Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law

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The case of proselytism presents a tangle of competing claims: on the one hand, the rights of proselytizers to free exercise of religion and freedom of speech; on the other hand, the rights of targets of proselytism to change their religion, peacefully to have or to maintain a particular religious tradition, and to be free from injury to religious feelings. Clashes between these claims of right are today generating acute tensions in relations between states and peoples, a state of affairs starkly illustrated by the recent Danish cartoons controversy. Irrespective of their resolution in any particular domestic legal system, how should such conflicts be addressed as a matter of international law? In noticing that surpisingly little attention has been paid to this question in the literature, this Article argues that the key to unlocking the puzzle is to recognize that the right to freedom of religion and belief generates competing claims not only with other fundamental rights such as free speech, but within the right to religious liberty itself. This insight suggests at least three challenges to theories of rights in the Lockean and Kantian traditions: first, the problem of the incommensurability of values, which the liberal algebra of rights is unable to reconcile; second, the complex conceptual problems associated with rights foundationalism; and third, the intrinsic value of communal goods and their relationship to personal autonomy. Once these limitations and blindspots in rights discourse are acknowledged, a value pluralist approach is argued to offer a preferable path by allowing us to reimagine liberal theory in intersubjective and hermeneutic terms.

I. Introduction

What do the following cases have in common?

- (1) A Jehovah's Witness is arrested for violating an ordinance requiring a permit for solicitation and for the common law offense of inciting a breach of the peace after distributing religious materials in a predominantly Roman Catholic neighborbood and playing a phonograph record with an anti-Catholic message to two pedestrians.¹
- (2) In response to sustained and successful Pentecostal missionary activity, the South African Hindu Anti-Defamation Coalition calls on

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^{1.} Cantwell v. Connecticut, 310 U.S. 296 (1940).

"Christians, their pastors, evangelists and churches who seek to ridicule Hindus and Hindutva and cunningly convert their beloved Hindu Sisters and Brothers to Christianity using devious means to stop doing so."²

- (3) France bans the wearing of ostentatious religious symbols in its public schools in part because the practice constitutes an exercise of pressure, provocation, proselytizing, and propaganda.³
- (4) The Russian Parliament enacts a law in 1997 imposing restrictions on the activities of foreign missionaries and assigning different rights to religious organizations on the basis of their length of presence in Russia.⁴
- (5) A Danish newspaper publishes twelve editorial cartoons depicting the Islamic prophet Muhammad, leading to widespread and violent protests both in Denmark and across the Islamic world.⁵

One thing these cases have in common is that they all involve the right to freedom of religion and belief. Another is that they all involve "communicative acts" that raise potential rights claims beyond religious freedom, such as to free speech, freedom of association, and freedom of assembly. Case (1) involves questions familiar to U.S. First Amendment jurisprudence—individual claims of right both to freedom of expression and free exercise of religion, and the extent of the state's power to limit such rights to protect public order. In Case (2), it is not only individual but collective rights that appear most at stake: a situated religious, ethnic, and cultural minority asserting claims of right against what is perceived to be the harmful proselytizing activities of another group. In addition to addressing these sets of claims, Case (3) raises further questions concerning the identity of the state itself and its background relationship to minority groups and religion in general. In Case (4), each of the preceding elements is present with the further complication of a law targeting not domestic but transnational actors and relying for its justification on complex notions of citizenship, nationalism, history, and political transition. Finally, unlike the previous examples,

^{2.} S. African Hindu Anti-Defamation Coalition Newsletter (Durban, S. Afr.), 1997, reprinted in Thillayvel Naidoo, Proselytism Within South Africa's Hindu Community, 14 Emory Int'l. L. Rev. 1121, 1145 (2000).

^{3.} Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, at 5190.

^{4.} O Svobode Sovesti i o Religioznikh Objedinenijah [On the Freedom of Conscience and Religious Associations], Sobranie Zakonodatel'stva Rossiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1997, No. 39, Item 4465 (Federal Law No. 125-FZ).

^{5.} Muhammeds ansigt, Jyllands-Posten, Sept. 30, 2005, reprinted in Kevin Boyle, The Danish Cartoons, 24 Neth. Q. Hum. Rts., 185–91 (2006).

^{6.} The term "communicative acts" is from Habermas and is used here to mean an act having an implicit *telos* (mutual understanding among human beings). Thus, communicative action "presupposes the use of language as a medium for a kind of reaching understanding, in the course of which participants, through relating to a world, reciprocally raise validity claims that can be accepted or contested." JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 99 (Thomas McCarthy trans., 1984).

Case (5) involves not religious speech but speech directed at ridiculing, insulting, and otherwise attacking persons holding particular religious beliefs and convictions.

Irrespective of how such cases may be resolved in any particular domestic legal system, how should they be addressed as matters of international law? Do the communicative acts so described violate or are they protected by international human rights norms regarding freedom of religion and belief and other associated rights? What, in particular, would we need to know in order to make such a determination? Indeed, is such a determination possible either as a matter of law or at the level of theory?

While such questions have received considerable attention as matters of constitutional theory and in moral and political philosophy,⁷ they have yet to be seriously addressed as matters of international law.⁸ Part of the reason for this is the sheer complexity and interrelated nature of the normative claims involved. The task is not merely one of untangling Hohfeldian jural relations or analyzing the correlation between rights and duties.⁹ International and regional human rights instruments recognize at least four rights directly related to religion and belief: the right to freedom of thought, conscience, and religion;¹⁰ the right to equal protection of the law, including the prohibition of discrimination on the basis of religion;¹¹ the right of persons belonging to religious minorities to profess and practice their relig-

^{7.} Although, even here, there has been a general unwillingness in Western legal and political philosophy to recognize collective values as being of moral concern and a tacit assumption of the general correspondence between nation and state—that the political community is coterminous with a dominant majority ethnic, religious, and cultural community. See, e.g., WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 74 (1995) (arguing that "the demands of national minorities and ethnic groups raise a deep challenge to all Western political traditions" and that these traditions "have all been guilty of ethnocentric assumptions, or of over-generalizing particular cases, or of conflating contingent political strategy with enduring moral principle"). In the realm of law existing between nation-states, however, such questions are not so easily avoided nor are such assumptions so obviously made.

^{8.} A partial exception is the recent writing of Professor Koskenniemi. See, e.g., Martti Koskenniemi, Human Rights, Politics, and Love, 13 Finnish Y.B. Int'l. L. 79, 85 (2002) (noting that in "every important social conflict, the claims of opposing sides may be described as rights claims" and that "sometimes both sides are able to rely on the same right"). Koskenniemi has yet, however, to explore the conceptual and jurisprudential implications of such conflicts for international human rights law. See also David Kennedy, The International Human Rights Movement: Part of the Problem?, 15 Harv. Hum. Rts. J. 101, 116 (2002) (arguing that human rights "promises a legal vocabulary for achieving justice outside the clash of political interest," but that "[s]uch a vocabulary is not available: rights conflict with one another").

^{9.} See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions As Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913).

^{10.} See, e.g., International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief arts. 1, 6, G.A. Res. 36/55, U.N. Doc. A/36/684 (Nov. 25, 1981) [hereinafter Declaration on Religious Intolerance]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222 [hereinafter ECHR]; Cairo Declaration on Human Rights in Islam arts. 10, 18(a), 24, 25, U.N. GAOR, 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (Aug. 5, 1990) [hereinafter Cairo Declaration].

^{11.} See, e.g., ICCPR, supra note 10, arts. 2(1), 26; Declaration on Religious Intolerance, supra note 10, arts. 2, 3, 4; ECHR, supra note 10, art. 14; Cairo Declaration, supra note 10, art. 1.

ion;¹² and the right to protection from incitement to discrimination, hostility, or violence.¹³ In addition to these four rights, a number of other rights and freedoms bear a close relationship to religion and belief.¹⁴ These include most directly, as noted above, the rights to freedom of opinion and expression, freedom of assembly, and freedom of association.¹⁵ In particular, religious considerations have historically had a significant impact on the scope of freedom of opinion and expression, for example, in relation to laws prohibiting blasphemy or injury to religious feelings.

It is this overlapping constellation of rights that is the subject of my inquiry. In order to grasp the dialectical nature of the claims involved and get a sense of what ultimately is at stake in their resolution, the Article narrows its scope of analysis by considering a single hypothetical law pertaining to proselytism. This approach has two virtues. First, by carefully analyzing the tensions between the competing claims of proselytizers as subject and the targets of proselytism as object we gain critical insights into the nature of religious freedom as a fundamental norm embedded in international law. Second, and this is the thesis of the Article, such an analysis reveals that the right to freedom of religion and belief generates competing claims not only with other fundamental rights (such as freedom of expression) but also within the right to religious liberty itself.

Normative conflicts of both these kinds raise serious challenges to the determinacy and efficacy of the concept of rights and, as a direct result, to liberal rights regimes in general. They allow us to see more clearly the extent to which liberal theory in fact rests on a particular and contingent view of pluralism. This view is often described as being premised on the "nondiscrimination" principle, which is reflected in the twin features of the liberal state: the "privatization" and separation of religion from the state, and the

^{12.} See, e.g., ICCPR, supra note 10, art. 27; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities arts. 1–4, 8(3), G.A. Res. 47/135, U.N. GAOR, plen. mtg. 92, Supp. No. 49, Annex at 210, U.N. Doc. A/RES/47/135 (Dec. 18, 1992); Framework Convention for the Protection of National Minorities arts. 3–5, 8, 12, 13, 15, 17, 19–21, Feb. 1, 1995, 34 I.L.M. 351 [hereinafter European Framework Convention].

^{13.} See ICCPR, supra note 10, arts. 19, 20(2); International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter Race Convention]; European Framework Convention, supra note 12, art. 6; Cairo Declaration, supra note 10, art. 22.

^{14.} As noted in numerous judicial decisions and by scholars, violations of religious freedom almost invariably abridge other human rights, including the right to life, liberty, and the security of the person; the right to freedom from torture, or cruel, inhuman, or degrading treatment or punishment; the right to freedom from discrimination; the right to a fair and public hearing by an independent and impartial tribunal; the right to freedom of movement and residence; and the right to privacy. These rights and freedoms comprise the penumbral rights that buttress the protection accorded to freedom of religion or belief. See U.N. Econ. & Soc. Council, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Study of Discrimination in the Matter of Religious Rights and Practices, at 21, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960) (prepared by Arcot Krishnaswami) [hereinafter Krishnaswami Study]; John Witte, Jr., Religious Human Rights in Global Perspective: Legal Perspectives xviii (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

^{15.} Certain manifestations of religion or belief—such as the dissemination of religious or other beliefs, assembly for worship, procession or pilgrimage, or the organization of religious institutions—fall within these other freedoms as well.

assertion of a "neutral" public sphere that seeks to maintain its neutrality through rigorous commitment to a scheme of individual rights. Yet on the basis that this is merely one conception among others, so-called "value pluralists" have advanced competing accounts of pluralism that they assert constitute a more robust form of nondiscrimination. On this view, there is a different underlying principle—that of a plurality of *collective* subjects asserting claims of right—and thus a different conception of the state requiring not just non-interference with an individual's putative sphere of liberty but the positive promotion and protection of the religious or cultural beliefs and identities of specific majority and minority groups. ¹⁶

This second form of not *liberal* but *value* pluralism raises a host of difficulties and uncertainties for rights theory. At its core, it rests on the idea that the plurality of valuable options and ways of life are ultimate and irreducible.¹⁷ As a doctrine in moral and political philosophy, value pluralism is thus defined by its anti-monistic position as an ethical theory; by its view that conflicts of values are an intrinsic part of human life and that there is no single right answer in choosing between them; and by its insistence that conflicts between entire ways of life suggest that not only individuals but also communities may be the principal bearers of rights (and duties) in pluralist political orders.¹⁸

If correct, one implication of such a view is that radical choices may need to be made when conflicts between incommensurable values break out within the very idea of liberty itself. This implication raises the disabling prospect that in deciding which among a rival set of "basic liberties" is to be protected, and to what degree, we inescapably must advance controversial arguments about the good. Given that international law recognizes not just individual but also collective claims of right, this controversy will include further and deeper conflicts over competing conceptions of individual and collective goods. These are exactly the kinds of intractable difficulties that liberal rights discourse had hoped to avoid.

The aim of the Article, however, is not to refute liberalism per se or to map out a new theory of religious freedom, but rather to suggest that various liberal maneuvers (of the kind, for example, adopted by Rawls in advancing a "minimalist" conception of human rights in his *Law of Peoples* (2) cannot rescue us from this impasse. Rather, given the variety of normative settlements both within and between different ways of life and the patchwork of dispensations actually existing in the world, the important question for us to ask is whether we can make religious freedom more manageable

^{16.} For discussion on these competing accounts of pluralism, see Peter G. Danchin, Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law, 33 YALE J. INT'L L. 1, 13–16 (2008).

 $^{17.\,}$ See Joseph Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics 155–76 (1994).

^{18.} John Gray, Enlightenment's Wake: Politics and Culture at the Close of the Modern Age 69, 138 (1995).

^{19.} John Rawls, The Law of Peoples (1999).

from a liberal point of view. Once these limitations are recognized, I argue that a value pluralist approach offers a preferable path.

Part II begins by analyzing the practice of proselytism under international human rights law. This includes, in particular, the scope of valid limitations on manifestations of religion and belief and the extent to which limitations analysis turns on a specific conception of the mind-action dichotomy. Part III considers the dialectics of various possible rights claims of proselytizers and the targets of proselytism. On the side of the proselytizer, this encompasses strong claims to the free exercise of religion and to freedom of expression. On the side of the target of proselytism, however, the situation is more complex and encompasses two distinct bundles of claims that appear to be in tension with each other: on the one hand, the freedom to change one's religion or belief and to receive information; on the other, the right to "have or maintain" a religious belief or tradition and to be free from injury to religious feelings. This latter issue, in particular, has been controversial in recent times in the Danish cartoons affair and raises the question whether speech rising to the level of incitement to discrimination, hostility, and violence may and should be restricted. In considering the nature and scope of these competing claims, it is argued that different ways of thinking about religious freedom lead to a pluralism of conceptions not just of the good, but also of the right.

Part IV then illustrates these theoretical points by describing the surprising pluralism in constitutional arrangements and conceptions of the right to religious freedom actually existing in the world. This is illustrated by briefly setting out the tremendous range of relationships, not only inter- but also intra- different faith traditions and the state in national constitutions. Together, this "cultural function" of the nation-state, and its reflection in the disparate forms of overlapping consensus achieved in the particular historical and factual circumstances of different political communities, provides powerful evidence of both the factual and normative dimensions of value pluralism.

Finally Part V argues that, given this great diversity, a value pluralist approach is needed to act as a corrective to three primary limitations and blindspots in contemporary rights discourse. First, value pluralism acknowledges that rights are subject to "disabling indeterminacies" which arise "not merely from the open-texture of their central concepts, but more seriously from incommensurabilities among, and within, the values they invoke."²⁰ This feature of rights discourse is particularly acute in conflicts

^{20.} Gray, *supra* note 18, at 132. For this reason, Gray has advanced what he terms a theory of "agonistic" liberalism, which represents "an application in political philosophy of the moral theory of *value-pluralism*—the theory that there is an irreducible diversity of ultimate values (goods, excellences, options, reasons for action, and so forth) and that when these values come into conflict or competition with one another there is no overarching standard or principle, no common currency or measure, whereby such conflicts can be arbitrated or resolved." *Id.* at 68–69.

involving the right to religious freedom. Second, value pluralism acknowledges, and indeed seeks to transcend, the various difficulties associated with rights foundationalism.²¹ And third, value pluralism acknowledges the intrinsic and undeniable value of communal goods to personal autonomy, rendering impossible a tidy liberal theory in international law. Rather, we should expect different models of toleration and compromised conceptions of neutrality. It is only by recognizing these limitations that new pathways can be found to reimagine liberal theory in intersubjective and hermeneutic terms.

II. Proselytism and The Right to Freedom of Religion and Belief

Consider the following hypothetical national law:

It is an offence to make any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect, or naivety.

This appears *prima facie* to violate the most basic protections of international human rights law regarding freedom of religion or belief. As noted above, all the major international human rights instruments recognize the right to freedom of thought, conscience, and religion, including not only the freedom to hold religious beliefs,²² but also the freedom to "manifest" those beliefs. Article 18 of the International Covenant on Civil and Political Rights provides as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

^{21.} The question of which, if any, grounds for human rights are "universal" or "foundational" is essentially contested. For an illuminating recent discussion, see Joseph Raz, *Human Rights Without Foundations* (Oxford Legal Studies Research Paper No. 14/2007), *available at* http://papers.csrn.com/sol3/papers.cfm?abstract_id=999874 (advancing an antifoundational or "political conception" of human rights).

^{22.} Both the Human Rights Committee and the European Court of Human Rights have indicated that the beliefs protected by provisions recognizing the right to freedom of religion include not only religious beliefs, but, at least, other beliefs of a similar fundamental character, including atheism and agnosticism. See U.N. Hum. Rts. Comm., General Comment No. 22, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993) [hereinafter General Comment No. 22] ("Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."); Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) ¶ 31 (1993) (Article 9 "is also a precious asset for atheists, agnostics, skeptics and the unconcerned.").

- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
- 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.²³

To the extent, then, that proclaiming religious experience and belief, including the attempt to persuade others to adopt new religious beliefs or affiliations, falls within the "manifestation" of those beliefs, the law prohibiting proselytism appears to violate article 18(1). A plain reading of the law suggests, however, that its purpose is not to prohibit all manifestations of religious belief of this kind, but rather only to proscribe certain coercive or harmful expressive conduct undertaken with the aim of trying to change the religious beliefs, affiliations, or identities of others. The question then is how to determine what type of conduct is "coercive" or "harmful," and whether, once so defined, proscribing conduct of this kind is compatible with article 18.

A. Religious Views on Proselytism

Unsurprisingly, different religious traditions view this question in different ways. It is not always easy to discern, however, whether differences between religious groups concern disagreements about appropriate activities on the one hand, or different definitions of proselytism on the other. The Catholic Church, for example, has sought to distinguish between (proper) acts of "Christian witness" and (improper) acts of "proselytism." The Evangelical Lutheran Church in America, for its part, regards "evangelistic

Proselytism embraces whatever violates the right of the human person, Christian or non-Christian, to be free from external coercion in religious matters, or whatever, in the proclamation of the Gospel, does not conform to the ways God draws free men to himself in response to his calls to serve in spirit and in truth.

Study Document, Common Witness and Proselytism, prepared in 1970 by a Joint Theological Commission between the Roman Catholic Church and the World Council of Churches, reprinted in 23 ECUMENICAL REV. ¶¶ 5, 8 (1971); see also J. Paul Martin & Harry Winter, Religious Proselytization, in Proselytization and Communal Self-Determination in Africa 29, 39 (Abdullahi Ahmed An-Na'im ed., 1999); Tad Stahnke, Proselytism and the Freedom to Change Religion in International Human Rights Law, 1999 BYU L. Rev. 251, 255–56.

^{23.} ICCPR, *supra* note 10. The corresponding provisions of other international and regional instruments are based on either article 18 of the ICCPR or article 18 of the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). *See* ECHR, *supra* note 10, art. 9; American Convention on Human Rights art. 12, July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; Declaration on Religious Intolerance, *supra* note 10, art. 1(1).

^{24. &}quot;Christian witness" is defined as the "continuous act by which a Christian or a Christian community proclaims God's acts in history and seeks to reveal Christ as the true light which shines for every man" and is distinguished from "proselytism," which is defined to mean "improper attitudes and behaviour in the practice of Christian witness":

outreach" by its adherents to be a matter of religious obligation, ²⁵ while religious groups such as the Jehovah's Witnesses and the Mormons carry out evangelizing and the distribution of religious literature on a worldwide basis. In some Islamic traditions, proselytism targeted at Muslims is not permitted while proselytism by Muslims directed at nonbelievers is regarded as a religious duty. ²⁶ Given these divergent positions, on what basis is it possible to determine which of these manifestations of religious expression and dissemination of belief are protected by article 18?

B. Article 18 of the Covenant on Civil and Political Rights

A review of the jurisprudence of relevant international courts and committees would suggest the following considerations. First, the scope of the freedom to manifest religion or belief is said to have both "public" and "private" dimensions. The Universal Declaration of Human Rights, the ICCPR, and other international instruments recognize that the freedom to manifest religion or belief encompasses actions taken "either alone or in community with others and [whether] in public or private." It is often noted by scholars and judges that manifestations performed in public and in community with others are more likely to be limited than are manifestations performed alone and in private. All the same, the freedom to manifest religion has an ineliminably "public" dimension, albeit one that international human rights law deems to be subject to more far-reaching limitations than religious practice or observance in "private." This is a complex and critical distinction to which I shall return shortly.

Second, the freedom to manifest religion or belief is expressed in terms of "worship, observance, teaching and practice." Arcot Krishnaswami has commented that these four terms do not circumscribe the scope of the freedom:

^{25.} The Evangelical Lutheran Church in America has issued a mandatory call to all Christians to engage in "evangelistic outreach" on the basis that "[i]n Christ, God calls the church to share the gospel in word and deed, to proclaim the Good News of Jesus Christ, and to witness to God as Creator, Redeemer, and Sanctifier." Stahnke, *supra* note 24, at 256 n.7 (quoting Division of Global Mission, Evangelical Lutheran Church in America, *The Role of the Missionary in the Global Mission of the Evangelical Lutheran Church in America*).

^{26.} See Abdullahi A. An-Na'im, Islamic Foundations of Religious Human Rights, in Religious Human Rights in Global Perspective: Religious Perspectives 337, 352 (John Witte Jr. & Johan D. van der Vyver eds., 1996).

^{27.} Universal Declaration of Human Rights, *supra* note 23, art. 18; *see also* ICCPR, *supra* note 10, art. 18 ("[The right to freedom of thought, conscience, and religion] shall include freedom to have or to adopt a religion or belief of his choice, and freedom, *either individually or in community with others and in public or private*, to manifest his religion or belief in worship, observance, practice and teaching.") (emphasis added).

^{28.} See Krishnaswami Study, supra note 14, at 22. Any limitation on the freedom to manifest religion or belief cannot, however, be supported solely on the ground that the same manifestation is permitted in a different context. For example, limitations on the freedom to worship in public cannot be supported on the basis that worship in private is permitted. See Ahmad v. United Kingdom, App. No. 8160/78, 4 Eur. H.R. Rep. 126, ¶ 5 (1982) (Eur. Comm'n H.R.).

Bearing in mind that on the one hand the [Universal] Declaration was prepared with a view to bringing all religions or beliefs within its compass, and on the other hand that the forms of manifestation, and the weight attached to each of them, vary considerably from one religion to another, it may safely be assumed that the intention was to embrace all possible manifestations of religion or belief within the terms "teaching, practice, worship and observance."²⁹

In similarly expansive terms, the Human Rights Committee has commented that the terms "worship, observance, practice and teaching" should not be narrowly construed and that the freedom to manifest religion or belief "encompasses a broad range of acts."30 In this vein, various international bodies have articulated non-exhaustive lists of acts that fall within the scope of this freedom. Again, the specification of certain acts is not intended to exclude other acts, but to ensure that those acts specified are included. These lists recognize such powers as the ability to obtain an effective legal personality; the ability to own property and make contracts; the ability to maintain places of worship, instructional facilities for clergy, and private educational facilities for children; the ability to print and publish religious works; the ability to solicit donations; the ability to structure and operate institutions according to religious doctrine without control or undue interference from the state; the ability to maintain foreign contacts and receive foreign financial assistance and personnel; and the ability to disseminate religious beliefs.31

On this view, our imagined law prohibiting proselytism is *prima facie* overbroad and violates the freedom to manifest religion or belief.³² How, after all, can a religious adherent bear Christian witness or evangelize without "intrud[ing] on the religious beliefs of a person of a different religious persuasion with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support"? Given that proclaiming religious experience and belief is integral to many major religious traditions, it would be incongruous for the attempt to persuade another to adopt new religious beliefs or a new religious affiliation not to be included within the freedom to manifest religion.

