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**TRIPTYCH:
SECTARIAN DISPUTES, INTERNATIONAL
LAW, AND TRANSNATIONAL TRIBUNALS
IN DRINAN'S
CAN GOD AND CAESAR COEXIST?**

CHRISTOPHER J. BORGENT†

INTRODUCTION

In 1993, Samuel Huntington famously proclaimed that we are entering into an era of a “clash of civilizations.”¹ A “civilization,” however, is a rather abstract entity; people are not abstract. When people clash about religion, it may or may not be across some hypothesized “civilizational” boundary.

Sometimes the clash is more like a struggle between the individual and his community. Consider the story of Abdul Rahman, an Afghan man who converted to Christianity in 1990 at the age of twenty-five.² Sixteen years later, after the Taliban collapsed, the new Afghan regime decided to try the now forty-one-year-old Rahman for the crime of conversion from Islam.³ Afghanistan’s law is based on the shari’a.⁴ The prosecutors

† Associate Professor of Law, St. John’s University School of Law. I would like to thank Elizabeth Defeis and Mark Janis for their participation in this written symposium. Father Robert Drinan was especially generous with his time and comments; this essay is dedicated to his memory. This article was completed prior to Father Drinan’s passing away and I have kept the text unaltered, reflecting the exchange of ideas that took place while he was alive rather than a reconsideration after his passing. This article also benefited from the hard work of Francis Cavanagh, Andrew Roop, and the editorial staff of the St. John’s University Journal of Catholic Legal Studies. Any mistakes are solely my own.

¹ Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFFAIRS, Summer 1993, at 22; see also SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

² See *Afghan on Trial for Christianity*, BBC NEWS, Mar. 20, 2006, http://news.bbc.co.uk/2/hi/south_asia/4823874.stm [hereinafter *Afghan on Trial*].

³ See *id.*

⁴ See, e.g., Andrea Elliott, *In Kabul, a Test for Shariah*, N.Y. TIMES, Mar. 26, 2006, § 4, at 43. Afghanistan’s new Constitution accommodates shari’a and secular

sought a death sentence for Rahman's conversion. The trial judge explained: "We will ask him if he has changed his mind. If so we will forgive him."⁵ If Rahman had not changed his mind, his mental state would have been assessed and then he would have faced a possible execution. Luckily for Rahman, Afghanistan allowed him to move to Italy where he was granted asylum.⁶

Or consider the story of Luigi Cascioli, a seventy-two-year-old Italian atheist who sued Enrico Righi, a seventy-five year-old priest from his village, for the alleged crime of fraudulently maintaining that Jesus Christ existed historically and is the Son of God.⁷ As Cascioli expected, an Italian court dismissed the suit. This now gives him the ability to appeal to the European Court on Human Rights ("ECHR") under what he calls a theory of "religious racism." It is reported that the ECHR has agreed to hear the case.⁸ If the ECHR does so, it will likely ask for evidence upon which the Catholic Church maintains the existence and divinity of Christ.

Sometimes, however, the clash does seem to be civilizational. This may be the only way to make sense of the rioting and demonstrations around the world in early 2006 due to cartoons, originally published in Denmark, portraying Mohammed in a satiric light.⁹ After Islamic states diplomatically protested the publication of the cartoons as being religiously insensitive, Denmark apologized. Newspapers from Spain, Italy, France, and Germany then re-printed the cartoons in a show of support for the principle of freedom of the press. Muslims around the world, angered over what they saw as religious bigotry, took to the

law alike, "but it is still unclear how successfully they will coexist." *Id.* Apostasy, or "the act of renouncing one's faith . . . is a grave sin in Islam, and according to classical Shariah, it warrants a punishment of execution." *Id.*

⁵ *Afghan on Trial*, *supra* note 2.

⁶ See Ian Fisher & Elisabetta Povoledo, *Italy Grants Asylum to Afghan Christian Convert*, N.Y. TIMES, Mar. 30, 2006, at A14.

⁷ See Eric J. Lyman, *Italian Atheist Sues Priest over Jesus' Existence*, USA TODAY, Jan. 31, 2006, at 8A.

⁸ See Anderson Cooper 360° Blog, <http://www.cnn.com/CNN/Programs/anderson.cooper.360/blog/2006/05/how-do-you-prove-jesus-existed.html> (stating the European Court of Human Rights has agreed to consider the case). Cascioli's application to the ECHR is available on Cascioli's home page: http://www.luigicascioli.it/29processo_eng.php.

⁹ See *Q & A: The Muhammad Cartoons Row*, BBC NEWS, Feb. 7, 2006, <http://news.bbc.co.uk/1/hi/world/4677976.stm>.

streets in a series of increasingly violent and ultimately deadly protests.¹⁰

Can international law be used to address these and other conflicts that arise out of questions of the freedom of religion? Modern international law was born of conflicts of politics and religion. The Treaty of Westphalia, the seed from which grew today's systems of international law and international relations, attempted to set out rules to end decades of religious strife and war across the European continent.¹¹ The treaty replaced empires and feudal holdings with a system of sovereign states.¹² But this was within a relatively narrow and historically interconnected community: Protestants and Catholics, yes, but Christians all. Europe was Christendom.

To what extent can international law be an effective tool for delineating and protecting religious freedom around the world in the 21st century? In *Can God and Caesar Coexist?*, Father Robert Drinan sketches a preliminary answer.¹³ While Westphalia largely took religion out of international law, Father Drinan considers how international law may mediate and moderate conflicts over religious freedom.¹⁴

It is an ambitious project, to say the least. Father Drinan claims no simple solution, but rather offers suggestions on how to proceed. One central concept in his discussion is the establishment of an international tribunal to resolve conflicts over religious rights, much as the ECHR and the Inter-American

¹⁰ *Id.*; see also Salman Masood, *2 Die as Pakistan Cartoon Rage Turns Violent*, N.Y. TIMES, Feb. 15, 2006, at A6.

¹¹ See Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, Oct. 24, 1648, reprinted in 1 MAJOR PEACE TREATIES OF MODERN HISTORY: 1648–1967, at 7 (Fred L. Israel ed., 1967). The Treaty of Westphalia memorialized the end of the Thirty Years War, which “began as a religious struggle between rival leagues of Catholic and Protestant states within the Holy Roman Empire” and eventually marked the decline of the Hapsburg dynasty. *Id.* at 3–5.

¹² See *id.* (“The Peace of Westphalia is a fitting beginning for the study of modern diplomacy. It expresses the emergence of the modern secular state system based on the existence of a plurality of sovereign ‘powers’ . . .”).

¹³ See ROBERT F. DRINAN, S.J., *CAN GOD & CAESAR COEXIST? BALANCING RELIGIOUS FREEDOM & INTERNATIONAL LAW* (2004).

¹⁴ See *id.* at 15 (“[I]t is not impossible that in the near future one of the central issues in the area of human rights will be the level of attention and enforcement that world law will accord to the boundaries of religious freedom.”).

Court on Human Rights (“IACHR”) do for human rights more generally.¹⁵

A tribunal focusing on the international law of religious rights has never existed. Faith in the work of international institutions, however, is a hallmark of mainstream international legal jurisprudence, particularly from the Victorian era to today, but with roots that delve much deeper into the earth of the profession. In this instance, is such faith misplaced?

Part I of this essay will consider Father Drinan’s proposal as part of the “modernist” tradition of international legal jurisprudence. Aspects of Father Drinan’s argument are especially similar to conceptions of international law elucidated by Hersch Lauterpacht, perhaps the greatest twentieth-century exponent of legal modernism. Both Lauterpacht and Drinan draw from a worldview defined by the European Enlightenment and the start of what is commonly called the Age of Reason.

After situating the proposals of *Can God and Caesar Coexist?* within international law’s tradition, Part II will turn to a pair of relatively recent methods of criticizing the “traditional” view of international law: rational choice theory and so-called “critical” or new stream perspectives on international law. Although these perspectives have at times been linked with politically conservative (rational choice theory) and liberal (new stream) viewpoints, Part II will argue that they are better understood as atavistic conceptions of law that have earlier manifestations in the theories of the Enlightenment *philosophes* and of their Romantic critics. As such, legal modernism, new stream theory, and rational choice perspectives are methodological siblings, borne of the Age of Reason and now squabbling over the intellectual inheritance of their parents. They may be better off sharing the wealth and helping each other.

With this discussion as a base, Part III will return to Father Drinan’s proposal and how it may profit from the perspectives of rational choice and the new stream. While new stream and rational choice theorists are each critical of the perspective of mainstream international law, each can learn from the other in considering how to address the sectarian struggles of today. We must trace the path from Lauterpacht to bin Laden, from the

¹⁵ See, e.g., *id.* at 5–6 (considering the creation of a tribunal concerning religious freedom), 86–87 (concerning the ECHR and religious freedom).

Concert of Europe to the era of *Jihad vs. McWorld* because, in the end, Father Drinan's project challenges us to consider how the tools of the Enlightenment apply to the Age of Terrorism.

I. ROBERT DRINAN AND INTERNATIONAL LEGAL MODERNISM

A. *Father Drinan's Proposal*

Beginning with an observation that the United Nations human rights system "assumes that the right to religious freedom is equal in importance to the right to freedom of speech and assembly and the right to be free from discrimination based on race and gender," Father Drinan's central concern is how religious freedom can be better protected around the world.¹⁶ The answer, in part, lies in the prudential construction of international regimes and institutions. Mirroring the process of institutionalizing human rights after World War II, Father Drinan suggests that the 1981 United Nations Declaration on Religious Freedom ("Religious Freedom Declaration") is a good text from which an eventual treaty could be shaped.¹⁷

Much as the Universal Declaration on Human Rights, a General Assembly resolution from 1948, led to the drafting of the core international human rights treaties, the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), the Religious Freedom Declaration is a non-binding United Nations resolution that nonetheless allows states to reach a consensus as to the scope of certain rights and freedoms.¹⁸ Often called "soft law," such hortatory or aspirational documents can become the seedlings from which binding treaties and conventions (like the ICCPR and ICESCR) grow.¹⁹

¹⁶ DRINAN, *supra* note 13, at 41.

¹⁷ See *id.* at 213 (describing the 1981 United Nations Declaration on Religious Freedom as "[t]he best attempt at formulating some kind of legal code between God and Caesar").

¹⁸ See Universal Declaration of Human Rights, G.A. Res. 217A (III) (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966), available at http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

¹⁹ On soft law, generally, see COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed.,

But a treaty is not the end of Father Drinan's proposal. The idea to which he keeps returning is the establishment of an international tribunal that would be devoted to resolving disputes that arise out of the posited Covenant on Religious Freedom.²⁰ Father Drinan does not define exactly what such a tribunal would look like, but does draw comparisons to the ECHR.²¹ Such a tribunal would thus allow individuals to file suits against their own country, or any other state that was a signatory to the Religious Freedom Covenant, for violations of that state's obligations under the Covenant.²² One could imagine suits based on events such as those described in the introduction or a host of other problems being argued before the tribunal.

As Father Drinan admits, it is not known what the final result of his proposal would be. He asks:

What will be the consequences of this new world law granting the freedom to act on one's "conscience, religion or belief"? For the first time in history there are norms discouraging nations from punishing an individual who acts contrary to law because of a moral conviction derived from conscience. Will it work?²³

I have no answer as to what the final result would be of drafting such a treaty and institutionalizing a tribunal to hear disputes arising from it. Rather, I wish to examine some of the difficulties in building these institutions and consider ways to overcome these impediments. At the heart of my analysis is the belief that although, as Father Drinan contends, there is a formal equality among religious freedom and rights of freedom of speech and assembly—the same enforcement mechanisms exist for each of these rights as they are all part of the same instrument, the ICCPR, with the same Optional Protocol—the application of such enforcement mechanism would be much more contentious in regards to religion than in these other freedoms. The conflicts

2000) and Gunther F. Handl et al., *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988).

²⁰ See *supra* notes 14 and 15 and accompanying text.

