Roger Williams University Law Review

Volume 10
Issue 2 *Symposium: Religious Liberty In America and Beyond: Celebrating the Legacy of Roger Williams on the 400th Anniversary of his Birth*

Article 5

Spring 2005

A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture

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[A] decisive voice [in establishing the United Nations Commission on Human Rights in the aftermath of World War II] was that of Charles Malik, the Lebanese ambassador, philosopher and outspoken Arab Christian. Malik insisted that the [Universal Declaration of Human Rights] include Article 18: the right to freedom of thought, conscience and religion, including the right to change one's religious beliefs. Unless the proposed bill "can create conditions which will allow man to develop ultimate loyalties . . . over and above his loyalty to the State," he warned, "we shall have legislated not for man's freedom but for his virtual enslavement." Back then, Muslim delegates balked at Article 18 – just as they ignore it today.[1]

 This essay, which was the basis of a presentation I gave at Roger Williams University School of Law on October 15, 2004, is part of a larger work in progress, tentatively titled *Human Rights as Morality, Human Rights as Law*. I am grateful to the audience at Roger Williams for the opportunity to discuss this essay with them. I am indebted to Kathleen Brady, Chris Eberle, Ed Eberle, Rick Kay, Steve Smith, and George Wright for helpful comments.

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1. Joseph Loconte, *Op-Ed: Morality for Sale*, N.Y. TIMES, Apr. 1, 2004, at A23. Compare Loconte's remarks with those of Amartya Sen:

> When, in the twelfth century, the Jewish philosopher Maimonides had to flee an intolerant Europe to try to safeguard his human right to stick to his own religious beliefs and practice, he sought shelter in Emperor Saladin's Egypt (via Fez and Palestine), and

INTRODUCTION

In the midst of the countless grotesque inhumanities of the twentieth century, there is a heartening story, amply recounted elsewhere: the emergence, in international law, of the morality of human rights.[2] The morality of human rights is not new; in one or another version, the morality is very old.[3] But the emergence of the morality in international law, in the period since the end of World War II, is a profoundly important development – a development that makes the moral landscape of the twentieth century a touch less bleak. Although it is only one morality among many, the morality of human rights has become the dominant morality of our time. Indeed, unlike any morality before it, the morality of human rights has become a global morality; human-rights-talk has become the moral lingua franca.[4] Nonetheless, neither the mo-

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found an honored position in the court of this Muslim emperor. Several hundred years later, when, in Agra, the Moghul emperor of India, Akbar, was arguing, and legislating, on the government's duty to uphold the right to religious freedom of all citizens, the European Inquisitions were still going on, and Giardino Bruno was burnt at the stake in Rome, in 1600.

Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 352-53 (2004).

2. *See, e.g.*, Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982); ROBERT F. DRINAN, CRY OF THE OPPRESSED: THE HISTORY AND HOPE OF THE HUMAN RIGHTS REVOLUTION (1987).

3. *See* LESZEK KOLAKOWSKI, MODERNITY ON ENDLESS TRIAL 214 (1990):

> It is often stressed that the idea of human rights is of recent origin, and that this is enough to dismiss its claims to timeless validity. In its contemporary form, the doctrine is certainly new, though it is arguable that it is a modern version of the natural law theory, whose origins we can trace back at least to the Stoic philosophers and, of course, to the Judaic and Christian sources of European culture. There is no substantial difference between proclaiming "the right to life" and stating that natural law forbids killing. Much as the concept may have been elaborated in the philosophy of the Enlightenment in its conflict with Christianity, the notion of the immutable rights of individuals goes back to the Christian belief in the autonomous status and irreplaceable value of the human personality.

Id.

4. As Jürgen Habermas has recently noted: "Notwithstanding their European origins, . . . [i]n Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victim of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity." JÜRGEN

rality of human rights nor its relationship to the law of human rights is well understood.[5]

As it has emerged in international law, what does the morality of human rights hold? The International Bill of Rights, as it is informally known, consists of three documents: the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[6] The Universal Declaration refers, in its preamble, to

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HABERMAS, RELIGION AND RATIONALITY: ESSAYS ON REASON, GOD, AND MODERNITY 153 (Eduardo Mendieta ed., 2002).

5. For a brief overview of the subject of human rights, see James Nickel, *Human Rights*, *in* ELECTRONIC STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *at* http://plato.stanford.edu/entries/rights-human/ (last visited Mar. 21, 2005). For a more extended discussion, see JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS (2d ed. 2004). For historical context, see Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117 (2004).

6. The Universal Declaration of Human Rights (Universal Declaration) was adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948. G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., 183d plen. mtg., U.N. Doc. A/810 (1948), *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement (last visited May, 4, 2005) [hereinafter Universal Declaration]. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which are treaties and as such are binding on the several state parties thereto, were meant, in part, to elaborate the various rights specified in the Universal Declaration. The ICCPR and the ICESCR were each adopted and opened for signature, ratification, and accession by the General Assembly of the United Nations on December 19, 1966. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; *see also* International Covenant on Economic, Social, and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. The ICESCR entered into force on January 3, 1976 and, as of April 2005, has 151 state parties. Office of the United Nations High Commissioner for Human Rights, ICESCR, http://www.ohchr.org/english/countries/ratification/3.htm (last visited May, 4, 2005). The ICCPR, entered into force on March 23, 1976 and, as of April 2005, has 154 state parties. Office of the United Nations High Commissioner for Human Rights, ICCPR, http://www.ohchr.org/english/countries/ratification/4.htm (last visited May, 4, 2005). In October 1977, President Jimmy Carter signed both the ICCPR and the ICESCR. Although the United States Senate has not ratified the ICESCR, in September 1992, with the support of President George H. W. Bush, the Senate ratified the ICCPR. HUMAN DEVELOPMENT REPORT 2004: STATUS OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 238-241 (Mar. 2004), http://hdr.undp.org/statistics/data/indic/indic_265_1_1.html (last visited Mar. 21, 2005). The Sen-

"the inherent dignity . . . of all members of the human family" and states, in Article 1, that "[a]ll members of the human family are born free and equal in dignity and rights . . . and should act towards one another in a spirit of brotherhood."[7] The two covenants each refer, in their preambles, to "the inherent dignity . . . of all members of the human family," and to "the inherent dignity of the human person" – from which, the covenants insist, "the equal and inalienable rights of all members of the human family . . . derive."[8] As the International Bill of Rights makes clear, then, the fundamental conviction at the heart of the morality of human rights is this: Each and every (born) human being – each and every member of the species homo sapiens – has inherent dignity;[9] therefore, no one should deny that any human being has, or treat any human being as if she lacks, inherent dignity.[10]

To say that every human being has inherent dignity is to say that one's dignity inheres in nothing more particular than one's

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ate ratified the ICCPR subject to certain "reservations, understandings and declarations" that are not relevant here. 138 CONG. REC. S4781-84 (daily ed. Apr. 2, 1992). So the United States is a party to the ICCPR but not to the ICESCR.

7. Universal Declaration, *supra* note 6, pmbl., art. 1.

8. The relevant wording of the two preambles is as follows:

> The State Parties to the present Covenant,
>
> *Considering* that . . . recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.
>
> *Recognizing* that these rights derive from the inherent dignity of the human person.
>
> . . . .
>
> *Agree* upon the following articles . . . .

See ICCPR, *supra* note 6, pmbl. (emphasis added); ICESCR, *supra* note 6, pmbl. (emphasis added).

9. *Cf.* IN DEFENSE OF HUMAN DIGNITY: ESSAYS FOR OUR TIMES (Robert Kraynak & Glenn Tinder eds., 2003); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004).

10. The morality of human rights holds not that every human being has inherent dignity, but only that every *born* human being has inherent dignity. I comment on this state of affairs elsewhere in the work of which this essay is a part, in the course of discussing abortion from the perspective of the morality of human rights. Because abortion is not an issue in this essay, I will bracket the born/unborn distinction and say simply that according to the morality of human rights, every human being has inherent dignity.

being a human being;[11] it does not inhere, for example, in one's "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[12] According to the morality of human rights, because every human being has inherent dignity, no one should deny that any human being has, or treat any human being as if she lacks, inherent dignity. The conviction that every human being has inherent dignity – and that therefore no one should deny that any human being has, or treat any human being as if she lacks, inherent dignity – is so fundamental to the morality of human rights that when I say, in this essay, "the morality of human rights," I am referring, unless the context indicates otherwise, to this conviction. For the sake of simplicity, I will say that an action/policy "violates" a human being if the rationale for the action/policy denies that the human being has, or treats her as if she lacks, inherent dignity.

The morality of human rights is one thing, the law of human rights, another. What is the relationship of the former to the latter? How do we get from the morality of human rights to the law (international, transnational, and national) of human rights: What rights – that is, what rights-claims, claims about what one may not do to someone, or about what one must do for someone – should we who affirm the morality of human rights, *because* we affirm it, want the law to protect (and seek to have it protect if it doesn't already)?

We who affirm the morality of human rights, because we affirm it, should do (i.e., we have good reason to do) what we can, all things considered, to prevent government from violating human beings. That is, we should do what we reasonably can to prevent

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11. *Cf.* CHARLES E. CURRAN, CATHOLIC SOCIAL TEACHING, 1891-PRESENT: A HISTORICAL AND ETHICAL ANALYSIS 132 (2002).

> Human dignity comes from God's free gift; it does not depend on human effort, work, or accomplishments. All human beings have a fundamental, equal dignity because all share the generous gift of creation and redemption from God. . .Consequently, all human beings have the same fundamental dignity, whether they are brown, black, red, or white; rich or poor, young or old; male or female; healthy or sick.

Id.

12. The ICESCR, in Article 2, bans "discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICESCR, *supra* note 6, art. 2(2).

government from taking actions or pursuing policies that deny that one or more human beings have, or treat them as if they lack, inherent dignity.[13] One of the things that we in liberal democracies can do, that we are politically free to do, to prevent governments – our own government as well as other governments – from violating human beings is support laws that forbid, or if enacted would forbid, governments to take actions or pursue policies that violate one or more human beings. This is surely not the only thing we can do,[14] but it is one of the most important things we can do.[15]

It would be a mistake, however, to think that we who affirm the morality of human rights should want the law to ban only actions/policies that violate (i.e., whose rationales violate) one or more human beings. We should also want the law to ban actions/policies that, even if they (their rationales) do not violate any human being – even if they neither deny that any human being has inherent dignity nor treat any human being as if she lacks it – are nonetheless a source of unwarranted human suffering or other harm.[16] I am referring here to significant human suffering (or other harm), not trivial human suffering. Dietrich Bonhoeffer observed that "[w]e have for once learned to see the great events of world history from below, from the perspective of the outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled

13. *Cf.* Sen, *supra* note 1, at 340-42 ("Loosely specified obligations must not be confused with no obligations at all.").