Despite the evident logic of this conclusion, during the drafting of international instruments the question of whether proselytism falls within the scope of the freedom to manifest religion or belief has been a subject of surprising dissensus. While article 12(1) of the American Convention on

^{29.} Krishnaswami Study, supra note 14, at 17.

^{30.} General Comment No. 22, supra note 22, \P 4; see also Arrowsmith v. United Kingdom, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5, 203 (1980).

^{31.} General Comment No. 22, supra note 22, ¶ 4; Declaration on Religious Intolerance, supra note 10, art. 6.

^{32.} Of course before such a judgment can definitively be reached, a limitations analysis of the right to manifest religion or belief is necessary. See infra Part II.C.

Human Rights includes the freedom to "disseminate one's religion or beliefs," neither proselytism nor the freedom to disseminate a religion is expressly mentioned in any of the other international instruments.³³ To the contrary, the drafting history of the ICCPR reveals that in 1947 the following italicized words were deliberately deleted from an early version of article 18 before it was finally adopted by the Commission on Human Rights:

Every person of full age and sound mind shall be free, either alone or in a community with other persons of like mind, to give and receive any form of religious teaching and endeavor to persuade other persons of full age and sound mind of the truth of his beliefs, and in the case of a minor the parent or guardian shall be free to determine what religious teaching he shall receive.³⁴

The absence of express recognition of proselytism or the freedom to disseminate religious beliefs in international instruments as a legitimate manifestation of religion is usually explained by pointing to the "sensitivity" of the issue for many states. The further question of whether such a freedom can be implied in the text of article 18(1) has been similarly contentious. By adopting a "categorical" approach to interpretation, some states have argued that article 18(1) cannot be said to include such a right. Just as "fighting words" or "shouting fire in a crowded theatre" have been held by the U.S. Supreme Court not to fall within the category of protected speech under the First Amendment,³⁵ so too, the argument goes, proselytism falls outside the protected category of a manifestation of religion or belief in article 18(1). The perceived virtue of such an approach is that it avoids the need for any subsequent "balancing"- or "limitations"-style analysis under article 18(3) (see further below).36 But this strategy is ultimately unconvincing. Given the commitment to and centrality of proselytism in so many religious traditions, on what basis can such a practice simply be excluded from the category of a manifestation of religious belief? At the least, such a determination requires consideration of the potentially coercive or harmful effects of prose-

^{33.} Certain acts associated with proselytism are, however, mentioned in international instruments. See, e.g., General Comment No. 22, supra note 22, ¶ 4 ("freedom to prepare and distribute religious texts and publications" is part of teaching and practice of religion); Declaration on Religious Intolerance, supra note 10, art. 6(d) (freedom to "write, issue and disseminate relevant publications"); id. art. 6(f) (freedom to "solicit and receive voluntary financial . . . contributions").

^{34.} MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 194 (1997) (quoting *Report of the Working Group to the Commission on Human Rights*, art. 15, U.N. Doc E/CN.4/56) (emphasis added).

^{35.} For a discussion of the categorical approach to interpreting the free speech clause in the First Amendment, see William van Alstyne, A Graphic Review of the Free Speech Clause, 70 Cal. L. Rev. 107, 121–25 (1982) (noting that the category of "the freedom of speech" does not include perjury, obscenity, defamation, fighting words, commercial fraud, criminal solicitation, etc.). See also Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265 (1981) (discussing "definitional-absolutist" theories of free speech).

^{36.} For a discussion of "ad hoc balancing" versus categorical approaches, see Pierre J. Schlag, An Attack on Categorical Approaches to Freedom of Speech, 30 UCLA L. Rev. 671 (1983).

lytism on the rights and freedoms of others.³⁷ But, as we shall see, once this step is taken then one is already engaged in some form of balancing or limitations-type analysis either as between conflicting rights or as between an asserted public interest and an individual right.

C. The Mind-Action Distinction and Limitations Under Article 18(3)

The third point is that under international human rights law the state can impose valid limitations on the freedom to manifest religion or belief. Consider once again article 18(3) of the ICCPR:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.³⁸

In order to understand the function of article 18(3), we need to return to the distinction made previously between the "private" and the "public" dimensions of freedom of religion or belief. This is sometimes referred to as the distinction between the *forum internum* and the *forum externum*, the former encompassing the right to "have or adopt" a religion or belief, the latter the right to "manifest" that religion or belief.³⁹ The *forum internum* is considered to be absolutely protected from interference by the law, i.e., it is nonderogable and not subject to limitation by the state. This is further reflected in article 18(2), which provides that no person "shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice."⁴⁰ The state, for example, is absolutely prohibited from proscribing

^{37.} Recall that article 18(2) of the ICCPR provides that "[n]o one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice." ICCPR, supra note 10, art. 18(2). To the extent that proselytism is held to constitute coercion, article 18(2) can thus be read as itself limiting the scope of the freedom to manifest religion or belief in article 18(1). Conversely, to the extent that proscribing proselytism is itself a form of coercion (that is, by impairing the freedom to have or adopt a religion one of whose central tenets includes proselytism), article 18(2) can also be read as a limitation on the limitations provisions in article 18(3). The point here is that without a material conception of what constitutes "coercion" or "harm," the bundle of rights claims and limitations in article 18 is indeterminate and unable, on its own terms, to indicate the appropriate limits to the freedom to manifest religion or belief. This raises the related question of whether the "coercion" in article 18(2) covers only state action or whether it includes coercive acts by private actors as well. The text is not clear on this point, although international and regional human rights instruments have generally been interpreted to apply beyond state authority. See, e.g., Velasquez Rodriguez, Ser. C, No. 4, 9 Hum. Rts. L. J. 212 (1988) (Int.-Am. Ct. H.R.). As indicated above, the state then faces a potential conflict of duties: on the one hand, the duty to prevent private acts of harm or coercion; and on the other, in doing so the duty not to violate the individual freedom to manifest religion or fundamental beliefs.

^{38.} The corresponding provision in the European Convention is article 9(2). In U.S. First Amendment jurisprudence, the state's right to limit the manifestation of religious belief was recognized as early as 1878 in *Reynolds v. United States*, 98 U.S. 145 (1878) (rejecting the claim that religious beliefs necessitated, and therefore excused, religious practices that run counter to neutrally enforced criminal laws).

^{39.} On the distinction between the *forum internum* and the *forum externum*, see Bahiyyih G. Tahzib, Freedom of Religion or Belief: Ensuring Effective International Legal Protection 26 (1996). 40. ICCPR, *supra* note 10, art. 18(2).

membership of certain religions under law, from coercing individuals to reveal their religion without consent, or from using threats, physical force, or penal sanctions to compel individuals to adhere to or recant certain religious beliefs.⁴¹

Understood in this way, the forum internum is a narrower concept than the commonly understood meaning of the term "private sphere." It encompasses the internal sphere of personal thought, conscience, or belief and not those external spheres, even if nonstate and therefore technically "private," such as places of worship, the school, or the family, where religious belief may be communicated or acted upon. The purported distinction is thus between thought or conscience on the one hand and action related to belief on the other. The dichotomy between external pressure inducing a forcible change in *inner* belief and external pressure obliging action that runs counter to inner belief is not, however, so easily drawn. There is, unsurprisingly, a rich jurisprudence at both the domestic and international levels that deals with this fragile divide. 42 Consider, as one recent example, the case of Buscarini v. San Marino, in which newly elected members of the parliament of San Marino were required, on pain of losing their parliamentary seats, to take a compulsory oath on the Gospels.⁴³ In challenging this obligation under article 9 of the ECHR, the applicants argued that their right to freedom of religion and conscience had been infringed. The Court held that the obligation to take the oath in this form was a violation of article 9 as it "required them to swear allegiance to a particular religion." However, rather than viewing this as a violation of the nonderogable forum internum under article 9(1), on the grounds that the state was compelling individuals either to recant their religion or belief or to adhere to another religion or belief, the Court avoided this question altogether and held that under the

^{41.} *Id.* In *Darby v. Sweden*, App. No. 11581/85, 187 Eur. Ct. H.R. (ser. A) (1990), the European Court of Human Rights held that article 9(1) "protects everyone from being compelled to be involved in religious activities against his will." *See id.*, annex to the decision of the Court, ¶ 51.

^{42.} The most well-known First Amendment case is West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), where the U.S. Supreme Court held that the Board of Education's resolution making the flag salute a regular part of the school program and requiring all teachers and pupils to participate was unconstitutional. While avoiding the question of whether nonconformist beliefs would exempt individuals from the duty to salute, and deciding the case instead on the basis of unjustified interference with freedom of expression, Justice Jackson stated:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Id. at 642. For a general discussion of cases involving the belief-action distinction in the jurisprudence of the European Court of Human Rights, see Peter Danchin and Lisa Forman, The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities, in Protecting the Human Rights of Religious Minorities in Eastern Europe 192 (Peter G. Danchin and Elizabeth A. Cole eds., 2002) [hereinafter Protecting the Human Rights of Religious Minorities]; see also Carolyn Evans, Freedom of Religion under the European Convention on Human Rights 74–79 (2001) (discussing the difficulties of the internal-external dichotomy in ECHR case law).

^{43.} Buscarini v. San Marino, App. No. 24645/94 (1999) (unreported).

limitations clause in article 9(2), the oath was an unnecessary limitation on the manifestation of religion or belief in a democractic society.⁴⁴

If we apply the mind-action distinction to our imagined law proscribing proselytism, we can again see the difficulty. On one reading, the law infringes on the *forum internum* by imposing a penal sanction compelling adherents of some religious traditions—if not expressly then by its effect—to recant or disavow certain central tenets of their faith.⁴⁵ Conversely, the law can be read not as impinging on the *forum internum* at all—adherents remain free to believe that proselytism is a religious duty—but merely limiting the extent to which religious beliefs can be acted upon in relation to the rights and freedoms of others. Of course, one can imagine varying degrees of legal restriction on proselytizing activities ranging from complete prohibition on the one hand to restrictions in only the most extreme circumstances of harm or coercion (however these concepts are understood) on the other.

On whatever basis such limits are drawn, and however unstable this distinction is in its application,⁴⁶ the general point is that international human rights law imagines an internal or personal sphere of "belief" that is in some sense pre- or extra-social, political, and legal and hence absolutely "inviolable" or "sovereign."⁴⁷ David Kennedy has observed in discussing the historical disentanglement of law from religion: "Religion was to be respected, even honored, in its own sphere—the domain of private commitment and spiritual meaning."⁴⁸ In the conditions of the modern state, religion is thus imagined as having two dimensions: insofar as religion involves actual manifestations of belief and actions in the world, it is subject to regulation and control by the public (political and legal) spheres; insofar as it involves matters of conscience, it is imagined as occupying—in a state of inviolable freedom—the private sphere of personal belief, sentiment, and identity.⁴⁹

^{44.} The Court stated that it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs; consequently, the Court unanimously held that the limitation could not be regarded as "necessary in a democratic society" and was in violation of article 9(2). For a full discussion of this case, see Danchin & Forman, *supra* note 42, 212–13.

^{45.} As recognized in *Wisconsin v. Yoder*, at some point burdening external manifestations of belief will have harmful implications for the internal realm. 406 U.S. 203, 216 (1972) (noting that religion for the Amish was not "simply a matter of theocratic belief" but a "deep religious conviction" that pervaded their whole way of life, interference in which would have the inevitable consequence of interfering with their belief).

^{46.} The assumption that action and belief can be clearly distinguished has been questioned by many scholars. See, e.g., J.E.S. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 238–39 (1987); Gabriel Moens, The Action-Belief Dichotomy and Freedom of Religion, 12 Sydney L. Rev. 195 (1989); Donna Sullivan, Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination, 82 Am. J. Int'l. L. 487, 500–10 (1988).

^{47.} This is also a dominant feature of U.S. First Amendment jurisprudence. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

48. David Kennedy, Losing Faith in the Secular: Law, Religion and the Culture of International Governance,

in Religion and International Law 309, 313 (Mark W. Janis & Carolyn Evans eds., 1999).

^{49.} See, e.g., Talal Asad, Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam 205 (1993) ("The constitution of the modern state required the forcible redefinition

However this distinction is understood and calibrated in practice, the law both constructs and reflects the idea of a legal subject possessing an inviolable inner realm of ideas or beliefs separate from one's actions and "being in the world," whether in the "public" domain of law and politics or in the "private" (but not "inner") domain of temple, school, or family.

This sphere of individual, private conscience forms the protected "core" of the human right to freedom of religion or belief. Its inviolability is both unchallenged and unchallengeable, and rights discourse proceeds from this basic claim to other related claims (but not the reverse). The justification for such inviolability, however, remains obscure and unsettled. Different accounts of human rights point to different theoretical "foundations," whether grounded in ideas of natural law, human dignity, reason, agency, democracy, etc. Some theories point to religion itself as a possible—or arguably, the only—"foundation" of the human rights idea. ⁵⁰ But in a world that includes agnostics, atheists, and nonbelievers, such accounts are generally regarded as falling outside of the secular, modernist mainstream.

I will have more to say concerning the relationship between rights foundationalism and religious freedom in Part V. At this stage, I wish merely to observe that there is a specific conception of the mind-action dichotomy that underlies the international human right to religious freedom. This conception, however justified—and that, as I say, remains a matter of great contestation—generates the various dichotomies that characterize rights discourse in the area of freedom of religion or belief: the idea of a clearly ascertainable and stable separation between private conscience and public reason; the idea of a *forum internum* and a *forum externum*; the idea of private and public spheres. These dichotomies, or "Cartesian dualisms" as they are sometimes termed, are vulnerable, however, to critiques that seek to challenge the historical particularity and ethnocentrism of liberal rights regimes on the grounds that "some privileged understanding of rationality is falsely legitimated by claiming . . . an unwarranted universality." If, in

of religion as belief, and of religious belief, sentiment, and identity as personal matters that belong to the newly emerging space of private (as opposed to public) life.").

^{50.} See, e.g., Michael J. Perry, The Idea of Human Rights: Four Inquiries 11–42 (1998) (ch. 1, "Is the Idea of Human Rights Ineliminably Religious?"). In considering whether the conviction that "every human being is sacred" can have a secular justification or whether it is inescapably religious, Perry concludes:

There is no intelligible (much less persuasive) secular version of the conviction that every human being is sacred; the only intelligible versions are religious. (To say that the only intelligible versions of the conviction are religious is not to say that any religious version is persuasive or even plausible.) The conviction that every human being is sacred is, in my view, inescapably religious—and the idea of human rights is, therefore, ineliminably religious.

Id. at 11-12.

^{51.} See, e.g., RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS AND PRAXIS 19 (1983) (discussing the "Cartesian anxiety" which derives from Descartes' "dualism" in Western philosophy and the quest for secure and stable "foundations" for knowledge—some fixed, ultimate constraints that can secure our thought and action).

other words, the mind-action dichotomy itself were shown to be only one possible conception among others for understanding our knowledge of the world, or even shown to be an illusion, the universality of this assumption, and the various theoretical distinctions that flow from it, would require substantial reconsideration.

Let us proceed, however, on the assumption that the *forum internum* is in the sense indicated "inviolable." It then becomes clear why the *forum externum* is correspondingly regarded as being subject to valid limitations on the grounds set out in article 18(3), i.e., as "prescribed by law" and "necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others."⁵² Given the need to ensure that limitations do not eviscerate the right itself, the Human Rights Committee has stated that the limitations in article 18(3) should be "strictly interpreted."⁵³ Likewise, the European Court of Human Rights ("European Court") has recognized that restrictions imposed on the freedom to manifest religion or belief "call for very strict scrutiny," because such restrictions have a direct impact on "the need to secure true religious pluralism, an inherent feature of the notion of a democratic society."⁵⁴ Thus, it is recognized that there are—at least in theory—specific limits on the state's ability to limit manifestations of religion or belief.

What then does human rights jurisprudence regard as constituting such limits? In the first instance, limitations must be "prescribed by law." This requirement protects against a variety of circumstances related to abuse of the legal process, including limitations that are the result of arbitrary decisionmaking, decisions taken not in compliance with existing law, or pursuant to rules that are not stated with sufficient clarity or specificity (a) to allow persons to know with reasonable certainty the legal consequences of their actions and (b) to allow for application in a nondiscriminatory manner. Second, limitations must be in furtherance of one of the grounds specifically listed in international instruments. Limitations are not permitted on other, unlisted grounds such as national security. Third, limitations must not be applied in such a manner as would vitiate the right to freedom of religion for a particular group. This result may depend upon the centrality of the limited manifestation to a particular religion, or upon the cumula-

^{52.} See General Comment No. 22, supra note 22, ¶ 3.

^{53.} *Id.* ¶ 8.

^{54.} Manoussakis v. Greece, App. No. 18748/91, 23 Eur. H.R. Rep. 387, 407 (1997).

^{55.} ICCPR, supra note 10, art. 18(3); ECHR, supra note 10, art. 9(2); American Convention, supra note 23, art. 12(2).

^{56.} See Krishnaswami Study, supra note 14, at 17–18; Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) ¶ 40 (1993) (problem with vague laws).

^{57.} See ICCPR, supra note 10, art. 18(3); ECHR, supra note 10, art. 9(2); American Convention, supra note 23, art. 12(3); Declaration on Religious Intolerance, supra note 10, art. 1(3).

^{58.} See General Comment No. 22, supra note 22, ¶ 8.

^{59.} See id.

tive effects of a number of limitations.⁶⁰ Fourth, limitations cannot be "imposed in a discriminatory manner."⁶¹ Fifth, limitations cannot be based on a state's determination of the legitimacy of the beliefs that are sought to be manifested.⁶² And sixth, in the words of the Human Rights Committee, "limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated."⁶³

How then would articles 18(2) and (3) apply to our imagined law proscribing proselytism? As we have already seen, article 18(2) is open to conflicting interpretations. On the one hand, a proselytizer may argue that the law coercively impairs her freedom to follow the central tenets of her most deeply held religious beliefs. On the other hand, a person subject to proselytism—assuming that she is an unwilling listener whose consent to the conversation is, in some respect, compromised (a point to which we shall return shortly)—may argue that without the protection of such a law she is subject to a form of coercion and harm that interferes with the peaceful enjoyment of her freedom of religion (which may include religious or non-religious beliefs such as atheism or agnosticism). In other words, both the proselytizer and the target of proselytism can advance rights claims based on freedom of religion or beliefs that are in conflict with each other. The consequence is that, in imposing any limitation under article 18(3), the state will restrict the freedom of religion of either the proselytizer or the target of proselytism. While our imagined law will burden the free exercise of religion of proselytizing faiths, its absence may in certain circumstances burden the peaceful enjoyment of religious or fundamental beliefs of non-proselytizing faiths or groups—assuming, of course, that proselytizing groups are present and active in the state.

How then is the state to draw the appropriate limitation? Here, again, the determination of the validity of our imagined law is open to a number of possible claims of limitation by the state. The law can be said to have been properly prescribed through the democratic process and can arguably be jus-

^{60.} See Krishnaswami Study, supra note 14, at 20 ("[A]ccount must be taken of the fact that even though each of the several limitations taken by itself may be considered permissible, the whole complex of limitations when taken together may be such as to render the exercise of the right nugatory.")

^{61.} For an example of this type of situation, see *Grandrath v. Federal Republic of Germany*, App. No. 2299/64, 10 Y.B. Eur. Conv. on H.R. 626, 678 (1967) (Comm. Ministers) (limitation on right to be free from forced labor, i.e., military conscription, was applied to Jehovah's Witness ministers but not to Lutheran ministers and Catholic priests who were granted conscientious-objector status).

^{62. &}quot;The right to freedom of religion as guaranteed under the [European] Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate." Manoussakis v. Greece, App. No. 18748/91, 23 Eur. H.R. Rep. 387, 408 (1997). This limit should presumably be read in accordance with the ECHR and the ICCPR. ECHR, supra note 10, art. 17 ("Nothing in [this Convention] may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in [this Convention]."). The ICCPR contains virtually identical language. ICCPR, supra note 10, art. 5(1).

^{63.} General Comment No. 22, supra note 22, ¶ 8.

tified on a number of the grounds listed in article 18(3), like the protection of public order, public morals, or the fundamental rights and freedoms of others. The state may argue, for example, that the law is required to prevent public disorder on the grounds that the proselytizing activities of certain religious groups are causing or are likely to cause threats and violence. There may be a history of such violence in the state or such consequences may appear likely under prevailing social conditions. More controversially, the state may argue—as the Greek government did in the case of Manoussakis v. Greece—that any conception of the protection of public order must take into account the fact that an overwhelming proportion of the population is of the same religion (in this case, Greek Orthodox) and that the dominant or national religion has played a central role in the "national conscience" and patriotic history of the nation.⁶⁴ In such circumstances, the activities of a certain religious community or group of religious communities may threaten public order simply by virtue of being visible, different, or successful. While this fact alone may not permit the state to suppress such manifestations of religion or belief as a matter of public policy, it may—so the argument goes-allow the state to impose more narrow, "reasonable" limitations on manifestations of the kind embodied in our envisaged law in order to prevent public disorder.65

Before proceeding further, it is important to note that, quite apart from the question of public order, a limitation of this kind gives rise to a number of other related difficulties. It may, for example, result in claims of differential treatment by restricting the activities of only certain religious groups. His may be the case even if the law (as is the case with our imagined law) is stated to apply to all persons and religious groups. Questions of equal treatment, in turn, call into question the historical relationship between religion and the state with each state's particular religious identity and constitu-

^{64.} Manoussakis, 23 Eur. H.R. Rep. at 404-05.

^{65.} See, e.g., Karl Josef Partsch, Freedom of Conscience and Expression, and Political Freedoms, in The International Bill of Rights: The Covenant on Civil and Political Rights 209, 212-13 (Louis Henkin, ed., 1981) ("[L]imitations on freedom to manifest one's religion cannot be imposed to protect ordre public with its general connotations of national public policy, but only where necessary to protect public order narrowly construed, i.e., to prevent public disorder. A state whose public policy is atheism, for example, cannot invoke Article 18(3) to suppress manifestations of religion or beliefs.").

^{66.} Such claims can arise where states have laws protecting the dominant religious group by restricting the activities of minority religious groups. The Malaysian government, for example, has rejected assertions that its laws prohibiting proselytism directed at Muslims impact upon the right to religious freedom of non-Muslims.

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

U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, ¶ 58, U.N. Doc. E/CN.4/1990/46 (Jan. 22, 1990) (prepared by Angelo Vidal d'Almeida Ribeiro).

tional matrix giving rise to its own complex patchwork of compromises and dispensations.⁶⁷ I wish to put such questions aside for the moment and will return to them in Part IV below.

Similar arguments to those regarding "public order" can be made by the state in relation to the need to protect "public morals," especially in relation to small or unpopular religious groups such as Falun Gong, Hare Krishnas, or Scientologists. 68 It is generally recognized that limitations predicated on the need to protect public morals "must be based on principles not deriving exclusively from a single tradition." 69 Beyond that, however, the exact limits of the concept of "public morals" remains elusive and in practice has been worked out by each state within its margin of appreciation in accordance with its own political, historical, and societal narratives and circumstances. 70

III. CONFLICTING CLAIMS: THE DIALECTICS OF SUBJECT AND OBJECT

Let us turn now to consider limitations made in furtherance of the protection of the "fundamental rights and freedoms of others." It is only on this question that we begin to appreciate the extent of the indeterminacy of the various rights claims that may be advanced under article 18. As a preliminary matter, it is useful to distinguish between the possible rights claims of the proselytizer on the one hand and those of the target of proselytism on the other. I shall leave for later discussion of the broader question of the interests and identity of the state—that is, those overriding interests concerning society or the nation in general that are separate from, but nevertheless linked to, the interest in protecting the rights and freedoms of others.⁷¹

^{67.} For example, "[f]rom the perspective of the Malaysian government, the unity and stability of the multi-ethnic, multi-religious State of Malaysia is dependent upon the preservation and strengthening of the Islamic character of the State and Muslim institutions." Stahnke, *supra* note 24, at 308.

