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The American Journal of International Law, Vol. 91, No. 4. (Oct., 1997), pp. 593-627.

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IS PERSONAL FREEDOM A WESTERN VALUE?

By Thomas M. Franck*

No one must be disturbed because of his opinions, even in religious matters, provided their expression does not trouble the public order established by law.

Declaration of the Rights of Man and of the Citizen, 1789

I. THE AUTONOMOUS CONSCIENCE

Various forces and tendencies contending in the world of ideas bear directly on the identity of each person. The nation, the tribe, the state, the “ethnie” or sociocultural group, international institutions, and several nongovernmental transnational actors, including the great religions—all contend for adherents. Two things stand out in this cacophony: first, that individuals, nowadays, may have more than one affiliation; and, second, that affiliative choices increasingly can be made by individuals acting autonomously.

States and churches, on the whole and despite notable exceptions, appear to be becoming more respectful of individuals’ personal choices in composing their increasingly complex identities. An example of this tendency to tolerate such personal autonomy is the recent willingness of many more states to permit their citizens to opt for dual, or even multiple, nationality.¹ Even where an aspect of identity seems securely fixed—one’s sex, for example—there is in many places greater social and legal tolerance for individuals’ efforts to make this a more, or less, important aspect of their identity, or, in some cases, even to change it.²

Is it likely that personal autonomy will become the prevalent condition of persons throughout the world? And is it realistic to expect states and societies to accommodate so high a degree of personal independence? Will established communitarian institutions accede to a global realignment of personal affiliations, bending the old and still-powerful national and denominational boundaries? We do not know. What is evident is that five hundred years ago, throughout the world, persons had very little freedom to choose their nationality, religion, profession, and place of residence, as well as the other aspects of their individual identity. Today, a formal accommodation by the state to personal individuation has achieved near-global normative recognition, even if it is not invariably evident in state practice.

II. THE POSTWAR EMPOWERING OF INDIVIDUAL CONSCIENCE

Such a change has not been gathering momentum, these past fifty years, without incurring some backlash. As Professor Onuma has pointed out, to many the “discourse

* Of the Board of Editors.

This essay is a draft of part of a forthcoming book. The author wishes to express his appreciation to Judge Rosalyn Higgins and Professors Philip Allott, Ruth Lapidoth, Dianne Otto and Lilly Sucharipa, as well as to his research assistant Timothy Rhodes.

The research for this article was facilitated by a sabbatical granted by the author’s faculty and a scintillating academic year as a Fellow of Trinity College, Cambridge, and at the Lauterpacht Research Centre for International Law. Additional funding was provided by the Filomen D’Agostino and Max E. Greenberg Research Fund of New York University School of Law.

¹ Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AJIL 359 (1996).

² For evidence of changing attitudes in the United States, see John Blake, *Presbyterians Vote to Keep Transsexual Minister in Fold*, ATLANTA J. & CONST., Oct. 23, 1996, at 05C; for China, see Uli Schmetzer, *Sex Change Perilous in China; Leading Dancer Wins Battle*, CHIC. TRIB., Jan. 20, 1996, at N4; for the United Kingdom, see Jojo Moyes, *When a Man Loves Being a Woman*, INDEPENDENT (London), Feb. 22, 1997, at 19.

on human rights is part of the Westcentric intellectual discourse that dominates the entire world. This . . . is foreign to many developing nations because of their diverse civilizational backgrounds” and engenders “a strong resentment against the political, economic and military hegemony, as well as the imperial and colonial history, of Western powers and Japan.”³ Moreover, other voices argue that the contemporary emphasis on individual rights gives short shrift to nonindividualistic claims, also relevant to identity formation, such as the rights pertaining to membership in groups and those based on gender. Not all of these arguments can be addressed, or even accommodated, in a single essay. The object of this article, however, is to consider the most common of these assertions, the one echoed by Professor Onuma, regarding the allegedly Western hegemonic quality of the human rights regime constructed after World War II. To further sharpen the discourse, this essay examines only that part of the human rights canon which pertains to individual autonomy in matters of conscience because, in this arena, the conflict between Western and non-Western values is most passionately and frequently encountered.

The fundamental instrument of this new regime is the 1966 International Covenant on Civil and Political Rights.⁴ It has now been formally ratified as binding by almost all states and establishes in law most of the essential elements of personal autonomy. It purports to entitle all men and women to equality of rights (Article 3) and all persons to “freedom of thought, conscience and religion” (Article 18(1)), as well as freedom from coercion (Article 18(2)). It prohibits marriage without the free consent of both spouses (Article 23(3)) and accords both parties equal rights pertaining to marriage and its dissolution (Article 23(4)). The Covenant also creates a wide penumbra of conscientious and expressive rights, such as the right to participate in politics, public affairs and “genuine periodic elections which shall be by universal and equal suffrage” (Article 25); and it prohibits inequality or discrimination based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 26).

In other words, the Covenant requires societies to abandon various practices that, in one guise or another, have long limited the personal autonomy of their citizens and subjected them to traditional conformist values. The new regime undermines previously unchallenged rules that subordinate the expression of individuality to oppressive communitarian norms. Naturally, there must always be a social balance between the rights of individuals and of societies. The modern rights canon, however, has evidently sought to shift that balance to benefit the individual person.

It has not always succeeded. Some societies have continued to deny women the right to higher education and have prohibited free expression of religious, political or cultural views. These holdouts against the emerging norms, however, are finding life increasingly difficult as a result of the mobilizing impact of the Covenant and the pressure to conformity exerted by it and by the surveillance of state behavior by governments, the Human Rights Committee established by Article 28 of the ICCPR⁵ and nongovernmental organizations. Some of the holdouts have urged that the global rights approach of the international treaty system be replaced or modified by cultural relativism.

³ ONUMA YASUAKI, IN QUEST OF INTERCIVILIZATIONAL HUMAN RIGHTS 1 (Asia Foundation Occasional Paper No. 2, 1996).

⁴ Dec. 16, 1966, 999 UNTS 171 [ICCPR].

⁵ See also DOMINIC MCGOLDRICK, HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1991). See generally THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS (1986); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT, esp. chs. 4, 9 (1996).

The work of the Human Rights Committee, for all its shortcomings,⁶ has been important in both adumbrating the treaty text and insisting on its universal application, albeit with flexible response to special local circumstances. In addition to receiving, reviewing and discussing periodic reports of the state parties to the Covenant, the Committee, constituted of elected human rights experts, has published occasional general comments under Article 40(4) of that instrument, which have enriched the normative canon. In 1993, it formulated a comment on Article 18, further clarifying the parties' obligations under international law regarding freedom of conscience. This asserted that the "right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18(1) is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others." Moreover, it said, "this provision cannot be derogated from, even in time of public emergency."⁷ Freedom of conscience was held to include the right to choose one's religious leaders and teachers⁸ and "to replace one's current religion or belief with another or to adopt atheistic views."⁹ Such freedom, according to the Committee, also precludes all discrimination, for example, in government service or access to education, based on religious tests.¹⁰

III. ORIGINS, FORCES AND FACTORS

The idea of free exercise of individual conscience, of course, did not originate with the Covenant and the struggle for implementation is not unique to the Human Rights Committee. These are but the current manifestation of a very long chapter in the history of ideas. Progress, as one might expect, has been uneven: remarkable in some places, not much evident in others. The record yields cause for both rejoicing and despair, but it also yields something else. By studying the progress made toward full implementation of aspects of the principle of personal autonomy, we can glimpse some elements of its dynamic: the forces that propel it forward. This impression, in turn, may help us to judge whether that dynamic, in those societies where it is most developed, is likely to support a more universal prognosis applicable as well to those—mostly non-Western—regimes and societies where the principle has lagged, been resisted, or been declared inapplicable.

It is primarily to this end that the history of the struggle for freedom of conscience offers rewards. Of the various indicators of personal autonomy, freedom of conscience is probably the most desired and certainly has been the most strenuously resisted. The forces for emancipation and repression, moreover, are not always easily identified. Historically, the state's resistance to individualisms, in most instances, has been reinforced by that of the churches. Yet religion has also played a role in emancipating, as well as suppressing, the autonomous personal conscience. Saint Paul and Saint Thomas both argued from within the Christian tradition that free will is the necessary precondition for an act of genuine faith.¹¹ Thomas, in particular, preached that the individual is

⁶ See Anne F. Bayefsky, *The Future of the Human Rights Treaty System: Forging Recommendations*, Paper for Conference on Enforcing Human Rights Law, York University, Toronto (June 22–24, 1997). See also International Law Association, *Committee on International Human Rights Law and Practice, First Report* (1996).

⁷ Report of the Human Rights Committee, General Comment No. 22(48) (art. 18), Annex VI, at 208, UN Doc. A/48/40 (pt. I) (1993).

⁸ *Id.*

⁹ *Id.* at 208–09.

¹⁰ *Id.* at 210.

¹¹ Saint Thomas Aquinas "resists the forced conversion of Jews and pagans," in DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 88 (1986) (citing THOMAS AQUINAS, *SUMMA THEOLOGIAE* 2a2ae.10, 8, at 61–65 (Thomas Gilby trans., McGraw-Hill 1974)).

endowed with right reason, the key to personal salvation.¹² In sixteenth-century England, “[r]eligious salvation itself changed from a collective to a more individual matter.”¹³ At least some of the Protestant reformers seemed to embrace the notion that the Christian faith, in the words of King Edward VI’s 1549 Anglican Book of Common Prayer, “is a religion to serve God, not in bondage of the figure or shadowe: but in the freedom of spirit.”¹⁴

This emphasis on personal belief rather than formal ceremony, of course, did not guarantee freedom of conscience, but it did emphasize the inauthenticity of coerced communitarian conformity and led in time to the “secularization of personhood and association.”¹⁵ As “social relations were secularized the sanctity of society was replaced by the sacredness of the individual.”¹⁶ In the eighteenth century, the British philosophers Locke and Bayle insisted that the independent conscience is “expressive of an ethical God’s image in us” and is thus independently worthy of the utmost protection from external interference.¹⁷ They advanced the autonomy-enhancing proposition that all expressions of reason proceed from the divine spark that ignites our humanity.

John Locke’s *Letters Concerning Toleration* established this essentially religious basis for freedom of conscience: “The toleration of those that differ from others in matters of religion, is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind,” he wrote, “that it seems monstrous for men to be so blind, as not to perceive the necessity and advantage of it, in so clear a light.”¹⁸

Locke’s ideas inspired American colonists, and especially their intellectual leaders Thomas Jefferson and James Madison, to provide in their new federal framework a specific guarantee that state coercion could no longer be applied to the design of religious worship or to secure persons’ attendance at specified religious services.¹⁹ With the ratification, in 1791, of the First Amendment to the U.S. Constitution, the federal Government was enjoined from making any law “respecting an establishment of religion, or prohibiting the free exercise thereof.”

This constitutional innovation has “two prongs,”²⁰ one guaranteeing free exercise of conscience and the other prohibiting the establishment of a state religion. The free exercise clause has the longer political history. Its origins are traceable to the British Toleration Act of 1689,²¹ which exempted most Nonconformists from the penalties of certain laws, such as those pertaining to seditious libel, so long as their dissent did not extend beyond what the Act allowed. Thus, laymen, so long as they swore allegiance to the king and renounced transubstantiation, were pretty much free to worship as they pleased, in the more liberal spirit that followed the overthrow of the last of the Stuarts and the ascent of a comparatively tolerant House of Orange.

They were free, however, not as of right but as of the king’s grace, and His Majesty’s tolerance had its limits.²² By 1697, weary of religious controversy, King William ordered

¹² For the better-known contrary tendency in the Christian-Roman church tradition, see Saint Augustine (Bishop of Hippo Regius in the fourth to fifth centuries, who originated the powerful theory of persecution of dissenters, the schismatic Donatists, in particular). 1 SAINT AUGUSTINE, LETTERS 187, 203, 368 (Wilfrid Parsons trans., 1951).

¹³ C. JOHN SOMMERVILLE, *THE SECULARIZATION OF EARLY MODERN ENGLAND* 129 (1992).

¹⁴ *Id.* at 59.

¹⁵ *Id.* at 129–43.

¹⁶ *Id.* at 143.

¹⁷ RICHARDS, *supra* note 11, at 119.

¹⁸ See Letters 1–4, in 6 *THE WORKS OF JOHN LOCKE* 1–574 (Thomas Davison ed., 1823). For the quoted words, see Letter 1, at 5, 9.

¹⁹ RICHARDS, *supra* note 11, at 111.

²⁰ *Id.*

²¹ 1 W. & M., ch. 18 (Eng.).

²² See generally W. K. JORDAN, *THE DEVELOPMENT OF RELIGIOUS TOLERATION IN ENGLAND* (4 vols., 1932–40); LEONARD W. LEVY, *BLASPHEMY* 226 (1993).

that his criminal courts and sheriffs execute "all laws against laymen who scandalized or disturbed the peace of the realm by their religious opinions."²³ In the Old Bailey in 1698, Susan Fowls was convicted of blasphemy and was pilloried, fined and jailed for having "passed the bounds of decency by cursing the Lord's Prayer and verbally abusing Christ."²⁴ As the beneficiaries of the new toleration were soon to learn, it was one thing for the state to accommodate private nonconformity but quite another to endure public criticism of the orthodox beliefs that, it was commonly understood, enshrined the values and preserved the peace of society.

The other prong of the American Constitution's First Amendment, prohibiting the "establishment of religion," had different origins. Even Britain's Glorious Revolution of 1688 had retained the Anglican establishment in modified form, and none of the writings of John Locke actually argued for the disestablishment of the Church of England. Rather, the second prong's origins are to be sought elsewhere: in the founding of Rhode Island Colony on the hewn granite of Roger Williams's disestablishmentarian principles.²⁵

Disestablishment, the severance of the historically rooted alliance between church and state, is a more radical proposition than mere toleration. Williams was the foremost seventeenth-century advocate of complete religious freedom, but he had scant regard for mere toleration. While he wrote that there "is no sin ordinarily greater against God than to use violence against the Consciences of men," he deplored toleration as exemplified by the Toleration Act, for it pretended to give by law what all were inherently entitled to as creatures of God. An admiring nineteenth-century European scholar lauded Williams for bringing the theories of freedom of church and state into practice in governing the small community of Rhode Island. Despite predictions that "the democratic attempts to obtain universal suffrage, a general elective franchise, annual parliaments, entire religious freedom, and the Miltonic schism," would be short-lived, he wrote,

these institutions have not only maintained themselves here, but have spread over the whole union. They have superseded the autocratic commencements of Carolina and New York, the high church party of Virginia, the theocracy in Massachusetts, and the monarchy throughout America; they have given laws to one quarter of the globe, and, dreaded for their moral influence, they stand in the background of every democratic struggle in Europe.²⁶

Particularly potent was Williams's integration of religious and political liberty. "Where civil liberty is entire," he wrote, "it includes liberty of conscience, and where liberty of conscience is entire, it includes civil liberty."²⁷ These views were advanced by Jefferson and Madison in their advocacy of the Virginia Bill for Religious Freedom, in 1786, which disestablished the Anglican church. The Virginia law, and the First Amendment, each went a long step beyond the English Toleration Act of 1689, enforcing a clean break between political authority and all institutionalized religions. In his plea for legal disestablishment in Virginia, Jefferson argued against

²³ LEVY, *supra* note 22, at 235.