²¹ See *id.* at 89.

²² I will use the term "transnational tribunal" to describe a tribunal in which an individual or subnational group is able to maintain a right of action against a state. By this nomenclature, the term "international tribunal" is used for tribunals that resolve disputes between states. I discuss transnational tribunals and domestic legal change at greater length in Christopher J. Borgen, *Transnational Tribunals and the Hegemony of Process*, 38 GEO. WASH. INT'L L. REV. (forthcoming 2006) (manuscript at 2, on file with author).

²³ See DRINAN, *supra* note 13, at 22.

over using a transnational tribunal may outweigh the benefits of establishing such a tribunal.

But to chart a way forward, we first need to look back.

B. *The Enlightenment and the Tradition of Legal Modernism*

Father Drinan's analysis and proposal speak with the same optimism that is found in much international legal scholarship with its roots in the humanism and rationality of the Enlightenment. As described by Professor Brian Tamanaha:

The Enlightenment *Philosophes'* distinctive contribution was to extend the application of reason and science to the social, political, legal, economic, and moral realms. They believed that a science of man could be developed which would allow government and society to be designed to give rise to a more just, rational existence.²⁴

This not only included scrutinizing the religious teachings of the Church, but also a fundamental reordering of the relationship between church and state.²⁵ In 1648, the Treaty of Westphalia was concluded, ending the era of religious wars in Europe. Besides defining the modern international system around the sovereignty of states, Westphalia also played a role in the evolution of the concept of religious freedom. Although it "stopped short of providing individuals with freedom of religion, . . . the treaty nevertheless asserted the right to religious asylum and states' prerogative to select their own religion."²⁶ Westphalia is thus a key text in both the history of international law and of the protection of religious freedom. These ideas concerning religious freedom were adopted and expanded upon by John Locke, such as in his *Letter Concerning Toleration* from 1690, and other Enlightenment-era writers.²⁷ Locke and the French *philosophes* in turn influenced the leaders of the American Revolution in general and Thomas Jefferson in particular.²⁸

²⁴ BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 39 (2004).

²⁵ See *id.*

²⁶ MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 78 (2004).

²⁷ See *id.*; JOHN LOCKE, A LETTER CONCERNING TOLERATION (Patrick Romanell ed., Liberal Arts Press 1950) (1960).

²⁸ See ISHAY, *supra* note 26, at 81. "Thomas Jefferson . . . championed the right of the individual to religious opinion and freedom of conscience based on the

Although the philosophy of the Age of Reason would go through many permutations from the Enlightenment into Romanticism, followed by Neo-Classicism, Neo-realism, Symbolism, Aestheticism, Nihilism, Modernism, and today's Postmodernism,²⁹ the mainstream of international legal theory flowed directly from the headwaters of the Enlightenment and directly into Victorian Modernism.³⁰ The Enlightenment contributed the belief in universal values as well as the conviction that the world could be improved through the judicious application of reason to dispel myths and superstitions. The careful application of reason would allow the universal values to become clear and reason would allow us to design the institutions to order society around those values. The modernists of the Victorian era and after took this faith in reason and focused on building international institutions—ranging from individual treaties to the attempts to “outlaw” war at the turn on the twentieth century to the League of Nations to the United Nations—that reflected a belief in the existence of universal values and the possibility of rational management of conflicts.³¹

By considering Father Drinan's work as part of this tradition of legal modernism, the mainstream of international

reasoning of Locke, Paine, and the French *philosophes*.” *Id.* at 80.

²⁹ See JOHN RALSTON SAUL, *VOLTAIRE'S BASTARDS: THE DICTATORSHIP OF REASON IN THE WEST* 15 (1992).

³⁰ Jurisprudential periods do not follow the same nomenclature as this timeline of general philosophy. Legal academics disagree both as to the periodization and the naming of different eras in international jurisprudence. For example, the German historian Wilhelm Grewe calls international law from the fifteenth century until 1919 “classical” international law and everything since 1919 “post-classical” international law. See WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 575 (Michael Byers, trans., 2000) (1984). Together, according to Grewe, classical and post-classical international law make modern international law, as contrasted to medieval international law. *Id.* David Kennedy refers to the “traditional period” of international legal scholarship as being from roughly 1700–1900 followed by the “modern era.” See David Kennedy, *A New Stream of International Law Scholarship*, 7 *WIS. INT'L L.J.* 1, 17, 26 (1988). For the purposes of this article, I will refer to the “mainstream” legal style exemplified from the turn of the century to the present day as “legal modernism” or “traditional” international law. Since the 1980s, there has been an increase in international scholarship related to the Critical Legal Studies movement. I will refer to this as the “new stream” of international jurisprudence or “post-modern” international legal scholarship.

³¹ See ISHAY, *supra* note 26, at 174, 177. *But see* MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* 433 (2001) (discussing the shortcomings of the Kellogg-Briand Pact as an attempt to outlaw war).

jurisprudence from the 19th and 20th centuries, we can perhaps gain a deeper view into strengths and weaknesses of his argument. To do this, I want to turn briefly to Hersch Lauterpacht, perhaps the greatest exponent of international legal modernism in the first half of the twentieth century.³² In certain ways, Lauterpacht was the quintessential Victorian, even though the Victorian Age was gone, replaced by World Wars and nuclear bombs.³³ Yet how he addressed the problems of his day can give us an insight into how Father Drinan approaches questions of religious liberty as we transition from the Cold War through the "Post Cold War" and into what some have called the "Age of Terror."

Hersch Lauterpacht was born in 1897 and died in London in 1960.³⁴ He was a teacher, at both the London School of Economics and Cambridge University; a scholar, writing numerous books and articles on a wide variety of concerns to international law; and ultimately, from 1955 to 1960, a judge on the International Court of Justice.³⁵

International law in the nineteenth century was a time of tension and promise. The tension was between natural law and positivism. A belief in natural law, rights that exist regardless of the sovereign decisions of states,³⁶ was particularly strong in the European academy. Natural law theorists of a previous era

³² Regarding the life and work of Hersch Lauterpacht, see generally Nathan Feinberg, *Hersch Lauterpacht—Jurist and Thinker*, 3 ISRAEL L. REV. 333 (1968); Dr. C. Wilfred Jenks, *Hersch Lauterpacht—The Scholar as Prophet*, 36 BRIT. Y.B. INT'L L. 1 (1960); Iain G.M. Scobbie, *The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function*, 8 EUR J. INT'L L. 264 (1997).

³³ See generally KOSKENNIEMI, *supra* note 31, at 353–412 (discussing Lauterpacht and his Victorian values).

³⁴ See Jenks, *supra* note 32, at 1.

³⁵ See, e.g., H. LAUTERPACHT, PRIVATE SOURCES AND INTERNATIONAL LAW (1927); H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933); H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (1947); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950); H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (1958). Lauterpacht was also the editor of four editions of the treatise *International Law: A Treatise*. See, e.g., L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE (H. Lauterpacht ed., 8th ed. 1961). Those editions came to be known as "Lauterpacht's Oppenheim." See Ricard B. Bilder, *Oppenheim's International Law, Vol. I, Peace*, 88 AM. J. INT'L L. 383, 383 (1994) (book review). For a brief biography, including Lauterpacht's career at the London School of Economics and Cambridge University, see KOSKENNIEMI, *supra* note 31, at 376, 388.

³⁶ See Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81, 82 (1991).

believed that law was the will of God; after the Enlightenment it emanated from reason. For positivists, law was the result of sovereign decision-making; states signed on to treaties or formed customary international law.³⁷ One found law based not on the proper understanding of universal reason, but on the discoverable facts upon which states agreed. The modernists thus had a tension in their legal theory.

Theoretical tensions notwithstanding, the turn of the century was also the time of a great flowering of modernist projects. The Hague Peace Conferences attempted to codify rules to regulate and ultimately end wars.³⁸ Inter-state arbitration was growing at a rapid pace, providing states with juridical, rational alternatives to war.³⁹ Societies of international law were being founded in the United States and Europe.⁴⁰ The promise of the Enlightenment was bearing fruit in legal modernism.

Perhaps no greater shock could have come to Lauterpacht, who “[s]ituat[ed] international law within a historical trajectory of European thought towards a Kantian, cosmopolitan law,”⁴¹ than the horrors of the First World War. Wilhelm Grewe, in his magisterial *The Epochs of International Law* remarks that “the end of the First World War is almost unanimously considered by historians of international law as constituting the end of an epoch” greater than the shifts of 1648 (Westphalia) or 1815 (the end of the Napoleonic Wars and the start of the Concert of Europe).⁴² The blooming of internationalist thought from the late Victorian era was engulfed by the hard winter that lasted from the beginning of the First World War to the end of the Second. As Martti Koskeniemi explains: “To find a place for law in [the]

³⁷ DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 14 (2002).

³⁸ See George H. Aldrich and Christine M. Chinkin, *Symposium: The Hague Peace Conferences*, 94 AM. J. INT'L L. 1, 1 (2000) (introducing and situating the historical significance of the Hague Peace Conferences in international law).

³⁹ See GREWE, *supra* note 30, at 611 (listing the number of newly concluded arbitration treaties for the period of 1920–1945, which shows a peak in 1929 and then a sharp decline after 1933).

⁴⁰ See Monroe Leigh & Cristian DeFrancia, *International Law Societies and the Development of International Law*, 41 VA. J. INT'L L. 941, 941–43 (2001) (describing the development of international law societies beginning in the late nineteenth century). See, e.g., The American Society of International Law, <http://www.asil.org> (last visited Aug. 1, 2006); The European Society of International Law, <http://www.esil-sedi.org/english> (last visited Aug. 1, 2006); The International Law Association, http://www.ila-hq.org/html/frame_top.htm (last visited Aug. 1, 2006).

⁴¹ KOSKENIEMI, *supra* note 31, at 358.

⁴² GREWE, *supra* note 30, at 575.

dangerous time [of the interwar period], Lauterpacht looks back into the middle of the nineteenth century and hopes to resuscitate its liberal rationalism and its ideal of the rule of law, its belief in progress, its certainty about the sense and direction of history”⁴³ While other theorists, such as Hans Kelsen, considered theories of the irrational behavior of the public, “it would have been unthinkable for Lauterpacht to integrate such disturbing evidence into his ordered world. For Lauterpacht, even at the worst of times, the world remains a whole, united in the rational pursuit of liberal ideals.”⁴⁴

It is somewhat ironic that in the midst of this worldwide crisis that for many denied the efficacy of international law, international law made strides in making the philosophy of the Enlightenment part of actual statecraft in embedding natural law concepts within positivistic instruments. Until the interwar period, universal rights were only a theoretical construct, not part of actual diplomatic practice. Rights, be they collective rights such as sovereignty or individual rights such as the freedom of speech, were viewed by many leading lawyers as being culturally contingent. Imperial states distinguished between what they viewed as “‘civilized’ nations, ‘barbarous’ and ‘semi-barbarous’ communities and ‘savages.’”⁴⁵ The interwar period saw a withering away of the argument that international law must be based on Western civilization and there was increased acceptance that the “international legal order [applied] to all States, regardless of their race, culture or geographical location.”⁴⁶ Grewe explains:

Together with the formula “all the nations of the earth,” which was used by most treaties in order to express the now-dominant idea of a universal international legal community of mankind, the terms “society of nations,” “international community,” “société oecuménique du droit des gens” and “société internationale globale” were employed in the literature. In this way, the general, all-embracing “societas humana” which had formed the centerpiece of the system of great rationalist legal philosophers of the eighteenth century, as well as the “société des nations” of Vattel and the legal thinkers of the French

⁴³ KOSKENNIEMI, *supra* note 31, at 355.

⁴⁴ *Id.* at 360.

⁴⁵ GREWE, *supra* note 30, at 582.

⁴⁶ *Id.* at 581.