14. *See id.* at 327.

15. When I say that a government action/policy violates a human being, I mean that the rationale for the action/policy violates a human being; that is, the rationale either denies that one or more human beings have inherent dignity or treats them as if they lack it. What the Nazis did to Jews was embedded in an ideology according to which Jews are pseudohuman; the Nazis denied that Jews have whatever moral status – whatever dignity, whatever worth – true human beings have. (According to the morality of human rights, the moral status that human beings have is inherent dignity.) Whether or not Bosnian Serbs believed that Bosnian Muslims were pseudohuman, Bosnian Serbs certainly treated Bosnian Muslims as if they lacked inherent dignity. How else to understand what Bosnian Serbs did to Bosnian Muslims – humiliation, rape, torture, murder? In that sense, what Bosnian Serbs did to Bosnian Muslims constituted a *practical* denial – an *existential* denial – that Bosnian Muslims have inherent dignity.

16. I develop this point elsewhere in the work of which this essay is a part.

– in short, from the perspective of those who suffer."[17] If we decline to do what we can, all things considered, to diminish unwarranted human suffering (or other harm) – and by "we" I mean here primarily the collective "we," as in "We the People," acting though our elected representatives – we decline to do what we can, all things considered, to protect those who endure that suffering. We thereby fail to respect their inherent dignity; we violate them by treating them as if they lack inherent dignity. Primo Levi wrote that once we know how to alleviate torment and do not, we become tormentors.[18] Sometimes it is not, or not only, a government action/policy that violates human beings; sometimes the violation is our failure to do what we can, all things considered, to protect human beings from the action/policy.[19]

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17. *See* Dietrich Bonhoeffer, *After Ten Years: A Letter to the Family and Conspirators*, *in* DIETRICH BONHOEFFER, A TESTAMENT TO FREEDOM 482 (Geoffrey B. Kelly & F. Burton Nelson eds., rev. ed. 1990):

> There remains an experience of incomparable value. We have for once learnt to see the great events of world history from below, from the perspective of the outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled – in short, from the perspective of those who suffer. . . . This perspective from below must not become the partisan possession of those who are eternally dissatisfied; rather, we must do justice to life in all its dimensions from a higher satisfaction, whose foundation is beyond any talk of "from below" or "from above."

Id. at 486.

18. PRIMO LEVI, THE DROWNED AND THE SAVED 24-25 (Raymond Rosenthal trans., 1986).

19. What Amartya Sen, borrowing from Immanuel Kant, calls the distinction between "perfect" and "imperfect" duties is relevant here–though I would mark the distinction by different terms: "determinate" and "indeterminate" duties.

> [The human right to freedom from torture] includes . . . an affirmation of the need for others to consider what they can reasonably do to secure the freedom from torture for any person. For a would-be torturer, the demand is obviously quite straightforward, to wit, to refrain and desist. The demand takes the clear form of what Immanuel Kant called a perfect obligation. However, for others too (that is, those other than the would-be torturers) there are responsibilities, even though they are less specific and come in the general form of "imperfect obligations" (to invoke another Kantian concept). The perfectly specified demand not to torture anyone is supplemented by the more general, and less exactly specified, requirement to consider the ways and means through which torture can be prevented and then to decide what one should, thus, reasonably do.

Sen, *supra* note 1, at 321-22; *see also id.* at 322-23.

To say, in the present context, that an instance of human suffering is "unwarranted" is to say that the action/policy that is a source of the suffering – that is a cause of the suffering, or that fails to intervene to diminish the suffering – is not warranted, that it is not justified. Not justified from whose perspective? It is scarcely surprising that the action/policy, and therefore the suffering that it causes, or fails to intervene to diminish, is justified from the perspective of those whose action/policy is in question. But theirs is not the relevant perspective. The relevant perspective belongs to those of us who, in coming face-to-face with the suffering, must decide what, if anything, to do, or to try to do, about it; in making that decision, we must reach our own judgment about whether the suffering is warranted.

This, then, is the relationship of the morality of human rights to the law of human rights; this is how we get from the morality of human rights to the law – more precisely, to what we believe should be the law – of human rights: We who affirm the morality of human rights, because we affirm it, should want the law to ban actions/policies that violate any human being, or that are otherwise a source of unwarranted human suffering. We should want the law to protect certain rights; we should support laws – we should work to get laws on the books if they are not already there,

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> Even though recognitions of human rights (with their associated claims and obligations) are ethical affirmations, they need not, by themselves, deliver a complete blueprint for evaluative assessment. An agreement of human rights does involve a firm commitment, to wit, to give reasonable consideration to the duties that follow from that ethical endorsement. But even with agreement on these affirmations, there can still be serious debates, particularly in the case of imperfect obligations, on (i) the ways in which the attention that is owed to human rights should be best paid, (ii) how the different types of human rights should be weighed against each other and their respective demands integrated together, (iii) how the claims of human rights should be consolidated with other evaluative concerns that may also deserve ethical attention, and so on. A theory of human rights can leave room for further discussions, disputations and arguments. The approach of open public reasoning . . . can definitively settle some disputes about coverage and content (including the identification of some clearly sustainable rights and others that would be hard to sustain), but may have to leave others, at least tentatively, unsettled. The admissibility of a domain of continued dispute is no embarrassment to a theory of human rights.

Id.

and to keep them there if they are – that (would) protect certain rights (rights-claims): rights not to be subjected to actions/policies that violate human beings, or that otherwise are a source of unwarranted human suffering.

The general question I address in this essay is whether we who affirm the morality of human rights should want the law, including the international law of human rights, to protect a right to religious freedom. A brief look at the sorry state of religious freedom in Saudi Arabia provides us with a real-world context for this inquiry.

Saudi Arabia has a population of about 24 million, 6-7 million of whom are foreigners.[20] "Comprehensive statistics for the religious denominations of foreigners are not available; however, they include Muslims from the various branches and schools of Islam, Christians, and Hindus. . . . The U.S. Conference of Catholic Bishops estimates that there are well over 500,000 Catholics in the country, and perhaps as many as 1 million."[21] The U.S. State Department's Country Reports on Human Rights Practices for the Year 2003 provides the following details about the condition of religious freedom in Saudi Arabia:

> The Government [of Saudi Arabia] does not provide legal protection for freedom of religion and [in 2003] such protection did not exist in practice. Islam is the official religion, and the law provides that all citizens must be Muslims.
>
> The Government prohibited non-Islamic public worship. The Government informally recognized the right of non-Muslims to worship in private; however, it did not always respect this right in practice. In general, non-Muslims were able to worship privately, but must exercise great discretion to avoid attracting attention. Conversion by a Muslim to another religion was considered apostasy. Public apostasy is a crime under Sahri'a and, according to the Government's interpretation, is punishable by death. . . .

20. U.S. Department of State, International Religious Freedom Report, 2003, Saudi Arabia, http://www.state.gov/g/drl/rls/irf/2003/24461.htm [hereinafter Int'l Religious Freedom Rep.].

21. *Id.* There are about 800,000 Filipinos in Saudi Arabia; "approximately 90 percent of the Filipino community is Christian." *Id.*

> Islamic practice generally was limited to strict adherence of the so-called "Wahhabi" interpretation of the Hanbali school of the Sunni branch of Islam as promulgated by Muhammad Ibn Al Wahab, a puritanical 18th century religious reformer. The spreading of Muslim teachings not in conformity with the officially accepted interpretation of Islam was prohibited. . . . [A]dherents of the Shi'a branch of Islam faced institutionalized discrimination, including restrictions on religious practice and on the building of mosques and community centers. The Ministry of Islamic Affairs directly supervised, and was a major source of funds for the construction and maintenance of most mosques in the country. The Ministry paid the salaries of the imams (prayer leaders) and others who worked in the mosques. On occasion, the Government provided direction to mosque orators and imams regarding the content of their messages; in some instances, imams were banned from speaking. A Government committee was responsible for defining the qualifications of imams. . . .
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> . . . .
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> The Government prohibited public non-Muslim religious activities. Non-Muslim worshippers risked arrest, lashing, and deportation for engaging in over religious activity that attracts official attention. The Government has stated publicly, including before the U.N. Commission on Human Rights, that its policy is to protect the right of non-Muslims to worship privately. During the year, senior officials in the Government publicly reaffirmed this right, while also asserting that no church would be allowed to be built in the country. However, the Government did not provide explicit guidelines – such as the number of persons permitted to attend and acceptable locations – for determining what constitutes private worship, which made distinctions between public and private worship unclear. Such lack of clarity, as well as instances of arbitrary enforcement by the authorities, forced most non-Muslims to worship in such a manner as to avoid discovery by the Government of others. Authorities deported those detained for non-Muslim worship almost always after sometimes-lengthy periods of arrest. . . .
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> . . . .
>
> The Government did not permit non-Muslim clergy to en-

> ter the country for the purpose of conducting religious services, although some came under other auspices. Such restriction made it very difficult for most non-Muslims to maintain contact with clergymen and attend services. Catholics and Orthodox Christians, who require a priest on a regular basis to receive the sacraments required by their faith, particularly were affected. . . .
>
> Proselytizing by non-Muslims, including the distribution of non-Muslim religious materials such as Bibles, was illegal. . . .[22]

FREEDOM OF RELIGION UNDER INTERNATIONAL LAW

I asked at the beginning of this essay whether we who affirm the morality of human rights should want the law of international human rights to protect a right to religious freedom. The International Bill of Rights, as I noted previously, consists of three documents: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. The ICCPR and the ICESCR are treaties and as such are binding on the several state parties thereto; they are meant, in part, to elaborate the rights specified in the Universal Declaration. (As of April 2005, the ICCPR had 154 state parties, including the United States, and the ICESCR, 151 state parties.[23] Saudi Arabia is a party to neither treaty.) The Universal Declaration states, in Article 18:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and obser-

22. U.S. Department of State, Country Reports on Human Rights Practices, 2003, Saudi Arabia, http://www.state.gov/g/drl/rls/hrrpt/2003/27937.htm (last visited May 4, 2005). For more on (the lack of) religious freedom in Saudi Arabia, see Int'l Religious Freedom Rep., *supra* note 18. For a report on (inter alia) the depressing state of intellectual life in Saudi Arabia, see Elizabeth Rubin, *The Jihadi Who Kept Asking Why*, N.Y. TIMES MAGAZINE, Mar. 7, 2004, at 38.