²⁴ *Id.*

²⁵ ROGER WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS, A SEASONABLE PLEA FOR THE LIBERTY OF CONSCIENCE AND THE RIGHT OF PRIVATE JUDGMENT, IN MATTERS OF RELIGION, WITHOUT ANY CONTROL FROM HUMAN AUTHORITY (1744); Roger Williams, *The Bloody Tenet, of Persecution for Cause of Conscience* (1644), reprinted in 5 THE FOUNDERS' CONSTITUTION 48-49 (excerpts) (Philip B. Kurland & Ralph Lerner eds., 1987). See also JAMES E. ERNST, THE POLITICAL THOUGHT OF ROGER WILLIAMS (1929).

²⁶ ERNST, *supra* note 25, at 1 (citing Georg G. Gervinus, *Introduction* (1853) to EDWIN EMERSON, A HISTORY OF THE NINETEENTH CENTURY 65 (1901)).

²⁷ *Id.* at 203. No citation is given.

the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking, as the only true and infallible, and as such, endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time.²⁸

He added that “our civil rights have no dependance on our religious opinions, any more than on our opinions in physicks or geometry.”²⁹

These ideas of toleration and disestablishment may be said to have a Western provenance, if by that one means, in a narrow chronological sense, that they first found general political acceptance in societies spread around the North Atlantic littoral. But the same could be said of gravity, or Mendel’s law, neither of which is today thought to be particularly “Western.” Locke, Williams and Jefferson may have been products of the western European enlightenment, but the ideas they espoused were as eagerly embraced several centuries later by Jawaharlal Nehru, who regarded them as essential principles upon which to found an independent nonsectarian India.³⁰ They were influential, too, on the thinking of Nelson Mandela, as evidenced by the Constitution for a new Republic of South Africa adopted in 1996.³¹ This is not to deny the evident fact that, toward the end of the second millennium, much of the world is still being governed by a political establishment that includes a designated church and its ecclesiastical hierarchy.³² But the momentum, however long it takes to develop and despite episodic backsliding, lies with toleration and disestablishment.

The First Amendment’s two ideas—toleration and disestablishment—even if still not universally emulated, have both reflected and enhanced a powerful transformation under way in human teleology.

What has created this momentum? The intellectual power of its advocates, perhaps, but also the more general transformation of belief systems in Western societies. This enlightenment has altered the balance between belief and doubt, faith and skepticism, tilting it radically in favor of the latter. It was brought about not primarily by theologians but by biologists, chemists, physicists, astronomers, industrialists and mathematicians. When the spirit of skeptical inquiry reached theology, social and political philosophy, and sociology, there, too, human reason was elevated above divine revelation. “Beyond any reasonable doubt nearly all America’s Founders qualify on this score,” Professor John Murrin has observed, citing Jefferson and Adams as prime examples. “Madison . . . seemed much more comfortable with nature’s supreme being than with God’s revelation by the 1780’s. He looked increasingly to history, not the Bible, for political guidance. James Wilson also believed that the Bible usefully reinforced moral precepts that we learned through our moral sense and reason” In effect, the Founders “took Protestant private judgment a step beyond earlier eras and used it to evaluate the plausibility of Scripture itself,” giving no credence to miracles. “Jefferson advised his nephew [that] one should read the Bible as one would any other book, accepting what is edifying and rejecting what is fantastic,” including, in particular, as he said to Adams, “the fable” of the Virgin Birth. In drafting the Constitution, the large majority of

²⁸ Thomas Jefferson, *A Bill for Establishing Religious Freedom*, June 12, 1779, in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 25, at 77.

²⁹ *Id.*

³⁰ INDIA CONST. §25 (amended 1950).

³¹ S. AFR. CONST. §§9(3), 15.

³² David Ziskind, *Labor Provisions in Constitutions of Europe*, 6 COMP. LAB. L. 311, 374 (1984). Examples include England, Greece, and much of Scandinavia and of the Islamic world.

Founders refused to invoke God or providence, choosing instead to construct “a machine that would go by itself.”³³

The cause of rationalism and skepticism was taken up a decade later by the French Revolution and, still later, by Karl Marx.³⁴ The two revolutions permanently undermined the previously prevalent conviction that religion must play a leading role in governance. They rejected the widespread belief that establishment of religion validated and legitimated communitarian values. In the nineteenth century, it gradually became thinkable, at least in Western nations, that the role of governments should be limited to the defense and protection of property—seen by Locke as the essential basis of individual liberty—and to the provision of other essential social services. The rest, it became commonplace to assert, should be left to the individual. Jefferson put it in this pithy phrase: “it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.”³⁵ The state thus ought not to enforce any view, or even multiple views, of religion or morality, insofar as private beliefs posed no threat to the private beliefs and property of others. In Madison’s more elegant formulation, the government had no calling to deny “equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.”³⁶

Despite these triumphantly optimistic early American libertarian views, the two-hundred-year struggle for unfettered self-expression in matters of conscience has never quite ended. The French Revolution’s Declaration, cited at the beginning of this essay, more restates than concludes the struggle, for it leaves undecided who should declare whether any particular free expression really does “trouble the public order established by law.” Even in the United States, the outcome of this struggle has never been completely certain. To this day the conflict continues, now waged primarily between mainstream churches that favor freedom of conscience and the vociferous right-wing fringes that still favor a “dictatorship of religious values.”³⁷ Nevertheless, in America the trend seems clear and the febrile fringe has had little success in exchanging its passions for the hard currency of laws and institutions. The Constitution and its judicial interpreters have erected considerable obstacles to enforced conformity, and even in American churches there is today a humanist tendency to translate God into a shared morality, which religious leaders have sought to shape by preaching and teaching, but which, ultimately, is the discursively derived sum of personal beliefs. Thus, the emphasis of much religion in the time of free conscience is increasingly on influencing, but not coercing, “the individual’s system of values.”³⁸ Professor David Richards correctly summarizes the majority’s belief: if we are to have “any rights, we must have this right, the inalienable right to conscience.”³⁹

In that view, a free marketplace of ideas is as intellectually optimal for moral and social development as a free economic market is for economic growth.

³³ John M. Murrin, *Religion and Politics in America from the First Settlements to the Civil War*, in RELIGION AND AMERICAN POLITICS 19, 32 (Mark A. Noll ed., 1990).

³⁴ To Marx, “the existence of religion is the existence of a defect” and “the source of this defect can only be sought in the nature of the state itself.” KARL MARX, *On the Jewish Question*, in SELECTED WRITINGS 39, 43–44 (David McLellan ed., 1977). Nevertheless, Marx did not at first advocate abolition, but freedom, of religion. In 1870, during the Paris Commune, he wrote: “the pay of the priest, instead of being extorted by the tax gatherer, should only depend on the spontaneous action of the parishioners’ religious instincts.” KARL MARX, *The Civil War in France*, in 1 MARX & FRIEDRICH ENGELS, SELECTED WORKS 471, 525 (1955).

³⁵ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., 1955).

³⁶ James Madison, *Memorial and Remonstrance Against Religious Assessment*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 5, 8–9 (Marvin Meyers ed., rev. ed. 1981).

³⁷ E. J. Dionne, Jr., *Religion and Politics*, N.Y. TIMES, Sept. 15, 1987, at A19.

³⁸ Robert Wuthnow, *Quid Obscurum: The Changing Terrain of Church-State Relations*, in RELIGION AND AMERICAN POLITICS, *supra* note 33, at 337, 347.

³⁹ RICHARDS, *supra* note 11, at 85. *See id.* at 85–102.

IV. THE OPPOSITION TO FREEDOM OF CONSCIENCE

Against the advocates of freedom of conscience stands, and has long stood, an equally diverse array that sees it as no more "natural" or legally desirable for each person to be entitled to design a personal belief system than to determine whether to steal bread or cross the street at the red light. The reasons advanced against free and unfettered exercise of conscience are as varied as those for toleration. They include the following.

First, conscience (or "inner light") can become perverted and those so afflicted lack the rationality essential to freedom. When that happens, the paternal society must intervene, as it would with other delusional persons, to protect them from the consequences of their own self-destructive willfulness. This was the antitoleration position taken late in life by Augustine toward Donatist and other heretics. That line of thought led, eventually, to the excesses of the Spanish Inquisition.⁴⁰ It also inspired Calvin to burn Michael Servetus and other Protestant heretics. It may have its modern analogue in the death sentence (*fatwah*) imposed on the author Salman Rushdie by the Ayatollah Khomeini,⁴¹ or the 1996 decision by Egypt's Court of Cassation to divorce two happily married Cairo professors because the husband, an Arabic linguist, was held to have deviated, in his writings, from orthodox Koranic exegesis.⁴²

A second argument against toleration derives from the view that religious truth is revealed institutionally and is worked out through institutional traditions. The validity of these beliefs no more depends on individual assent than that of other accepted social conventions, such as the alphabet, the numerical system, the calendar and rules of etiquette. The individual, although possessing free will, has an obligation to accept these traditions. To function in society, persons must repress doubt and accept on faith that which is traditional and, thus, true: at least true for those within the system in which the institutions and traditions operate. This, approximately, is the position regarding doctrine currently taken by the Catholic hierarchy and, to some extent, by some other "established" churches of Western and Orthodox Christianity, as well as Islam.

A third reason for rejecting toleration is that a society, to function as a community, needs certain common values, beliefs and ceremonies of rededication. These unite it, give it a sense of common purpose, and support a system of restraint on otherwise unbridled, individualistic self-seeking. The "truth" of these values, beliefs and ceremonies, while unknowable in any epistemological sense, is adequately demonstrable in utilitarian terms through evidence of the society's right functioning. That this belief system thus is only contingently justified need not make its guardians less zealous in demanding individual conformity with the common conscience of the community. In the West, this line of justification is usually employed by secular "religions," including extreme nationalisms, and by "scientific" Marxism-Leninism.⁴³ What distinguishes these "secular" and essentially nondeistic religions from agnostic humanism is the former's insistence on conformity and rejection of the latter's subjectivism and tolerance. In the

⁴⁰ See AUGUSTINE, *supra* note 12; RICHARDS, *supra* note 11, at 87-88. See also PETER R. L. BROWN, RELIGION AND SOCIETY IN THE AGE OF SAINT AUGUSTINE 260-78 (1972).

⁴¹ See M. M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153, 154 (1993).

⁴² Professor Nasr Abu Zeid and his wife, Ibtihal Younis, also a professor, were ordered to separate because of the husband's unbelief. Both had fled to the Netherlands, where his life was believed to be in jeopardy. The decision was publicly and vehemently opposed by leaders of Egypt's Organization for Human Rights as highly destructive of that nation's emerging civil society. N.Y. TIMES, Aug. 6, 1996, at A6. It was subsequently suspended by Egypt's highest court. N.Y. TIMES, Dec. 20, 1996, at A17. See Judith Miller, *New Tack for Egypt's Islamic Militants: Imposing Divorce*, N.Y. TIMES, Dec. 28, 1996, at 22.

⁴³ PAUL MOJZES, RELIGIOUS LIBERTY IN EASTERN EUROPE AND THE USSR: BEFORE AND AFTER THE GREAT TRANSFORMATION 38-48 (1992). According to Lenin, from the perspective of the state, religion ought to be a private affair, but from the perspective of the Party, religion must be fought. V. I. LENIN, *To the Rural Poor*, in 6 COLLECTED WORKS 402 (1972).

case of Marxist-Leninist doctrine, for example, the rejection of religion as a dangerous “opium of the masses”—a term frequently borrowed from Marx by Lenin (who rendered it “opium *for* the masses”)⁴⁴—was to lead not to liberal heterodoxy, but to the establishment of a new orthodoxy in the form of credal “scientific materialism.”⁴⁵

V. THE SPECIAL CASE OF ISLAM

Elements of all three conceptual bases for denying freedom of individual conscience are evident in contemporary Islamic fundamentalism. During the United Nations debate on the Universal Declaration of Human Rights, the Saudi Arabian delegate, Ambassador Baroodi, called attention to the fact that “the declaration was based largely on Western patterns of culture, which were frequently at variance with the patterns of culture of Eastern States.”⁴⁶ In particular, he sought to delete from the Declaration any reference to the right of individuals to change religious beliefs.⁴⁷ In this he was supported by Iraq⁴⁸ and Syria,⁴⁹ but not by Lebanon,⁵⁰ or Turkey⁵¹ and Egypt. In the event, the Saudi amendment failed to be adopted by twenty-seven votes to five, with twelve abstentions.⁵²

In explaining Pakistan’s vote to delete, its delegate, Sir Zafrullah Khan, admitted that “the problem . . . involved the honour of Islam.” He added, however, that “the Moslem religion had unequivocally proclaimed the right to freedom of conscience and had declared itself against any kind of compulsion in matters of faith or religious practice.”⁵³ Ambassador Khan quoted the Koran: “Let he who chooses to believe, believe, and he who chooses to disbelieve, disbelieve.”⁵⁴ Egypt’s representative, although having voted against the Saudi initiative, expressed concern that the Declaration’s provision on freedom and tolerance, in permitting the autonomous exercise of individual conscience, might also seem to license the activities of aggressive Western Christian missionaries in seeking converts in Islamic countries.⁵⁵ He warned that Egypt had not intended to affirm a legal right to preach error.

It continues to be difficult to reconcile the burgeoning canon of human rights law with the values of self-described “communitarian” religions like Islam, which insist that individuals are defined by their adherence to the community and not vice versa. Human rights, on the other hand, tend to elevate individual claims over communitarian values, including a few that are profoundly important to at least some tendencies within the Roman Catholic and Islamic faiths. Papal displeasure with global efforts to enunciate and implement women’s reproductive autonomy⁵⁶ parallels the interest of Islam in protecting its societies from non-Islamic missionaries. While the Koran may extend some tolerance to submissive Christians and Jews—“People of the Book”⁵⁷—it is less accommodating to heathen “People of the Fire,”⁵⁸ and not at all to those who would openly practice or propagate rival faiths in Islam’s bosom. “Oh you who believe,” it warns, “take not in except your own kind; for [the unbelievers] will spare nothing to corrupt

⁴⁴ MOJZES, *supra* note 43, at 41–42.

⁴⁵ *Id.* at 44.

⁴⁶ UN GAOR, 3d Comm., 3d Sess., 91st mtg., pt. I, at 49 (1948).

⁴⁷ *Id.* at 391, 396.

⁴⁸ *Id.* at 402.

⁴⁹ *Id.* at 403.

⁵⁰ *Id.* at 399.

⁵¹ *Id.* at 397.

⁵² *Id.* at 406. The five votes were cast by Afghanistan, Iraq, Pakistan, Saudi Arabia and Syria.

⁵³ UN GAOR, 3d Sess., 182d plen. mtg., at 891 (1948).

⁵⁴ *Id.* at 890.