^{68.} See, e.g., David Little, Religious Minorities and Religious Freedom: An Overview, in Protecting the Human Rights of Religious Minorities, supra note 42, at 33, 42–46 (discussing prejudicial treatment by states in Europe toward various religious minorities that have been designated as "sects" or "dangerous cults").

^{69.} General Comment 22, supra note 22, ¶ 8.

^{70.} The jurisprudence of the European Court of Human Rights indicates that it is impossible to find a uniform European conception of morals, thus requiring a "margin of appreciation" left to the states. See, e.g., Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976) (finding in relation to a restriction on freedom of expression on the grounds of "obscenity" that it was not possible to find a uniform European concept of morals in the domestic law of the various European states); see also Alexandre Charles Kiss, Permissible Limitations on Rights, in The International BILL of Human Rights, supra note 65, at 290, 303–04.

^{71. &}quot;These include the protection of a particular dominant religious tradition or dominant political ideology, the preservation of public order, and the regulation of the religious 'marketplace' in order to ensure fairness and to encourage informed religious choices." Stahnke, *supra* note 24, at 305.

A. The Rights of the Proselytizer

As we have already seen, the proselytizer's strongest claim is one of free exercise—the freedom to manifest her religion or belief under article 18(1). She also has a claim, however, to freedom of expression under article 19 of the ICCPR. Approached in this way, some different considerations and results may be reached, especially where claims to manifest religion are conjoined with claims to freedom of speech.⁷² Recall, for example, the U.S. Supreme Court's decision in West Virginia State Board of Education v. Barnette. This case involved Jehovah's Witnesses who were conscientiously opposed to saluting the flag. The Court held that a resolution of the Board of Education making the flag salute a regular part of the school program and requiring all teachers and pupils to participate was unconstitutional. Justice Jackson, in his opinion for the Court, noted that the flag salute in connection with the pledge of allegiance required "affirmation of a belief and an attitude of mind."73 In thus deciding the case on the basis of an unjustified interference with freedom of expression, he was able to avoid the question of whether nonconformist religious beliefs would exempt individuals from the duty to salute (and was thus able to avoid confronting the belief-action distinction discussed previously).74

While this approach may be more suggestive of the weight that American constitutional jurisprudence places on free speech—what the Supreme Court in *Palko v. Connecticut* referred to as "the matrix, the indispensable condition, of nearly every other form of [freedom]"⁷⁵—it also illustrates the intertwined nature of the relationship between freedom of religion or belief and other fundamental rights such as freedom of expression and association.⁷⁶

^{72.} See, e.g., Employment Div. v. Smith, 494 U.S. 872, 881 (1990) (dicta stating that the reason that some prior decisions held that the First Amendment bars the application of laws even of general applicability is due to the fact that these cases involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech or of the press"). Stahnke has noted that framing proselytism in terms of freedom of expression rather than freedom of religion has some practical ramifications. Where the proselytizer seeks, for example, to have another reject, rather than adopt, religious beliefs (i.e., because the proselytizer does not necessarily have religious beliefs of his own), this cannot be easily classified as a "manifestation" of religion or belief. Further, viewing proselytism as a form of expression avoids the need to confront the question of whether the beliefs being asserted are "religious" or "fundamental," or whether proselytism falls within the protected "category" of religious freedom. See Stahnke, supra note 24, at 278–79.

^{73.} W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).

^{74.} In holding that the flag salute was a form of utterance, Justice Jackson stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. The point here is that if no one has a duty to salute because that violates freedom of expression, it logically follows that those with nonconformist beliefs cannot be required to salute. The parents and children with such religious beliefs in this way fall into a broader protected category.

^{75.} Palko v. Connecticut, 302 U.S. 319, 327 (1937).

^{76.} See supra note 14. The few cases that have come before the European Court and the Human Rights Committee pertaining to religious freedom almost invariably rely on one, or a number, of these ancillary rights stated in the alternative. A review of these cases reveals that the treaty bodies prefer to decide cases

Given that each rights claim may be supported by different principles and interests, this becomes a particularly important and complicating factor when claims of right come into conflict with each other. That is to say, the question of proselytism gives rise not only to conflicts internal to the different aspects of the right to freedom of religion or belief itself, but also to conflicts as between religious freedom and other rights. I shall return to this question below.

Before proceeding, however, I wish to make one further observation regarding the relationship between religious freedom and free speech. We have seen that while human rights law regards the holding of religious beliefs to be a matter of inviolable individual freedom, the attempt to persuade others of those beliefs is subject to certain (as yet unspecified) restrictions. We should note, however, that it would be preposterous to invoke a similar notion in relation to political speech: for example, to say that while you can hold political views, any attempt to persuade others of such views is subject to certain limitations. The logic of free speech is that "debate on public issues should be uninhibited, robust and wide-open,"77 and this idea makes little sense unless individuals can aggressively present their views to others—even to those for whom they are unwelcome or upsetting. This idea was powerfully expressed during the Danish cartoons affair, especially in the United States where, as Robert Post has noted, the First Amendment has been held to protect all religious polemic from legal sanction—even expression that aims "deliberately and provocatively to assault the religious sensibilities of the pious."78

The invocation by proselytizers of the right to freedom of expression creates tremendous pressure on the targets of proselytism to explain why religious speech should be treated differently from political speech. It is to this issue—and the rights of the target of proselytism—that we must now turn.

B. The Rights of the Target of Proselytism

In considering the rights and interests of the target of proselytism—that is, the "fundamental rights and freedoms of others" that the state must take into account in limiting the freedom to manifest religion or the freedom of expression—we see two sets of potential claims that are internally in tension with each other. On the one hand, the target of proselytism has the freedom to change her religion and the freedom to receive information. On the other

on the basis of rights other than what they perceive to be the more "sensitive" right to freedom of religion and belief in article 18.

^{77.} N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

^{78.} Robert Post, Religion and Freedom of Speech: Portraits of Muhammad, 14 Constellations 72, 73 (2007). Post refers to the judgment of the Supreme Court in Cantwell v. Connecticut as authority for this proposition. Id. at 73 n.7. He does note, however, that the First Amendment is exceptional in this respect and that in Europe "there is a long history of regulating blasphemy, and as a consequence the question of subjecting the cartoons to legal sanction is very much alive." Id. For further discussion on this point, see infra Part III.B.3.

hand, she has the right to "have or adopt" a religion and to be free from injury or offense to her religious feelings. We need to consider each of these bundles of claims in turn.

1. The Freedom to Change Religion or Belief

Similar to the question of whether the freedom to manifest religion or belief includes the freedom to proselytize, the question of whether freedom of religion encompasses the freedom to change religion has been a controversial question in international law. Even today there remain marked points of disagreement among states as a matter of practice.⁷⁹ While the freedom to change one's religion or belief is entrenched in positive human rights standards, its acceptance by many states remains controversial.80 In many Muslim states, for example, it is considered a central tenet of Islam that there may be no coercion in matters of religion. Certain contemporary interpretations of Islam, however, do not accept the right of a person to abandon their religion or to convert to another, and it is a capital offence (apostasy) under Islamic law in some countries for a Muslim to repudiate his or her faith in Islam.81 Accordingly, many Islamic states do not formally accept the Human Rights Committee's interpretation of the right to "have or adopt" a religion as meaning the right to replace one's current religion or to adopt atheistic views.82 Due to the fact that apostasy—the abandonment or renunciation of one's religious beliefs—is treated as an offense, it naturally follows that proselytism—the attempt to change another's beliefs—is also prohibited (at least when directed at Muslims by others, proselytism directed at non-Muslims other than dhimmis being regarded as a religious duty of Muslims).83 The result is that today, a number of Islamic countries stand outside of international human rights norms on this question.84

^{79.} See Evans, supra note 34, at 238.

^{80.} See J. A. Walkate, The Right of Everyone to Change His Religion or Belief: Some Observations, 30 Neth. Int'l L. Rev. 146 (1983).

^{81.} See Abdullahi Ahmed An-Na'im, The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan, 16 Religion 197 (1986). Various Islamic states have laws prohibiting apostasy from Islam. These laws are purported to stem from the shari'a, and the approach of that body of law to the commitment of those that have become, or have been born as, Muslims. See David Little et al., Human Rights and the World's Religions: Christianity, Islam, and Religious Liberty, in Religious Diversity and Human Rights 213, 215 (Irene Bloom et al. eds., 1996). In the Declaration on the Rights and Care of the Child in Islam of the Islamic Conference, this prohibition on apostasy is noted in article 8, which addresses the right to education: "While Islam guarantees Man's freedom to voluntarily adopt Islam without compulsion, it prohibits apostasy of a Muslim afterwards, in view of the fact that Islam is the Seal of Religions and, therefore, the Islamic society is committed to ensuring that the sons of Muslims preserve their Islamic nature and Creed and to protecting them against attempts to force them to relinquish their religion." Declaration on the Rights and Care of the Child in Islam, 269, 273 art. 8, U.N. Doc. A/ 50/85-S/1995/152, Annex I: Res. 16/7-C (IS) (Feb. 23, 1995).

^{82.} See General Comment No. 22, supra note 22, \P 5.

^{83.} See An-Na'im, Islamic Foundations of Religious Human Rights, supra note 26, at 352-53.

^{84.} The enforcement of apostasy rules in Islamic countries may vary, but in recent years at least a few states have sought to invigorate them and to defend them as consistent with international human rights standards. For example, Mauritania has a provision in its penal code that imposes a death sentence for

This problem has been further exacerbated by the progressive dilution of the language in the International Bill of Rights and subsequent instruments. Article 18 of the Universal Declaration of Human Rights speaks explicitly of the right "to change" one's religion, whereas the corresponding article in the ICCPR speaks only of the right "to have or adopt" a particular religion or belief.⁸⁵ While this change in wording does not deny the right to change religions, it does signal the reluctance of many states to squarely confront the implicit consequences of this right.⁸⁶ Indeed, as time has elapsed, "reaching a consensus on this point seems to be even more elusive."

Of course, it does not necessarily follow that the freedom to change one's religion supports the right of another to proselytize. The Malaysian government, for example, has argued that its laws proscribing proselytism of Muslims by non-Muslims do not restrict the freedom of Muslims to change their religion:

If any Muslim desires to seek knowledge about another religion or even to possess another religion of his own free will and on his own initiative, [laws prohibiting proselytism] are not capable of deterring him. Those laws are merely aimed at protecting Muslims from being subjected to attempts to convert them to another religion.⁸⁸

In contrast to the Malaysian position, the European Court has stated in the *Kokkinakis* case that the freedom to change religion would be a "dead letter" if the freedom to manifest religion did not include "the right to try

[&]quot;any Muslim who abandons his faith and does not repent within three days." U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, ¶ 60, U.N. Doc. E/CN.4/1990/46 (Jan. 22, 1990) (prepared by Angelo Vidal d'Almeida Ribeiro). The Mauritanian government has defended this offense and its penalty as a proper limitation (in furtherance of public order and morality) on the right to freedom of religion. Note also here the position of non-Muslims or dhimmis in some Islamic states. Under the shari'a, these minority groups may have a degree of security of the person, freedom to practice their religion, and a degree of internal community autonomy, but they are often not allowed to participate in the public affairs of the Islamic state.

^{85.} See Universal Declaration of Human Rights, supra note 23, art. 18; American Convention, supra note 23, art. 12(1). The ICCPR adopted a related, but different, formulation: "[The right to freedom of religion] shall include freedom to have or to adopt a religion or belief of his choice... No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." ICCPR, supra note 10, arts. 18(1) & (2) (emphasis added). Note that the U.N. Declaration on Religious Intolerance, supra note 10, art. 1(2), adopted the same wording as article 18 of the ICCPR, but deleted the important phrase "or to adopt."

^{86.} See Partsch, supra note 65, at 211. See also Natan Lerner, Proselytism, Change of Religion and International Human Rights, 12 EMORY INT'L. L. REV. 477, 507-08 (1998).

^{87.} See Stahnke, supra note 24, at 280 n.81. It can also be seen that while the global instruments have taken into account the opposition of certain Islamic states to the right to change religion, the European Convention on Human Rights (designed for a narrower national, cultural, and religious region) does not.

^{88.} U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, ¶ 52, U.N. Doc. E/CN.4/1989/44 (Dec. 30, 1988) (prepared by Angelo Vidal d'Almeida Ribeiro).

and convince one's neighbour."⁸⁹ This argument is further reinforced by the freedom of the target of proselytism to receive information. Article 19(2) of the ICCPR provides that the right to freedom of expression "shall include freedom to seek [and] receive . . . information and ideas of all kinds."⁹⁰ As Kent Greenawalt has suggested, restrictions on proselytism may not only violate the rights to free exercise and free speech of proselytizers, but also unduly restrict the right of willing listeners to receive information.⁹¹ Again, however, it does not necessarily follow that the right to receive information includes the right to be confronted with all possible forms of unsolicited views, including those that the state deems important to restrict either to protect the "fundamental rights and freedoms of others" from specific harms or to serve some other compelling state interest.

2. The Freedom to Have or Maintain a Religion

Exerting pressure in the opposite direction are the freedoms of the target of proselytism to "have or adopt" a religion and to be free from "injury to religious feelings." We must consider each claim in turn. In relation to the first—the freedom to "have" a religion—the question here is the extent to which this includes a right to the peaceful enjoyment of that freedom (i.e., either to maintain one's religion or to change one's religion without being subject to proselytism) such that the state must act to limit the freedom of others to proselytize. This was the question that confronted the European Court of Human Rights in the seminal case of *Kokkinakis v. Greece*.

a. Kokkinakis v. Greece

The *Kokkinakis* case involved the prosecution by Greece of a Jehovah's Witness for proselytism directed toward a member of the dominant religion, Christian Eastern Orthodoxy. The Greek law at issue proscribing proselytism was virtually the same as our imagined law.⁹² In the end, the Court decided the case on narrow factual grounds and declined to confront the central normative question at issue: when and on what basis does the freedom of religion or belief protected under article 9 preclude member states from criminalizing attempts to induce somebody to change his or her religion.

Any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety.

For a detailed discussion of the facts and a critique of the European Court's decision in *Kokkinakis*, see Protecting the Human Rights of Religious Minorities, *supra* note 42, at 200–10.

^{89.} Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) ¶ 31 (1993).

^{90.} ICCPR, *supra* note 10, art. 19(2); *see also* Otto Preminger Inst. v. Austria, App. No. 13470/87, 295 Eur. Ct. H.R. (ser. A) 6, 20 (1994) (noting that the right to "take cognizance of certain views is implied in the right to impart those views").

^{91.} See Kent Greenawalt, Title VII and Religious Liberty, 33 Loy. U. Chi. L.J. 1, 51 (2001) (discussing the issue of religious expression in the workplace between employers and employees).

^{92.} Section 2 of Law No. 1672/1939 defined "proselytism" as:

ion? The Court held that while Greece had a legitimate aim in criminalizing proselytism in order to protect the rights and freedoms of others,⁹³ a distinction must be drawn between "proper" and "improper" proselytism, the former corresponding to "true evangelism . . . [while] the latter represents a corruption or deformation of it."⁹⁴ However, rather than deciding whether the proselytism in the present case was "improper," or further developing relevant notions such as "coercion," "impropriety," or "duress," the Court held six to three, on factual grounds, that the Greek court's reasoning as to Kokkinakis's liability under the law was not sufficiently precise and that there had accordingly been a violation of article 9.95

Judge Martens, in joining the majority decision, was critical of the Court's unwillingness to address the central issue in the case. In adopting what we might term a "naïve liberal" approach, 96 Judge Martens stressed the importance of the freedom of thought, conscience, and religion of the individual to human dignity and argued that article 9 is "absolute" and leaves no room for interference by the state. 97 On his view, it was not the concern of the state whether someone wishes to change their religion, nor whether someone attempts to induce another to change their religion. To allow the state to interfere by making proselytism a criminal offense "would not only run counter to the strict neutrality which the state is required to maintain in this field but also create the danger of discrimination when there is a dominant religion."

By contrast, one of the dissenting judges, Judge Valticos, argued that proselytism constitutes the "rape of the beliefs of others" and held that the

- 1. Freedom of conscience in religious matters is inviolable. The enjoyment of personal and political rights shall not depend on an individual's religious beliefs.
- 2. There shall be freedom to practice any known religion; individuals shall be free to perform their rites of worship without hindrance and under the protection of the law. The performance of rites of worship must not prejudice public order or public morals. *Proselytism is probibited.*

1975 Syntagma [SYN] [Constitution] 13 (Greece) (emphasis added).

The Greek Court of Cassation had earlier held that the law prohibiting proselytism was

fully compatible with [the Constitution's recognition] of the inviolability of freedom of conscience in religious matters and provides for the freedom to practice any known religion, subject to a formal provision . . . prohibiting proselytism in that proselytism is forbidden in general whatever the religion against which it is directed, including therefore the dominant religion in Greece . . . the Christian Eastern Orthodox Church.

Kokkinakis, 260 Eur. Ct. H.R. ¶ 12.

94. Id. ¶ 48. The Court held that the criteria adopted by the Greek legislature in creating the law against proselytism were reconcilable insofar as they were designed to punish only "improper" proselytism.

95. Id.

^{93.} Article 13 of the Greek Constitution of 1975 states that

^{96.} See Anna Elisabetta Galeotti, Toleration as Recognition 118 (2002) (discussing "the naive liberal view [that] conceives of toleration as the principle according to which everyone should be free to follow his or her ideals and style of life as long as no harm is done to anyone else").

^{97.} Kokkinakis, 260 Eur. Ct. H.R. ¶¶ 13-14.

^{98.} Id. ¶ 15.

freedom to manifest one's religion did not include the right to attempt "persistently to combat and alter the religion of others, [and] to influence minds by active and often unreasonable propaganda." For Judge Valticos, the applicant was a "militant Jehovah's Witness, a hardbitten adept of proselytism, a specialist in conversion," while the Jehovah's Witnesses as a group were a "sect . . . involved [in] . . . systematic attempt[s] at conversion and consequently an attack on the religious beliefs of others." 100

The difference in reasoning between Judges Martens and Valticos goes to the heart of the dilemma addressed by this Article. On the one hand, the reasoning of Judge Martens is both naïve and unconvincing. By viewing the case as a conflict between the personal autonomy (individual freedom of conscience and belief) of the proselytizer and a certain privileged conception of the collective good as determined by the majority (i.e., adherents of Christian Eastern Orthodoxy), Judge Martens made two interrelated claims: (a) that because the right to freedom of religion is "absolute," making proselytism a criminal offence violates the "strict neutrality" of the state; and (b) that therefore enforcing the majority's conception of the good discriminates against individuals who, in this case, are members of a minority religious group. 102

This reasoning is open to question. Judge Martens ignores the fact that the case involves not only a conflict between an individual right and the collective good, but also a conflict between two individual rights—the right of the proselytizer to manifest her religion or belief and the right of the target of proselytism to the peaceful enjoyment of her freedom of religion. Of course, if the target of proselytism welcomes the speech of the proselytizer, then presumably no conflict arises. It is possible, however, to imagine scenarios involving conflicts between the rights of willing listeners referred to above and the right of the state to enact such anti-proselytism laws on the basis of certain collective or public interests. I shall return to this question below. But if we proceed on the assumption that the target of proselytism is unwilling in some specified sense, then the Court is faced with a genuine conflict of rights. 103 If, for example, the Court were to uphold the law on the basis that the state has a legitimate interest in protecting the rights of individuals to the peaceful enjoyment of their fundamental beliefs (whether religious or non-religious), this would require privileging the rights claims of the targets of proselytism over those of proselytizers. Conversely, if the Court were to find that the law infringed article 9 by unjustifiably restricting the freedom to manifest religion or belief, this would require privileging the rights claims of proselytizers over those of targets of proselytism.

^{99.} *Id.* ¶¶ 2, 8 (Valticos, J., dissenting).

^{100.} Id. $\P\P$ 9-10 (Valticos, J., dissenting).

^{101.} Id. ¶¶ 14-17 (Martens, J., dissenting in part).

^{102.} Id. ¶ 5 (Martens, J., dissenting in part).

^{103.} Although I do not pursue the point further here, this could apply to political speech as well.

Judge Martens's proposal of relying on an absolute conception of individual freedom of conscience is incapable on its own of resolving this dilemma. After all, whose claim of individual freedom is to be preferred—that of the proselytizer or the target of proselytism—and how is either preference to be reconciled with the "strict neutrality" of the state? In order to answer these questions, Judge Martens cannot avoid the need for a substantive theory of justice capable of explaining why one claim of right is normatively preferable to the other. I shall return to this point further below.

On the other hand, the reasoning of Judge Valticos is equally unconvincing. As several commentators have suggested in the wake of *Kokkinakis*, there appears to be a bias in the jurisprudence of the Court under article 9 toward protecting traditional and established religions and a corresponding insensitivity toward the rights of minority, nontraditional, or unpopular religious groups. Jeremy Gunn, for example, suggests that a summary review of the Court's jurisprudence reveals a consistent pattern of rejecting article 9 claims, and this includes a persistent denial of applications from religions that can be classified as new, nontraditional, or minority, as well as a distinct pattern of institutional bias towards traditional religions.¹⁰⁴ In this way, those religions established within a state, either because they are an official religion or have a large number of adherents, are more likely to have their core doctrines recognized as manifestations of religious belief.¹⁰⁵

This pattern is reflected in the reasoning of Judge Valticos which relies, if not expressly then at least implicitly, upon a privileged conception of the collective good—that of the established, majority, or dominant religion. As in the case of Malaysia discussed previously, laws proscribing proselytism of the dominant religious group are in this way viewed not as restricting the freedom of believers to change their religion, but merely as protecting the dominant religious group from being subjected to attempts to convert them to another religion. While this can be framed in terms of an individual's right to the maintenance and peaceful enjoyment of her religion (thus raising the conflict-of-rights dilemma discussed above), at a deeper level the rationale for the law derives from a certain perceived conception of the collective good of the state.

The shift in reasoning from claims of right to claims of the "collective good" is, however, problematic for two reasons. First, it threatens to eviscer-

^{104.} See T. Jeremy Gunn, Adjudicating Rights of Conscience Under the European Convention on Human Rights, in Religious Human Rights in Global Perspective: Legal Perspectives, supra note 14, at 305, 311 n.28; see also Eyal Benvenisti, Margin of Appreciation, Consensus, and Universal Standards, 31 N.Y.U. J. Int'l L. & Pol. 843, 850 (1999) (arguing that the European Court grants a wide margin of appreciation to majority-dominated national institutions as opposed to "democratically challenged" minorities).

^{105.} Evans suggests that religions whose devotions take different forms—for example, sexual intercourse or refusal to pay taxes to a centralized system hostile to their beliefs—are more likely to have their devotions excluded from the protection of article 9 as non-manifestations. *See* Evans, *supra* note 34, at 290–91.

ate even a modest conception of the individual right to freedom of religion or belief. If rights are able to be restricted to protect the role that a "dominant or national religion has played . . . in the 'national conscience' and patriotic history of the nation," then the notion of individual freedom is vulnerable to far-reaching and potentially oppressive limitations in accordance with the perceived imperatives of the interests of the state. Second, it privileges one collective good over another in a manner antithetical to the basic human rights commitments to equality and nondiscrimination. Here the collective good of the minority Jehovah's Witnesses—for whom proselytism is a central tenet of their faith and way of life—is being restricted in favor of the collective good of the majority Greek nation for whom Eastern Orthodoxy is central to the identity of the Greek nation-state.

