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I. INTRODUCTION

Justice Frankfurter of the United States Supreme Court once wrote: "Adjustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing."[1] Proselytism is one form of expression that has resulted in inevitable, and sometimes fierce, conflict. But on Justice Frankfurter's terms, proselytism—whether it is viewed as an exercise of free expression or a manifestation of religious belief—is not in itself the problem. The problem lies in finding

1. Niemotko v. Maryland, 340 U.S. 268, 275 (1951) (Frankfurter, J., concurring).

the proper balance between the freedom to proselytize and the multitude of rights, duties, and interests of religious groups, individuals, and the state that may conflict with that freedom.

The difficulty of this "adjustment" is deepened by a number of factors. Persons who proselytize, whether as a matter of conscience or religious belief, may adhere to their entitlement to do so with great strength. Likewise, the targets of proselytism may hold their religious beliefs (or their sense of privacy in those beliefs) with equal strength; attempts to persuade them in matters of religious belief may lead to injury to religious feelings. Finally, religious groups, desiring to preserve or expand their numbers, may have strong views as to the terms on which persons may change their religious identity or affiliation. This may influence the groups' view on proselytism.

Within the framework of international human rights law, states are responsible for sorting out these, and other, competing interests in formulating policies that adequately protect the rights of all involved. But states themselves exhibit different views on the necessity of regulating, or the wisdom of influencing, religious choices of their people. In some societies a change in religious beliefs may have far-reaching social ramifications, whereas in others, such a change will have only private impact. Inevitably, different state practices will be a reflection of more general societal considerations. It appears that the extent to which other rights and interests give way to the freedom to proselytize is indicative of the extent to which a society views itself as hospitable to change in the religious beliefs of its members, and considers an open (and consequently confrontational) exchange of different religious viewpoints to be acceptable, or even desirable.

Given all of the variables at play, it is very difficult in the abstract to pose general solutions to the conflicts raised by proselytism. As Justice Frankfurter noted: "Court[s] can only hope to set limits and point the way. It falls to the lot of legislative bodies and administrative officials to find practical solutions within the frame of [court] decisions."[2] The same practical limitations constrain the application of international human rights standards.

2. *Id*. at 275-76.

The goal of this article is to explore in a variety of political and religious contexts the different rights and interests at issue when conflict arises over proselytism. States must consider these rights and interests in order to establish a decision-making framework consistent with the principles of international human rights law. This article concludes that certain state action restricting proselytism, either by employing discriminatory methods or in furtherance of interests not recognized in international instruments, is inconsistent with international standards. The validity of other restrictions will depend upon a variety of circumstantial variables primarily relating to the potential for coercion. These variables cannot be sorted out in any consistent way without resorting to the particulars of each case.

Part II of this article addresses important preliminary issues including (a) the definition of proselytism as employed here, (b) a brief overview of the views of various religions on proselytism, and (c) a discussion of the different forms that restrictions on proselytism can take and the discrimination that may arise from such restrictions. Part III reviews the provisions in international human rights instruments most relevant to the issue of proselytism. These provisions pertain to the right to freedom of religion, the right to freedom of expression, the right to be free from discrimination on the basis of religion, and the rights of religious minorities to profess and practice their religion. Part IV outlines in detail the competing rights and interests that arise in conflicts over the freedom to engage in proselytism. These rights and interests include: (1) the rights of the source of the proselytism to manifest their religion and engage in free expression; (2) the rights of the target of the proselytism to change their religion, to receive information, to be protected from injury to their religious feelings and to maintain their religious identity; and (3) the interests of the State to protect the dominant religious tradition or official ideology and to preserve public order. Part V clarifies the different factors states have employed to draw the line between "proper" and "improper" proselytism. Four primary factors are identified: the characteristics of the source, the characteristics of the target, where the proselytism takes place, and the nature of the exchange between the source and the target.

II. PRELIMINARY ISSUES

A. The Definition of Proselytism

The term "proselytism" has been used so far without definition. In many contexts, it has had a decidedly negative connotation. Consider this definition of "proselyte" contained in a Catholic dictionary: "A Gentile converted to Judaism, hence any convert from one religion to another. To proselytize, meaning to make converts, is generally used in a pejorative sense, either because one's own religion is the loser or as implying unscrupulous methods . . . ."[3]

A more complete elaboration of the negative meaning that has been ascribed to proselytism is found in a study document entitled *Common Witness and Proselytism*, prepared in 1970 by a Joint Theological Commission between the Roman Catholic Church and the World Council of Churches.[4] This document defines the term "Christian witness" as "the continuous act by which a Christian or a Christian Community proclaims God's acts in history and seeks to reveal Christ as the true light which shines for every man."[5] In contrast, this document describes proselytism as a perversion of Christian witness:

> Here is meant improper attitudes and behaviour in the practice of Christian witness. Proselytism embraces whatever violates the right of the human person, Christian or non-Christian, to be free from external coercion in religious matters, or whatever, in the proclamation of the Gospel, does not conform to the ways God draws free men to himself in response to his calls to serve in spirit and in truth.[6]

As used in this article, "proselytism" means expressive conduct undertaken with the purpose of trying to change the religious beliefs, affiliation, or identity of another. The person initiating the conduct is the "source," and the person on the receiving end is the "target."

This definition of proselytism encompasses several important concepts. First, it avoids the notion of *per se* improper con-

3. A CATHOLIC DICTIONARY 408 (Donald Attwater ed., 2d rev. ed. 1954).

4. This document is reprinted in 23 ECUMENICAL REV. 9 (1971) [hereinafter *Common Witness and Proselytism*].

5. *Id.* ¶ 5.

6. *Id.* ¶ 8.

duct; whether proselytism is improper ultimately depends on a variety of factors to be discussed below. The definition also stresses that proselytism is intentional conduct, undertaken with a particular goal in view. For this reason, the term "proselytization" is avoided, as that term can suggest a process, rather than a purposeful human action. Finally, this definition implies that the source need not have religious beliefs of their own. Thus, proselytism includes attempts to persuade the targets to abandon their current religious beliefs or affiliation without necessarily replacing them with those of the source.

B. Religious Views on Proselytism

Religions hold a wide variety of views on the propriety of proselytism. While one religion may require its adherents to attempt to bring others to the faith, such activity may be prohibited or even impossible for another.[7] Other religions adhere to the entire range of views in between. Furthermore, a religion may have a different view on being the source of

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7. The following statement by the Evangelical Lutheran Church in America is an example of a mandatory call to engage in proselytism, here termed "evangelistic outreach":

> In Christ, God calls the church to share the gospel in word and deed, to proclaim the Good News of Jesus Christ, and to witness to God as Creator, Redeemer, and Sanctifier. "Go . . . and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything that I have commanded you." (Matthew 28:19,20)
>
> Answering the call of God to evangelistic outreach where Christ is not known, or not fully known, requires people to bear the message. The missionary calling is both general and specific: all Christians are called by God to mission wherever they are; some are additionally called by a local body of Christians to mission in another location.

Division of Global Mission, Evangelical Lutheran Church in America, *The Role of the Missionary in the Global Mission of the Evangelical Lutheran Church in America* (visited Nov. 19, 1998) <http://www.elca.org/dgm/policy/role.html>.

At the other end of the spectrum are societies where religious identity is closely allied to ethnic or national heritage, or where religious beliefs or practices are based on ancestor worship. The attempt to have another person adopt this type of religious affiliation may have no meaning as it would be impossible for an outsider to adopt such an identity or to engage in the required practices. For example, the religion of the Balinese is a mixture of elements of Hinduism and pre-Hindu native beliefs and is described in this fashion: "The Balinese live with their forefathers in a great family of the dead and the living, and it would be absurd for them to try to make converts of another nationality, since the ancestors of the converts would still remain of another race apart." MIGUEL COVARRUBIAS, ISLAND OF BALI 261 (KPI Ltd. 1986) (1937).

proselytism, as opposed to being the target.[8] Likewise, views on proselytism may vary depending upon the religious identity of the target. For instance, a distinction may be drawn between targeting those of a different denomination within the same religion, and those of a different religion altogether. Given these divergent views, proselytism can raise problems of an intrareligious nature, as well as problems of interreligious relations and unity. The intricacies of theological disputes and intra or interreligious relations are outside of the scope of this study.[9] They are, however, relevant, as religious views inevitably influence state policies. One or two brief examples will help to illustrate the pertinent points to be made here.

A significant feature of some religions is the belief that their path to the truth is an exclusive one. Inevitably, these groups are confronted with the reality that other people have different religious beliefs, or no religious beliefs at all. Such groups may respond in various ways. At the extreme, this confrontation has contributed to war, forced conversion, and fierce religious persecution throughout history. This type of response has been repudiated by most religions.[10] Instead, many religious groups direct activities at convincing targets to change their religious beliefs by choice.

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8. This position may be directly related to a religion's view on conversion:

> [W]hile many religions or beliefs welcome—and in some cases even encourage—the conversion of individuals belonging to other faiths, they are reluctant to admit the conversion of individuals of their own faith; apostasy is viewed with disfavour by them and often is prohibited by their religious law or discouraged by social ostracism.

ARCOT KRISHNASWAMI, STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES, U.N. Doc. E/CN.4/Sub. 2/200/Rev. 1, U.N. Sales No. 60.XIV.2 (1960), [hereinafter KRISHNASWAMI STUDY], *reprinted in* RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS 2, 22 (Tad Stahnke & J. Paul Martin eds., 1998).

9. For a good review of views on proselytism as articulated in documents issued by Catholic, Protestant, and Orthodox Christian church bodies and associations, see Joel A. Nichols, *Mission, Evangelism, and Proselytism in Christianity: Mainline Conceptions as Reflected in Church Documents*, 12 EMORY INT'L. L. REV. 563 (1998).

10. For example, the Catholic Church expressed the following at the Second Vatican Council regarding relations with non-Christians: "The Church therefore has this exhortation for her sons: prudently and lovingly, through dialogue and collaboration with the followers of other religions, and in witness of Christian faith and life, acknowledge, preserve, and promote the spiritual and moral goods found among these men, as well as the values in their society and culture." *Declaration on the Relationship of the Church to Non-Christian Religions*, *in* THE DOCUMENTS OF VATICAN II 660, 662-63 (Walter M. Abbott & the Very Reverend Monsignor Joseph Gallagher eds., 1966) (footnote omitted).

In this context, some religions have developed theological principles or ethical rules regarding the appropriate treatment of those who do not share their religious beliefs. If a religious group is dominant in a state, that religion's principles or rules may influence official state policy concerning the treatment of those outside the dominant tradition. Laws concerning proselytism between such groups must therefore be viewed in the context of these broader religious views.

For example, Abdullahi Ahmed An-Na'im, a scholar of traditional Islamic law, has summarized the applicable rules in this fashion:

> (1) If a person chooses to become a Muslim, or is born and raised as a Muslim, then he or she will have full rights of citizenship in an Islamic state . . . . However, once a Muslim or officially classified as such, a person will be subject to the death penalty if he or she becomes an apostate, that is, one who persists in repudiating his or her faith in Islam . . . .
>
> (2) If a person chooses to be or remain a Christian, Jew, or believer in another scriptural religion, as defined by Shari'a — one of *ahl al-kitab*, the People of the Book or believers in divine scripture who are called *dhimmis* — he or she will suffer certain limitations of rights as a subject of an Islamic state. [*D*]*himmis* are not supposed to enjoy complete legal equality with Muslims.
>
> (3) If a person is neither a Muslim nor one of *ahl al-kitab*, as defined by Shari'a, then that person is deemed to be an unbeliever (*khafir* or *mushrik*). An unbeliever is not permitted to reside permanently, or even temporarily according to stricter interpretations, in peace as a free person within the territory of an Islamic state except under special permission for safe conduct (*aman*). In theory, unbelievers should be offered the choice of adopting Islam, and if they reject it they may either be killed in battle, enslaved, or ransomed if captured.[11]

The traditional Islamic view on proselytism is clearly consistent with the above scheme: proselytism targeted at Muslims is prohibited, whereas aggressive proselytism by Muslims directed at nonbelievers is demanded. As certain modern States

11. Abdullahi Ahmed An-Na'im, *Islamic Foundations of Religious Human Rights*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 352 (John Witte Jr. & Johan D. van der Vyver eds., 1996).

purport to apply principles following or based on traditional Islamic law, it is clear that those States cannot be indifferent to the religious choices of its people.

Proselytism within a religion can precipitate conflict as intense as that between religions. It is therefore a significant issue with regard to ecumenism, or the path of Christian cooperation and unity. Churches that identify themselves as Christian have different views on the question of whether unity is possible or desirable. As a result, they may have different standards on the question of proselytism as between Christians.

For example, if a church refuses to recognize that "other churches also . . . provide access to salvation in Christ,"[12] then that church will make no distinction between its proselytism directed at other Christians and proselytism directed at non-Christians. However, if a church considers that at least some other churches provide access to salvation, a distinction may be made between proselytism towards these Christians and proselytism directed at non-Christians.

It is this latter distinction that underlies the standards on proselytism expressed by the World Council of Churches and the Catholic Church in *Common Witness and Proselytism*.[13] Recalling the definitions of Christian witness and proselytism contained in that document and related above, Christians are reminded that "[t]he Lord has called all his disciples to be witnesses to him and his Gospel, to the ends of the earth."[14] This witness, whether directed at other Christians or non-Christians, "should be completely conformed to the spirit of the Gospel, especially by respecting the other's right to religious freedom."[15] A number of requirements are stated in this regard, including the avoidance of "physical coercion, moral constraint or psychological pressure,"[16] the "offer of temporal or material benefits,"[17] the "exploitation of . . . need [and] weakness,"[18] and

12. *Common Witness and Proselytism*, *supra* note 4, ¶ 11.
13. *Id.*
14. *Id.* ¶ 1.
15. *Id.* ¶ 25.
16. *Id.* ¶ 27(a).
17. *Id.* ¶ 27(b).
18. *Id.* ¶ 27(c).

"unjust or uncharitable reference to the beliefs or practices of other religious communities."[19]

Additional considerations apply to witness by members of one Christian church to those of another. Under these circumstances, witness "should be completely concerned to do nothing which could compromise the progress of ecumenical dialogue and action,"[20] and should "be concerned in fostering whatever can restore or strengthen between [Christians] the bonds of true brotherhood."[21] In light of these principles, appropriate action towards other Christians is suggested as follows:

> Missionary action should be carried out in an ecumenical spirit which takes into consideration the priority of the announcement of the Gospel to non-Christians. The missionary effort of one Church in an area or milieu where another Church is already at work depends on an honest answer to the question: what is the quality of the Christian message proclaimed by the Church already at work, and in what spirit is it being proclaimed and lived? Here frank discussion between the Churches concerned would be highly desirable, in order to have a clear understanding of each other's missionary and ecumenical convictions, and with the hope that it would help to determine the possibilities of cooperation, of common witness, of fraternal assistance, or of complete withdrawal. In the same manner and spirit the relations between minority and majority Churches should be considered.[22]

Although some groups may distinguish between opposing proselytism as a moral or ethical matter and calling on the state to prohibit it, states—democratic and otherwise—nonetheless tend to respond to religious views on proselytism.[23] These views, particularly those of the dominant

19. *Id.* ¶ 27(f).

20. *Id.* ¶ 25.

21. *Id.* ¶ 28.

22. *Id.* ¶ 28(b) (footnote omitted). Even greater restrictions are suggested between the Orthodox churches and the Catholic Church, whereby all proselytism, as it is defined in this article, is prohibited: "Whatever has been the past, the Catholic Church and the Orthodox Church are determined to reject not only proselytism but also the intention even to draw the faithful of one Church to another." *Id.* ¶ 28(e)(iii).

23. Some groups that oppose proselytism in any form likewise oppose any appeal to the civil authorities to silence other groups that engage in it. *See* COMMISSION ON

religious group, may influence state policy. In order to adequately protect the rights of all, restrictions on proselytism must be given careful attention to determine if they are based solely on the consideration of religious views. Given the complexity in distinguishing between religious and secular considerations, this analysis may be difficult; but, it is no less essential for its difficulty.

As important as religious beliefs are to the individuals that hold them and to the societies of which they are a part, considerations beyond those of a strictly religious character must guide a state's approach to proselytism. While international human rights instruments recognize the right to have religious beliefs and the freedom to act on them, these instruments also confirm that states can limit this freedom to act in order to ensure other specified interests.[24] Therefore, even the strongest religious imperative to engage in proselytism, such as a requirement to bring as many to the "true" religion as possible, cannot prevail over a valid limitation. This is the case even though those who believe they are entitled to engage in proselytism may be burdened, perhaps severely, in the manifestation of their religious beliefs.

Conversely, a strictly religious basis for restricting proselytism is not by itself a valid limitation on the activity. Thus, a religious group's assessment of "the quality of the Christian message"[25] of a Church or a determination that proselytism weakens "the bonds of true [Christian] brotherhood"[26] would not give rise to a valid limitation on proselytism. As a result of this principle, members of some religions may be frustrated in the attempt to enforce what they

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FAITH AND UNITY, MIDDLE EAST COUNCIL OF CHURCHES, PROSELYTISM, SECTS, AND PASTORAL CHALLENGES: A STUDY DOCUMENT ¶¶ 61-64 (1989) (prepared for the Middle East Council of Churches' General Assembly, July 1989), *cited in* David A. Kerr, *Mission and Proselytism: A Middle East Perspective*, 20 INT'L BULL. MISSIONARY RES. 12, 18 (1996) (citing *id.*).

24. These interests are the protection of "public safety, order, health, or morals or the fundamental rights and freedoms of others." International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 18(3), 999 U.N.T.S. 171, 6 I.L.M. 368, 383 [hereinafter ICCPR]; *see also* The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9(2), 312 U.N.T.S. 221, *reprinted in* INTERNATIONAL LAW: SELECTED DOCUMENTS at 464, 467-68 (Barry E. Carter & Phillip R. Trimble eds., 1995) [hereinafter European Convention].

25. *Common Witness and Proselytism*, *supra* note 4, ¶ 28(b).

26. *Id.* ¶ 28.

believe to be appropriate standards of behavior. But by employing these principles, international human rights standards are directed at achieving a peaceful balance between the interests of those holding different religious views on proselytism, as well as the interests of those holding no religious beliefs.[27]

C. Restrictions on Proselytism

States can restrict proselytism in a variety of ways: directly or indirectly; intentionally or unintentionally. Before examining the various rights and interests that may determine the propriety of a restriction on proselytism, it is necessary to consider certain issues particular to indirect restrictions on proselytism and the manner in which restrictions on proselytism may lead to discrimination on the basis of religion or belief.

1. Indirect restrictions

In addition to laws that directly regulate proselytism,[28] there are a myriad of laws, rules and regulations that indirectly restrict proselytism. For instance, the failure of a religious group to be registered with, or be recognized by, the state as a prerequisite to functioning as an organizational entity can result in a restriction on proselytism. Moreover, activity that can be characterized as proselytism may take different forms, such as religious discussions; preaching; teaching; the publication, distribution or sale of printed and electronic works; broadcasting; solicitation of funds; or provision of humanitarian or social services. All of these actions can be proselytism depending upon the intent with which they are undertaken. Therefore, regulation of any of these activities may intentionally or unintentionally restrict proselytism.

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27. A certain measure of moderation on the part of religious groups is required to make this scheme work. A religious view that does not accept that under any circumstances other interests can be paramount to the freedom to proselytize is likely to give rise to consistent conflict and is not amenable to a process of conflict resolution. On the other hand, a religious view that no form of proselytism could ever be valid can lead to severe restrictions on, and even persecution of, other religious groups.

28. *See infra* Part IV.

Further, laws that do not have as their apparent purpose the prohibition of proselytism can nevertheless be employed in furtherance of that goal. For example, government officials may determine which religious views can be disseminated through the discretionary grant or denial of permits required for activities related to proselytism (such as distributing literature); or, officials can suppress such activity through means such as a tax or fee. These types of restrictions are manifest in the experience of the Jehovah's Witnesses in the United States during the first half of the twentieth century. Between 1937 and 1953, the United States Supreme Court examined a number of laws and regulations—mostly local municipal rules—that indirectly affected proselytism. A table of these cases is provided at the end of this article.

These cases primarily involved Jehovah's Witnesses, who at that time engaged in a public and very confrontational style of proselytism that employed strong negative views about the government and other religious groups, particularly the Catholic Church.[29] For this and other reasons—including their steadfast refusal to salute the flag or to serve in the armed forces—the Witnesses were extremely unpopular. Substantial pressure was put on local authorities to suppress their activities or otherwise remove them from public places.[30] The Witnesses, however, were persistent in their proselytizing activities, in their willingness to disobey the law as applied to them and be arrested for it, and in their efforts to challenge their convictions as improper restrictions on the freedoms of free exercise of religion, speech, and the press guaranteed by the First Amendment to the United States Constitution.[31]

29. *See* Douglas v. City of Jeanette, 319 U.S. 157, 170-74 (1943) (Jackson, J., dissenting).

30. *See id.* at 181 (Jackson, J., dissenting) ("[L]ocal authorities caught between offended householders and the drive of the Witnesses, have been hard put to keep the peace of their communities.").

31. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. For a brief description of the Witnesses' persistence, see *Table of United States Supreme Court Cases Concerning the Regulation of Proselytism (1937-1953)* at the end of this article.

The regulations at issue in the majority of these cases were similar in that they required the procurement of permission or a license (sometimes along with payment of a fee) from the local government authorities in order to pursue a variety of activities.[32] Many of these activities were directly expressive, such as distributing literature, soliciting contributions for charitable causes, holding outdoor meetings, having processions, or using sound amplification devices. Other activities could be described in a more commercial vein, such as selling or soliciting orders for books or other merchandise, or carrying on a trade. Some of the regulations specifically targeted those who went door-to-door to conduct these activities, whereas others restricted the activity in public places, such as on the street or in a park.[33]

The Supreme Court found two primary problems in the course of invalidating these regulations as contrary to the constitutional guarantees of freedom of religion, of speech, and of the press. The first problem was the absence of objective standards to guide decision making in the granting of permits and licenses. In some cases, there were no standards at all.[34] This left local officials with unfettered discretion in the application of the rules. In other cases, the standards were overly vague or subjective; one challenged regulation, for example, required a determination of whether the cause for which a person was soliciting was a "religious" one, and whether it was "free from fraud."[35] These subjective standards likewise left to the discretion of local officials which ideas could be disseminated and which could not. The types of discretion identified in these cases could be employed to intimidate, harass and even silence those engaging in expression, including proselytism, simply because the local population or government found their message to be objectionable. The Court was also troubled by the fact that there were other, less restrictive,

32. See *Table of United States Supreme Court Cases Concerning the Regulation of Proselytism (1937-1953)* at the end of this article.