Revolution—conceptions which had always been confined to theoretical speculation and never accepted by the practical law of nations of Europe—now entered positive treaty law.⁴⁷

This recognition of universal rights in positive law set the stage for a shift in Lauterpacht's work. In response to the collapse of the Victorian attempt to use international law as a scientifically-based constraint on foreign policy, but with the recognition of the universality of international law, Lauterpacht turned his efforts after World War II towards human rights and an attempt to "articulate in ethical terms the political unity that had seemed lost."⁴⁸ Lauterpacht wrote one of the central texts of the post-war emphasis on human rights, simply titled *International Law and Human Rights*.⁴⁹ As described by Koskenniemi, in Lauterpacht's book:

Words such as "fundamental," "inalienable," and "sanctity" abound, underlin[e] the ahistorical, quasi-religious seriousness of human rights. The book's revivalist argument is this: natural rights (that is, individual human rights) are rooted in (Western) legal and political thought, from Greek philosophy to modern Western constitutions.⁵⁰

Along with his work on human rights, Lauterpacht became increasingly interested in the role of international tribunals in defining international law.⁵¹ Building on his theory that international law had no actual lacunae,⁵² only difficult questions that were still in need of resolution, Lauterpacht argued that the judicial function of international tribunals would fill the gaps of international law.

In Lauterpacht, we see the quintessential modernist relying on reason and a sense of universal rules to order a messy world. First trying to change—if not end—warfare through legal means, Lauterpacht and the modernists turned their attention to the relationship between law and societal values in the form of human rights.⁵³ For Lauterpacht the international judge—and

⁴⁷ *Id.* at 584 (internal citations omitted).

⁴⁸ KOSKENNIEMI, *supra* note 31, at 411.

⁴⁹ LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS*, *supra* note 35.

⁵⁰ KOSKENNIEMI, *supra* note 31, at 392 (citing to HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 73–93 (1950)).

⁵¹ *See id.* at 411–12.

⁵² *See* LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY*, *supra* note 35, at 85–87.

⁵³ *See* KOSKENNIEMI, *supra* note 31, at 391–92.

the contemplative rationality of the judge—became of central importance to the evolution of international law.⁵⁴ Each of these strands—the universality of values, the rationality of society, the importance of human rights, the constructive role of international adjudication—is part of the DNA of Father Drinan’s argument as well.

C. *The Promise of International Law*

Father Drinan’s view is similarly holistic, small-c catholic. His call for treaties and tribunals to make sense of the confusion concerning religion and politics exhibits a faith in rationality and in international institutions. If one can say that Lauterpacht’s world-view “relies on the interlocutor’s willingness to take for granted the intrinsic rationality of a morality of sweet reasonableness, the non-metaphysical doctrine of the golden middle,”⁵⁵ then a similar description may apply to Father Drinan’s. As when one reads Lauterpacht, in reading *Can God and Caesar Coexist?*, one has a sense that Father Drinan believes that although there is great injustice in the world that must be ended, there is also a general progress across societies towards similar emancipatory goals. In these ways, Father Drinan is modernist in his tone.

While it is clear that Father Drinan sees international law as a way to forward the freedom of religion, it is not clear just how successful he thinks international law will be. Consider the following passage:

But if the record of the ECHR [on religious freedom issues] is somewhat disappointing, it must also be recognized that no instant resolutions of the classic clashes between religion and government are feasible. In fact, the time may never come when the demands of government will be consistently required to yield to the leanings of individuals who are conscientiously opposed to a law of general application that unintentionally conflicts with their religious views.⁵⁶

So, while optimistic, Father Drinan takes care not to be unrealistic. International law today holds much promise. The ECHR is building an impressive jurisprudence in human rights,

⁵⁴ See LAUTERPACHT, *supra* note 35, at 61–63 (discussing the role of a judge in the international judicial system).

⁵⁵ KOSKENNIEMI, *supra* note 31, at 410.

⁵⁶ DRINAN, *supra* note 13, at 86–87.

overall, even if Father Drinan may find its cases in the religious areas wanting. Its caseload, and that of its Western Hemisphere analog, the IACHR, is burgeoning.⁵⁷ There are also attempts at reforming the sporadically functional United Nations human rights system.⁵⁸ There is reason for some hope that the international human rights system will increase in effectiveness.

But the years leading to World War I were years of hope in the promise of international law. The issue is really which impulse is stronger in today's world, the drive to rationalize and harmonize or the impulse to ostracize and balkanize? As Benjamin Barber puts it, this is the struggle of McWorld against Jihad.⁵⁹

Father Drinan is coy as to which has the upper hand, but he sees a way forward in the use of international institutions. The new stream critics and the rational choice theorists are not so sure. Whereas Father Drinan (and Lauterpacht) are exponents of the Enlightenment by way of modernism, the new stream academics are the intellectual heirs of the Romantics and the rational choice theorists draw very different lessons from the Enlightenment than does Father Drinan. We will turn to their views now as a means to further unpack the relationship of international law to religious freedom.

⁵⁷ Regarding the number of cases filed before the Inter-American Commission of Human Rights, see Inter-American Commission on Human Rights: Annual Report 2004, <http://www.cidh.org/annualrep/2004eng/chap.3.htm> (last visited July 29, 2006) (illustrating that the total number of complaints received by the Inter-American Commission on Human Rights during the last seven years has risen from 458 in 1997 to 1329 in 2004).

⁵⁸ The most recent attempt at reform culminated in the evolution of the UN's Human Rights Commission into a new Human Rights Council. See General Assembly Resolution A/60/251 (April 3, 2006) establishing the Human Rights Council. See also the Human Rights Council's website, <http://www.ohchr.org/english/bodies/hrcouncil>. See Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 693 (1999) (noting the "perennial" question of reforming the UN human rights system and citing to Philip Alston, Final Report on Enhancing Long-term Effectiveness of the United Nations Human Rights Treaty System, UN Doc. E/CN.4/1997/74 (Mar. 7, 1997), as an example of increasing skepticism as to the possibility of reform).

⁵⁹ See generally BENJAMIN R. BARBER, *JIHAD VS. MCWORLD* 4–20 (1995) (describing the tensions between Jihad and McWorld). Barber uses the term "jihad" as shorthand for characteristics "favorable to parochialism, antimodernism, exclusiveness, and hostility to 'others.'" *Id.* at 205. Although he uses a term from Islam, he emphasizes that jihad, in this sense, is "a characteristic of all fundamentalisms." *Id.* at 206.

II. TWO CRITIQUES

Robert Drinan and Hersch Lauterpacht share a faith in humanity's essential rationality. Perhaps more importantly than being rational, people are generally reasonable. Father Drinan and Lauterpacht also believe in international law as a project that is continuously being built and, in the process of constructing international law, the state system will become progressively more peaceful and just. This sense of the rationality of humans and in the ability to perceive universal rights—as described in international law—is part of the world view of the European Enlightenment.⁶⁰ The reaction against the Enlightenment was Romanticism, which, as Professor Brian Tamanaha describes:

[T]he Romantics . . . challenged the very coherence and desirability of universality, and . . . the scope of reason, advocating in their place particularity, will, creativity, and passion. They glorified cultures as wholes unto themselves, each with its own unique and incommensurable life world and values.⁶¹

Tamanaha explains that, as the project of the Enlightenment seemed to be unable to rationalize and universalize society and its norms, philosophers began rejecting the idea of an ultimate good.⁶² But, while the philosophical discourse may have turned from the Enlightenment to Romantic and critical voices, international lawyers picked up the thread of the Enlightenment's story and took it for their own. And today, we find international law's mainstream with a universalizing project that is a recognizable offspring of the Enlightenment, whereas current critical voices share some characteristics of the Enlightenment and of the Romantics.

The critical voices of particular interest to us are the rational choice theorists, also called economic behavioralists, and the critical legal studies or "new stream" theorists.

A. *Voltaire's Bastards: The Universalism of Self-Interest*

The Enlightenment was the parent of a large, contentious brood. One result of the Enlightenment was the belief in the

⁶⁰ See TAMANAHA, *supra* note 24, at 39–40.

⁶¹ *Id.* at 40.

⁶² See *id.* at 41.

existence of universal rights, rights that apply to all people regardless of race, color, or creed.⁶³ Another child of the Enlightenment is rationality.⁶⁴ In Father Drinan's project, we see how a faith in reason is used to foster the protection of universal rights.⁶⁵ But this is not the only way that the Enlightenment's genetic material may combine; other descendents of the Enlightenment focus on rationality in the sense of strategic decision-making to achieve desired results. To the rational choice theorists, rational decision-making based on self interest is the true universal constant in humankind. Consequently, rather than worrying about conceptions of rights, which are historically and socially contingent, one should focus on the common strategies that states use to forward their individual interests.

The result of this exercise is a different sort of universalism than Father Drinan's, a universalism of technique rather than of right. Rational choice theorists, such as Eric Posner and Jack Goldsmith, do not perceive international law as absolute rules that must be followed by states.⁶⁶ In *The Limits of International Law*, Posner and Goldsmith, the authors, argue that multilateral human rights treaties have little influence on state behavior.⁶⁷ Rather, the enforcement of human rights is based on the interests of the states involved, regardless of whether international legal obligations exist. According to Posner and Goldsmith:

[S]tates that care about human rights . . . will pressure human rights abusers regardless of whether they are signatories to a treaty or have violated customary international law. When

⁶³ See ISHAY, *supra* note 26, at 83–84 (explaining the success of the Enlightenment in influencing the recognition of fundamental human rights in many international treaties).

⁶⁴ The role of rationality on policymaking is John Ralston's Saul's quarry in his book *VOLTAIRE'S BASTARDS*. See, generally, SAUL, *supra* note 29, at 5, 7–9.

⁶⁵ See DRINAN, *supra* note 13; text accompanying notes 13–15.

⁶⁶ See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 108, 115–17, 119–21, 123–26 (2005) (arguing that human rights treaties have little influence on human rights practices); in reply to Goldsmith and Posner's assertions, see, generally, Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393 (2006).

⁶⁷ *Id.* As for customary international law, rational choice theorists argue that much of what is claimed by mainstream international lawyers to be state practice due to a belief in the existence of a legal obligation is nothing more than self-interested activity. See *id.* at 109–12.

conditions are not right, they will tolerate human rights abuses in other states regardless of whether they are signatories to a treaty or have violated customary international law.⁶⁸

Concerning Father Drinan's project, a rational choice theorist would first find it telling that the Declaration on Religious Freedom is only a General Assembly resolution and that states did not seek to have it become a convention.⁶⁹ General Assembly resolutions are the runts of international law's litter: They are not legally binding in and of themselves and are only of marginal use in the formation of customary international law.⁷⁰ This is a technique that states use when they want to have the benefit of making a proclamation but not of the costs of actually being bound to the declaration.⁷¹ Instead of viewing soft law as a step to hard law, rational choice theorists are likely to view the decision to use a non-binding declaration as a lack of commitment to compliance.⁷²

With its skepticism about the role of treaties and the existence of customary international law, rational choice theory not only clashes with mainstream international law, but particularly with European conceptions of international law. The European worldview has been described as being essentially Kantian: cosmopolitan with a concern for formal legality.⁷³ Martti Koskenniemi situates the U.S. view as being one of rational choice: "Legalization, is just a policy choice, a matter of costs and benefits—with no *a priori* reason to believe that the latter would outweigh the former."⁷⁴ Father Drinan's argument,

⁶⁸ *Id.* at 134.

⁶⁹ See DRINAN, *supra* note 13, at 20–21.

⁷⁰ See 1 OPPENHEIM'S INTERNATIONAL LAW 48–50 (Robert Jennings & Arthur Watts eds., Longman 9th ed. 1992), for a discussion concerning General Assembly resolutions. See also *Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic (Compensation for Nationalized Property)*, 17 INT'L LEGAL MATERIALS 1, 27–31 (1978).

⁷¹ See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2005–09 (2002). See also Eric A. Posner, *The Signaling Model of Social Norms: Further Thoughts*, 36 U. RICH. L. REV. 465, 472 (2002), for Eric Posner's argument that social interaction should be understood as having two stages: the signaling stage and the cooperation stage.