The court in Kokkinakis therefore faced not only the question of how to resolve a series of conflicts between various individual rights, but also between different conceptions of the collective good. These difficulties become particularly acute when the conceptions of the collective good (and the rights claims deriving from them) are in fact incompatible or "incommensurable"—that is, no way can be found for the way of life of both the proselytizer and the proselytized to be fully respected consistent with the claims of right at issue. Not allowing the state to criminalize proselytism will be regarded as discriminatory by the majority group for whom both the purpose and effect of the law is to protect and ensure the flourishing and identity of the Greek state (the public sphere) as Christian Eastern Orthodox. Allowing the state to criminalize proselytism, however, will be regarded as discriminatory by minority groups for whom disseminating their faith is central both to their religious convictions and to their future survival as distinct religious groups. Judge Valticos recognizes the former danger but, in considering the individual freedom of conscience of both proselytizer and the proselytized primarily in terms of the collective good of the majority, he fails to acknowledge the centrality of proselytism to the religious life (and collective good) of the Jehovah's Witnesses. His approach, in other words, is insensitive to both individual freedom and minority rights. By contrast, Judge Martens recognizes the latter danger but, consistent with the insensitivity of his reasoning to the collective dimensions of the rights claims at issue, he fails to recognize that the right to freedom of religion also protects certain collective goods (of both the majority and minority groups) and that there may actually be no "strictly neutral" way, consistent with the claims of right at issue, to prefer one over the other.

To reiterate then, the Court was faced with not one but two types of conflict: the first between various individual rights claims (some of which are internal to article 18, others of which are between article 18 and other related rights such as freedom of expression) and the second between incompatible conceptions of the collective good. These two types of conflict are conceptually interrelated. In order to understand the nature of that interrela-

tionship, we need to examine how rights discourse imagines and constructs the relationship between individual rights and collective goods. At this stage of my argument, however, I wish merely to refer to one possibility: while the formality of rights discourse may obscure the fact, there may be no principled way—consistent with what Jeremy Waldron has termed the "liberal algebra"¹⁰⁶—to resolve such conflicts other than by seeking a form of reconciliation or *modus vivendi* between the particular conceptions of the collective good of different (majority and minority) groups in the historical context of a particular political community. To do so, however, risks undermining the rationale for human rights in the first place, i.e., the idea that rights are independent of the good (and thus not subject to the potentially unjust demands of majoritarian politics) and are both compossible and adequate in the sense indicated by Waldron. The underlying problem, as John Gray has recently argued, is that the freedoms that liberal rights protect are not necessarily compossible and may in fact be rivals:

[I]f such conflicts can be resolved only by invoking judgements of the good on which reasonable people may differ; if, in the absence of such judgements, liberal principles are devoid of content; if, that is to say, applying liberal principles necessarily involves resolving conflicts among incommensurable values—then liberal principles have nothing of the simplicity of which Rawls speaks. Liberal regimes are no different from others in having to make choices between rival freedoms; but liberal principles cannot tell them how to make them.¹⁰⁷

Indeed, as the case of proselytism illustrates, liberal rights not only are rivals *inter se* but also may be internally inconsistent and contested. The *Kokkinakis* case demonstrates that the right to freedom of religion or belief generates competing claims not only with other rights (such as freedom of expression) but also *within* the right to religious freedom itself.

Confronted as it was with these two types of conflict, and the background theoretical controversies to which they give rise, the court in *Kokkinakis* cau-

^{106.} Waldron observes that the "liberal algebra" seeks to secure order in a way that is fair to the aims and activities of all. This aim is "Kantian in inspiration: Act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law." Thus,

the liberal claim "may be described as the task of specifying a set of constraints on conduct (call it set C), satisfying two conditions: (1) no two actions permitted by C conflict with one another; and (2) for each individual who is subject to C, the range of actions permitted by C is adequate for the pursuit of his ends. I shall call these the requirements of compossibility and adequacy. Together they amount to something like algebraic specifications for the formal structure of a liberal society.

Jeremy Waldron, *Toleration and Reasonableness, in* The Culture of Toleration in Diverse Societies: Reasonable Tolerance 13, 14–15 (Catriona McKinnon & Dario Castiglione eds., 2003). For a full discussion of the notions of compossibility and adequacy, see *infra* notes 233–32 and accompanying text. 107. John Gray, Two Faces of Liberalism 69 (2000).

tiously resorted to a form of "decisional minimalism." ¹⁰⁸ In seeking to avoid high-level theorizing, the court formulated a pragmatic distinction between "proper" and "improper" proselytism. To be fair, this was a reasonable approach given that the Greek law itself sets up the distinction between certain actions regarded as acceptable and certain other types of actions regarded as unacceptable (i.e., actions involving inducement, or promises of inducement, or moral or material support, or fraud, or taking advantage of certain vulnerable attributes of the target). Factors such as these *required* the Court carefully to examine contextual issues such as the time, manner, and place of the religious expression; the interests of the target in receiving that expression (especially in the case of willing listeners); and the character of the expression itself.

In seeking to distinguish proper from improper religious expression, we can immediately identify a category of harmful actions that arguably should be limited—disrupting services of worship, cult-style brainwashing, or the deliberate targeting of the most vulnerable members of society. We are uncomfortable, for example, with the notion that Christian evangelists can march into mosques or synagogues or that missionaries can approach children. But at the same time, we can also see that there will be many situations involving acts of proselytism that will not be as clear cut. The situation of religious speech in the workplace, for example, raises a complex constellation of conflicts between the rights and interests of both employers and employees.¹⁰⁹

b. The Indeterminacy of Harm

In seeking to justify the statute and set out the general principles or concerns that mark the proper from the improper, we therefore need to think harder about certain background questions at the intersection of individual, religion, and state. In this respect, the Court declined either to advance a conceptual justification for the proper/improper distinction or to indicate a test to be used in specific cases. ¹¹⁰ One can, of course, imagine various possible ways of doing so. Stahnke, for example, has proposed a practical framework to assist decisionmakers in disentangling the factors used to draw the

^{108.} The term is Cass Sunstein's and refers to the practice of saying no more than is necessary to justify an outcome and leaving as much as possible undecided in order to lessen the burdens of judicial decision and to lessen the risk of damaging judicial errors. *See* Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 9–23 (1999).

^{109.} See, e.g., EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988) ("Christian, faith-operated business" requiring all workers regardless of their own religious or non-religious beliefs to attend weekly religious services); Brown Transport Corp. v. Pennsylvania Human Relations Comm'n, 578 A.2d 555 (Pa. 1990) (Bible verses on paychecks and Christian religious content in a company newsletter). For detailed discussion of these cases and the conflicts that they raise between the rights claims of employers and employees involving religious expression, see Greenawalt, supra note 91, at 36–56.

^{110.} It was the Court's failure to define the term "improper proselytism" or to analyze in any depth these conflicting rights and interests that Judge Pettiti was most critical of in *Kokkinakis*. *See* Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) ¶ 25 (1993).

line between proper and improper proselytism. This involves four interrelated variables, the touchstone of which is the notion of "coercion": (1) the attributes of the source of proselytism;¹¹¹ (2) the attributes of the target of proselytism;¹¹² (3) where the action alleged to be improper proselytism takes place;¹¹³ and (4) the nature of the action.¹¹⁴ Each of these variables can be laid out on a scale that will provide a starting point for a "more focused discussion on the range of choices available to states consistent with international human rights standards."¹¹⁵

What is instructive about this approach is its pull toward concrete questions of fact—i.e., reliance on variables corresponding closely with particular factual circumstances and context—and its corresponding avoidance of questions of high-level theory. But the difficulty with this contextual analysis is that the constellation of rights claims of both source and target appear indeterminate absent some background theory of justice capable of providing

- 111. The question here is whether there exists some "physical, legal or economic advantage" that the source has in relation to the target. Stahnke lists examples of potentially coercive sources: "the state and its official representatives, private persons acting with state authority or endorsement, providers of important health or social services, and employers or employment superiors." Stahnke, *supra* note 24, at 328. He further notes that one "coercive relationship that is generally left untouched by States is that between parents and children." *Id.* at 328 n.220. The European Court recognized this dynamic in *Larissis v. Greece*, App. No. 140/1996/759/958-60, 140 Eur. Ct. H.R. (ser. A) ¶ 51 (1998) (conviction of two Greek military officers for improper proselytism of their military subordinates).
- 112. The concern here is with the "perceived susceptibility of the target to the types of persuasion (and, potentially, coercion) that may be employed by different sources." This vulnerability may result from the "relationship to the source" or from the "nature of the target." For example, this category would include "children, as well as targets that are uneducated, naïve, or generally weak or unsure of themselves." Stahnke, *supra* note 24, at 332. Another important attribute of vulnerability is financial need. See, for example, the argument of the Nepalese government that legal protections against proselytism are needed in Nepal to guarantee the rights of "weak person[s]" and to "discourage the anomaly in a socio-economically weak society where instances of involuntary religious conversion are found to have taken place by means of financial enticement and other temptations." U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., *Implementation of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, ¶ 66, U.N. Doc. E/CN.4/1994/79 (Jan. 20, 1994) (*prepared by* Abdelfattah Amor).
- 113. The question here is whether the target is in a particular place by choice and is free to leave. For example, proselytism is an "expected manifestation of religious belief when it takes place at the place of worship or in the religious classroom of the source, at least as long as the targets are at these places voluntarily." Stahnke, *supra* note 24, at 334. The more difficult issue, however, concerns places open to the public like streets, parks, government offices, courtrooms, schools, and other "public" facilities.
- 114. The last factor involves the "nature of the exchange . . . between the source and target" and is the most important regarding the notion of coercion. This can range from a mere exchange of ideas to "conversion or change in beliefs through violence or threats of violence." It can also include "promises or offers of something of value to the target in exchange for their change in beliefs or affiliation." For example, India, Israel, and Greece each have proselytism statutes prohibiting the offer or granting of tangible benefits, such as money, "material assistance," or "social advantages," in exchange for a change in religious beliefs and affiliation. *Id.* at 335–37 (Greece: Section 4 of Act 1363/1938; India: Orissa Freedom of Religion Act 2 of 1968; Israel: Penal Law Amendment (Enticement to Change Religion), 5738-1977).
- 115. Stahnke's argument is that in developing the basic notion of "coercion" that underlies this area of human rights law, these factors need to be considered in order to establish a sound analytical approach consistent with evolving ECHR jurisprudence. He concludes that the failure to do so will perpetuate the current low level of protection for the rights of minority religious groups in many European states. Stahnke, *supra* note 24, at 332–39.

either a hierarchy of the rights at issue or some substantive content to concepts such as "coercion" or "harm." 116 Indeed, as Kokkinakis shows, analyzing such questions in formal terms by considering only individual claims of right fails to explain either why proselytism is such a controversial and contested issue or why states regard it as necessary to enact laws restricting individual freedom (and not only of proselytizers but also of the targets of proselytism). In order to confront these questions, we need to understand the collective dimensions of individual rights (i.e., the interests and conceptions of the good protected by the right to freedom of religion and belief) as well as the relationship between not just the individual and the state but also between differently situated groups within the state and the corresponding tensions that arise from different individual and collective rights claims. I have discussed these particular questions extensively elsewhere. 117 For present purposes, I wish only to illustrate how even a cursory consideration of broader questions of social and historical context will have an important bearing on how we understand legal restrictions on proselytism.

c. Community, History, Context

Questions of the historical relationships between groups within particular societies (i.e., different views of the good in terms of different conceptions not only of nationalism but also of minority and indigenous rights)—and their complex interrelationship within the legal framework of the state—are pivotal to any understanding of how and why proselytism raises concerns for human rights. Consider the following two general examples. The first concerns those states in Central and Eastern Europe that, after the fall of communism, enacted laws to limit the rights of religious minorities, especially so-called foreign "cults" and "new religious movements." Russia, for example, in 1997, enacted a Law on the Freedom of Conscience and Religious Associations that distinguishes between, and assigns different rights to, "religious organizations" on the one hand and "religious groups" on the other

^{116.} This problem is well-illustrated by the indeterminacy surrounding Mill's "harm principle." For Mill, the "only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." John Stuart Mill, On Liberty 68 (Gertrude Himmelfarb ed., Pelican Books 1974) (1859). As Koskenniemi has argued, the difficulty is that liberal theory is unable to provide any criteria by which to delimit the harmless from the harmful. If "harm" means a violation of individuals' interests, then an objective criterion is needed to determine what interests are possessed by individuals even without their acknowledgment (i.e., a theory of the kind recognized by Hobbes, Locke, and Rousseau of "natural" or "objective" interests distinct from subjective desires). But such a theory of the "natural good" violates liberalism's skepticism regarding the objectivity of values. Any constraint seems a violation of individual freedom as what counts as "harm" can only be subjectively determined. Conversely, if "interest" means no more than "desire" and harm thus means anything that directs itself against what people desire, then there is no determinate concept of harm at all. "If the continuing (private) behaviour of some people could count as 'harm' (because it directs itself against somebody's wants) then we would ultimately violate the ratio of the harm principle itself, namely the purpose of establishing and protecting people's private spheres." MARTTI KOSKENNIEMI, FROM APOL-OGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 87 (2006).

^{117.} See Danchin, supra note 16, at Part V.A (discussing the relationship between communal goods and individual rights).

based on a fifteen-year residence requirement. The legislation has had the effect of re-establishing state control over religious affairs in Russia and consolidating the "special relationship" between the state and the dominant Russian Orthodox Church while at the same time discriminating against various "new" religions in the country.

As the successor to the more open "liberal" Soviet legislation of 1990, the "regressive" 1997 law was hardly a surprise, however. Having survived the communist attempt at anti-religious socialization of the population, the traditional churches in Russia were at that time facing a myriad of severe social problems including demographic imbalances, limited expertise in developing a "practical theology," and, in many instances, crippling poverty. In response, they sought special constitutional protections and preferences from the state while at the same time requesting strict control over "other" religions, particularly those considered to be foreign and well-resourced. In December of 1996, Patriarch Aleksii II put the position of the Russian Orthodox Church as follows:

It is our obligation to battle for people's souls by all legal means available, rather than allowing them to perish. [We must] react to the continuing intense proselytizing activity by some Catholic circles and various Protestant groups . . . [and] to the growing activity of sects, including those of a totalitarian nature . . . [for] it is largely our own brothers and sisters who fall victim to these sects. 121

^{118.} The 1997 Russian law extends to "religious organizations," and denies to "religious groups," the "privilege of acquiring juridicial personality, of receiving direct financial benefits from the state, and of being entitled to own real property and commercial enterprises, as well as to operate religious, educational, cultural, and social institutions and charitable activities, and to receive and disseminate religious literature." Little, supra note 68, at 47; see also T. Jeremy Gunn, Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations, 12 EMORY INT'L. L. REV. 43 (1998).

^{119.} See, e.g., Eileen Barker, The Protection of Minority Religions in Eastern Europe, in Protecting the Human Rights of Religious Minorities, supra note 42, at 58–86 (discussing the impact of foreign "new religions" in post-communist societies and the relationship between national identity and exclusive association with a particular religion or "Mother Church").

^{120.} Stahnke includes "foreign sources" as one of the factors to be considered in his framework. This includes concerns, in the colonial context, of the religious intolerance expressed toward foreign missionaries due to the civil power they once possessed (e.g., in China, concerns about foreign interference through religious groups in the internal political affairs of the state) and concerns over economic advantage, especially where foreigners from wealthy states are operating in poor and developing countries and have far greater economic means than local peoples and institutions. See Stahnke, supra note 24, at 330–31

^{121.} John Witte, Jr., Introduction—Soul Wars: The Problem and Promise of Proselytism in Russia, 12 EMORY INT'L L. REV. 1 (1998) (quoting Aleksii II, Patriarch of Moscow and All Russia, Address of the Patriarch to the Councils of the Moscow Parishes at the Episcopal Gathering (Dec. 12, 1996), in 6 TSERKOVNO-OBSCHESTVENNYI, Dec 26, 1996, at 7) (alterations in original). Barker notes that many of the well-resourced foreign missionaries and "new" minority religions in Eastern and Central Europe have "not only experience in teaching and proselytizing, but also access to expensive technology with which they can communicate their message to tens of thousands or more at a time." Barker, supra note 119, at 69–70.

The traditional churches sought to use nationalist sentiments to bolster their attempts to regain their former ascendancy (i.e., "to be Russian is to be Orthodox"). This, in effect, was a plea for a form of "group rights" structure—one that allowed the state positively to protect and support the dominant faith while at the same time providing only limited recognition and protection to minority faiths. The degree of limitation and restriction would then depend on various factors, including the identity and historical acceptance of the minority group in question. 122

In this historically and socially situated moment in Russia's struggle to establish new religion-state relationships following the collapse of communism and "official atheism," Harold Berman argued that

[Russia] is undergoing an unprecedented historical experience of tumultuous and even catastrophic transition from one type of political system to another, from one type of economic system to another, and from one type of belief system to another. It is entirely *inappropriate*, in my view, to apply to Russia today the broad provisions on religious freedom of the international human rights covenants *without* taking into consideration Russia's present situation viewed in the light of Russia's historical experience. Rights may properly be declared in universal terms, but their application in specific cases must always take into account the specific circumstances of those cases.¹²³

In Berman's view, therefore, the 1997 Russian law may not only be an acceptable limitation on the right to religious freedom of certain (proselytizing) minority religions but may in fact be a necessary one given the historical and societal factors at issue. Regardless of the merits of this argument, my point is that these types of considerations—and their undeniable importance to our understanding of a particular set of circumstances implicating the right to religious freedom—are invisible to analysis solely through the lens of the liberal rights framework.¹²⁴

My second example concerns the modern states of Africa, which, four decades after decolonization, remain mired in crises of cultural, religious, and racial identity. According to John Pobee, religion and the treatment of African religions within the African state have been significant sources of social and political rupture.¹²⁵ Mutua has described the situation as follows:

^{122.} This idea is further developed in Danchin, *Religion, Religious Minorities and Human Rights: An Introduction, in Protecting the Human Rights of Religious Minorities, supra* note 42, at 10–11.

^{123.} Harold J. Berman, Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory, in Religious Human Rights in Global Perspective: Legal Perspectives, supra note 14, at 285–86.

^{124.} One could imagine, for example, the Russian government invoking considerations of "public order" as its justification for limitations on the religious freedom of minority religions. But, as we have seen, this does not capture the true justifications or factors that explain the perceived need for the 1997 law.

^{125.} John S. Pobee, Africa's Search for Religious Human Rights Through Returning to Wells of Living Water, in Religious Human Rights in Global Perspective: Legal Perspectives, supra note 14, at 391.

[T]he modern African state, right from its inception, has relentlessly engaged in a campaign of the marginalization, at best, or eradication, at worst, of African religion. Further . . . the destruction and delegitimation of African religion have been actively effected at the urging, or with the collusion and for the benefit of, either or both Islam and Christianity, the two dominant messianic traditions. 126

Mutua's argument is that the conscious and planned displacement, vilification and even demonization of African religion—first by missionaries and colonial administrations and later by mission-educated African elites forging the postcolonial state—goes beyond the legitimate bounds of manifestation of religion or belief and constitutes a gross violation of the human right to religious freedom of African peoples themselves. 127 He notes that the idea of converting the "other" is largely unknown to African peoples because their religions—which are communal and non-universalist—are their collective identity and way of life. 128 In spite of this fact, none of the constitutions of the newly independent African states—written by European lawyers on the eve of independence—make mention of African religions but instead seek to transplant a formal liberal state structure, including the protection of religious freedoms such as the right to proselytize, into the former colonies. 129 Indeed, to this day some postcolonial states impose bans on important elements of African culture and religion. 130

Wherever the African is, there is his religion: he carries it to the fields where he is sowing seeds or harvesting a new crop; he takes it with him to the beer party or to attend a funeral ceremony; and if he is educated [formal Western education], he takes religion with him to the examination room at school or in the university; if he is a politician he takes it to the house of parliament. Although many African languages do not have a word for religion as such, it nevertheless accompanies the individual from long before his birth to long after his physical death.

Mbiti, supra note 127, at 2-3.

^{126.} Makau Mutua, Returning to My Roots: African "Religions" and the State, in Proselytization and Communal Self-Determination in Africa, supra note 24, at 170.

^{127.} It is a "repudiation, on the one hand, of the humanity of African culture and, on the other, a denial of the essence of the humanity of the African people themselves." *Id.* (citing John Mbiti, African Religions and Philosophy 13 (1970) (noting that most missionaries regarded African religions as primitive, superstitious, and savage)).

^{128. &}quot;It is . . . tautological to talk about the religion of the Yoruba, for instance, because their identity is their religion." Mutua, *supra* note 126, at 172. As Mbiti notes, in traditional African society there was no dichotomy between the secular and the religious or between the material and the spiritual:

^{129.} Šee, for example, Kenya's 1963 independence constitution which in section 22(1), drawing expressly on language in the international human rights instruments, guarantees freedom of religion to each person, including the "freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and private, to manifest and propagate his religion or belief in worship, teaching, practice and observance." The constitutions of Malawi, Nigeria, Zambia, and the Republic of the Congo provide virtually identical rights and protections. Constitution § 33 (1999) (Malawi); Constitution § 24 (1963) (Nigeria); Zambia Const. § 24 (1964); Constitution art. 25 (1964) (Congo).

^{130.} This has occurred, for example, in those states that are either constitutionally Islamic or proclaim Islam to be the religion of the state, such as Algeria, Egypt, Libya, Morocco, Tunisia, and Mauritania. The one important exception is post-apartheid South Africa, which, while not explicitly mentioning

On Mutua's view, therefore, the real question is not why postcolonial African constitutions contain human rights protections of religious freedom, but why they *do not* contain explicit recognition of African religions that, in turn, would justify the enactment of measures restricting the freedom of foreign proselytizing religious groups while protecting the religious freedom of African peoples. Indeed, the 1981 African Charter on Human and Peoples' Rights seeks to recognize this need by defining a concept of human rights which requires the state not only to protect religious freedom but also to promote and protect "morals and traditional values recognized by the community," to assist the family, which is the "custodian of morals and traditional values," and to join popular struggles against "foreign cultural domination." ¹³¹

d. Beyond the Liberal Algebra

My general point is that a pluralistic society comprised of competing comprehensive conceptions of the good will inevitably face the need to restrict religious freedom in ways that liberal rights theory will have difficulty either explaining or accepting. We are not dealing here with two abstract individuals—A and B—stripped of all their contingent characteristics standing in a Rawlsian original position in a situation of perfectly symmetrical equal freedom. Were such a scenario even conceivable, there would be little controversy. A and B would have an equal right to religious expression and, as is often said by liberal theorists, A's right would end where B's nose begins. We would ask, in other words, whether B was a willing listener and to the extent that B was unwilling (i.e., to the extent that A's proselytizing speech caused some identifiable harm or coercion to B) we would seek to justify some limit to A's individual freedom. Of course, as already mentioned, this would require us to advance some moral conception of harm or coercion in order to mark the boundary between proper and improper conduct. This in itself would be a daunting task because, in order to work out the precise boundary between the two equal individual freedoms, it would require us to advance a view of the good (for example, some conception of moral personality based on the notion of free will). 132

African religions, in its 1996 Constitution recognizes the "institution, status, and role of traditional leadership, according to customary law." S. Afr. Const., ch. 12, §§ 211–12 (1996). For a detailed discussion of constitutional provisions concerning religion in countries in southern Africa, see Christof Heyns & Danie Brown, *The Constitutional Protection of Religious Human Rights in Southern Africa*, 14 Emory Int'l L. Rev. 699 (2000).

