them.

However, this reasoning can be argued the other way around. If some principles are justified as human rights minimums within the state, which the state may impose on private groups and institutions within it, then there also should be human rights principles which the international community is justified in demanding that states observe. This is not a new view. Tseöni traces the concept of human rights in international law to Kant, and explains that under Kantian theory, respect for human rights is a fundamental prerequisite of the state. However, this remains a controversial question in international law. How it directly impacts religious freedom will be revisited in Chapter 3.

2.5.4 Group rights: the utilitarian argument

An argument that promotes group rights above individual rights, for a completely different reason than communitarian arguments, can be termed the group-rights-utilitarian argument: individual rights can be protected only by giving power to
the group. While the ultimate goal is to protect the individual’s rights, this must, paradoxically, sometimes be achieved by favouring the group over the individual. Gedicks claims\textsuperscript{12} that religious groups protect individual liberty precisely because they challenge the power of the state, something which individuals are incapable of doing alone in the modern world. To allow groups the freedom they require to fulfill this role, they should be allowed to trump individual liberty in cases where group rights and individual rights conflict.

This may be likened to the powers accorded by some laws to labour unions over workers. Organized labour is seen as the only power strong enough to challenge employers and authorities, and to protect individual workers’ rights, something the individual worker is unable to do. To ensure unions have these powers, for instance to deploy strikes, the decisions of individual workers must give way to union decisions. Similarly, the rights of individuals against the state can only be protected if power is given to popular social institutions, like religions, to override individual preferences.

The group-utilitarian justification provides no answer for those individuals whose rights are infringed by religions. By transferring authority from the state to religions, authority which may be paramount to individual rights, we are merely transferring the power to infringe individual rights, not protecting them.

\textbf{2.6 Religious views and liberal prescription of religious freedom}

Religions that view themselves as all-encompassing social prescriptions for the community of their adherents stand completely at odds with the liberal view of the role of religion. A key idea of liberalism is the autonomous individual – an individual who is not ruled by others and rules himself\textsuperscript{118} – a view which is inherently incompatible with many religious world views.

As part of the liberal ideology, religious toleration is perceived to be compatible with Protestantism, the religion historically associated with the rise of liberal thought. However, even this is not entirely the case and historically has not necessarily been so. Liberalism has been an important tradition in Protestantism, owing to the Protestant emphasis on private judgment.\textsuperscript{115} But Protestant Christianity developed an affinity not just with the individualistic aspect of liberalism, but also with the other defining characteristic of the liberal movement, the rise of the nation-state.\textsuperscript{116} The Protestant Reformation, although ultimately conducive to religious freedom, also encompasses a history of religious intolerance. While Protestantism empowered the individual in exercising personal religious freedom, it utilized the power of the state to establish religion, aligning the state-religion with the newly emerging nation-state. While some aspects of the Reformation worked in favour of religious liberty and separation of Church from state (especially among minority groups such as the Baptists and Anabaptists which were not aligned with the state), the main Reformers such as Luther and Calvin actually helped reinforce the principle of one religion in one state, and put the power of religion directly behind the secular authority.\textsuperscript{117} While today there is no such relation
between Church and state in those states which are traditionally linked with
Protestantism, as will be seen in Chapter 3 their history shows a complex relation-
ship to the liberal principle of freedom of religion.

The conflict may be even more pronounced in the case of religions that are
not aligned with the philosophical tradition of liberalism. The Muslim political
theorist Mernissi argues that lack of public-private demarcation is inherent in
the Islamic state. She claims\(^{110}\) that being Muslim is not a matter of personal
choice, but of belonging to a theocratic state. Being a Marxist or an atheist does
not contradict obeying national law, but being a Muslim is inherently a matter
that is not disjointed from the public code. This would be impossible to reconcile
with a liberal state's conception of freedom of religion. Mernissi's conception
has direct implications in the international sphere. A view of the right to reli-
gious freedom in international law exclusively as a right of the sovereign state
was expressed by the Saudi Arabian government.\(^{111}\) It argued that this right
comprises the freedom of any country to adhere to, preserve and protect its
religion, and show respect and tolerance towards religious minorities of the
country's citizens as long as the former respect the constitutional tenets of their
country.