33. For an overview of these regulations, see *id*.

34. *See, e.g.*, Kunz v. New York, 340 U.S. 290 (1951) (involving a Baptist minister); Niemotko v. Maryland, 340 U.S.268 (1951); Saia v. New York, 334 U.S. 558 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Tucker v. Texas, 326 U.S. 517 (1946); Largent v. Texas, 318 U.S. 418 (1943); Lovell v. City of Griffin, 303 U.S. 444 (1938).

35. Schneider v. New Jersey, 308 U.S. 147, 157-58 (1939) (quoting ordinance of Irvington, New Jersey).

means to prevent the dangers, such as fraud, at which these subjective standards were directed.[36]

The second problem arose in situations where a license fee was charged for engaging in activities, such as selling or otherwise distributing literature, that encompassed the dissemination of ideas and opinions, including proselytism. No discretion was placed in the hands of the administrating officials in the application of these revenue-raising arrangements.[37] Furthermore, these arrangements fell clearly within the state's taxation power. Nevertheless, the Supreme Court prohibited their application to proselytism because it believed that the danger they posed to the freedoms protected by the First Amendment was too great to be tolerated:

> No one could doubt that taxation which may be freely laid upon activities not within the protection of the Bill of Rights could, when applied to the dissemination of ideas, be made the ready instrument for destruction of that right. Few would deny that a license tax laid specifically on the privilege of disseminating ideas would infringe the right of free speech. For one reason among others, if the State may tax the privilege it may fix the rate of tax and, through the tax, control or suppress the activity which it taxes. . . .
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> . . . The constitutional protection of the Bill of Rights is not to be evaded by classifying with business callings an activity whose sole purpose is the dissemination of ideas, and taxing it as business callings are taxed.
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> . . . .
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> The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition

36. *See, e.g.*, *Schneider*, 308 U.S. at 164.

37. The Court was deeply divided on the issue of licensing fees, and the matter was only settled after the Court reversed itself and overruled an earlier decision. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 316 U.S. 584 (1942) [hereinafter *Jones I*], *vacated*, 319 U.S. 103 (1943) [hereinafter *Jones II*]; *see also* Follett v. Town of McCormick, 321 U.S. 573 (1944) (holding license tax unconstitutional as applied to a professional minister).

> of the exercise of the privilege, is capable of being used to control or suppress it.[38]

These cases represent an impressive body of decisions giving concrete form to the human rights of unpopular minorities in the face of both government and popular opposition. Because the regulations in question gave too much power to public officials to impinge on the freedoms of religion, speech, and the press, the Supreme Court invalidated their application to proselytism even though they could have validly restricted other activities in furtherance of the normal range of police powers of the state, and did not single out any particular class of speech or speakers for inferior treatment. For the same reason, the Court prohibited taxes levied on the exercise of those freedoms. Finally, it should be noted that in these cases, the Supreme Court protected the freedom to proselytize even though at times the message and the manner in which it was delivered was intolerant, divisive and abusive, and could disturb the targets in their own religious feelings and in their tolerance of others:

> Considerable emphasis is placed on the kind of literature which petitioners were distributing — its provocative, abusive, and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. But those considerations are no justification for the license tax which the ordinance imposes. Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.[39]

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38. *Jones I*, 316 U.S. at 607-08 (Stone, C.J., dissenting); *see also Follett*, 321 U.S. at 579 (Murphy, J., concurring) ("It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.").

39. *Murdock*, 319 U.S. at 115-16 (citation omitted); *see also* Martin v. City of Struthers, 319 U.S. 141, 157 (1943). Recent United States Supreme Court cases involving proselytism include *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1989); *Int'l*

2. Discrimination in restrictions on proselytism

Restrictions on proselytism can give rise to a number of issues regarding discrimination on the basis of religion or belief. A restriction may on its face make distinctions on the basis of religion (either that of the source or that of the target). Even in the absence of a facial distinction, a restriction may have a differential effect on religious groups due to differences between those groups (either in terms of belief or otherwise). Further, a restriction may be applied or enforced by the relevant authorities in a differential manner. All of these differentiations are potentially discriminatory. The danger of discrimination is particularly high where underlying the distinctions are tensions between the dominant religious group and minority groups, coupled with the ability of the dominant group to effect public policy, as well as the law and its application.

Examples of facial distinctions include the laws of certain Islamic countries that prohibit proselytism only where the target is a Muslim.[40] In other situations, a restriction may be placed on proselytism by a particular group. This type of restriction may accompany, or be an intended consequence of, a ban on the existence or limitations on the activities of that group in its organizational form. Examples of this type of restriction have included the Ahmadis in Pakistan, Baha'is in Iran, and Jehovah's Witnesses in Argentina, Singapore, Gabon and the Central African Republic.[41] Another type of facial

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Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); and *Lee v. Int'l Society for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992). *Table of United States Supreme Court Cases Concerning the Regulation of Proselytism (1937-1953)* at the end of this article further illustrates the range of regulations that swept proselytism under their purview and the variety of interests asserted by the states in these cases.

40. See, for example, the situation in Malaysia described in Part IV.C.1.a and accompanying notes.

41. *See Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, Commission on Human Rights, U.N. ESCOR, 52d Sess., Agenda Item 18 ¶¶ 9, 13, 21, 41-44, U.N. Doc. E/CN.4/1996/95/Add.1 (1996) (Ahmadis in Pakistan) [hereinafter *Special Rapporteur's Report 1996 Add. 1.*]; *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. Commission on Human Rights, 52d Sess., Agenda Item 18 ¶¶ 55-70, U.N. Doc. E/CN.4/1996/95/Add.2 (1996) (Baha'is in Iran) [hereinafter *Special Rapporteur's Report*

distinction that is prevalent in restrictions on proselytism is regulation of the foreign, as opposed to native, source.[42]

Facially neutral restrictions on proselytism more heavily impact religious groups that encourage, mandate, or frequently engage in proselytism than those groups that discourage, prohibit, or otherwise do not engage in proselytism. Similarly, facially neutral restrictions of proselytism may affect majority and minority religious groups in different ways. To the extent that a control on proselytism is intended to preserve a certain pattern of religious affiliation by limiting the opportunities for conversion, such a provision will naturally favor the majority religious group, particularly if the majority is not aggressively seeking converts of its own.

As noted above with respect to the cases involving the Jehovah's Witnesses in the United States, regulations that are vague or that leave official decision makers broad discretion are susceptible to discriminatory abuse in their application. Furthermore, even restrictions that are framed in more precise, neutral terms can be enforced in a differential manner. In *Kokkinakis v. Greece*,[43] an applicant to the European Court of Human Rights described such a situation. Although the Greek statute in question prohibited proselytism by members of all religious groups,[44] the applicant asserted that Greece did not uniformly enforce the prohibition:

> [I]t would surpass "even the wildest academic hypothesis" to imagine, for example, the possibility of a complaint being made by a Catholic priest or by a Protestant clergyman against an Orthodox Christian who had attempted to entice one of his flock away from him. It was even less likely that an

1996 Add.2]; *Report on the Situation of Human Rights in Argentina*, Inter-America Commission on Human Rights, OEA/ser.LI/V/II.49. doc. 19 corr.1 (1980) at 251-55 (Jehovah's Witnesses in Argentina); Zaheeruddin v. State, 26 S.C.M.R. (Sup.Ct.) 1718 (1993) (Pak.) (Ahmadis in Pakistan); Chan Hiang Leng Colin v. Public Prosecutor [1995] 1 SLR 687 (Jehovah's Witnesses in Singapore); Chan Hiang Leng Colin v. Minister for Information and the Arts [1995] 3 SLR 644 (Jehovah's Witnesses in Singapore); U.S. Department of State, 104th Cong., 2d Sess., *Country Reports on Human Rights Practices for 1995*, at 47 (Jehovah's Witnesses in Central African Republic); *id.* at 98 (reporting restrictions on Jehovah's Witnesses in Gabon although they are not formally enforced).

42. See, for example, the situations in China and Ukraine described in Part IV.C.1.b-c and accompanying notes.

43. 260 Eur. Ct. H.R. (ser. A) (1993).

44. *See infra* note 101 and accompanying text.

> Orthodox Christian would be prosecuted for proselytising on behalf of the "dominant religion."[45]

Regardless of whether or not this is, or was, an accurate portrayal of the enforcement of the Greek restrictions, it sufficiently illustrates the type of problem that can arise. Differential application or enforcement of nondiscriminatory rules can bring about the same results as discriminatory ones.

III. PROSELYTISM AND INTERNATIONAL HUMAN RIGHTS LAW

All major international human rights documents recognize the right to freedom of religion, which includes not only the freedom to hold religious beliefs, but also the freedom to manifest those beliefs.[46] Article 18 of the International Covenant of Civil and Political Rights ("ICCPR") provides:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[47]

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45. *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 16-17.

46. *See* ICCPR, *supra* note 24, art. 18. This article will deal primarily with the developing body of international human rights law through the work of the United Nations Human Rights Committee ("Human Rights Committee" or "Committee") under the ICCPR, and the reports and decisions of the human rights tribunals of the Council of Europe, the European Court of Human Rights ("European Court"), and the European Commission of Human Rights ("European Commission," together the "European Bodies") under the European Convention. *See supra* note 24. The European Commission was disbanded in 1998, and its role has been subsumed into a reorganized European Court. *See* Protocol No. 11 to the European Convention, *supra* note 24.

47. The provisions of other international instruments are based on the same language as article 18 of the ICCPR, which itself is derived from article 18 of the Universal Declaration of Human Rights.

Article 9 of the European Convention provides:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom,

While the freedom to hold beliefs is considered to be absolute, i.e., not subject to limitation by the State, the freedom to manifest beliefs is subject to valid limitations.[48] According to the Human Rights Committee,

> Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. . . . The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.[49]

Both the Human Rights Committee and the European Court have clearly stated that those provisions guaranteeing the right to freedom of religion protect not only religious beliefs, but also

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> either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
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> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

European Convention, *supra* note 24; *see also* American Convention on Human Rights, Nov. 22, 1969, art. 12, 9 I.L.M. 99 (1969) [hereinafter American Convention]; *Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 36-55, U.N. GAOR, 36th Sess. Agenda Item 75, Supp. No. 51, art. 1(1), U.N. Doc. A/36/55 (1981) [hereinafter *Declaration on Religious Intolerance*]; *Concluding Document of the Vienna Meeting*, Conference on Security and Cooperation in Europe, princ. 16, *reprinted in* 28 I.L.M. 531, 534 [hereinafter *CSCE Vienna*].

48. *See* Human Rights Committee, *General Comment No. 22 (48) (art. 18)*, U.N. GAOR, 48th Sess., Supp. No. 40, ¶ 3, U.N. Doc. CCPR/C/21/Rev. 1/Add.1 (1989), *reprinted in* U.N. Doc. HR1/GEN/1/Rev.1 at 26 (1994) [hereinafter *General Comment on Article 18*].

49. *Id.* ¶ 8. The European Court has adopted a similar formulation for the review of an interference with the freedom to manifest religion or belief. "Such an interference is contrary to Article 9 unless it is prescribed by law, directed at one or more of the legitimate aims in paragraph 2 and necessary in a democratic society for achieving them." *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 18 (quotations omitted). For an interference to be "necessary in a democratic society," it must be both "justified in principle and proportionate" to the aim to be achieved. *Id.* at 21.

other beliefs of a similar fundamental character, including atheism and agnosticism.[50]

Along with the right to freedom of religion, international human rights instruments recognize the principles of equality and nondiscrimination on the basis of religion. The ICCPR and the European Convention both contain obligations to secure the rights specified in those instruments without "distinction of any kind" (in the words of Article 2(1) of the ICCPR[51]) or "discrimination on any ground" (in the words of Article 14 of the European Convention).[52]

In addition, both instruments recognize that the principle of nondiscrimination extends beyond the assurance of the specific rights articulated in the instruments. Article 26 of the ICCPR obligates states to provide for the equal protection of the law and "equal and effective protection against discrimination on any ground."[53] This protection is not limited to the rights specified in the ICCPR, but extends to "any field regulated and protected by public authorities."[54] Although the obligation to pre

50. *See General Comment on Article 18*, *supra* note 48, ¶ 2 ("Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."); *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 17 (Article 9 "is also a precious asset for atheists, agnostics, skeptics and the unconcerned.").

51. Article 2(1) of the ICCPR provides: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, *supra* note 24, art. 2(1).

52. Article 14 of the European Convention provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention, *supra* note 24, art. 14.

53. Article 26 of the ICCPR provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, *supra* note 24, art. 26.

54. The Human Rights Committee has determined that "article 26 does not merely duplicate the guarantees provided for in article 2 . . . . [Article 26] prohibits discrimination in law and in practice in any field regulated and protected by public authorities." S.W.M. Broeks v. The Netherlands (views adopted 9 April 1987, 29th Sess.) Communication No. 172/1984, Report of the Commission on Human Rights, U.N. GAOR 42d Sess., Supp. No. 40, ¶ 12.3, U.N. Doc. No. A/42/40 (1987), *reprinted in* 2 Y.B.H.R. Comm. 293, 297 (applying Article 26 to social security legislation

vent discrimination contained in article 14 of the European Convention does not have the same reach as article 26 of the ICCPR, an independent violation of a right specified in the European Convention is not necessary to support a claim of discrimination under article 14. To raise a valid claim of discrimination, it is enough to show that the subject matter of the claim falls within the scope of an article protecting a specified right.[55] It should be mentioned, however, that not every case of unequal treatment is considered to be discrimination.[56] Under both the ICCPR and the European Convention, unequal treatment is not discrimination if it is

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outside the purview of any of the other rights specified in the ICCPR) [hereinafter Broeks]. *See also, General Comment on Article 18*, *supra* note 48, ¶ 12.

55. *See* Belgium v. Marckx, 31 Eur. Ct. H.R. (ser. A) at 15-16 (1979); Inze v. Austria, 126 Eur. Ct. H.R. (ser. A) at 17 (1987). This relationship is established when a state enacts measures that go beyond the minimum requirements of specified rights. *See, e.g.*, Belgian Linguistics Cases, 6 Eur. Ct. H.R. (ser. A) (1968) (suggesting that state provision of education in multiple languages beyond the requirements of the right to education protected under article 2 still is subject to provisions of article 14). The relationship may also be established when the state seeks to justify limitations on specified rights. *See, e.g.*, Grandrath v. Federal Republic of Germany, App. No. 2299/64, 10 Y.B. Eur. Conv. on H.R. 626, 678 (Eur. Comm'n. on H.R.) (1967) (limitation on right to be free from forced labor protected under article 4(3)(b)); Belgian Linguistics Case, 6 Eur. Ct. H.R. (Ser. A) at 34 (1968) ("It is as though [article 14] formed an integral part of each of the Articles laying down rights and freedoms."). For more on the debate behind this issue, see E. W. VIERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW 113-20 (1973).

56. The Human Rights Committee has suggested the following definition under the ICCPR:

> "[D]iscrimination". . . should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Human Rights Committee, *General Comment No. 18 [37]*, ¶ 7, U.N. Doc. CCPR/C/21/Rev./Add.2, *reprinted in* 2 Y.B.H.R. Comm. at 377 [hereinafter *General Comment on Non-discrimination*].

This definition is patterned after the definitions contained in article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (entered into force Jan. 4, 1969) [hereinafter Race Convention] and article 1 of the Women's Convention (except that the Women's Convention definition does not include the term "preference"). These latter definitions do not appear to allow for any unequal treatment on the basis of race or sex, respectively. The use of the word "imply" in the Human Rights Committee's definition of discrimination under the Covenant appears to recognize the possibility that not all differential or unequal treatment is discrimination.

made in pursuit of a legitimate aim and is based on objective and reasonable grounds.[57]

The right to freedom of religion is also explicitly recognized in those provisions of international human rights documents that concern the rights of minorities. Specifically, article 27 of the ICCPR provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[58] Although it has been expressed that article 27 provides for distinct, and additional, protection of the right of persons belonging to religious minorities to profess and practice their religion,[59] it is not entirely clear how these provisions

57. The Human Rights Committee had stated: "The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26." Broeks, *supra* note 54, ¶ 13; *see also General Comment on Article 18*, *supra* note 48, ¶ 13 ("[T]he Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.").

The European Court has come to a similar conclusion:

> [T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration . . . . A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Belgian Linguistics Case, 6 Eur. Ct. H.R. (ser. A) at 34 (1968).

58. ICCPR, *supra* note 24, art. 27; *see Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Annex 2 G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, art. 1(1), U.N. Doc. A/47/135 (Vol. I) (1992), *reprinted in* 32 I.L.M. 911 (1993) [hereinafter *Minorities Declaration*]; Framework Convention for the Protection of National Minorities Adopted by the Council of Europe, Feb. 1, 1995, art. 8, *reprinted in* 34 I.L.M. 351 (1995) [hereinafter Framework Convention]; *Document of the Copenhagen Meeting of the Conference on the Human Dimension*, Conference on Security and Cooperation in Europe, June 29, 1990, ¶ 32, *reprinted in* 29 I.L.M. 1305 (1990) [hereinafter *Copenhagen Document*].

59. *See* Human Rights Committee, *General Comment No. 23(50)* (art. 27), U.N. GAOR 50th Sess., ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994) [hereinafter *General Comment on Article 27*] ("[Article 27] establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else,

provide any additional protection in this regard than that provided to all persons under the general provisions covering the rights to freedom of religion and to equal protection of the laws. One possible exception to this general statement is the obligation of the state to take measures to protect the identity, including the religious identity, of those belonging to a minority group.[60] Such measures must be consistent with the general obligations against discrimination. The Human Rights Committee has stated that special measures are not discrimination when (1) they "are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27," (2) they are "based on reasonable and objective criteria," and (3) they "respect the provisions of articles 2(1) and 26 of the [ICCPR] both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population."[61] The key factor here is some condition that

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they are already entitled to enjoy under the Covenant.").

60. According to the Human Rights Committee, "positive measures by States may also be necessary to protect the identity of a minority. . . ." *Id.* ¶ 6.2; *see also id.* ¶ 8.

Article 8(3) of the *Minorities Declaration* provides that "[m]easures taken by States to ensure the effective enjoyment of the rights set forth in [the present] Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights." *Minorities Declaration*, *supra* note 58, art. 8(3). The Minorities Declaration does not, however, contain any positive obligation on States to take such special measures. *See* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 51 (1991).

Article 4 of the Framework Convention states: "[U]ndertake to adopt, where necessary, adequate measures in order to promote . . . full and effective equality between persons belonging to a national minority and those belonging to the majority." Framework Convention, *supra* note 58, art. 4(2). Such special measures are not discrimination. *See id.* art. 4(3).

In the framework of the protection of minorities under the Organization for the Security and Cooperation in Europe (formerly the Conference for the Security and Cooperation in Europe):

> The participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity. They will take the necessary measures to that effect after due consultations, including contacts with organizations or associations of such minorities, in accordance with the decision-making procedures of each State.

Copenhagen Document, *supra* note 58, ¶ 33.

61. *General Comment on Article 27*, *supra* note 59, ¶ 6.2; *see also Copenhagen Document*, *supra* note 58, ¶ 33 ("Any such measures will be in conformity with the principles of equality and non-discrimination with respect to the other citizens of the

truly threatens the existence or way of life of the minority,[62] or the ability to exercise their rights.[63]

IV. THE RIGHTS AND INTERESTS IMPLICATED BY RESTRICTIONS ON PROSELYTISM

In conflicts involving proselytism, the rights and interests of the source, the target and the state can be arrayed against one another. The task of determining whether proselytism can be restricted consistent with international human rights standards will necessarily involve an analysis of these rights and interests. This section explores the rights and interests of each of these parties, referring whenever possible to the adjudication and commentary by international bodies on these issues.

A. The Rights of the Source

1. The freedom to manifest religion or belief

Is proselytism a manifestation of religion or belief, and therefore encompassed within the concept of the right to freedom of religion or belief? There is no definitive consensus in international human rights instruments. With the exception of the American Convention, which explicitly states in article 12(1) that the right to freedom of religion includes the freedom to "disseminate one's religion or beliefs,"[64] neither proselytism nor the freedom to disseminate a religion is mentioned in

participating State concerned.").

62. *See* Ominayak v. Canada, Communication No. 167/1984, U.N. GAOR, 45th Sess., Supp. No. 40, (Vol. II), Annex 9A, Commission on Human Rights, ¶¶ 32.2, 33, U.N. Doc. A/45/40 (1990), *reprinted in* Y.B.H.R. Comm. at 381 (holding that state development plans that threaten to destroy subsistence patterns of Canadian Indian group violated the right "to engage in economic and social activities which are part of the culture of the community to which they belong" and which were protected under article 27). This could raise troubling issues for religious minorities if their existence is based on personal choice rather than national or ethnic difference.

63. *See* Lovelace v. Canada, Communication No. 24/1977, U.N. GAOR, 13th Sess., Supp. No. 40, (Vol. II), ¶ 15, U.N. Doc. A/36/40 (1981), *reprinted in* Y.B.H.R. Comm. at 320 (suggesting that the national law that deprived author of her right to remain on tribal reserve violated her right under article 27 to have access to her native culture and language in community with others because the reserve was the only place she could have access to those things).

