Challenges to Effective Protection of Freedom of Religion or Belief in Highly Diverse Settings

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I. Introduction

My goal in this paper is to discuss strategies for promoting and effectively protecting freedom of religion and belief in highly diverse settings. I will set the stage for this analysis by describing a range of social attitudes towards religion that might prevail in a society, the types of public policies and legal protections of freedom of religion and belief that will likely flow from those attitudes, and the distortions and challenges that often arise as a result of those attitudes. With this framework in place, I will suggest a series of strategies for mitigation that promote the protection of religious freedom, as well as the freedom to not believe in any religion.

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| --- | --- | --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges | Strategies for Mitigation /  Protecting Freedom of  Religion and Belief |

I will take as given an acceptance of the importance of freedom of religion or belief (including the right not to believe),[[2]](#footnote-2) and the basic human rights and legal frameworks for protecting not only freedom of religion and belief, but other human rights as well.[[3]](#footnote-3)

II. Social Attitudes Towards Religion

Any attempt to create a framework for analyzing social, political and legal phenomena will involve distorting oversimplifications. The various categories discussed below all involve abstract types. Actual historical configurations are more complex and more varied. Nevertheless, such frameworks can be helpful in orienting analysis and identifying patterns. For example, even though it is an oversimplification, we can map on a continuum a range of possible social attitudes towards religion in general, and with respect to some religions in particular.

|  |
| --- |
| Social Attitudes |
| 1. Unique and  Universal  Truth |
| 2. Valuable |
| 3. Ordinary |
| 4. Private |
| 5. Suspect |
| 6. Dangerous |
| 7. Evil |

These attitudes run from a very positive view of at least some religions or belief systems to very negative attitudes. At one end of the continuum, a particular religion may be widely viewed as providing unique and universal truth, with corresponding social attitudes that are very positively disposed towards it. This will usually, although not always, involve corollary attitudes towards other religions or belief systems that are more negative. Moving down the continuum, religion may be viewed as being valuable, even if it is not demonstrably true. Here greater pluralism may be possible, with positive attitudes covering several, or perhaps many, different religions. Next, religion may be viewed on a par with other types of beliefs and commitments. It is not viewed as being unique or special, but a matter of personal preference or even taste. From here it is easy to view religion as a private matter, something that is practiced at home, or behind closed doors. More negatively, religion may be viewed with suspicion. Here, rather than being viewed as a private matter, religion becomes a matter of public concern. Even more negatively, religion may be viewed as being dangerous, or even evil.

This range of attitudes is possible in both societies that are religiously homogeneous and societies that are religiously pluralistic, but they will typically have different features. In a homogeneous system, attitudes will likely focus on the dominant religion, with possibly polarized attitudes towards it. In highly diverse and pluralistic systems, attitudes will more likely be more bunched towards the middle of the continuum.

III. Public Policies that Follow from these Attitudes

Again (acknowledging the oversimplification), a range of public policies predictably follow from these social attitudes.

|  |  |
| --- | --- |
| Social Attitudes | Public Policies |
| Unique and Universal Truth | Theocratic state  Established Church  Multiple establishments |
| Valuable | Tiered systems  Promote  Cooperation |
| Ordinary | Respect / Friendship  Tolerance  Spheres of influence |
| Private | Ignore  Hands off  Cabin / limit |
| Suspect | Negative publicity  Monitor  Sect  Commissions |
| Dangerous | Oversight  Warn  Channel / Change /  Control |
| Evil | Discourage  Suppress  Eliminate / Abolish |