23. *See supra* note 6.

vance.[24]

The ICCPR states, in Article 18:

> 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 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 belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to assure the religious and moral education of their children in conformity with their own convictions.[25]

Article 18 of the ICCPR articulates more than a right to freedom of religion; it articulates a "right to freedom of thought, conscience and religion."[26] Nonetheless, Article 18 does articulate a

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24. Universal Declaration, *supra* note 6, art. 18.

25. ICCPR, *supra* note 6, art. 18(1).

26. *See* Karen Musalo, Claims for Protection Based on Religion or Belief: Analysis and Proposed Conclusions, U.N. Doc. PPLA/2002/01 (2002).

> Although the ICCPR does not itself define "religion or belief" there is extensive guidance in the *travaux*, as well as from the bodies monitoring the ICCPR's implementation. On the basis of these sources, it is clear that Article 18 of the ICCPR protects both religious and nonreligious forms of belief. Thus it protects the right to hold a belief as well as the right to refrain from adopting any religion or belief. Comprehended within this right is the right to choose, change or retain the religion or belief of one's choice. The right to freedom of belief is absolute, and not subject to any limitations whatsoever. States are to refrain from "coercion" or any other measures which might "impair" this unconditional freedom. Article 18 also protects the freedom to manifest one's religion or belief in public.

right to freedom of religion, according to which (1) religious beliefs – that is, accepting, rejecting, and changing religious beliefs – are not subject to governmental regulation, and (2) religious practices, though subject to governmental regulation, are subject only to such regulation as is "prescribed by law and . . . necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[27] The protected religious practices

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> Article 18 distinguishes between inner freedom of belief, and outer or public freedom to manifest one's beliefs. Whereas the former is absolute, the latter is subject to limitations specified in Article 18.3, Pursuant to Article 18.3, any limitation on the manifestation of religion or belief must be (1) prescribed by law, (2) serve one of the listed purposes (public safety, order, health or morals or the fundamental rights and freedom of others) and (3) be necessary for attaining the purposes asserted.

Id. at iv-v; *see also* Karen Musalo, *Claims for Protection Based on Religion or Belief*, 16 INT'L J. REFUGEE L. 165 (2004).

27. ICCPR, *supra* note 6, art. 18(3). Of course, if a politically independent, religion-protective judiciary is not authorized to decide what "limitations . . . are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others", then the "freedom to manifest one's religion or belief" may not be much protected in reality. Elsewhere in the work of which this essay is a part, I address the question of the proper role of courts in enforcing human rights. For a critique of the decisions of the European Court of Human Rights in the area of religious freedom, see generally CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2001).

It bears mention, especially to those with an interest in American constitutional law, that the right to the free exercise of religion protected by the United States Constitution has never been understood, because it would be conspicuously implausible to understand it, to forbid government to prohibit any religious practice whatsoever. *See, e.g.,* Reynolds v. United States, 98 U.S. 145, 166 (1879).

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Id. By its very terms the free exercise right forbids government to prohibit, not the exercise of religion, but the "free" exercise of religion – that is, the freedom of religious exercise. Just as government may not abridge "the freedom of speech" or "the freedom of the press", so too it may not prohibit the freedom of religious exercise. (The First Amendment declares: "Congress

include not only public worship but also religious proselytization:

> The literal language of [Article 18 of the ICCPR] and its amplification in more recent instruments and cases certainly protect the general right to proselytize – understood as the right to "manifest," "teach," "express," and "impart" religious ideas for the sake, among other things, of seeking the conversion of another. . . . [T]he [ICCPR] regards the religious expression inherent in proselytism as no more suspect than political, economic, artistic, or other forms of expression and entitled to the same protection.[28]

Article 18 of the ICCPR holds a particular ideal of religious freedom up to the world as a worthy aspiration for all governments; in that sense, Article 18 universalizes a particular ideal of religious freedom. But should any ideal of religious freedom be universalized. In particular, should the ideal embodied by Article 18 be universalized? Put another way, should we who affirm the morality of human rights want the law – not least, the international law of human rights – to protect the right to freedom of religion that Article 18 protects, and if so, why? Hereafter, when I refer to the right to freedom of religion, I mean the right that Article 18 articulates.[29]

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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.) The right to freedom of religious exercise is not an unconditional right to do, on the basis of religious belief or for religious reasons, whatever one wants. One need not concoct outdated hypotheticals about human sacrifice to dramatize the point. One need only point, for example, to the refusal of Christian Science parents to seek readily available lifesaving medical care for their gravely ill child. *See, e.g.*, Lundman v. McKown, 530 N.W.2d 807 (Minn. Ct. App. 1995); *see also* Caroline Frasier, *Suffering Children and the Christian Science Church*, ATLANTIC MONTHLY, Apr. 1995, at 105. Just as the right to freedom of speech does not privilege one to say, and right to the freedom of the press does not privilege one to publish, whatever one wants wherever one wants whenever one wants; so too, the right to freedom of religious exercise does not – because it cannot – privilege one to do, on the basis of religious belief or for religious reasons, whatever one wants wherever one wants whenever one wants.

28. John Witte, Jr., *Primer on the Rights and Wrongs of Proselytism*, 31 CUMB. L. REV. 619, 627 (2001).

29. And not just Article 18. Another international document merits mention here: The Declaration on the Elimination of All Forms of Intolerance and

It bears emphasis, even at the risk of belaboring the point, that the ideal of religious freedom embodied by Article 18 does not forbid government to ban or otherwise regulate religious practices; rather, Article 18 insists only that government not ban or otherwise regulate religious practices unless "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[30] So, Article 18 permits government to regulate some kinds of religious proselytization. As John Witte ex-

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of Discrimination Based on Religion or Belief (The Declaration), which was proclaimed by the UN General Assembly on Nov. 25, 1981. G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (1981) [hereinafter Elimination Declaration]. The Declaration is a lengthy elaboration of the right that the international legal community holds up as a universal ideal and that Article 18 of the ICCPR protects as a human right. *See* Derek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, 2002 BYU L. REV. 217 (2002). "[The] question, whether the Declaration should become a convention, is an especially difficult one. Even though the Declaration does not have binding status, it carries the weight of a solemn U.N. statement and a great degree of moral suasion." *Id.* at 230.

The most important transnational (regional) treaties protecting a right to freedom of religion are the European Convention on Human Rights and Fundamental Freedoms (European Convention) and the American Convention on Human Rights (American Convention). Each convention protects – the European Convention in Article 9 and the American Convention in Article 12 – a right to freedom of religion that is virtually identical to the right that Article 18 of the ICCPR protects. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); American Convention on Human Rights, art. 12, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force 1970). On Article 9 of the European Convention, see Javier Martinez-Torron, *The Permissible Scope of Legal Limitations on the Freedom of Religion: The European Convention on Human Rights*, 3 GLOBAL JURIST ADVANCES 1, 1-3. *See also* EVANS, *supra* note 27. The right to freedom of religion protected by Article 8 of the African Charter on Human and Peoples' Rights is much more briefly stated: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms." African Charter on Human and Peoples' Rights, art. 8, June 27, 1981, 1520 U.N.T.S. 217.

That the ICCPR protects the right to freedom of religion does not mean that every state party to the ICCPR actually respects the right. As the human rights community well and sadly knows, rights on paper are one thing, rights in practice, something else. *See, e.g.*, Carolyn Evans, *Chinese Law and the International Protection of Religious Freedom*, 44 J. OF CHURCH & STATE 749 (2002).

30. ICCPR, *supra* note 6, art. 18.

plains:

> The [ICCPR] provides no protection for coercive proselytism. At minimum, the [ICCPR] bars physical or material manipulation of the would-be convert and in some contexts even more subtle forms of deception, enticement, and inducement to convert. The [ICCPR] also casts serious suspicion on any proselytism among children or among adherents to minority religions.[31]

For Saudi Arabia or any other government to reject the ideal of religious freedom embodied by Article 18 is not merely to reject the claim that government should not regulate religious practices. No government accepts that extreme, and extremely silly, claim. Rather, it is to reject the claim that – it is to reject a discursive framework according to which – government should not regulate a religious practice unless it believes, and can offer a serious justification in support of its belief, that the regulation as "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Of course, disagreement about whether a particular regulation is "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" is inevitable – though this is not to say that each and every instance of such disagreement is reasonable.
Again, should we who affirm the morality of human rights universalize the ideal of religious freedom embodied by Article 18 of the ICCPR?

THE SALVATION RATIONALE

Imagine the following scenario. Like Saudi Arabia, Elysium has a population of about 25 million. As befits its name, however, Elysium is a somewhat kinder, gentler place, a somewhat more human-rights-friendly place, than Saudi Arabia – as I am about to explain. Approximately 80 percent of Elysians belong to a religion known as The One True Faith (TOTF); the other 5 million belong to various other religions. TOTF vigorously affirms, and gives a theological ground in support of, the morality of human rights: According to one of TOTF's fundamental teachings, every human being has inherent dignity, and is therefore inviolable, because every

31. Witte, Jr., *supra* note 28, at 627.

human being is a beloved child of God and a sister/brother to oneself. Like many other religions, TOTF teaches that one cannot be coerced into accepting – truly accepting – a religion (religious beliefs) as her (or his) religion; and, indeed, the Elysian Constitution, inspired in part by an argument that John Locke makes in *A Letter Concerning Toleration*, forbids government to try to coerce anyone into accepting TOTF as her (or his) religion.[32] Relatedly,

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32. *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans., 1689), *available at* http://www.constitution.org/jl/tolerati.htm (last visited May 3, 2005):

> No way whatsoever that I shall walk in against the dictates of my conscience will ever bring me to the mansions of the blessed. I may grow rich by an art that I take not delight in; I may be cured of some disease by remedies that I have not faith in; but I cannot be saved by a religion that I distrust and by a worship that I abhor.... [W]hatsoever may be doubtful in religion, yet this at least is certain, that no religion which I believe not to be true can be either true or profitable unto me. In vain, therefore, do princes compel their subjects to come to their Church communion, under pretence of saving their souls. If they believe, they will come of their own accord, if they believe not, their coming will nothing avail them. How great so ever, in fine, may be the pretence of good-will and charity, and concern for the salvation of men's souls, men cannot be forced to be saved, whether they will or no. And therefore, when all is done, they must be left to their own consciences.