64. American Convention, *supra* note 47, art. 12(1).

international instruments.[65] The lack of any direct recognition of proselytism may be an indication of the sensitivity of states to the issues it raises and the difficulty of delineating agreeable standards.[66]

Given that proclaiming religious experience and belief is important to many of the major religions of the world, it is logical that the freedom to manifest religion would include the attempt to persuade another to adopt new religious beliefs or affiliation.[67] As Arcot Krishnaswami, a special rapporteur to the

65. Some activities that are closely associated with proselytism are mentioned in these international documents. *See, e.g.*, *General Comment on Article 18*, *supra* note 48, ¶ 4 ("freedom to prepare and distribute religious texts or publications" is part of teaching and practice of religion); *Declaration on Religious Intolerance*, *supra* note 47, art. 6(d) (freedom to "write, issue and disseminate relevant publications"); *id.* art 6(f) (freedom "[t]o solicit and receive voluntary financial . . . contributions"); *CSCE Vienna*, *supra* note 47, principle 16d (freedom to solicit financial contributions); *id.* principle 16j (freedom to disseminate religious publications).

66. As approved by the drafting committee of the Commission on Human Rights in 1947, the article in the draft Covenant on Civil and Political Rights on freedom of religion contained the following provision:

> Every person of full age and sound mind shall be free, either alone or in a community with other persons of like mind, to give and receive any form of religious teaching [*and endeavor to persuade other persons of full age and sound mind of the truth of his beliefs*], and in the case of a minor the parent or guardian shall be free to determine what religious teaching he shall receive.

MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 194 (1997) (quoting Report of the Working Group to the CHR, E/CN.4/56, art. 15) (emphasis added). The italicized portion of the draft provision was deleted from the article as adopted by the Commission. *See id.* at 194-95.

67. Not all states are in agreement. The Malaysian government has argued that laws prohibiting proselytism directed at Muslims do not impact upon the right to religious freedom of non-Muslims.

> For the protection of its special position as the religion of the Federation, article 11 (4) of the Constitution provides that State law (and federal law in respect of the federal territories) may control or restrict the propagation of non-Islamic religions among Muslims.
>
> . . . .
>
> Such being the limited scope of the enactments, they could not in any way diminish the enjoyment by non-Muslims of freedom of thought, conscience and religion.

Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. ESCOR, 46th Sess., Capital Provisional Agenda Item 24, Committee on Human Rights, ¶ 58, U.N. Doc. E/CN.4/1990/46 (1990) [hereinafter *Special Rapporteur's Report 1990*].

The Indian Supreme Court in *Stainislaus v. Madhya Pradesh & Ors.*, (1977) 2 S.C.R. 611, discussed *infra* notes 206-208 and accompanying text, held that "the right freely to profess, practice and propagate religion" as enshrined in the Indian Constitution, did not encompass the right to convert (or attempt to convert) another

United Nations, has said: "While some faiths do not attempt to win new converts, many of them make it mandatory for their followers to spread their message to all, and to attempt to convert others. For the latter, dissemination is an important aspect of the right to manifest their religion or belief."[68]

International recognition of the freedom to change religion further support this view. The European Court has held that proselytism is a component of the freedom of religion guaranteed by article 9 of the European Convention:

> While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest [one's] religion. Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> According to Article 9, freedom to manifest [one's] religion . . . includes in principle the right to try to convince one's neighbour, for example through teaching, failing which, moreover, freedom to change [one's] religion or belief, enshrined in Article 9, would be likely to remain a dead letter.[69]

The Inter-American Commission on Human Rights has apparently reached a similar conclusion, although in a case that did not directly concern proselytism. In *Ortiz v. Guatamala*,[70] the Inter-American Commission adjudicated claims concerning the kidnaping, detention and torture of an American Catholic nun, Sister Ortiz, by agents of the Guatemalan government. The Inter-American Commission determined that the violence inflicted on Sister Ortiz violated, *inter alia*, her right to freedom of religion protected under the American Convention:

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person to one's own religion. *Id*. at 615-16. A close reading of the Court's analysis shows that it made this determination because it believed that recognizing such a right would violate the rights of others. It can be questioned whether or not the Court should have made this determination at such an abstract level. It is one thing to say that the statute before it, by virtue of selecting the appropriate criteria, is a valid limitation on the right to propagate religion in furtherance of protecting the rights of others. It is another to implicitly hold that under no circumstances would a limitation be invalid, at least as against the constitutional protection of freedom of religion.

68. KRISHNASWAMI STUDY, *supra* note 8, at 34. International recognition of the freedom to change religion further supports this view. *See infra* Part IV.B.1.

69. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 17 (1993) (quotations omitted).

70. Case 10.526, Inter-Am. C.H.R. 45, OEA/ser. L/V.II.95 doc. 7 rev. 2 (1996).

> It is likely that the attacks against Sister Ortiz were intended
>
> to punish and suppress her religious activities as a Church missionary and her work with the indigenous people of [Guatemala]. . . . In addition, because of the surveillance, threats, kidnapping, torture and rape which Sister Ortiz experienced, she returned to the United States to escape her captors and the violence against her in Guatemala and has been unable to return because of her fear. *As a result, she has been denied her right to exercise her right to freedom of conscience and religion by working as a foreign missionary in Guatemala for the Catholic Church*.[71]

As proselytism falls within the ambit of the manifestation of religion, it does so regardless of the form that it may take. A particular problem arises where the proselytizing activity is in a form that is unusual in comparison to other religious groups, or where it includes practices that are disfavored by those groups. However, in the words of the Human Rights Committee, the scope of the right to freedom of religion "is not limited [to] . . . practices analogous to those of traditional religions."[72] The United States Supreme Court addressed this problem by placing door-to-door proselytism of the Jehovah's Witnesses on equal footing with more traditional practices:

> The hand distribution of religious tracts is an age-old form
>
> of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same

71. *Id.* ¶ 119 (emphasis added). According to the case report, Sister Ortiz "was present in Guatemala as a representative of the [Catholic] Church who worked with poor indigenous persons. . . ." *Id.* ¶ 81.

72. *General Comment on Article 18*, *supra* note 48, ¶ 2.

> claim to protection as the more orthodox and conventional exercises of religion.[73]

2. *The right to freedom of expression*

As proselytism is here defined as expressive activity, it is encompassed by the right to freedom of expression protected under international human rights instruments. Although the distinction between proselytism as the manifestation of religion or belief and proselytism as expression may seem formal, there can be practical ramifications to the designation as one or the other. First, that branch of proselytism where the source is motivated by a desire to convince the target to change her religious beliefs, but not adopt new ones, does not fall easily within the notion of the manifestation of religion or belief because the source does not necessarily have religious beliefs of her own. Second, categorizing proselytism as expression relieves the examiner from the task of determining whether or not the beliefs asserted by the source are "religious," or whether proselytism falls within the scope of religious freedom. Third, different results might be reached concerning the same conduct if the legal principles and standards employed to review the manifestation of religion differ from those governing expression.[74] Although this requires a close examination of the particulars in any given legal system, an example can be found in international instruments. While these instruments recognize that the protection of national security is a valid

73. Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943) (footnotes omitted).

74. An issue of this type is reflected in the United States Supreme Court decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), where the Court determined that "the right of free exercise [of religion] does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (involving the religiously-motivated use of peyote by members of the Native American Church)). The Court recognized, however, that prior cases (including those discussed *supra* Part II.C.1) held that the First Amendment barred the application of a neutral law of general applicability, but that these cases involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech or of the press." *Smith*, 494 U.S. at 881. Therefore, under current United States precedent, if proselytism were viewed only as a manifestation of the free exercise of religion, it might be subject to a different set of standards than if it were viewed as a matter of freedom of speech or of the press as well.

interest that may support a limitation on the right to freedom of expression,[75] they do not list national security as a justification for limitations on the freedom to manifest religion.[76]

3. Conclusion

Determining that proselytism is encompassed within either the freedom to manifest religion or belief or the right to freedom of expression does not mean that it cannot be restricted. However, such a determination establishes a presumption in favor of permitting proselytism, and any restriction must meet the requirements laid down in international instruments. Therefore, the validity of limitations on proselytism turns on the existence of overriding interests, articulated on behalf of the state, either in the protection of society in general or in the protection of the rights of others. Equally important, the limitations must sufficiently further those interests.[77] These rights and interests are discussed in the following sections.

B. The Rights of the Target

The protection of the rights and freedoms of others is a recognized ground for limiting the freedom to manifest religion or the freedom of expression.[78] Thus, the source may be limited in order to protect the rights of the target to maintain a religion and be free from injury or offense to religious feelings. However, limiting the source may also restrict the target as the target is entitled to the freedom to change religion and the

75. *See* ICCPR, *supra* note 24, art. 19(3)(b); European Convention, *supra* note 24, art. 10(2); American Convention, *supra* note 47, art. 13(2)(b); African Charter on Human and Peoples' Rights, June 27, 1981, art. 27(2), *reprinted in* 21 I.L.M. 59 (1981) [hereinafter African Charter].

76. The Human Rights Committee has noted this in *General Comment on Article 18*, *supra* note 48, ¶8: "The Committee observes that paragraph 3 of art. 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security." *Id.*

77. *See id.* ¶ 8; Human Rights Committee, *General Comment 10 (art. 19)*, U.N. GAOR 19th Sess., ¶ 4, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994).

78. *See* ICCPR, *supra* note 24, art. 18(3); European Convention, *supra* note 24, art. 9(2); American Convention, *supra* note 47, art. 12(3); African Charter, *supra* note 75, art. 8.

freedom to receive information. These considerations can move a state in contradictory directions.

1. The freedom to change religion

There is some controversy in the international community over the question of whether or not the right to freedom of religion encompasses the freedom to change religion.[79] Although this freedom is explicitly recognized in the Universal Declaration, the European Convention, and the American Convention,[80] the ICCPR adopted a related, but different, formulation: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."[81] The Human Rights Committee's comment on the scope of this provision states that:

> The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.[82]

In certain countries, the treatment of apostasy overshadows and determines that of proselytism. If apostasy, i.e., the abandonment or renunciation of one's religious beliefs, is considered an offense, it naturally follows that proselytism, as the attempt by another to change one's beliefs, will be prohibited.

Certain Islamic states have laws prohibiting apostasy from Islam.[83] These laws purportedly stem from the Shari'a (i.e. the

79. *See* EVANS, *supra* note 66, at 238.

80. *See Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, art. 18 (1948); European Convention, *supra* note 24, art. 9(1); American Convention, *supra* note 47, art. 12(1).

81. ICCPR, *supra* note 24, art. 18(2). Over time, reaching a consensus on this point seems to be even more elusive. The Declaration on Religious Intolerance, art. 1(2), adopted the same wording as article 18(2) of the ICCPR but deleted the important phrase "or to adopt." *See Declaration on Religious Intolerance*, *supra* note 47, art. 1(2).

82. *General Comment on Article 18*, *supra* note 48, ¶ 5.

83. Islamic States are not the only ones that have, or have had, punishments for apostasy. According to Blackstone's Commentary on the laws of England, apostasy was at one time apparently punished by death, and in the seventeenth century a statute was enacted that provided that "any person educated in, or having made profession of, the christian religion, shall by writing, printing, teaching, or advised

law based on the Qur'an and other Islamic holy writings, as well as subsequent jurisprudential interpretation of those texts), and the approach of that body of law to the commitment of those that have become, or have been born as, Muslims:

> The Qur'an vigorously denounces those who renounce Islam, for "the Devil has seduced them" away from the true faith (67:25). The major historical example is the revolt of the tribes after Muhammad's death in 632 A.D. Abu Bakr, and jurists since then, condemned secession from Islam (*ridda*) as doubly heinous: It not only is a violation of the compact of submission made with Allah, but it is also a breach of contract with his representatives on earth. It is, then, an offense both against God and against the state: it is both apostasy and treason. Far from having the right to become a non-Muslim, the Muslim faces the death penalty as a sanction for such a change.[84]

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speaking, deny the christian religion to be true, or the holy scriptures to be of divine authority," was, for successive violations, ineligible to hold a public office, incapable of bringing a legal action or purchasing land, and imprisoned for three years. 4 WILLIAM BLACKSTONE, COMMENTARIES *44.

Nepal apparently had, until recently, a prohibition on apostasy that applied to all religions. Article 19(1) of the Constitution of the Kingdom of Nepal provides that "Every person shall have the freedom to profess and practice his own religion as handed down to him from ancient times having due regard to the traditional practices: Provided that no person shall be entitled to convert the religion of any person." NEPAL CONST. art. 19(1), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Blaustein & Flanz eds., 1987). Apparently, a person is no longer prohibited from changing their religion by virtue of their own free will, as a law penalizing self-conversion was repealed in 1992. *See* Kusum Shrestha, *Fundamental Rights in Nepal*, 15 ESSAYS IN CONSTITUTIONAL LAW 1, 21 (1993) (citing Amendment to section 1 of the chapter on Miscellany of the code of the country in 1992).

84. David Little et. al., *Human Rights and the World's Religions: Christianity, Islam and Religious Liberty*, *in* RELIGIOUS DIVERSITY AND HUMAN RIGHTS, 213, 215 (Irene Bloom et al. eds., 1996).

In the *Declaration on the Rights and Care of the Child in Islam* of the Islamic Conference, this prohibition on apostasy is noted in Art. 8, which addresses the right to education:

> While Islam guarantees Man's freedom to voluntarily adopt Islam without compulsion, it prohibits apostasy of a Muslim afterwards, in view of the fact that Islam is the Seal of Religions and, therefore, the Islamic society is committed to ensuring that the sons of Muslims preserve their Islamic nature and Creed and to protecting them against attempts to force them to relinquish their religion.

Declaration on the Rights and Care of the Child in Islam, U.N. GAOR, 50th Sess., Item 28, Annex I: Res. 16/7-C (IS), at 269, U.N. Doc. A/50/85/S/1995/152 (1995) [hereinafter *Child in Islam*].

The enforcement of rules prohibiting apostasy in Islamic countries may vary, but in recent years at least a few states have sought to invigorate them and have defended them as consistent with international human rights standards. For example, Mauritania apparently has a provision in its Penal Code that imposes a death sentence for "any Muslim who abandons his faith and does not repent within three days."[85] The Mauritanian government has defended this offense and its penalty as a proper limitation (in furtherance of public order and morality) on the right to freedom of religion:

> The Islamic religion, which plays an important role in the maintenance of security and stability . . . is an integrated religious faith and any person who embraces it of his own free will must be assumed to have accepted all its teachings, including the rules governing apostasy, which strengthen the foundations of the society based upon it.
>
> Apostasy from this religion, which guarantees so many freedoms and so much security, stability and social justice, is regarded as high treason and everyone is aware of the penalties that States impose for this type of offence, which threatens their stability and their very existence.
>
> While this religion does not compel anyone to embrace it, it does not tolerate duplicity in this respect or apostasy, which are incompatible with its sacrosanct nature as a divinely-revealed religion based on immutable principles.
>
> The precepts of this religion cannot be changed, since the holy law on which it is based comprises moral principles in which our society believes and any person who violates them arouses social indignation. Consequently, apostasy constitutes one of the most serious offences against the public order and morality established by this religion . . . .[86]

85. *Special Rapporteur's Report 1990*, *supra* note 67, ¶ 60 (quoting a letter addressed to Mauritania's government "transmitted by Special Rapporteur").

86. *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. ESCOR, 47th Sess., Provisional Agenda Item 22, Commission on Human Rights, ¶ 76, U.N. Doc. E/CN.4/1991/56 (1991) [hereinafter *Special Rapporteur's Report 1991*]. A similar view on apostasy was apparently held by Thomas Aquinas, who wrote that those "who at one time accepted the Faith, and professed it; they must be compelled, even by physical force, to carry out what they promised and to hold what they once accepted." ERIC D'ARCY, CONSCIENCE AND ITS RIGHTS TO FREEDOM 159 (1961). *See* Little et. al., *supra* note 84, at 222-23.

In a society that imposes such a high price for apostasy, and claims such a close connection between adherence to the dominant faith and social and political stability (even to the point of threatening the very existence of the state), it follows that proselytism—at least proselytism of Muslims by others—will not be tolerated.[87]

Nonetheless, laws penalizing apostasy are inconsistent with international human rights standards. In those instruments that explicitly recognize the freedom to change religion, at the

87. The Sudan also has a prohibition against apostasy, punishable by death, that directly prohibits proselytism as well. The law encompasses "every Muslim who propagates for the renunciation of the Creed of Islam or publicly declares his renunciation thereof by an express statement or conclusive act." *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. ESCOR, 49th Sess., Provisional Agenda Item 22, Commission on Human Rights, ¶ 56, U.N. Doc. E/CN.4/1993/62 (1993) [hereinafter *Special Rapporteur's Report 1993*] (quoting section 126 of the Sudan Criminal Act 1991). The government of the Sudan has defended this law on the grounds that an Islamic State should apply Islamic law—or rules consistent with Islamic law—to problems that exist within an Islamic society:

> Islam is regarded by Muslims not as a mere religion but as a complete system of life. Its rules are prescribed not only to govern the individual's conduct but also to shape the basic laws and public order in the Muslim State. . . .
>
> For Muslims, Islam provides a total system of life, starting even before birth extending throughout every moment of life. Matters such as infant-feeding, child-rearing, abortion, marriage and divorce, legacy and inheritance, bargains and contracts, war and peace, international relations, the treatment of minorities and all other aspects of life are governed in one way or another by legal rules in the sources of Islamic law. Furthermore, Muslims consider all these aspects as having the same importance as, let us say, ritual prayer and fasting. Hence, any problem which arises should be treated and solved in the way recommended by, or at least in harmony with, the related rules of Islam.
>
> Accordingly, all aspects of Islamic law should be taken and accepted as a unit, one total and indivisible system. Hence, apostasy from Islam is classified as a crime for which *ta'zir* [disciplinary, reformative and deterrent] punishment may be applied. The punishment is inflicted in cases in which the apostasy is a cause of harm to the society, while in those cases in which an individual simply changes his religion the punishment is not to be applied. But it must be remembered that unthreatening apostasy is an exceptional case, and the common thing is that apostasy is accompanied by some harmful actions against the society or State. . . . Assuredly, the protection of society is the underlying principle in the punishment for apostasy in the legal system of Islam.

Id. ¶ 56. For a case study on the application of the apostasy law to an important religious and political figure in the Sudan, see Abdullahi Ahmed An-Na'im, *The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan*, 16 RELIGION 197 (1986).

very least, penal sanctions on apostasy impermissibly restrict that freedom. In addition, the Human Rights Committee has clearly stated that: "Article 18.2 [of the ICCPR] bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers . . . to adhere to their religious beliefs . . . ."[88]

It does not necessarily follow that the freedom to change religion, the freedom to abandon religious belief, or the "right to replace one's current religion or belief with another or to adopt atheistic views,"[89] supports the freedom of others to proselytize. In other words, does restricting the ability to proselytize impair the rights of those who have not expressed a desire to receive such information? There is no international consensus on the answer to this question. For example, the Malaysian government has argued that a prohibition on proselytism of Muslims by non-Muslims does not interfere with the ability of Muslims to change their religion:

> If any Muslim desires to seek knowledge about another religion or even to possess another religion of his own free will and on his own initiative, [laws prohibiting proselytism] are not capable of deterring him. Those laws are merely aimed at protecting Muslims from being subjected to attempts to convert them to another religion.[90]

However, as noted above, the European Court has adopted a different view, stating that the freedom to change religion would likely be "a dead letter" if the freedom to manifest religion did not include "the right to try to convince one's neighbour."[91]

The distinction between these two views lies in the conditions necessary to ensure a person's freedom to change her religion. Under one view, the absence of any hindrance or penalty on the part of the state is considered sufficient. The other view holds that, in order to truly ensure a person's right to change her religion, the state may not overly restrict the source from seeking out targets and attempting to deliver

88. *General Comment on Article 18*, *supra* note 48, ¶ 5.
89. *Id.*
90. *Special Rapporteurs Report 1990*, *supra* note 67, ¶ 58.
91. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 17 (1993).

information relevant to exercising that freedom. This conflict of views is taken up again in the following section.

2. The freedom to receive information

The freedom to receive information has been expressed in international instruments as a corollary to the right to freedom of expression.[92] As stated in article 19(2) of the ICCPR, the right to freedom of expression "shall include freedom to seek[] [and] receive . . . information and ideas of all kinds."[93] The European Court has noted that the right of a person to "take cognisance" of certain views is implied in the right to impart those views.[94]

As with the freedom to change religion, an important question here is whether the person exercising the freedom to receive information must seek it out themselves, or whether that person has some right to be confronted with views that others would like to put before him, which could then be accepted or declined. If the former is the case, the state may place significant restrictions on the mechanisms used to deliver information, and consequently will determine the information with which people will be confronted. Under the latter viewpoint, the state cannot usurp from potential receivers of information the power to determine the information with which they will be confronted; thus the state will be limited in its ability to restrict the delivery of information, even to those who have not expressed a desire to receive it.

An example of this latter view is found in the case of *Martin v. City of Struthers*,[95] in which the United States Supreme Court invalidated a statute that made it unlawful for a person to summon the occupant of a residence to the door for the purpose of distributing a handbill, circular or advertisement.[96] The Court noted that the freedoms of speech and of the press

92. *See* ICCPR, *supra* note 24, art. 19 (2); European Convention, *supra* note 24, art. 10 (1); American Convention, *supra* note 47, art. 13(1); African Charter, *supra* note 75, art. 9.

93. ICCPR, *supra* note 24, art. 19(2) at 374.

94. *See* Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. (ser. A) at 20 (1994).

95. 319 U.S. 141 (1943).

96. *See id.* In this case, a Jehovah's Witness was convicted under the statute for distributing a leaflet for a religious meeting. *See id.* at 142.