⁵⁵ UN GAOR, 3d Sess., 183d plen. mtg., at 913 (1948).

⁵⁶ Barbara Crossette, *Vatican Drops Fight Against U.N. Population Document*, N.Y. TIMES, Sept. 10, 1994, at A5.

⁵⁷ KORAN 5:12–18.

⁵⁸ *Id.* at 9:3–4, 9:113.

you. They wish for your destruction. The aspersions of their mouths [against you] have already been manifest and what is yet hidden in their bosoms is worse still"⁵⁹

Thus, Saudi Arabia, citing its religious obligations, has steadfastly refused to accept not only the Universal Declaration, but the International Covenant on Civil and Political Rights.⁶⁰ Islamic states also played a leading role in changing the draft text of the General Assembly's more recent Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.⁶¹ Deleted were provisions that recognized "the right to choose, manifest and change one's religion or belief."⁶² In addition, the Saudis have refused to accede to the Convention on the Elimination of All Forms of Discrimination against Women,⁶³ to which there are currently more than 150 state parties. Egypt and some other Islamic countries, having adhered, entered reservations to the effect that they are "willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic Sharia."⁶⁴ This lawyerly formula reflects the dilemma of some Muslim states caught between demands for strict and traditional interpretation of their theological canon and a desire to avoid outright confrontation with globally recognized human rights principles.

Because it seeks to protect communitarian cohesion around the True Word of the Prophet, Saudi law firmly "indicates a legal preference for Islamic doctrine, customs, and values as well as for persons of Islamic faith."⁶⁵ "Islam," literally, means "submission." While contemporary Islam has many faces, they appear to have in common an intense focus on the law, based on the Koran, supplemented by the Sunna or practices and sayings of the Prophet, which expresses the essence of the *ummah* or community. So strong is this bond that, to an extent, it "replaces other boundaries of corporate identity such as family, tribe and nation."⁶⁶ It is especially intended to preclude any sense of a personal, autonomous identity. While there is room for case-by-case interpretation of doctrine as in the leading collections of tradition such as the Bukhari, that interpretive function is vested in those who are communally authorized and certainly not in the individual person. In cases of doubt, one may consult the legal interpreter of one's choice, but no person may make the call on his or her own.⁶⁷

The effect is to subordinate to an essentially codified way of life what, in one stream of Christian tradition, is the individual's inherent and divine capacity for "right reason." The Ayatollah Khomeini's fatwah ordering the death of novelist Salman Rushdie for his "blasphemy" in *The Satanic Verses* has been displayed as an example of this Islamic ethos. In the communitarian view of Islamic tradition, Professor M. M. Slaughter has explained, the self "is defined through traditions and concepts of honor. The [Western] concept of the autonomous self requires the free speech principle; the socially situated self of Islamic society necessarily rejects free speech in favor of prohibitions against insult and defamation."⁶⁸ For that reason, the Ayatollah's fatwah ordered the death not only of Rushdie, but also of his publishers, calling "on all zealous Muslims to execute them

⁵⁹ *Id.* at 3:118-19.

⁶⁰ ICCPR, *supra* note 4. Saudi Arabia is not a party.

⁶¹ GA Res. 36/55, UN GAOR, 36th Sess., Supp. No. 51, at 171, UN Doc. A/36/51 (1981).

⁶² 1981 U.N.Y.B. 880.

⁶³ Dec. 18, 1979, 1249 UNTS 13.

⁶⁴ See Declaration and Reservations to CEDAW, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 169, UN Doc. ST/LEG/SER.E/14 (1995). See also the ratifications of Iraq, *id.* at 171; Kuwait, *id.*; and Libya, *id.* at 172.

⁶⁵ Note, *Kiss of Death: Application of Title VII's Prohibition against Religious Discrimination in the Kingdom of Saudi Arabia*, BYU L. REV. 399, 408 (1994).

⁶⁶ Slaughter, *supra* note 41, at 173.

⁶⁷ 1 LAW IN THE MIDDLE EAST 72-76 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

⁶⁸ Slaughter, *supra* note 41, at 155.

quickly, wherever they may be found” as penalty for blaspheming against the “Muslim sanctities.”⁶⁹

How profound a challenge are authoritarian religions to the liberal and individualistic faiths?⁷⁰ There can be little doubt that they offer a starkly different vision of personal identity. In Islam, Professor Slaughter contends, “there is no *a priori* self as such, but only self as expressed in, and realized through constitutive attachments and relations.”⁷¹ Samuel P. Huntington has concluded that this creates a wide and essentially unbridgeable chasm between a West devoted to individual values arrived at through personal choice and the rest of the world, in which these values are either reviled or relegated to a minor place. He starkly contrasts Western individualism with an irreconcilably distinct collectivism elsewhere, thus endorsing the stark view that “the values that are most important in the West are least important worldwide.”⁷² Thus, he sees an inherent, absolutely fundamental distinction between the Western liberal tradition of personal autonomy, democracy, the rule of law, religious freedom and toleration, on the one hand, and the rest of the world’s regard for social cohesion and conformity to community values, on the other.

Huntington also rejects the theory that all societies are at different places, but moving in the same direction, on a common road. He doubts that “modernization” of non-Western societies will have any significant effect on their values. “Modernization and economic development,” he claims, “neither require nor produce cultural westernization. To the contrary, they promote a resurgence of, and renewed commitment to, indigenous cultures.”⁷³ These “indigenous cultures”—individualism and democracy in the West and communitarian authoritarianism elsewhere—are immutable and irreconcilable, making a historic confrontation almost inevitable.

But is East really East and West really West? How immutable and irreconcilable are these cultures? The question, to be answered seriously, must be understood to have both latitudinal and longitudinal aspects. Latitudinally, a credible answer requires a careful comparison of the competing tendencies across the spectrum of contemporary societies, both Eastern and Western, and also within those societies. What, for example, is one to make of Israel, an essentially Western, modern, urbanized and industrialized society, yet one in which only Orthodox rabbis may perform legally sanctioned Jewish marriages?⁷⁴ Does the law reflect Israel’s deeply imbedded community values, or only some far less authentic happenstance of its political culture? As one examines individual nations—Western and non-Western—the binary categorization begins to fall apart and the reality does not appear to be nearly as simple and schematic as Huntington proposes.

Longitudinally, a credible answer requires an examination of the provenance of modern Western tolerance, its respect for individual conscience and its values. How long has Western culture been identified with democracy, toleration and respect for individual human rights? A clear-eyed examination of the record will show that, a few centuries ago, we were all—as it were—Islamic fundamentalists.

Let us focus first, however, on the latitudinal aspect. Here, Huntington’s evidence supporting the cultural collision theory is far from convincing. For example, most Americans and many other “Westerners” probably not only do not oppose, but actually share

⁶⁹ DANIEL PIPES, *THE RUSHDIE AFFAIR: THE NOVEL, THE AYATOLLAH, AND THE WEST* 27 (1990). The Japanese translator of the book was indeed murdered and an attempt was made on the life of the Italian translator. Slaughter, *supra* note 41, at 160–61.

⁷⁰ See Slaughter, *supra* note 41, at 189 and authorities cited therein.

⁷¹ *Id.* at 189.

⁷² Samuel P. Huntington, *The West: Unique, Not Universal*, FOREIGN AFF., Nov.–Dec. 1996, at 28, 33–34 and accompanying notes.

⁷³ *Id.* at 37.

⁷⁴ See Haim Shapiro, *A Wedding Ceremony for the Tel Aviv Yuppie*, JERUSALEM POST, Aug. 26, 1994, at 8B.

with non-Western societies a commitment to community-based values and identity. The difference between "liberal" and "communitarian" societies is less evident in the value each places on community than in the extent to which individuals are free to self-determine their affiliative choices and concomitant values. Liberal communities do exist in profusion. What most distinguishes them from more traditional communitarian societies is that they tend to be voluntary associations, their membership not exclusively predetermined by fixed historical, cultural, national or religious tradition. It might therefore be more accurate to speak less of Western individualism than of Western "communities constituted by free choice," in explaining alleged differences between East and West.

This language does not eliminate the differences between Western and other cultures, but it describes them more accurately. It also softens the differences, revealing them to be matters of degree, emphasis or shading. In traditional communitarian society, what is valued is social order and fixed role assignment. Virtue consists of living up to the demands imposed by one's assigned role in the community.⁷⁵ The social and educational institutions of traditional communitarian societies are deemed to have an obligation not to inform at random or encourage intellectual questioning but to inculcate in accordance with "fundamental goals for the protection, restoration and improvement of public order."⁷⁶ What Professor Frances Foster has called the "parental theory" of socialization is employed "to remedy . . . popular naivete and inexperience with an information policy that is protective and educational. As a protective measure, the parental theory categorically rejects the notion of a free market of competing ideas. It views such a scheme as detrimental to the interests of both individuals and society."⁷⁷

However, even in the most individuated Western societies there is to be found a lively culture of enforced social coherence and much pressure to conform. A minority of extremely Orthodox Jews in Israel have long used their balance of power in the parliament to impose their communitarian sabbatical theology on the largely nonobservant majority. Even lunatic fringe "freemen" in Montana, while asserting their extreme autonomy against all organized government, huddle in tight little political and military formations. Also in America, as in other democracies, there are parents whose parentalism extends to demanding instruction in what they regard as fundamental orthodoxies. They oppose the teaching of evolution in school, seek to ban books and films, and ostracize people for being "different." Among the "liberated" young, too, there are obvious peer pressures to conform to the latest styles in language, deportment, culture and taste. Thus, induced conformity is not exotic in Western society, sometimes as the result of policy and often as a consequence of mere myopia. To give an example of the latter: very little effort is made in Western educational institutions to offer a range of cultural, religious or social options that extend beyond the prevailing norms and values of the dominant society, especially during students' formative years.

Moreover, fanaticism and death threats against those who offend extreme religious sensibilities are not uniquely problems of Islam. For example, in the United States, antiabortion radicals have resorted to murder to "save the lives" of the unborn, and, in Israel, numerous death threats were made against those judges of the Supreme Court who unanimously acquitted John Demjanjuk of being the Treblinka concentration camp's "Ivan the Terrible."⁷⁸ The difference is that, currently, the fanatics have taken

⁷⁵ See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 190–209 (1981).

⁷⁶ W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175, 179–80 (1995).

⁷⁷ Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 265–66 (1996) (citations omitted).

⁷⁸ Anton LaGuardia, *Nazi Death Camp Guard 'Is Not Ivan the Terrible'*, DAILY TELEGRAPH (London), July 30, 1993, at 8.

control of the government in Iran, but not in Israel or the United States or, for that matter, in most Islamic nations.

Still, there are useful distinctions between so-called individualistic and communitarian societies. One of these is how they regard the questions raised by apostasy: individual exit from a religion and entry into a different set of beliefs. In individualistic, democratic communities, a person may encounter some hurdles in affiliating—in becoming a citizen of Switzerland, for example—but almost never in departing. In traditional communitarian societies, on the contrary, it may be possible, even easy, for an outsider to join but almost impossible to exit. Jane Kramer has aptly given the example of Islam as “a one-way door, because you can enter Islam easily but can never leave it.”⁷⁹ Even this difference, however, is effectively true of only *some* Islamic societies. The more moderate, while still regarding exit as prohibited, would leave the remedy against defectors to God.

Most Muslims do regard apostasy as an insult to the Islamic community and to God and there is little Islamic counterpart to the tendency of Americans to go denomination shopping. In the United States, even though a majority of persons still regard themselves as believers, “[s]ociologists of religion say denominational loyalty has deteriorated markedly since the 1960’s. In its place has grown a spiritual searching that can lead people far beyond the faith into which they were born.”⁸⁰

It appears that there *are* distinctions between such traditional communitarian societies as are found in the Islamic world and the more individualistic societies characteristic of the West, but that these are matters of degree, of a spectrum, rather than simply of polarities. Thus, when very conservative Islamicists seek to practice their beliefs in the West, they are likely to encounter problems with the law, as do Western Christians when they engage in public displays and proselytizing in the more conservative Muslim states. A recent example is the arrest and criminal indictment of two Iraqi men who had married the thirteen- and fourteen-year-old daughters of Iraqi refugees, residents of Ohio, in strict accordance with Islamic tradition. The grooms were charged with rape and the women’s parents with child abuse and contributing to the delinquency of minors.⁸¹ What seems to be occurring, here, is a series of skirmishes where cultures overlap, not titanic clashes of civilizations. Also evident is a gradual accrual of common ground, despite resistance from fundamentalists, nationalists and antiglobalists. For example, a court in Pakistan’s rigorously traditional society recently held that fathers do not have the right to control their daughters’ choice of spouses. A three-judge bench of the Lahore High Court decided by two to one that the marriage of an adult without the traditional prior permission of a *wali* (guardian) is not invalid in Islamic law.⁸²

That there is such convergence is not the view taken by Professor Huntington. It matters whether his theory of a profound East-West fault line is sufficiently sustained by evidence because, on the basis of it, he predicts the coming of a decisive conflict between the West and Islam, one exceeding in virulence the confrontation between capitalism and communism.⁸³ He expects the more traditional conflagrations between states and ideologies to be replaced by clashes between “civilizations.” These will pit against one another the cultural and religious traditions of Western Christianity, Eastern Christianity, Islam, Buddhism and Hinduism, as well as other Chinese and Japanese beliefs. “The next world war,” he predicts, “if there is one, will be a war between civilizations.”⁸⁴ He

⁷⁹ Jane Kramer, *Letter from Europe*, NEW YORKER, Jan. 14, 1991, at 60, 71.

⁸⁰ Gustav Niebuhr, *For 360 Years, a Church that Endures*, N.Y. TIMES, Apr. 7, 1996, §1, at 12. But that phenomenon is much less apparent in other “Western” nations, where church adherence, however nominal, has remained consistent even as actual belief in doctrine has withered away.

⁸¹ N.Y. TIMES, Dec. 2, 1996, at A10.

⁸² SCOTSMAN, Mar. 11, 1997, at 10.

⁸³ Samuel Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22.