^{131.} African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/ Rev.5 (1981), arts. 17, 18(2), 20(3). The Preamble to the African Charter states that it is inspired by the "virtues" of African "historical tradition" and the "values of African civilization." It prohibits discrimination based on religion (art. 2) and guarantees freedom of religion or belief (art. 8); see also Makau wa Mutua, The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties, 35 Va. J. Int'l L. 339 (1995).

^{132.} Seeking to draw the line at "willing listeners" based on some notion of autonomy does not resolve the problem. This is because, however we conceive of and develop a comprehensive conception of moral autonomy and personality, it will have certain indispensable content, some of which will be con-

But the problem that confronts us in cases like *Kokkinakis* is actually even more complex than this. A is a member of a small minority group (let us call it JW—the Jehovah's Witnesses), the collective identity of which is related to a particular religious tradition that includes among its central tenets a religious duty of proselytism. B, on the other hand, is a member of a majority group (let us call it EO—Greek Eastern Orthodoxy), the collective identity of which is related not only to a particular dominant religious tradition but also to the historical character and identity of the state itself. We are now faced with the problem of trying to work out not only the meaning of the individual freedom of A and B—which bears a complex *moral* relationship, as yet unspecified, to their respective groups JW and EO—but also the *ethical* meaning of the relationship between JW and EO inter se.

Judge Martens assumed that the first question could be answered without considering the relationship of A and B to their respective groups. This was regarded as possible by invoking the asserted "neutrality" of the state—a neutrality that, in the case of the Greek nation-state, does not actually exist. Judge Valticos on the other hand, while rejecting any pretense to neutrality, assumed that the second question could be answered by considering only the relationship between B and EO and not taking into account the relationship between either A and JW or between JW and EO. The meaning of the (moral) right to freedom of religion for Judge Valticos, in other words, did not include the harmful action of proselytism—"harm" in this respect being defined in terms of EO's conception of the good. This fails to recognize the legitimate claims of JW to a different conception of the good (one that includes the religious obligation of proselytism).

It is not my intention to unpack these competing claims further here. My general point is that the right to freedom of religion and belief gives rise to both moral and ethical questions that bear a complex relationship to different types of relations between individuals and groups—what Robert Cover once termed different normative worlds or paideic *nomoi*. More so perhaps than in cases of free speech alone, 134 conflicts involving claims of religious

troversial. See, e.g., Jeremy Waldron, God, Locke and Equality: Christian Foundations in Locke's Political Thought 239–40 (2002) (comparing "John Locke on God" to "John Rawls on moral personality"). Waldron suggests that Rawls's conception in his political liberalism of the human person as a free agent with certain moral powers "has to be able to do by itself... all the work for equality that is done, for Locke, by the notion of our status in the eyes of God." Id. In proceeding to note that Rawls's theory does not necessarily fail by relying on some comprehensive conception of moral personality, Waldron argues that the "overlapping consensus that defines his political liberalism does have indispensable content, and some of that content is controversial." Id.; see also Peter W. Edge, Religious Rights and Choice under the European Convention on Human Rights, 3 Web J. Current L. Issues (2000) (noting that "the existing Protestant and Enlightenment focus on belief [and individual choice] as the foundation of religious interests" is given a central place in the article 9 jurisprudence of the European Court of Human Rights).

^{133.} Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 12 (1983).

^{134.} Of course, conflicts involving freedom of expression may also involve conflicts between groups and thus the same point applies to issues like hate speech and threats to national security (e.g., restric-

freedom cannot meaningfully be addressed or properly understood without taking into account these collective dimensions of the question. Accordingly, in the case of the newly democratic states in Central and Eastern Europe, or indeed in the case of Mr. Kokkinakis in Greece, the question of whether proselytism constitutes a violation of human rights cannot meaningfully be addressed under an analytical framework of the kind proposed by Stahnke without taking into account the broader historical and inter-group context in which these forces and actors are operating.

As regards matters of history, this includes not only the history of the particular political community in which the question is being contested, but also the history of the idea of religious freedom itself and its relationship to that community. One might expect, for example, that the notion of religious freedom as a constitutionally protected human right may have a different resonance and meaning in Eastern Europe as opposed to, say, Eastern Africa. As regards matters of differently-situated groups, this includes not only the relationship between the individual and the various collective structures in different political communities (whether that is the nation-state, a religious minority, or an indigenous people), but also the relationships between individual rights and differing conceptions of the collective good. If this is correct, then the question of whether proselytism constitutes a violation of human rights will turn in large measure on how the individual rights claims at issue are understood in terms of the corresponding background conceptions of the good which are in conflict.¹³⁵

We can now perhaps see how considerations of this type would change the reasoning of the court in *Kokkinakis*. If the individual freedom of the proselytizer is interpreted in terms of the collective good of the majority religious group (i.e., the Greek nation-state), then the court will be likely to allow the state to proscribe a wider scope of acts as constituting "improper" proselytism. If, on the other hand, the court considers the individual freedom of the proselytizer in terms of the collective good of the minority religious group (i.e., Jehovah's Witnesses), then it is likely to restrict the scope of acts that the state can proscribe as "improper" proselytism. While on the basis of the specific facts in *Kokkinakis* the case was decided in favor of the

tions on political speech said to threaten the "democratic values" of the state). But issues of freedom of religion or belief will often raise deeper tensions involving questions of (ascriptive) collective identity and the character of the (nation-)state itself that bear an important conceptual relationship to the meaning of individual freedom.

135. Note, for example, the following argument by Serhii Plokhy in relation to the state of religious pluralism in Russia and Ukraine:

[G]overnment policy toward religious minorities in the postcommunist countries is influenced mainly by the kind of relationship that emerges between the state authorities on the one hand and the dominant religious groups on the other. . . [T]he character of [that policy] toward the dominant churches is influenced by the character and intensity of the nation-building process that is currently under way

Serhii Plokhy, State Politics and Religious Pluralism in Russia and Ukraine: A Comparative Perspective, in Protecting the Human Rights of Religious Minorities, supra note 42, at 297–98.

proselytizer and against the state, ¹³⁶ it is apparent that the court has generally construed individual rights in terms of the collective good of the majority as against that of minority religious groups. ¹³⁷ This approach does not prevent minority religious groups from freely practicing their beliefs as guaranteed under article 9—at least not in those "private" spaces of the private sphere such as homes or places of worship (although not in those "public" spaces of the private sphere such as the streets or open spaces where the rights and freedoms of others may be implicated). Rather, it means that in cases of conflict, the court will prefer the majority nation's conception of the collective good including the limits to individual freedom implied by that conception.

Given the dangers of this approach for a liberal theory of human rights (i.e., for any approach that privileges individual freedom), the Court has employed a variety of techniques including the "margin of appreciation" and tests of "reasonableness" to mask the partiality of its reasoning in determining outcomes. Viewed in this way, Judge Martens's assertion of an absolute right to religious freedom in accordance with strict state neutrality is unconvincing. In seeking to reach some kind of balance or *modus vivendi* between personal autonomy and religious social forms in the context of the European nation-state system, the Court has tacitly endorsed what I term a theory of "liberal value pluralism," while formally justifying its reasoning in terms of a theory of "liberal neutrality."

This proposition can be illustrated by the recent twin cases of *Efstratiou v. Greece* and *Valsamis v. Greece* in which the Court held that requiring students to take part in school parades commemorating the outbreak of war between Greece and Italy in 1940 was not an interference with either their or their parents' pacifist convictions as Jehovah's Witnesses. In accordance with what the Court deemed to be "objective criteria," the legitimate societal objective of achieving national unity was held to outweigh the deeply held religious convictions of the Witness children and their parents against participation in the parade. The majority judgment justified its finding of the limited impact of requiring the applicants' attendance by reiterating that the parade served the dominant "public interest" (i.e., the majority's conception of the collective good). This was because the commemoration of national events served both pacifist and public interests, and because the

^{136.} As noted above, the Court did *not* find that the Greek proselytism law itself was contrary to article 9, only that the reasoning of the Greek courts was insufficiently precise as to specify why Kokkinakis's proselytism was improper.

^{137.} See Peter W. Edge, The European Court of Human Rights and Religious Rights, 47 Int'l & Comp. L.Q. 680 (1998); Gunn, supra note 104, at 325.

^{138.} Efstratiou v. Greece, App. No. 24095/94, 24 Eur. H.R. Rep. 294 (1997); Valsamis v. Greece, App. No. 21787/93, 24 Eur. H.R. Rep. 294 (1997). The Court further held that suspending pupils for refusing to march in such parades did not violate their freedom of religion in that the disciplinary rules applied generally and in a neutral manner. Important to the Court's reasoning was the finding that such measures had a limited duration and therefore a limited impact.

presence of military representatives at the parade did not alter its nature as an expression of national values and unity.¹³⁹

In a joint dissenting opinion, judges Thor Vilhjalmesos and Jambrek argued that the applicant's experience of being forced to participate in the parade was clearly contrary to her "neutralist, pacifist and thus religious beliefs." Viewing the question of individual freedom more from the perspective of the minority conception of the good, they argued that the applicant's perception of the symbolism of the parade and her religious and philosophical convictions should only be rejected by the Court if they were clearly unfounded or unreasonable. In the circumstances, there was no basis for regarding her participation as necessary in a democratic society, even if the public event was for most people an expression of national values and unity.

3. Freedom from Injury to Religious Feelings

That is all that I wish to say on the subject of the conflict between the freedom to manifest and the freedom to have and peacefully maintain one's religion. There is, however, a final bundle of claims by the target of proselytism that we must consider—the right to be free from injury to religious feelings.

There is no explict provision in the international instruments stating that individuals or groups have a right to be "free from injury to religious feelings." However, article 20(2) of the ICCPR provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Furthermore, article 19(3) qualifies the right to freedom of expression by stating that the exercise of this right

carries with it special duties and responsibilities . . . [and] may therefore be subject to certain restrictions . . . provided by law and . . . necessary:

- a. For respect of the rights or reputations of others;
- b. For the protection of national security or of public order (*ordre public*), or of public health or morals.¹⁴¹

^{139.} Efstration, 24 Eur. H.R. Rep. at 295, ¶ 32. Furthermore, the majority suggested that the applicants' religious interests were being adequately addressed by other means such as exemption from religious education lessons, school prayer, and the Orthodox mass.

^{140.} Id. at 322, ¶ 34.

^{141.} ICCPR, *supra* note 10, arts. 19(3), 20(2). There are similar provisions providing protection against such incitement in other international conventions. *See, e.g.*, Race Convention, *supra* note 13, art. 4 (requiring states to prohibit and punish not only incitement to racial discrimination and violence, but also the dissemination of ideas "based on racial superiority or hatred"); American Convention, *supra*, note 23, art. 13(5) (any advocacy of national, racial, or religious hatred constituting "incitement . . . to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin" considered as offenses punishable by law).

The specific words "injury to religious feelings" are also found in the jurisprudence of the European Court and former Commission. The Commission stated in *Wingrove v. United Kingdom* that while religious believers could not expect to be exempt from all criticism and must tolerate the denial by others of their beliefs, the state has a responsibility to ensure the peaceful enjoyment of believers' rights under article 9 and the English law of blasphemy was "intended to suppress behavior likely to cause justified indignation among believing Christians." As a consequence, it was "intended to protect the right of citizens not to be insulted in their religious feelings." 142

For reasons soon to be apparent, the conflicts arising from this set of claims are equally if not more intractable than those we have considered to date. As Krishnaswami has observed, many states have laws prohibiting blasphemy or injury to religious feelings:

It is to prevent the dissemination of a faith in a manner offensive to others that special laws, such as laws against blasphemy have been enacted Unfortunately, in some cases the laws against blasphemy have been framed in such a manner that they characterize any pronouncement not in conformity with the predominant faith as blasphemous . . [Such laws] have sometimes been used to limit unduly—or even to prohibit altogether—the dissemination of beliefs other than those of the predominant religion or philosophy. 143

We are thus confronted here with a conflict between the freedom of the proselytizer (or, for present purposes, the blasphemer, whether religious or irreligious) either to manifest her religion or belief or to exercise her right to freedom of expression (or both), and the freedom of the target of proselytism to be free from injury to her religious feelings in those circumstances, as yet undefined, which are legitimately protected by the offense of blasphemy.

Such conflicts have been the subject of a voluminous literature that I do not wish to revisit in detail here. 144 Rather, I wish to make two general observations. The first is that this conflict of rights—involving as it does claims to both freedom of religion and expression—raises all the same dilemmas discussed previously. In addition, however, it raises further difficult

^{142.} Wingrove v. United Kingdom, App. No. 17419/90, 24 Eur. H.R. Rep. 1 (1997), ¶¶ 52–53 (1997); see also Evans, supra note 34, at 339.

^{143.} Krishnaswami Study, supra note 14, at 41. The term "blasphemy" has been defined as

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

Stahnke, supra note 24, at 290 (quoting BLACK'S LAW DICTIONARY 216 (4th ed. 1968)).

^{144.} See, e.g., H.M. Kamali, Freedom of Expression in Islam (1997); Sacrilege versus Civility: Muslim Perspectives on the Satanic Verses Affair (A.R. Kidwai & M.M. Ahsan eds., 1991); Stahnke, supra note 24, at 289–99. For a general discussion in the context of the ICCPR, see Mashood A. Baderin, International Human Rights and Islamic Law 125–29 (2003).

questions regarding, in the words of ICCPR article 20(2), incitement to discrimination, hostility, or violence. Religious belief can play a role both in the source of the prohibited incitement and in the selection of the target. Religions have been and continue to be fertile sources of prejudice and hatred, often leading to discrimination and violence. Strong anti-religious beliefs have been manifested in a similar fashion. The Human Rights Committee has stated that any manifestation of religion or belief that amounts to incitement to discrimination, hostility, or violence is not protected under the right to freedom of religion in article 18.¹⁴⁵ Furthermore, given that it is often on the basis of religious identity or belief that persons or groups are targeted for such incitement, the Committee has noted that the protection afforded by article 20(2) of the ICCPR is directly related to the exercise of the rights protected under articles 18 and 27.¹⁴⁶

The difficulty, as discussed above, is that certain manifestations of religion, especially in the form of proselytism, are often likely to amount to at least some form of "incitement to discrimination or hostility." 147 Recall, for example, the role of Christian missionaries in many parts of Africa or the intolerance that is sometimes shown by religious leaders and believers toward other religions or nonbelievers. Furthermore, there is an obvious tension between the obligation to prohibit incitement to discrimination, hostility, or violence and the obligation to ensure the right to freedom of expression.¹⁴⁸ In its General Comment on article 20, the Human Rights Committee stated that article 20(2) is "fully compatible with the right of freedom of expression as contained in article 19 the exercise of which carries with it special duties and responsibilities."149 This assertion is open to question, however, when one considers that certain states have entered reservations to article 20(2) on the very grounds that it infringes on constitutionally protected rights to freedom of expression. The United States, for example, has rejected the position of the Human Rights Committee arguing that article 20(2) requires the suppression of expression on the basis of content alone rather than on the basis of a demonstrated connection between the content of the expression and its effect on public order or the rights of others: "Under the First Amendment [to the U.S. Constitution],

^{145.} See General Comment 22, supra note 22, ¶ 7.

^{146.} *Id.* ¶ 9 (stating that the "measures contemplated by article 20, paragraph 2, of the Covenant constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed toward those groups").

^{147.} See supra note 32 and accompanying text.

^{148.} This problem is considered from the standpoint of international standards as well as the practice of a number of states in Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination (Sandra Coliver ed., 1992).

^{149.} U.N. Hum. Rts. Comm., General Comment No. 11, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003). Similar determinations are found in General Recommendation XV(42) of the Committee on the Elimination of Racial Discrimination, reprinted in U.N. Doc. A/42/18 (Jan. 1, 1987), and in the U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 45, U.N. Doc. E/CN.4/1995/32 (Dec. 14, 1994) (prepared by Abid Hussain).

opinions and speech are protected categorically, without regard to content. Thus, the right to engage in propaganda for war is as protected as the right to advocate pacifism, and the advocacy of hatred as protected as the advocacy of fellowship."¹⁵⁰ Under U.S. law, even in the case of speech posing a "clear and present danger" to public order, the government must establish that such speech is "intended to incite or produce imminent lawless action and is likely to achieve that end," or constitute words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Thus, the First Amendment permits the limitation of expression intended, and likely, to result in imminent violence but *not* in the case of the incitement to discrimination or hostility or expression not likely to result in imminent violence. This is a considerably narrower limitation on expression than that set out in article 20(2).

The case of *Faurisson v. France* provides a useful illustration of these two conceptions of incitement. Here, France defended before the Human Rights Committee the application of its criminal law to certain Holocaust deniers. The Gayssot Act made it a criminal offense to contest the existence of crimes against humanity as found by the Nuremburg Tribunal. In finding that the applicants' rights to freedom of expression were not violated, the Committee accepted the French government's argument that "racism did not constitute an opinion but an aggression, and that every time racism was allowed to express itself publicly, the public order was immediately and severely threatened." ¹⁵² In the absence of explicit incitement, several members of the Committee justified this decision by suggesting that this was a case where

in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a *pattern of incitement* against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.¹⁵³

Here again, we can observe the powerful role that the background conditions of history and inter-group relations (especially in terms of the rights and vulnerabilities of minority groups) can play in attempting to resolve conflicts between claims of right. Indeed, it may be the very different histories and understandings of religious and cultural nationalism that best explain the differences in approach to permissible limitations on hate and

^{150.} U.N. Hum. Rts. Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, ¶ 597, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994) (U.S.).

^{151.} Id. ¶ 590 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

^{152.} U.N. Hum. Rts. Comm., Report of the Human Rights Committee: Volume II, annex VI, Communication No. 550/1993, ¶¶ 7.3, 9.7, U.N. Doc. A/52/40 [VOL.II] (SUPP) (Nov. 8, 1996).

^{153.} Id. ¶ 4 (Evatt & Kretzmer, concurring) (emphasis added).

other extremist speech in Europe and the United States. Similarly, these same factors may provide the best explanations for the current impasse between the "West" (broadly defined as including Europe and the United States) and the "Islamic world" on the question of how to resolve conflicts between free speech and the demands of religious sanctity.

a. The Danish Cartoons Controversy

Let me illustrate these two assertions by considering briefly the response to the Danish cartoons affair in the United States, Europe, and predominantly Muslim countries respectively. In the United States, consistent with the Enlightenment premises of the American Constitution, the weight of legal opinion has been in favor of free speech against any countervailing right to freedom of religion, and in favor of the individual right to expression against any countervailing group or minority rights to be free from discrimination, hostility, or violence. 154 In Europe, however, there has generally been a greater sensitivity shown to these countervailing factors and a genuine (albeit inconclusive) attempt to reconcile the competing claims of right at issue with regard to both the historical context of European intergroup relations and the relevant international human rights instruments. 155 By contrast, in the vast majority of Islamic states there has been a consensus that the cartoons are part of a wider pattern of discrimination and hostility toward Muslims in Europe in particular and are defamatory of Islam in general. 156 On the grounds that defamation of religions is inconsistent with the right to freedom of expression, the Organization of the Islamic Conference has recently called for "legally-binding" U.N. resolutions to "prevent defa-

^{154.} See, e.g., Steve Edwards, On the Right to Give Offence, Policy, Spring 2006, at 33, 35 (on the basis of the "axiom of classical liberalism" that "no-one may initiate force or the threat of force against anyone else," arguing that to "compromise' freedom of expression by erecting statutory guard-posts around a bundle of unproven and unfalsifiable assertions is to assault the very foundations of science, logic and rationality") (emphasis omitted); Post, supra note 78, at 84 (concluding that the Danish cartoons are "rather far from legally prohibited hate speech" as they, inter alia, take a position on issues of "obvious public moment," do not "advocate discrimination or oppression or violence," and "do not portray Muslims as without human dignity"); Barbara Smoker, Should We Respect Religion?, Free Inquiry, Oct./Nov. 2006, at 27, 30 (relying on the Millian argument for free speech as the pursuit of truth and arguing that "[f]ar from being willing to moderate free speech by respect for religion, we should moderate respect for religion in favor of free speech").

^{155.} See, e.g., Boyle, supra note 5, at 188, 191 (noting that freedom of religion is both an individual and a collective right and arguing for a "long-term approach to the elimination of religiously motivated hatred and discrimination" requiring both believers and nonbelievers to "seek harmony between these freedoms in practice, not one that a priori privileges one over the other, whether it is freedom of expression or freedom of religion"); Paul Sturges, Limits to Freedom of Expression? Considerations Arising from the Danish Cartoons Affair, 32 IFLA J. 181 (2006) (analyzing the cartoons controversy in terms of both ICCPR and ECHR provisions). See also Susannah C. Vance, The Permissibility of Incitement to Religions Hatred Offenses under European Convention Principles, 14 Transnat'l L. & Contemp. Probs. 201 (2004).

^{156.} See, e.g., A. Sivanandan, Freedom of Speech Is Not an Absolute, RACE & CLASS, July 2006, at 76–77 (arguing that racism in Europe is "particularly and violently directed at Muslims today" and that freedom of speech cannot be used to "endanger other people's lives by incitement to racial, ethnic or religious harred").

mation of religion and prophets" and to "render all acts whatsoever defaming Islam as 'offensive acts' and subject to punishment." ¹⁵⁷

The eclectic, value pluralist nature of the European position is the approach most consistent with the thesis of this Article. By considering both the individual and collective interests protected by the right to freedom of religion, we begin to see the unarticulated major premises and particulars masquerading as universals in First Amendment discourse. This is evident in Robert Post's analysis of the cartoon controversy. Post identifies three possible state interests justifying legal suppression of the cartoons—the suppression of blasphemy, the protection of religious groups, and the prevention of discrimination—and ultimately dismisses each one. In order to see why exactly he dismisses them, let us consider each of his arguments in turn.

The first of such interests is the suppression of blasphemy. In seeking to resolve the "contradiction between keeping public discourse open to all opinions and excluding from public discourse those who would deny what a particular religion regards as sacred," Post concludes that in restricting such speech the "state loses democractic legitimacy with respect to those who do not believe in the truths protected by a law of blasphemy." 158

As a normative matter, however, why should democratic self-governance as a justification for protecting free speech take precedence over the intrinsic value of respect for religions and religious belief? Does the state not thereby risk losing its legitimacy with respect to those with sensitive and communal religious convictions? Nothing in the Covenant on Civil and Political Rights supports the view that article 19 is necessarily hierarchically superior to article 18 and, conversely, article 20(2) in fact *requires* states to prohibit by law advocacy of religious hatred rising to the level of inciting discrimination, hostility or violence. Furthermore, many democratic states, such as the United Kingdom, maintain laws prohibiting blasphemy that have been upheld by the European Court as compatible with article 10 of the ECHR. Why, then, does Post so easily assume the priority of free speech and its associated justification of democractic legitimation?

The answer, I believe, lies in Post's rejection of the second possible state interest in suppression—the protection of religious groups. Post criticizes the logic of the European Court's statement in *Otto Preminger Institute v. Austria* that "persons have a right not to be insulted in their religious beliefs

^{157.} On Eliminating Hatred and Prejudice Against Islam, Islamic Conference of Foreign Ministers, 33d Sess., June 19–21, 2006, Res. No. 26/33-P. Note that fifty-seven member states of the OIC have had longstanding concerns regarding the "defamation of religions." The U.N. Human Rights Commission has passed resolutions annually since 1999 on combating defamation of religions. See U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., Report to the Economic and Social Council, Res. 2005/3, U.N. Doc. E/CN.4/2005/L.11/Add.1 (Apr. 12, 2005).