"embrace[d] the right to distribute literature, and necessarily protect[ed] the right to receive it."[97] The statute criminalized the distribution of information regardless of the desire of the recipient to receive it, and therefore "substitute[d] the judgment of the community for the judgment of the individual householder."[98] The Court found that the statute was a "naked restriction of the dissemination of ideas" because other legal avenues were available[99] — such as the law of trespass — that would "leave[] the decision as to whether distributers of literature may lawfully call at a home where it belongs — with the homeowner himself."[100]

International human rights standards do not lead to a simple solution to this problem. The presumption is on the side of expression, and the state seeking to restrict expression must justify the limitation. However, restrictions on expression must be viewed in light of the circumstances in which they arise, including the extent to which information of all kinds flows freely within a society. For instance, if people are continually confronted with information designed to influence their political opinions, their moral values, and even their consumer choices, it might be inconsistent to otherwise overly restrict information designed to influence their religious choices. Such may be the case in European and American democracies. On the other hand, in societies where information is generally restricted and people must seek it out rather than be confronted by it, it may be more problematic to allow information on religion to flow freely. Although generally restrictive policies on free expression cannot, in themselves, support further restrictions, it should be left open to states to articulate the specific harm that could result from the confrontation occasioned by unsolicited expression.

3. The freedom to have or maintain a religion

While the freedoms to change religion and to receive information may support the freedom to proselytize, other

97. *Id.* at 143 (citation omitted).
98. *Id.* at 144.
99. *Id.* at 147.
100. *Id.* at 148 (referring to a proposed ordinance that would make it illegal to approach the home of a person who has indicated that solicitation is unwelcome).

rights and freedoms may support a restriction on proselytism. In *Kokkinakis v. Greece*,[101] Greece successfully argued to the European Court that a restriction on proselytism can, in theory, be sustained as an effort to protect the right of the target to the peaceful enjoyment of their freedom of religion. However, for such a restriction to be a valid limitation on the right of the source to manifest their religion, the Court ruled that particular circumstances must be present that render the proselytism "improper."

In the *Kokkinakis* case, the European Court examined the conviction of a Jehovah's Witness, Minos Kokkinakis, for a violation of a Greek law criminalizing proselytism. Article 13(2) of the 1975 Greek Constitution provides, in relevant part: "There shall be freedom to practise any known religion; individuals shall be free to perform their rites of worship without hindrance and under the protection of the law. The performance of rites of worship must not prejudice public order or public morals. Proselytism is prohibited."[102] The term "proselytism" as used in the Greek Constitution was defined in the statutory enactments of the late 1930s that made proselytism a criminal offense:

> 2. By "proselytism" is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion . . . , with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety.
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> 3. The commission of such an offence in a school or other educational establishment or a philanthropic institution shall constitute a particularly aggravating circumstance.[103]

Further clarification on proselytism was given by the Greek courts as follows:

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101. 260 Eur. Ct. H.R. (ser. A) (1993).

102. GREEK CONST. art. 13(2), *reprinted in Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 11. Previous Greek constitutions, beginning in 1844, contained a prohibition against proselytism only when targeted at the dominant religion, the Christian Eastern Orthodox Church. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 12.

103. Section 4 of Act 1363/1938, as amended by Section 2 of Act 1672/1939, *reprinted in Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 12.

> [P]urely spiritual teaching does not amount to proselytism,
>
> even if it demonstrates the errors of other religions and entices possible disciples away from them, who abandon their original religions of their own free will; this is because spiritual teaching is in the nature of a rite of worship performed freely and without hindrance. Outside such spiritual teaching, which may be freely given, any determined, importunate attempt to entice disciples away from the dominant religion by means that are unlawful or morally reprehensible constitutes proselytism as prohibited by the aforementioned provision of the Constitution.[104]

The Greek government argued to the European Court that "[t]he sole aim of [the prohibition on proselytism] was to protect the beliefs of others from activities which undermined their dignity and personality,"[105] and that such a prohibition was necessary "to protect a person's religious beliefs and dignity from attempts to influence them by immoral and deceitful means."[106] Although not explicitly adopting these arguments, the Court ruled that the conviction of Mr. Kokkinakis was in pursuit of the legitimate aim of protecting the rights of others.[107] Furthermore, the Court went on to approve of the attempt in the Greek legislation to develop criteria that would separate what it termed "Christian witness" from "improper proselytism":

> First of all, a distinction has to be made between bearing
>
> Christian witness and improper proselytism. The former corresponds to true evangelism, [which has been] describe[d] as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may . . . take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with

104. Supreme Administrative Court, judgment no. 2276/1953, *reprinted in Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 13. This case was decided prior to 1975, when the constitutional provision was revised to encompass all proselytism, rather than only that targeted at Orthodox Christians.

105. *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 18.

106. *Id.* at 20.

107. *See id.* at 20.

> respect for the freedom of thought, conscience and religion of others.
>
> Scrutiny of [the Greek statute] shows that the relevant criteria adopted by the Greek legislature are reconcilable with the foregoing if and in so far as they are designed only to punish improper proselytism, which the Court does not have to define in the abstract in the present case.[108]

Noting, however, that it had not been shown in the Greek courts that Mr. Kokkinakis had done anything improper, the Court determined that his conviction was a violation of article 9 of the European Convention.[109]

Although it is open to other interpretations, the identification of "improper proselytism" in this case seems to correspond to the notion of coercion that would impair the freedom to have, or more clearly, to maintain, a religion. The important question that follows is at what point can expression by one person work a coercion on another to relinquish their religious beliefs? This question is taken up further in Part V below.

4. Freedom from injury to religious feelings

Proselytism may fall within the ambit of laws prohibiting blasphemy or the injury to religious feelings where the expression by the source includes criticism or a negative portrayal of the doctrine, scriptures, or founder of a particular religious tradition. The precise scope of these laws raises

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108. *Id.* at 21.

109. *See id.* at 50. According to the Greek Courts, the evidence indicated that Mr. Kokkinakis had done the following:

> [The Kokkinakises] went to the home of [the target] . . . and told her that they brought good news; by insisting in a pressing manner, they gained admittance to the house and began to read from a book on the Scriptures which they interpreted with reference to a king of heaven, to events which had not yet occurred but would occur, etc., encouraging her by means of their judicious, skilful [sic] explanations . . . to change her Orthodox Christian beliefs.
>
> [Mr. Kokkinakis] visited [the target] and after telling her he brought good news, pressed her to let him into the house, where he began by telling her about the politician Olof Palme and by expounding pacifist views. He then took out a little book containing professions of faith by adherents of the [Jehovah's Witnesses] and began to read out passages from Holy Scripture, which he skilfully [sic] analysed.

Id. at 8-9.

sensitive issues, as an attempt to change a person's religious beliefs will at times include some argument as to what is incorrect or undesirable about those beliefs. These types of laws can be used to suppress the expression of religious beliefs or opinions on religious issues that are perceived to be incorrect by or are unpopular with adherents of other religious groups, particularly the dominant group.

> It is to prevent the dissemination of a faith in a manner offensive to others that special laws, such as laws against blasphemy, have been enacted. . . . Unfortunately, in some cases the laws against blasphemy have been framed in such a manner that they characterize any pronouncement not in conformity with the predominant faith as blasphemous. . . . [They] have sometimes been used to limit unduly — or even to prohibit altogether — the dissemination of beliefs other than those of the predominant religion or philosophy.[110]

Blasphemy and injury to religious feelings are closely related. Blasphemy has been described in general as:

> purposely using words concerning God calculated and designed to impair and destroy the reverence, respect and confidence due to Him as the intelligent creator, governor, and judge of the world. . . . It is a willful and malicious attempt to lessen men's reverence of God by denying His existence, or His attributes as an intelligent creator, governor, and judge of men, and to prevent their having confidence in Him as such.[111]

It follows that one purpose of prohibitions against blasphemy is to protect adherents of religious beliefs in their own feelings about those things that are sacred to them. In this regard, the European Commission has determined that the "main purpose" of the English common law offense of blasphemous libel is "to protect the rights of citizens not to be offended in their religious feelings."[112]

There are, however, important distinctions between the concepts of blasphemy and injury to religious feelings. Blasphemy statutes, for example, do not necessarily protect all

110. KRISHNASWAMI STUDY, *supra* note 8, at 35.

111. BLACK'S LAW DICTIONARY 216 (4th ed. 1968) (quoting Commonwealth v. Kneeland, 20 Pick. (Mass.) 206, 211, 212 (1838)).

112. Gay News Ltd. v. United Kingdom, 5 Eur. H.R. Rep. 123, ¶ 11 (1983) (Commission report).

persons from injury to religious feelings. In the leading modern English case on blasphemous libel at common law, Lord Scarman criticized the blasphemy law on the grounds that it did not sufficiently protect the religious feelings of all in a plural society:

> I do not subscribe to the view that the common law offence of blasphemous libel serves no useful purpose in the modern law. On the contrary, I think there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom. In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt.[113]

Laws prohibiting injury to religious feelings broaden this protection to safeguard all religious beliefs.

Additionally, whereas protection of the injury to religious feelings may be directed toward the security of persons in holding their religious beliefs, and perhaps also to the maintenance of public order, it has been argued that protection against blasphemy is directed toward maintaining the health of one of the very roots of society. In other words, damage to the dominant religion is equated with damage to one of the foundational elements of both society and the state. An English court expressed this idea as follows:

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113. R. v. Lemon [1979] 1 All E.R. 898, 921-22. The English courts explicitly declined to extend the offense of blasphemy to cover other religions in *R. v. Chief Metropolitan Stipendairy Magistrate, ex parte Choudhury*, 1 All E.R. 306 (Q.B. 1991). In that case, a British Muslim had sought to bring summonses against Salman Rushdie and his publisher for *The Satanic Verses*. The European Commission determined that the protection provided by English blasphemy law only to the Church of England, and in some respects to Christianity as a whole, was not discrimination on the basis of religion in violation of Art. 14 of the European Convention. *See* Choudhury v. U.K., 12 HUM. R. L. J. 172-73 (1991). The European Court did not have this question before it when it considered English blasphemy laws in *Wingrove v. United Kingdom*, 24 Eur. H.R. Rep. Ct. H.R. 1, 18 (1996), where the applicant attacked the foundation of the law of blasphemy. *See id.* ¶ 50. In 1994, the High Court of Lahore apparently ruled that "blasphemy against any prophet of God would be tantamount to blasphemy against the prophet Mohammed." *Special Rapporteur's Report 1996 Add.1*, *supra* note 41, ¶ 27.

> Indeed, all offences of this kind are not only offences to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together; and it is upon this ground that the Christian religion constitutes part of the law of England. . . .[114]

There is a strong similarity between this view and the arguments the Mauritanian and Sudanese governments advanced in defense of prohibitions on apostasy.[115]

As noted above, proselytism can include criticism of the religious beliefs of a target; the unsuccessful attempt to change those beliefs is thus likely to cause injury to religious feelings. When states seek to curtail such injury by limiting proselytism, these restrictions must be carefully structured. Legal provisions protecting religious feelings, either denominated as prohibitions of blasphemy or cast in more general terms, can sweep into their purview almost any act of proselytism if states define the offense too broadly. Specifically, states must carefully consider the level of intent necessary to commit the offense and the perspective from which the offensive acts must be viewed. As to the former, if any attempt to convince someone that her religious beliefs are worthy of replacement satisfies the intent requirement of a statute prohibiting injury to religious feelings, the application of the law to proselytism will be quite broad. As to the latter, if the offense is viewed from the subjective perspective of the actual target or from the point of view of a "typical" adherent to the beliefs of either the source or the target, the application of the law may be biased and subject to abuse.

A 1960 case from Pakistan illustrates these problems. In *Punjab Religious Book Society v. State*,[116] the High Court of Pakistan reviewed the government's seizure of a book that was alleged to violate a law prohibiting injury to religious feelings.[117] The law—section 295-A of the Pakistan Penal

114. *Choudhury* [1991] 1 All E.R. at 313 (quoting R. v. Williams [1797] 26 State Tr. 654, 714).

115. *See supra* notes 86-87 and accompanying text.

116. [1960] P.L.D. 629 (W. P.) Lahore 631 (Pak).

117. The Penal Code of Pakistan now contains a number of offences relating to religion that could operate as restrictions on proselytism. These include performing

Code—was adopted in 1927 during British rule, and applied to all religions:

> Whoever, with deliberate and malicious intention of outraging the religious feelings of any class [of the citizens of Pakistan], by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[118]

According to the report of the case, the Urdu translation of a book written by a German missionary named Rev. C.G. Fander had been distributed in Pakistan since 1891. The book was clearly an act of proselytism, as it was described as a "comparison between Islam and Christianity" and the "object of the author . . . was to show that Christianity was a true religion and Islam was not."[119] The validity of the book's seizure depended on whether or not its publication was punishable under section 295-A. Thus, the central question was whether the intention of the author met the requirements of the statute. On this point, the High Court of Lahore addressed the inevitable conflict between persuasion in religious beliefs and injury to religious feelings:

> Now, it will be noticed that the intention contemplated by section 295-A of the Pakistan Penal Code is not just the ordinary intention that one finds mentioned with regard to almost all other offences made punishable by that Code but a deliberate and malicious intention to do the thing mentioned therein. It appears to me that in section 295-A of the Pakistan

acts or uttering words intended to outrage or wound the religious feelings of others (secs. 295-A and 298); blasphemy against the Holy Prophet Muhammad (sec. 295-C); defiling a copy of the Holy Quran (sec. 295-B); making derogatory statements concerning other Muslim holy personages (sec. 298-A); and a variety of prohibitions on persons of the religious group known as Ahmadis, including "propagation of [their] faith, or invit[ing] others to accept [their] faith" (secs. 298-B and 298-C). *See* 1 ABDUL HALIM, THE PAKISTAN PENAL CODE WITH COMMENTARY 637-48 (4th ed. 1989). For further information on restrictions against the Ahmadis, a group that proclaims itself to be Muslim but that some Muslims consider heretical, see Commission on Human Rights, *Special Rapporteur's Report 1996 Add.1*, *supra* note 41, ¶¶ 9, 13, 21, 41-44. Some of these criminal provisions were adopted during British rule while others were added during the Islamicization campaign of President Zia-ul-Haq in the 1970s and 1980s and of Prime Minister Nawaz Sherif in the 1990s. *See id.* ¶¶ 10-16.

118. 1 HALIM, *supra* note 117, at 640 (alteration in original).

119. Punjab Book Society, P.L.D. at 631.

> Penal Code the Legislature hedged "intention" with "deliberately" and "maliciously" because it was providing punishment for insulting or attempting to insult the religion or religious beliefs of a person and it is well-known that when followers of a religion try to show that their religion is the best in the world, words which will not be palatable to the followers of other religions are difficult to avoid and if it were not made necessary that the intention to do the things mentioned in the section should be deliberate and malicious, the door would have been closed on all religious discussions. . . . However, the laws of Pakistan, like those of every other civilised country, do not forbid religious discussions and preachings and I should think that if a law attempted to put a gag on these things it will be attempting to attain the impossible because it will be wanting to deny human beings the satisfaction they want to get from showing to as many people as they can that at least in matters which are not mundane they have made the best choice. . . . It is clear that in the attempt to show that a particular religion is better than the others, things may be said or written which will outrage the religious feelings of followers of other religions. When a person does that, the law will presume that he intended to insult religious beliefs of the followers of other religions. But even so the ingredients of section 295-A of the Pakistan Penal Code will not have been satisfied because they can be satisfied only if it is established that the intention to insult the religious beliefs was deliberate and malicious. When the thing objected to on the ground that it outrages the religious feelings of others is extremely offensive and has no reliable source to justify its acceptance as correct, the Court will presume that it was done with the deliberate and malicious intention of insulting the religious beliefs of the followers of the religion to which or the founder of which the thing relates. The same presumption will be raised when the thing objected to indicates that the argument in favour of one religion has sunk to the level of abuse of another.[120]

Furthermore, the Court cautioned that the perspective from which the action was to be judged was that of a neutral person of normal susceptibilities: "a person who is neither connected with the religion of the person who is alleged to have outraged the religious feelings of someone nor with that of the person or

120. *Id*. at 637-38.

persons whose religious feelings are stated to have been outraged."[121] Although the contents of the book exhibited an intent to outrage the religious feelings of Muslims, the Court found that it could not be said to have gone so far as to be deliberate and malicious.[122]

Are the dangers identified by the Pakistani Court recognized in international standards as well? The European Court has on two occasions addressed whether laws prohibiting blasphemy and the injury to religious feelings were consistent with article 10 of the European Convention protecting free expression. Although these cases did not involve proselytism, they do articulate general principles that would pertain to the application of these laws to proselytism.[123]

In *Wingrove v. United Kingdom*,[124] the European Court considered the English common law of blasphemy as it was applied by the British authorities to prohibit the distribution of an original video work, entitled *Visions of Ecstasy*.[125] The English courts had defined blasphemy as follows:

> Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. *The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves*.[126]

121. *Id*. at 638.

122. *See id.* at 639-40.

123. The European Commission has indicated that prohibitions on blasphemy could be applied to manifestations of religious belief. *Gay News*, 5 Eur. H.R. Rep. ¶ 13 ("Even assuming that there had in fact been an interference with the applicants' rights under Art. 9, it would have been justified under Article 9(2) on . . . the same grounds as the restriction of the applicants' freedom of expression under Article 10(2).").

124. 24 Eur. H.R. Rep. 1 (1996).

125. The video depicted the artist's explicit conception of the ecstatic visions of Jesus Christ by St. Teresa of Avila. *See id.* at 5-13.

126. *Id*. at 14 (emphasis added) (quoting art. 214 of Stephen's Digest of the Criminal Law (9th ed. 1950).

In the view of the European Court, the interference with free expression resulting from the law of blasphemy was in furtherance of "the protection of 'the rights of others' . . . . It is also fully consonant with the aim of the protections afforded by article 9 to religious freedom."[127]

In determining that there had been no violation of article 10 resulting from the restrictions on the video, the Court first noted that a less exacting level of international scrutiny was appropriate for restrictions on expression that could offend moral or religious convictions than for restrictions on "political" speech:

> Whereas there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations.[128]

The Court then found that because the English law of blasphemy "does not prohibit the expression, in any [possible] form, of views hostile to the Christian religion," or necessarily "opinions which are offensive to Christians,"[129] "the reasons given to justify the measures taken can be considered as both relevant and sufficient for the purposes of Article 10(2)."[130]

In the case of *Otto-Preminger-Institut v. Austria*,[131] the European Court addressed an Austrian law designed to protect injury to religious feelings. The law provided:

127. *Id.* at 28.
128. *Id.* at 30.
129. *Id.* at 31.
130. *Id.*
131. 295 Eur. Ct. H. R. (ser. A) (1994).

> Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.[132]

The law was applied to seize a film entitled *Das Liebeskonzil* ("Council in Heaven").[133] In the course of its decision, the Court explained how criticism of a religion might interfere with an adherent's right to freedom of religion:

> Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, . . . guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religions beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.
>
> . . . The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.[134]

The Court determined that the seizure of the film did not violate article 10 of the European Convention because the Austrian Courts could reasonably determine that seizure was

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132. Section 188 of Austrian Penal Code, *reprinted in Otto-Preminger*, 295 Eur. Ct. H.R. (Ser. A) at 12.

133. *See Otto-Preminger*, 295 Eur. Ct. H.R. (Ser. A) at 8-9. According to the report of the case, the film was based on a play written by Oskar Panizza that was published in 1894. Panizza was later imprisoned by a German court for "crimes against religion," and the play was banned in Germany. *Id.* at 11.

134. *Id.* at 18. The dissenting judges opposed the idea that the right to freedom of religion encompassed the protection of religious feelings from injury. *See id.* at 24 (Palm, Pekkanen and Makarczyk, JJ., dissenting).

necessary to protect the religious peace in the district in which it was going to be shown.[135]

In both *Wingrove* and *Otto-Preminger-Institut*, it was the manner in which the message was delivered, and not the content of the message, that implicated a restriction on the freedom to deliver it. Any harm resulting from the substance of a message must generally be tolerated in respect of the different views that make up a pluralistic society.[136] Harm resulting from the method of its delivery, however, may be limited through restrictions when the manner of expression is extreme enough. As the European Court recognized in the *Otto-Preminger-Institut* case:

> Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."
>
> However, as is borne out by the wording itself of Article 10 § 2, whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes "duties and responsibilities." Amongst them — in the context of religious opinions and beliefs — may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.[137]

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135. *See id.* at 20-21.

136. An exception to this principle may be found in the obligation to prohibit "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" as provided in article 20(2) of the ICCPR. *See also General Comment on Article 18*, *supra* note 48, ¶ 7 ("[N]o manifestation of religion or belief may amount to . . . advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."); Race Convention, *supra* note 56, art. 4; American Convention, *supra* note 47, art. 13(5); *Copenhagen Document*, *supra* note 58, ¶ 40; Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, art. 22(d), *reprinted in* U.N. GAOR, 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/ PC/62/Add. 18 (1993). Where the content of proselytism includes expression that falls within the ambit of these provisions, the State may be obligated to act to prohibit such expression.

137. *Otto-Preminger*, 295 Eur. Ct. H.R. (ser. A) at 19.

The European Court appears willing to leave to the discretion of states—in light of conditions that may exist in each—to determine at what point the manner of expression so overwhelms the message that the right of others to hold contrary views has been violated.

One factor that may be considered by a state in its exercise of this discretion is the appropriate perspective from which to view the alleged offense or injury to religious feelings. The Austrian government in the *Otto-Preminger-Institut* case had argued that the seizure of the film was necessary, in part, because of the fact that a vast majority of the residents of the area where the film was to be shown were Roman Catholic.[138] The Court accepted that this could be used as a factor, without specifically addressing the need to view these situations in an objective manner:

> The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time.[139]

In contrast, the United States Supreme Court has taken the view that the state may not legitimately prohibit "attacks upon a particular religious doctrine,"[140] because of the inherent difficulty in administering such a prohibition without favoring certain groups over others. In *Joseph Burstyn, Inc. v. Wilson*,[141] the Supreme Court struck down a New York law that prohibited the commercial showing of motion pictures that were determined by state officials to be "sacrilegious." The term "sacrilegious," as used in the statute, was interpreted by New York's highest court to mean that "no religion, as that word is understood by the ordinary, reasonable person, shall be treated

138. *See id.* at 20.
139. *Id.* at 21.
140. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952).
141. *Id.*

with contempt, mockery, scorn and ridicule."[142] The Supreme Court noted the difficulty in applying the definition of "sacrilegious" in an objective manner:

> In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control . . . in a censor. . . . Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. . . . It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine.[143]

5. *The right of persons belonging to religious minorities to maintain their religious traditions and identity*

As related above, one of the purposes of the protection of the rights of persons belonging to religious minorities is to ensure the "survival and continued development" of their particular religious identity.[144] States may take "positive measures" necessary to further this goal.[145] This raises the question of whether proselytism targeted at a minority group in danger of losing their religious identity may be justifiably restricted.