⁸⁴ *Id.* at 39.

adds that on "both sides the interaction between Islam and the West is seen as a clash of civilizations," and cites the Indian Muslim author M. J. Akbar and the scholar Bernard Lewis for the prediction that Islamic nations from the Maghreb to Indonesia will confront the Christian West for control of a new world order.⁸⁵

To sustain such a cataclysmic hypothesis, however, the latitudinal evidence is remarkably selective and incomplete. A problem with Huntington's prediction is that it is based on a lack of attention to the divisions within Islam itself. These countervailing tendencies take the form of intra-Islamic conflict: Iran-Iraq, Iraq-Kuwait, the Afghan civil war between rival fundamentalists, and the Algerian war between modernists and Islamicists. They are manifest in Islam's theological divisions among Sunni, Shia and Ishmaili. Countervailing evidence is also apparent in the increasing convergence of interest between the West and at least some Islamic states: Turkey, Albania, Egypt, the Federated Gulf States, Indonesia, Jordan, Malaysia, Morocco and Tunisia. Within Islam there is as much "matter of degree" variation as within Western societies, much of it centering on the very issues Huntington sees as constituting the great chasm between Eastern and Western culture.⁸⁶

Various religious authorities within Islam take radically different positions, not least in matters pertaining to the rights of individuals. For example, when an Egyptian court, at the instance of religious zealots, ruled in 1996 that the aforementioned Cairo literary scholar, Professor Nasr Abu Zeid, would have to divorce his spouse, an Egyptian art historian, because his writings were heretical, the ruling was first stayed, then upheld, by higher tribunals. Then, when traditionalists brought fifty similar actions against other Muslim intellectuals, the Egyptian parliament approved a law banning all such private third-party suits based on alleged violations of religious law.⁸⁷ The incident illustrates the need to recognize that Islam speaks with more than a single voice. "I am a Muslim," Professor Abu Zeid declared, "it is the militants who are . . . hijacking Islam."⁸⁸

Similar differences between factions are also evident in the *Satanic Verses* incident. The Shiite fatwah issued by Khomeini against Rushdie was countered by a rival Sunni fatwah by Dr. Tantawi, the mufti or official expounder of Islamic law and Grand Sheikh of Cairo's Al-Azhar University, the leading Islamic institution of higher learning. This second fatwah, while also condemning the blasphemous portions of *Verses*, annulled the death sentence because such a penalty may only be imposed after a trial with full due process in which the accused's motive is carefully examined, a trial Rushdie had not had. Dr. Tantawi also questioned the application of Islamic law to the author, on the ground that he lives outside the Islamic community.⁸⁹

As many writers have made clear, Islam, a legalistic religion, has many interpretive tendencies. It is also worth noting that throughout much of the Islamic world, the state—an institution copied not from the Koran but, rather, in self-defense, from the West—has begun to exercise powers formerly allocated to religious leaders. This power is sometimes exercised to curb Islamicist excesses. In late 1996, for example, the Federation of Malaysia's Prime Minister, Mahathir bin Mohamad, threatened to suspend the Islamicist government of the federated state of Kelantan. By this maneuver, he forced that local government to abandon proposed laws mandating stoning to death for adultery, amputation of hands for theft and forty strokes of the cane for consumption of alcohol. Although formally acting in the interest of the federal government's sole prerogatives in matters of criminal law, and in spite of the fact that Islam is Malaysia's official religion,

⁸⁵ *Id.* at 32.

⁸⁶ See Fouad Ajami, *The Summoning*, FOREIGN AFF., Sept./Oct. 1993, at 2.

⁸⁷ N.Y. TIMES, Dec. 28, 1996, at 22.

⁸⁸ *Id.*

⁸⁹ Karim Abrawi, *Letter from Cairo*, GUARDIAN (UK), Mar. 3, 1989, at 26.

Mahathir said that modern Muslims must be prepared to reinterpret the Koran and sayings of the Prophet Muhammad. "Only when Islam is interpreted so as to be relevant in a world which is so different from what it was 1,400 years ago," he said, "can Islam be regarded as a religion for all ages."⁹⁰

This point is made in very practical terms by a 1996 manual prepared for the Sisterhood is Global Institute by Mahnaz Afkhami and Haleh Vaziri,⁹¹ which openly addresses "the tension between individual freedom and communal authority."⁹² It examines the canon of modern human rights instruments and the Islamic law of the Koran and "the tradition of sayings by the Prophet Muhammad" (Hadith), rejecting the charge "that the universalist human rights discourse is an imposition of Western values on a multitude of diverse societies."⁹³ The manual seeks to inform Islamic women about both Islamic and human rights norms in such a way as to prepare them to play a role in furthering convergence and opposing extremism. This objective is widely shared. Thus, in early 1997, thousands of Turkish women marched in Ankara to protest any attempt to reintroduce Sharia into the secular Turkish legal system. They carried banners proclaiming: "Women's Rights Are Human Rights."⁹⁴

This impetus to modernize Islam is often accompanied by the state's subsuming of roles traditionally reserved to the clergy. Even in Saudi Arabia, "[s]tate jurisdiction now regulates societal areas that were formerly controlled by the religious sphere, and the ulama have become state administrators whose dogma and activities are supportive of the political leadership."⁹⁵ Such a nationalization of religious power brings to mind the developments in post-Reformation countries in Europe—England, Scandinavia and Prussia, in particular—where the subordination of religious authority to the state, however harsh the initial consequences, in historical retrospect can be seen as a first step on the road to toleration. The Muslim world's modernizers today increasingly insist on lessening compulsory uniformity of belief, seeing it as a prerequisite for social and economic advancement of the nation. They warn that retention of the ban on apostasy "appears to be an anachronism in the laws of modern nation States" and point out that the death penalty for it already "has been abandoned in most contemporary penal codes."⁹⁶ In the Human Rights Committee, Islamic members have been among the most outspoken in rejecting the notion of incompatibility between Muslim law and the global law of the human rights treaty system.⁹⁷

How "special" is the case of Islam and what sort of challenge does it pose to the expansion and globalization of "Western" concepts of autonomous individual self-determination? It may be that the Christian West will indeed have to confront all-Islam, or, more probably, that *some* of the West may confront *some* Islamic societies *sometime*. Such conflicts have been endemic since the early Middle Ages. However, the case for a culturally driven military confrontation, an East-West big bang, is not well based.

To the extent there is going to be competition or conflict, it should be seen not as a new phenomenon, but as only one more instance of a recurrent interaction between historically unreconciled forces, dominant here and there, now and then, but always

⁹⁰ Michael Richardson, *Malaysia Moves to Rein in Radical Islamic Fundamentalism*, INT'L HERALD TRIB., Oct. 9, 1996, at 4.

⁹¹ MAHNAZ AFKHAMI & HALEH VAZIRI, CLAIMING OUR RIGHTS: A MANUAL FOR WOMEN'S HUMAN RIGHTS EDUCATION IN MUSLIM SOCIETIES (1996).

⁹² *Id.* at iii.

⁹³ *Id.* at xii.

⁹⁴ Stephen Kinzer, *Turkish Women Protest the Koranic Law*, INT'L HERALD TRIB., Feb. 17, 1997, at 9.

⁹⁵ AYMAN AL-YASSINI, RELIGION AND STATE IN THE KINGDOM OF SAUDI ARABIA 135 (1985).

⁹⁶ Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 322 (1994).

⁹⁷ Interviews with members of the UN Human Rights Committee (Jan.–June 1997).

brandishing radically dogmatic appreciations of both the individual and the community. In historical perspective, any forthcoming "conflict of civilizations" between Islam and the West would be only a variation on that recurrent theme, familiar to philosophers, politicians and generals. Kant, Locke and Napoleon all thought—albeit differently—in terms of civilizational clash. For most of the nineteenth and twentieth centuries, it was Hegelian social philosophy that, applied or misapplied in Nazi and Communist ideology and flying the antiliberal banner of communitarianism, gave credence to the concept of "wars of civilization." Hyperbole aside, however, the prospect of continuing the historic tension between cultures emphasizing communitarian structural cohesion and those emphasizing individual freedom should evoke not apocalyptic alarm but research into underlying causes and discernible correlations between social value formation and various causal factors. Particularly useful, too, would be a broad inquiry into historical trends to determine whether certain social tendencies have historical momentum on their side.

VI. THE SPECIAL CASE OF ENGLAND

Professor Huntington's "clash of civilizations" theory can only be understood on the basis of two unstated assumptions: (1) that Islam and other non-Western systems are accurately represented by their most radically conservative manifestations; and (2) that the West's liberalism and tolerance (its "First Amendmentism") emanate from an inherently occidental culture. These assumptions are invalid. A unitary view of many-faceted Islam, as we have seen, is factually insupportable. On examination of further evidence, the same would be concluded about Buddhist and Hindu cultures. But an ethnocentric basis for so-called Western individualism and freedom is equally fallacious. Even a cursory investigation of "Western" history can readily demonstrate that autonomy and freedom of conscience are not any more indigenous to the West than to the East. Rather, Western First Amendmentism is still only the recent, imperfectly realized and hard-won culmination of a long struggle.

That struggle was waged in the West against entrenched forces of political and theological orthodoxy bent on enforcing conscientious conformity against the spirit of personal inquiry. Much as in some non-Western societies today, Western leaders long sought to repress the individual conscience—particularly its public expression—in the name of protecting social cohesion and communal stability. The French Declaration of 1789 contains precisely the self-serving caveat in favor of "public order" that is always cited by authority to justify repression of nonconformity. Historically, in the West, those seeking to enforce conformity eventually yielded to reason, but only when overpowered by political, economic and social forces they could no longer control.

There is no reason to believe that these underlying emancipating forces—urbanization; industrialization; advances in communications; scientific discoveries; a revolution in information storage, distribution and retrieval—are indigenous to Western society and cannot affect other societies as they have affected our own. On the contrary, one must assume them to be independent variables, which, when they come to the fore anywhere under the right conjunction of circumstances, can tilt the balance in favor of more personal autonomy.

Although we cannot prove this hypothesis about the future, we can challenge countervailing hypotheses built on a falsely imagined past. Thus, Huntington's predictions of a great chasm between inherently irreconcilable civilizations is undermined by evidence that contemporary communitarian, conformist societies very much resemble our own of only a few years ago.

Consider England, today. It is the cradle of parliament and the rule of law but is also the place where Salman Rushdie resides. Unlike Iran, England has not issued a writ authorizing Rushdie's murder for blasphemy. On the contrary, it has spent millions of pounds protecting the writer against potential enforcers of the Iranian mullahs' decree. Clearly, Iran and England are different, even profoundly so, when it comes to respect for religious dissent. But England still maintains a common law offense of blasphemy,⁹⁸ although not, of course, one imposing the death penalty on offenders. Indeed, English Muslims sought to invoke it, by initiating legal proceedings to compel the Crown to prosecute the errant author. The High Court, instead of holding that the law of blasphemy had fallen into desuetude, found that it continued to be in effect but was directed only against those who blasphemed the established Church of England.⁹⁹

Even a cursory study of English—or, indeed, Western European—history makes modern Islamicist passion seem quite familiar, its excesses not very exotic.¹⁰⁰ While English blasphemy law may by now be a rather toothless tiger, such laws were of great consequence until quite recently. Throughout the religiously turbulent seventeenth century, English law continuously treated all blasphemy as a form of sedition, rather as does Islamic law today. The English common law, according to Blackstone, punished “blasphemy against the Almighty, by denying his being or providence; or by contumelious reproaches of our saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. . . . [F]or Christianity is

⁹⁸ See *Regina v. Lemon*, [1979] 2 W.L.R. 282.

⁹⁹ *Regina v. Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury*, [1991] 1 Q.B. 429, 447.

¹⁰⁰ English attitudes toward blasphemy and heresy have their roots elsewhere in the West, particularly in ancient Greece, Palestine and Rome. There was not much in any of those societies to distinguish their values from those of contemporary instances of communitarian intolerance. Alcibiades, one of the commanders of the Athenian army, was condemned to death for impiety, in 415 B.C., while fighting Sparta. LEVY, *supra* note 22, at 5. Aristotle was convicted of the same offense a century later. *Id.* at 7. According to the Old Testament, a person “who blasphemes the name of the Lord shall be put to death; all the congregation shall stone him.” *Leviticus* 24:16. If liberal democratic autonomy and conscientious liberty are peculiarly Western blossoms, they surely were not planted by our mother Athens or father Jerusalem. Toleration was not a sentiment familiar anywhere in Europe before the sixteenth century, certainly not to the Roman Catholic hierarchy or to the Christian monarchies of Europe. By unrelenting persecution, “the Church attained and long kept its catholicity. Its monopoly as the only recognized and established religion was built on murder as well as on the exclusivity of its control of salvation.” LEVY, *supra*, at 46. Punishment for heresy and blasphemy was seen by both church and state as therapeutic. The more severe such punishment, the better, because toleration of conscientious dissent “endangers the unity of society” and “failure to punish the blasphemer might lead to public disturbances.” *Id.* at 3. Flogging and stoning became the lesser penalties for conscientious dissent in the Judeo-Christian tradition, with death the more common remedy. Heresy, the charge leveled against obdurate objectors to the Christian creed formulated by the Council of Nicea in A.D. 325 and to the Trinitarian theology confirmed by the Council of Chalcedon in A.D. 451, largely replaced blasphemy as the charge brought against conscientious dissent.

The tolerance of the Eastern church was no greater than that of Rome. In the Orthodox Christian church's Byzantine realm, Emperor Justinian's Code in 529 made provision for putting blasphemers to death, since “failure to do so tended to cause famine, earthquake and pestilence.” *Id.* at 50. This repression of dissent was endorsed by Charlemagne and his successors upon the founding of the Holy Roman Empire in A.D. 800. *Id.*

Augustine advocated death for heretics, but was careful to insist that the state, and not the church, be the one to carry it out. While this kept the ecclesiastical hand technically unbloodied, it linked it firmly to that of the temporal power, assuring that for at least 1200 years such views as those advanced by Roger Williams and Thomas Jefferson would be expressed openly only on pain of burning, hanging, ripping out of tongues, gouging out of eyes, cutting off of ears or lips or various creative combinations of these typically “Western” answers to the free thinkers' provocations. Levy gives an excruciatingly detailed account of this history. *Id.* at 46–462. According to Saint Thomas Aquinas, heretics “by right . . . can be put to death and despoiled of their possessions by the secular [authorities], even if they do not corrupt others, for they are blasphemers against God, because they observe a false faith. Thus they can be justly punished more than those accused of high treason.” *Id.* at 51–52 and accompanying cites. The Reformation in Europe did little to introduce greater tolerance. Calvin, in the sixteenth century, burned dissidents in Geneva, and Luther called for the burning of synagogues and for cutting out the tongues of Jewish blasphemers. *Id.* at 60–61.

part of the laws of England.”¹⁰¹ The criminalization of conscientious dissent was seen by the Church of England, after its historic but socially and politically divisive break with Rome, as a weapon against those who would foment civil insurrection. Chief Justice Hale, in the 1676 *Taylor’s Case*, held that “Christianity is parcel of the laws of England” and that statements attacking it or Christ tended “to dissolve all those obligations whereby civil societies are preserved.”¹⁰²

This was not a new perspective. Pre-Reformation England and post-Reformation England in that sense were indistinguishable. England’s breach with Rome had done nothing to mitigate the established church’s virulent intolerance. Anglicans and Roman Catholics had vied to stamp each other out during the reigns of Henry VIII, Edward VI and Mary I. Indeed, Henry VIII’s Act of the Six Articles imposed criminal penalties, including being roasted alive,¹⁰³ on anyone denying such key doctrines as transubstantiation.¹⁰⁴ A few years later, under Edward, it became almost as dangerous to espouse transubstantiation as it had been to deny it. Then Queen Mary made it once more very unhealthy to deny its validity. The people fully empathized with the anonymous doggerel attributed to one clergyman of the period:

And this law, I will maintain,
Unto my dying day, sir,
That whatever king shall reign,
I will be the Vicar of Bray, sir!

That sinecure could be retained, however, only by paying closest attention to constantly shifting doctrinal fashion, always enforced by draconian laws and the full power of the state.