Non-monotheistic religions and the political traditions they inform have
other views on the respective roles of the individual, the state and religion. Those
Asian states in which Buddhism and Hinduism are predominant tend to espouse
non-separation of state and religion, integration of the individual and the public,
and a grant of formal power to the state without clear theories of accountability.\(^{129}\)
These are at odds with Western ideas of constitutionalism and individual freedom,
as well as with the possibility of separation of state from religion. In Japan,
for instance, it has been asserted that the post-war 1947 constitution, which
was drafted by US occupation forces, instituted foreign Christian values.\(^{131}\)
Separation of religion from state in that constitution, imposed by the allied
forces, certainly introduced foreign, American, ideals, as will be discussed in
Chapter 3.

However, other aspects of the liberal concept of religious toleration may be
particularly suited to non-monotheistic religions: Monotheistic religion, suggests
the Buddhist philosopher Abe, is apt to be intolerant due to its emphasis on one
absolute god. Religions based on exclusive faith generate intolerance. In contrast,
Buddhism does not compel its adherents to 'have no other god'. It has no dogma,
as Buddha's teachings are just one of the many ways to enlightenment.\(^{122}\) Hinduism
encompasses two aspects: the ever present moral order of the universe (dharma) but
also individual devotion (bhakti).\(^{123}\) The second, more individualistic and less
authoritarian aspect, is more easily reconciled with the liberal concept of religious
freedom, but Hinduism is, in fact, a mixture of both.

As we can see even from this small sample, religious views and religiously
informed state views on different aspects of religious freedom have varied enor-
mously. If such are the divergences in the political philosophies of the states and
the religious philosophies that inform them, both historically and currently, it
is obvious that grave obstacles stand in the way of achieving a consensus on an
international right to freedom of religion. This difficulty will be explored in later chapters.

2.7 Religious political participation

There are problems inherent in the concept of religious freedom that make religious freedom impossible to realize within the state. If religious freedom includes the freedom to use religion to oppose the state and its political underpinnings (in a liberal state, democracy, human rights, and possibly, neutrality), the state cannot maintain both itself and complete, unbridged religious freedom. The state will necessarily provide incomplete protection of religious freedom, especially under the view that claims religious freedom is a group right. While an individual may wish to use religion against principles of the state, organized political activity is much more central to the exercise of religious freedom by a group. Therefore, any limitation on religious participation in the political sphere is injurious to the exercise of group religious freedom. Conversely, any justification of limitations of religious political activity may contribute to a political argument in favour of recognizing religious freedom as an individual, rather than group, right. Examples of such limitations will be discussed in this and the following sections.

In the context of religious freedom, competition between the authority of religion and the authority of the state makes the conflict between group and individual rights much sharper compared to other human rights. It raises some profound problems in all states, and particularly in liberal democracies. These problems, both in quality and in quantity, are distinct from any that arise with other civil institutions. This is because religions are coherent, all-encompassing, externally derived, alternative normative systems to the state. Both problems analysed show that religious freedom might be harder to define and more difficult to achieve than other human rights.

The first problem, discussed in section 2.7.1, is that of the legitimacy of using religious reasons for legislation. Law in a democracy is made by majority vote, regardless of the subjective motivations people have for casting such vote. Each vote is equal. But there are limitations on the power of majority vote. Respect for human rights, including religious freedoms, is one of these limitations. But is prohibition of legislation based on religious doctrine one of these limitations? If democracy is based on collective decision making by rational autonomous agents, when these agents are deciding according to predetermined external doctrine, they are bypassing substantive, if not procedural, democracy. These two opposing arguments mean that democracy and liberalism stand in irreconcilable tension regarding the status of religion in the state.

The second problem, discussed in section 2.7.2, is that of the right of religious political parties that are opposed to democracy to participate in the democratic process. If religious freedom is recognized as a collective right, one of its most important manifestations is the ability to participate in democratic elections. This presents a conflict between democracy as a free and equal election process, and
the limitations on it necessary to make democracy both meaningful and sustainable. This conflict is fundamentally unsolvable.