The loss of identity through successful conversion efforts cannot, without more, render proselytism a violation of the rights of persons belonging to a religious minority. Success in proselyting may only be indicative of the free choice of the target. It is the individual's desire to maintain an identity that triggers protection for that identity.[146] This issue has arisen in

142. Joseph Burnstyn, Inc. v. Wilson, 101 N.E.2d 665, 672 (1951).

143. *Wilson*, 343 U.S. at 504-05 (citation omitted).

144. *General Comment on Article 27, supra* note 59, ¶ 9.

145. *Id.* ¶ 6.2.

146. In this regard, there can be significant conflict between individual members of minority groups and the group as a collective body or its leadership. *See* Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. ESCOR 32d Sess. ¶ 250, U.N. Doc.

connection with the rights of indigenous peoples, and the protection of those who continue to adhere to their native religious beliefs. However, to more fully appreciate the situation of indigenous peoples, it is necessary to take a step back and consider briefly the process of religious change that attended the colonial experience.

Religious change has historically gone hand in hand with international exploration, conquest and colonization, and the resulting political re-alignments. The attempt to spread European Christianity was a feature of the colonial enterprise in Africa and Asia, although policies and practices varied from imperial power to imperial power and according to local conditions.[147] The propagation of Christianity among the native inhabitants was an attendant purpose to the exploration, conquest and settlement of the lands of the Western hemisphere.[148] Like-wise conversion to Islam accompanied the

E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E. 78.XIV.1 (1979) [hereinafter *Linguistic Minorities*].

147. *See* 2 JUSTO L. GONZÁLEZ, THE STORY OF CHRISTIANITY 305-06 (1985).

148. *See* The Papal Bull, *Inter Caetera* (Alexander VI), May 4, 1493, *in* DOCUMENTS OF AMERICAN HISTORY 3 (Henry Steele Commager ed., Appleton-Century-Crofts, Inc., 5th ed. 1949) ("We have indeed learned that you, who for a long time had intended to seek out and discover certain islands and mainlands remote and unknown and not hitherto discovered by others, to the end that you might bring to the worship of our Redeemer and the profession of the Catholic faith their residents and inhabitants."); First Charter of Virginia, April 10, 1606, *in* DOCUMENTS OF AMERICAN HISTORY, *supra*, at 8 ("We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of *Christian* Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those Parts, to human Civility, and to a settled and quiet Government; Do, by these our Letters Patents, graciously accept of, and agree to, their humble and well-intended Desires."); Mayflower Compact, November 11, 1620, *in* DOCUMENTS OF AMERICAN HISTORY, *supra*, at 15 ("Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first colony in the northern Parts of Virginia."); The First Charter of Massachusetts, March 4, 1629, *in* DOCUMENTS OF AMERICAN HISTORY, *supra*, at 18 ("[O]f all other Matters and Thinges, whereby our said People, . . . may be soe religiously, peaceablie, and civilly governed, as their good Life and orderlie Conversacon, maie wynn and incite the Natives of Country to the Knowledg and Obedience of the onlie true God and Sauior of Mankinde, and the Christian Fayth, which in our Royall Intencon, and the Adventurers free Profession, is the principall Ende of this Plantacion.").

expansion of Arab empires into North Africa, the Middle East, and Persia.[149]

An assessment of these events in terms of the right to freedom of religion of both native and newcomer is beyond the scope of this study. However, this history has shaped the policy of some states towards proselytism, either in general or with respect to those segments of the population that still adhere to native religious beliefs.

José R. Martínez Cobo, the U.N. Special Rapporteur that studied discrimination against indigenous populations, described the conflict between colonizers and natives over religious beliefs and practices in this way:

> Since the very first contacts between the "newcomers" and the "natives", some of their respective religious beliefs and practices came to be expressed by each one of them and perceived by the other. Soon after, with renewed contacts, efforts were set in motion by the "newcomers" to convert the natives to their belief. By the time colonial rule was established there was usually an ongoing religious struggle. The "colonizers", who generally brought with them what they believed to be the only true religion, considered the religious beliefs and practices of the "natives" as "pagan", "gentile", "heathen", "idolatrous", and soon showed contempt for and intolerance of these beliefs. In most cases this haughty attitude contrasted with the "natives'" sincretism, which meant tolerance, if not acceptance of the other beliefs or religion by the "natives". Often where there was a religious imperative to catechize and convert the "pagan" to the newly arrived "true religion", further problems ensued often resulting in legal or social pressures amounting to the interdiction of the practice of the indigenous religion and the desecration or destruction of sacred symbols, objects and places, in the name of religion and civilization. A reaction by the "natives" to reaffirm their own beliefs and religion, particularly in the light of this and other not very civilized or exemplary behaviour by the "colonizer", was not long in coming.[150]

149. *See* IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 51-53 (1988).

150. José R. Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.7, ¶ 48 (1982) [hereinafter *Cobo Report*].

As a result of the ensuing or threatened disorder, some colonial powers began to control access of religious groups to certain areas.[151]

To some subsequently independent peoples, this experience has left an ambivalent legacy. On the one hand, there is a measure of acceptance of the beliefs of the newcomer—as "adopted" by the native inhabitants and as an important part of the culture of the now independent nation. On the other hand, there is a sometimes bitter or painful awareness of the elements of suppression and coercion that led to their adoption. The religious policies of certain independent states reflect this ambivalence, which has led in some cases to heightened concern with proselytism and the activities of foreign missionaries.[152]

An example of this ambivalence can be seen in the provisions of the Constitution of Papua New Guinea, a territory formerly administered by Australia, adopted at its independence in 1975. The Constitution recognizes in its preamble that: "WE, THE PEOPLE OF PAPUA NEW GUINEA . . . pledge ourselves to guard and pass on to those who come after us our noble traditions and the Christian principles that are ours now."[153] However, Section 45 of the Constitution contains specific qualifications on the right to freedom of religion with respect to the ability to propagate religious views and intervene into the religious affairs of

151. *See* KRISHNASWAMI STUDY, *supra* note 8, at 55 n.1.

152. In addition to the example of Papua New Guinea described below, see ZIMB. CONST. art. 19(5)(b) (permitting limitations on the freedom of religion "for the purposes of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited intervention of persons professing any other religion or belief"), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Blaustein & Flanz, eds., 1987).

153. PAPUA N.G. CONST. preamble, *reprinted in* Constitutions OF THE COUNTRIES OF THE WORLD, *supra* note 83.

others.[154] The genesis of these provisions has been described as follows:

> The phrasing of [section 45] represents an attitude, common in Papua New Guinea, of an acceptance of some Christian principles coupled with a resentment of the activities of many of the missionaries who brought Christianity to the country. Many Papua New Guineans, though sincere Christians, maintain links with traditional practices and beliefs and particularly resent the efforts of some missionaries to suppress aspects of the traditional culture, particularly art-forms and traditional ceremonies. This explains the emphasis in the section on the exercise of rights to propagate religious views only to the extent that they do not interfere with the freedoms of others.[155]

In an effort to avoid the abuses of the past, a number of countries have formulated policies directed at protecting those holding native beliefs. These express concerns may support a restriction on certain aspects of proselytism.

The first concern is condemnation or suppression of native beliefs by state action or by religious groups—in particular, those religious groups administering educational or health care facilities or providing humanitarian assistance in areas where traditional beliefs remain prevalent. Where proselytism is present in this context, its coercive possibilities are enhanced by a restriction on the freedom of religion of those adhering to native beliefs. The extent to which private religious groups

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154. *See* JOHN L. GOLDRING, THE CONSTITUTION OF PAPUA NEW GUINEA: A STUDY IN LEGAL NATIONALISM 233-34 (1978). Section 45 of the Constitution reads:

> (1) Every person has the right to freedom of conscience, thought and religion and the practice of his religion and beliefs, including freedom to manifest and propagate his religion and beliefs in such a way as not to interfere with the freedom of others. . . .
>
> (2) No person shall be compelled to receive religious instruction or to take part in a religious ceremony or observance. . . .
>
> (3) No person is entitled to intervene unsolicited into the religious affairs of a person of a different belief, or to attempt to force his or any religion (or irreligion) on another, by harassment or otherwise.
>
> . . . .
>
> (5) A reference in this section to religion includes a reference to the traditional religious beliefs and customs of the peoples of Papua New Guinea.

Id. at 234.

155. *Id.* at 233-34.

ultimately restrict religious freedom under these circumstances depends upon the extent to which those groups dominate or control important services.

A second concern is the prevention of any exercise of governmental authority by religious groups in native areas. This practice of giving religious groups governmental power was employed in a number of colonial settings; in particular, some Latin American countries granted administrative authority to missionary organizations of the Catholic Church.[156] The dangers of this policy are the potentially coercive use of governmental authority, or the confluence of governmental and religious identity, that would exert pressure on those holding other beliefs to adopt the "official" beliefs.

A third concern is official policy based on the notion that a change in religious beliefs and practices, i.e., the adoption of the dominant or another recognized religion, is in the best interests of the indigenous peoples because it will assist them in becoming more fully integrated or assimilated into society at large.[157] Regardless of the considerable debate over whether or not such efforts at assimilation have been successful, these policies substitute the choice of the state for the choice of the individual. In this regard, the Draft United Nations Declaration on the Rights of Indigenous Peoples provides that:

> Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
>
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities . . . . .

156. *See, e.g., Cobo Report, supra* note 150, ¶¶ 57-58 (reviewing a 1946 Argentinian decree that recommended "the establishment of missions among the Indians" and declared that "no new religious missions, temples or denomination organizations belonging to faiths other than the Roman Catholic Apostalic faith shall be established in national territory for purposes of proselytism among the Indians").

157. For an example of a restriction on proselytism in the face of this concern, see *State Party Report of Brazil to the Human Rights Committee*, ¶ 235, U.N. Doc. CCPR/C/81/Add.6 (1997) ("All churches and denominations are free to establish places of worship and religious education, though the Government controls access of missionaries to indigenous areas so as to avoid forced acculturation.").

> (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures . . . .[158]

C. The Interests of the State

As with the protection of the rights and freedoms of the target, a consideration of other interests of the state may support both the freedom to proselytize and its restriction. As already noted, the primary interest supporting the freedom to proselytize is the protection of the rights of the source. In addition, states may be motivated to grant and protect that freedom if they perceive that benefits from religious freedom, generally, are maximized by free choice and a self-directed population in matters of religion. A state may also hold the view that the religious pluralism resulting from vigorous competition in matters of religious belief is an important addition to the overall cultural diversity of its people. This section, however, will focus primarily on those state interests commonly asserted to restrict proselytism. These include the protection of a particular dominant religious tradition or dominant political ideology, the preservation of public order, and the regulation of the religious "marketplace" in order to ensure fairness and to encourage informed religious choices.

1. Protection of a dominant religious tradition or political ideology

Restrictions on proselytism can exist within an integrated system of offenses, regulations, policies and practices designed to (1) inhibit conversions from or otherwise protect the position of the dominant religious group or (2) encourage adherence to the dominant political ideology. Examples of the first type are generally found among the Islamic states, where there may exist some or all of the following: prohibitions on apostasy, expansive application of laws against blasphemy and the injury to religious feelings, as well as prohibitions on proselytism. Closely related to these restrictions are civil and social

158. *Draft United Nations Declaration of the Rights of Indigenous Peoples*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1994/1995, Aug. 26, 1994, art. 7, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, *reprinted in* RELIGION AND HUMAN RIGHTS, *supra* note 8, at 133-34.

disabilities that may result from the adherence to a religious community other than the dominant one.

Examples of the second type of restrictions are primarily found among those states that espouse a communist or socialist ideology. Here, the restrictions serve to establish and preserve the primacy of atheism or beliefs of a similar anti-religious character that form a part of the officially sanctioned political ideology. Prohibitions on blasphemy or the injury to religious feelings may be replaced or supplemented by expansive rules limiting expression criticizing the policies of the ruling political party or the state. Civil or social disabilities are placed on those who adhere to any religious belief.

A hallmark of both of these situations is that, for the most part, the prohibitions and penalties run in a single direction. One scholar of Islamic society has characterized the situation in those states in this way: "[N]on-Muslim missionary efforts to convert Muslims are generally curtailed when not absolutely prohibited. . . . Missionary work to convert non-Muslims to Islam is, on the other hand, officially encouraged and even publicly funded in some countries."[159] Penalties for apostasy only apply to Muslims. Restrictions on blasphemy are framed or enforced to suppress only expression critical of Islam. The same bias can be found in the efforts to protect official ideologies in communist states.

Three examples illustrate restrictions on proselytism imposed for the purpose of protecting the dominant religious group or official political ideology. First, in Malaysia, laws prohibiting proselytism targeted at Muslims are specifically sanctioned by the Constitution; the government has defended this provision as necessary to protect Islam and Islamic institutions in a multireligious state. Second, in the People's Republic of China, religious activities, including proselytism, are restricted in order to properly guide society in its development as a socialist state. Finally, Ukrainian statutes on proselytism and religious freedom illustrate one of the reactions to proselytism and growing religious pluralism in the states of Eastern Europe and the former Soviet Union following the collapse of communism.

159. Ann Elizabeth Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. J. COMP. L. 127, 149 (1987).

a. Malaysia. As discussed above, certain Islamic states have argued that a prohibition on apostasy of Muslims, and consequently proselytism of Muslims by non-Muslims, is necessary in order to protect the Islamic faith, to preserve public morality, to promote public order, and to ensure the stability of Islamic society.[160] A similar argument is made by the government of Malaysia with respect to restrictions on proselytism targeted at Muslims in the context of a multiethnic, multireligious state.

The Malaysian Constitution authorizes the enactment of laws that "may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam."[161] In 1988, the U.N. Special Rapporteur alleged that this provision, and the laws enacted pursuant to it, had a negative impact on religious freedom.[162] In response to this allegation, the Malaysian government articulated certain problems inherent in maintaining social stability in a multireligious state that is nevertheless dominated by a particular religious tradition.

> [W]hen Malaysia achieved its independence in 1957, it inherited enormous national problems. Top of the list are the daunting problems of forging unity among the multiracial and multi-religious composition of the newly born country which are not easily appreciated by foreign observers. . . Malaysia, or Malaya then, was born from a land and State which had its own long established indigenous institutions characterized by Islamic teachings and belief . . . Malaysia was to be born as a multiracial and multi-religious nation.
>
> One important factor underlying the opportunity of forging ahead for the birth of a united nation then was the fact that this multi-religious and multiracial society had had little experience in religious and racial interaction. . . . Yet, as civilized human beings, Malaysian leaders from the various ethnic communities worked out compromises between the ethnic groups. . . The compromises agreed to include the

160. *See supra* notes 83-87 and accompanying text.

161. Art. 11(4), *reprinted in* FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 220 (Kevin Boyle & Juliet Sheen eds., 1997).

162. *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. ESCOR, 45th Sess., Provisional Agenda Item 22, Commission on Human Rights, ¶ 51, U.N. Doc. E/CN.4/1989/44 (1988) [hereinafter *Special Rappoteur's Report 1988*].

> understanding that all institutions indigenous to the country must be preserved, the character of the country and all its attributes must not only be maintained but strengthened further, and the rights of the indigenous (Malays) must remain, while those of the other ethnic groups are guaranteed.
>
> The spirit of the Constitution of Malaysia pertaining particularly to interracial and inter-religious relations between the various ethnic communities was derived from the above compromises. Indeed article 11 and the various legislations passed in consonance with that article are reflective of the compromise that the character of the country and all its attributes should not only be maintained but strengthened. This is the wish of the indigenous people (Malays) who are Muslims and indeed if there should be a change in the characteristics mentioned above, it should only take place in accordance with the wishes of the Muslims. However, in keeping with the spirit of compromise, the Constitution at the same time guarantees freedom of worship to the others.[163]

From the perspective of the Malaysian government, the unity and stability of the multiethnic, multireligious state of Malaysia is dependent upon the preservation and strengthening of the Islamic character of the state and Muslim institutions. It is apparently in furtherance of that goal that Muslims are protected "from being subjected to attempts to convert them to another religion."[164]

The government's arguments notwithstanding, if a law regulating proselytism directed at Muslims, enacted in furtherance of Article 11(4) of the Constitution, purports to cover all forms of proselytism, it is uncertain that such a law could be sustained as a proper limitation on the freedom to manifest religion enacted for the protection of public order. Support for this proposition comes from Malaysia's own Supreme Court, in the case of *Minister for Home Affairs v. Othman*.[165] In that case the petitioner, a Christian, was detained by the Minister of Home Affairs under a statute that permitted such detentions in order to prevent persons from

163. *Id.* ¶ 52. The Malaysian government made a further response, found in *Special Rapporteur's Report 1990*, *supra* note 67, ¶ 58.

164. *Special Rapporteur's Report 1990*, *supra* note 67, ¶ 58.

165. [1989] 1 M.L.J. 418 (Sup. Ct.).

"'acting in any manner' prejudicial to the security of Malaysia."[166] The Minister supported the detention on the grounds that the petitioner "was involved in a plan or programme for the dissemination of Christianity amongst Malays."[167] It was alleged that the petitioner had attended a series of meetings and seminars and had caused the conversion of six Malays to Christianity. The lower court, on a petition of habeas corpus, ruled that the detention was unlawful,[168] and the Supreme Court affirmed that decision.[169]

The Supreme Court recognized that under the Malaysian Constitution, the article protecting the right of freedom of religion "does not authorize any act contrary to any general law relating to public order, public health or morality."[170] However, the Supreme Court determined that the extent of the petitioner's activities, as alleged by the Minister, did not fall within that proviso:

> We do not think that mere participation in meetings and seminars can make a person a threat to the security of the country. As regards the alleged conversion of six Malays, even if it was true, it cannot in our opinion by itself be regarded as a threat to the security of the country.
>
> . . . .
>
> . . . The guarantee provided by art 11 of the Constitution, ie the freedom to profess and practice one's religion, must be given effect unless the actions of a person go well beyond what can normally be regarded as professing and practising one's religion.[171]

The Supreme Court's decision was taken in the absence of any law prohibiting the propagation of Christianity among Muslims, as would be authorized by Article 11(4).[172] The

166. *Id.* at 419.

167. *Id.* at 420.

168. The lower court decision is reported at [1989] 1 M.L.J. 368 (High Ct.).

169. *Orhman*, 1 M.L.J. 418.

170. *Id.* at 419.

171. *Id.* at 420. Note from this passage that the Supreme Court considers the petitioner's proselytizing activities to fall within the protection of religious freedom as provided in the Constitution. The Court apparently does not share the government's position, related above, that controlling or restricting the propagation of non-Islamic religions among Muslims does not impair the religious freedom of non-Muslims. *See supra* text accompanying note 90.

172. *See Orhman*, 1 M.L.J. at 369.

existence of such a law may have rendered the petitioner's detention lawful. However, if the activities of the petitioner were not contrary to public order in the absence of a law restricting the propagation of Christianity among Muslims, it is hard to see how the presence of such a law would change that determination. The petitioner's detention might have been a limitation on his freedom of religion as prescribed by state law, but not in furtherance of one of the permissible goals that are specifically articulated in international instruments.

b. The People's Republic of China. The religious policy of the People's Republic of China recognizes, in principle, the right to freedom of religion, but only to the extent compatible with the security and development of a socialist state. One official document has described the proper relationship between religion and society in this way:

> Religion should be adapted to the society in which it is prevalent. This is a universal law for the existence and development of religion. Now the Chinese people are building China into a modern socialist country with Chinese characteristics. The Chinese government advocates that religion should adapt to this reality. However, such adaptation does not require citizens to give up religious belief, nor does it require any religion to change its basic doctrines. Instead, it requires religions to conduct their activities within the sphere prescribed by law and adapt to social and cultural progress.[173]

In furtherance of this goal, the "sphere prescribed by law" within which religious activities may be conducted is small. Organized religious activities can take place only at specific religious sites that have been registered with the state

173. State Council Information Office, *Freedom of Religious Belief in China* (October 1997), *as reprinted in* BEIJING REVIEW, Nov. 3-9, 1997, at 16. *See also Document 19: The Basic Viewpoint in the Religious Question During Our Country's Socialist Period*, § IV, *reprinted in* R. Lanier Britsch, *The Current Legal Status of Christianity in China*, 1995 BYU L. REV. 347, 370 ("[T]he basic starting point and firm foundation for our handling of the religious question and for the implementation of our policy and freedom of religious belief lies in our desire to unite the mass of believers and nonbelievers and enable them to center all their will and strength on the common goal of building a modernized, powerful socialist state. Any action or speech that deviates in the least from this basic line is completely erroneous, and must be firmly resisted and opposed by both Party and people.") [hereinafter *Document 19*].

authorities.[174] These activities can be conducted only by state-approved and regulated religious personnel.[175] Registered sites are administered by state-approved associations that must be affiliated with official state religious organizations, the so-called "Patriotic Religious Organizations."[176]

One intended effect of these restrictions is to severely limit proselytism, at least with respect to religious believers bringing nonbelievers to their faith.[177] While the state recognizes that, as a matter of religious freedom, "[a] person who was previously a nonbeliever has the freedom to become a religious believer,"[178] proselytism in this direction is curtailed.[179] This is particularly true with respect to foreigners. One of the linchpins of China's religious policy is the prevention of foreign influence in religious activities.[180] Foreign influence is generally thought to be a subversive influence to the stability and the proper development of society and the socialist Chinese state.[181] As a part of this comprehensive policy, Chinese law prohibits foreign missionaries.[182] According to the state Council's *Regulations on*

174. *See Document 6: Issued by the Central Committee of the Communist Party and the State Council on Some Problems Concerning Further Improving Work on Religion*, *reprinted in* Britsch, *supra* note 173, at 384, at § II [hereinafter *Document 6*]; *Order of the State Council of the People's Republic of China, No. 145* (Jan. 31, 1994), art. 2, *reprinted in* Britsch, *supra* note 173, at 396 [hereinafter *Order No. 145*]; *Regulations from the Shanghai Religious Affairs Bureau* (Nov. 30, 1995), art. 32, *reprinted in* HUMAN RIGHTS WATCH/ASIA, CHINA: STATE CONTROL OF RELIGION 90 (1997) [hereinafter *Shanghai Regulations*] ("No one may preach religion outside of places set aside for religious activities.").