One thus speaks at some peril about any Western tradition of respect for individualism in Tudor England. The first hundred years after the establishment of the Church of England were fraught with civil war, regicide and large-scale executions, all the products of religious zealotry. Even during the last four years of the brief restoration of Catholicism under Mary (1553–1558), 273 subjects were burned for heresy, including four bishops and an archbishop.¹⁰⁵

Only in the late sixteenth century did the prolonged excesses of intolerance very gradually begin to tire the ruling classes. First came the respite from religious dogmatism during the long reign of Elizabeth I, beginning in 1558. It is said that she “did not share the uncompromising zeal of either Catholic or Protestant.” Whether or not Elizabeth actually said that all difference between Christians “is a dispute over trifles,” clearly “[e]xcessive doctrinal enthusiasm wearied and annoyed her.”¹⁰⁶ Although formal public adherence to the established church was certainly still required during her reign, the Queen’s minister, Lord Cecil, convinced her that, while the Crown could not concede liberty of worship, it at least might concede liberty of private conscience.¹⁰⁷ As is so often the case, institutionalized hypocrisy preceded—and to some extent disguised—profound changes in society, its social values and its political institutions. Laws compelling conformity were not repealed but tended not to be vigorously enforced.

Actual public dissent, however, was another matter. For some time, it continued to be severely repressed not only in England, but almost everywhere in Europe, not least

¹⁰¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *59.

¹⁰² *Taylor’s Case*, 86 Eng. Rep. 189 (K.B. 1676). The defendant had called Christ a “whore-master” and “bastard” among other things.

¹⁰³ LEVY, *supra* note 22, at 82–84 and accompanying cites.

¹⁰⁴ 31 Hen. 8, ch. 14. See DAVID FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES 686–87 (1993).

¹⁰⁵ LEVY, *supra* note 22, at 86 and accompanying cites.

¹⁰⁶ 1 JORDAN, *supra* note 22, at 86 (1932).

¹⁰⁷ *Id.* at 88.

where the Reformation was under way. The burning—in Geneva in 1553—of the anti-Trinitarian, Michael Servetus, on the order of John Calvin, at last aroused enough repulsion to engender Europe's first serious debate on toleration.¹⁰⁸ That debate also resounded in England, where ascendant Presbyterianism—the Calvinist system imported through Scotland by John Knox—despite being the chief rival to the Church of England, enthusiastically shared its intolerance of personal religious autonomy.

That conscientious dissent from the doctrines of established Christianity could corrode the bonds of civil society remained a deeply held view in England, as elsewhere in Europe, well into the nineteenth and early twentieth centuries. Typical of its resilience among the English faithful was a "Letter to the Parishioners of Great Yarmouth by their Minister," written in 1847. It vehemently opposed a petition to Parliament, then being circulated, that had argued "in favour of the Removal of Jewish Disabilities." The petition sought to make Jews eligible for election or appointment to Parliament. "My dear friends," wrote the Yarmouth divine,

I cannot express to you the pain of my heart to see you petitioning for the abrogation of that great religious principle whereby the nation, and we as its members, are bound up in a solemn relationship to *Christ Jesus* as our common head. . . . [I]f you seek to deprive us of that bond, you rend asunder the very life of the nation: and you will see, ere many years have passed by, the unnatural excitement of partial and divided life exhibited here and there amid the nation that has hitherto been one; preying inwardly upon its own vitals; continually fighting in a fearful strife, part against part; wasting its own forces by an inward fever; instead of developing the functions of the united body in wholesome action towards those who bear an external relationship to it.¹⁰⁹

Over time, however, the "religious struggle which marked the history of this era etched deep into the fabric of Anglican thought a profound distrust of all coercive practices and a stalwart disavowal of the fanatical devotion to sectarian ends from which persecution springs."¹¹⁰ Queen Elizabeth I had already allowed recusants to avoid the established sacraments with a small fine.¹¹¹ The last two persons executed for heresy in England died in 1612, in the reign of James I, who eventually recognized the unwisdom of creating martyrs, preferring that "heretics hereafter, though condemned, should silently, and privately, waste themselves away in the prison."¹¹²

Enlightenment, however, did not come all at once or without reversals. The temporary reforms of Oliver Cromwell's Commonwealth recognized, despite the efforts of the more extreme Puritans, that the right to "individual faith" is "of such transcendental importance that the state dare not touch it."¹¹³ In 1650 Parliament passed its first Toleration Act repealing all legal enforcement of religious uniformity. Briefly, there was a secularization of England that proceeded from the "recognition that social order could rest on another basis than religious agreement."¹¹⁴ But the Protectorate failed to perpetuate itself, and even before its demise, the tendency to tolerate dissent was constantly undermined by an inclination to limit it to the mainstream Protestants. One month before enacting the so-called Toleration Act of 1650, Parliament had criminalized

¹⁰⁸ Professor Levy has written that the debate was opened with the publication by Sebastian Castellio of Basel, a professor of Greek and epic poet, of his *Concerning Heretics*, "the sixteenth century's first book on religious liberty." LEVY, *supra* note 22, at 67.

¹⁰⁹ In a collection of unpublished pamphlets in Trinity College Library, Cambridge, No. 289C 80 46, at 8 (1847). The author is Henry MacKenzie, M.A., later the Anglican Bishop of Nottingham.

¹¹⁰ 4 JORDAN, *supra* note 22, at 422–23 (1940).

¹¹¹ LEVY, *supra* note 22, at 89. *But see id.* at 91.

¹¹² *Id.* at 99.

¹¹³ SOMMERVILLE, *supra* note 13, at 108–09.

¹¹⁴ *Id.*

the beliefs of a sect called the Ranters, and many of its followers (who, perhaps paradoxically, believed in neither heaven nor hell) were jailed, whipped, hanged or had their tongues bored through with a hot iron.¹¹⁵ Moreover, whatever tolerance there was at that time had been strongly opposed by many of the Commonwealth's Presbyterian champions, even though they themselves had previously been cruelly persecuted by the Anglican establishment under Archbishop Laud.

Typically, one John Bastwick, a Presbyterian, on being released from prison by the Protectorate, demanded, in the name of the Bible, death for "atheism, blasphemy, profanation of the Sabbath, and all manners of impiety and toleration of all religions."¹¹⁶ This he thought to be the due not only of Catholics and Anglicans, but also of Unitarians, Congregationalist sects and any who disagreed with Presbyterian orthodoxy. Adam Stewart, another of that faith, urged that, while persecution could not extirpate wrong beliefs, magistrates "could cut away an ill tongue."¹¹⁷ The imprisonment and trial of Paul Best by the Long Parliament, beginning in 1645,¹¹⁸ led in 1648 to Parliament's passing "An Ordinance for the Punishing of Blasphemies and Heresies," which once more imposed the death penalty on atheists and the anti-Trinitarian Socinians and imposed lesser punishments primarily on the Baptists.¹¹⁹ Almost immediately, however, Pride's Purge cleared the Presbyterians out of Parliament and suspended the enforcement of that law.

After the period of army rule and the Protectorate came the Stuart Restoration and the revival of Anglican supremacy. The Act of Uniformity of 1662 prescribed the Church of England's Book of Common Prayer for all churches. During the brief Restoration, thousands of Nonconformists, ranging from Quaker to Presbyterian, died in jail.

The end of the Stuart dynasty, however, was marked by a new Toleration Act of 1689.¹²⁰ That law has been described by the historian Macaulay as "among those great statutes which are epochs in our constitutional history."¹²¹ Yet, while it formally ended persecution of Nonconformists, it required their teachers and preachers to continue to subscribe to all but three of the Anglican Articles of Religion. It did not extend toleration to Roman Catholics, or to those who denied the doctrine of the Trinity, and it did not repeal laws requiring attendance at some place of worship. For all this, as we have noted, the Act was scorned by Roger Williams in Rhode Island. The Test and Corporation Acts of 1673 also remained in force, formally restricting public office to communicants of the Church of England,¹²² although society increasingly turned a blind eye to dissenters, dubbed "occasional conformists," who were willing to take Anglican communion on a few formal occasions.¹²³

Not only was this "toleration" still severely circumscribed at the end of the seventeenth and beginning of the eighteenth centuries, it may even be discounted as little more than a tactical rallying of the conformists and opportunists, the better to inflict greater intolerance on others. Daniel Neal's preface to his *History of the Puritans* (1731–1732), for example, notes approvingly that, after passage of the Toleration Act, Nonconformists delivered from the "Yoke of Oppression," now in company with Anglicans, "may with greater success bend their united Forces against the common Enemies of Christianity."¹²⁴

¹¹⁵ LEVY, *supra* note 22, at 158.

¹¹⁶ *Id.* at 111.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 111–15.

¹¹⁹ *Id.* at 120–21 and accompanying cites.

¹²⁰ 1 W. & M., ch. 18.

¹²¹ 2 THOMAS BABINGTON MACAULAY, *THE HISTORY OF ENGLAND* 282 (Everyman ed. 1972).

¹²² Ernest A. Payne, *Toleration and Establishment: I, A Historical Outline, in FROM UNIFORMITY TO UNITY 1662–1962*, at 255, 259 (Geoffrey F. Nuttall & Owen Chadwick eds., 1962).

¹²³ Daniel Defoe is quoted by Payne as calling it "playing Bo-peep with God Almighty." He cites Sir Thomas Abney, onetime Lord Mayor of London and Member of Parliament, as an example. *Id.* at 261–62.

¹²⁴ *Id.* at 263 (quoting Neal).

In 1698, Parliament passed a law “for the more effective suppressing of Blasphemy and Profaneness.”¹²⁵ Prosecutions under it and under common law continued for another two hundred years.¹²⁶

The Schism Act of 1714 forbade teaching by anyone who could not demonstrate that he had taken Anglican communion during the previous year.¹²⁷ It was repealed five years later,¹²⁸ but the use of law and the state’s power to entice and bully individuals into religious conformity continued to be seen as an essential antidote to civil war and the unraveling of the social contract. In *Rex v. Woolston*, in 1729, the English court declared that “whatever strikes at the root of Christianity, tends manifestly to the dissolution of civil government.”¹²⁹ According to Blackstone, blasphemy was a common law criminal libel that consisted of a “public affront to religion and morality on which all government must depend for support.”¹³⁰ “The English,” one writer comments, “seem peculiarly attached to the notion that the individual and his innermost thoughts are part of the bonds holding society together, and that society may therefore act to prevent, as far as possible, external influences from leading those thoughts from the established path.”¹³¹

Not until the nineteenth century were there notable further steps in the direction of toleration, progress having been slowed by, among other factors, public reaction to the excesses of the French Revolution’s campaigns against religion. In 1812 the Conventicle and Five Miles Acts were repealed,¹³² and the following year the law of blasphemy was amended¹³³ to make it lawful to deny the doctrine of the Trinity, thus exempting from criminalization the doctrines of Unitarians and Jews. In 1828 the Test and Corporation Acts were repealed¹³⁴ and the following year the Catholic Emancipation Act put Roman Catholics on a par with Nonconformist Protestants.¹³⁵ The Marriage and Registration Acts of 1836 and 1856 at last legitimated marriages conducted by Nonconformist ministers, although a registrar had to be present. In 1858 Parliament passed the Act to provide for the Relief of Her Majesty’s Subjects professing the Jewish Religion,¹³⁶ which dropped the uniform religious oath requirements that had excluded Jews from public office.¹³⁷ In 1859 religious tests for appointments at Oxford and Cambridge were dropped.

These battles for and against toleration were fought with immense vigor only a century and a half ago. In 1830 Macaulay had written: “why a man should be less fit to exercise [the civil powers of full citizenship] because he wears a beard, because he does not eat ham, because he goes to the Synagogue on Saturdays instead of going to Church on Sundays, we cannot conceive.” These differences, he argued, had no more to do with fitness to be a magistrate, legislator or Chancellor of the Exchequer than with fitness to be a cobbler.¹³⁸ His reasoning did not carry for almost thirty years.

Macaulay and other Christians, in demanding full tolerance for the Jews, and Sydney Smith, in pursuing Catholic emancipation, adopted particularist arguments somewhat

¹²⁵ 9 & 10 Will. 3, ch. 32.

¹²⁶ Note, *Blasphemy*, 70 COLUM. L. REV. 694, 696 (1970).

¹²⁷ 13 Anne, ch. 7.

¹²⁸ 5 Geo. 1, ch. 4.

¹²⁹ *Rex v. Woolston*, 93 Eng. Rep. 881 (K.B. 1729). This case was cited approvingly in New York in 1811 in *People v. Ruggles*, 8 Johns. 290 (N.Y. Sup. Ct. 1811).

¹³⁰ 4 BLACKSTONE, *supra* note 101, at *59.

¹³¹ Note, *supra* note 126, at 698 (citing PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 9–14 (1965)).

¹³² 52 Geo. 3, ch. 155, §1.

¹³³ 53 Geo. 3, ch. 160 (repealing 9 Will. 3, ch. 32).

¹³⁴ *The Repeal of the Test and Corporations Acts, 1828*, 9 Geo. 4, ch. 17.

¹³⁵ 10 Geo. 4, ch. 7.

¹³⁶ 21 & 22 Vict., ch. 48.

¹³⁷ See the account of the struggle for Jewish emancipation in URSULA HENRIQUES, *RELIGIOUS TOLERATION IN ENGLAND, 1787–1833*, at 183–205 (1961).

¹³⁸ Thomas Babington Macaulay, *Civil Disabilities of the Jews*, 52 EDINBURGH REV., Oct.–Jan., 1830–31, at 365, quoted and paraphrased in *id.* at 201.

later developed more generally by John Stuart Mill. It was Mill's contention, building on Locke, that church and state must be altogether separate and that the accommodation of difference in philosophy and belief is a sign of a society's intellectual strength and resilience. By the latter part of the nineteenth century, as one historian remarked, "advanced opinion . . . had already shown signs of growing weary of divine decrees and infallible dogma, all of which helped to make the life of men in society disturbed and fratricidal."¹³⁹ At last, a clear distinction between church and state—rather than an enforced code of religious conformity—was becoming the conventional wisdom on which to erect a peaceable kingdom. As Locke had insisted, the prerogative of force now resided with the state only to compel conformity with laws enacted to promote true civil interests.

Leading churchmen of the established church had been arrayed on both sides during this battle for and against conscientious toleration. For example, in the House of Lords debates in 1707 on the Act of Union with Scotland,¹⁴⁰ which recognized the Presbyterians as the established church in Scotland, the liberal Archbishop Tenison of Canterbury said that

he had no scruple against . . . confirming [the Act] within the bounds of Scotland [since] he thought that the narrow notions of all the Churches had been their ruin and he believed the Church of Scotland to be as true a Protestant Church as the Church of England though he could not say it was so perfect.¹⁴¹

Yet, as late as 1887, the Bishop of Winchester in convocation warned against participation in public worship with the Dissenters, who believed "that for very slight differences of opinion you may separate from a great national Church, and that any body of men that like may set up a new Church of their own."¹⁴² In 1880, twenty-one years after the publication of Mill's classic essay *On Liberty*, and with the support of many Anglican clergy—but with sixteen thousand of them petitioning *against* it—the Burial Laws Amendment Act granted non-Anglicans the right to burial in churchyards.¹⁴³

The Anglican religion is still England's state church, headed by the British monarch, and only Anglican bishops hold *ex officio* appointments to the House of Lords. The two archbishops, as well as all bishops of the Church of England, continue to be appointed by the Crown on the advice of the Prime Minister, who usually, but not invariably, accepts the counsel of the church's Crown Appointment Commission.¹⁴⁴ Beyond those vestiges of establishment, however, little else remains, in Britain, to qualify or disqualify persons on account of conscientious belief.¹⁴⁵ In 1967 Parliament revoked the Blasphemy Act of

¹³⁹ Edward Carpenter, *Toleration and Establishment: 2, Studies in a Relationship*, in FROM UNIFORMITY TO UNITY, *supra* note 122, at 289, 291.