Id. Locke wrote those words in 1689. Earlier in the seventeenth century, on a different continent, another prophet of religious toleration – Roger Williams – was pressing, with more passionate rhetoric, the same message. *See* Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America,* ROGER WILLIAMS U. L. REV. 425 (1999):

> [S]ince a religious conversion must involve an actual change of heart, [Roger] Williams denied that "the Arm of Flesh" or the "Sword of Steel" could ever "reach out to cut the darkness of the Mind, the hardness and unbelief of Heart, and kindly operate upon a Souls affections to forsake a long continued Fathers worship, and to embrace a new, though the best and truest." Persecution could only force worship, causing hypocrisy in belief.
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> ....
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> "I plead the cause of truth and innocency against the bloody doctrine of persecution for the cause of conscience" asserts Williams in *Bloody Tenent*, which best encapsulates his argument. "By "persecution for the cause of conscience," Williams means that it is "spiritual rape" to coerce people to faiths or beliefs they do not voluntarily subscribe to. It is, for example, "a spiritual rape [to] force the consciences of all to one worship," or "to batter down idolatry, false worship, [or] heresy, [with] ... weapons [such as] ... stocks, whips, prisons, [or] swords." Such "*Soule* or *Spiritual Rape*" is worse than

the Elysian Constitution forbids government to prohibit anyone from practicing her religion in private.[33] Elysian statutory law specifies the "private" places where non-TOTFers may worship and otherwise practice their religion, including their own homes.

However, TOTF teaches that no human being can achieve eternal salvation who does not (freely) embrace TOTF as the one true faith. It is not surprising, therefore, that TOTF is the politically/legally favored religion – in that sense, the "established" religion – in Elysium.[34] Accordingly, the Elysian Constitution forbids the government to enact any law or adopt any policy inconsistent with the teachings of TOTF. Nonetheless, because Elysians have

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"to force and ravish the Bodies of all the Women in the World." *Id.* at 441-42, 443 (passages rearranged).

33. *Cf.* Eberle, *supra* note 32:

> [For Roger Williams, m]atters of conscience extend beyond questions of belief. "By persecution for cause of conscience, I . . . mean either for professing some point of doctrine which you believe in conscience to be the truth, or for practicing some work which you believe in conscience to be a religious duty." For Roger Williams, it is clear that conscience encompasses both belief ("professing some point you believe on conscience to be the truth") and action ("practicing some work which you believe in conscience to be a religious duty").

Id. at at 444-45.

34. On the idea of an "established" church, see Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: The Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003). According to McConnell:

> An establishment is the promotion and inculcation of a common set of beliefs through governmental authority. An establishment may be narrow (focused on a particular set of beliefs) or broad (encompassing a certain range of opinion); it may be more or less coercive; and it may be tolerant or intolerant of other views. During the period between initial settlement and ultimate disestablishment, American religious establishments moved from being narrow, coercive, and intolerant to being broad, relatively noncoercive, and tolerant. Although the laws constituting the establishment were ad hoc and unsystematic, they can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.

Id. at 2131. For a sketch of different kinds of religious establishment, from extreme to moderate, see W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1, 19-25 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

taken to heart James Madison's *Memorial and Remonstrance against Religious Assessments*, the Elysian Constitution embraces a part of Thomas Jefferson's *Statute for Religious Freedom*, and forbids the government to require any citizen to support, financially or otherwise, TOTF.[35] So, the "establishment" of religion in Elysium is in some respects much less severe than it has been in other places at other times (e.g., Saudi Arabia today).[36]

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35. In his *Memorial and Remonstrance against Religious Assessments*, which bears the date June 20, 1785, James Madison wrote:

> [W]e hold it for a fundamental and undeniable truth, "that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [Virginia Declaration of Rights, art. 16.] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.

Reprinted in JAMES MADISON AND THE AMERICAN NATION, 1751-1836: AN ENCYCLOPEDIA 461 (Robert A. Rutland ed., 1994).

Thomas Jefferson drafted the *Virginia Statute for Religious Freedom*, but it was James Madison who secured its adoption by the Virginia legislature in 1786. *See* Thomas Jefferson, *Virginia Statute for Religious Freedom* (1779), *reprinted in* A DOCUMENTARY HISTORY OF RELIGION IN AMERICA 259-61 (Edwin S. Gaustad ed., 1982), *available at* at http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html. The Statute remains a part of present-day Virginia's constitution. The part of the Statute embraced by the Eylsian constitution states: *"Be it enacted by the General Assembly*, that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ." *See id.* § 2.

36. We should not assume that for a government to establish a religion is necessarily for it to violate the right to freedom of religion. Indeed, Article 18 of the ICCPR does not contain anything like the United States Constitution's ban on government establishing religion. So long as government respects the right to freedom of religion – so long as it respects what American constitutional law recognizes as the right to the free exercise of religion – its establishment of religion does not violate the right to freedom of religion.

Consider, in that regard, the case of Ireland, whose Constitution affirms, in its Preamble, a nonsectarian Christianity:

> In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, we, the people of Eire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, . . . do hereby adopt, enact, and give to ourselves this Constitution.

Pmbl., Constitution of Ireland, 2002, *available at* http://www.taoiseach.gov.ie/upload/static/256.pdf. Moreover, Article 6 states, in relevant part: "All powers

of government, legislative, executive, and judicial, derive, *under God,* from the people, whose right it is to designate the rulers of the State and, in the final appeal, to decide all questions of national policy, according to the requirements of the common good." *Id.* art. 6(1) (emphasis added). And Article 44 of the Constitution states, in relevant part: "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honor religion." *Id.* art. 44(1). On "religion in the Preamble", see J.M. KELLY, THE IRISH CONSTITUTION 6-7 (3d ed. 1994). (Although it affirms Christianity, the Irish Constitution explicitly disallows the "endowing" of any religion. Article 44(2)(2) states: "The State guarantees not to endow any religion." Art. 44(2)(2), Constitution of Ireland, 2002.)

Given the religious commitments of the vast majority of the people of Ireland, it is not at all surprising that the Irish Constitution affirms Christianity. In so doing, the Irish Constitution does not violate the right to freedom of religion. Three things are significant here. First, the religious convictions implicit in the Irish Constitution's affirmation of Christianity in no way deny – indeed, they affirm – the idea that *every* human being, *Christian or not,* is inviolable. Second, the Irish Constitution's affirmation of Christianity is not meant to insult or demean anyone; it is meant only to express the most fundamental convictions of the vast majority of the people of Ireland. Third, and most importantly, the Irish Constitution protects the right to freedom of religion as a right not just for Christians, who are the vast majority in Ireland, but for all citizens. Article 44 states, in relevant part: "Freedom of conscience and the free profession and practice of religion are . . . guaranteed to every citizen. . . . The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status." *Id.* art. 44(2)(1). Article 44 also states that "[l]egislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, *nor be such as to effect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.*" *Id.* art. 44(2)(4) (emphasis added). Therefore, the conclusion that in affirming Christianity the Irish Constitution violates the right to freedom of religion – or that in consequence of the affirmation Ireland falls short of being a full fledged liberal democracy – is, in a word, extreme. *Cf.* BRIAN BARRY, JUSTICE AS IMPARTIALITY 165 n.c (1995).

> We must, of course, keep a sense of proportion. The advantages of establishment enjoyed by the Church of England or by the Lutheran Church in Sweden are scarcely on a scale to lead anyone to feel seriously discriminated against. In contrast, denying the vote to Roman Catholics or requiring subscription to the Church of England as a condition of entry to Oxford or Cambridge did constitute a serious source of grievance. Strict adherence to justice as impartiality would, no doubt, be incompatible with the existence of an established church at all. But departures from it are venial so long as nobody is put at a significant disadvantage, either by having barriers put in the way of worshipping according to the tenets of his faith or by having his rights and opportunities in other matters (politics, education, occupation, for example) materially limited on the basis of his religious beliefs.

Id.

Now we come to the heart of the matter. John Locke wrote, in *A Letter Concerning Toleration*, that "the whole jurisdiction of the magistrate . . . neither can nor ought in any manner to be extended to the salvation of souls . . . ."[37] The government of Elysium, however, disagrees with Locke on this point. Elysian law bans any public practice of, and any proselytization on behalf of, any religion other than TOTF. It also bans any "proselytization" of positions, like atheism and agnosticism, that challenge theistic religion generally. The rationale for this policy is simple and

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Consider too the case of England, where the Church of England is the established church – though much less established now than in the past. *See* Cheryl Saunders, *Comment: Religion and the State*, 21 CARDOZO L. REV. 1295, 1295 (2000).

> The special status of the Church of England manifests through legal links with the British crown. Under legislation, the reigning queen or king is "supreme governor" of the church and swears a coronation oath to maintain it. As such, the monarch may not be a Catholic, or marry a Catholic, and must declare on accession to the throne that he or she is a Protestant.
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> This is surprising enough in a western liberal democracy at the end of the twentieth century. But there is more. The monarch also appoints the archbishops and other reigning church dignitaries. Twenty-six of these "Lords Spiritual" sit in the upper house of the legislature, the House of Lords. The British Parliament can legislate for the church and can prescribe modes of worship, doctrine and discipline. And the church has delegated legislative authority in relation to church affairs. Measures initiated by the church may be accepted or rejected, but not amended, by the Parliament and override earlier inconsistent law.

Id. at 1295. Professor Saunders then states:

> As usual with the British system of government, however, what you see is not exactly what you get. In advising the crown on appointments to church positions, the prime minister draws names from a list provided by church authorities. As a practical matter, Parliament is unlikely to veto legislative measures initiated by the church, or to act unilaterally in relation to other church affairs. Vernon Bogdanor draws attention to a House of Commons debate on the ordination of women priests in 1993, in which several Members expressed the view that the House should not be discussing the view at all.