175. *See Document 6*, *supra* note 174, § IV; *Shanghai Regulations*, *supra* note 174, arts. 15-17, 31.

176. *See Document 6*, *supra* note 174, § II .

177. The requirement that religious personnel be restricted to their registered place of worship is alleged to have severely restricted proselytism. *See* HUMAN RIGHTS WATCH/ASIA, CHINA: STATE CONTROL OF RELIGION 33-36 (1997) [hereinafter HUMAN RIGHTS WATCH/ASIA, CHINA].

178. *Document 19*, *supra* note 173, § IV, at 369.

179. *See Document 6*, *supra* note 174, § II, at 388 ("Preaching and missionary work by self-styled preachers and other illegal missionary work must be firmly curbed.").

180. *See Document 19*, *supra* note 173, § XI; *Document 6*, *supra* note 174, § IV; *Order No. 145*, *supra* note 174, art. 4.

181. *See* Luo Shuze, *Some Hot Issues in Our Work on Religion*, *reprinted in* HUMAN RIGHTS WATCH/ASIA, CHINA, *supra* note 177, at 65-66.

182. *See Document 19*, *supra* note 173, § XI, at 380 ("[Religious persons] must determinedly refuse any meddling or interfering in Chinese religious affairs by foreign churches or religious personages, nor must they permit any foreign religious organization . . . to use any means to enter our country for missionary work or to

the Supervision of the Religious Activities of Foreigners in China:

> Foreigners within China's borders who conduct religious activities must observe Chinese laws and regulations; they are not allowed to establish religious organizations, set up religious offices, open places for religious activities or run religious institutes, nor may they develop followers, appoint religious personnel or conduct missionary activities among Chinese citizens.[183]

As a final matter, the state is not indifferent to the religious choices of its people. Ideologically, the Chinese Communist Party embraces the notion that religion should wither away over time for the general good of society.[184] Although the government now rejects the use of force in order to bring about this goal, it is to this end that religious policy is ultimately directed.[185] The Party must aggressively propagate atheism, and all Party members must be avowed atheists.[186] Therefore, proselytism directed at convincing religious believers to abandon their beliefs is encouraged as a matter of state policy.[187]

c. Ukraine. The collapse of the Soviet empire and its communist ideology has let loose a wide-ranging process of national and political development throughout the region. The search by states, both old and new, for a guiding national character has in some cases resulted in a desire to promote a national religious identity. This in turn has had an impact on religious freedom in the new democracies of Eastern Europe and the former Soviet Union. One area in which this impact has

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secretly introduce and distribute religious literature on a large scale.").

183. *Order of the State Council of the People's Republic of China, No. 144, art. 8* (Jan. 31, 1994), *reprinted in* Britsch, *supra* note 173, at 395 (translated from CNCR No. 2287, Feb. 25, 1994).

184. *See Document 19*, *supra* note 173, § I.

185. *See id.* §§ I, IV; *Document 6*, *supra* note 174, § I.

186. *See Document 19*, *supra* note 173, § IV at 369 ("We Communists are atheists and must unremittingly propagate atheism."); *id.* § IX at 377 ("A Communist Party member cannot be a religious believer; s/he cannot take part in religious activities."); *Document 6*, *supra* note 174, § VI.

187. *See Document 6*, *supra* note 174, § II at 392 ("Party committees and governments at all levels must . . . instruct the propaganda departments to . . . educate the masses, youngsters in particular, in dialectical materialism and historical materialism (including atheism).").

been felt is proselytism, particularly by foreign religious groups targeting those who are at least nominally part of the dominant religious traditions.

Following the collapse of communism and the Soviet Union, a number of Eastern European states and the newly-independent Soviet republics enacted laws that established freedom of religion on a relatively equal basis for all denominations, and granted broad freedom to religious organizations to operate without government interference.[188] An unintended consequence of the establishment of religious freedom in principal, along with the loosening of controls on the press and foreign visitors in general, was an influx of representatives of foreign religious organizations.

In some cases, the foreigners came to support existing local denominations. In other cases, they came to establish new organizations that would grow through proselytism. The result was both a marked increase in religious pluralism and a reassessment of the legal rules under which the foreigners operated. At the instigation, or with the support, of local religious denominations—in particular the dominant religion—a number of these laws have been amended for the purpose of restricting proselytism by foreign religious organizations.[189]

188. Laws of this kind were passed in Hungary, Czechoslovakia and many former Soviet Republics. The former Soviet States based their laws on a law enacted by the Soviet Union in 1990. That law, entitled "On Freedom of Conscience and Religious Organisations," is translated into English at 33 J. CHURCH & ST. 192 (1991). *See also* Law on Freedom of Religion, RSFSR Law on Freedom of Religion, JPRS-UPA-90-071, Dec. 18, 1990, Act of the Ukrainian Soviet Socialist Republic on Freedom of Conscience and Religious Organizations, PRAVDA UKRAINY, April 29, 1991, at 3 [hereinafter *Ukrainian Act*], *quoted in* Howard L. Biddulph, *Religious Liberty and the Ukrainian State: Nationalism Versus Equal Protection*, 1995 BYU L. REV. 321, 329; Law of Belarus' On the Freedom of Conscience and Religious Organizations, MINSK, No. 2054-XII, Dec. 17, 1992.

189. For an analysis of the amendments to the Ukrainian and Russian laws, see generally Biddulph, *supra* note 188; W. Cole Durham et. al., *The Future of Religious Liberty in Russia*, 8 EMORY INT'L L. REV. 1 (1994); and a number of the articles contained in *Soul Wars: The Problem of Proselytism in Russia*, 12 EMORY INT'L L. REV. 1-738 (1998). For the attempts to amend the law of Belarus', see *Written Question E-3960/97* (Dec. 12, 1997), Commission of the European Communities, 1998 O.J. (C 187) 101.

This statement made by Metropolitan Kirill of Smolensk and Kaliningrad at a world conference of missions in 1996 gives a representative official view of the Russian Orthodox Church on the activities of foreign religious organizations since 1990:

The history of religious freedom legislation in Ukraine is illustrative of the increased restrictions described above. Following the demise of the USSR in late 1991, the independent Republic of Ukraine retained the "Law on Freedom of Conscience and Religious Organizations" enacted earlier in 1991 by the Ukrainian Soviet Socialist Republic. This law, which was modeled on a law adopted in the Soviet Union in 1990, provided for the right to freedom of conscience in the following terms:

> All citizens shall have the guaranteed right of freedom of conscience. The above right shall include the freedom to have, to adopt and to change religion or convictions at one's own choice and the freedom to profess individually or together with other persons any religion or to profess no religion, to establish

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> As soon as freedom for mission work was allowed, a crusade began against the Russian church even as it began recovering from a prolonged disease, standing on its feet with weakened muscles. Hordes of missionaries dashed in, believing the former Soviet Union to be a vast missionary territory. They behaved as though no local churches existed, no gospel was being proclaimed. They began preaching without even making an effort to familiarize themselves with the Russian cultural heritage or to learn the Russian language. In most cases the intention was not to preach Christ and the gospel but to tear the faithful away from their traditional churches and recruit them into their own communities. Perhaps these missionaries sincerely believed that they were dealing with non-Christian or atheistic communist people, not suspecting that our culture was formed by Christianity and that our Christianity survived through the blood of martyrs and confessors, through the courage of bishops, theologians, and laypeople asserting their faith.
>
> Missionaries from abroad came with dollars, buying people with so-called humanitarian aid and promises to send them abroad for study or rest. We expected that our fellow Christians would support and help us in our own missionary service. In reality, however, they have started fighting with our church. . . . All this has led to an almost complete rupture of the ecumenical relations developed during the previous decades. An overwhelming majority of the population refused to accept this activity, which offends people's national and religious sentiments by ignoring their spiritual and cultural tradition. Indeed, given the lack of religious education, people tend to make no distinction between the militant missionaries we are speaking about and ordinary people of other faiths or confessions. For many in Russia today, "non-Orthodox" means who those [sic] have come to destroy the spiritual unity of the people and the Orthodox faith – spiritual colonizers who by fair means or foul try to tear the people away from the church.

This portion of Metropolitan Kirill's statement is reprinted in John Witte, Jr., *Soul Wars: The Problem and Promise of Proselytism in Russia*, 12 EMORY INT'L L. REV. 1, 12-13 (1988).

> religious cults, to express openly and to spread freely one's own religious or atheistic convictions.[190]

Among the forces that sought to have the law amended in response to the influx of foreign religious ideas and operatives were those that identified the restoration of the Ukrainian nation with the restoration of the traditionally dominant faiths. One scholar has described the situation thus:

> The political legitimacy of post-Soviet Ukraine, like that of the other successor states of former USSR, is strongly associated with the task of restoring a traditional national culture, long suppressed within a multinational empire. The state was considered to have the task of restoring the predominance of Ukrainian language, history, music, art, and other traditional cultural institutions that had been suppressed by Russian Tsarism and the Soviet regime.
>
> Traditional religious institutions were among these casualties of the Soviet period, and some nationalists viewed the state as having the obligation to restore historically dominant faiths that had been decimated by the communists in order to bring about the spiritual renewal of Ukrainian society. The restoration of traditional faiths was now being threatened by the flowering of the strange new religions "imported from abroad," which were supported by the ample human and material resources of international evangelism. Those taking such a position believed that, to promote the reflowering of Ukrainian nationalism and spiritual renewal of society, the state should erect protective barriers against the importing of increased religious pluralism.[191]

As the right to freedom of conscience was accorded only to Ukrainian "*citizens*," an amendment was enacted in 1993 to significantly restrict the religious activities of foreigners in the Ukraine:

> Clergymen, preachers of religion, instructors (teachers), and other representatives of foreign organizations who are foreign citizens temporarily staying in Ukraine, may preach religious dogmas, perform religious rites and practice other canonic activities only in those religious organizations on whose invitations they came, and upon an official agreement

190. *Ukrainian Act* art. 3, *quoted in* Biddulph, *supra* note 188, at 329.
191. Biddulph, *supra* note 188, at 337.

> with the state body which has registered the statute of the corresponding religious organization.[192]

This provision presents significant restrictions on foreign religious groups seeking to proselytize in Ukraine, particularly those with no native base of operations.

d. Conclusion. The preservation of a particular religious tradition, the official ideology of a state, or the religious character of a state's institutions—divorced from any of the other limitations expressly provided for in international instruments—cannot support limitations on the freedom to manifest religion. Thus, goals such as the protection of the Islamic character of the Malaysian state, the proper development of society into "a modern socialist country with Chinese characteristics" or the restoration of traditional "Ukrainian" values following their suppression under Soviet rule do not support the limitations provided for in international instruments. When states argue that these goals support limitations recognized by international instruments, such as the protection of public order, these arguments must be carefully scrutinized because of the inherent danger of favoring the majority while limiting the rights and freedoms of minorities.

The Human Rights Committee has addressed this problem from at least three angles, all of which lend support to the assertion that the preservation and promotion of a dominant religious tradition or political ideology cannot support a limitation on the freedom to manifest religion or belief. First, the existence of a dominant religion, in and of itself, must not result in an impairment of the rights of those belonging to a different religious group.[193] In this regard, "measures . . . imposing special restrictions on the practice of other faiths" are specifically singled out as being "not in accordance with the prohibition of discrimination based on religion or belief and the

192. 1993 Amendment to article 24 of *Ukrainian Act*, from *Handbook of the Council for Religious Affairs*, *quoted in Biddulph*, *supra* note 188, at 339.

193. *See General Comment on Article 18*, *supra* note 48, ¶ 9. For an example of this from the European Court, see *Darby Case*, 187 Eur. Ct. H.R. (ser. A) (1990), where the European Court determined that a state cannot force an individual to contribute to a state church if they are not a member of that church.

guarantee of equal protection."[194] The Human Rights Committee expressed the same concerns with respect to the existence of an official ideology.[195] Second, states are prohibited from restricting the manifestation of religious beliefs by adopting an overly narrow conception of public morality: "The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."[196] In other words, what furthers public morality is not necessarily co-extensive with what furthers the dominant religion in a society. Finally, any limitations on the right to manifest religion should not be "imposed for discriminatory purposes or applied in a discriminatory manner."[197] Any distinction based on religion should be supported by reasonable and objective criteria in pursuit of a legitimate aim under the ICCPR.[198] Protection of a dominant religion or ideology is not an objective basis on which to support a limitation on proselytism.

2. The preservation of public order

The Malaysian example related above involved an apparently comprehensive restriction on proselytism that applied only as against the activities of non-Muslims towards Muslims. An example from India involves a more narrowly-tailored restriction on proselytism conducted by all groups. This example provides a more precise illustration of the types of proselytism that may raise the concern of multireligious states in the interests of maintaining public order.

With respect to freedom of religion, Article 25 (1) of the Indian Constitution provides, "[S]ubject to public order, morality and health and to the other provisions of this Part [of the Constitution], all persons are equally entitled to freedom of

194. *General Comment on Article 18*, *supra* note 48, ¶ 9.
195. *See id.* ¶ 10.
196. *Id.* ¶ 8.
197. *Id.*
198. *See General Comment on Non-discrimination*, *supra* note 56, ¶ 13.

conscience and the right freely to profess, practice and propagate religion."[199]

The Indian Supreme Court has upheld the laws of two Indian states, Orissa and Madhya Pradesh, that criminalize the conversion of persons to another religion under certain circumstances. For the purposes of this discussion, the two acts are essentially the same. The relevant section of the Orissa Freedom of Religion Act 2 of 1968 provides: "No person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion."[200]

The terms used in this provision are defined as follows:

> In this Act, unless the context otherwise requires:—
>
> (a) 'conversion' means renouncing one religion and adopting another;
>
> (b) 'force' shall include a show of force or a threat of injury of any kind including threat of divine displeasure or social ex-communication;
>
> (c) 'fraud' shall include misrepresentation or any other fraudulent contrivance;
>
> (d) 'inducement' shall include the offer of any gift or gratification either in cash or in kind, and shall also include the grant of any benefit, either pecuniary or otherwise . . . .[201]

The statutes in question were challenged in the High Courts of the respective states as being invalid restrictions on religious freedom in violation of Article 25 of the Constitution.[202] Both Courts upheld the prohibition against conversions by means of force or fraud.[203] In addition, the High Court of Madhya Pradesh upheld the prohibition of conversion by means of "allurement" (defined in practically identical terms as "inducement" in the Orissa Act).[204] The Orissa High Court,

199. Yulitha Hyde v. State, 1973 A.I.R. 116 (Ori.) 120.

200. *Id*.

201. *Id*. The Act provides for a penalty of one-year imprisonment, however, the penalty is doubled "in case the offence is committed in respect of a minor, a woman, or a person belonging to the Scheduled Castes or Scheduled Tribes." *Id*.

202. *See id*; Stainislaus v. State, 1975 A.I.R. 163 (M.P.).

203. *See Yulitha Hyde*, 1973 A.I.R. 116 (Ori) 121; *Stainislaus*, 1975 A.I.R. 163 (M.P.) 168.

204. *See Stainislaus*, 1975 A.I.R. 163 (M.P.) 168.

however, held that the definition of "inducement" was too broad to be justified under the permissible limitations of Article 25:

> We shall now deal with the argument regarding the definition of 'inducement.' The attack is mainly on the ground that it is too widely stated and even invoking the blessings of the Lord God to say that 'by His grace your soul shall be elevated' may come within the mischief of the term. Learned Government Advocate while agreeing that even holding out that an intangible benefit is to come may answer the definition, contends that the intention of the Legislature is not to transcend the ordinary concept of the term. We are of the view that the definition is capable of covering some of the methods of proselytizing and though the concept of inducement can be a matter referable to 'morality', the wide definition is indeed open to reasonable objection on the ground that it surpasses the field of morality.[205]

On other grounds than those relied on by the state high courts, the Indian Supreme Court, hearing both cases together, affirmed the decision of the Madhya Pradesh court and reversed that portion of the Orissa court's decision that invalidated the "inducement" section of the statute.[206] The Supreme Court determined that the right to freedom of religion guaranteed by Article 25 did not encompass the right to attempt to convert another person to one's religion.

> [W]hat the [Article 25] grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25 (1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike.[207]

205. *Yulitha Hyde*, 1973 A.I.R. 116 (Ori.) 121.

206. *See* Stainislaus v. Madhya Pradesh & Ors. (1977) 2 S.C.R. 611.

207. *Id.* at 616. The Court noted that the term "propagation" as used in Article 25 meant "to transmit or spread one's religion by an exposition of its tenets." *Id.*

The Supreme Court did not consider proselytism, as it is defined here, to fall within the protection of Article 25. Even if it had, it would probably have sustained the Acts as valid limitations on the right to religious freedom in furtherance of public order. On a separate legal issue, the Supreme Court held that the restrictions were valid efforts to maintain public order:

> It has been held by this Court . . . that "public order" is an expression of wide connotation and signifies state of tranquillity which prevails among members of a political society as a result of internal regulations enforced by the Government which they have established. . . .
>
> . . . [T]he right of freedom of religion guaranteed by Articles 25 and 26 of the Constitution is expressly made subject to public order, morality and health, and that "it cannot be predicted that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order." . . . [I]f a thing disturbs the current life of the community, and does not merely affect an individual, it would amount to disturbance of the public order. Thus if an attempt is made to raise communal passions, *e.g.* on the ground that some one has been "forcibly" converted to another religion, it would, in all probability, give rise to an apprehension of a breach of the public order, affecting the community at large. The impunged Acts . . . are meant to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community.[208]

Given the sometimes violent relations between religious groups, international standards cannot be indifferent to the relationship between public order and those acts perceived to be attacks on another religion, particularly the dominant religion. But such a connection must be carefully scrutinized, as the argument can be subject to abuse. For instance, limitations on the rights of members of minority religious groups or persons holding atheistic or agnostic views should not be based solely on the unpopularity of their message. Furthermore, any limitations on rights in this regard should be viewed in light of the state's fulfillment of its own obligation to promote tolerance,

208. *Id.* at 617-18.

mutual understanding and peaceful relations between groups.[209] In other words, it should be difficult for a state to support a limitation on rights in furtherance of public order where the danger, in part, stems from the state's own actions in respect to relations between communities of different religions or beliefs. If the threat to public order stems solely from the intolerance of others to the otherwise peaceful exercise of rights, a state may be less able to justify a limitation than if the threat derives directly from the violent or disorderly nature of the exercise itself.[210]

3. Protection of consumers in the religious marketplace

Given the existence in many societies of a multitude of religious choices, some states have articulated an interest in protecting the choices of its people from the influence of ignorance, misrepresentation and fraud. This interest—which might be termed the protection of consumers in the modern marketplace of religion—has been advanced in favor of regulating groups such as those termed "cults," "sects," or "new religious movements" that engage heavily in proselytism. It has also engendered programs designed to provide information to the public on those groups.[211]

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209. *See, e.g.*, Universal Declaration, *supra* note 80, art. 26(2); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 13(1), 993 U.N.T.S. 3 [hereinafter ICESCR]; Race Convention, *supra* note 56, art. 7; African Charter, *supra* note 75, arts. 28, 29(7); *CSCE Vienna*, *supra* note 47, principle 16b.

210. For discussion of these issues in the context of racial discrimination in the United States, see *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) ("[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise."); *Buchanan v. Warley*, 245 U.S. 60, 81 (1917) ("[P]reservation of the public peace . . . cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.").

211. A number of governmental entities in Western Europe have begun investigations into the activities of religious groups considered to be "dangerous" to its members or others, with a view towards the necessity or desirability of legal reforms or educational programs. The work of the Council of Europe is discussed below. The European Parliament's investigation culminated in the Rapporteur's (Mr. R. Cottrell) Report on Behalf of the Committee on Youth, Culture, Education, Information and Sport on the Activity of Certain New Religious Movements Within

This is a particularly sensitive area for a number of reasons. First, regulation of a particular group because of its alleged activities is a significantly more drastic, and perhaps less effective, step than regulating the offending activities themselves, regardless of their source. Second, determining the existence of fraud or misrepresentation may place the state in the position of determining the truth or falsity of religious beliefs.

Third, the desire to provide persons with information in order to make 'informed' choices can mask an effort to prevent people from making the 'wrong' choices. If the latter were the case, the state would be in the position of arbiter of the proper choice of religion for its people. Thus, the objectivity of the information and the neutrality of its presentation are extremely important. For example, a state taking an interventionist attitude towards the information available to its people when making religious choices may refuse to do so with regard to *all* religious choices. Sometimes what is new, different or unusual is considered for that reason alone to be harmful. A state may therefore provide information on groups of this nature but not on established religious groups, even in areas where there exists substantial ignorance (either of adherents or nonadherents) about established groups or where significant harm would be found in an objective assessment of the practices of those established groups. In this case, the state may be attempting to dissuade people from making particular religious choices based on a view of the propriety of those choices, rather than on neutral criteria applicable to all religious groups.

a. The availability of information. The Parliamentary Assembly of the Council of Europe has addressed the problem, in the context of the activities of certain sects or new religious movements, of persons claiming to have been harmed by religious choices. In deliberation over the desirability of legislation to ban or otherwise control these groups,[212] the

the European Community, which called for member states to set up their own study commissions. Reports have recently been issued by such commissions in France, Belgium, Germany, Italy, Switzerland and Sweden.