2.7.1 Are religious reasons for legislation a breach of religious freedom?

One of the difficult problems regarding the permissible bounds of religion in the state, in states which are liberal democracies, is that of religious motivation for legislation. This question, of the legitimacy of use of religious reasons in the democratic political process, is pivotal both to theory and practice of the liberal state. The resolution of this question is necessary to resolve the fundamental question: Can a liberal state and religion co-exist in the same society? The answer to this question has direct bearing on the interpretation of freedom of religion as a group or individual right, and is ultimately at the core of understanding religious freedom. This problem will be revisited, with some its practical manifestations regarding women and religion, in Chapter 4.

On the one hand, if the legislative process is the culmination of the free marketplace of ideas, then religious ideas must be as eligible to compete in it as any other idea. On the other hand, if the resulting law is equivalent to the religious norm, and the reason for its adoption is religious dictate on which the legislators acted, is that not tantamount to imposition of religious norms in contravention of the religious freedom of all citizens?

In the discussion that follows, it is clearer to focus on primary religious reasons, that is, religious reasons given as the direct justification for the legislation. There are many cases of hidden or secondary religious reasons, that is, reasons that are based on social or cultural norms, which are ultimately derived from religious teachings even if religion is no longer seen as their justification.

When asking whether religious reasons are legitimate, different answers must be given for different actors in the political system. I will analyse them in order, from the actor for which it is most permissible to use religious reason to the one for which it is least permissible.

First, individual citizens. Principles of individual freedom and individual choice mean that individual citizens may generally make decisions as they please, for any reasons they feel are apt, or for no reason at all. But is this true also when they act as voters? Of course, there is no possibility of placing legal restrictions on citizens' reasons for voting as they do, but should there be any such moral constraints? I think not, as citizens should enjoy absolute personal freedom in forming their decisions. Others see a social reason for reaching the same conclusion. Not only are religious reasons perfectly legitimate reasons for voting, but their inclusion may even serve a social function, argues Weilman. He argues that to achieve liberal democratic citizenship, as many citizens as possible must participate in political life. This entails, he claims, allowing moral and religious argument from citizens and even some moralizing by government. Many people become involved in public life through participation in churches, and their participation in political life would be curtailed if this could not be the platform for their own political agenda.
However, it may be argued that when exercising their right to vote, individual citizens cannot legitimately act as they please. Rawls argue that not only should legislators and officials be limited to public reason in political decisions, but citizens should likewise be limited when they are acting politically, as voters, rather than in their personal lives. Their limitation to reliance on public reason means that they should be able to explain their actions in terms others could accept as consistent with their freedom and equality.125

Some attempt has been made to reconcile these opposing views. Liberal democracy and religious public reasoning are not contradictory. Greenwald argues that it does not follow from a secular and separationist form of a liberal democracy that people should eschew their religious convictions when making political choices.126 At least in choosing between several reasonable possibilities given by public choice, he suggests that one may use a non-public (or religious) reason.127

Second, there are individuals who hold institutional religious positions and the organizations they represent. These, of course, use religious reasons in conducting the affairs of their religions, but the question is whether they may rely on their religious authority in public discussion, use the power of religious institutions to advance political goals, and involve themselves in the political process. Among opponents of the legitimacy of such involvement, Audi128 demands that those holding institutional religious positions refrain from pressing for specific public policies. Greenwald129 likewise argues that religious leaders should steer clear of endorsing political parties, because such action will make religion political and alienate those with opposing religious views. However, he fails to explain why making religion political is an undesirable thing. It could be argued that making religion political means being part of robust discussion in society and is therefore a beneficial result.

Weichman130 argues that religious institutions may legitimately be involved in politics, citing two examples: the first is of US Catholic Bishops writing a letter in support of economic justice; the second is Church support for the US civil rights movement in the 1960s. However, the content of the involvement—the fact that religious institutions supported worthwhile causes131 (from a liberal viewpoint)—demonstrates little about the principled political legitimacy of such institutional involvement. If such involvement is legitimate when it furthers causes compatible with liberalism, it must also be legitimate when it furthers causes which liberals would oppose.132 An argument for institutional religious involvement in political life based on the content of the involvement in particular cases is lacking in principle.