⁷² See GOLDSMITH & POSNER, *supra* note 66, at 99.

⁷³ See Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 117 (2005).

⁷⁴ *Id.* Koskenniemi's brief sketch of the American mindset warrants some fleshing out. Robert Kagan had astute observations on similar issues in his article

in this sense, is closer to being “European” than “American”: The protection of human rights is not just a policy choice. Rights exist; they are real; they are universal.

B. *The New Stream: Apologies and Utopias*

If the relationship of rational choice theorists to the mainstream is a battle over two universalisms, then the critique by the new stream theorists is the resurgence of particularism. Much in the same way that the Romantics reacted to the homogenizing proclivities of the Enlightenment *philosophes*, the new stream reacts to the universalism of mainstream legal perspectives by “problematizing” many of the givens of jurisprudential orthodoxy.

There is no single new stream school; its bibliography is large and diverse.⁷⁵ *Third World Approaches to International Law*, or “TWAIL,” critiques the Western and developed country biases of the rules and structures of international law.⁷⁶ *Latin American Criticism*, or *LatCrit*, does the same with a particular emphasis of the culture of the Americas and especially of indigenous peoples.⁷⁷ Feminist legal theory explains how

Power and Weakness, POLICY REV., No. 113 (June and July 2002), available at <http://www.hoover.org/publications/policyreview/3460246.html> (last visited Jan. 23, 2007). Kagan’s argument (in part based on observations of Robert Cooper) is that Europe represents a “post-modern world” in which there are no traditional security threats; it is a Kantian paradise. *Id.* at *15. Europe is inward looking and satisfied that it has found a set of rules that foster peace and prosperity, at least within Europe. The tough places in the world—swaths of Africa, the Middle East and Asia—are definitely outside of this post-modern paradise; they are still mired in the modern and the pre-modern world of Hobbes. The U.S. has to navigate between these worlds, maintaining security for the post-modern world by remaining engaged with the modern and the pre-modern. The U.S. mans the wall but cannot walk through the gate. *Id.* Consequently, the U.S. has not incorporated the relatively rigid legalism of those who live their lives within the post-modern paradise because it needs flexibility to address the problems emanating from the rest of the world. The trick, of course, is to move states from the Hobbesian world into the Kantian paradise. . . . How to do this, in part, is one of Father Drinan’s concerns.

⁷⁵ Literally. See David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT’L L.J. 417, 417–21 (1994); see also Kennedy, *supra* note 30, at 26; Purvis, *supra* note 36, at 82.

⁷⁶ See, e.g., Makau Mutua, *What is TWAIL?*, 94 A.S.I.L. PROC. 31, 31 (2000) (“The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West.”).

⁷⁷ See, e.g., Kevin R. Johnson, *Foreword: LatCrit Goes International*, 16 FLA. J. INT’L L. x, xvi-xx (2004) (discussing recent developments in *LatCrit* scholarship that indicate a renewed international focus); cf. Berta Esperanza Hernández-Truyol, *On*

international law favors the interests of men over women.⁷⁸ The origins of new stream theory are similarly varied: legal realism, anarchism, Sartrean existentialism, radical social theory, and progressive historiography all contributed to new stream scholarship.⁷⁹ Critical theory, linguistic theory, structuralism, literary theory, sociology, and normative philosophy are among the approaches that inform the new stream.⁸⁰ New stream writers react to what they view as the lack of self-reflection, the doctrinal timidity, and the cabined thinking of mainstream international legal jurisprudence.⁸¹ They attempt to be reflective about the discipline of international law,⁸² and unearth its underlying assumptions, biases, and cognitive structures in an attempt to “rejuvenate the field as an arena of meaningful intellectual inquiry.”⁸³

While the varied perspectives of the new stream would each have their own set of concerns regarding Father Drinan’s proposal, I will focus on the work of sociological critiques of international law, of which David Kennedy⁸⁴ and Martti Koskenniemi⁸⁵ are among the most influential scholars.⁸⁶

Becoming the Other: Cubans, Castro, and Elian—A LatCritical Analysis, 78 DENV. U. L. REV. 687 (2001).

⁷⁸ See, e.g., Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379, 381 (1999) (arguing that there are significant power differentials between men and women in the field of international law, notably, the underrepresentation of women in international legal institutions, the gender-biased vocabulary used, and supposedly gender-neutral constructs that affect men and women differently).

⁷⁹ Purvis, *supra* note 36, at 89.

⁸⁰ See Kennedy, *supra* note 30, at 7; Purvis, *supra* note 36, at 88–89.

⁸¹ See Kennedy, *supra* note 30, at 4–6; Purvis, *supra* note 36 at 87–89.

⁸² See Purvis, *supra* note 36, at 87–89.

⁸³ Kennedy, *supra* note 30, at 6.

⁸⁴ For examples of David Kennedy’s work on the sociology and history of the international legal profession, see David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT’L L. 9 (1999) [hereinafter Kennedy, *Disciplines*]; David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 197 UTAH L. REV. 545 (1997); see also David Kennedy, *Tom Franck and the Manhattan School*, 35 N.Y.U. J. INT’L L. & POL. 397 (2003); David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209 (1986); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J. 1 (1986).

⁸⁵ Before *The Gentle Civilizer of Nations*, Koskenniemi set the mark for critical perspectives on international law with *From Apology to Utopia*, which has become recognized as one of the most significant jurisprudential texts on international law in the latter half of the twentieth century. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (Cambridge Univ.

The sociologists consider the substance of international law through the optic of the habits, techniques, biases, and blind spots of the international legal profession.⁸⁷ Here it is not only the law, but the lawyers who are “problematized.” While international legal sociologists are not necessarily “crits” or even identified as part of the new stream,⁸⁸ their work animates contentions shared among many new stream perspectives. International legal sociology often shows that the very concept of an international legal profession is fraught with ideological baggage as to shared projects, methods, and goals. Realizing that as lawyers, we are more likely to see certain problems and miss others, as well as a tendency towards certain types of solutions, we can better assess both how we perceive the world and how we choose to address its problems.

Professional training, such as law school and legal practice, “actively socializes people to value certain things above others.”⁸⁹ Lawyers, thus, carry “normative biases systematically instilled by their professional training.”⁹⁰ This world view, which is at first learned, becomes more deeply instilled as lawyers act to actually reinforce their understanding of how transnational litigation and arbitration affects the knowledge, interest, and expectations of lawyers, judges, and litigants in transitional societies. By changing these expectations, it plays a part in forming the norms of the evolving legal system. David Kennedy observed:

Press 2005) (1989) [hereinafter KOSKENNIEMI, FROM APOLOGY TO UTOPIA]; see also George Rodrigo Bandeira Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 EUR. J. INT'L L. 539, 540 (2005); Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351, 355 (1999) [hereinafter Koskenniemi, *Letter to the Editors*] (describing a method of analyzing international law that borrows from French structuralism, social and linguistic theory, and an analysis of binary oppositions).

⁸⁶ See also David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 461 (1994).

⁸⁷ See Kennedy, *Disciplines*, *supra* note 84, at 13 (“[I]ndividuals . . . rush headlong to establish, embrace, and embellish their discipline’s blind spots and contradictions.”).

⁸⁸ Note, for example, Martti Koskenniemi’s ambivalence of being identified as a “critic” in Koskenniemi, *Letter to the Editors*, *supra* note 85, at 351–52.

⁸⁹ Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 905 (1998).

⁹⁰ *Id.*

I have been repeatedly struck by the degree to which individuals are not blinded by their disciplinary commitments, but instead rush headlong to establish, embrace, and embellish their discipline's blind spots and contradictions. Their disciplinary sensibility is as much about desire, construction, and work as it is about error or ignorance. As a result, I am increasingly convinced that a disciplinary sensibility does not precede the people who occupy it, but is their common project, made and remade as they pursue the projects of their hearts and heads.⁹¹

By accepting a discipline's professional habits, blind spots, and biases, you turn its project into your own.⁹² Aspects of the Enlightenment world view have become pervasive in international legal argument, if not the method of policymaking in the West in general. The subtitle to John Ralston Saul's book on the Enlightenment's effects on modern policy, *Voltaire's Bastards*, is *The Dictatorship of Reason in the West*.⁹³ International legal argument, according to new stream writers, "operates within a restricted intellectual structure."⁹⁴ That structure is the result of a political choice and it demonstrates the existence of bias and "international law's denial or ignorance of its own structure serves to obscure the existence of that structure."⁹⁵ The structure of the discussion, how and what one says, has been an unexamined given in the scholarship of the mainstream. Martti Koskenniemi has mused: "I often wonder to what extent international law is becoming a political theology in Europe . . ."⁹⁶ This law-as-theology defines how we see and interact with the world. It tells us what the problems are that need fixing and how to fix them.

One of the key blind spots of the profession has to do with the relationship of international law and religion.⁹⁷ There also

⁹¹ Kennedy, *Disciplines*, *supra* note 84, at 13.

⁹² *Id.* "It might be, in other words, that a discipline's blind spots, strategies of evasion, elision, or forgetfulness might be linked to bias of various sorts." *Id.* at 12-13.

⁹³ SAUL, *supra* note 29.

⁹⁴ Purvis, *supra* note 36, at 98. See generally KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra* note 85, at 1 (describing how theory is excluded from the doctrine of international law); SAUL, *supra* note 29, at 324 (noting that the "rational" approach to law can be "dangerously dissociated from the realities of human society").

⁹⁵ Purvis, *supra* note 36, at 99.

⁹⁶ Koskenniemi, *supra* note 73, at 120.

⁹⁷ See Kennedy, *supra* note 30, at 23-24 (discussing the marginalization of religion in modern international law).

exists a more general critique concerning the relationship of religion to the history of international law.⁹⁸ David Kennedy is skeptical of the traditional historical narrative in which Westphalia marked the separation of religion from international law: “Ironically,” he notes, “at the very moment of religion’s disappearance [from the narrative], international law appears as a universalist ideology of its own—temporally freed from its origin and context.”⁹⁹ International law, in one sense, took on many trappings of religion. Religious movements such as the Reformation also need to be understood as political acts. In Kennedy’s view, international law and the rhetoric of religion inform and affect each other.

Considering Father Drinan’s argument from the perspective of new stream theorists, two issues immediately come to mind: First, who has defined this right of religious freedom and is it actually universal? Second, is the legalistic technique of defining a right in a treaty and forming a tribunal actually the way to protect this right (assuming it exists) or is it simply the method that is most comfortable to an international lawyer?

Considering the first question, the universality of religious freedom as a human right, new stream writers echo the Romantic sensibility that cultures are different and should be respected as such.¹⁰⁰ An attempt to apply one culture’s conception of right and wrong is a source of struggle and contention; its resolution is decided by the application of power. New stream authors could look into the drafting history of the Universal Declaration of Human Rights and note that Chung-Shu Lo of China said in the debate at the United Nations that “[t]he basic ethical concept of Chinese social political relations is the fulfillment of the duty to one’s neighbour, rather than the claiming of rights.”¹⁰¹

⁹⁸ See *id.* at 18–19 (examining the “story” of international law’s historical relationship with religion).

⁹⁹ *Id.* at 22.

¹⁰⁰ See, e.g., Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT’L L. 66, 67–68 (1991) (stating that international lawyers must “resist phony, reified, would-be universalist legal discourse” and acknowledge “opposing and self-differentiating national and regional/continental cultural traditions”).

¹⁰¹ CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 69 (2003).