Id. at 1295-96. Clearly, and happily, that England has an established church does not mean all that it once meant. Nonetheless, that England *still* has an established church remains controversial. *See, e.g.*, Clifford Longley, *An Act That Holds Us Back*, TABLET, Mar. 17, 2001, at 362; Clifford Longley, *Establishment – It's Got to Go*, TABLET, May 11, 2002, at 2.

37. LOCKE, *supra* note 32.

straightforward – and unLockean: By banning practices that will predictably cause some Elysians to abandon, and other Elysians not to embrace, TOTF, the policy seeks to maximize the number of Elysians who will achieve eternal salvation.

In denying freedom to non-TOTFers to practice their religion in public and to proselytize on behalf of their religion, does Elysian law deny that non-TOTFers have, or otherwise treat them as if they lack, inherent dignity, and thereby violate them? It is difficult to see how it does: It is *because* they insist that *all* Elysians – non-TOTFers no less than TOTFers – have inherent dignity, and that every Elysian is a beloved child of God, that Elysian officials are trying maximize the number of Elysians who will achieve eternal salvation. In denying freedom to non-TOTFers to practice their religion in public and to proselytize, Elysian officials are acting out of a deep respect and concern for all Elysians. The conclusion seems to me inescapable that Elysian law does not violate non-TOTFers; that is, Elysian law neither denies that non-TOTFers lack inherent dignity nor otherwise treats them as if they lack it.

Does this mean that we who affirm the morality of human rights (and do not embrace TOTF) should not want international law to protect the right of all persons, including all Elysians, to practice their religion in public and to proselytize (so long as such practice and proselytization do not harm, or threaten to harm, "public safety, order, health, or morals or the fundamental rights and freedoms of others")? We who affirm the morality of human rights should want the law to guard human beings against actions/policies that violate (or would violate) them, by denying that they have, or by otherwise treating them as if they lack, inherent dignity. But, as I explained in the introduction to this essay, it is false that we should want the law to do only that; we should also want the law to guard human beings against actions/policies that, even if they do not violate human beings, are nonetheless a source of unwarranted human suffering.

Now, although TOTFers vigorously affirm the morality of human rights, they do not believe that the suffering some non-TOTFers may experience in consequence of the Elysian law at issue is "unwarranted".[38] Because of their exclusivist theology of

38. As I explained in the introduction to this essay, to say that the suffer-

salvation, TOTFers believe the law is justified (and the suffering therefore not unwarranted) as a loving effort to protect all Elysians, including those who are non-TOTFers, from the worst fate – the most horrific fate – imaginable: the loss of eternal salvation. So TOTFers, notwithstanding their vigorous affirmation of the morality of human rights, do not want international law to protect – indeed, they want it not to protect – the right of all persons, and therefore of all Elysians including non-TOTFers, to practice their religion in public and to proselytize.

By contrast, we who reject TOTF's theology of salvation – as we all do, since not a single one of us is a TOTFer – have a different understanding of the suffering that Elysian non-TOTFers endure in consequence of the law at issue: Because it is based on a mistaken theology the rationale for the law is false, and the suffering of non-TOTFers is – absent another, true rationale – unwarranted. It is just as unwarranted as the suffering of those who are discriminated against on the basis of a sincerely held but nonetheless demeaning view – a false, deficit-attributing view – about their race, for example, or their sex. Of course, one who affirms the morality of human rights and rejects TOTF's theology of salvation may nonetheless accept a different exclusivist theology of salvation, and one who fits that profile may not want international law to protect – they may want it not to protect – the right of all persons to practice their religion in public and to proselytize. For example, one who accepts the Roman Catholic Church's pre-Vatican II theology of salvation may want international law not to protect the right of non-Catholics in "Catholic" countries to practice their religion in public and to proselytize.[39]

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ing of human beings is "unwarranted" is to say that the political act or policy that is the immediate cause of the suffering is not warranted, that it is not justified, from the perspective of those who come to know about the suffering and who must therefore decide what, if anything, to do, or to try to do, about the suffering. In making that decision, they must reach their own judgment about whether the suffering is warranted.

39. On the other hand, even those whose theology is exclusivist – TOTFers, for example, or pre-Vatican II Roman Catholics – can have one or more reasons for wanting the law to protect a right to freedom of religion in *some* contexts: for example, where they are in a minority, and fear that they may be forbidden to practice their religion in public or to proselytize; or where they are in a majority, but fear that forbidding others, or certain others, to practice their religion in public or to proselytize will provoke a bloody civil war.

> [In the 1940s, the] Protestants had reason for their suspicion of Catholics. The "liberal" approach to the pluralism of religious practice found in the United States was certainly not replicated in Spain and some Latin American countries, or even, to some extent, in Italy. The Church had no problem with diversity of belief – it was accepted that no one could be coerced into Catholicism – but practice was a different matter. It was the duty of a Catholic state, the argument ran, to constrain public expression of religion other than Catholicism. Error, it was repeated mantra-like, has no rights.[40]

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40. Michael Walsh, *U-turn on Human Rights*, TABLET, Dec. 14, 2002, at 7. Walsh's short article provides a good summary of the fierce debate among the cardinals and bishops at the Second Vatican Council that preceded the Council's "u-turn" with respect to freedom of religious practice – its adoption of the Declaration on Religious Freedom, known as *Dignitatis Humanae*, promulgated by Pope Paul VI on Dec. 7, 1965. Declaration on religious Freedom (*Dignitatis Humanae*), *reprinted in* THE SIXTEEN DOCUMENTS OF VATICAN II (Marianne Lorraine Trouvé ed., N.C.W.C. trans., Pauline Books & Media 1999) (1965). Although *Dignitatis Humanae* succeeds in explaining, in terms consistent with earlier papal pronouncements, the Church's traditional support for freedom of religious belief, it fails to explain, in such terms, the Church's u-turn with respect to freedom of religious practice. For a taste of earlier papal condemnations of Protestantism and the idea of freedom of religious practice, see John Witte, Jr., *The Serpentine Wall of Separation*, 101 MICH. L. REV. 1869, 1899-1900 (2003). One persistent critic of the Church's u-turn has written:

> This new year of 1995 marks thirty years since the close of the Second Vatican Council, and without a doubt the confusion, division and loss of faith within the Catholic Church can be directly attributed to some of the decrees and declarations of this Council . . . and the most destructive of the Catholic Faith after the Council, was the decree *Dignitatis Humanae* on Religious Liberty . . . .
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> The reason this decree was the most controversial and the most destructive is that it explicitly taught doctrines previously condemned by past Popes. And this was so blatant that many conservative Council Fathers opposed it to the very end; while even the liberal cardinals, bishops and theologians who promoted the teachings of *Dignitatis Humanae* had to confess their inability to reconcile this decree with the past condemnations of Popes.

Letter from Bishop Mark A. Pivarunas, CMRI, entitled *The Doctrinal Errors of Dignitatis Humanae* (Feb. 2, 1995), ¶¶ 1-2, http://cmri.org/95prog2.shtml (last visited May 4, 2005).

The question whether the Roman Catholic Church has performed u-turns with respect to some of its official teachings has been hotly contested. *See generally* John T. Noonan, Jr., *Development in Moral Doctrine*, 54

BEYOND THE SALVATION RATIONALE

There is, however, a different profile: One who affirms the morality of human rights and rejects any and all exclusivist theologies of salvation. That we who fit that profile lack one particular reason for wanting the law *not* to protect the right to freedom of religion – namely, an exclusivist theology of salvation – does not mean that we necessarily have a reason or reasons for wanting the law *to* protect the right to freedom of religion.[41] So what reasons do we who affirm the morality of human rights and reject exclusivist theologies of salvation have for wanting the law to protect the right to freedom of religion? We should not suppose that we who fit that profile all have exactly the same reasons: We who are religious believers may have one or more theological rea-

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THEOLOGICAL STUD. 662, 669 (1993). Discussing usury, marriage, slavery, and religious freedom, Judge Noonan has shown:

> Wide shifts in the teaching of moral duties, once presented as part of Christian doctrine by the magisterium, have occurred. In each case one can see the displacement of a principle or principles that had been taken as dispositive – in the case of usury, that a loan confers no right to profit; in the case of marriage, that all marriages are indissoluble; in the case of slavery, that war gives a right to enslave and that ownership of a slave gives title to the slave's offspring; in the case of religious liberty, that error has no rights and that fidelity to the Christian faith may be physically enforced. . . . In the course of this displacement of one set of principles, what was forbidden became lawful (the cases of usury and marriage); what was permissible became unlawful (the case of slavery); and what was required became forbidden (the persecution of heretics).

Id. at 669. *Cf.* John T. McGreevy, *A Case of Doctrinal Development: John T. Noonan – Jurist, Historian, Author, Sage*, COMMONWEAL, Nov. 12, 2000, at 12.

> Some Catholics concede that the church admits the principle of doctrinal development, but they accuse [John] Noonan, in Richard John Neuhaus's words, of too often equating development with "a change, or even a reversal, of doctrine." At a recent meeting of the Catholic Common Ground initiative, Noonan and theologian Avery Dulles had a polite, but sharp, exchange on the subject, with Noonan again insisting that "the record is replete with mistakes – the faithful can't just accept everything that comes from Rome as though God had authorized it."

Id. at 17.

41. That we lack one particular reason *not* to do something does not entail that we lack *any reason at all* not to do it; nor does it entail that we have a reason *to* do it.

sons;[42] we who are not religious believers can have only secular reasons.

But there is one reason – a secular reason – that we who fit the profile can and should all share, though by itself the reason is incomplete. (If it were not a secular reason, it would not be a reason that we can and should all share.) Because a government action/policy that denies freedom of religion to some human beings causes those human beings to suffer, and because it also thereby precipitates social and political divisiveness and, sometimes, instability, the international law of human rights should not leave governments with discretion (authority) to deny freedom of religion to anyone – unless, of course, there is a justification for leaving them with such discretion. (Not to leave governments with such discretion is *not* to compromise their ability to regulate religious practices when "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.") Put another way, we should want the international law of human rights to protect the right to freedom of religion unless there are good reasons for entrusting governments with discretion to ban or otherwise regulate religious practices, even when no serious claim can be made that such regulation is "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Are there such reasons?