¹⁴⁰ 6 Anne, ch. 40.

¹⁴¹ *The Chronicle of Convocation* (May 12, 1887), quoted in Carpenter, *supra* note 139, at 301–02 (citing STATE PAPERS AND LETTERS addressed to William Carstares 760 (J. McCormick ed., 1774)).

¹⁴² *Id.* at 301.

¹⁴³ Payne, *supra* note 122, at 279.

¹⁴⁴ Peter Crumper, *Freedom of Thought, Conscience and Religion*, in DAVID HARRIS & SARAH JOSEPH, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 355, 362 (1995). The Church of England is not established in Wales or Northern Ireland. The Presbyterian Church is established in Scotland. *Id.* at 363.

¹⁴⁵ FELDMAN, *supra* note 104, at 687.

1698,¹⁴⁶ although, as we have noted, blasphemy was still recognized by the High Court as a common law offense in the 1991 *Rushdie* case.¹⁴⁷

While the effort to prosecute Rushdie failed, a 1979 prosecution did succeed. It had been brought by a private citizen against a newspaper and its publisher for printing a poem by James Kirkup, a British poet teaching at Amherst College (U.S.), that depicted Jesus as homosexual.¹⁴⁸ In the House of Lords, the conviction was sustained by Lord Scarman as necessary to protect "religious beliefs . . . from scurrility, vilification, ridicule and contempt."¹⁴⁹ Moreover, freedom of religious expression and criticism of religion are still chilled in modern Britain by a raft of other speech-curbing laws on scandal, incitement to disorder, profanity and obscenity.¹⁵⁰ In 1995, moreover, the European Court of Human Rights upheld a ban imposed by British censors on *Visions of Ecstasy*, a film about Saint Teresa of Avila who had erotic visions of Jesus. The Court sided with the British Government on the ground that the film would "give rise to outrage" and that "a reasonable jury properly directed would find that it infringed the criminal law of blasphemy."¹⁵¹ The European judges noted that blasphemy laws are still in force in various European countries and that, because the film could "outrage and insult the feelings of believing Christians," the censorship "could not be said to be arbitrary or excessive."¹⁵²

What does all this tell us? At the very least, it makes clear that modern "Western" liberal values, with their emphasis on individuated personal autonomy and human rights, are no emanation of some deep cultural tradition of the societies of Europe and North America: certainly not of England. It demonstrates that these values and the legal skein that gives them effect are a radical and very recent repudiation of everything that characterized these societies throughout their recorded history. It also tells us that there are still many exceptions to the liberalizing trends of recent years.

At best, the account would arouse us to ask what brought about the recent, remarkable reversal of social values and laws in some states, including England. And that, in turn, should cause us to inquire whether those so-called non-Western societies which currently espouse some of the values and laws that were from time immemorial the conventional wisdom of England may, in time, be subject to the same visions and revisions that eventually compelled the inhabitants of England to embrace toleration and freedom of conscience.

VII. THE SPECIAL CASE OF THE UNITED STATES

Britain's American colonies, with the notable exception of Roger Williams's Rhode Island, emulated the early English legal precepts, establishing religion and criminalizing blasphemous dissent. The colonial settlers in America simply replicated the ecclesiastical conflicts of England and their attendant intolerances.

¹⁴⁶ The revocation came in 1967 as part of the Criminal Justice Act. Criminal Justice Act, 1967, ch. 80 (Eng.). This rescinded several "obsolete" laws on the recommendation of a government-appointed law commission. It was thought that that was the end of the matter, but this conclusion ignores the resilience of the common law of blasphemy as propounded by Blackstone.

¹⁴⁷ In 1985 the UK Law Commission had unanimously recommended the abolition by statute of the common law offense of blasphemy. That recommendation still awaits action, LAW COMMISSION REPORT NO. 145, OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP (1985), and many in England still believe that the law, instead of being repealed, ought to be enforced and extended to protect all other religions from intemperate dissent, see FELDMAN, *supra* note 104, at 693.

¹⁴⁸ See *Regina v. Lemon*, [1978] 3 All E.R. 175, 1979 App. Cas. 617.

¹⁴⁹ 1979 App. Cas. at 658.

¹⁵⁰ ST. JOHN A. ROBILIARD, RELIGION AND THE LAW: RELIGIOUS LIBERTY IN MODERN ENGLISH LAW 35-40 (1984).

¹⁵¹ *Wingrove v. United Kingdom*, App. No. 17419/90, 24 Eur. H.R. Rep. 1 (1996).

¹⁵² *Id.* at 32.

The revolution did not entirely extirpate this tradition. Much of the legal framework of intolerance survived into the postcolonial era in both the statutes and the practices of the former colonies.¹⁵³ The American Revolution, unlike its French counterpart, was neither anticlerical nor countertheological, and the Constitution and First Amendment forbade only the *federal* establishment of religion. They did not abrogate the then-extant establishment in Massachusetts, Connecticut, Vermont and New Hampshire. Not until the passage of the Fourteenth Amendment, ratified in 1868, was the federal prohibition applied at the state level.

More important, the “free exercise” clause, like its “free speech” twin, has never been treated as absolute, leaving room for the punishment of obscenity, libel and incitements to violence. Each of these exceptions has been used, at one time or another, as justification for prohibiting speech and practices pertaining to religion, and even for punishing blasphemy.¹⁵⁴

Through much of America’s nineteenth century, attitudes of public officials and some judges regarding the corrosive effect of conscientious dissent strongly resembled those of their English counterparts. In 1811 the New York State Supreme Court of Judicature, in a decision written by the “American Blackstone,”¹⁵⁵ Chief Justice Kent, held that the defendant’s public denunciation of Jesus as a bastard and his mother, Mary, as a whore constituted blasphemy. Kent noted “that we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those impostors [*‘Mahomet’* or *‘the grand Lama’*].”¹⁵⁶ He thought that the English common law crime of blasphemy still applied to the former colony despite New York’s having neither a blasphemy statute nor an established church. “No government among any of the polished nations of antiquity, and none of the institutions of modern *Europe*,” he said on behalf of a unanimous court—here excepting a “single and monitory” case—“ever hazarded such a bold experiment upon the solidity of the public morals, as to permit with impunity, and under the sanction of their tribunals, the general religion of the community to be openly insulted and defamed.” (The reference to a “single exception” obviously was directed at revolutionary France.) In the court’s opinion, the defendant’s words were punishable “because they strike at the root of moral obligation, and weaken the security of the social ties.”¹⁵⁷

The Ayatollah Khomeini could not have said it better. Although Kent was not a religious fanatic, he approved the view common at the time to persons of his class and station that religion was “a bulwark of good social order”¹⁵⁸ and that without religion the poor might not be held in check.¹⁵⁹ Thus, only a century and a half ago, the value of personal conscientious autonomy was nowhere near as widely shared, or as deeply felt, as it is today. It was not unusual for persons, even some deeply steeped in law and public philosophy, to think it essential to repress freedom of personal conscience for the sake of social stability, and to express that view through punishment. In that spirit, during the 1820s and 1830s, state criminal prosecutions for blasphemy continued sporadically.¹⁶⁰

¹⁵³ Note, *supra* note 126, at 694 nn.2, 3, and cases and statutes therein cited.

¹⁵⁴ *Id.* and citations throughout. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1879) (plural marriage); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity).

¹⁵⁵ LEVY, *supra* note 22, at 401.

¹⁵⁶ *People v. Ruggles*, 8 Johns. 290, 295 (N.Y. Sup. Ct. 1811).

¹⁵⁷ *Id.*

¹⁵⁸ LEVY, *supra* note 22, at 402.

¹⁵⁹ *Id.* at 404.

¹⁶⁰ *Id.* at 406 and accompanying cites, 413. See also *People v. Porter*, 2 Park. Crim. Rep. 14 (N.Y. Cir. J. & County JJ. 1823); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824); *State v. Chandler*, 2 Del. (2 Harr.) 553 (1837); *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206 (1838).

By the 1840s, however, even in England “the focus of the law had shifted from protection of Christian belief to the protection of Christian sensibilities.”¹⁶¹ A book written under the pseudonym “John Search,” but believed to be by the Anglican Archbishop of Dublin, Richard Whately, argued vehemently *against* legal restraints on the free expression of religious (or irreligious) views.¹⁶² The cause was taken up by others, many of them deists, who were also libertarians. It gradually ceased to be unlawful to challenge the truth of Scripture or doctrine, provided it was done in moderate and thoughtful tones. Lord Coleridge, in a much-quoted opinion, formulated the new distinction thus: “the mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy.” From this it followed that, “if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy.”¹⁶³

In the United States, the constitutional rulings of the Supreme Court made it increasingly clear, as early as the mid-nineteenth and certainly by the mid-twentieth centuries, that free conscience and speech could not be curtailed—particularly not to secure conformity of religious belief, but also not to protect the tender sensibilities of believers.¹⁶⁴ In 1971 the state of Pennsylvania dropped its effort to prosecute for blasphemy several shopkeepers who had displayed “wanted” posters of Jesus with the legend: “Wanted for sedition, criminal anarchy, vagrancy and conspiracy to overthrow the established government.”¹⁶⁵ Still, it is notable that, in 1971, the state was still trying.

In the last years of the twentieth century, a blasphemy trial anywhere in the United States is probably unthinkable. The prevailing American legal justifications for free speech, as Professor Slaughter accurately summarizes them, “are ultimately based on the liberal values of individual autonomy, self-determination, and self-governance.”¹⁶⁶ These are now rather firmly established, but perhaps more interesting is the fact that this occurred so recently. Only recently did it become the essentially uncontested common wisdom of courts “that a union of government and religion tends to destroy government and to degrade religion” and “that governmentally established religion and religious persecutions go hand in hand.”¹⁶⁷ Only thirty years ago did the Supreme Court make it entirely clear that the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”¹⁶⁸

The recently dominant liberal perspective accepts that each person’s “self-evident,” “inherent” or “inalienable” autonomy includes a free conscience able to make self-defining teleological choices.¹⁶⁹ It takes seriously the words of Article 18 of the Universal Declaration of Human Rights, that “[e]veryone has the right to freedom of thought, conscience and religion” and that this right “includes freedom to change his religion or belief.”¹⁷⁰ There thus appears to be a convergence around Locke’s notion of society

¹⁶¹ The felicitous phrase is from Slaughter, *supra* note 41, at 183. The distinction appears in the opinion of Lord Erskine in *Shore v. Wilson*, 8 Eng. Rep. 450, 517 (H.L. 1842).

¹⁶² LEVY, *supra* note 22, at 424. The book is JOHN SEARCH, *CONSIDERATIONS OF THE LAW OF LIBEL, AS RELATING TO PUBLICATION ON THE SUBJECT OF RELIGION* (1833).

¹⁶³ *Regina v. Ramsay & Foote*, 48 L.T.R. 733, 736, 739 (Q.B. 1883).

¹⁶⁴ *Vidal v. Girard’s Executors*, 43 U.S. (2 How.) 126, 198–99 (1844). See also *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46 (1988).

¹⁶⁵ LEVY, *supra* note 22, at 530. See also *N.Y. TIMES*, Apr. 25, 1971, at 60.

¹⁶⁶ Slaughter, *supra* note 41, at 184. See also Note, *supra* note 126.

¹⁶⁷ *Engle v. Vitale*, 370 U.S. 421, 431–32 (1962). See also *Lee v. Weisman*, 505 U.S. 577 (1992); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁶⁸ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

¹⁶⁹ The terms “inherent” and “inalienable” are used, *inter alia*, in the preamble to the Universal Declaration of Human Rights of 1948. GA Res. 217A (III), UN Doc. A/810, at 71 (1948).

¹⁷⁰ *Id.*, Art. 18.

as a compact that preserves most of the essential prerogatives of autonomy enjoyed by individuals in “a state of nature.”¹⁷¹

While it may no longer be possible for Americans to live autonomously outside *any* community, it is not especially arduous, today, for them to exercise their autonomy by leaving one political, religious, professional or social community—perhaps in disagreement with its perceived *nomos*—and entering another. Moreover, they are increasingly allowed to define their specific personal identities by creating a “portfolio” of variegated loyalties to family, state, culture, religion or transnational interest groups. They are relatively at liberty to alter the mix and hierarchy of affinity groups and allegiances, always consciously seeking an individualized identity that reflects their free conscience, values and concept of the good. In consequence, Slaughter points out, “[t]he ideal life is found, not in fulfilling predefined roles and patterns, but rather in exercising autonomy by choosing roles and in changing identity.”¹⁷²

In America’s liberal democratic society, to quote a 1992 decision of the U.S. Supreme Court regarding attempts by Pennsylvania to restrict abortions, the law protects “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”¹⁷³ Thus, at “the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁷⁴

The way freedom of conscience is accepted in America, today, leads some observers to draw the starkest contrasts to less tolerant societies, most of which, nowadays, are in the non-Western world.¹⁷⁵ Such starkness seems confirmed by the contemporary rhetoric with which intolerant theocracies defend their policies against what they perceive as rampantly immoral, socially destructive and even Satanic Western liberalism. Despite such superficial evidence, however, the theory of a Great Fault between civilizations cannot withstand historical scrutiny. The “liberal” West, certainly insofar as it includes England and the United States, did not become “liberal” until very recently, but mostly remained firmly on the other side of any fault line that can now be discerned between tolerant and intolerant societies. That England and the United States now espouse tolerant accommodation to individual conscientious autonomy thus cannot credibly be attributed to ethnic or genetic inherencies but must, instead, be explored in terms of

¹⁷¹ JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 55 (Prometheus ed. 1986) (1690).

¹⁷² Slaughter, *supra* note 41, at 187.