This position is not singular to China; other Asian leaders have noted that the Asian conception of human rights is different than what has evolved in Western Europe.¹⁰² One Chinese author recently described Asian values as emphasizing “consensual solutions, communitarianism rather than individualism, social order and harmony, respect for elders, discipline, a paternalistic state, and the primary role of government in economic development.”¹⁰³ The reason for these different values is that they are socially and geographically contingent. Western Europe, with its historically low population density and non-labor-intensive agriculture, was able to form a conception of rights that was individualistic.¹⁰⁴ Asia, with its high population density and labor-intensive agriculture, evolved a communitarian conception of rights that would allow for stability under such conditions.¹⁰⁵ Such theorists might argue, for example, that it is not that the Chinese or the Malaysians do not believe in human rights, but that the socio-economic realities of their societies produce a different conception of rights. In other words, values are not universal, they are contextual.¹⁰⁶ Mainstream authors have a response to this: First and foremost, they play the “let’s be realistic” card right back to the new stream authors. Arguments against the universality of rights are not made by the people who are being deprived of those rights, but rather by the political leaders and economic elites who have a vested interest in the status quo, just or unjust.¹⁰⁷ David

¹⁰² See TAMANAHA, *supra* note 24, at 139 (stating that some Asian leaders object to the application of Western, individualized human rights doctrine to Eastern, communitarian societies).

¹⁰³ TOMUSCHAT, *supra* note 101, at 70.

¹⁰⁴ See, e.g., speech by Liu Huaqiu, head of Delegation of the People’s Republic of China to the World Human Rights Conference, June 1993 (*quoted by* Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 BUFF. J. INT’L L. 215, 226–27 (1996)) (stating, among other things, “[t]he concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture, and values of a particular country.”).

¹⁰⁵ See *id.* at 67–68 (describing the impact of agriculture on Chinese and Indian civilizations).

¹⁰⁶ See Koskenniemi, *supra* note 73, at 119 (“[L]aw has no shape of its own, but always comes to us in the shape of particular traditions or preferences . . .”).

¹⁰⁷ See Pierre-Marie Dupuy, *Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi*, 16 EUR. J. INT’L L. 131, 131 (2005) (observing that the universality of international law is currently “under attack from those who, in the name of their assumed unique position in the world community, aim to weaken the very notion of an international

Bederman has quipped, “[i]t is ironic that among the values that compete at the moral-philosophic center of international law, human rights are most contentiously disputed as being artifacts either of false universalism or dangerous relativism.”¹⁰⁸ Moreover, as some new stream authors acknowledge, the context-driven origin of rights does not deny that such rights may actually be universal.¹⁰⁹

Thus, universal values are more than just partisan preferences. As one Iranian said to French international lawyer Pierre-Marie Dupuy: “When an Iraqi, Turkish or Afghan dissident is tortured in prison, he suffers in the same way a French or British person would in a suburban police station. And he has as much need as them of Amnesty International’s aid!”¹¹⁰

Dupuy reverses the critique that invocations of universal rights are merely pie-in-the-sky rhetoric. Actually, it may be the universalists who are causing real change and the critics who are involved in theological squabbles of great noise and little consequence: “If the passionate demand for self-scrutiny leads to paralysis, we should perhaps begin to wonder if we have not gone too far in our denunciations of those who appeal to the universal . . .”¹¹¹ Martti Koskenniemi recognized this criticism of the critics in writing: “Skepticism about the material determinacy of international law seems to prevent new approaches lawyers from making normative propositions. Such propositions are, perhaps, understood as matters of political preference.”¹¹²

This is not to say that new stream authors are devoid of policy proposals. However, a particular outlook as to “what is to be done” is not the new stream’s strength, as Koskenniemi points out.¹¹³ Rather, it is an attention to why actors do what they do or believe what they believe. They move from this into a dissection

legal order”).

¹⁰⁸ BEDERMAN, *supra* note 37, at 123 (2002).

¹⁰⁹ See Koskenniemi, *supra* note 73, at 115.

¹¹⁰ Dupuy, *supra* note 107, at 135.

¹¹¹ *Id.* at 136.

¹¹² Kennedy & Tennant, *supra* note 75, at 427 (quoting Memorandum No. 371/26 from Martti Koskenniemi on the Essex Conference to the Ministry for Foreign Affairs of Fin. (October 1993) (translating from the Finnish original)).

¹¹³ See *id.* (stating that the research of new stream authors does not provide answers to lawyers seeking advice).

of the interests hidden (or obvious) in certain jurisprudential constructs.

This leads us to the second issue: whether “legalization” as a technique is desirable. I will consider this question at length in Part III, below, but at this point, I want to set out the concern that new stream authors have with legalistic technique. Just what are these professional habits and blind-spots mentioned by David Kennedy, as relevant to this discussion? One habit is the attempt to move issues from out of the realm of political negotiation and into one of juridical assessment. This was done, for example, with disputes over international trade. Prior to and in the early years of the General Agreement of Tariffs and Trade (“GATT”), trade disputes between countries were resolved by diplomatic negotiation.¹¹⁴ To be sure, countries drew on past experience—precedent—in the negotiation, but the issue would not be resolved by a technocratic decision as to what was legal or illegal. Rather, resolution would come about through a combination of persuasion and power. As the GATT evolved and more countries became part of the world trading system, negotiations became less “clubby” and more formal. As they became more formal, greater use was made of third-parties to mediate or resolve differences between the countries. Finally, in the jump from the GATT into the new World Trade Organization, dispute resolution became formally legalized, with the use of tribunals, legal briefs, and appeals. In this process, an issue that had been largely a policy matter, resolved by negotiation, became a legal matter, resolved by litigation.

With legalization, lawyerly tropes such as balancing tests and reasonable person standards gain in importance over political techniques such as mobilizing the public or non-binding mediation. While such activities still have a place outside of the tribunal proceeding, they are not (officially) part of the tribunal process.¹¹⁵

¹¹⁴ The narrative in this paragraph draws from JEFFREY L. DUNOFF, STEVEN R. RATNER, DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS ACTORS, PROCESS* 831 (2d ed. 2006); see also Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 *MINN. J. GLOBAL TRADE* 1, 7–8 (1999).

¹¹⁵ See *WORLD TRADE ORG., UNDERSTANDING THE WTO* 55–56 (3d ed. 2005), available at http://events.streamlogics.com/wto/2004/e-doc/understanding_e.pdf (relating WTO panels to tribunals and describing the dispute settlement system as a rule-based system where experts “examine the evidence and decide who is right and who is wrong”).

I will turn back to these concerns momentarily. For the moment, it is sufficient to note that lawyers solve problems in a certain way, calling upon a certain set of values and skills ingrained in the profession. I will discuss the efficacy of these legal structures and professional habits in addressing religious freedom worldwide below.

C. Summarizing the Critical Perspectives

Compelling as it is, Father Drinan's world view would be criticized by both the rational choice theorists and the new stream scholars. The new stream would find his rhetoric weighted with the baggage of the Western rationalist project and his stance as not sufficiently critical of the intellectual tradition or of the profession in which it is embedded. The rational choice theorists would find his faith in treaties and transnational unwarranted. According to them, while Father Drinan argues for a normative prescription, he has not adequately accounted for how states actually act.

The response of Father Drinan and other mainstream scholars to the rational choice theorists may be that states, even if they almost always act out of self-interest, will change the calculation of costs and benefits with the existence of law and a tribunal. Much in the same way that people tend to speed if they do not think they will be caught, once enforcement becomes at least more possible (is there a police officer with a radar gun down the road?) then the risk analysis changes and compliance becomes more probable.

Moreover, even if decisions of a tribunal are not enforced, there is still a benefit. For Father Drinan, the lack of enforcement is important, but does not eradicate the value of such a tribunal:

Some observers will wonder whether a judgment favoring a claimant would be worthwhile. After all, the existing government might not enforce it, or it might receive little publicity and thereby only harm the situation of the aggrieved party. But at least a voice of protest would have been heard and a complaint processed. One important moral justification for creating human rights tribunals is simply that they might

prevent any recurrence of the situation in which Europe's Jews had no place to go to complain.¹¹⁶

Both the new stream scholars and the rational choice theorists have some salient points regarding Father Drinan's analysis. But then again, Father Drinan—and others who use mainstream or classic modes of international legal argument—have a stance with much appeal because he maintains a consistent *world view of the good* as opposed to merely a consistent *critique* of practices or a *rule* for strategic decision-making. Father Drinan contends that, in the end, you have to stand up for some conception of the good. He has his; he explains what it is, and he sets his sights on that spot. He then starts traveling the road to get to that place.

While the new stream writers may lack a coherent vision as to how the international system should be ordered and how to get there from here, new stream theories, especially sociological and historiographic theories of the international legal profession, have led to a better understanding of how and why international lawyers do what they do. These critiques may not show a specific way forward, but they do highlight the pitfalls in Father Drinan's path.

III. BETWEEN FAITH AND REASON: RECONSIDERING THE LIMITS OF INTERNATIONAL LAW AND TRIBUNALS IN RESOLVING CONFLICTS OVER RELIGIOUS FREEDOM

Drawing from new stream theory and rational choice perspectives, as well as mainstream international legal theory, one finds that efforts to use international law to protect freedom of religion face serious obstacles. First, there is the question of universality and particularity: How will universal laws interact with contrary domestic norms? Second is the question of whether legalization is a step towards a solution or a contributing factor to the conflict. Finally, in a preliminary attempt to map a way forward, I will briefly consider the perspectives of legitimacy theory and transnational legal process.

A. *Domestic Norms and International Law*

How one chooses to worship—or not worship—is often an issue of great personal import. Believers want to express their

¹¹⁶ DRINAN, *supra* note 13, at 106.

devotion in the manner they want; non-believers want to be free from having to participate in worship. Father Drinan sees this as a key reason to internationalize the protection of freedom of religion: It is a core human value that deserves the utmost respect.¹¹⁷ Yet, because religious expression (or the freedom from religious expression) is so important to so many, it also excites passionate—and perhaps irrational—responses. Father Drinan recognizes this as well. Asking why some rights are protected through tribunals or similar institutions and others not, he answers that:

There is no good answer to that question except that the leaders of the United Nations have for many years concluded or assumed that religion is too volatile, controversial, or unmanageable to be controlled by some global entity. Underlying this theory is some abiding hostility toward religion as a cause of political violence and even war.¹¹⁸

While the Romantics of a previous era may have argued that all cultures were unique and thus one culture's norms *should not* be applied to another culture's, the argument here is less normative and more empirical: Religion is so closely held—it is so intrinsic to the identities of both societies and individuals—that the disputes that arise from clashing conceptions of the good *cannot* be managed by an transnational tribunal.

Let us consider what may be the hardest case: the ability of such a treaty and tribunal to promote religious freedom within predominantly Muslim countries. Father Drinan notes that “one has to wonder if any worldwide juridical authority could define and apply international principles of religious freedom to the Muslim world; or, more pointedly, if the rulings of such a tribunal could ever win acceptance in the world of Islam—some fifty nations and 1.2 billion adherents.”¹¹⁹ Only the European tribunals—that are, as I will argue below, unique due to the high degree of federalization among the European states and the relative similarities of their societies—have dared to broach these topics.

¹¹⁷ See *id.* at 226 (stating that “[r]espect for religious freedom seems to be instinctual, deep, and powerful”).

¹¹⁸ *Id.* at 41–42.

¹¹⁹ *Id.* at 181.

There is a “virtual inseparability of Islam and the culture that is both its cause and its effect.”¹²⁰ Consequently, predominantly Islamic societies have shown hostility towards the transplantation of norms that are considered foreign.¹²¹ This makes it especially difficult for law as defined by a treaty and interpreted by an international tribunal to overcome deeply rooted norms that are intertwined in the very structure of a society. Some Muslim nations have reserved the right not to be ruled by international law, and that shari’a will always have precedence.¹²²

International norms concerning religious freedom have not been welcomed in certain Muslim countries. Writing about religious freedom and Islamic states, Christian Tomuschat observes that:

Article 18 [of the ICCPR] distances itself from the UDHR by introducing ambiguous language. It provides that the right to freedom of thought, conscience, and religion “shall include freedom to have or to adopt a religion or belief of his choice.” This phrase can be interpreted in different ways and has in fact been subjected to such divergent interpretations.¹²³

Moreover, Article 1 of the Religious Freedom Declaration specifies that:

[F]reedom of religion “shall include freedom to have a religion or whatever belief of his choice.” The representatives from Islamic states made it unequivocally clear in the debate preceding the vote that this provision was by no means intended to confer a right to change one’s religion.¹²⁴

This can be a serious problem because at issue is not simply what the “black letter” law says, but rather how the society acts in regards to religious freedom. A government may pay lip service to religious freedom but, if your neighbors view you with hostility, then your freedom of religion is in name only.