^{158.} Post, supra note 78, at 78.

because offense of this kind inhibits the right to practice a religion." ¹⁵⁹ Such a rationale excludes from public discourse those whose convictions are offensive to religious groups. The difficulty for Post is the notion of toleration that lies at the heart of the Court's attempt to balance the competing interests. In response to the Court's assertion that a "spirit of tolerance must be a feature of democratic society," Post replies that "democracy does not require toleration in the sense that persons abandon their *independent evaluation of the beliefs and ideas of others*"; otherwise, "[t]o the extent that democracy suppresses my expressions of disapproval or condemnation for the actions of groups that I dislike, it excludes me from the formation of public opinion." ¹⁶⁰

While defensible in a particular constitutional or philosophical tradition, this proposition rests on an underlying bias that cannot simply be assumed as a matter of international law. Individual freedom of thought, conscience, and expression, justified on Enlightenment rationalist and secular modernist grounds, is the dominant value in Post's normative scheme. Freedom of religion, however, is compatible with this view primarily to the extent it is understood to encompass an inviolable private or inner realm of "belief" the so-called forum internum discussed earlier—separate from manifestations of that belief.¹⁶¹ On this view you may believe in any prophet or religion you wish, provided you do not manifest your beliefs in such a way as to restrict the rights of others to believe (or not to believe) or express (or not to express) themselves as they choose. The difficulty with this argument is that it relies on a prior contingent assumption equating religion with belief. This may be less problematic in a strongly immigrant and Christian society such as the United States (although even here the assumption is inherently problematic). 162 But in contexts where religion and state have different historical configurations and where ascriptive religious identities define the differences between majority and minority national groups, this simply will not work.

^{159.} *Id.* at 79; see Otto Preminger Inst. v. Austria, App. No. 13470/87, 295 Eur. Ct. H.R. (ser. A) 6, 18 (1994) (stating that "in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them"); see also Wingrove, 24 Eur. H.R. Rep. 1 (upholding censorship of a film showing a Catholic saint in a state of sexual eestasy).

^{160.} Post, supra note 78, at 79-80 (emphasis added).

^{161.} See supra note 42 and discussion on the belief-action distinction. The point is not that free exercise of religion is not protected, but that the scope of limitations on the manifestation of religious beliefs will depend on the theory of religious toleration employed. Note, for example, the uncertainty following the Supreme Court's decision in Employment Division v. Smith regarding the scope of religious toleration in cases involving the enforcement of formally neutral, general laws that burden the free exercise of religion. See, e.g., Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993). The real question is the extent to which the state recognizes a limited sphere of collective autonomy. See Cover, supra note 133, at 31–32 (arguing that the idea of "associational self-realization in nomian terms" tacitly underlies the Court's famous decision in Wissonsin v. Yoder, 406 U.S. 205 (1972)).

^{162.} See Danchin, supra note 16, at Part III.D (discussing two competing conceptions of liberal nationalism in First Amendment justisprudence).

Once the right to freedom of religion is understood to include the communal, public, and sensitive aspects of religions such as Islam, Post's argument collapses and the need arises to engage with a genuine conflict of interests internal to the right itself. Why, for example, should Post's assumption not now be reversed, as many representatives of Islamic states have urged, and the right peacefully to manifest one's religion be regarded as the dominant value? On this view, freedom of thought and opinion remains absolutely protected, but manifestations of that opinion are now open to limitation to the extent they incite discrimination, hostility, or violence toward religion. The fraught task of calibrating the respective rights and interests now resumes, for example, in undertaking to draw the line between speech that is "gratuitously offensive" and speech that, though offensive, contributes to "any form of public debate capable of furthering progress in human affairs."163 But while the heremeneutic difficulties remain, the method and mode of reasoning has shifted. It is now respect for the intrinsic value of religious belief and practice that provides the unspoken background and tacit starting point for the ensuing rights discourse.

Consider the implications of this argument in the context of Post's rejection of the third possible state interest in suppression—the prevention of discrimination. Post suggests that states have an interest in preventing discrimination against Muslims but that this objective is "distinct from the interest in prohibiting and preventing speech that Muslims find offensive." ¹⁶⁴ The line to be drawn is according to the version of Mill's harm principle articulated in *Brandenburg v. Ohio*: content-based restrictions on speech are not permissible unless the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." ¹⁶⁵ But what is the conception of "harm" being deployed here? Why should imminent violence be the correct standard as opposed to, say, the article 20(2) standard of inciting racial or religious discrimination and hostility? Furthermore, *whose* harm is at issue here? Is it the harm caused by suppressing speech or the harm caused by the speech itself that is our critical concern? As suggested by Stanley Fish, whose ox exactly is being gored? ¹⁶⁶

^{163.} This distinction is drawn by the European Court in *Otto Preminger Inst.*, 295 Eur. Ct. H.R. at 19. Post notes that the distinction between the style and substance of speech is what underlies British law on blasphemous libel that permits anything to be said so long as the "decencies of controversy are observed." Post, *supra* note 78, at 80 (internal quotation marks omitted).

^{164.} Post, supra note 78, at 82.

^{165.} Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

^{166.} Stanley Fish, There's No Such Thing as Free Speech: And It's a Good Thing, Too 104 (1994). Fish's argument is that speech is "never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict." *Id.* His larger point is that liberal theories of free speech derive from Enightenment rationalism: a "faith (a word deliberately chosen) in reason as a faculty that operates independently of any particular world view." *Id.* at 134. However, this is *in itself* a world view that works to shape the debate carried on within its influence. Thus, persons embedded in "different discursive systems"—such members of religious traditions who privilege faith over reason and thus deny the fundamental premise of liberalism, as I suggest here—will be marginalized within an ideological system that, while claiming to treat all truth claims

As we shall see in Part IV below, different states in different parts of the world, each with its own unique history and constitutional settlements, continue to struggle with these questions and reach different forms of accommodation of the rights claims at issue. Once the concept of religion is viewed in the strongly pluralist terms demanded by international law rather than in solely Enlightenment rationalist terms, and once the *collective interests* that the right to freedom of religion protects are brought explicitly back into the analysis as opposed to focusing solely on individual autonomy, notions such as "discrimination" and "harm" lose the self-assuredness they assume in Post's hands, and become once again essentially-contested concepts within divergent religious and cultural nomian spheres. If correct, this argument has profound implications for any mapping of individual toleration in international law.¹⁶⁷

b. Blasphemy and a Dominant Religion

The second and final observation I wish to make concerns an additional feature of blasphemy laws that adds a further complicating factor to this analysis. This is the fact that blasphemy laws do not necessarily protect *all* individuals or groups from injury to religious feelings but extend protection in general only to the established or dominant religious group. The English common law offense of blasphemous libel, for example, has been held by the British courts not to extend to all religions but to cover only the Church of England and, in some respects, Christianity as a whole. The rationale for the limited scope of the offence is related to the historical relationship between the state and the (Protestant Christian) nation in Britain. Still today, the Anglican Church of England and the Presbyterian Church of Scotland remain officially "established" and retain various privileges and immunities under British law. Thus, as stated in *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* (the "Salman Rushdie" case):

Indeed, all offences of this kind are not only offences to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together; and it is upon this ground that the Christian religion constitutes part of the law of England ¹⁶⁹

equally, is in fact centered around the primacy of a particular "foundationalist" eighteenth-century conception of Reason whose ascendancy in the West is itself the product of contingent historical forces and political struggles.

^{167.} See infra Part V.

^{168.} See, e.g., Gay News Ltd. v. United Kingdom, App. No. 8710/79, 5 Eur. H.R. Rep. 123 (1983). In R. v. Lemon, 1 All E.R. 898, 921 (1979) (U.K.), Lord Scarman criticized blasphemous libel at common law on the grounds that it did not extend to "protect the religious beliefs and feelings of non-Christians" (which was necessary in an "increasingly plural society such as that of modern Britain") but rather belonged to a "group of criminal offences designed to safeguard the internal tranquility of the kingdom."

^{169.} R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury, 1 All E.R. 306, 313 (Q.B. 1991) (quoting R. v. Williams, 26 State Tr. 654, 714 (1797)). In this case, concerning Salman Rushdie's *The Satanic Verses*, the Court declined to extend blasphemous libel to cover other religions. *Id.* at 306. The

The identification of those "obligations whereby civil society is bound together" with a particular religious tradition accordingly raises complex questions of the background relationship between the state and different conceptions both of nationalism and of the equality of religious minorities, relating to treatment and rights. It is to such questions of religious freedom as it "actually exists" in the constitutional arrangements of different countries around the world that we now turn.

IV. ACTUALLY EXISTING RELIGIOUS FREEDOM

Although often overlooked in discussions of this kind, what I term the "cultural function" of the nation-state has particular importance for our understanding of the nature and limits of the right to freedom of religion and belief.¹⁷⁰ This is because the cultural and historical traditions of national groups have been shaped, to varying degrees, by particular religious traditions.¹⁷¹ Even a cursory review of the basic forms of the relationship of the state to religion(s) in national constitutions reveals a great plurality of arrangements in actually existing nation-states around the world—a veritable patchwork of dispensations and disparate forms of overlapping consensus seeking to reconcile the particular historical and factual circumstances of the state with the norm of freedom of religion and belief.

Of course, as Krishnaswami reminds us, the constitutional form that the relationship between religion and the state takes is not itself a conclusive prediction of the extent to which rights related to religion and belief are protected in any country:

[T]he mere fact that a country falls into one of the three categories [of established church/state religion, recognition of several religions, or separation of state and religion] is not in itself a sufficient basis upon which to determine whether or not discrimination with respect to freedom of thought, conscience and religion exists in that country. It is necessary to probe more deeply into the actual situation in each case in order to reach a conclusion on this matter.¹⁷²

Thus, it is important to realize that, as a general matter, the extent of religion-state identification does not necessarily correlate in a linear fashion with

case went to the European Commission, which determined that the restricted protection provided by the English blasphemy law was not discrimination on the basis of religion in violation of articles 9 and 14 of the European Convention. See Choudhury v. United Kingdom, App. No. 17439/90, 12 Ним. Rts. L.J. 172–73 (1991).

^{170.} For a comprehensive argument that freedom of religion should be "reconstructed" as "a special case of the right to culture" and should thus be defined as a "minority rights requirement," see Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 625–45 (1999).

^{171.} See, e.g., Yael Tamir, Liberal Nationalism (1993). For detailed discussion of the relationship between religion and national self-determination, see Danchin, supra note 16, at Parts II–III.

^{172.} Krishnaswami Study, supra note 14, at 48.

the extent of religious freedom in any particular model of religion-state relationship. As Durham has observed, "both strong positive and strong negative identification of church and state correlate with low levels of religious freedom. In both situations, the state adopts a sharply defined attitude toward one or more religions, leaving little room for dissenting views." ¹⁷³ Both absolute theocracies and radically secularist regimes (such as those that existed under official Communist atheism) correspond with a low level of religious liberty, especially for minority religions. ¹⁷⁴ There can also be substantial differences between constitutional texts and actual practices. Constitutions are primarily aspirational documents, and the legal effect in practice of any constitutional principle or norm may vary from the actual text. In addition, states with similar constitutional provisions may place significantly different interpretations on those provisions. ¹⁷⁵

In what follows, I set out some of the basic forms of recognition of the relationship of the state to religion in national constitutions. My aim in doing so is to illustrate the tremendous variety of constitutional arrangements existing in the world regarding religion, and accordingly the diversity of contexts in which laws restricting proselytism arise for consideration. This great pluralism in normative settlements both within and between different ways of life lays the groundwork for the final argument in Part V concerning the need for a shift toward value pluralism as an account of religious freedom in international law.

A. Religion and State in National Constitutions

Some constitutions recognize no particular relationship between religion and the state and contain provisions that generally follow the language of international instruments.¹⁷⁶ In other constitutions, a dominant religion is specifically mentioned, albeit in the context of other religions. For example, the 1978 Spanish Constitution provides:

Article 16

1. Freedom of ideology, religion and cult of individuals and communities is guaranteed without any limitation in their demonstrations other than that which is necessary for the maintenance of public order protected by law.

^{173.} W. Cole Durham, Jr., Perspectives on Religious Liberty: A Comparative Framework, in Religious Human Rights in Global Perspective: Legal Perspectives, supra note 14, at 18.

^{174.} See, e.g., id. at 19.

^{175.} For example, the establishment clauses in the Australian and U.S. constitutions, although worded in similar terms, have been interpreted quite differently by the courts in each country. See, e.g., Peter Bailey, Human Rights: Australia in an International Context 97 (1990) (observing that, in Attorney-General for Victoria Ex Rel Black v. Commonwealth, 146 C.L.R. 559 (1981) (the "DOGS case"), the Australian High Court "departed from the 'strict separationist' view being applied at the time of Federation by the United States Supreme Court, in favor of a 'non-preferential' or middle view").

^{176.} See, e.g., S. Afr. Const. 1996 arts. 9(3), 15, 16(2)(c), 31.

- 2. No one may be obliged to make a declaration on his ideology, religion or beliefs.
- 3. No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain the appropriate cooperation with the Catholic Church and other confessions.¹⁷⁷

It is not apparent from these provisions what significance, if any, the particular mention of the Catholic Church might have, as no privileges or differential treatment are explicitly indicated. However, in its agreements with the Holy See structuring the relationship between the Spanish state and the Catholic Church, it is recognized that the Spanish legal code provides for "norms appropriate to the fact that the majority of the Spanish people profess the Catholic religion." Thus, where mention of a particular religion is the result of that religion's dominant position in the national community, specific legal norms and practices must be closely examined for differential treatment of other religious communities. Indeed, in Spain, the Catholic Church retains certain privileges not granted to other religious communities.

In some constitutions, a particular religion is identified as the religion of the state or as the "established" religion. Certain special treatment or privileges may be provided for in connection with this recognition. One example of this type of recognition (ironically, given the discussion in Part III.B.3 above) is the Constitution of Denmark, which provides:

Section 4

The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State.

Section 6

The King shall be a member of the Evangelical Lutheran Church.

^{177.} Constitución [C.E.] art. 16 (Spain), translated in 17 Constitutions of the Countries of the World (Gisbert H. Flanz ed., 2006) [hereinafter Constitutions of the World]; see also Constitution of the Republic of Macedonia art. 19, translated in 11 Constitutions of the World (specifically mentioning the Macedonian Orthodox Church).

^{178.} Agreement of July 28, 1976, Spain-Holy See, Aug. 19, 1976, B.O.E. No. 230, pmbl., reprinted in Religion and Human Rights: Basic Documents 237 (Tad Stahnke & J. Paul Martin eds., 1998). I am grateful to Tad Stahnke for helpful conversations on these issues. The discussion in this and the following section on constitutions in predominantly Muslim states draws extensively on his early research and work in this area.

^{179.} See, e.g., Tad Stahnke, Equality and Religious Preferences: Theoretical, International and Religious Perspectives, in Protecting the Human Rights of Religious Minorities, supra note 42, at 87. Stahnke notes that there are four primary agreements between Spain and the Holy See, which set out various privileges and benefits (on general matters, legal affairs, education and cultural affairs, and economic affairs). Spain has also concluded agreements with the Federation of Evangelical Religious Entities of Spain, the Islamic Commission of Spain, and the Federation of Israelite Communities of Spain. See also Gloria Moran, The Spanish System of Church and State, 1995 BYU L. Rev. 535.

Section 66

The constitution of the Established Church shall be laid down by Statute. 180

B. Pluralism in Islamic Constitutions

Many predominantly Muslim states contain similar provisions with respect to Islam. There is, however, great diversity across the Muslim world as to the constitutional arrangements dealing with the role of Islam and the scope of the right to freedom of religion or belief.¹⁸¹ As Stahnke and Blitt observe, from among fourty-four predominantly Muslim countries, ten declare themselves to be "Muslim states";¹⁸² twelve declare Islam to be the "official state religion";¹⁸³ eleven declare themselves to be "secular states";¹⁸⁴ and eleven make no constitutional declaration concerning the Islamic or secular nature of the state.¹⁸⁵ Within all these states today, discussions are ongoing concerning the appropriate constitutional role for Islam, the scope and limits of the right to freedom of religion and belief, and the application of rights to equality and nondiscrimination.

A striking recent example of this dynamic is the post-2003 Iraqi constitution, approved in 2005. Under article 2(1), Islam is declared to be the "official religion of the State" and a "fundamental source of legislation," while no law that "contradicts the established provisions of Islam may be established." Article 2(2) further states that "[t]his Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice such as Christians, Yazedis, and Mandi Sabeans." At the same time, article 14 provides that "Iraqis are equal before the law without discrimination based on . . . religion, creed, belief or opinion"¹⁸⁶

In such cases where a national constitution recognizes—either explicitly or implicitly—a religion as having the character of a state or established religion, two basic problems can arise. First, such recognition may result in

^{180.} Constitution of the Kingdom of Denmark §§ 4, 6, 66, translated in 5 Constitutions of the World, supra note 177. Other provisions of the Danish Constitution recognize religious freedom and some measure of equality with respect to religion and religious communities. See id. §§ 67–70.

^{181.} Tad Stahnke & Robert C. Blitt, The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries, 36 GEO. J. INT'L. L. 947 (2005).

^{182.} Those countries are Afghanistan, Bahrain, Brunei, Iran, Maldives, Mauritania, Oman, Pakistan, Saudi Arabia, and Yemen. *Id.* at 954–55 tbl.

^{183.} Algeria, Bangladesh, Egypt, Iraq, Jordan, Kuwait, Libya, Malaysia, Morocco, Qatar, Tunisia, and United Arab Emirates. *Id.* at 955 tbl.

^{184.} Azerbaijan, Burkina Faso, Chad, Guinea, Kyrgyzstan, Mali, Niger, Senegal, Tajikistan, Turkey, and Turkmenistan. *Id.*

^{185.} Albania, Comoros, Djibouti, The Gambia, Indonesia, Lebanon, Sierra Leone, Somalia, Sudan, Syria, and Uzbekistan. *Id.*

^{186.} Constitution of the Republic of Iraq (2005) art. 14, translated in 9 Constitutions of the World, supra note 177.

differential treatment of, and possible discrimination against, persons belonging to other religions or to no religion. This differential treatment may be confined to religious matters—as, for instance, differential limitations on the freedom to manifest religion or belief in cases such as proselytism or differential funding of religious institutions—or may affect the equal protection of other civil or political rights. Second, because the structure and rules of the institutions of the state or established religion are frequently set down by law and those institutions have a state character, there is the danger that the freedom of religion of persons belonging to that religion will be subject to greater state interference than would be true in nonstate institutions.

The U.N. Human Rights Committee and the European Commission have both indicated that the existence of a state or established religion is not in itself a violation of the right to freedom of religion, but does raise certain potential problems. The Human Rights Committee has commented that:

The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents of other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26.187

At least ten of the countries discussed above, however, provide that Islam has a fundamental role in the form and function of the state and society greater than recognition as the state or established religion. An example of this is the 1979 Constitution of Iran. The Iranian Constitution explicitly recognizes not only that Islam is the religion of the state, but also that "[t]he form of government of Iran is that of an Islamic Republic." The principles on which an Islamic Republic rests include belief in "the One God (as stated in the phrase . . . 'There is no god except Allah'), His exclu-

^{187.} General Comment No. 22, supra note 22, ¶ 9. In a case involving Sweden, the European Commission stated that the existence of a state church was not incompatible with article 9 of the European Convention, as long as the state church system included safeguards to protect an individual's freedom of religion, including no compulsion to join the state church and the freedom to leave. Darby v. Sweden, App. No. 11581/85, 187 Eur. Ct. H.R. (ser. A) ¶ 45 (1990) (Comm'n Rep. Annex at 17–18).

^{188.} Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] art. 1, translated in 9 Constitutions of the World, supra note 177.

sive sovereignty and the right to legislate, and the necessity of submission to His commands."¹⁸⁹ As a result, all laws must conform to Islamic criteria. ¹⁹⁰

The scheme of recognition of religious communities set out in the Iranian Constitution generally conforms to traditional Islamic criteria. According to article 12, "[t]he official religion of Iran is Islam and the Twelver Ja'farî school," while other schools of Islam enjoy "official status" in regards to religious education and personal status law. 191 The rights of religious minorities are set out in article 13:

Zoroastrian, Jewish and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.¹⁹²

The form of relationship mentioned above implicates the problems of differential treatment with respect to the recognition of a state or established religion. It also illustrates problems related to the submission of all persons, regardless of their religion or belief, to a political, social, and legal system purported to be based solely on the tenets of one religion. ¹⁹³

On the other hand, some constitutions within predominantly Muslim countries recognize the separation of religion and religious communities from the state. Additional provisions in some such constitutions establish secularism as a constitutional principle. In furtherance of secularism, such provisions may address the social place of religion and may explicitly curtail the political activities of religions. A prominent example of these types of provisions is the constitution of Turkey. In the preamble of the constitution, it is stated that its provisions are to be "understood, interpreted and implemented" in light of certain basic principles, including

the determination that no activity can be protected contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values

^{189.} Id. art. 2.

^{190.} *Id.* art. 4 ("All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the *fuqaha*' of the Guardian Council are judges in this matter.").

^{191.} Id. art. 12.

^{192.} *Id.* art. 13. Non-Muslims must be treated "in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights." *Id.* art. 14. The rights to freedom of religion or protection from discrimination on the basis of religion are not expressly recognized in the Iranian Constitution, although articles 23 and 26 provide certain limited protections. *Id.* arts. 23, 26.

^{193.} See, e.g., Ann Elizabeth Mayer, Islam and Human Rights: Tradition and Politics 83–97 (1999) (examining Islamic law, especially discrimination against women and non-Muslim minorities, in terms of international human rights standards); see also Constitution of the Kingdom of Saudi Arabia pmbl., art. 1, translated in 16 Constitutions of the World, supra note 177 (stating that the "Kingdom of Saudi Arabia is an Arab and Islamic sovereign state" whose religion is Islam and whose constitution is the "holy Quran and the Prophet's Sunnah"). Under article 23, the state "protects the Islamic creed, carries out its sharia and undertakes its duty toward the Islamic call." Id. art. 23.

or the nationalism, principles, reforms and modernization of Atatürk and that, as required by the principle of laicism, sacred religious feelings can in no way be permitted to interfere with state affairs and politics. 194

Furthermore, the ramifications of secularism are contained in the constitutional provisions on the right to freedoms of thought and faith, which state, in part:

No one can be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for [the purpose of] even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets or for . . . obtaining political or personal benefit and influence. 195

Provisions of this kind are a reminder of Durham's thesis that constitutional dispensations of an explicitly anti-religious character may also correlate with a negative impact on the recognition of rights related to religion and belief. ¹⁹⁶

C. French and American Exceptionalism

Two of the most recognizable constitutions—and I would add historically exceptional ones—on the question of religion and religious freedom are those of France and the United States. These documents emerged from their respective eighteenth-century revolutions and each enshrines Enlightenment principles of individual liberty of conscience and separation of church and state. The fundamental principles and laws of the French Republic state in their preamble that "[t]he French People solemly affirm the laws and rights of man and the citizen set down in the Declaration of Rights of 1789 and the fundamental principles recognized by the laws of the Republic." Article 2 of the 1958 French Constitution states that "France is a Republic, indivisible, secular, democratic and social. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion. It shall respect all beliefs." While for many years the Catholic Church was

^{194.} Constitution of the Republic of Turkey pmbl., translated in 18 Constitutions of the World, subra note 177 (emphasis added).

^{195.} *Id.* art. 24. This provision has recently been invoked by the Turkish Constitutional Court to abolish the Turkish Welfare Party, a political party devoted to increasing the role of Islam in Turkish society and the state. The case ultimately went to the European Court of Human Rights. *See* Refah Partisi (The Welfare Party) v. Turkey, App. Nos. 41340/98 & 41342–44/98 (Grand Chamber 2003) (upholding the dissolution as compatible with the ECHR despite the Refah Party being in government at the time, its leader being prime minister, and the party having 4.3 million members).