We can readily anticipate a religious reason for entrusting governments with such discretion: "Certain religious teachings are true and so important that no government should be deprived of the authority to prohibit or otherwise regulate practices, religious or not, that may lead some people to reject those teachings." (An example of a religious teaching that many believe to be true and important: "Although one need not embrace Christianity in order to be saved, one who does so has a much better chance of being saved.")[43] We can also anticipate a secular version of this reason:

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42. Only a religious believer could think, for example, that it is God's will that we not interfere with one another's conscientious search for religious truth.

43. *See Other Faiths Are Deficient, Pope Says*, TABLET, Feb. 5, 2000, at 157:

> The revelation of Christ is "definitive and complete," Pope John Paul affirmed to the Congregation for the Doctrine of the Faith, on 28 January. He repeated the phrase twice in an address which went on to say that non-Christians live in "a deficient situation, compared to

"Certain nonreligious teachings or certain antireligious teachings or both are true and so important that no government should be deprived of the authority to prohibit or otherwise regulate practices, religious or not, that may lead some people to reject those teachings."[44] (A familiar example of an antireligious teaching that some have believed to be true and important: "Religion is the opium of the people.")

Is this reason – in either the religious version or the secular version – a good reason for entrusting governments with discretion to ban or otherwise regulate, religious practices, even when there is no serious claim that such regulation is "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others?" It is not a good reason for those who fit the following profile: After reflecting on historical experience, they agree with John Locke that "[n]either the right nor the art of ruling does necessarily carry along with it the certain knowledge of other things, and least of all true religion."[45] Moreover, they have concluded that (1) the likely costs – to religion, to government and politics, and/or to the society as a whole – of entrusting governments with discretion to deny freedom of religion in the service of teachings that the political powers-that-be believe to be true and important outweigh the benefits of doing so and (2)

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those who have the fullness of salvific means in the Church."

Id. The harsh doctrine that there is no salvation outside the church has been revised, however. "[Pope John Paul II] recognized, following the Second Vatican Council, that non-Christians can reach eternal life if they seek God with a sincere heart. But in that 'sincere search' they are in fact 'ordered' towards Christ and his Church." *Id.*(citation omitted).

44. This was essentially the position espoused by the Roman Catholic Church prior to Vatican II. *See supra* note 40.

45. LOCKE, *supra* note 32, at 10; *see* Madison, *supra* note 34, at 461, 462. Madison explains why

> [w]e the subscribers, citizens of the said Commonwealth [Virginia]," [reject the proposed] "Bill establishing a provision for Teachers of the Christian Religion . . ."
>
> . . . .
>
> 5. Because the Bill implies either that the Civil Magistrate is a competent judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.

Id.

the benefits of *not* entrusting governments with such discretion outweigh the costs of not doing so.

We can anticipate a second reason for entrusting governments with such discretion:

> It is sometimes important to the unity and stability of a nation, or to the survival of the moral tradition and culture of a nation, or to both, that the religion or religions that support that unity/stability or that tradition/culture or both, be nurtured and protected from competition; no government should be deprived of the authority to prohibit or otherwise regulate practices, religious or not, that may weaken the market share of such religions

This is a secular reason, because one need not be a religious believer to accept it,[46] even if those who do accept it are probably more likely than not to be religious believers. At least a part of this reason seems to many of us to be outdated: belied by historical experience, which teaches that because of the suffering they cause and the divisiveness and instability they can precipitate, actions/policies that deny freedom of religion to some citizens – that forbid some citizens to practice their religion in public or to proselytize even when such a prohibition is not "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" – generally pose a more serious threat to the unity/stability of a nation than would granting freedom of religion to all citizens. This teaching is reflected in the opening of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: "[T]he disregard and infringement of . . . the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind . . . ."[47]

But what about the other part of this reason: the goal of protecting the moral culture/tradition of a nation? Recall that the

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46. *Cf.* McConnell, *supra* note 34, at 2182 (quoting NICCOLO MACHIAVELLI, THE DISCOURSES 139, 143 (Leslie J. Walker trans., Bernard R. Crick ed., Penguin 1970) (1520)) ("Machiavelli, who called religion 'the instrument necessary above all others for the maintenance of a civilized state,' urged rulers to 'foster and encourage' religion 'even though they be convinced that is it quite fallacious.' Truth and social utility may, but need not, coincide.") (citation omitted).

47. Elimination Declaration, *supra* note 29, at 171.

particular freedom of religion at issue is subject to regulations that "are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." So it is not as if there is no room, in a political community that accepts the right to freedom of religion, for the legislators to enact laws that they judge to be necessary to protect the community's public morality. If a court or other adjudicatory institution is charged with enforcing the right to freedom of religion,[48] just how much room there is depends, of course, on how deferential the judges are to the legislators' judgments.

As I explained previously, we who affirm the morality of human rights should want the law to protect the right to freedom of religion unless there are good reasons for entrusting governments with discretion to deny freedom of religion – in particular, discretion to forbid some human beings to practice their religion in public or to proselytize. I have suggested in the preceding paragraphs that for many of us there are no good reasons. This judgment – that there are no good reasons for entrusting governments with such discretion – is so widespread that the ICCPR specifically denies such discretion to the 152 states that, as of June 2004, are parties to it: Article 18 of the ICCPR protects the right to freedom of religion. For those of us for whom there are no good reasons, the suffering caused by actions/policies that forbid some religious believers to practice their religion in public or to proselytize is unwarranted; and, as I explained in the introduction to this essay, we who affirm the morality of human rights should do what we can, all things considered, to diminish unwarranted human suffering. One of the things we can do, all things considered, is to support the international legal community's call for every government to respect freedom of religion, which, as Article 18 of the ICCPR reflects, centrally includes freedom to practice one's religion in public, as well as in private, and to try to persuade others to embrace one's religion.[49]

48. Elsewhere in the work of which this essay is a part, I discuss the proper role of courts in protecting human rights.

49. Again, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief is a lengthy elaboration of the right that the international legal community holds up as a universal ideal and that Article 18 of the ICCPR protects. *See supra* note 29.

THE UNIVERSALITY OF HUMAN RIGHTS, THE RELATIVITY OF CULTURE

That there is an international *law* of human rights does not entail that there is also a universal *morality* of human rights. We can imagine a world in which, although there is no universal morality, an alliance of dominant nations, or a superpower, has succeeded in imposing an international law of human rights. In our world, however, there is now, some sixty years after the end of World War II, a global morality of human rights. (As Jürgen Habermas has recently noted: "Notwithstanding their European origins, . . . [i]n Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victims of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity.")[50] This universal morality consists of various claims – though, as I explained in the introduction to this essay, it does not, as I understand it, consist of any rights-claims:

> ***first,*** the fundamental claim that every human being has inherent dignity and is therefore inviolable (not to be violated);
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> ***second,*** claims to the effect that a particular act (either of commission or of omission) violates one or more human beings;[51] more precisely, claims that in acting for a particular reason or reasons, one is denying that one or more human beings have, or is treating them as if they lack, inherent dignity and is thereby violating them;
>
> ***third,*** claims to the effect that we who affirm that every human being has inherent dignity and is therefore inviolable should do what we can, all things considered, to try to diminish unwarranted human suffering; in particular, we should work to get laws on the books if they are not already there, and to keep them there if they are, that (would) protect certain rights (rights-claims): rights not to be subjected to actions/policies that violate human beings, or that otherwise are a source of unwarranted human suf-

50. HABERMAS, *supra* note 4, at 153.

51. A claim to the effect that a particular act violates a *human being* should not be confused with a claim that a particular act violates a *legal right*. The former claim is a moral claim; the latter, a legal claim.

fering.

Now, this is not to say that there is a universal moral consensus. There is not. Not everyone affirms that every human being is inviolable. Some believe (or act as if they do, or both) that no human beings are inviolable; others, that only some human beings are inviolable. Moreover, not everyone who affirms that every human being is inviolable believes that the ground of human inviolability is the inherent dignity of every human being. Nor does everyone who believes that the ground of human inviolability is the human dignity of every human being give the same account of why – in virtue of what – every human being has human dignity.[52]

Although we who affirm that every human being has inherent dignity and is therefore inviolable – that is, we who affirm the morality of human rights – agree among ourselves about what many of the acts are that violate human beings, and also about what many of the rights (rights-claims) are that we should want the law to protect, we nonetheless sometimes disagree among ourselves about whether a particular act violates human beings, or about whether we should want the law to protect a particular right. For example, TOTFers, who constitute the vast majority of the Elysian citizenry, affirm the morality of human rights, but they nonetheless disagree that the law should protect the right to freedom of religion.

Moreover, even we who affirm the morality of human rights and agree that the law should protect a particular right sometimes disagree among ourselves about what the right requires (or would require, if the law protected it) in one or another context. Indeed, the international law of human rights anticipates and accommodates some such differences. For example, Article 18(3) of the ICCPR states that "[f]reedom to manifest one's religion or belief 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." (Some other core provisions of the ICCPR are substantially similar: Article 19(3), which concerns freedom of expression; Article 21, which concerns freedom of peaceful assembly; Article 22(2), which concerns freedom of association.) Nations do not all face precisely the

52. IN DEFENSE OF HUMAN DIGNITY, *supra* note 9.

same problems with respect to public safety, public order or public health. Moreover, nations do not all have precisely the same moral culture; the content of the public morals can and sometimes does differ, in part, from one nation to another. Consequently, the government of one nation may reasonably deem a particular law or regulation "necessary to protect public safety, order, health, or morals" even though in another nation such a law/regulation would be gratuitous. This is why, for example, one might be inclined to conclude that the recent French ban on students wearing, "[in] schools, colleges and public lycées," symbols that "conspicuously manifest a religious affiliation" does not violate the right to freedom of religion even though such a ban would be quite unnecessary in, say, Australia.[53] And just as the international law of human rights accommodates relevant differences between France and Australia, it also accommodates relevant differences between, say, Australia and Malaysia.

> In contrast to criticisms which tend to portray international human rights norms as being not only hostile, but also impervious, to non-Western cultural influences, [it is clear] that there is enormous scope for such differences to be taken into account in the implementation of those norms at the domestic level. . . . [I]dentical norms can lead to very different results, but results that may well be, in the light of the prevailing and other cultural circumstances, largely compatible with the international norms.[54]

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53. *See* Michael Hirst, *French Vote to Ban Headscarves "Will Backfire,"* TABLET, Feb. 14, 2004, at 26.