¹²⁰ *Id.*

¹²¹ See BARBER, *supra* note 59, at 206–07.

¹²² See DRINAN, *supra* note 13, at 182. Although Westerners may react critically to the decision by Muslim nations that the Shari’a cannot be superseded by international law, the result is not very different from U.S. decision that, in internal matters, the Constitution trumps international law.

¹²³ TOMUSCHAT, *supra* note 101, at 73.

¹²⁴ *Id.* at 73–74; see also DRINAN, *supra* note 13, at 184 (noting Islam’s reluctance “to accept the right to change one’s religion”).

Consequently, as Rosa Brooks has written, “creating the rule of law is most fundamentally an issue of norm creation.”¹²⁵

B. Would a Transnational Tribunal on Religious Freedom be Part of the Answer or Part of the Problem?

Would an international tribunal assist in the evolution of domestic norms or in combating religious intolerance around the world or might it exacerbate the situation by stoking fears of “Western imperialism”? International tribunals are a peculiarly Western technique to address issues ranging from disagreements between countries to, in this case, norms within countries. In the years prior to World War I, when European countries tried to curb armed conflict through legalistic techniques, Britain and the United States, in particular, signed a host of bilateral international arbitral agreements to resolve inter-state disputes, showing the Anglo-American proclivity to using quasi-litigation to resolve disputes.¹²⁶

International tribunals and courts have proliferated since the end of the Second World War in a variety of issue areas.¹²⁷ In the 1960s and 1970s investor-state dispute resolution, as ensconced in bilateral investment treaties, was used to resolve

¹²⁵ Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the Rule of Law*, 101 MICH. L. REV. 2275, 2285 (2003). Brooks contrasts the role of norms in a society versus that of law. See *id.* at 2321–28.

¹²⁶ See GREWE, *supra* note 30, at 611.

¹²⁷ The 1990’s saw the establishment of, among other tribunals, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Tribunal for the Law of the Sea, the World Trade Organization Dispute Settlement Understanding and the World Bank Inspection Panel. There has also been a trend towards increasing use of international tribunals and courts in general. Thus, we find not only more tribunals, but, generally, increasing use of each tribunal and consequently a significant expansion of international case law. See Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT’L L. & POL. 697, 697–98 (1999) (discussing the development of international courts and tribunals over the course of the twentieth century); *Developments in International Criminal Law: Foreword*, 93 AM. J. INT’L L. 1, 1 (1999) (discussing the establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunals for Rwanda in recent years). See generally Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101 (1998); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709, 715–17 (1999) (listing organizations that are classified as judicial bodies).

disagreements over expropriations and nationalizations.¹²⁸ In the 1990s the Western powers feared the effects of rampant nationalism and wanted to stem secessionists and *genocidaires* and so built tribunals to address the situations in Rwanda and Yugoslavia.¹²⁹ This was further expanded with a standing International Criminal Court.¹³⁰ Now, in an era of a concern over a “clash of civilizations” where U.S. troops combat Islamists in battlefields large and small around the globe, where Muslim youth have shown their frustration for being treated as second class citizens in France and throughout Europe, and as questions of cultural assimilation and integration become heated topics in many industrialized countries, Western democracies have become particularly anxious over religious and ethnic tensions. It is understandable that one of the first reactions of mainstream international lawyers would be to turn to the lawyerly techniques of codification, in the form of treaty making, and judicialization, in the form of constructing an international tribunal.

Keeping in mind that “[t]he thesis of [Father Drinan’s] book [is] that religious freedom has been elevated to the status of customary international law, and therefore its observance should be monitored and supervised like other basic rights of a political nature,”¹³¹ we should consider the mechanisms for the monitoring and enforcement of human rights and whether they are counterproductive in this case. The ICCPR, the Convention Against Torture, and other human rights treaties have monitoring committees that receive periodic reports regarding the human rights practices on member states in the given topic area. While monitoring groups are unable to directly enforce violations, they can muster political and moral opprobrium.

¹²⁸ See, e.g., RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* xii (1995); Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT’L L. 621 (1998).

¹²⁹ Regarding the International Criminal Tribunal for the Former Yugoslavia (ICTY), see Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by Res. 827 (May 25, 1993), available at <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf> [hereinafter ICTY]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Nov. 8, 1994, 33 I.L.M. 1958.

¹³⁰ See Rome Statute of the International Criminal Court, arts. 5–6, July 17, 1998, 37 I.L.M. 999, 1003–04 (1998) (defining genocide and listing it as one of the four crimes within the ICC’s jurisdiction).

¹³¹ DRINAN, *supra* note 13, at 185.

1. The Effectiveness of Tribunals

Tribunals, by contrast, may be able to actually award damages or prospective relief.¹³² Third-party dispute resolution for human rights is scattered among a variety of courts and quasi-judicial institutions with either global or regional purview.¹³³ Father Drinan tends to cite to cases from the ECHR, probably the most successful of human rights dispute resolution mechanisms.¹³⁴ The structure of the European system is more focused on the individual complaint process rather than other regional or global human rights dispute settlement mechanisms. Whereas the ICCPR has an optional individual complaint mechanism, the European Convention requires accession to the individual complaint mechanism.¹³⁵ Unlike the Inter-American System, which uses two tiers,¹³⁶ the European system replaced the pre-existing Court and Commission structure (as is currently the case of the Inter-American system) with a single Court.¹³⁷ Individual complaints, as a result, are heard in the first instance by a body that can order binding measures, as opposed to only issuing a report.¹³⁸ Besides being able to require prospective relief in the form of amelioration of domestic law and policy, the ECHR is also able to order compensation for the plaintiff.¹³⁹

¹³² Concerning compensatory damages, see DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 214, *et seq.* (1999).

¹³³ *Id.* at 14–15.

¹³⁴ See, e.g., DRINAN, *supra* note 13, at 159 (citing the 1993 case *Kokkinakis v. Greece*, the first claim on religion heard by the ECHR).

¹³⁵ See Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2, (Dec. 16, 1966), available at http://www.unhchr.ch/html/menu3/b/a_opt.htm.

¹³⁶ See Inter-American Court of Human Rights, http://www.corteidh.or.cr/index_ing.html (last visited Jul. 27, 2006); Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at <http://www.cidh.org/Basicos/basic3.htm> [hereinafter *Inter-American Convention*] (concerning the Inter-American Commission on Human Rights).

¹³⁷ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1, 1998, 213 U.N.T.S. 222, available at <http://www.hri.org/docs/ECHR50.html>; see also European Court of Human Rights, <http://www.pict-pcti.org/courts/ECHR.html> (last visited Jul. 27, 2006).

¹³⁸ See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1, 1998, 213 U.N.T.S. 222, art. 46, available at <http://www.hri.org/docs/ECHR50.html>.

¹³⁹ *Id.* art. 41.

Thus, all tribunals are not created equal.¹⁴⁰ The individual complaint mechanisms in United Nations human rights mechanisms are weak due to a lack of money damages, a lack of credible enforcement, complaint mechanisms are not mandatory, and politicization of the reporting process. While the ECHR and the IACHR have certain strengths relative to the United Nations system, the European experience is still an outlier point. Furthermore, while the ECHR is perhaps the most successful of human rights tribunals, it is not a helpful analogy when designing a global tribunal on religious rights.

For one thing, Europe is relatively homogenous when compared to the international system as a whole. However, Father Drinan takes a view of Europe's history that overemphasizes earlier conflicts.¹⁴¹ Such an emphasis of early conflict makes a generalization of the European into the international seems like less of a stretch. But as Father Drinan notes, "one must remember that the court was designed to adjudicate cases arising in countries with common cultures and, in general, a deep respect for understanding differences in religious background."¹⁴² The importance of this deep cultural similarity, the common norms of today's Europe, cannot be underestimated when we are analyzing the efficacy of a tribunal adjudicating conceptions of human rights.

¹⁴⁰ How to accurately assess the "effectiveness" of international and transnational tribunals, and the result of those assessments, are hotly-debated issues. Laurence Helfer and Anne-Marie Slaughter set the standard with their 1997 article, which set out thirteen variables for effectiveness. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 300-37 (1997). John Yoo & Eric Posner have criticized Helfer and Slaughter's analysis focusing in particular on whether political dependence is favorable of independence for international tribunals. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005); see also Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005); Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957 (2005).

¹⁴¹ In Father Drinan's view:

Many of the ECHR's rulings may seem routine, but it must be remembered that they are being issued on a continent where minority groups have been persecuted for their religions since before the time of the Roman Empire. Heretics and nonbelievers were commonly subjected to torture and the most painful deaths that ingenuity could devise. The Crusades, the Inquisition, and the Holocaust are part of the collective memory of Europe.

Id. at 88-89.

¹⁴² *Id.* at 90.

Besides normative and cultural affinities, high levels of European political and legal integration, both among the countries of the EU and between the EU institutions and those of its member States, has led to a robust normative interaction. The ECHR, though not an EU institution, benefits from this. In the EU, the nations of Europe have the deepest pooling of sovereignty of any international organization, such that the EU may be closer to a proto-state than simply a regional arrangement. This institutional depth—including a parliament, administrative agencies, ministerial councils, as well as courts—gives a sizable advantage to the normative weight of the ECHR. The other institutions of the EU have socialized the general publics and the elite decision-makers to be accustomed to interplay between domestic and international institutions. One can say that the history of Europe since World War II is largely a story of increasing reliance on, and comfort with, regional and other international institutions. The rise of European economic power and the securing of the European peace can be crafted as the story of the evolution from the European Coal and Steel Community to the European Union. Economic benefits were a major driving force behind Europe's deepening institutionalization and it provided an important incentive. Regardless as to whether such a narrative would tell the whole story (it does not; more on that below), it nonetheless is a story that engenders a respect for international institutions.

As a result of this history of integration, the ECHR can rely not only on the normative commonality of Europe, but on domestic institutions that are open to the concept of normative interpretation from international institutions. Consequently, the ECHR "has begun to see its rulings change the shape of domestic law, through legislative revision and administrative decree as well as judicial decision."¹⁴³

Such integration is unique. The IACHR, perhaps the next most robust human rights tribunal, nonetheless stands in contrast to the European experience. Lacking the institutional interplay that the ECHR has with domestic courts, there have been relatively few cases before the IACHR and "almost no incorporation of those cases in national jurisprudence."¹⁴⁴ The

¹⁴³ Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1108, 1109 (2000).

¹⁴⁴ Holly Dawn Jarmul, Note, *The Effect of Decisions of Regional Human Rights*

track records of human rights adjudication only worsens from there. In the regions that are the most religiously diverse, Africa and Asia, there is either no human rights enforcement mechanism (Asia) or one in the early stages of construction (Africa).¹⁴⁵

These observations show us that relatively homogenous and politically integrated groups of people tend to have more effective human rights dispute resolution mechanisms. The ECHR is far at one end of the spectrum of effectiveness. It is followed by the IACHR, covering the slightly less homogenous culture of the Americas. Keep in mind that the U.S. has not submitted to the jurisdiction of the IACHR, thus the Inter-American Court largely settles human rights disputes arising out of the culturally similar states of Latin America.¹⁴⁶ Africa may provide the most interesting experiment given its large Muslim, Christian, and animist populations, but its human rights court is, as of this writing, being re-designed and is as yet untested.¹⁴⁷ Asia, with significant populations of Muslims, Christians, Hindus, Buddhists, as well as states hostile to religion, such as China, does not have a binding human rights court.¹⁴⁸ And such is the case in the international system overall.