^{196.} Durham, supra note 173, at 12-25.

^{197. 1958} Const. pmbl. (France), *cited in* Freedom of Religion and Belief: A World Report 294–95 (Kevin Boyle & Juliet Sheen eds. 1997) [hereinafter Freedom of Religion and Belief].

^{198.} Id. art. 2.

accorded certain privileges and state support, in 1946, secularism or *laïcité* was officially adopted in France as a constitutional principle.¹⁹⁹

Like France, the United States is a constitutional democracy based on respect for individual liberty as entrenched in a bill of rights. I do not wish to discuss here the two religion clauses of the First Amendment to the U.S. Constitution other than to note that the free exercise clause has generally been interpreted to provide a robust conception of the freedom to manifest religious belief.²⁰⁰ Needless to say, questions of equality and nondiscrimination on the basis of religion have generated a vast, labyrinthine jurisprudence as the Supreme Court has struggled to establish standards consistent with the principles of liberal neutrality and separation of church and state.²⁰¹ As I have argued elsewhere,²⁰² this is unsurprising. The free exercise clause has operated in this respect as a de facto form of value pluralism, employing the doctrine of "substantive neutrality" to mediate between the religious and secular spheres in such a way that the Court has been unable to bring any regularity or coherence to establishment clause jurisprudence under the *Lemon* test.²⁰³

D. Unwritten Constitutionalism

Final mention must be made of two nation-states that do not have written constitutions: the United Kingdom and Israel. The United Kingdom—

199. The 1790 Decree by the National Assembly stated that the Assembly respected religion and was linked to the Roman Catholic Church (which was the only religion supported by public funds) and that the Assembly could not and ought not debate a motion on the Catholic religion that would continue to receive the customary ecclesiastical privileges. It was only in 1905 that article 2 of the Laws of Separation formally ended the privileged position held by the Catholic Church stating that "[t]he Republic does not recognize, remunerate or subsidise any religion." See FREEDOM OF RELIGION AND BELIEF, supra note 197, at 295. The 1905 laws were the result of a complex compromise between the Catholic Church and other religious and non-religious groups. Note, however, that in the regional departments of Bas-Rhin, Haut-Rhin, and Moselle, certain pre-1905 regulations continue to distinguish between recognized (Catholic Church, Lutheran Church of the Augsburg Confession, Reformed Church, and Judaism) and non-recognized religions (Islam, Orthodoxy, certain independent Protestant churches, and various new religious movements). Id.

200. U.S. Const. amend. I. For an overview of the vast jurisprudence of the United States Supreme Court on issues related to freedom of religion, see Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 Notre Dame L. Rev. 581 (1995); Douglass Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409 (1986).

201. The establishment clause prohibits the state from influencing, forcing, or punishing a person for having, professing, or otherwise manifesting particular religious beliefs. This prohibition echoes the international human rights principle that there shall be no coercion with respect to the freedom to have or to adopt a religion. Particular problems have arisen, however, involving indirect government influence on religious beliefs through what could be perceived as the endorsement by the state of particular religious expressions. Cases of this type include the display of religious symbols on government property and the recitation of religious prayers or benedictions at public events. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).

202. See Danchin, supra note 16, at Part III.D.

203. The *Lemon* test has three prongs: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

composed of the four "nationalities" of England, Scotland, Wales, and Northern Ireland—not only has no written constitution or bill of rights, but, until its recent incorporation of the European Convention on Human Rights into domestic law, it has lacked any systematic statement or body of legal or constitutional protection for religious liberty or against religious discrimination. The gradual transition from a "confessional state" to a religiously plural society has occurred through periodic legislative reform of a web of discriminatory laws against Catholics, Jews, and Protestant nonconformists, and through the common law decisionmaking of the courts. As noted in the discussion on blasphemous libel, however, the (Anglican) Church of England and the (Presbyterian) Church of Scotland remain officially "established" and retain various privileges and immunities under British law. 100

A broadly similar, but greatly more complex, relationship between nation-state and religion exists in Israel. In the absence of a written constitution, there is no express constitutionally guaranteed state-religion relationship, not only for Othodox and secular Jews but for all religions and denominations, as well as nonbelievers. The 1948 Declaration of Independence provides that the state will "maintain equality of social and political rights for all its citizens, irrespective of race, religion, or sex." But, the declaration also proclaims the state to be a "Jewish State in Eretz-Israel," willing to "open its doors to every Jew." Israel's Basic Law on Human Dignity and Freedom, which has constitutional standing, states as its purpose to "protect human dignity and liberty in order to establish in a Basic Law values of the State of Israel as a Jewish and democratic state." The religious-nationalistic structure of the state creates a need for the classification of citizens as either Jewish or non-Jewish for a large number of religious, social, and legal purposes.

^{204.} See Freedom of Religion and Belief, supra note 197, at 314–15. "Non-dominant groups were allowed to find a place within a framework established by the terms, structures and character of main-stream Christianity. This situation has been described as one of 'tolerant discrimination,' a step away from assimilationism but still not quite that pluralism which is conducted through dialogue and mutual change on the basis of respect and acceptance." *Id.* at 315.

^{205.} See supra note 168 and accompanying text.

^{206.} In England, the Archbishop of Canterbury is the highest ranking non-royal person. The sovereign, who is head of the established church, must be a member of the Church of England and, under the 1701 Act of Settlement, cannot marry a Catholic. The monarch appoints the bishops of the Church of England on the advice of the prime minister who, by convention, chooses from two names nominated by the church itself. The church takes the leading role in national and civic religious occasions. It is also represented in the House of Lords (the non-elected chamber of the U.K. Parliament). See FREEDOM OF RELIGION AND BELIEF, Supra note 197, at 316. The Church of Scotland has played an ongoing role in sustaining Scottish identity since the union between Scotland and England in 1707. Id. at 317.

^{207.} Id. at 436.

^{208.} Id.

^{209.} Id.

^{210.} The Law of Return (1950) grants any Jew in the world the right to settle in Israel and automatic citizenship. The Nationality Act (1952) provides the basis for the determination of citizenship. It applies different rules to the acquisition of Israeli nationality by Jews and non-Jews. Instead of the usual two

Israel—personal status matters such as marriage and divorce,²¹¹ education,²¹² dietary laws, and days of rest,²¹³ and women's rights in certain areas, for example²¹⁴—are subject to autonomy regimes that establish a complex system of religious and non-religious legal codes and courts. The very idea of an "autonomy regime" of the kind found in states such as Israel represents the attempt to institutionalize within a liberal nation-state the notion of value pluralism.²¹⁵

grounds of birthplace and consanguinity, Israel gives preferences to the latter with the result that a person born in Israel does not receive citizenship on the basis of birthplace alone. *Id.* at 436–37.

- 211. Each recognized religious community in Israel has legal authority over its members in matters of marriage, divorce, conversion, and inheritance, exercising this authority through Rabbinic Courts, Shariah Courts, Druze Religious Courts, and Courts of the Christian Community. In matters of marriage and divorce, religious courts have exclusive jurisdiction over Jewish citizens or residents of Israel. Thus, Orthodox religious authorities (which do not recognize alternative movements in Judaism) have exclusive control over marriage and divorce of all members of the Jewish community, whether or not they are Orthodox. The Rabbinic Court Jurisdiction Law (Marriage and Divorce) (1953) therefore directly conflicts with individual religious freedom, as it requires non-Orthodox and secular Jews to accept Orthodox religious law. Neither inter-religious nor civil (or non-Orthodox) marriage is therefore available in Israel. *Id.* at 440.
- 212. The State Education Law provides that the "object of state education is to base elementary education in the State on the values of Jewish culture and . . . on love of the homeland and loyalty to the State and the Jewish people." *Id.* at 438. There are two separate educational systems (Jewish and non-Jewish), which enjoy full autonomy, and while non-Jews must study Jewish religion and history, Jewish children are not required to study the Qur'an, the Gospels, or Arab history. *Id.*
- 213. According to the status quo agreement made between secular mainstream Zionists and the religious parties before the establishment of the state, the Sabbath is the official day of rest, with no public transport allowed, and institutional kitchens must follow Jewish dietary laws. The national airline does not fly on the Sabbath, television and radio broadcasting on Yom Kippur is banned, and under the 1994 Frozen Meat Law, non-kosher meat cannot be imported. *Id.* at 428–29.
- 214. Women in Israel are subject to the personal status laws enforced by the various Jewish, Druze, Christian, and Muslim religious courts. Many of these laws are in conflict with the equality and prohibition of discrimination against women norms in the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"). See generally Sullivan, supra note 46, at 514–18. The combination of general state law (such as the Equality of the Sexes Act (1951) and the Equal Opportunity in Employment Act (1982)) and personal status laws produces a complicated picture. Orthodox women, for example, cannot become rabbis but may become judges (but not in a family court, where they may not even be witnesses). Freedom of Religion and Belief, supra note 197, at 439–40.
- 215. In this respect, both autonomy regimes and legal recognition of religious and other "personal" laws can be found in many other states, especially in Africa and Asia (for example, in Bangladesh, India, Malaysia, Nigeria, Pakistan, South Africa, Sri Lanka, Tanzania, and Uganda). For an overview in the context of Muslim personal laws, see Rashida Manjoo, The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights (Harvard Law Sch. Human Rights Program, Working Paper, July 2007), available at http://www.law.harvard.edu/programs/hrp/documents/Manjoo_RashidaWP. pdf. The legal recognition of shari'a law is also today becoming a contested issue in a number of Western states. See, e.g., Marion Boyd, Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion, Report to the Attorney General of Ontario (Dec. 2004), available at http://www.attorneygeneral.jus.gov.on.ca/ english/about/pubs/boyd/ (reviewing whether Islamic principles of family and inheritance law could be used to resolve disputes within the Muslim community in Canada and examining the Islamic Institute of Civil Justice established to conduct arbitrations according to Islamic personal law); Rowan Williams, Archbishop of Canterbury, Foundation Lecture at the Royal Courts of Justice: Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), available at http://www.archbishopofcanterbury.org/ 1575 (noting that "[a]mong the manifold anxieties that haunt the discussion of the place of Muslims in British society, one of the strongest . . . is that Muslim communities in this country seek the freedom to live under sharia law" and exploring what "might be entailed in crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom").

Israel, then, is a liberal nation-state, and its religion-state relationship reveals the various contradictions of liberal nationalism. The unity of nation and state—the realization of the right to national self-determination—is the dominant principle. Liberal rights and democratic principles are recognized, but only once the "boundedness" of the political community is secure. In this respect, Israel is a "liberal" but not a "neutral" state. Its very purpose is to ensure the survival of the Jewish people and to secure the public space to ensure the flourishing of one (or a limited number of) unique religion(s), set(s) of customs, and tradition(s). Furthermore, the non-neutral identity of the state and the nature of the compromises forged between various religious and secular groups in autonomy regimes ensure a corresponding recognition (albeit not "equal recognition") of the group rights of non-Jewish minorities.

In conclusion then, the case of Israel, and indeed of all the countries discussed here, reveals two complex dimensions of the liberal tradition seemingly at odds with each other: the first, the pursuit of an ethical *modus vivendi* seeking peaceful coexistence between rival ways of life; the second, the assertion of a universal moral ideal claiming rational consensus on principles of right and justice that purports to stand apart from conflicts over the good. Whether and how some form of reconcilation between these two liberal projects may be sought is the question to which we now turn.

V. VALUE PLURALISM AND RELIGIOUS FREEDOM

The discussion in Parts III and IV presents daunting challenges to thinkers in the Lockean and Kantian traditions. The case of proselytism presents a series of individual and collective interests that are "inherently rivalrous, and often constitutively uncombinable, and sometimes incommensurable, or rationally incomparable."²¹⁶ At the same time, the fundamental rights and liberties of liberal thought allow no escape from the need to make radical choices in which "reason leaves us in the lurch and in which, whatever we do, there is a wrong or an irreparable loss of value."²¹⁷ What would it mean to take these deep conflicts of value more seriously? What are the implications of a moral theory of value pluralism that recognizes an irreducible diversity of ultimate values while at the same time denying the availability of any overarching standard or Archimedean point to resolve conflicts both within and between them? This is the challenge taken up in Part V.

^{216.} GRAY, ENLIGHTENMENT'S WAKE, supra note 18, at 68.

^{217.} *Id.* at 69. For Gray, agonistic liberalism is thus "an application in political philosophy of the moral theory of *value pluralism*—the theory that there is an irreducible diversity of ultimate values (goods, excellences, options, reasons for action and so forth) and that when these values come into conflict or competition with one another there is no overarching standard or principle, no common currency or measure, whereby such conflicts can be arbitrated or resolved." *Id.* at 68–69.

A. Incommensurable Values and the Problem of Compossibility

In the *Kokkinakis* case, we saw that the right to freedom of religion and belief generates different types of conflicts not only between various individual and collective claims of right, but also more deeply between different conceptions of individual and collective goods. This included conflicts not only with other rights (such as freedom of expression) but also *within* the right to religious liberty itself.²¹⁸ This raises the disabling prospect that in deciding which among a rival set of Rawlsian "basic liberties" is to be protected, and to what degree, we inescapably have to advance (controversial) arguments about the good. This, of course, was exactly the problem that we (and Rawlsians) had hoped to avoid. The Kantian algebra, in enshrining certain principles as "fundamental rights," was meant to avoid the intractable difficulties associated with making (subjective) judgments about different conceptions of the good.

The underlying difficulty, as a long line of political theorists have posited, is that claims of right and justice embody values that are themselves incompatible and incommensurable.²¹⁹ John Gray has identified three primary ways in which incommensurable values may arise. First, such values can arise from conventions that govern moral life in particular cultures. Following Raz, such goods—say, for example, friendship and money—are not strictly comparable as values but at the same time it is "part of the meaning of some goods that they are not to be traded off against one another."220 Second, incommensurable values can arise when the same good is differently interpreted and embodied in different cultures. Courage and prudence are generically "human" ethical values, but may be differently embodied in, say, Christian or Islamic or Buddhist societies. And third, such values can arise when different goods and virtues are recognized and honored in different cultures. Thus, the "ideals of life we find honoured across longer stretches of history and in disparate cultures are irreducibly diverse; some of them are necessarily discordant; and reasonable people do not converge on any ranking of them."221

^{218.} See supra note 106 and accompanying text.

^{219.} For the most recent philosophical literature on value pluralism and incommensurability, see Stuart Hampshire, Morality and Conflict (1983); Incommensurability, Incomparability and Practical Reasoning (Ruth Chang ed., 1997); Avishai Margalit, The Decent Society (1996); Joseph Raz, The Morality of Freedom (1986); Bernard Williams, Ethics and the Limits of Philosophy (1985).

^{220.} Gray, Two Faces of Liberalism, *supra* note 107, at 35 (citing Raz, The Morality of Freedom, *supra* note 219, at 352).

^{221.} *Id.* at 38. Gray offers marriage as an example of this third kind of incommensurability. In some more traditional societies, marriages are arranged and the idea of romantic love rejected in favor of personal and social compatibility and the economic benefits reaped by the partners and their families. By contrast, most liberal cultures "reject ideals of marriage in which personal choice and romantic love are not central." For Gray, this is not a cultural variation on a shared ideal but a case of "different and opposed ideals." *Id.* at 40.

The liberal algebra is intended to resolve these different types of conflict by specifying a scheme of basic rights (or a public-private divide, or both) satisfying the two conditions of compossibility and adequacy. One of the ways it appears to achieve this is simply by removing from the scheme of liberties those rights that make obviously incompatible claims. This strategy is evident in the evolution of Rawls's notion of basic rights. In A Theory of Justice, Rawls defended the priority of liberty over other values by advancing the "Greatest Equal Liberty Principle," according to which each individual has the most extensive liberty subject to others having the same, restrictable only for the sake of liberty. 222 But as H.L.A. Hart famously demonstrated, this principle suffers from a disabling indeterminacy. Claims about the greatest liberty are not freestanding and depend on judgments concerning the relative value of the human interests that different liberties protect.²²³ Different views of human goods will therefore generate competing judgments about what constitutes the greatest liberty (or the meaning of "equality" or the Millian "harm" principle, for example). If this is correct, then there can be no perfect way to protect all liberties, and compromises between rival ideals involving conflicts of value are inevitable.²²⁴

On account of Hart's critique, Rawls, in his *Political Liberalism*, replaced the idea of the most extensive system of liberty with an account of the "basic liberties." ²²⁵ But as Gray argues, this strategy merely replaced the problem of indeterminacy with that of arbitrariness in the selection of the basic liberties.

The absence of important liberal freedoms from Rawls's list of basic liberties is not inadvertent. It flows from an insuperable difficulty in his theory. The choice of some liberties as basic presupposes an evaluation of the human interests they protect. People with differing conceptions of human interests, or who differ in the importance they give to the interests they agree in recognizing, will make different judgments as to which liberties are basic.²²⁶

Adopting the same social contractarian methodology, Rawls later proposed an even further narrowed-down list of basic or "urgent" rights in his Law of

^{222.} John Rawls, A Theory of Justice 124, 250, 302 (1972).

^{223.} Hart cites the example of rules of order in debate, which restrict the liberty of speakers, to illustrate this indeterminacy. Such rules exist not so that speakers can exercise the maximum freedom to speak, but rather to achieve the purposes of debate (i.e., to exchange arguments, pursue the truth, etc.). See H.L.A. Hart, Rawls on Liberty and Its Priority, in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 223–47 (1983).

^{224.} It may be objected that conflicts between rights raise problems not of incommensurability per se (which suggests the impossibility of any universal theory of justice) but rather of reaching a coherent conception of "reasonableness" (in the Rawlsian sense). But here, again, the difficulty we face is how to reach such a conception when we lack the scales to weigh conflicting liberties and the divergent conceptions of the good and human well-being that these liberties protect.

^{225.} JOHN RAWLS, POLITICAL LIBERALISM 289-368 (Columbia University Press 1996) (1993).

^{226.} Gray, Two Faces of Liberalism, supra note 107, at 73.

Peoples as he sought to advance a theory of human rights applicable to the religiously and culturally more diverse conditions present at the international level. This "special class of urgent rights" was said to include a "sufficient measure of liberty of conscience to ensure freedom of religion and thought," though not an "equal liberty."²²⁷

By each successive move, Rawls sought to shield liberal principles from the pluralism to which they are supposed to be a response. This is because it is only if the basic rights themselves do not make incompatible demands that justice can be secured from conflicts of value. But the result is that rights no longer track the human interests they exist to protect. Nothing is easier than resolving a conflict among rights by deleting one of them. To do so, however, is to suppress the source of the conflict in ethical life—the fact that vital human interests are at odds. Since each and every right protects interests that may be at odds, the end of the road for this strategy is an account of rights that is so far removed from the facts of ethical life as to be practically vacuous.²²⁸

The complete absence of group rights from Rawls's construction of the liberal algebra, or even recognition of the serious conflicts generated by the collective aspects of individual rights, is a predictable consequence of this avoidance strategy.

As seen in the cases of both *Kokkinakis* and the Danish cartoons, as soon as these missing values are reintroduced into moral and political theorizing (as they necessarily must be in international human rights law), the twin assumptions of compossibility and adequacy are quickly rendered utopian. Faced with genuine conflicts of rights, any evaluative choice between these alternatives will quickly lapse into the language of "balancing," "weighing," or even "trading-off" of values.²²⁹ It is far from clear, however, how to resolve what are in effect conflicting demands arising from conflicting values or moral viewpoints. And, of course, any resort to a utilitarian conception of the public interest or an ethical conception of a collective good will conflict with the initial justification of the basic liberties themselves, leaving us once again enmeshed in the conflict of values that we had hoped to avoid.²³⁰

^{227.} RAWLS, LAW OF PEOPLES, *supra* note 19, at 65 & n.2. This is because in societies based on an "associationist social form," whether religious or secular, members are "viewed in public life as members of different groups, and each group is represented in the legal system by a body in a decent consultation hierarchy." *Id.* at 64. In such societies, "one religion may legally predominate in the state government, while other religions, though tolerated, may be denied the right to hold certain positions." *Id.* at 65 n.2. Rawls refers to this as permitting "liberty of conscience, though not an equal liberty." *Id.*

^{228.} Gray, Two Faces of Liberalism, supra note 107, at 46-47.

^{229.} For example, the artificiality of categorical approaches to interpreting fundamental rights or "contouring" away conflicts between them may be compared to forms of ad hoc balancing where the demands of certain rights are held to override or defeat others for reasons of the "public interest" or other conceptions of societal goods. For discussion of categorical versus balancing approaches to interpreting claims of right, see *supra* note 36 and accompanying text. For Rawls's idea that the basic liberties must be "contoured" so that conflicts among them are removed and they constitute a harmonious set, see RAWLS, POLITICAL LIBERALISM, *supra* note 225, Lecture VII.

^{230.} As Koskenniemi has argued, liberalism

Let me illustrate this point a little further with Jeremy Waldron's recent example of the entrepreneurial pornographer (P) who enjoys the public sale and display of his pornographic wares, and the devout Muslim (Q) who abhors pornography and, according to the dicates of his religious beliefs, wishes to live and raise his family in a society free of the public displays of $P.^{231}$ Waldron has argued that this example poses severe difficulties for Kantian algebraic liberalism and for the two liberal requirements of compossibility and adequacy. The fundamental Rawlsian concept of "reasonableness" is unable to resolve the dilemma that P and Q are unable to live together in a liberal arrangement. P

The reasons for this are as follows. The first meaning of Rawlsian reasonableness—that persons accept the subjection of the good to the right—cannot tell us who as between P and Q has a conception of the good that is incompatible with liberal principles.²³³ The second meaning of Rawlsian reasonableness—that people have conceptions of the good whose divergence from other conceptions is intelligible in light of the so-called "burdens of judgment"—is similarly unable to tell us which of P's or Q's conceptions of the good are "unreasonable."²³⁴ Waldron then asks whether the late Rawlsian strategy of the need to state one's conception of the good in "publicly accessible terms" will not reveal that the problem with Q's conception of a certain public moral environment free of pornography and blasphemy is that "it depends on premises that are internal to his religious faith, and that might seem perhaps arbitrary from an external point of view."²³⁵ But for Waldron this approach will not work either:

I don't think there is any way of saying that a set of permissions is adequate for the practice of a religion except by paying attention to how that set of restrictions seems from the internal point of view of the religion. To abandon any interest in that would be, in effect, to abandon any real concern for adequacy. An externally stated adequacy con-

assumes that a set of fundamental rights or a natural distinction between private and public spheres exist to guarantee that liberty is not violated. But this blocks any collective action as the content of those freedoms (either as "rights" or a "private sphere") can be justifiably established only by reference to individuals' views thereof. Collective action becomes possible only by an utilitarian interpretation of the descending argument. But utility conflicts with rights.

Koskenniemi, supra note 116, at 66-67.

- 231. See Waldron, supra note 106, at 19.
- 232. Id. at 21.

^{233.} The subjection of the good to the right refers to the "willingness to tailor [one's] ends so that they can be practiced on fair terms with the practice of the ends of others, similarly disciplined." *Id.* at 22.

^{234.} Waldron describes the Rawlsian term "burdens of judgment" as a "quasi-epistemic conception, comprising the various hazards, vicissitudes and perspectives in the conscientious exercise of people's powers of reason and judgement in the circumstances of modern human life." *Id.* at 22.