> [Last week, deputies of the French National Assembly] voted 494 to 36 in favour of the bill, which [provides:]. . . "In schools, colleges and public lycées, the wearing of signs by pupils which conspicuously manifest a religious affiliation is forbidden." . . . The bill now goes to the Senate for debate early next month [March 2004], where it is likely to be passed. The "conspicuous" religious symbols . . . now banned from public classrooms include Islamic headscarves, Jewish skullcaps and Christian crosses. Once the bill takes effect with the new school year in September, sanctions for refusing to remove the banned items will range from a warning to temporary suspension to expulsion from school.

Id. The French ban took effect on Sept. 2, 2004. Elaine Sciolino, *Ban on Head Scarves Takes Effect in France*, N.Y. TIMES, Sept. 3, 2004, at A8.

54. Philip Alston, *The Best Interests Principle: Towards a Reconciliation*

The Vienna Declaration and Programme of Action (Vienna Declaration) – adopted in June of 1993 by the representatives of 172 states at the World Conference on Human Rights – acknowledges that "the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind . . . ."[55] Respect for what we may call "cultural relativity" plays, and should play, an important role in the international law of human rights:

Political histories, cultural legacies, economic conditions, and human rights problems do differ not only among the First, Second, and Third Worlds, but within each world as well. In the practical world of implementing universal human rights, this needs to be kept in mind. Internationally recognized human rights provide general direction. They do not provide a plan of implementation that can be applied mechanically, irrespective of political, economic, and cultural diversity.[56]

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of Culture and Human Rights, 8 INT'L J. L. & FAM. 1, 19, 22-23 (1994). "Even within the common law tradition, American and English law have been shown to function very differently, in large part because of the different legal, political and institutional cultures in which the law operates." *Id.* at 23.

55. Vienna Declaration and Programme of Action , U.N. Doc. A/Conf. 157/23 (1993) [hereinafter Vienna Declaration].

56. Jack Donnelly, *Post-Cold War Reflections on the International Law of Human Rights*, 8 ETHICS & INT'L AFF. 97, 113 (1994); *cf.* Alston, *supra* note 54, at 20.

> Perhaps the best way to understand the role that culture can and does play in this regard is by analogy to the concept of the margin of appreciation within the jurisprudence developed under the European Convention on Human Rights. The analogy also serves to emphasize that the cultural dimension is a universal one and not only something which comes unto play when we are considering non-Western cultural factors. The margin of appreciation concept is nowhere to be found in the text of the European Convention. Rather, it is a doctrine which has been developed by the European Commission and Court of Human Rights to enable an appropriate degree of discretion to be accorded to national authorities in their application of the provisions of the Convention. Cultural considerations have figured very prominently in the factors for which the European supervisory organs have been prepared to make some allowance. Moreover, many of the cases in which the doctrine has been most clearly applied and explored have concerned the notion of permissible restrictions upon rights, the organs have also made considerable use of the doctrine in determining the actual scope of many of the rights.

Id. On the "margin of appreciation" doctrine in the European Convention system, see generally INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS,

Similarly, respect for cultural relativity must play an important role in the universal morality of human rights. As no less steadfast an opponent of "moral relativism" than John Paul II[57] emphasized: "Certainly there is a need to seek out and to discover the most adequate formulation for universal and permanent moral norms *in the light of different cultural contexts* . . . ."[58]

Respect, however, is not the same as uncritical deference.[59] It is always important to undertake a careful scrutiny of "claims of relativism in terms of their foundations within the cultural, philosophical, or religious traditions of societies," precisely because many such claims "have no foundation whatsoever in such traditions."[60] But even when such scrutiny yields the conclusion that a

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MORALITY 854-57 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000).

57. *See* John Paul II, *Veritatis Splendor*, 23 ORIGINS 297 (1993).

> 53. The great concern of our contemporaries for historicity and for culture has led some to call into question . . . the existence of "objective norms of morality" valid for all peoples of the present and the future, as for those of the past. . . . It must certainly be admitted that man always exists in a particular culture, but it must also be admitted that man is not exhaustively defined by the same culture. . . . [T]he very progress of cultures demonstrates that there is something in man which transcends those cultures. This "something" is precisely human nature: This nature is itself the measure of culture and the condition ensuring that man does not become the prisoner of any of his cultures, but asserts his personal dignity by living in accordance with the profound truth of his being.

Id. at 314 (citation omitted).

58. *Id.* (emphasis added).

59. "We respect the religious, social, and cultural characteristics that make each country unique. But we cannot let cultural relativism become the last refuge of repression." So stated U.S. Secretary of State Warren Christopher in an address to the 1993 World Conference on Human Rights. Warren Christopher, *Democracy and Human Rights: Where America Stands*, 4 U.S. DEP'T ST. DISPATCH 441, 442 (1993).

60. Philip Alston, *The UN's Human Rights Record: From San Francisco to Vienna and Beyond*, 16 HUM. RTS. Q. 375, 384 (1994); *see also* Anne F. Bayefsky, *Cultural Sovereignty, Relativism, and International Human Rights: New Excuses for Old Strategies*, 9 RATIO JURIS 42, 52 (1996) ("There is nothing romantic about the claims to cultural sovereignty. The claim is firmly rooted in the old-fashioned strategies of non-interference, supremacy and control."); *cf.* Michael Posner, *Rally Round Human Rights*, 97 FOREIGN POL'Y 133, 137-38 (1994-95).

> Many of the Asian governments, like those of China and Singapore, that are most critical of U.S. human rights policy and seek to characterize it as Western-based and culturally biased are among the declining number of regimes that absolutely prevent any inde-

"claim of relativism" *does* have a genuine foundation in "the cultural, philosophical, or religious traditions" of a society, that is scarcely the end of the matter. In the very same sentence in which it acknowledges that the differences among nations and regions "must be borne in mind," the Vienna Declaration goes on to insist that, *nonetheless*, "it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms."[61]

The distinguished philosopher Charles Taylor has recommended "a presumption of equal worth" of cultures as "a starting hypothesis with which we ought to approach the study of any other culture."[62] Taylor explains:

> [I]t is reasonable to suppose that cultures that have provided the horizon of meaning for large numbers of human beings, of diverse characters and temperaments, over a long period of time – that have, in other words, articu-

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pendent human rights groups from operating. Their claims of cultural relativism can only be sustained if they continue to prevent their own people from raising human rights issues. But they are fighting a losing battle. Recent experience in countries as diverse as Chile, Kuwait, Nigeria, South Africa, and Sri Lanka leave no doubt that where people are allowed to organize and advocate their own human rights, they will do so. The common denominators in this area are much stronger than the cultural divisions.

Id. For an example of the Chinese government's effort to deflect the West's emphasis on human rights, see Liu Huaqui, Head of the Chinese Delegation, Speech at the World Conference on Human Rights (June 15, 1993), *in* Pieter van Dijk, *A Common Standard of Achievement: About Universal Validity and Uniform Interpretation of International Human Rights Norms,* 13 NETH. Q. HUM. RTS. 105, 105 (1995). *See also* Information Office of the State Council of the Peoples' Republic of China, Human Rights in China (1991), *reprinted in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 56, at 547-48. For a kindred statement on behalf of the countries of East and Southeast Asia, including Singapore, see Bilhari Kausikan, *Asia's Differing Standard*, 92 FOREIGN POL'Y 24 (1993). For a skeptical look at the claim "that there is a distinct Asian approach to human rights", see Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 AUSTRALIANN Y.B. INT'L L. 1, 5-6 (1994).

61. Vienna Declaration, *supra* note 55(5). For a similar discussion by Secretary Christopher, in his address to the 1993 World Conference on Human Rights see Christopher, *supra* note 59, at 442 ("That *each* of us comes from different cultures absolves *none* of us from our obligation to comply with the Universal Declaration [on Human Rights].").

62. Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 25, 72 (Amy Gutmann ed., 1992); *see id.* at 66-73.

> lated their sense of the good, the holy, the admirable – are almost certain to have something that deserves our admiration and respect, even if it is accompanied by much that we have to abhor and reject.[63]

As Taylor then insists, "it would take a supreme arrogance to discount this possibility *a priori*."[64] But again, respect is not uncritical deference; Taylor's sensible presumption is, after all, a *rebuttable* presumption: We must not confuse the moral stance that is or might be appropriate at the opening – at the beginning of our evaluation – with the stance appropriate at the close. Respect for cultural relativity does not mean that anything goes.[65]

Given my ignorance about the details of the situation in France, I am agnostic about whether the recent French ban on students wearing certain religious symbols in public schools violates the right to freedom of religion. So, I am agnostic about how the European Court of Human Rights should rule in the case, if a case is brought.[66] France is a party not only to the ICCPR, but also to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which protects, in Article 9, a right to religious freedom that is virtually identical to the right that Article 18 of the ICCPR protects. I assume that the best reason for doubting that the ban violates the right to freedom of religion is that it is either correct or, at least, reasonable to think that, as President Chirac and members of the French National Assembly have argued, the present climate of religious division and hostility

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63. *Id.* at 72-73.

64. *Id.* at 73.

65. *See* Alston, *supra* note 54, at 20 ("Footbinding in pre-World War II China, child slavery or bondage, and female infanticide in various societies are examples of practices in relation to which culture-based arguments have already had to yield (in theory, if not always in practice) in favour of human rights norms.").