Unfortunately, the ECHR is an outlier point rather than a generalizable case. Other regions, and the international system as a whole, are more fractious and less integrated than Europe. Most obviously and most importantly, the normative disparity is broad. Also, while the EU was knit together by mutual economic interest which allowed for normative disagreements to be

Tribunals on National Courts, 28 N.Y.U. J. INT'L L. & POL. 311, 324 (1996). *But see id.* at 324–28 (noting the special case of Argentina and the “power of publicity”).

¹⁴⁵ Concerning the African Court of Human Rights, see GEORGE WILLIAM MUGWANYA, *HUMAN RIGHTS IN AFRICA* 45–49 (2003) (tracing the history of the African System); The Project on International Courts and Tribunals, African Court of Human and Peoples’ Rights, <http://www.pict-pcti.org/courts/ACHPR.html> (last visited July 19, 2006); *see also* The Protocol to the African Charter of Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights, Oct. 6, 1998, http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf. Concerning the lack of a system in Asia, see MUGWANYA, *supra*, at 49–50.

¹⁴⁶ *See* Jarmul, *supra* note 144, at 312, nn. 5 & 6 (naming Latin American countries that have signed the convention and noting that the United States has declined to participate).

¹⁴⁷ *See* MUGWANYA, *supra* note 145, at 45–49; TOMUSCHAT, *supra* note 101, at 214.

¹⁴⁸ TOMUSCHAT, *supra* note 101, at 33–34.

subsumed by the greater (economic) good, there is no such economic incentive assisting in the construction of global human rights institutions such as a religious rights tribunal. Under such circumstances, the prospects of a global court for perhaps the most contentious of human rights—freedom of religion—are not heartening.

But difficulty is not impossibility and the stakes are high. Father Drinan argues that “[t]o concede that religious human rights are not enforceable in some countries would lessen the importance of all human rights in the covenants of the United Nations.”¹⁴⁹

2. Would a Tribunal on Religious Freedom be Counterproductive?

While Father Drinan is correct in saying that we would never want to just throw our hands in the air and say that certain human rights are unenforceable in certain countries, we should at least pause and consider whether attempting to establish an international tribunal is the path we want to follow. Consider economic, social, and cultural rights in comparison to civil and political rights. While there is a complaint mechanism—however weak—in the ICCPR, despite current considerations by the United Nations, the International Covenant of Economic, Social, and Cultural Rights (“ICESR”), as of yet, does not have any individual complaint procedure.¹⁵⁰ Michael Dennis and David Stewart—both of whom are involved in the human rights field—argue that, far from ensuring the protection of economic, social, and cultural rights, “the proposed individual-complaints procedure would improvidently ‘legalize’ the content and provision of . . . [these] rights . . . [and] there are other, more promising pathways to realizing the promises and visions embodied in the UDHR and the ICESCR.”¹⁵¹ They conclude that “[t]he call for formal, binding, case-by-case adjudication seems to us an example of overreaching legal positivism, borne of the myth that judicial or quasi-judicial

¹⁴⁹ DRINAN, *supra* note 13, at 185.

¹⁵⁰ See Michael J. Dennis & David P. Stewart, *Justiciability of Economic Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT’L L. 462, 462 (2004).

¹⁵¹ *Id.* at 466.

processes intrinsically produce better, more insightful policy choices than, for example, their legislative counterparts.”¹⁵² The protection of human rights is at times set back by over-judicialization, when what is needed is a diplomatic solution.

One difficult problem for the tribunal would be separating what is or is not part of a core religious practice. Peyote for American Indians? Marijuana for Rastafarians? Polygamy for non-mainline Mormons? Father Drinan considers an example relating to the treatment of women in Islamic societies.¹⁵³ A court may condemn some acts as human rights violations but those acts may be required—or at least allowed—by that community’s religion.¹⁵⁴ In a hypothetical suit by aggrieved women, can a transnational court be asked to weigh human rights law versus a particular community’s interpretation of religious rights and obligations when such a court is outside of the relevant community of faith? Could the resolution of such a conflict be possible through another forum, such as a domestic legislature or court?

By using legal mechanisms that give the illusion of universality of norms, we paper over large gaps. Even worse, we start to believe that there is consensus where there is conflict. The very act of “papering over”—of drafting universal declarations, covenants, and the like—is resented by people who prefer the particular. “Religious freedom” and “freedom of conscience” are concepts that are difficult to square across the Wahabis of Saudi Arabia, the factions of Northern Ireland, the Shi’a regime of Iran, and many Christian Conservatives, to name a few.

Attempts to universalize norms tend to bring a resurgence of particularity. As Benjamin Barber would put it, McWorld fosters Jihad.¹⁵⁵ Even in the EU, which I described as being relatively homogenous and highly integrated, efforts at universality cause backlash. “The more ‘Europe’ hoves into view, the more reluctant and self-aware its national constituents become.”¹⁵⁶ This is

¹⁵² *Id.*

¹⁵³ See DRINAN, *supra* note 13, at 135.

¹⁵⁴ See, e.g., *id.* at 143, 148 (discussing the practice female genital mutilation, which is accepted by Islam and in some African nations, but is rejected elsewhere in the world as a violation of human rights).

¹⁵⁵ See BARBER, *supra* note 59, at 5 (“McWorld not only imperils but re-creates and reinforces Jihad.”).

¹⁵⁶ *Id.* at 11.

exemplified not only by the ethnic cleansing by Milosevic's Serbs but by the French "Non" to the EU Constitution.¹⁵⁷ Each was driven (at least in part) by a fear or hatred of the "Other," a rejection of being told by people from outside their community to accept into their community those who are not like them.

While tolerance is a virtue, I doubt that it is innate. We are motivated by our differences: in how we look, how we speak, whom we love, and if and how we praise. These are the deepest roots of our conceptions of who we are. Father Drinan sees this as well, although with a note of optimism, he states: "Catholics, and possibly all believers, seem tribalistically to show rivalry and antagonism toward groups with other beliefs—feelings that can quickly grow into astonishingly bitter hostility. Such outbreaks of rancor have decreased remarkably since Vatican II . . ." ¹⁵⁸ While Vatican II may have decreased the spite between Catholics and other groups, religious based violence as a global phenomenon has been surging.¹⁵⁹

In societies transformed by the European Enlightenment, the law often challenges our preconceptions of the way things work. Law repeatedly gives us Copernican moments, forcing us to realize that we are not the center of the universe. It brings different looking people into our schools and allows people to work where they could not. It forces us to realize that others—besides those who look, sound, pray, and act like us—are owed the same opportunity to thrive that we have had.

In the domestic politics of the United States this has been a long and hard reckoning requiring the engagement of Presidents, Congress, the courts, and a multitude of citizens over successive generations. The project of inclusion is not over, even given the sizable, though sporadic, commitment of our society and government.

¹⁵⁷ See, e.g., Don Singleton, 'Butcher' is Dead. Milosevic dies in jail amid war trial, DAILY NEWS, Mar. 12, 2006, at 8 ("Milosevic was accused of orchestrating a brutal campaign of ethnic cleansing against non-Serbs during the collapse of the Yugoslav federation . . ."); George F. Will, Editorial, *French Rejects EU's Constitution, Elites*, THE AUGUSTA CHRON., June 2, 2005, at A4 (noting with regard to the French rejection of the EU Constitution, "[t]he cognitive dissonance of the French is striking: They wish to lead a Europe from which they are effectively insulated.").

¹⁵⁸ DRINAN, *supra* note 13, at 110.

¹⁵⁹ See Katie Avon Miller, *C of C Course Looks at Bias and Religious Violence*, THE POST & COURIER, Feb. 20, 2005, at 3F (recognizing that worldwide religious violence is increasing).

Absent effective enforcement mechanisms, international law's task is even more difficult. Law takes a long time to seep down to deep rooted norms. Rather than the short (or long) sharp shock of change in domestic legal reform, international law acculturates domestic behavior through repeated reference to international norms via the interactions between domestic and international institutions or actors.¹⁶⁰ Countries that adhere to international norms may be rewarded; those that transgress the norms may be sanctioned.

Although enforcement by tribunal is a technique that international lawyers have often used to solve problems, here there is a concern that an imposed standard and an outside tribunal may actually exacerbate the situation. At best, states, as rational actors, may sign a treaty for short-term gain in reputation and then make no effort to comply, assuming that enforcement by international human rights tribunals is rarely efficient or effective. In light of this, Father Drinan writes:

Most people would agree that a nation has the right to resist international norms that go directly against a fundamental aspect of a national religion. But does this mean that a small group, or even a large majority, in control of a nation has a right to follow religious practices directly forbidden by global standard that arguably rise to the level of customary international law? The answer has to be yes.¹⁶¹

Any tribunal facing such deep conviction "would have an impossibly heavy burden of proof."¹⁶² Rather, he considers that perhaps a monitoring body, similar to the Committee against Torture, could track compliance with world norms regarding religious norms on religious freedom.¹⁶³ While much of Father Drinan's focus is on building a means of enforcing rights, he implicitly accepts that judicialization may not be the best technique to resolve this problem or that, at least, more than one technique is necessary. And, while there is no final answer to the dilemma of an international tribunal being irrelevant at best to counter-productive at worst, a sketch of a further research may be made from insights gleaned from legitimacy theory and the theory of transnational legal process.

¹⁶⁰ See discussion *infra* Part III.C.2.

¹⁶¹ DRINAN, *supra* note 13, at 183.

¹⁶² *Id.*

¹⁶³ See *id.*

C. *Belief, Legitimacy, and the Process of Compliance*

The interpretation that foreign judges sitting on an international tribunal may give to a Covenant on Religious Freedom may be profoundly at odds with any number of norms in any number of societies. We have already touched upon regional conceptions of rights, such as the “Asian values” debate. There are also differences between religious traditions, such as the concerns currently in the news regarding Muslims and Christians. There is also the question of how fundamentalists from different faiths would react to such a tribunal. This leads to concern that some of the most religious states would be least interested in universalist norms and a global tribunal to resolve disputes concerning religious freedoms. Conversely, secular societies could fear that a tribunal on religious freedom may find that a greater degree of religious speech or expression should be allowed.¹⁶⁴

Besides having to encompass a wide variety of traditions, such a tribunal may be faced with a diverse set of issues. There are numerous potential lawsuits that may bridge the topics of religious freedom and women’s rights, such as disputes over abortion or polygamy.¹⁶⁵ Father Drinan noted that a vexing question may be whether freedom of religion should favor a right to proselytize or right to “privacy” from proselytization.

Under such circumstances, it is impossible that any given state or religious group will agree with all of a tribunal’s decisions. It is even questionable whether most people would agree with the substance of many of the tribunal’s decisions. If that is in fact the case, then such a tribunal may be untenable. Yet, other tribunals have faced the problem of making many unpopular decisions. According to legitimacy theory, they were nonetheless effective if the process by which they came to their decision was considered “legitimate.”

1. Unpopular Rules and Right Process

Using legitimacy theory, one focuses less on the specific substance of the results of the tribunals, but rather on the

¹⁶⁴ See DRINAN, *supra* note 13, at 119 (describing the possible effect of a tribunal on “nonbelievers”).

¹⁶⁵ See *id.* at 134–48 (explaining how a tribunal could impact women’s rights and the legality of abortion).

process by which the result was achieved. Thomas Franck, whose book, *The Power of Legitimacy Among Nations*, is the seminal text of legitimacy theory, wrote that “[l]egitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”¹⁶⁶

There are two instances where procedural fairness and right process are needed for Father Drinan’s proposal to work. First, the process of making the Covenant on Religious Freedom will need to be legitimate. But what should happen if many states choose to apply reservations to key clauses, such as, for example, a clause guaranteeing the right to convert or a clause allowing the dissemination of religious materials? If a treaty on religious freedom would only be perceived legitimate by these states if it allowed reservations to be applied to such clauses, then it may be that there is too much normative difference among the potential signatories for a meaningful Covenant on Religious Freedom to be effectively applied at the global level.