^{235.} Id. at 23.

dition—which was quite at odds with internal conceptions—would be arbitrary and unmotivated.²³⁶

Finally, imagining someone in the classic Rawlsian original position who is unsure whether he will turn out to be P or Q, we again face a predicament. This is because our imagined person

wants to leave room for the possibility that he may hold sensitive religious convictions, and he wants to leave room for the possibility that he may hold a conception whose practice sits ill with those sensitivities. What is he to do? He cannot gamble with his ability to discharge whatever religious obligations he turns out to hold, by plumping either for a principle that favors a given sensitive aim or for a principle that favors pornographic aims. He faces a dilemma. The actual incompossibility of aims of these various types is represented in the intractability of this decision problem for each person behind the Rawlsian veil of ignorance.²³⁷

By defining religion a priori in Protestant, Enlightenment terms as private "conscience"—and thus restricting the "field of aims" among which compossibility is to be sought—the real dilemmas involving religion in terms of its public role in shaping a communal set of practices and collective way of life are thereby not resolved, but simply avoided.²³⁸ In relation to P and Q, then, Waldron concludes that there is "no determinate solution to the problem of compossibility" of rights, with the result that

we can no longer confront issues like the case of Salman Rushdie with the conviction that there is a perfectly good solution of live-and-letlive, if only people would restrain themselves sufficiently to adopt it. There is no such accommodating solution. It means that we can no longer organize liberal aspirations around the formula of the kingdom

^{236.} *Id.* The meaning of an "externally stated adequacy condition" (i.e., the meaning of the norm of freedom of religion itself) cannot be determined without taking into account the "internal point of view" of particular religious traditions. The connection between the right and the good is thus far closer and more dynamic historically and culturally than Rawls imagines. In this respect, Rawls's use of the terms "religion" or "conscience" in his theory of justice are tacitly defined according to a particular conventional content which, as we see here, is contested.

^{237.} Id. at 24.

^{238.} As Waldron suggests, once we consider the great variety of religious conceptions actually in the world (whether, for example, those of small, intensely sectarian, insular groups; those of cosmopolitan scale religions like Islam and Catholicism; those of religions with monastic ideals and others that emphasize community action; those of spiritual "sects" or "cults"; or those of secular atheists), we have to "come to terms with the fact that people pursue not only different aims, but aims with different and disparate shapes." *Id.* at 18. As he further notes, the rejection of the idea that the abstract, universal right to freedom of religion "entails equal or uniform rights at a more concrete level" leads to a conception of complex (rather than formal) equality, in which the rights of differently-situated persons will turn out to "differ in detail." *Id.* at 19, 35 n.10.

of ends. The algebra intimated in Rawls's principle of an adequate liberty for each, compatible with a similar liberty for all, is insoluble.²³⁹

It is for these reasons that the problems of incommensurability and incompossibility raise a critical challenge to the overall efficacy of the notion of a liberal algebra based on a fixed structure of rights. We are left to ask whether the liberal premise itself rests either on a misunderstanding—because it fails to take seriously the incommensurability of certain values—or on an impossibility—because not everyone's individual freedom can be respected and ensured consistently with the freedom of everyone else. ²⁴⁰ Liberal theory can resolve such conflicts only by (tacitly) positing a hierarchy of values—or perhaps a single, trumping, "covering value"—or by drawing "domain restrictions" between spheres of incommensurable values (for example, between a putative public "secular" sphere and a private "religious" sphere) and by then developing theories of toleration based on open-textured principles such as "reasonableness" (in liberal political philosophy) or "decency" (in Rawls's *Law of Peoples*).

In this respect, liberal rights discourse may be viewed as only one of many possible forms of value pluralism. Brian Barry is correct that the development in Rawls's thought from comprehensive to political liberalism comprises a "rather muddled version of Michael Walzer's anti-Enlightenment particularism." Barry, however, argues that in order to remedy this perceived "deficiency" in Rawls, we must reassert the need for a refortified cosmopolitanism—a utopian quest for a final, rationalist, but inevitably ethnocentric, monism. By contrast, I suggest that we need to understand why Rawls thought it necessary to adjust his scheme of basic liberties over time. This inquiry, I believe, will point us toward a non-foundational, and hence perpetually self-(re)creating, attempt to find an overlapping consensus on a plurality of equally ultimate, equally sacred—but intrinsically incommensurable—values.

B. Rights and the Search for "Foundations"

Steven Lukes has suggested that in post-Enlightenment political theory, rights function as secular expressions of the "sacredness" of certain values. Rights characterize those values to which "we devote ourselves to maintaining . . . without calculating the loss involved, by omitting or refusing to commensurate the benefits against the cost"; such values are identified with

^{239.} Id. at 33.

^{240.} Iris Marion Young terms this account of moral reason the "view from nowhere," and describes the "ideal of impartiality" as expressing an "impossibility, a fiction." Iris Marion Young, Justice and the Politics of Difference 103 (1990) (citing Thomas Nagel, The View From Nowhere 63 (1986)).

²⁴¹. Brian Barry, Culture and Equality: An Egalitarian Critique of Multiculturalism 331 n.27 (2001).

^{242.} Id.

the "inviolability of persons . . . constraining or 'trumping' consequentialist, and in particular utilitarian, considerations." The consequence is that "it is not only believers and particularists and conservatives and romantics and traditionalists who treat their favourite values as sacred: liberals do so too." ²⁴⁴

The difficulty in liberal theorizing has always been how to advance a sound theoretical foundation for rights that can explain and justify their "sacredness" and priority over conflicting claims of the good. Even a cursory review of the history of the social contractarian tradition reveals how different accounts of any pre-social state of nature yields different conceptions of basic rights. The question therefore logically arises: If liberal theorists from Hobbes to Pufendorf to Rawls and their respective followers disagree not only about comprehensive philosophical conceptions of the good, but also about the fundamental principles of justice and right themselves, how are we to arrive at a secure foundation for human rights? How are we to know whether human nature is asocial in the Hobbesian sense and thus the only natural right is that of self-preservation, or is inherently social in the Pufendorfian sense and thus a richer account of natural rights is possible, one that includes notions of gratitude and mutual assistance (a basic right to subsistence)?²⁴⁵

As noted in the previous section, Rawls sought to address this problem in his later work through the notion of an "overlapping consensus" by which people adhering to different comprehensive religious, philosophical, and moral doctrines may affirm the same conception of justice on different moral and political grounds. But as Jeremy Waldron has argued, this maneuver does not resolve the dilemma of "justice-pluralism" and "disagreement about rights." Waldron identifies two models for thinking about the relation between disagreements about justice and disagreements about the good. On the first model, "each conception of the good is associated with or generates a particular vision of the just society." On the second model,

^{243.} Steven Lukes, Liberals and Cannibals: The Implications of Diversity 68 (2003). In order to illustrate the idea of "sacred values," Lukes distinguishes between the metaphor of a "trade-off" (which suggests that "we compute the value of the alternative goods on whatever scale is at hand, whether cardinal or ordinal, precise or rough-and-ready") and a "sacrifice" (which suggests such "total and one-sided commitment to one point of view, with its associated background of belief and faith . . . [that] devotion to the one exacts an uncalculated loss of the other"). Thus, to be "sacred is to be valued incommensurably." *Id.* at 67.

^{244.} *Id.*; cf. MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD 15, 18 (1994) (arguing for a "thin," "minimalist," and "non-foundational" morality expressed in such general values as "truth," "justice," "life," and "liberty," constructed by "abstracting from social practices reiterated in many countries and cultures").

^{245.} See generally Richard Tuck, The Rights of War and Peace: Political Thought and International Order from Grotius to Kant 148 (1999) (arguing that the great contribution of Pufendorf was thus to show that both "Grotius's and Hobbes's theories about the conversion of interests into rights could be used as the basis for a quite different set of political conclusions").

^{246.} Jeremy Waldron, Law and Disagreement 149-50 (1999).

^{247.} Id.

"particular theories of justice are not seen as tied to or generated by particular conceptions of the good" but instead "are viewed as rival attempts to specify a quite separate set of principles for the basic structure of a society whose members disagree about the good."²⁴⁸

In the first case, disagreements about justice are the result of disagreements about the good, whereas in the second, they are motivated quite separately. How, Waldron asks, does a "less-than-well-ordered society, in which people disagree about the fundamentals of justice" make the transition to a "well-ordered society in which one particular conception of justice . . . is enshrined as a framework for public reason?" The problem is that so long as "each competing conception of the good generates its own conception of justice . . . it is impossible for competing conceptions of the good to be related to a single conception of justice (such as [Rawls's theory of justice as fairness]) in the strong moral relation that Rawls refers to as 'overlapping consensus.'" ²⁴⁹ Even if over time a single conception of justice is able to become more than a mere *modus vivendi* and to secure the moral allegiance of competing comprehensive conceptions, this does not resolve the initial question of how we are to reach agreement on any specific set of human rights norms or indeed any single starting conception of justice.

For this reason, the problems of rights foundationalism within the social contractarian tradition are irresolvable. There is simply no single, objective foundation for human rights to be found, whether in a putative state of nature, in a psychological conception of human nature, or in any unimpeachable theory of the relationship between individual autonomy and political order. As Gray suggests in arguing that rights claims are never foundational, "human rights have neither substantive content nor moral weight until their impact on human interests, their contribution to human well-being, has been specified." ²⁵⁰

This dilemma can only meaningfully be addressed by recognizing that human rights are not fixed entities to be arrived at either by abstract deontological deduction or (tacit) consensual agreement alone, but rather are sites of contestation and tension straddling opposing spheres—mediating between consent and justice, autonomy and community, freedom and order, passion and rationality. Critical legal scholars have thus suggested that human rights are best understood as *mediators* between the domains of factual and value judgments. The difficulty for liberal theory is that, on its own assumptions, it cannot consistently justify the normative, objective character of rights without resorting to concrete principles that, in turn, it is then

^{248.} Id.

^{249.} *Id.* at 162. This will be, at best, a mere *modus vivendi*. If, however, a single (liberal) conception of justice is able to secure itself for a period of time as a *modus vivendi*, "it may cause each of the justice-components of those comprehensive conceptions to gradually lose ground, even within its generating conception," with the result that different comprehensive conceptions are left to "forge a genuine moral allegiance" to that single conception of justice. *Id.* at 162–63.

^{250.} GRAY, ENLIGHTENMENT'S WAKE, supra note 18, at 72.

unable to justify. The practical consequence for the politics of justice, as Waldron suggests, is the "problem of selecting a substantive principle of justice to act on (together) when we disagree about which principles are true or reasonable and which not."²⁵¹

The role of human rights as a mediating or straddling concept has important implications for legal theory and, in particular, for our understanding of the right to freedom of religion in international law. The indeterminacy of rights discourse in political philosophy is unavoidable whether at the domestic or international level (and indeed more so under the more diverse conditions of the latter). Accordingly, once liberal accounts of human rights are transposed to the international sphere, they will suffer from the same conflicts and incommensurabilities as in the domestic case. They will claim the two sides—objectivity and formality—of law in contrast to the subjectivity of politics in either its utopian or apologist form. But they will fail to provide a convincing argument or theoretical basis for their favored set of "fundamental" or "basic" liberty norms. Indeed, these are the very questions that rights discourse seeks to refer away from itself, thereby maintaining the illusion of the objectivity and compossibility of rights while hiding their deeper incommensurability. In the absence of a practical philosophy of critical praxis, rights discourse is unable to reconcile the contradictory demands of individual freedom and social order.252

As argued in the previous section, this creates the danger that rights discourse can appear coherent only by adopting a legal formalism that distances theorizing about justice from the actual full-blooded disagreements that exist among individuals and communities in political societies. This is exacerbated if one or more rights are simply removed from the liberal algebra in an attempt to shield it from the reality of value pluralism. In this respect, many contemporary forms of "impartial" or "objective" reasoning about rights are generally insensitive to divergences of judgment about human interests and well-being. The unmasking of the *partiality* and *historicity* of liberal rights discourse is therefore the first step toward perceiving the need for value pluralism. As argued by Iris Marion Young:

Insistence on the ideal of impartiality in the face of its impossibility functions to mask the inevitable partiality of the perspective from which moral deliberation actually takes place. The situated assumptions and commitments that derive from particular histories, experiences, and affiliations rush to fill the vacuum created by counterfactual abstraction: but now they are asserted as "objective" assumptions

^{251.} Waldron, Law and Disagreement, supra note 246, at 161.

^{252.} For a recent attempt to respond to the failure of rights foundationalism in international law, see Raz, *supra* note 21 (advancing an antifoundational "political conception" of human rights setting limits to the sovereignty of states).

about human nature or moral psychology. The ideal of impartiality generates a propensity to universalize the particular.²⁵³

The propensity for impartiality in moral reasoning constructs an over-determined division between normality/deviance and neutrality/particularity.²⁵⁴ Situated identities that differ from those of the dominant group are thereby silenced or designated as inferior. Any claims by oppressed groups challenging the alleged neutrality of the legal order are thus heard as those of "biased, selfish special interests that deviate from the impartial general interest."255 It is only by exposing the partiality of the supposedly universal normative order that one can begin to confront forms of hierarchical decisionmaking that perpetuate the oppression of disadvantaged or marginalized groups. This requires a view of rights discourse not in terms of an imagined universal rationality with the abstract individual as subject, but rather in terms of a dialogic conception of moral reason that is the product of the "interaction of a plurality of subjects under conditions of equal power that do not suppress the interests of any."256 On this pluralist view, to seek to posit an objective foundation for rights in either an exclusively normative or exclusively consensual theory risks only catastrophe—the possibility of a single, ruthless, and fanatically pursued "final solution" on the one hand; the possibility of a blind, obscurantist irrationalism on the other.²⁵⁷

C. Communal Goods and Individual Rights

The rejection of rights-foundationalism in favor of value pluralism leads to a third and final area of critique: liberal theory's blindness to the value of communal goods. For present purposes, I wish to make just two observations on the role of autonomous choice in different forms of human flourishing.²⁵⁸ The first is to call into question the abstract conception of a "free" liberal self denuded of any specific cultural or communal identity or historical inheritance (complete with all their conflicting demands). The second is

^{253.} Young, supra note 240, at 115.

^{254. &}quot;Moral reason that seeks impartiality tries to reduce the plurality of moral subjects and situations to a unity by demanding that moral judgment be detached, dispassionate, and universal. But . . . such an urge to totalization necessarily fails. Reducing differences to unity means bringing them under a universal category, which requires expelling those aspects of the different things that do not fit the category. Difference thus becomes a hierarchical opposition between what lies inside and what lies outside the category, valuing more what lies inside than what lies outside." *Id.* at 102.

^{255.} Id. at 116.

^{256.} *Id.* at 106. Against the idea of a "fictional contract," Young thus states that if "normative reason is dialogic, just norms are most likely to arise from the real interaction of people with different points of view who are drawn out of themselves by being forced to confront and listen to others. Just decisionmaking structures must thus be democratic, ensuring a voice and vote to all the particular groups involved in and affected by the decisions." *Id.* at 116. This intersubjective conception of rights discourse arising from the concrete encounter with others is similar to Jürgen Habermas's notion of "communicative ethics." *See supra* note 6.

^{257.} Lukes, supra note 243, at 89-90.

^{258.} For a detailed discussion, see Danchin, supra note 16, at Part V.A.

to observe that, in practice, the subject claiming freedom of religion is more often collective than personal.

On the first point, value pluralists such as Joseph Raz have emphasized the collective aspects of liberal rights and the limits of rational choice by showing that while rights protect the well-being of individuals, autonomous choice will only have value in a context of choice-worthy options and cultural environments possessing a range of inherently public goods. Raz has therefore observed how claims of the role of rights in securing individual freedom have historically been advanced against such a natural social background of collective goods that their "contribution to securing the very ends which were supposed to be served by the rights was obscured, and all too often went unnoticed."259 He notes, in particular, that in seeking to understand the history of liberalism, it is of great importance to realize that the right to religious freedom, which is so intimately tied to the early growth of liberal ideals, was "bound up with the existence of a public culture in which religion was a social institution."260 The collective dimensions of individual rights—their role in fostering a public culture enabling people to value and take pride in their identity as members of distinct groups—is thus a critical factor in the story of religious freedom. This obliges us, at a minimum, to question the Enlightenment conception of individual freedom as being in some essential way opposed to or independent of collective goods such as religion, culture, and tradition. Rather we need to ask, with Raz, whether personal freedom and autonomy may not be better conceived of as elements in the protection of collective goods, or as valuable simply because they depend on and serve those collective goods.²⁶¹

On the second point, well-known communitarian critics of liberalism such as Michael Sandel, Alasdair MacIntyre, Charles Taylor, and Michael Walzer have challenged the exclusive subjectivity of the individual in political theory.²⁶² Whether we look to Rawls's "basic liberties," Nozick's

^{259.} Joseph Raz, The Morality of Freedom 250-51 (1986).

^{260.} *Id.* Raz argues that "inasmuch as religion is and was a social institution embracing a community, its practices, rituals and common worship, the right to free religious worship, which stood at the cradle of liberalism, is in practice a right of communities to pursue their style of life or aspects of it, as well as a right of individuals to belong to respected communities." *Id.*

^{261.} *Id.* at 254. As Raz observes, this is not to say that fundamental rights are not in competition with *other* collective goods, or that they do not conflict with other rights. On the contrary, the point is merely that "there is no general rule giving either rights or collective goods priority in cases of conflict." *Id.* at 255.

^{262.} See generally Alasdair MacIntyre, Whose Justice? Which Rationality? 344—45 (1988) (arguing that the liberal claim to morally justified ethical neutrality and toleration conceals the fact that liberalism is based on a "particular conception of the good life" and is therefore one tradition among others without any necessary moral claim to priority); MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 30 (1996) (distinguishing between "New World" and "Old World" pluralism and arguing that New World pluralism severs the link between citizenship and any single nationality such that citizenship in the New World requires commitment only to the abstract ideals of "liberty, equality and republicanism"); Michael Sandel, Religious Liberty: Freedom of Conscience or Freedom of Choice?, 3 Utah L. Rev. 597 (1989) (noting the danger that ethical conceptions of a norm such as freedom of religion or belief that do not conform to a liberal theory

"side constraints," ²⁶⁴ or Dworkin's "rights as trumps," ²⁶⁵ the assumption is that the "subject matter of justice cannot, except indirectly, be found in the histories of peoples, and their often tragically conflicting claims; it must always be a matter of individual rights." ²⁶⁶ Value pluralism, by contrast, seeks to recognize and understand the claims of collective subjects (peoples, nations, minorities) and the complex role played by collective values in any theory of justice. This was the lesson of the restrictions imposed on proselytism in Russia and in post-colonial African states discussed in Part III above.

VI. CONCLUSION

This Article has not sought to advance a new theory of religious freedom in international law, or to map out the various implications of value pluralism for a theory of human rights. Rather, it has pursued the more modest task of seeking to identify the conceptual shifts that must occur for such theorizing to begin. The three lines of critique in Part V raise unsettling questions for liberal accounts of the right to freedom of religion and belief. The first argument concerning incommensurabilities among ultimate values, and critically *within* such values themselves, suggests certain limits to the rationalist ambition of advancing a tidy and universally applicable theory of religious freedom. Mill's Harm Principle simply does not enable subjects with different conceptions of the good to reach an unforced consensus

of the good, especially those premised on "deep"—that is, sensitive and "public"—communal bonds, will thereby become marginalized and excluded); Charles Taylor, *The Politics of Recognition, in* Charles Taylor et al., Multiculturalism: Examining the Politics of Recognition 37–39 (Amy Gutman ed., 1994) (contrasting two modes of politics, one of "equal dignity" and the other of "difference," and arguing that "the development of the modern notion of identity, has given rise to a politics of difference" that requires us to recognize and encourage particularity and which is also underpinned by a "principle of universal equality"); Charles Taylor, *Modes of Secularism, in* Secularism and Its Critics 36–37 (Rajeev Bhargava ed., 1998) (arguing that viewed from a non-Western perspective, the right to freedom of religion and belief appears inextricably linked to its Christian origins both in the form of post-Enlightenment Deism and the rise of Western unbelief and secularism and that, in both cases, it "understandably comes across as the imposition of one metaphysical view over others, and an alien one at that"); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENCE OF PLURALISM AND EQUALITY (1983); Michael Walzer, *Comment, in* Charles Taylor et al., *supra*, at 99–100. For general discussion on these themes, see Stephen Mulhall and Adam Swift, Liberals and Communitarians (1992).

263. RAWLS, A THEORY OF JUSTICE, *supra* note 222, at 61 (stating that the "basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law").

264. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 29 (1974) (positing the strict deontological view that the "rights of others determine the constraints upon your actions" and that this "side-constraint view forbids you to violate these moral constraints in the pursuit of your goals").

265. Ronald Dworkin, Taking Rights Seriously 92 (1978) (discussing the "weight" of individual rights and suggesting that we should "stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general").

266. Gray, Enlightenment's Wake, *supra* note 18, at 5. The consequence is that the "diverse claims of historic communities, if they are ever admitted, are always overwhelmed by the supposed rights of individuals." *Id.* at 6.

on when and how liberty should be constrained. Comparative judgments of harm or what it means to treat people as equals will vary according to different views of human interests. Given that this will create disagreements not only as to the meaning of harm but also as to which human interests are morally significant, the quest for a universal conception of value neutrality will therefore always be fraught and contested.

This suggests that whatever theory we advance needs to be sensitive and closely correlated to the realities of the life of actual normative communities. Such a shift in perspective moves us away from the single-minded search for freestanding universal principles and back toward actual political life characterized as it is by intractable conflicts between different ways of life. The animating virtue for such an approach is toleration rather than neutrality and the need to balance competing claims of similar validity rather than to prescribe a universal regime. This ethos underlies Gray's "agonistic" theory of liberalism that asks us to recognize the contingency of both selfhood and community and to recognize that liberal selves and cultures are themselves particular social forms and cultural traditions. ²⁶⁷

The second argument concerning the search for secure foundations for human rights raises important questions concerning philosophical method. Given the first argument's skepticism regarding any determinate and fixed set of compossible or dovetailing liberties, we have strong reasons to be skeptical regarding *any* agent-neutral political morality that claims to rest not on particularlistic loyalties or conceptions of the good but rather finds its "foundations" in exclusively deontological universal principles of justice or rights. If correct, this suggests that the search for a definitive list of basic liberties is itself misconceived and any structure or scheme of rights that claims to promote and protect different human interests will necessarily be indeterminate and significantly variable.

This humbling conclusion does not leave us mired in a hopeless nihilism of ethical and moral relativism. Value pluralist accounts of human rights acknowledge both the incommensurability of values and the historicity of understanding and meaning. They suggest that these two insights open new pathways to dialogic and hermeneutic approaches to rights discourse which seek to transcend the Cartesian anxiety generated by the dichotomy between subject and object and seek to recover, rather than deny, the indispensability of prejudice and tradition to any defensible conception of understanding and meaning. A prominent example of this kind of approach is Charles Taylor's attempt, applying the insights of Gadamer's philosophical hermeneutics to Rawls's idea of overlapping consensus to articulate a method by which we may reach a "genuine, unforced international consensus" on human rights.²⁶⁸

^{267.} Id. ch. 6. The word "agon" means a contest or rivalrous encounter. Id. at 68.

^{268.} Charles Taylor, Conditions of an Unforced Consensus on Human Rights, in The East Asian Challenge for Human Rights 124 (Joanne R. Bauer & Daniel A. Bell eds., 1999).

Finally, the third argument concerning the connection between individual autonomy and collective goods raises difficult questions about the role of autonomous choice in different forms of human flourishing. While I have not pursued the question here, this should at least alert us to the dangers of rights discourse embodying the unconscious prejudices of a particular tradition, for example in positing a single, rigid and dogmatic horizon of individual freedom. Such an approach forecloses the possibility of any fusion of horizons with other conceptions—conceptions that may well contain admirable and valuable insights and other forms of accommodation. A value pluralist approach, by contrast, opens the way to a less dogmatic and binary account of reason and religion in viewing both as human institutions and social practices requiring modes of justification and accountability. This requires the constant search for forms of accommodation, mutual understanding, and overlapping consensus between actual communities and the normative claims of rights discourse. In order for this to occur, however, a significant obstacle remains the inability of many Western rights theorists to see their culture as one among others.