¹⁷³ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

¹⁷⁴ *Id.* Such a commitment, of course, does not obviate the difficult task of deciding, case by case, when a socially intrusive claim to free exercise—e.g., the practice of polygamy—must yield to the social order as defined by a community as its “state interest.” *Reynolds v. United States*, 98 U.S. 145 (1879). There appears more recently, however, to be a tacit governmental agreement not to prosecute polygamy among small Mormon sects. *N.Y. TIMES*, Oct. 12, 1969, §1, at 5. The problem of social ramifications of free exercise, briefly noted in the text at note 81 *supra*, was faced in the 1996 indictment by a Nebraska prosecutor of recent immigrants from Iraq who had participated in the wedding of two sisters, aged 13 and 14, to Iraqi immigrant grooms aged 28 and 34. The father was charged with child abuse, the mother with contributing to the delinquency of minors, and the putative husbands with statutory rape under Nebraska law prohibiting marriage of persons under the age of 17 and making it illegal for anyone 18 or older to have sex with someone under 18, even with that person’s consent. The girls were taken into protective custody and the four adults arrested. “You live in our state,” the prosecutor was quoted as saying, “you live by our laws.” According to the defense attorney, however, such child marriage is approved among conservative rural Islamics, since it alleviates concern that the girls might otherwise be “dishonored.” Don Terry, *Child Brides in Middle America: Mideast Culture Clashes with the Law*, *INT’L HERALD TRIB.*, Dec. 3, 1996, at 11. Another example is the use of hallucinogenic drugs. *People v. Woody*, 61 Cal.2d 719, 394 P.2d 813 (1964), held that the use of peyote by Indians as a religious practice could not be prohibited. For discussion of this difficult subject, see, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁷⁵ For a defense of that difference from an Asian perspective, see Bilahari Kausikan, *Asia’s Different Standard*, 92 *FOREIGN POL’Y* 24 (1993).

sociocultural, technological, scientific, economic and political variables. *Prima facie*, such variables can operate anywhere. They are not society-specific.

What English and American history demonstrates is that, under the influence of various factors, these societies—quite recently as intolerant of freedom and individualism as any today—have evolved toward an acknowledgment of personal autonomy. The experiences of England and America certainly do not fully account for the evolution of a “Western” position on freedom of conscience, but they do suffice to undermine any unsupported claims that tolerant liberalism is an inherent characteristic of Western society that cannot be replicated elsewhere. This insight is reinforced when one considers the history of Sweden’s famously tolerant, liberal and democratic society. Sweden’s open society, too, is entirely a recent construct and not in the least “inherent.” Until quite recently, freedom of conscience was no more a Swedish idea than it is currently a Saudi Arabian one. The remarkable change that has only now transformed the Swedish social and cultural attitude toward conscientious autonomy should move one to inquire into the factors that determine (and change) the attitude of any society toward personal freedom.

VIII. THE SPECIAL CASE OF SWEDEN

The Reformation in England did not usher in freedom of conscience; nor did the American Revolution end the use of law to enforce conformity. Both events, however, did undermine societal support for enforcing old certitudes in matters of faith. In northern Europe, Anglican, Lutheran and Calvinist doctrines, although often as fiercely asserted and brutally enforced as any of the Old Order, lacked the power and conviction that only a long-pedigreed and universal hierarchy could muster. Mere national churches did not have quite the cachet of the universal Catholic and Orthodox churches or, for that matter, of universal Islam. A certain unwonted modesty was imposed on the claims of the new churches because they were demonstrably “only” national (or, as with Geneva, civic) institutions, operating, in most instances, plainly under the direction of secular authorities. Moreover, Protestantism’s restricted view of hierarchy and emphasis on personal salvation made the emergence of popular conscientious dissent almost inevitable, even if it was, at first, a fiercely resisted concomitant.

The new Protestant secular authorities often had wider interests that did not coincide with those of their own ecclesiastics. For example, however intolerant the rulers were of religious dissent at home, they tended to recognize the legitimacy of—and sometimes to form alliances with—foreign states regardless of the religions these espoused. This made it harder to compel conformity at home. Then, too, the subordinate role of new national Protestant churches to the political power of kings and parliaments in time led to the curbing of conformist zeal, as rulers found it prudent to sacrifice dogmatic uniformity to achieve domestic tranquility. The political leaders, when they came to realize that tolerance for diversity promoted, rather than eroded, the social fabric, were able to make the national churches bend to that new revelation.

This historic progression, from state-sponsored and legally enforced theological conformity to modern liberal democratic pluralism, began in western and central Europe with the decline of the Holy Roman Empire and the rise of sovereign states after the Peace of Westphalia. It drew strength from the dramatic triumph of populist politics over ecclesiastical power in the French and Russian Revolutions. In Scandinavia, the progression was rather more peaceful and, when it came, it was swifter than elsewhere in the West.

The inaccessibility of Sweden had caused it to be late in accepting the authority of Rome, and the country’s notoriously inclement climate had made Roman churchmen less

passionate than elsewhere about putting down deep roots. Thus, the Swedish branch of Catholicism was by default unusually independent and self-sufficient, even before the Reformation. In the words of one historian: "Nowhere else did the Pope exercise so little influence and, alone in medieval Christendom, the Swedes possessed what amounted to a national Church,"¹⁷⁶ one dominated by a Swedish perspective. This character was apparent even before King Gustav Vasa formally introduced the Lutheran Reformation. Beginning with his coronation in 1523, the church was methodically subordinated to the state, as the new king assumed very wide powers over church appointments. All bishops were compelled to take a lengthy oath of allegiance to the Swedish royal house and the clergy were made subject to discipline in Swedish crown courts.¹⁷⁷ The first break with Rome only came in 1544. As in neighboring states (Prussia, Saxony and Holland),¹⁷⁸ the clergy became "servants of the congregation and the state"¹⁷⁹ rather than independent servants of God.

Unlike England, Sweden went from Catholicism to a national Protestant church swiftly, without backsliding or significant conflict, and entirely. And its national church came quickly and wholly under governmental control. Sweden differed from England in many respects, but most significantly in that feudalism was not well established in the sense that the aristocracy served primarily as royal functionaries of the court. It lacked what England had had since Magna Carta: a class of landowners with the trappings of baronial autonomy. The Swedish barons, in effect, were a caste of high bureaucrats. This status made it almost inevitable that, when the church was nationalized, its now-Protestant bishops and clergy would fit into the prevailing pattern of subservience to the central political authority of the state. Moreover, when Protestantism did come to Sweden, it came (in contrast to England) in the form of an established state church with no claim to continuity with Catholicism and, thus, with no claim to institutionally independent, historically legitimated authority or power. It was incorporated as a part of the system of political governance, with no economic autonomy. All property, including church real estate and its income, was transferred to the Crown. "Ruled directly by lay officials and royal secretaries, the Church became a government department."¹⁸⁰ The clergy carried out poor relief for the state, kept registers of births and marriages, proclaimed royal edicts to their congregants, reported on the condition of local farms and estates, and, in general, "represented the government in exactly those areas where government impinged most directly on the individual." In the parliament, "it was most often they who could best express the sentiments of the common man. The most active and democratic local governing bodies were the parish meetings and the elected six-man vestries and church wardens."¹⁸¹

While the nationalization of religion sought to ensure a degree of stability after the collapse in northern Europe of Catholic preeminence, this new civil role of the church through marriage to the state made religious doctrinal power subordinate to those militant political forces which had already begun to press the state for greater freedom and toleration of conscientious dissent. These forces did not, however, come to the fore at once; as in England, the early Reformation moved defensively in the opposite direction. Catholics were banned from holding public services in 1595 and Catholicism itself was prohibited in 1617. The Conventicles Act remained in force until 1858, and in 1884

¹⁷⁶ ROLAND HUNTFORD, *THE NEW TOTALITARIANS* 16 (1972).

¹⁷⁷ NICHOLAS HOPE, *GERMAN AND SCANDINAVIAN PROTESTANTISM, 1700-1918*, at 82 (1995).

¹⁷⁸ *Id.* at 83-98.

¹⁷⁹ *Id.* at 94.

¹⁸⁰ IRENE SCOBIC, *SWEDEN* 21 (1972).

¹⁸¹ FRANKLIN D. SCOTT, *SWEDEN, THE NATION'S HISTORY* 195 (1988).

August Strindberg could still be prosecuted for sacrilege on the basis of a collection of short stories.¹⁸²

Compared to Britain's, however, the Swedish transition was far gentler. The sole punishment for remaining (or becoming) a "papist" was not execution or imprisonment, but exile. When Queen Christina reverted to Catholicism in 1654, there was no revolution. She quietly abdicated, left Sweden and never returned. The quite mild—for the times—intolerance that marked the transition of Sweden to Protestantism was at least partly because it was remarkably unopposed, especially as compared to that of England. "In few other countries," Roland Huntford concludes, "did the Reformation triumph, or Catholicism disappear, so swiftly, completely and effortlessly. By the end of the seventeenth century, not a single Catholic remained in Sweden."¹⁸³ This lack of conflict facilitated a policy of silken suppression. There was little of the blood, fire and clangor of the same period in Britain.

Still, the facts scarcely fitted the model of Western liberalism. Calvinism and Catholicism were prohibited by law. Enforced conformity continued until late in the nineteenth century. In 1848 Sweden's Baptists were forced to emigrate to America and expulsions of nonconformists continued until 1855. Until 1860, apostasy remained a crime and Free Churches were legalized only in 1870. All persons were legally deemed to be born into the state church until the law's repeal in 1970.¹⁸⁴ While the law, after 1860, permitted Swedes to embrace a religion other than the state church, those wishing to do so, until 1952, had to submit to personal examination of their motives by the established Lutheran clergy, which had the power to refuse the application.¹⁸⁵ In particular, persons were permitted to leave the state church only upon submitting proof of having joined another Christian denomination.¹⁸⁶

Lutheranism's virtual state monopoly prevailed at least until the arrival of a wave of new immigrants from the Mediterranean and Asia, after 1960. They made Islam formally the "second party" of Swedish religious beliefs, although it remains a small minority. The real opposition to Lutheranism's monopoly in Sweden, Norway and Denmark, however, has arisen not from outside, but from within the big tent of the state religion. Indeed, the struggle for personal self-determination in Sweden has become little more than a gentle slide into unbelief, most of it occurring more or less unremarked behind the facade of nominal adherence to an established Lutheran church in a Christian nation. It has been said that "Sweden is one of the rare countries in which men are often anti-religious, but rarely anti-clerical."¹⁸⁷

The Church of Sweden is to be disestablished by the year 2000.¹⁸⁸ With recent immigration, mostly from outside Europe, the traditional homogeneity of Sweden—until recently a nation of persons who have "never emerged from behind the veil of the group"¹⁸⁹—is no longer so apparent. Individual autonomy and assertion of personal identity appear

¹⁸² Nor was this unique to Sweden. A draconian Danish press law of 1799 provided (sec. 5) that anyone

who published anything which aimed to subvert Christian teaching on God's existence, or the immortality of the soul, or in print censured and insulted Christian doctrine, was to be exiled for three to ten years . . . [and] blasphemy was punished with a diet of bread and water for four to fourteen days.

HOPE, *supra* note 177, at 304.

¹⁸³ HUNTFORD, *supra* note 176, at 23.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ SCOTT, *supra* note 181, at 573.

¹⁸⁷ HUNTFORD, *supra* note 176, at 24.

¹⁸⁸ STATENS OFFENTLIGA UTREDNINGAR, CIVIL DEPARTEMENTET, STATEN OCH TROSSAMFUNDEN (Summary) 15–17 (1994). A résumé of previous efforts to disestablish the Swedish Lutheran church is in SCOTT, *supra* note 181, at 575.

¹⁸⁹ HUNTFORD, *supra* note 176, at 34.

belatedly to have supplemented, if not altogether supplanted, the Swedish preference for a nation "not of individual citizens, but of groups and guilds."¹⁹⁰

In matters of religious conscience, however, the transition from mandatory conformity to personal autonomy has been made as fully in Sweden as in England—perhaps even more so. It is a transition, however, of very recent origins and its pace has been somewhat slower and much gentler than in England. Nevertheless, the steps, their direction and the outcome are all unmistakably similar.

IX. THE ROAD TO TOLERATION: HISTORICAL PARALLELS AND INDEPENDENT VARIABLES

A gradual and uneven progression toward toleration appears to have occurred in Britain and in Sweden over a period of 450 years and in three distinct stages.

First, the churches were regarded as partners in the exercise of temporal power in the community. The power of kings, at this stage, is dependent on a "fusion of mythical and genealogical" explanations,¹⁹¹ which the ecclesiastical authorities are called upon to validate. At the second stage, government wrests power from the spiritual authorities, restricting them to jurisdiction over purely theological matters, and even then in a position of subordination. The churches, whether formally nationalized or only *de facto* under state control, become dependent on the state to enforce religious conformity or restrain dissent. The church/state partnership, at this stage, resembles that between a horse and its rider, with the state in the saddle. Finally, at the third stage, religion becomes an independent contractor, neither supported nor restrained by the state. Instead, either a constitutional or a *de facto* separation occurs. The state renounces control over church governance in return for the church's renunciation of all official status and accompanying rights to protection and privilege. At this point, all religions and beliefs, including secular humanism, agnosticism and atheism, are equally tolerated and none are enhanced or disadvantaged. The choice among them becomes entirely a matter for each person's individual, autonomous self-determination.

Western nations, and some non-Western ones such as India, have traversed all three of these stages. A few societies remain in the first stage, their governments being essentially theocracies, where religious and political powers act in partnership and the state is an instrument for the suppression of religious autonomy and individual self-identification. Iran, after a brief period in the second phase, appears to have reverted to the first. Most Islamic societies, however, even quite conservative ones, appear to have entered the second phase. In Saudi Arabia, we have noted, the clergy have been largely co-opted into the governmental bureaucracy¹⁹² in a manner reminiscent of Sweden's adoption of a national church after the Reformation. In nineteenth- and early twentieth-century China, too, the emperors gradually achieved preponderant control of theological as well as secular affairs by integrating both into the bureaucracy. With the transformation of China, after its revolution, into a Marxist state, all religions—whether Confucian, Christian, Buddhist or Islamic¹⁹³—endured the same subordination to the will of the political state. It remains to be seen whether these societies will proceed, like most "Western" and "Westernized" ones, to the third stage.

Article 36 of the 1982 Chinese Constitution, for the first time since the revolution, expressly recognizes that no "state organ, public organization or individual may compel citizens to believe in, or not believe in any religion, nor may they discriminate against

¹⁹⁰ *Id.*

¹⁹¹ NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* 333 (Stephen Holmes & Charles Larmore trans., 1982).

¹⁹² AL-YASSINI, *supra* note 95, at 135.