A middle way between prohibition of institutional religious involvement in politics and grant of equal participation in the political process is taken by US law. The limitation on the involvement of religion in politics is indirect. In the USA, churches are prohibited from endorsing or opposing political candidates if they wish to enjoy tax-exempt status.133 Although enforcement was not rigorous, and perhaps because of this very fact, claims were made that the prohibition was discriminately applied. Discrimination in application is one of the dangers of rules that allow religion into politics, but it is one of the dangers of legislation that
excludes religion from politics as well. The other danger of any regulation that decides how much religious speech may legitimately be included in the political process is that the state becomes a 'speech police'.

The third party is the legislators. A legislator does not enjoy the unencumbered freedom of the voter. They are elected to act in promotion of the public good not their idiosyncratic preferences. But legislators could claim that they were elected to promote a platform chosen by those who voted for them. If this platform relies on religious reasons, it is not only the legislator’s right but also his or her duty to use them to enact conforming legislation. Some attempt has been made to reconcile these demands on the legislator. Greenawalt argues that legislators may use religious reasons for themselves, but should publicly develop non-religious arguments. Similarly, Perry argues that it is constitutionally permissible for legislators to make a political choice based on religious argument but only where a plausible secular argument supports the same conclusion.

The legitimacy of reliance by legislators on a religious source should be differentiated according to the type of religious source used: legislation based on the idea that there is a God-created order fundamental to moral truth; legislation based on the idea of a God-inspired text; and legislation based on the directives of a God-anointed figure, like the Pope, believed to teach moral truth. The political legitimacy of these as a basis for legislation is not equal. The difference between them is in the degree to which the legislator divests himself/herself of the exercise of personal judgment. Reliance on a general belief in a God-ordered universe may be permissible; disallowing it transgresses the individual realm of freedom of belief. However, deference of the legislator to a non-state religious figure (such as the Pope) may well be considered an illegitimate use of institutional religion in the state.

It finally should be noted that any limitations on lawmakers relying on any aspect of religion, whether confessional or institutional, as a basis for their legislation conflicts with one aspect of religious expression of the group that some religions see as vital to their message — a religious political party.

Unselected public officials must exercise their judgment in making decisions of public policy on which they may hold a religious opinion. Unlike legislators, unselected public officials cannot claim to have been elected to their position by their voters to promote a particular religious viewpoint. They have an equal duty toward all citizens. Even if it may be legitimate for legislators to use religious reasons, public officials must rely only public reasons.

Judges are the final category to be examined. Even if it is legitimate for citizens and legislators to draw on their religious affiliation in choosing how to exercise their public decision making, it is different for decisions made by judges. Judges who bear religious allegiance may face a conflict between their belief and what is laid down by the law that they must interpret. In a liberal democracy, the case seems clear — rule of law must prevail and the judge must lay his or her personal beliefs aside. Judges must rule according to law, and not according to religious dictate.
Anything else would be a breach of the rule of law principle as well as an illegal imposition of the judge's religious beliefs on the litigants. However, from the judge's point of view, the case may not be so simple. A religious judge may feel that it is difficult to separate the personal from the professional. He or she may feel that their religious freedom is breached when they are not allowed to bring their religious beliefs into consideration. In many legal cases, moral determinations necessarily must be made. Indeed, according to natural law theories, a judge is bound to do so in every case. Ethical considerations can serve as protection against automatic application of unjust laws by judges. So why should only religious considerations be excluded?

This dilemma is not just a theoretical one. Recently, US Supreme Court Justice Antonín Scalia (himself a Catholic) opined in a public lecture that any Catholic judges who follow the Church's teaching (promoted by Pope John Paul II) that capital punishment is wrong should resign. But would judges who follow such religious teaching be doing something wrong? One factor to consider is that religious constitute a comprehensive normative system, and in that they are different from other moral beliefs. As in the case of legislation, we should differentiate between institutionalized and personal religious reasoning. A judge's reliance on institutional religious dictates (such as a direct command from a religious leader) in adjudication is very obviously wrong. It may be somewhat easier to argue in favour of a judge who relies on personal religious belief and not on religious dictates. However, in the case of judges the arguments against using religious reasons are the strongest of all the cases of use of religious reasons by political actors. These arguments must outweigh the injury to the religious beliefs of a judge and mandate against use of religious arguments by a judge.

How should international law treat domestic religiously motivated legislation (or other legal decision making) of the different types just analysed?