212. A precise definition of the terms "sects" or "new religious movements" is not offered by the Parliamentary Assembly. The notion of consent appears to be important. In the report on Sects and New Religious Movements prepared by Sir

Assembly has considered the role of education and the need to provide information on religious choices. Taking into account the protection of religious freedom provided by article 9 of the European Convention, the Assembly has rejected the need for legislation directly applicable to the activities of these groups. The primary recommendations of the Assembly address the availability of information:

> [T]he Assembly recommends that the Committee of Ministers
>
> call on the member states of the Council of Europe to adopt the following measures:
>
> i. [T]he basic educational curriculum should include objective factual information concerning established religions and their major variants, concerning the principles of comparative religion and concerning ethics and personal and social rights;
>
> ii. [S]upplementary information of a similar nature, and in particular on the nature and activities of sects and new religious movements, should also be widely circulated to the general public. Independent bodies should be set up to collect and circulate this information.[213]

In a thoughtful opinion approved by the Committee on Culture and Education, the Assembly acknowledged particular types of harm arising from the activities of religious groups, and approved methods that states may use to combat those harms consistent with protecting the rights of all concerned:

> The aim . . . is to prevent the possibility of an association or a
>
> religion being used as a cover for a criminal activity. In other words, it is a matter of implementing the law — which exists already in all countries in the form of the criminal code — rather than banning the existence of religious or cultural groups, even if their beliefs or ideas are unusual. To be

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John Hunt for the Committee on Legal Affairs and Human Rights, it is stated,

> This brings us to one of the elements that distinguish a sect from a religion. While a religion implies free, informed consent on the part of those who join it, people joining certain sects may be free when they join it, but are not informed, and, once they are informed, they are usually no longer free.

Report of the Committee on Legal Affaires and Human Rights, EUR. PARL. ASS. DEB. 23d Sess. Doc. 6535, at 8-9 (Feb. 5, 1992). Recalling the arguments made by certain Islamic States in favor of the prohibition of apostasy of those born into Islam, the usefulness of this factor might be questioned.

213. *Recommendation 1178 on Sects and New Religious Movements*, EUR. PARL. ASS. 23d Sess., ¶ 7(i)-(ii) (1992).

> perfectly clear, this means that each citizen must be free to change direction or radically change his beliefs, but without pressure and without infringement of his psychological and physical integrity; he must also be free to join a group of any ideological or religious persuasion, but at the same time he must be free to remain in it or leave it at any moment. This means that in a democracy the freedom of all religious, cultural or other groups must be respected, as long as they do not threaten the personal integrity of their members, nor their personal, professional and cultural relationships, nor, of course, the security of their property or their rights as workers. These offences have already been defined by legislation.
>
> . . . .
>
> The solution of the problem of sects does not lie in legislation. The problem of sects which commit offences exists, but so do the laws which punish these offences. What is needed is a greater awareness, preventive measures and the collective responsibility of society. Greater vigilance will of course be necessary, but the most effective action, in the medium term and long term, is education in this field, general information, creative and free association between young people, friendships between the people and groups concerned, and cultural growth with an enhanced capacity for thought and critical analysis.[214]

b. Fraud. With respect to fraud, a particular problem may arise concerning the "truth" of religious beliefs asserted by the source. If fraud is to be shown—either as an element of a direct prohibition of proselytism or as a general fraud provision applied to proselytism—then, in the usual circumstance, falsity or misrepresentation must be proved or, in the alternative, "truth" would be a successful defense. This could leave a court or a jury in the position of determining whether or not assertions in the nature of religious doctrines or beliefs were true or false. Such a situation might lead to conviction of those persons with beliefs that, although sincerely held, were unbelievable or fantastic to the minds of the majority of others.

The United States Supreme Court case of *United States v. Ballard*[215] is relevant to this problem. In that case, the leaders

214. *Opinion of the Commission on Culture and Education*, EUR. PARL. ASS. 43d Sess., Doc. No. 6546, at 3 (Jan. 20, 1992).

215. 322 U.S. 78 (1944).

of a religious movement called "I Am" were charged with selling literature and soliciting funds and memberships "by means of false and fraudulent representations, pretenses and promises."[216] The Supreme Court was faced with the issue of whether the trial court was correct to withhold from the jury any question as to the truth of the asserted religious beliefs and limit the jury question to whether the movement's leaders "honestly and in good faith believe[d]" those beliefs.[217] The Court upheld the trial court's decision on the grounds that the First Amendment precludes courts from deciding the truth or falsity of religious doctrines and beliefs:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of

216. *Id.* at 79 (quoting indictment). The alleged false and fraudulent representations included:

> Guy W. Ballard, during his lifetime, and Edna W. Ballard, and Donald Ballard, by reason of their alleged high spiritual attainments and righteous conduct, had been selected as divine messengers through which the words of the alleged "ascended masters," including the alleged Saint Germain, would be communicated to mankind under the teachings commonly known as the "I Am" movement;
>
> that Guy W. Ballard, during his lifetime, and Edna W. Ballard and Donald Ballard had, by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments, and did further represent that the three designated persons had in fact cured either by the activity of one, either, or all of said persons, hundreds of persons afflicted with diseases and ailments.

Id. at 79-80.

217. *Id.* at 81.

> disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible tolerance of conflicting views. . . . The religious views espoused by [the movement's leaders] might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.[218]

V. IMPORTANT FACTORS IN DRAWING THE LINE BETWEEN PROPER AND IMPROPER PROSELYTISM

The mere assertion of certain interests by the proponent of proselytism, or by the state in defense of the restriction of proselytism, does not clarify what factors lead to the conclusion that proselytism in a particular case is proper or improper. Indeed, in his partly concurring opinion in the *Kokkinakis* case, Judge Pettiti chastised the European Court for not attempting to clarify the meaning of "improper proselytism." He thought that it was possible to "define impropriety, coercion and duress more clearly and to describe more satisfactorily, in the abstract, the full scope of religious freedom and bearing witness."[219] The

218. *Id.* at 86-87. The European Commission has taken a somewhat different view of this problem, at least with respect to statements made in connection with offering something for sale. The case involved the Church of Scientology and its advertising for the sale of the "E-meter," a device that, according to the beliefs of Scientologists, leads to certain spiritual benefits for those who use it. *See* X. and Church of Scientology v. Sweden, App. No. 7805/77, 16 Eur. Comm'n H.R. Dec. & Rep. 68 (1979). The Church claimed that the application of a law protecting consumers from misleading advertising to the E-meter advertisements violated the rights to freedom of religion and freedom of expression of their members. A Swedish court, relying on expert testimony that certain assertions in the advertisements were not true, enjoined the Church from using phrases such as: The E-meter "'is an invaluable aid to measuring man's mental state and changes in it.'" Drawing a distinction "between advertisements which are merely 'informational' or 'descriptive' in character and commercial advertisements offering objects for sale," the Commission decided that the later fell outside the scope of the freedom to manifest religion. *Id.* ¶ 4. As to freedom of expression, the Commission, noting that "commercial" speech is to be accorded less protection than "the expression of political ideas," held that the limitation on using particular words in the advertisements was proportionate to the need to protect consumers from false or misleading advertisements. *Id.* ¶ 5.

219. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 28 (1993) (Pettiti, J., partly concurring).

remainder of this article takes up that task but by no means completes it.

In considering the examples of restrictions on proselytism given earlier in this article, the outlines of a framework emerge that helps to disentangle the factors that have been used to draw the line between proper and improper proselytism. The framework involves consideration of four variables, corresponding to certain relevant factual circumstances. The variables are all interrelated, and should be considered in combination, as appropriate. They are (1) the attributes of the source, (2) the attributes of the target, (3) where the action alleged to be improper proselytism takes place, and (4) the nature of the action. Each of these variables is laid out on a scale, and using the scales together one can see where the various states and other bodies that have considered the question have sought to draw the line between proper and improper action. As will be apparent, the framework is an incomplete one, and does not generate any answers of its own as to where the line should be drawn. However, it is hoped that the proffered framework will provide a starting point for a more focused discussion on the range of choices available to states consistent with international human rights standards. The array of scales are presented in the accompanying chart, and brief descriptions—relating back to the examples provided earlier in the article—are presented in the following sections.

The crucial decision for a state is where on the scales the proper point of intervention lies. It is this decision that is subject to international supervision. Too great a restriction on proselytism may result in an excessive burdening of persons who wish to engage in it, thereby pressuring them to submit to punishment, stifling them in their ability to express themselves freely or to manifest their religious beliefs, or even forcing them to relinquish those beliefs. Too great a restriction may also result in an excessive interference with the availability of information upon which persons would like to base their decisions regarding religious beliefs or affiliation. On the other hand, too little restriction may result in excessive harm to targets, whether or not they have retained their beliefs or have changed their beliefs based on considerations other than their own assessment of what has been presented to them by the source. Different conclusions on where to intervene may be

based on different assessments by states of the relative cost of each of these harms, or the likelihood of their being realized in actuality.

The touchstone of the framework is the notion of coercion. It is a basic assumption that an individual should be able to make a considered and unrestrained choice in matters of religious belief and affiliation. Thus, the more that proselytism interferes with that ability to freely choose, the more the regulatory power of the state may be attracted. Coercion exists in a variety of forms. Sources may exert different forms of coercive authority and control over others. Targets may be more or less susceptible to certain types of action or certain sources. The location of the action can contribute to coercion where the freedom of the target to freely move in and out of that place is restricted. Finally, the nature of the proselytism, in particular the nature of any proposed exchange between source and target, may be more or less coercive.

A. The Characteristics of the Source

1. Coercive sources

Attributes of the source, in particular as they pertain to the relationship between the source and the target, can be a determining factor in defining improper proselytism. Concern arises where the relationship is such that the target may not be able to exercise free choice in accepting or resisting the change in beliefs proffered by the source. Action that may be perfectly appropriate between two persons who are strangers, (i.e. at "arms-length" from one another) may not be appropriate where there exists some physical, legal or economic advantage that the source has over the target. Examples of potentially coercive sources include the state and its official representatives, private persons acting with state authority or endorsement, providers of important health or social services, and employers or employment superiors.[220]

220. One coercive relationship that is generally left untouched by States is that between parents and children. Indeed, international human rights instruments recognize that parents have a considerable interest in influencing the religious upbringing of their children. *See* Universal Declaration, *supra* note 80, art. 26(3); ICCPR, *supra* note 24, art. 18(4); ICESCR, *supra* note 209, art. 13(3); European Convention, *supra* note 24, First Protocol, art. 2; American Convention, *supra* note

The state is, by nature, a coercive creature in relation to those that are subject to it. Acts of proselytism by the state or its officials can amount to acts of improper coercion, which, in the words of the Human Rights Committee, include "[p]olicies or practices having the . . . intention or effect" of "compell[ing] believers or nonbelievers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert."[221]

Whether an action rises to this level of compulsion depends, at least in part, on the official position of the source and its relationship to the target. An action by a state official in the course of their legislative, administrative or judicial duties may have little effect on the public in general, but may have a much greater effect when the target's person or interests are controlled by, or directly influenced by, that official. In this way, a distinction can be made between state activities of a general character and policies and acts by state officials who have considerable authority over others. Officials of the latter type include those charged with the authority to direct or care for persons who are stationed, confined or committed to state institutions such as military installations, educational facilities, prisons, hospitals or nursing homes. Proselytism may constitute an abuse of that authority.

The United States Supreme Court apparently adheres to the view that almost any form of religious expression by the state or persons acting in an official capacity or with official endorsement raises an impermissible danger of coercion:

> [T]he Constitution guarantees that government may not coerce anyone to . . . participate in religion or its exercise . . . .
>
> . . . .
>
> . . . The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility

47, art. 12(4); CSCE Vienna, *supra* note 47, principle 16g. A considerable problem can arise, however, where the state is called upon to adjudicate matters of child custody and rights to visitation as between parents of different religions. *See* Hoffmann v. Austria, 255 Eur. Ct. H.R. (ser. A) (1993); *see generally* S.E. Mumford, *The Judicial Resolution of Disputes Involving Children and Religion*, 47 INT'L. & COMP. L.Q. 117 (1998) (discussing resolution of problems involving children whose parents are divorced and adhere to different faiths).

221. *General Comment on Article 18*, *supra* note 48, ¶ 5.

> and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.[222]

The state and its officials are not the only potentially coercive sources. Private institutions and individuals can exert considerable influence over the choice of religious beliefs of another. The situation where religious groups exercise some government authority or where they have been granted or maintain an exclusive position over the provision of educational, health or other social services has been raised previously with regards to indigenous peoples. But government authority or a monopoly position are not the only circumstances that raise concern. Someone in a private institution providing a needed service to another entrusted to their care, as in a hospital or a nursing home, may be a coercive source. Similarly, an employer or a hierarchical superior may be a coercive source, even when the target is free to look elsewhere for employment. In all these situations involving private sources, the target is either unable to break the relationship with the source, or there may be a strong incentive to stay in good relationship to the source. That incentive may influence a person's decision as to religious beliefs or affiliation.

The European Court recognized this dynamic in a case involving the conviction of two Greek military officers for improper proselytism of their military subordinates:

> [T]he hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.[223]

The Court therefore determined that the officers' criminal convictions for proselytism directed at their subordinates did

222. Lee v. Weisman, 505 U.S. 577, 587, 589 (1992).

223. Larissis v. Greece, 140 Eur. Ct. H.R. (ser. A), No. 140/1996/759/958-60, slip. op. ¶ 51 (Feb. 24, 1998).

not violate article 9 of the European Convention.[224] However, the Court went on to hold that it was not improper for the military officers to engage in similar proselytizing activity when directed at civilians.[225] In the context of private employment, the same conditions as articulated above by the European Court may be present as well.[226]

2. Foreign sources

A related concern over the attributes of the source is the problem of foreign sources. In this regard, does the "foreignness" of the source raise any concerns that cannot be adequately addressed by regulation of all sources, without distinction between native and foreign? As described in the section above on colonialism and indigenous peoples, some of the resentment of foreign religious personnel stems from the confluence of the religious intolerance they espoused and the civil power they once possessed. Another concern, as in the case of China, may be foreign interference, through religious groups, with the internal political affairs of a state. Imbedded in the concern over foreigners may also be the notion of economic advantage. Given the vast discrepancy in wealth between many societies, foreigners operating in poor and developing countries may have far greater economic means than the local inhabitants and their native institutions.

Regulation of the foreign source necessarily implicates the protection of the rights of noncitizens. As to this point, the state's obligation to protect human rights generally runs to anyone subject to its jurisdiction regardless of their citizenship status.[227] With very few exceptions, aliens present within a

224. *See id.* ¶ 55.

225. *See id.* ¶ 59.

226. Courts in the United States have recognized that policies or actions by private employers or employment superiors that encourage adherence to certain religious beliefs, such as mandatory prayer sessions, can violate laws prohibiting discrimination on the basis of religion in employment. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975); Meltebeke v. Bureau of Labor and Indus., 903 P.2d. 351 (Or. 1995).

227. *See* Human Rights Committee, *General Comment No. 15 (27) on the Position of Aliens Under the Covenant*, U.N. GAOR 28th Sess., July 22, 1986, ¶¶ 2, 7, U.N. Doc. CCPR/C/21/Add.5/Rev.1 (noting that "the general rule is that each one of the rights of the Covenant [on Civil and Political Rights] must be guaranteed without

state should have the same rights as citizens.[228] It is recognized, however, that foreigners do not have the right to enter any particular state.[229] On the other hand, once a state has opened its doors to foreigners, it must do so without discrimination.[230]

Restrictions that are targeted specifically at foreigners, such as those of China and Ukraine, or restrictions intended by their terms to fall most heavily on foreigners, must be carefully scrutinized to ensure that they are based on a legitimate aim and that they set out reasonable and objective criteria in pursuit of that aim. In particular, in the case of restrictions on foreign sources it is important to identify policies based on such subjective interests as (1) the disapproval of the religious message that foreigners seek to spread (either because it is new to the native territory or may conflict with the message of native religious groups) or (2) the desire to maintain a particular pattern of religious adherence. These considerations, divorced from any of the specifically mentioned grounds for limitations on rights to freedom of religion or expression, impermissibly favor some religions over others.

As a final matter, it is important to carefully distinguish between economic advantage as between religious groups 'competing' for adherents, and an economic advantage that the source may have over the target. Economic advantage in the former case must fall under the rubric of protection of certain religions and should be subject to the constraints discussed above. In the later case, the economic advantage of the foreign source may weigh directly on the ability of the target to act

discrimination between citizens and aliens" with exception of art. 25 on political rights). *Id.* ¶ 2.

228. *See id.* ¶ 2.

229. *See id.* ¶ 5.

230. To the extent that the foreign source may not even be present in the territory of the State, as, for example, where contacts and communications are made across borders, it should be noted that the right to freedom of expression includes the freedom to receive information "regardless of frontiers." *See Universal Declaration*, *supra* note 80, art. 19; ICCPR, *supra* note 24, art. 19(2); European Convention, *supra* note 24, art. 10(1); American Convention, *supra* note 47, art. 13(1); *Copenhagen Document*, *supra* note 58, ¶ 9.1. Communications across borders has been recognized as particularly important in the case of religious groups maintaining contacts with hierarchical institutions located in a different State and for religious minorities that are separated by international frontiers. *See Declaration on Religious Intolerance*, *supra* note 47, art. 6(i); *Minorities Declaration*, *supra* note 58, art. 2(5); Framework Convention, *supra* note 58, art. 17(1); *Copenhagen Document*, *supra* note 58, ¶ 32.4.

without coercion. Because the harm in this regard, discussed below, occurs regardless of the foreign or native identity of the source, there does not appear on this point to be a need to regulate foreign sources in a distinctive manner.

B. The Characteristics of the Target

The primary concern with the attributes of the proselytism target relates to the perceived susceptibility of the target to the types of persuasion (and, potentially, coercion) that may be employed by different sources. In essence, the greater the perceived "vulnerability" of the target, the more likely that proselytism directed towards it will be restricted. This principle is manifested in a variety of ways. For instance, some of the target's vulnerability may result directly from its relationship to the source. This was discussed above in relation to hospital patients, prisoners, employees, and so on.

Another type of vulnerability stems from the nature of the target, and may raise concern regardless of the identity or the tactics of the source. Certain people may be susceptible to a change in religious beliefs, as they might be susceptible to persuasion in any matter. In this category fall children, as well as targets that are uneducated, naïve, or generally weak or unsure of themselves. It is apparently on this basis that the Greek proselytism statute prohibits "taking advantage of [the] inexperience, . . . low intellect and naivety" of the target.[231] Another example is that portion of the Orissa statute that includes the use of a "threat of divine displeasure" within the definition of conversion by force.[232] This provision was sustained by the Orissa High Court based on the need to protect those with "undeveloped mind[s]" from the "numb[ing of] the mental faculty" that such threats create.[233] A distinction may be drawn here between those persons who are suffering from some form of physical or mental incapacity and those persons whose decision-making capacity may be affected by certain social or cultural factors. In the case of the former, the law will frequently provide protection against others taking advantage of such incapacity by not acting in their best

231. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 12 (1993).
232. Yulitha Hyde v. State, 1973 A.I.R. 116 (Ori.) 121 (India).
233. *Id.*

interests. In the case of the latter, the underlying factors can be addressed (particularly in the form of education and exposure to the beliefs of others) in order to enhance the target's decision-making capacity.

Other important attributes of the target are more explicitly tied to types of action that are considered to be improper. For example, a person who is needy may be more susceptible to financial inducement than one who is not; a person who is dependent on a particular facility for health care or food assistance may be more susceptible to its proselytism than those who are not, and so on. These types of vulnerable targets include persons in distress or in need as mentioned by the European Court in *Kokkinakis*.[234] A further example comes from Nepal. The Nepalese government has argued that legal provisions against conversion and proselytism in that country are necessary to guarantee the rights of "weak person[s]" and "reflects the intent to discourage the anomaly in a socio-economically weak society where instances of involuntary religious conversion are found to have taken place by means of financial enticement and other temptations."[235] This example illustrates the important point that the means used to address concern over the vulnerability of the target should correspond to the type and extent of the activity of the source. In this instance, can a blanket prohibition on all conversions resulting from proselytism be supported by a concern with the weakness of certain targets to financial and other inducements? A rule directed at that specific behavior may serve the same function and not unduly restrict the freedom of others, including those who may not be subject to the same form of persuasion.

C. Where the Action Takes Place

Where the proselytism takes place may have some impact on the necessity of its restriction in accordance with the likelihood that the target is in that place by choice and is free to leave. A state's determination to respect the privacy of the

234. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 12.

235. *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. ESCOR, 50th Sess., Provisional Agenda Item 20, Commission on Human Rights, ¶ 66, U.N. Doc. E/CN.4/1994/79 (1994) [hereinafter *Special Rapporteur's Report 1994*].

home may lead to a restricted ability to regulate proselytism that takes place in the home of the source or of a willing target. On the other hand, proselytism in the home of an unwilling target may be subject to greater restriction. A similar dichotomy exists with respect to places of worship or religious education. Proselytism is an expected manifestation of religious belief when it takes place at the place of worship or in the religious classroom of the source, at least as long as the targets are at these places voluntarily. It can be considered to be an unwarranted intrusion when it takes place at the place of worship or in the classroom of the target. It is to this situation, among others, that laws protecting religious worship from disturbance are directed.

Other distinctions can be drawn with respect to places open to the public. For instance, preaching or leading worship in a church or synagogue is different than doing the same activity on the street or in a public park. The difference lies in the listeners; in the former case they are likely to be there voluntarily, while in the latter the speaker also reaches those who may have chosen not to listen.[236] On the other hand, while practically all persons use the public streets and other public places, they are also likely to be free to move to other places if occasionally confronted with unwanted proselytism. For this reason, proselytism may be permitted (subject to safety considerations) in certain public places like streets or parks to a greater extent than in others. The same freedom to leave cannot be said of other public places where persons may be, for the most part, required to be present, such as government offices, courtrooms, schools, and other public facilities.[237]

D. The Nature of the Action

The most significant factor in the separation of improper from proper proselytism is the nature of the action, in the sense of its tendency to create coercive pressures on the target. In a

236. *See* Kunz v. New York, 340 U.S. 290, 298 (1951) (Jackson, J., dissenting); Niemotko v. Maryland, 340 U.S. 268, 282-83 (1951) (Frankfurter, J., concurring).