66. Ruti Teitel is not agnostic. *See* Ruti Teitel, *Through the Veil, Darkly*, FINDLAW (Feb. 23, 2004), *at* http://writ.findlaw.com/commentary/20040216_teitel.html (arguing that the ban violates the right to religious freedom and is an instance of religious discrimination). *But see* Leyla Sahin v. Turkey, App. No. 44744/98, ¶ 97 (June 29, 2004) (explaining that "[i]n democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."); Aisha Labi, *European Court Upholds Turkey's Ban on Student Headscarves*, 45 CHRON. OF HIGHER EDUC., July 16, 2004, at A34.

in France makes the ban a necessary strategy for protecting the public safety and/or the public order.[67] Correct or reasonable, that is, from the perspective of those who must judge whether the ban violates the right to freedom of religion, not from the perspective of those who enacted the ban.[68]

Now recall the Elysian government's justification for its ban on non-TOTFers' worshipping or proselytizing in public. Although TOTFers vigorously affirm the morality of human rights, they do not believe the suffering that some non-TOTFers may experience in consequence of the ban is "unwarranted" suffering. Because of their exclusivist theology of salvation, TOTFers believe that the law is justified (and the suffering therefore not unwarranted) as a loving effort to protect all Elysians, including non-TOTFers, from the worst fate – the most horrific fate – imaginable: the loss of eternal salvation. However, we who reject exclusivist theologies of salvation have a different understanding of the suffering that Elysian non-TOTFers endure in consequence of the ban: Because it is based on a mistaken theology, the rationale for the ban is false, and the suffering of non-TOTFers is, absent another, true rationale, unwarranted. From our perspective, and in our judgment, the conclusion is inescapable that the Elysian ban is fundamentally inconsistent with the right to freedom of religion.

Indeed, it is precisely because of their exclusivist theology of salvation that TOTFers – just like, for example, the pre-Vatican II

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67. *See generally* Guy Coq, *Scarves and Symbols*, N.Y. TIMES, Jan. 30, 2004, at A25; Hirst, *supra* note 53, at 26; *Elaine* Sciolino, *France Has a State Religion: Secularism*, N.Y. TIMES, Feb. 8, 2004, at 4; Alain Woodrow, *Tricolour Versus the Scarf*, TABLET, Jan. 3, 2004, at 6; *cf.* Tom Heneghan, *Islam a la francaise*, TABLET, Oct. 2, 2004, at 4; Elaine Sciolino, *Europe Struggling to Train New Breed of Muslim Clerics*, N.Y. TIMES, Oct. 18, 2004, at A1.

68. I can imagine someone saying at this point that no perspective is better than any other perspective and therefore no perspective should be privileged over any other perspective. But this would be a silly thing to say, as I have explained elsewhere. *See* MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS 80-81 (Oxford University Press 1998); *cf.* Gilbert Harman, *Human Flourishing, Ethics, and Liberty*, 12 PHIL. & PUB. AFF. 307, 321 (1983).

> [We can] condemn other people as evil, bad, or dangerous by our lights, or take them to be our enemies. Nothing prevents us from using our values to judge other people and other moralities. But we only fool ourselves if we think our values give *reasons* to others who do not accept those values.

Id.

Catholic Church,[69] and the kind of Islam that dominates in Saudi Arabia – reject the proposition that international law should protect the right to freedom of religion, which includes, at its center, the freedom to worship and otherwise practice one's religion in public (as well as in private), and to try to persuade others to embrace one's religion. Accordingly, the government of Elysium has been steadfast in its refusal to ratify any treaty that, like the ICCPR, protects the right to this degree of religious freedom. The Elysian constitution does protect a degree of religious freedom, but to a lesser degree than that protected by the ICCPR, the European Convention on Human Rights, and the American Convention on Human Rights.[70] Under the Elysian Constitution, as I reported earlier, government may not: (1) try to coerce anyone into accepting TOTF as her religion, (2) require any citizen to support, financially or otherwise, TOTF, or (3) forbid anyone to practice her religion in private.

In international law, some rights have a special status: their violation is understood to be a crime whether or not the perpetrator has ratified any treaty making the violation a crime. Which rights enjoy this status? Article 5 of the Statute of the International Criminal Court lists four categories of crimes within the jurisdiction of the court: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[71] A crime in any of the four categories consists of an act or acts that violate a right(s) protected by the international law of human rights.

Let us focus, for present purposes, on crimes in the second category. Article 7 states that "crime against humanity" means any of several acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[72] The specified acts include: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape or any other form of sexual violence of comparable gravity; persecution on political, racial, national, ethnic, cultural,

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69. *See supra* note 40 and accompanying text.
70. See *supra* note 29.
71. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 4 (Antonio Cassese ed., 2002).
72. *Id.* at 5.

religious, gender, or other grounds; enforced disappearance of persons; and apartheid.[73] As broad as the Article 7 list is, there are many rights protected by the international legal system (e.g., by the ICCPR) whose violation is not a crime against humanity. The right to freedom of religion is one such right: Elysium does not commit what international law recognizes as a crime against humanity in forbidding non-TOTFers to practice their religion in public or to proselytize. The U.N. Security Council is not about to take steps, even nonmilitary steps, to try to force Elysium (or, e.g., Saudi Arabia) to cease and desist.

This is not to say, however, that we who reject exclusivist theologies of salvation and applaud the ICCPR's protection of the right to freedom of religion should not try to persuade Elysium to ratify the right to freedom of religion and to abandon any policies that violate that right. But because the cultural divide that separates us from TOTFers is so great – they embrace an exclusivist theology, we reject every such theology – we may be skeptical that intercultural dialogue with Elysian TOTFers can be productive. Cultural relativity is a fact. Is productive intercultural dialogue even a possibility? (This question is relevant, of course, not just to the right to freedom of religion but also to many other rights.) Undeniably, achieving productive intercultural dialogue is sometimes a daunting challenge,[74] though sometimes no more daunting a

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73. *Id.*

74. That the challenge is sometimes daunting does not mean that it is impossible. *See, e.g.*, David Hollenbach, S.J., *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 891 (1993).

> [T]he Catholic tradition provides some noteworthy evidence that discourse across the boundaries of diverse communities is both possible and potentially fruitful when it is pursued seriously. This tradition, in its better moments, has experienced considerable success in efforts to bridge the divisions that have separated it from other communities with other understandings of the good life. In the first and second centuries, the early Christian community moved from being a small Palestinian sect to active encounter with the Hellenistic and Roman worlds. In the fourth century, Augustine brought biblical faith into dialogue with Stoic and Neoplatonic thought. His efforts profoundly transformed both Christian and Graeco-Roman thought and practice. In the thirteenth century Thomas Aquinas once again transformed Western Christianity by appropriating ideas from Aristotle that he had learned from Arab Muslims and from Jews. In the process he also transformed Aristotelian ways of thinking in fundamental ways. Not the least important of these transformations was

challenge than achieving productive intracultural dialogue.[75] Nonetheless,

> there is, in principle, [no] limit to the possibility of overcoming [moral disagreement. . . . [A]t no point are we justified in terminating an unresolved argument, for it always remains open to us to persevere with it still further. The next stage of argument may yet bring an enlargement of moral vision to one of the contending parties, allowing this contender to integrate the perspective of the other into his own in a relation of part to whole. . . . Therefore at any point there remains the possibility, though not the guarantee, of resolving deep conflict. . . . Confronted with apparent stalemate, there is no need to give in to moral or intellectual "pluralism", for it always

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> his insistence that the political life of a people is not the highest realization of the good of which they are capable – an insight that lies at the root of constitutional theories of limited government. And though the Church resisted the liberal discovery of modern freedoms through much of the modern period, liberalism has been transforming Catholicism once again through the last half of our own century. The memory of these events in social and intellectual history as well as the experience of the Catholic Church since the Second Vatican Council leads me to hope that communities holding different visions of the good life can get somewhere if they are willing to risk conversation and argument about these visions. . . .

Id.

75. *See* Amélie Oksenberg Rorty, *Relativism, Persons, and Practices*, *in* RELATIVISM: INTERPRETATION AND CONFRONTATION 418, 418 (Michael Krausz ed., 1989).

> Sometimes there is unexpectedly subtle and refined communication across radically different cultures; sometimes there is insurmountable bafflement and systematic misunderstanding between relatively close cultures. For the most part, however, we live in the interesting intermediate grey area of partial success and partial failure of interpretation and communication. The grey area is to be found at home among neighbors as well as abroad among strangers . . .

Id. See also Richard Rorty, *Solidarity or Objectivity?*, *in* POST-ANALYTIC PHILOSOPHY 3, 9 (John Rajchman & Cornel West eds., 1985)

> [T]he distinction between different cultures does not differ in kind from the distinction between theories held by members of a single culture. The Tasmanian aborigines and the British colonists had trouble communicating, but this trouble was different only in extent from the difficulties in communication experienced by Gladstone and Disraeli.

Id.

remains open to us to say "Press on with the argument".[76]

Again, we who affirm the morality of human rights should do what we can, all things considered, to try to diminish unwarranted human suffering. "Pressing on with the argument" is not only one of the things we can do – it is the *least* we can do – to try to relieve the unwarranted suffering that some human beings endure in consequence of being denied religious freedom.[77]

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76. RONALD BEINER, POLITICAL JUDGMENT 186 n.17 (1983); *see also* Philippa Foot, *Moral Relativism*, *in* RELATIVISM: COGNITIVE AND MORAL 152, 164 (Jack W. Meiland & Michael Krausz eds., 1982).

> One wonders . . . why people who say this kind of thing [that moral discourse can go only a little way, at best, in resolving disagreements] are so sure that they know where discussions will lead and therefore where they will end. It is, I think, a fault on the part of relativists, and subjectivists generally, that they are ready to make pronouncements about the later part of moral arguments . . . without being able to trace the intermediate steps.

Id. For Foot's perceptive explanation why "relativists, and subjectivists generally," are not able to take the whole journey, see *id.* at 165-66.

77. It bears emphasis here that, as Jürgen Habermas has explained, any effort to achieve productive intercultural dialogue imposes serious demands on those of us in western societies:

> Notwithstanding their European origins, . . . [i]n Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victims of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity. But to the extent that human rights are accepted as a transcultural language, disagreements over their appropriate interpretation between cultures have only intensified. Insofar as the intercultural discourse on human rights occurs under conditions of reciprocal recognition, it also has the potential of leading the West toward a decentered understanding of a normative construct that no longer remains the property of Europeans, and can no longer mirror the particularities of one culture. . . . [T]he West, molded by the Judaeo-Christian tradition, must reflect on one of its greatest cultural achievements: the capacity for decentering one's own perspectives, self-reflection, and a self-critical distancing from one's own traditions. The West must abstain from any non-discursive means, must be only one voice among many, in the hermeneutical conversation among cultures. In a word: overcoming Euro centrism demands that the West make use of its own cognitive resources. This is, God knows, easier said than done . . . .

HABERMAS, *supra* note 4, at 153-54.