The different ways in which religion motivates legislation is evident in the legislation in various states. For instance, the debate regarding legislation on abortion in many states, such as Ireland, has seen the use of religious reasons in the political forum, whether by the discussants resorting to religious moral codes or by direct involvement of the clergy. Likewise, religious reasons were present in different states in the debates on the legal rights of homosexuals (regarding criminalization of homosexual acts, same-sex marriage, and adoption by same-sex parents). Another recent use of religious reasons was the mobilization by the Greek Orthodox church against the elimination of registration of religion on identity cards in Greece.

Viewing religion as a group attribute makes for a stronger claim that religion cannot be dissociated from political life than if religion is viewed as merely an individual concern. The group is emasculated if it is not allowed to operate in the prime public sphere of the state. But it is precisely the group characteristics of religion - its ordered hierarchy, lack of individual moral reasoning, and acceptance of pre-written decisions - which make the use of religious public reasons anathema to the proponents of liberal democracy.

Of course, if the positions advocated lead to contravention of the state's international human rights obligations, the objection to them is clear, but human rights
discourse has not yet analysed whether intervention by clergy or by those relying on religious arguments is legitimate in cases that do not involve a breach of specific human rights obligations of the state. Equal freedom of belief for all is breached, especially of those who do not share the religious belief, when religious reasons are used for decisions of the state regardless of the resulting decision. However, if the legislators' reasoning is taken into account when deciding on the legislation's legality, then the same law could be deemed legal in one state (in which its enactment was motivated by religion) but not in another (in which it had a different basis). International law must assess here very different legal and moral cultures and cannot provide one satisfactory answer.

2.7.2 Democratic participation of non-democratic religious parties

Democratic participation and the continued observance of human rights may not always go hand in hand, as many commentators assume, but may pose conflicting demands on a state. This conflict occurs in democracies that face the rise of intolerant political parties through the democratic system. Numerous examples of this phenomenon exist in recent years: in 1996 Mahathir bin Mohamad, Prime Minister of the Federation of Malaysia, threatened to suspend the government of the state of Kelantan, thus pressuring the state government to abandon Islamic penal legislation that contravened personal freedoms. In Algeria in 1991 the second-round election was cancelled; the state justified the cancellation by claiming the Islamic FIS Party a threat to the secular Algerian state.

When a political party opposes democratic elections or threatens the continuing respect of basic human rights, it has been claimed by Fox and Nolte, the state may be justified, under international law, in curtailing this institution's participation in the democratic process. The dilemma is addressed by the ICCPR. While Article 25 of the ICCPR mandates that:

Every citizen shall have the right and opportunity ... without unreasonable restrictions ... to vote and to be elected ... guaranteeing the free expression and will of the electors.

Article 5(1) of the ICCPR declares that:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized therein or at their limitation to a greater extent than is provided in the present Covenant.

Fox and Nolte argue that Article 5(1) manifests the principles of substantive, rather than formal, democracy. They point to its application by the HRC in removing an Italian fascist party from the protection afforded by the Covenant,
and to similar jurisprudence by the European Commission for Human Rights, permitting such restrictions to apply to "persons who threaten the democratic system". Fox and Nolte suggest that international law views democratic procedure not as an end but as a means to creating a society in which citizens enjoy certain basic rights. If so, democratic elections may be curtailed or restricted in order to protect the continuing enjoyment of such rights.

However, when restriction on the activities of a party is triggered by its religious ideology, it is freedom of religion, as well as rights of association and political participation, which is being curtailed. If the religious group defines itself through its participation in public life, it is meaningless to talk of a group right of religious freedom and bar its participation in elections. In this sense the concept of freedom of religion as a group right is inimical to liberal democracy.

Religious group rights are not contradictory to a democratic regime that respects human rights, insofar as what is included in the religious group right is defined from a liberal perspective. For those religious groups that view their political aspect as part and parcel of their religious self-identity, such a definition of what the group may or may not do or say will not be acceptable.

Dombrowski argues that where a particular religion has a comprehensive conception of good such that it will survive only if it controls the machinery of the state and practices intolerance, it would effectively cease to exist in a politically liberal society. If this is a descriptive claim, it is simply not true. It is precisely in those cases in which a religion with a comprehensive conception challenges the authority of the existing state that the politically liberal society is strained to its limits.