237. An additional attribute considered by the United States Supreme Court in the regulation of speech, including proselytism, in public places is the degree to which the place is historically "devoted to assembly and debate" or has been opened by the State "for use by the public as a place for expressive activity." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 46 n.7 (1983).

loose way, the potential for coercion lies in the nature of the exchange, whether proposed or actually realized, between the source and target. At one end of the scale lies the bare communication of religious beliefs which, with some significant exceptions, is generally not considered to be improper. At the other end lies a conversion or change in beliefs through violence or threat of violence. This method appears to be universally denounced not only as a violation of the rights of the target, but also as contrary to current religious views regarding the appropriate means to bring people to the faith. Between these two extremes lies a broad range of actions, and it is within this area that many states have sought to draw the dividing line between proper and improper proselytism.

The exchange of religious ideas or the communication of religious beliefs where the target is merely listening does not raise significant concerns about coercion. These are the underlying facts of the *Kokkinakis* case, where Mr. Kokkinakis was found by the Greek courts to have engaged in religious discussions using skillful explanations and "in a pressing manner."[238] The European Court determined that a criminal conviction on this basis was a violation of article 9 of the European Convention. The facts of the *Othman* case also fall into this category, where the petitioner had allegedly participated in religious meetings and seminars; the Supreme Court of Malaysia determined that this activity, without more, did not prejudice the security of the state.[239]

There are, however, some significant exceptions to this principle. One example is that of the Sudan, where the law criminalizing apostasy encompasses anyone who "propagates for the renunciation of the Creed of Islam."[240] Laws prohibiting blasphemy or injury to religious feelings that penalize statements solely because they are not in conformity with another religion make up a further exception to this principle. Other significant exceptions relate to the exchange of religious ideas in conjunction with one of the other factors discussed above. Examples of this include the prohibition in the United

238. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 21; *supra* note 109.

239. *See supra* note 171 and accompanying text.

240. *See Special Rapporteur's Report 1993*, *supra* note 87, ¶ 56; *see also supra* note 87.

States of the discussion of religious ideas or the exchange of religious views by the state or those acting in an official capacity or with official endorsement.[241] The same may hold true for the discussion of religious subjects by persons working in state facilities in whose care others have been placed, such as prisons or hospitals. The *Larissis* case extends this principle to discussion by a hierarchical superior or employer, at least in certain settings.[242] In these situations, even the most basic exchange may be tainted by the coercive nature of the relationship within which it takes place.

A further species of religious discussion that is generally thought not to be coercive is that which includes a denial of the truth of the beliefs of others or is otherwise critical of those beliefs. The case law of the Greek courts, as related in the *Kokkinakis* case, has held that spiritual teaching that "demonstrates the errors of other religions" is not prohibited proselytism.[243] Likewise, in *Punjab Book Society*, the Lahore High Court determined that attempts "to show that [one's] religion is the best in the world" did not evidence a "deliberate and malicious" intent to insult the religious feelings of another.[244] Furthermore, the European Court determined that the English law of blasphemy and the Austrian law prohibiting injury to religious feelings did not violate the right to freedom of expression, in part, because they did not penalize the denial of the existence of God or other religious beliefs or all expression of opinions that are hostile or offensive to the Christian religion.[245]

However, when these expressions are delivered in a certain manner, states may feel compelled to prevent them. Falling at this point on the scale are the "extremely offensive" views, with "no reliable source to justify its acceptance as correct," that the Pakistani Court determined may fall within the statute prohibiting injury to religious feelings.[246] Likewise, the

241. *See supra* note 222 and accompanying text.

242. *See* Larissis v. Greece, 140 Eur. Ct. H.R. (ser. A), No. 140/1996/759/958-60, slip. op. (Feb. 24, 1998).

243. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 13 (1993).

244. Punjab Religious Book Society v. State [1960] P.L.D. 629 (W. P.) Lahore 637 (Pak).

245. *See* Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. (ser. A) (1994); Wingrove v. United Kingdom, 24 Eur. H.R. Rep. 1 (1996).

246. *Punjab Book Society*, P.L.D. at 638; *see supra* note 120 and accompanying

"gratuitously offensive"[247] expressions that "insult[] . . . an object of veneration"[248] of the Austrian law or the "contemptuous, reviling, scurrilous, or ludicrous matter" prohibited by the English blasphemy law are also in this category.[249] It is here that the United States parts company with the European Court and others, in that the proselytism at issue in some of the Jehovah's Witness cases was protected regardless of the hostile, abusive, and offensive nature of the activity.[250]

The next category of activity includes promises or offers of something of value to the target in exchange for their change in beliefs or affiliation. A division may be made here between, for lack of more precise terms, "tangible" and "intangible" benefits. An example of an intangible benefit arose in the Orissa proselytism statute, where the term "inducement" was defined to include the "grant of any benefit." The High Court of Orissa invalidated this provision of the statute, as it believed that inducement as therein defined could include purely spiritual benefits such as the promise of an eternity in the hereafter.[251] Spiritual benefits are, of course, one of the primary reasons for holding religious beliefs, and it is difficult to imagine making a principled division between proper and improper in this area. The Greek provision that penalizes as improper proselytism an offer of "moral support" may be subject to similar difficulties.[252]

The offer or granting of tangible benefits, such as money, "material assistance," and "social advantages," in exchange for a change in religious beliefs or affiliation is prohibited by a number of proselytism statutes, including those of India, Israel, and Greece.[253] Likewise, the European Court in the *Kokkinakis*

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text.

247. *Otto-Preminger*, 295 Eur. Ct. H.R. (Ser. A) at 19; *see supra* note 137 and accompanying text.

248. *Otto-Preminger*, 295 Eur. Ct. H.R. (Ser. A) at 12; *see supra* note 132 and accompanying text.

249. Wingrove v. United Kingdom, 24 Eur. H.R. Rep. 1, 14 (1996); *see supra* note 126 and accompanying text.

250. *See supra* note 39 and accompanying text.

251. *See supra* note 201 and accompanying text.

252. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 12 (1993); *see supra* note 103 and accompanying text.

253. *See supra* notes 103, 108, 201, and accompanying text; Penal Law Amendment (Enticement to Change Religion) Law, 5738–1977, *reprinted in* 32 LAWS OF THE STATE OF ISRAEL 62 (1977/78).

case identified this type of exchange, as in "offering material or social advantages," as a possible example of improper proselytism.[254]

On the reverse side of the offer of benefits is the injury of or the threat to withhold, injure, or destroy something of value. Again, there arises the question of intangible versus tangible value. The injury to religious feelings in a gratuitously offensive manner may fall into the category of injury to something of an intangible nature. Likewise, the "threat of divine displeasure" prohibited by the Orrisa proselytism statute may also fall into this category.[255]

Threats of a more tangible nature include that of "social excommunication," as found in the Orissa statute.[256] In this category should also fall policies and practices such as "those restricting access to education, medical care, employment, [political rights] or the rights guaranteed by . . . other provisions of the [ICCPR]" that are identified by the Human Rights Committee as tantamount to coercion employed to compel conversion.[257] Finally, on the far end of the scale, are actions such as the threat or use of physical violence that are mentioned as improper practices by both the Human Rights Committee and the European Court.[258] The nature of the exchange in these latter circumstances is such that the targets relinquish their religious beliefs or affiliation in order to preserve their rights, health, and even their lives.

VI. CONCLUSION

Proselytism is a controversial activity, in that it is likely to result in controversy between sources and targets, and between religious or political communities that may become identified with either. In many cases, the rights of religious minorities are opposed by the interests of the dominant religious or political group. Conflicts arise between religions and between denominations within religions. The state may wish to take sides or feel compelled to join in these controversies. The

254. *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 21.
255. *See supra* text accompanying notes 200-01.
256. *See id.*
257. *General Comment on Article 18*, *supra* note 48, ¶ 5.
258. *See id.*; *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 21.

dynamics of state involvement under these circumstances depends upon the relationship that exists between the state itself and particular religious groups. Such a mix of forces creates a situation in which the rights of religious dissenters, minorities, or nonbelievers are particularly at risk.

Because international instruments are generally silent on the issue of proselytism, the effect of international human rights obligations on conflicts engendered by proselytism has been minimal. International bodies have either not dealt extensively with the problem or have not been particularly aggressive in defining the parameters of the freedom to engage in proselytism. This silence, or reluctance to deal with proselytism issues, may be the result of the widely divergent practices of states, ranging from severe limitations on the activity in all of its forms to broad freedom to engage in the activity regardless of the effect it may have on the target.

Developing international standards to govern proselytism within this range of state practices is no easy task. However, a careful review of international and state practice yields a number of important principles that can guide states in their efforts to address proselytism conflicts consistent with their international obligations.

First, the purposeful attempt to change another's religious beliefs or affiliation is a manifestation of religion or belief and falls within the scope of the freedom to engage in such activity recognized in international human rights instruments. Second, the freedom to engage in proselytism must be protected irrespective of the content of the views asserted by the source, the manner in which those views are asserted, and whether the interference stems from state or private action. In this regard, the views of the dominant religious or ideological community on the scope of the freedom to engage in proselytism, as well as the actions of such communities vis-à-vis the state and religious minorities are extremely important. Third, as with all freedoms, the freedom to engage in proselytism is not unlimited. However, restrictions on proselytism must further a secular interest (i.e. restrictions cannot further purely religious or ideological goals), and the restrictions must be proportionate to the realization of those interests. In practice, the interests asserted by states to support restrictions on proselytism are typically the protection of (a) public order or (b) the right to

have or maintain a religion or belief without coercion. The two interests are interrelated, in that coercive methods of proselytism may provoke sharp responses.

Fourth, with respect to the protection of public order, the state's response to proselytism must be directly proportionate to the disorderly nature of the activity itself, and only in extreme circumstances (and for temporary periods) can it be related to the response of others to the activity. In other words, significant resistance to the expression of non-coercive methods of proselytism is indicative of a need for the state to address its obligation to promote peace, tolerance and mutual understanding between communities, rather than a need to restrict proselytism.

Fifth, with respect to improper coercion, whether an act of proselytism is improperly coercive will depend upon the characteristics of the source, the characteristics of the target, the place where the act takes place and the nature of the act itself. The combination of circumstances in each case is important. The location of an act, or a particular relationship between source and target can introduce an element of coercion to an act that might not be coercive in other circumstances. Sixth, unwanted, annoying or offensive acts of proselytism—even though they may result in social disruption—are not necessarily improperly coercive. Indeed, these conditions reflect circumstances under which a person can make a free and informed choice regarding religious beliefs.

Finally, states must walk an admittedly fine line between securing minimum conditions for a free choice of religion or belief and protecting against erosion of the ability to maintain the religion or belief that has been chosen. First and foremost, the ability to maintain a choice is eroded under circumstances where the target is forced to choose between something of necessity (such as the exercise of their rights, education, employment, or health care) and an abandonment (however brief) of their religion or belief. In the modern welfare state, where the state itself ensures and secures rights, and guarantees certain necessities without discrimination, perhaps only state action needs to be so controlled in this regard; but where the state cannot or does not secure rights and provide for necessities, private actors may also need to be regulated. A more difficult area to address is where the target is put to the

choice of obtaining or protecting something of value (whether tangible or intangible, such as their religious feelings) and an abandonment of religion or belief. In these situations, states should be guided, in the words of Arcot Krishnaswami by the need "to ensure a greater measure of freedom for society as a whole" according to the circumstances of the particular case.[259]

259. KRISHNASWAMI STUDY, *supra* note 8, at 16.

Invalid Regulation of Proselytism

Attributes of the Source:						
Stranger	Foreigner	Provider of important private health or social service	Employer or supervisor	Private person acting with State authority or endorsement, e.g., health, social, or educational service provider	State official directly controling the person or interests of others, e.g., judges, wardens, military officers, educational officials	
Attributes of the Target:						
Competent Adult	Weak, gullable uneducated or naïve person	Poor person	Employee	Person dependent upon others, e.g., refugees, humanitarian, health, or social service recipient	Person restricted by others, e.g., prisoner, patient, student	Person without capacity, e.g., child, mental incompetent
Where the Action Occurs:						
Home or place of worship of source or willing target		Public street, square, or park	Public facility, such as courthouse, administrative offices, school, military base, or hospital		Place of employment or public accomodation	Home or place of worship of unwilling target
Nature of the Action:						

Variables Considered in Regulating Proselytism

Table of United States Supreme Court Cases Concerning the Regulation of Proselytism

(1937 - 1953)

Case Name	Statute or Regulation	Violation	Freedom Implicated	Upheld/ Invalidated (reason)	Public Interest Asserted
Lovell v. City of Griffin 303 U.S. 444 (1937)	Permission of City Manager required to distribute literature of any kind.	Jehovah's Witness distributed religious tracts without permission.	Press	Invalidated (absolute prohibition on limits to freedom of press)	None indicated
Schneider v. New Jersey 308 U.S. 147 (1939)	Permit required to solicit, canvass, distribute circulars or call door-to-door; permit refused if "canvasser is not of good character or is canvassing for a project not free from fraud."	Jehovah's Witness, without a permit, offered religious booklets and solicited donations to cover printing.	Press Speech	Invalidated (officials' absolute authority to determine who may canvas revoked; ideas should not have to be presented to authorities for pre-approval)	(1) Keep streets clean (2) Prevent fraudulent appeals
Cantwell v. Connecticut 310 U.S. 296 (1940)	(1) Approval of secretary of public welfare council required to solicit support for religious, charitable or philanthropic cause; provided that secretary shall determine "whether such case is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity." (2) Prohibited inciting a breach of the peace (common law)	Three Jehovah's Witnesses went door-to-door selling religious pamphlets and soliciting contributions for their printing; one also played record for a passerby describing pamphlet in terms offensive to the Catholic religion.	Religion Speech	Invalidated (no state determination of what is religious cause; no present danger to disturbance of the peace)	(1) Protect against fraud and imposition (2) Public peace and order

Id. at 158.

Id. at 302.

Table of United States Supreme Court Cases Concerning the Regulation of Proselytism

Case Name	Statute or Regulation	Violation	Freedom Implicated	Upheld / Invalidated (reason)	Public Interest Asserted
Cox v. New Hampshire 312 U.S. 569 (1941) ,	License (and corresponding fee) required to hold parade and procession ("organized formations of persons") on public streets. at 575.	Eighty-eight Jehovah's Witnesses engaged in an "information march" without a license.	Assembly Speech	Upheld (limited nondiscriminatory authority to adjust for time, place and manner; fee met expense to administer act and maintain order)	(1) Public order (2) Safety and convenience in use of public highways
Chaplinsky v. New Hampshire 315 U.S. 568 (1942) ,	"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place." *Id*.	Jehovah's Witness, distributing religious literature on the street, in an argument with a public official called him a "damned racketeer" and "a damned Fascist," and said that "the whole [city] government . . . are Fascists or agents of Fascists."	Speech	Upheld (State can prohibit use in public place of words likely to cause breach of the peace)	Public peace
(1937 - 1953)	*Id*. at 569.	*Id*. at 569.			

Table of United States Supreme Court Cases Concerning the Regulation of Proselytism

Case Name	Statute or Regulation	Violation	Freedom Implicated	Upheld / Invalidated (Reason)	Public Interest Asserted
Jones v. Opelika 316 U.S. 584 (1942) ,	(1) License required for book agents and transient distributors of books; (2) License required to sell goods; (3) License required for any transient person to carry on any business.	(1) Jehovah's Witness sold religious pamphlets on the street without a license; (2) Jehovah's Witnesses went door-to-door distributing religious books and soliciting contributions for the books; (3) Jehovah's Witness sold religious literature without a license.	Press Religion Speech	Upheld (*But see* (1943) (vacating judgments previously entered in this case and invalidating statutes for the reasons stated in *Murdock v. Pennsylvania* 319 U.S. 105 (1943), and the dissenting opinions in 316 U.S. 584 (1942))) , 319 U.S. 103	
Jamison v. Texas 318 U.S. 413 (1943) ***(1937 - 1953)*** ,	Unlawful to distribute handbills on street or sidewalk.	Jehovah's Witness on a public street distributed handbills advertising religious meeting and religious books for purchase.	Press Religion	Invalidated (State cannot have absolute power to prohibit use of streets for speech) ,	(1) Plenary power over streets (2) Regulation of commercial advertising

Table of United States Supreme Court Cases Concerning the Regulation of Proselytism (1937 - 1953)

Case Name	Statute or Regulation	Violation	Freedom Implicated	Upheld / Invalidated (reason)	Public Interest Asserted
Largent v. Texas 318 U.S. 418 (1943) ,	Permit required to sell or solicit orders for books, wares, or merchandise.	Jehovah's Witness offered religious books and sought contributions for them without applying for a permit.	Press Religion Speech	Invalidated (granting or withholding permit in complete discretion of municipal officer "extreme form" of "administrative censorship,"	None indicated
Murdock v. Pennsylvania 319 U.S. 105 (1943) ,	License (and corresponding fee) required to solicit orders for goods or "merchandise of any kind." at 106.	Jehovah's Witnesses went door-to-door and distributed religious literature and sought contributions in exchange.	Press Religion	Invalidated (tax laid on exercise of freedoms can be used to control or suppress their enjoyments, especially of those who cannot afford the tax) *id.* at 422)	Regulation of purely commercial activity
Prince v. Massachusetts 321 U.S. 158 (1944) ,	Unlawful for (1) anyone to furnish a child merchandise for sale; or (2) parent or guardian to permit child to sell merchandise in street or public place. *Id.*	Jehovah's Witness accompanied her nine year old ward on street corner to distribute religious tracts for sale or donation.	Parent's discretion in raising child Religion	Upheld (State's ability to control children is greater than the parent's ability)	Protection of child welfare

Table of United States Supreme Court Cases Concerning the Regulation of Proselytism

Case Name	Statute or Regulation	Violation	Freedom Implicated	Upheld / Invalidated (reason)	Public Interest Asserted
Martin v. City of Struthers 319 U.S. 141 (1943) ,	Unlawful for person distributing handbills, circulars or other advertisements to summon resident to the door.	Jehovah's Witness went door-to-door to distribute leaflets advertising a religious meeting.	Press Speech	Invalidated (city may not substitute its unilateral decision for that of individual homeowner)	(1) Protect householder privacy (2) Crime prevention
Taylor v. Mississippi 319 U.S. 583 (1943) ,	Unlawful to (1) engage in teaching or dissemination of printed material encouraging disloyalty to the government; (2) distribute printed matter reasonably tending to create an attitude of stubborn refusal to respect the flag or the government.	Jehovah's Witness (1) criticized U.S. war policy; and (2) distributed pamphlets condemning saluting the flag as idol worship and counseling that, in the event of a conflict, "Jehovah's law" should be obeyed, rather than state law.	Press Speech	Invalidated (*West Virginia State Board of Education v. Barnette*, (1943) held state cannot force children to violate religious beliefs by saluting flag, therefore, advocacy of those beliefs could not be criminal)	Prohibit acts detrimental to peace and safety during war
(1937 - 1953)					

319 U.S. 624

Id. at 586.

Table of United States Supreme Court Cases Concerning the Regulation of Proselytism

Case Name	Statute or Regulation	Violation	Freedom Implicated	Upheld / Invalidated (reason)	Public Interest Asserted
Follett v. Town of McCormick 321 U.S. 573 (1944) ,	Flat license fee charged to agents selling books in town.	Jehovah's Witness, who was a resident of the town, made his living by going door-to-door offering books and soliciting contributions for them without a license.	Religion	Invalidated (indistinguishable from *Opelika* except for resident rather than itinerant) and *Murdock*	None indicated
Marsh v. Alabama 326 U.S. 501 (1946) ,	Unlawful to remain on the premises of another after having been warned not to do so.	Jehovah's Witness distributed religious literature on sidewalk of company-owned town without permission of the company.	Press Religion	Invalidated (same as privately owned town) *Lovell* but for	Right of private owner to regulate conduct of guests

(1937 - 1953)

Table of United States Supreme Court Cases Concerning the Regulation of Proselytism

(1937 - 1953)

Case Name	Statute or Regulation	Violation	Freedom Implicated	Upheld / Invalidated (reason)	Public Interest Asserted
Tucker v. Texas 326 U.S. 517 (1946) ,	Unlawful for any "peddler or hawker of goods or merchandise" to refuse to leave the premises after having been notified to do so. *Id.* at 518.	Jehovah's Witness distributed religious literature in a village owned by the U.S. Federal government who, when asked, refused to cease distribution or leave the village.	Press Religion	Invalidated (same as *Marsh*)	Security
Saia v. New York 334 U.S. 558 (1948) ,	Permission of the Chief of Police required to use sound amplification devices in public places.	Jehovah's Witness used sound equipment to amplify lectures on religious subjects after his permit to do so had expired.	Speech	Invalidated (no standards guiding police chief's decision; same as *Cantwell* *Lovell*) and	Control of noise

Table of United States Supreme Court Cases Concerning the Regulation of Proselytism

Case Name	Statute or Regulation	Violation	Freedom Implicated	Upheld / Invalidated (reason)	Public Interest Asserted
Niemotko v. Maryland 340 U.S. 268 (1951) ,	Disorderly conduct prohibited.	Jehovah's Witnesses conducted Bible talks in a public park after having been denied permission by the city authorities.	Equal protection of the laws Religion Speech	Invalidated (no ordinance prohibiting use of park without permit; no standards, total discretion vested in city authorities; no evidence of threat to peace and order; discrimination on basis of religion)	Protection of public peace and order
Kunz v. New York 340 U.S. 290 (1951) ,	Unlawful to, in any street, (1) hold meeting for public worship without first obtaining a permit from the city police commissioner; (2) ridicule or denounce any form of religious belief; or (3) preach atheism or agnosticism.	Baptist minister held religious meeting after his permit had been revoked on evidence that he had ridiculed and denounced other religious beliefs.	Religion Speech	Invalidated (licensing systems where administrative official given discretion to grant or withhold permit without specific criteria generally invalid)	Protection of public order
(1937 - 1953)					
Fowler v. Rhode Island 345 U.S. 67 (1953) ,	"No person shall address any political or religious meeting in any public park."	Jehovah's Witness addressed a religious meeting in a public park.	Equal protection of the laws Religion Speech	Invalidated (statute did not prohibit Catholic or Protestant worship)	None specified

Id. at 267.