¹⁹³ Cymoine Rowe, *Religious Freedom in the People's Republic of China*, 2 *ILSA J. INT'L & COMP. L.* 723 (1996).

citizens who believe in or do not believe in any religion.”¹⁹⁴ True, the Chinese Communist Party still refuses to admit persons publicly professing religious beliefs,¹⁹⁵ and the religious authority of the Tibetan Buddhist establishment remains restricted.¹⁹⁶ Still, it seems that the days of coerced conformity in China may be numbered and that this will result from the operation of the same independent variables—urbanization, industrialization, the rise of a middle class, the information and communications revolutions—as have operated in Western societies to unlock the demand for individual autonomy-based rights. In 1981 China did not oppose the final adoption by consensus of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,¹⁹⁷ although it continues to repress the Roman Catholic faith,¹⁹⁸ permitting only a national Catholic church to operate. According to Human Rights Watch, although “freedom of religious belief is guaranteed in China, religious practice for all officially recognized religions—Buddhism, Taoism, Catholicism, Islam and Protestantism—is severely circumscribed However, the stories of persecution of Chinese Christians . . . are out of proportion to proven offenses.”¹⁹⁹ In 1997 Beijing announced that it would sign the International Covenant on Economic, Social and Cultural Rights.²⁰⁰

A progression is also apparent in Eastern Europe. After the collapse of communism, in all countries of the region with the partial exception of Romania and Albania,²⁰¹ there is ambiguity and struggle about the appropriate role of church and state and the accommodation of individual freedom of conscience. Once-predominant churches now seek to reestablish themselves as the arbiters of social and political values under the aegis of post-Communist governments, for example, by insisting on control over religious education in state schools, recriminalizing abortion, and restricting “alien” missionaries.²⁰² Thus, the Bulgarian Orthodox church has attempted to replace earlier Communist-nationalist efforts forcibly to assimilate Turko-Islamic Bulgarians with its own brand of repressive religious conformism.²⁰³ In some instances, the state, which under communism had made the church its lap dog, still seeks to use religion to advance its political agenda. On the other hand, as various Catholic and Orthodox churches have sought to reclaim their sociopolitical power in Eastern European countries, they have also engendered a backlash from a citizenry that has little appetite for replacing one kind of communitarian supremacy with another. That has led to a sharp drop in church attendance in places like Slovakia²⁰⁴ and to the return to power of anticlerical parties of “reformed” ex-Communists, as in Poland.

Overall, however, there appears to be a readiness to enter a new, third phase marked by the enactment of laws in most of these countries that separate church and state and guarantee freedom of conscience.²⁰⁵ For example, the 1990 Hungarian law on “Freedom

¹⁹⁴ Eric Kolodner, *Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation*, 12 UCLA PAC. BASIN L.J. 407, 421 (1996).

¹⁹⁵ *Id.* at 419–20.

¹⁹⁶ Rowe, *supra* note 193, at 736–38.

¹⁹⁷ GA Res. 36/55, *supra* note 61. See UN GAOR, 36th Sess., 73d plen. mtg., Vol. 2, at 1218, UN Doc. A/36/PV.73 (1981).

¹⁹⁸ Henry Kamm, *China's Priests, Sticklers for Latin, Disavow Vatican*, N.Y. TIMES, Mar. 23, 1981, at A2; David Holley, *Graham Finds Chinese Like His Frog Sermon*, L.A. TIMES, Apr. 18, 1988, §1, at 6.

¹⁹⁹ Human Rights Watch, Memorandum 1 (June 18, 1997).

²⁰⁰ WASH. POST, Apr. 9, 1997, at A22.

²⁰¹ James E. Wood, Jr., *Rising Expectations for Religious Rights in Eastern Europe*, 33 J. CHURCH & ST. 1, 4 (1991).

²⁰² MOJZES, *supra* note 43, at 308–09.

²⁰³ *Id.* at 155.

²⁰⁴ *Id.* at 186. See also Jonathan Luxmore, *Eastern Europe 1994: A Review of Religious Life in Bulgaria, Romania, Hungary, Slovakia, the Czech Republic and Poland*, 23 RELIGION, ST. & SOC'Y 213, 215–16 (1995).

²⁰⁵ See, e.g., the Hungarian law of 1990 entitled “The Right to Freedom and Conscience,” which guarantees the free exercise of religion and prohibits state intrusion into religious affairs. MOJZES, *supra* note 43, at 268; and Wood, *supra* note 201, at 7.

and Conscience” stipulates that the “state is completely neutral to all religions and ideologies and may not be antagonistic toward religions.”²⁰⁶ In Romania, efforts by the Orthodox church to reestablish itself as the state religion have been opposed vociferously not only by freethinkers, but also by Latin-rite and Greek-rite Catholics.²⁰⁷ Gradually, Eastern Europe seems to be navigating the same journey as the West to disestablishment and freedom of conscience. It no longer makes sense to characterize so widespread a phenomenon as “Westernization,” except as a subtle rhetorical device to subvert what is evidently a much wider-spread aspiration and trend.

What determines the pace at which different societies travel this common road? A number of indicators suggest that the pace of the historic shift to autonomy is powered not by ideology or war, but by the more exogenous and inexorable forces of economics, technology and communications. To quote V. S. Naipaul, Western civilization is becoming the “universal civilization” that “fits all men.”²⁰⁸ Naipaul’s formulation, however, is unhelpful: the civilization that “fits all” is *not* Western, as even the most cursory examination of history has amply demonstrated. It is a civilization of tolerance, freedom and personal self-determination that is no more *inherently* Western than was the civilization of communitarian conformity and enforced subordination of the individual to state and church, which until so recently held sway in the West.

Rather, what is emerging is a civilization of *modernity*, in which the needs of urbanizing, industrializing, communicating and information networking have provoked a demand for a civil society in which a large area is clearly demarked as reserved for private choice and action in matters including, but by no means limited to, belief and affiliation. This demand governments increasingly find difficult to resist and churches increasingly have accommodated themselves to it.

That claim warrants careful consideration of supporting and countervailing evidence. If true, it suggests that liberal societies and autonomous persons have good reason for patience: for the cultural conflict with illiberal communitarians—so confidently predicted by Professor Huntington and others—will be waged, if at all, not by political or military power, but by economic, social and cultural forces that have already transformed many societies and must eventually do so wherever the embers of social vigor still wait to be fanned.²⁰⁹

One indicator is the flow of immigration, which is overwhelmingly in the direction of the liberal democratic societies, most of it from the communal authoritarian ones. But for immigration restrictions, the flow from communitarian to individualistic societies would be a global version of the stampede out of Eastern Europe that marked the 1988–1989 crumbling of communism’s Great Wall. True, immigrants come not solely for religious, but also for economic, freedom. Increasingly, however, it is becoming apparent that dynamic economic initiative and personal autonomy are indivisible.

There are other, suggestive indicators. The extent to which communications, information and higher education continue to be dominated by so-called Western institutions has an inevitable impact on global intellectual trends; and these, in turn, filter into the consciousness of other segments of society. The idea of an Arabic-language service of CNN, for example, is rightly seen as potentially insidious by Islamic fundamentalists. One way or another, however, the universalization of information and communications is likely to continue and it will most benefit the cultures that welcome and lead, rather than resist, it. Here, again, the advantage is with open societies that are able to accommodate a multiplicity of identities, values and beliefs: that is, societies constituted by auto-

²⁰⁶ MOJZES, *supra* note 43, at 268.

²⁰⁷ Luxmore, *supra* note 204, at 213.

²⁰⁸ Quoted in Huntington, *supra* note 83, at 40.

²⁰⁹ I am indebted to Professor Philip Allott for the felicitous phrase.

mous individuals. And it is precisely in those societies that individuals lead the great advances in science, technology and culture, which, in turn, propel the expansion of their influence.

This advantage, implicit in open societies competing with closed ones, is not so readily apparent from the internal perspective of either. From the internal vantage of the open society, its tolerance for diversity creates an impression of messy stasis: since theoretically all individuals are valued equally and autonomously, the society cannot have any one ideological or cultural "program," much less mount a concerted project of ideological or cultural expansion. The value it attaches to autonomy and nonconformity seems to vitiate the basic missionary premise imputed to "the West" by outsiders. A similar delusion prevails in the opposite camp. From the internal vantage of closed communitarian societies, they seem impregnable and thus invulnerable to the chaotic forces of individuation. One is always being told by such governments that their streets are safe at night and that front doors need never be locked. Their intolerance of nonconformity creates the illusion of inexorable unity at home and a vibrant capacity for concerted external expansion. Both perspectives, however, are misleading.

The liberal society may lack epistemic certitude, but that has proven to be no handicap to achieving economic, cultural and scientific progress and expansion. And the communitarian society may seem cohesive and united, but it is still rendered vulnerable by internal stagnation symptomatic of the suppression of social vibrancy and private initiative, as well as lack of priming by exposure to external competition. It is difficult to think of a predominantly communitarian society in which the controlled flow of information has not caused social, cultural and economic stagnation. One dramatic example is Japan, whose architecture underwent little significant transformation for a millennium even as architecture evolved, functionally and conceptually, in the West. This made it difficult to introduce new ideas and created a gap now filled by much dreadful modern commercial architecture imported willy-nilly as Japan plunged into the "modern" world. Once liberated, however, Japanese architects began to conceive new forms of expression equal to the best (and, of course, the worst) to be found anywhere.

X. CONCLUSIONS

Toleration of diversity by a society and its institutions is what enables each individual to exercise choice and manifest autonomous conscientious self-definition. While toleration is usually perceived in religious terms, it transcends religion to influence most facets of the individual, social and political state of being. In England, for example, the party system, and with it parliamentary democracy, emerged as a concomitant of religious toleration, which, from the mid-seventeenth to the nineteenth centuries, was gradually extended first to the Nonconformist chapels, then to the Roman Catholic church and, finally, to Jews.²¹⁰ To the growth of religious toleration may be attributed the notion of peaceful political change, secular education, the emergence of a civil society, the "idea of the limited State within which voluntary associations have their own sphere,"²¹¹ and, most especially, the theory of individual civil rights. The milestones in this evolution are the monumental legal enactments, the judicial decisions and rescissions, and the shifts of power to parliaments and to broadened electorates. These slowly ended the long era of enforced conformity in matters of personal belief and expression, and also unleashed a great whirlwind of social, cultural and economic creativity. From the internal perspective of traditional communitarian societies, it must be recognized, the prospect of such an "unleashing" represents what Professor Dianne Otto calls "modernity's threat of

²¹⁰ Payne, *supra* note 122.

²¹¹ *Id.* at 257.

universality.”²¹² Otto’s is a much more realistic appraisal of confrontation between communitarian and individualistic values than that offered by Samuel Huntington’s “clash of civilizations,” for it understands—that is, it welcomes, or regrets, but, either way, perceives—the tactical advantages of the latter over the former, and its inherent potential for universality.

In any conflict between advocates of freedom of conscience and the guardians of communal authority, one modern tactical advantage that inheres in the former seems particularly decisive. Only those who believe conditionally, that is, are willing to accept an unfettered right to profess any system of belief (or unbelief), are able when in power comfortably to accommodate those who believe in absolute, or merely different, truths. In a liberal society, these latter need not fight, emigrate or die for their beliefs, but can conscientiously join in building a successful and peaceable civil society. Such accommodation, however, is not reciprocal. Those who believe themselves possessed of invincible truths, if able to enforce their claim, must inevitably generate conditions of perpetual fight, flight and stagnation.

In an era when conflict is itself seen as antisocial and wasteful rather than ennobling, the tide would seem to be running toward belief systems that favor accommodation and conscientious laissez-faire. Precisely because religious certitude and enforced conformity have such a history of provoking men to war and mayhem, states have negotiated a global Covenant on Civil and Political Rights that makes toleration the universal norm. It purports to require all societies to guarantee to everyone “the right to freedom of thought, conscience and religion” and to “manifest his religion or belief in worship, observance, practice and teaching.”²¹³ While the Covenant may not invariably reflect practice in all societies, it does reflect a general, if grudging, acknowledgment that intolerance and enforced conformity are irreconcilable with peaceful and prosperous development, as well as with the personal-identity aspirations of persons everywhere.

This does not mean that the human rights canon, although of universal application, should never be interpreted contextually. Obviously, a society in which there has been a recent history of devastating racial, religious or cultural wars may have good reason to tailor its protection of conscientious freedom and conscientious expression in a mode different from that now prevailing in Sweden, Britain or the United States. If it is correct that the prevalence of personal freedom in a society is determined essentially by exogenous factors, then their absence would rightly be seen as a factor requiring the international community to address the concomitant lack of freedom not merely by criticism and opprobrium, but also by remedial measures directed at helping such societies to deal with the underlying causes.²¹⁴

There are trilateral tensions evident in virtually all societies between rights-based claims of the state seeking to preserve unity, the groups (e.g., cultural, ethnic, religious) seeking to preserve their cohesion, and the individual seeking freedom of expression and identity. This tension need not invariably be resolved by the individual claim’s trumping all others. For example, the Human Rights Committee, applying the ICCPR, has ruled that a Canadian conscientious objector is not entitled to refuse to pay taxes, part of which would be used to defray military expenditures; and that such withholding is not protected by the right established by Article 18 of the Covenant regarding freedom of conscience

²¹² Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337, 354 (1996).

²¹³ ICCPR, *supra* note 4, Art. 18.

²¹⁴ However, as the Human Rights Committee observed in a case in which it found that Cameroon had violated a prisoner’s rights under Article 7 of the ICCPR (prohibiting torture, and cruel, inhuman or degrading treatment), “certain minimum standards of detention must be observed regardless of a State party’s level of development.” Case No. 458/1991 (Albert Womah Mukong v. Cameroon), Report of the Human Rights Committee, UN GAOR, 49th Sess., Supp. No. 40, Vol. 1, at 73–74, para. 420, UN Doc. A/49/40 (1994).

and religion.²¹⁵ Similarly, the Committee rejected the religion-based claim of a Canadian Sikh who had been discharged from employment by a government-owned railway on refusing to wear a hard hat at work instead of his traditional turban.²¹⁶ Nevertheless, claims by authorities that would require individual conformity to laws and values established by the state, or even by a group, must be regarded with the greatest skepticism whenever those laws or values violate fundamental personal rights recognized and protected by the universal human rights canon. There may be special circumstances arising in any place or time that warrant flexibility in interpretation of the rules, but those rules, like the exceptions for which some of them allow, are universal: they are not “Western” or “imperial.”

The President of Sri Lanka, Mrs. Chandrika Kumaratunga, has expressed the view that “the free market has become universal, and it implies democracy and human rights.” Asked whether this statement does not imply a preference for “Western values” over Asian ones, she said that, “of course, every country has its own national ethos, but in the modern world, it is largely cultural, not a political system. When people talk about a conflict of values, I think it is an excuse that can be used to cover a multitude of sins.”²¹⁷ Something of the same point was made in a more strictly legal sense by Dame Rosalyn Higgins, currently a judge of the International Court of Justice but, previously, a member of the Human Rights Committee, which oversees national implementation of the Covenant on Civil and Political Rights. Summing up her experience on that body of experts elected from all the world’s major social and political systems, she observed: “Third World members have taken the lead in insisting that human rights are not a set of imposed western ideas, but are of universal application, speaking to the human condition.”²¹⁸

²¹⁵ Case No. 446/1991 (J.P. v. Canada), Report of the Human Rights Committee, UN GAOR, 47th Sess., Supp. No. 40, at 158, para. 633, and Annex X, §25, UN Doc. A/47/40 (1992).

²¹⁶ Case No. 208/1986 (Bhinder v. Canada), HUMAN RIGHTS COMMITTEE, OFFICIAL RECORDS, 1989/90, Vol. 2, at 362, para. 625, UN Doc. CCPR/9/Add.1 (1995).

²¹⁷ Interview conducted by Joseph Fitchett, INT’L HERALD TRIB., Nov. 29, 1996, at 4.

²¹⁸ Rosalyn Higgins, *Ten Years on the Human Rights Committee*, 1996 EUR. HUM. RTS. L. REV. 570, 575.