Rawls, while presenting a rather optimistic picture of the way intolerant religious sects will be whittled down naturally in a politically liberal society, ultimately concedes that he has no solution for the problem of intolerant religions in the liberal state:

Even if an intolerant sect should arise, provided that it is not so strong initially that it can impose its will straight away ... it will tend to lose its intolerance and accept liberty of conscience ... Of course, the intolerant sect may be so strong initially or growing so fast that the forces making for stability cannot convert it to liberty. This situation presents a practical dilemma which philosophy alone cannot resolve.

2.8 Conclusion

Religious freedom is unique, a double-sided right, encompassing the freedom to criticize and change ideas, and the right to preserve identity, a freedom of doing and of being. The term 'religion' freedom holds an internal contradiction. While freedom of religion, like all rights, is intended to ensure liberty, religion itself is also defined by the constraints it imposes. Freedom of religion protects both self-imposed and group-imposed constraints. For this reason, it is a liberty that sees the individual often at odds with the demands of the group. As we have seen, various theories which have tried to define and justify this right confronted
the need to address two competing aspects of this right: liberty or equality, individual or group. This important theoretical debate has, crucially, very practical legal applications. The tensions between individual and group demands on the application of the right to religious freedom must be taken into account by any legal system that accords this right. This chapter has argued and demonstrated that the right to religious freedom is an individual right, but has also highlighted the difficult problems associated with denial of group-related aspects of this right. These concerns exist for domestic legal systems and for international law, and will be exemplified and analysed in the various legal issues discussed in the following chapters.

Notes

1 See M. A. Glendon, 'Religious freedom and the original understanding of the Universal Declaration of Human Rights', Conference: Religious liberty and the ideology of the state, Prague, 2000, available at http://www.bedeufund.org/other/Prague2000/ GlendonPaper.html (accessed 8 December 2000). Glendon highlights the fact that the main controversy surrounding the drafting of the UDHR related to Article 18, specifically to the inclusion in it of the right to change religion. While all delegates agreed as to the importance of the inclusion of the right to freedom of religion in the Declaration, the Saudi Arabian delegation objected to the inclusion in it of a right to change one's religion based on the tenets of the Islamic faith. The Pakistani delegate was influential in bringing about the final inclusion of this right, based on the interpretation he gave to relevant passages of the Koran. This incident supports a wider claim: that in fact much more representative inter-cultural and inter-faith dialogue had taken place in the drafting of the Declaration than many commentators assume and that the final consensus was reached as much by non-Western as by Western contributions.

2 For the debate on universalism versus cultural relativism in the specific context of the UDHR, see K. Mickelson, 'How universal is the Universal Declaration?', University of New Brunswick Law Journal, 47, 1990, 19. For cultural-relativist criticism of the UDHR, see A. Polis and P. Schwab, 'Human rights: a western construct with limited applicability', in A. Polis and P. Schwab (eds), Human rights: cultural and ideological perspectives, New York: Praeger, 1980, 1. The authors claim that human rights is a Western concept that cannot be transplanted outside its cultural context, that it philosophically stems from Western Enlightenment-era philosophy of the autonomy of the individual, and that the UDHR was historically adopted when Western states were dominant in the international community, and so cannot be said to reflect universal values. For the view that the UDHR, although based on a human rights concept of Western origin, has universal applicability in the modern word, see R. E. Howard and J. Donnelly, Human dignity, human rights and political regimes, in J. Donnelly, Universal human rights in theory and practice, Ithaca: Cornell University Press, 1989, 65. On the wider debate on the universality of human rights, for a philosophical basis for the claim of universality of human rights, see R. Parthasarathy, 'Is the notion of human rights a Western concept?', Dignity, 120, 1989, 75. For a perspective that challenges the dichotomy of both pervasive view and argues that universalism/relativism is not an east/west distinction, see Y. Ghai, 'Human rights and interethnic claims', Cardozo Law Review 21, 2000, 1093, 1137. For further articles dealing with cultural implications of human rights, see A. A. An-Na'im (ed.) Human Rights in Cross-Cultural Perspective, Philadelphia: University of Pennsylvania Press 1992. For a relativist criticism waged against the UDHR, in a statement by the American Anthropological Association, see A. D. Renteln, International human rights: universalism vs. relativism, Newbury Park: Sage, 1990, 83.