Besides the legitimacy of the treaty, the actual dispute resolution process must be legitimate. Given the aversion to litigious dispute resolution in many Asian societies, there may be little interest in being forced into litigation over norms that are particularly closely held. Consequently, designing alternate fora of mediation may be able to make the institution as a whole gain in legitimacy and, consequently, efficacy.

Absent clear legitimacy from the outset, what is left is a constant give-and-take between a tribunal and states that regard it askance and are reticent to enforce its decisions. Nonetheless, ongoing interaction can be transformative under certain circumstances. For this, we consider the theory of transnational legal process.

2. The Process of Normative Change

Father Drinan argues that it is better to have a tribunal on religious freedom because, at least, there would be a forum to

¹⁶⁶ THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990); see also THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL INSTITUTIONS* 26–27 (1995) (discussing legitimacy as a component of fairness).

protest injustices, even if the rules were not ultimately applied.¹⁶⁷ Transnational legal process, as elucidated by Harold Koh, tells us that repeated interaction between domestic constituencies and transnational tribunals can affect domestic norms and law.¹⁶⁸ Koh defines transnational legal process:

[It is] the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system. Through this three-part process of *interaction*, *interpretation*, and *internalization*, international legal rules become integrated into national law and assume the status of internally binding domestic legal obligations Instead of focusing exclusively on the issues of "horizontal jawboning" at the state-to-state level as traditional international legal process theories do, a transnational legal process approach focuses more broadly upon the mechanisms of "vertical domestication," whereby international law norms "trickle down" and become incorporated in domestic legal systems.¹⁶⁹

Koh posits "four kinds of relationships between rules and conduct: coincidence, conformity, compliance, and obedience."¹⁷⁰ To use a common example, at times we act in a particular way, perhaps driving no more than fifty-five miles per hour on a particular stretch of road, and by *coincidence*, such behavior is the same as what is required by law. Other times, we *conform* our behavior to the legal norm when others are watching; when they are not watching we may start speeding, if we feel like it. Beyond that, one may *comply* with a rule, even when others are not watching, because of some secondary benefit that has nothing to do with legality or illegality; perhaps our car is more fuel efficient when driven below fifty-five miles per hour. Finally, one may choose to *obey* a norm because he has internalized it and believes it is correct.

As Koh explains: "[I]nstitutional habits soon lead nations into default patterns of compliance. These patterns act like

¹⁶⁷ See DRINAN, *supra* note 13, at 106.

¹⁶⁸ See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 635-42 (1998) (providing examples of the transnational legal process of domesticating international norms).

¹⁶⁹ *Id.* at 625-26 (internal citations omitted).

¹⁷⁰ Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1400 (1999).

riverbeds, which channel conduct along compliant pathways. When a nation deviates from that pattern of presumptive compliance, frictions are created."¹⁷¹ Signing a treaty and agreeing to the jurisdiction of a tribunal thus leads to certain expectations. If one deviates from those expectations, there can be diplomatic repercussions. Nevertheless, that is not the key to transnational legal process; the heart of the theory is that states begin to comply not out of fear of retaliation or repercussions, but because they internalize the rule. Transnational legal process thus posits four phases in the transfer of a norm from the international level to the national: interaction, interpretation, internalization, and obedience.¹⁷²

Transnational legal process can play an important part regarding Father Drinan's proposal as it opens the possibility that even if a tribunal is not embraced uniformly within a state, the fact that it allows for individual rights of action can push the government into a series of interactions with the tribunal concerning compliance with international norms. The hope is that this would cause a process of interpretation and internalization and ultimately obedience. As I have written elsewhere,¹⁷³ the success of transnational legal process in transmitting norms from the international level to the domestic level is contingent on whether the tribunal has a domestic constituency who is able to effectively press the government for legal change.¹⁷⁴ Whereas transnational tribunals dealing with international investment often have constituencies comprised of elite lawyers and judges who hope to become involved in international investment arbitration, human rights norms tend to transmit norms bottom up, through increased use of claims in grass roots litigation spurring change in the method of governance within a state.¹⁷⁵ While grass roots transnational litigation, especially where the transnational tribunal interacts with domestic courts, can lead to an increased legitimacy of the tribunal due to its widespread usage,¹⁷⁶ grass-roots litigation may

¹⁷¹ *Id.* at 1411.

¹⁷² *See id.* at 1414 (describing the four phases of the transnational legal process).

¹⁷³ *See Borgen, supra* note 22, at Part IV D 3.

¹⁷⁴ *See Helfer & Slaughter, Why States Create International Tribunals: A Response to Professors Posner and Yoo, supra* note 140, at 907-08.

¹⁷⁵ *See Borgen, supra* note 22.

¹⁷⁶ *See, e.g., Ernst-Ulrich Petersmann, Dispute Settlement in International*

also be relatively slow and uncertain compared to elite-led efforts at legal reform.¹⁷⁷ In the case of norms of religious freedom, it is unclear whether a politically significant number of people even *want* these norms to be transmitted into their domestic legal cultures. This may be true in some countries that are especially restrictive of religious freedom.

CONCLUSION

Father Drinan proposes using the tools of universalism to protect the particular. Nevertheless, using tools such as transnational courts, which were formed by the international legal project that evolved from Enlightenment, to resolve sectarian disputes within a political community risk exacerbating these conflicts. Using a transnational tribunal that applies international law to protect religious freedom will force a specific conception of that right; some things will be allowed whereas others prohibited, and that decision will be made in a tribunal sitting far from where many of the disputes may arise.

Such a tribunal is likely to be viewed not as protecting *religious freedom* in general but rather a *specific conception of religion*; it may be perceived as an attempt to impose a conception of the good upon populations that have different beliefs. The irony is that this fear may be equally strong in theocratic Muslim countries and secular European states—each may fear that the specific balance it has struck between

Economic Law—Lessons for Strengthening International Dispute Settlement in Non-Economic Areas, 2 J. INT'L ECON. L. 189, 220 (1999), stating

The close interaction between national and European constitutional law, especially the strong influence of the European Convention on Human Rights on the interpretation of EC law and the "direct applicability" of EC guarantees of freedom and non-discrimination by private litigants and national courts, has provided EC law with a legal dynamic and democratic legitimacy which United Nations law has never achieved.

Id. at 219.

¹⁷⁷ See Finnemore & Sikkink, *supra* note 89, at 910, stating [E]mpirical research on transnational norm entrepreneurs makes it abundantly clear that these actors are extremely rational and, indeed, very sophisticated in their means-ends calculations about how to achieve their goals. They engage in something we would call "strategic social construction:" these actors are making detailed means-ends calculations to maximize their utilities, but the utilities they want to maximize involve changing the other players' utility functions in ways that reflect the normative commitments of the norm entrepreneurs.

Id.

individual rights and societal norms will be upset. In this way the supposed universal right is interpreted by the populations as simply another particular conception of the good, one which is being imposed by a foreign institution. If this is the sum of the interaction between the transnational tribunal and domestic society, then there is little hope of success.

Insights from the theory of transnational legal process may be of use, however. The ongoing interaction and dialogue caused by such a tribunal may foster normative change within societies. Yet, this would still require a domestic constituency to take up the banner of the tribunal and it remains to be seen whether such a constituency exists and how effective it would be in bridging the gap between transnational litigation and domestic practice. Absent the political and socio-economic integration and convergence between countries that makes the ECHR so successful, a transnational tribunal requires domestic standard-bearers who can argue effectively that the interpretations of such a tribunal must be respected. Whether such a constituency exists in this case is an empirical question that warrants further study.

New stream and rational choice perspectives present not only the problems of Father Drinan's proposal, but with the addition of transnational legal process and legitimacy, suggestions as to possible paths forward. While the new stream criticizes the mainstream for intellectual habits which become conceptual ruts, they too have their own favored forms of analysis. One is to focus on the recurrence of dichotomies in legal reasoning, such as utopian/apologist or naturalist/positivist.¹⁷⁸ In our discussion of religious freedom we have had the recurring dichotomies of universality and particularity and of rationality and faith. But these dyads may be better understood not as ideas in opposition, but as complements. Benjamin Barber observes that "Jihad is not only McWorld's adversary, it is its child. The two are thus locked together in a kind of Freudian moment of the ongoing cultural struggle, neither willing to coexist with the other, neither complete without the other."¹⁷⁹ Moreover, it may be that the process of debate over a particular conception of the good will

¹⁷⁸ See Purvis, *supra* note 36, at 104.

¹⁷⁹ BARBER, *supra* note 59, at 157.

actually lead to a universal value. For example, while Koskenniemi views international law as having a distinctly European heritage, he concludes:

The fact that international law is a European language does not even slightly stand in the way of its being capable of expressing something universal. For the universal has no voice, no authentic representative of its own. It can only appear through something particular; only a particular can make the universal known.¹⁸⁰

One can see such transitions from the particular to the universal in other aspects of human rights which have gained a wider (though not complete) acceptance across cultures, such as the freedom of the press or the right to be free from torture. As Thomas Franck would emphasize, the right process leads to legitimacy, regardless of the substantive result.¹⁸¹ And so, we can ask ourselves, as David Bederman queries: "Should the law be abandoned, or modified, should its content or scope be adjusted in accordance with political realities? The questions are familiar to international lawyers continuously managing the distance between ought and is, law and fact."¹⁸² While Father Drinan readily concedes that success is not ensured, that the vast gulf between is and ought may not be bridged, nonetheless the attempt to make the transition is important in and of itself:

Many of the efforts of the human rights revolution are directed toward harmonizing the legislative needs of the state with the demands of sincere people of faith whose views collide with the government's demands. It is probably correct to note that these differences are inevitable, severe, and possibly irresolvable. But law—and increasingly international law—must at least try to resolve them. If international law does not make a sustained effort to resolve these clashes, they will only grow worse.¹⁸³

To be a modernist in a post-modern world is not an easy thing. But until post-modernism can posit a way forward, the ongoing labors of Father Drinan and the modernists like him, children of the Enlightenment but not Voltaire's bastards, provide at least the possibility of social change (assuming of course, that change is desirable).

¹⁸⁰ Koskenniemi, *supra* note 73, at 115.

¹⁸¹ See FRANCK, *supra* note 166, at 24.

¹⁸² See BEDERMAN, *supra* note 37, at 94–96.

¹⁸³ DRINAN, *supra* note 13, at 214.

The modernists need to realize a few things that the new stream authors understand. For one thing, the messiness of modern politics is real and unavoidable. A rational argument does not necessarily sway opinion or confer legitimacy and sometimes it comes down to power politics. Institutions that grow indigenously, however, tend to be more successful than those that are transplanted. Thus, rather than using techniques that are comfortable to the internationalists, such as transnational tribunals, the internationalists may find that using techniques (such as mediation and corporatist bargaining) indigenous to a society will yield better results. In heterogeneity process (without sacrificing the concept of the right), international law may find increased effectiveness.

A related issue is that norms that evolve within a community take deeper root than norms that are imposed. Father Drinan is optimistic about “the sudden recognition of a right never considered before the mid-twentieth century.”¹⁸⁴ But, while there is a formal recognition of the right of religious freedom, it may take time for this formal recognition to flower into consistent state practice. And the unfortunate truth is that while such flowering can be encouraged, it cannot be rushed.

For their part, the new stream authors have much to learn from the modernists. If all structured systems, such as the international human rights system, are inherently political and an attempt to impose on one’s version of the good, what should one do? Put more brusquely, if law must come to a fight to impose your will, what would you fight for?

Perhaps the most basic lesson is that at some point one has to move from criticism to a plan of action. Despite volumes of critiques about why various international institutions are imperfect, to a greater or lesser degree they do actually work. Trade and investment disputes are settled; human rights abusers go to jail or pay fines; government policies change. Institution building and transnational legal process can lead to real changes in how people think and act.

Mainstream authors may say to their new stream colleagues: at the end of the day, criticism is just talk. Results matter. Do something. Father Drinan’s proposal may not be perfect, but it’s

¹⁸⁴ DRINAN, *supra* note 13, at 233.

a start. And the ongoing process of trying to find a solution may be all the solution that exists.