At the positive end of the spectrum, when one religion is viewed as representing all truth, there is a tendency for a high degree of identification to emerge between that religion and the state. This may result in an alliance between religion and the state, involving at one extreme a theocratic state, where there is no distinction between public authority and religious authority.[[4]](#footnote-4) Less comprehensively, it may result in an established church, or as we see in some counties, multiple establishments, where more than one official state church is recognized.[[5]](#footnote-5) When religion is viewed as being generally valuable and positive there is also the possibility of favored treatment of religion by the state, including registration systems that favor some religions over others, and various systems of cooperation (often in areas of finance and education). The state will promote religion in a variety of ways, some formal, others informal. This promotion may be relatively benign and even-handed, or it may be discriminatory and viewed quite differently by those who are in the religious majority and those who are a religious or non-religious ideological minority. When religion is viewed as an ordinary feature of social life, the dominant public policy will be one of tolerance. This may manifest itself in attitudes of mutual respect between the state and religion, and among religions, and it may also manifest itself in jurisdictional attitudes towards the respective spheres of influence of religion and the state. Religion will not be favored or promoted by the state, but neither will it be suppressed or viewed with suspicion. As religion is viewed as a private matter, the state will take an even more hands-off attitude, ignoring religion when possible, and being careful not to create the impression that the state endorses one religion over others or has favorites. There may be policies aimed at cabining religion, or in limiting its influence. When religion is viewed with suspicion, public policies may be oriented toward monitoring religious groups (especially those that are new or small). This may involve negative publicity about religion or particular religions from the state, attitudes that reveal themselves in educational policy and content. More systematically, it may involve efforts to monitor and warn the public about religious groups that are perceived as dangerous through sect commissions or state-sponsored religious information bureaus. When religion is viewed as being dangerous or anti-social, the state may try to warn the public, and may try to control or steer groups towards more socially desirable doctrines or views. When religion is viewed as not just suspect but dangerous, efforts to monitor religion will become more oriented towards controlling and channeling religion in ways that are viewed as being more socially desirable. When religion is viewed very negatively, the state will strive not only to control, but to suppress, or at the extreme end of the continuum, eliminate religion altogether.

IV. Legal Protections of Freedom of Religion and Belief

The features of the legal system for regulating and protecting religion will also vary in predictable ways based upon the underlying social attitudes and public policies relating to religion.

|  |  |  |
| --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms |
| Unique truth | Theocratic state  Establishment  Multiple  establishments | Monopoly / Exclusive  privileges & immunities  Special Protections  Religious status (Millett)  systems |
| Valuable | Tiered systems  Promote  Cooperation | Religious law  Compelling State Interest  Balancing  Necessity tests |
| Ordinary | Respect  Friendship  Tolerance  Spheres of  influence | Religious autonomy  Equal Protection  Reasonable  Accommodations |
| Private | Ignore  Hands off  Cabin  Limit | Non-endorsement  General and Neutral  Separation |
| Suspect | Neg. publicity  Monitor  Sect  commissions | Bureaucratic discretion  Regulate  State oversight |
| Dangerous | Oversight  Warn  Channel  Change  Control | Speech  Less protection  Assembly |
| Evil | Discourage  Suppress  Eliminate  Abolish | Special prosecutors  Target  Nationalization  Persecution  Criminalization |

At the end of the spectrum with very positive views of one religion and public policies that support it, the favored religion is often treated in much the same way as an industrial monopoly, with special treatment and high degrees of protection and insulation from competition. Favored religions often enjoy broad privileges and immunities from normal legal standards. Favored religions are often insulated from state supervision or oversight, or are the subject of special agreements. Some areas of private law, such as family law and inheritance, may be under special religious jurisdiction, with separate courts and religious law.[[6]](#footnote-6)

When religion is viewed favorably, the state may be somewhat less deferential to religious law, but will still respect it in certain areas, such as governance of internal church disputes involving personnel and property. Religious freedom will receive high levels of protection, through legal doctrines such as the compelling state interest test, which protects religion from burdensome regulations unless there is a compelling state interest that justifies the regulation and there is no less restrictive means for realizing that interest.[[7]](#footnote-7) Other balancing tests may also be used, such as tests focusing on whether a regulation or limitation of religious freedom is really “necessary” or “necessary in a democratic society.”[[8]](#footnote-8)

When religion is viewed as an ordinary feature of social life, characterized by respect, friendship, tolerance, and spheres of operation, these attitudes and policies will be reflected in legal protections of religious autonomy, equal protection, and accommodation of religious needs when such accommodations are not particularly burdensome.

When religion is viewed predominantly as a private matter, and the state tries to take a hands-off approach, legal protections will be based upon concepts such as non-endorsement of religion,[[9]](#footnote-9) general and neutral laws that do not explicitly discriminate against or target religious practices,[[10]](#footnote-10) and the separation of church and state.[[11]](#footnote-11)

When religion is viewed with some degree of suspicion and state monitoring of religion is employed, we would expect greater levels of bureaucratic discretion in the regulation of religious affairs, and the accompanying problems of unequal and discriminatory treatment that often arise under such systems. As suspicion becomes deeper and even hostile, there will be more substantive regulation of religious groups by the state and higher degrees of state oversight. The state may become actively involved in religious affairs, selecting religious personnel, approving and changing doctrines, and dictating the content of religious education.

Finally, when religion is viewed as an affirmative evil to be controlled, suppressed, or eliminated, state efforts to limit or eradicate religious influence will increase. These may take the form of special prosecutors who target religious leaders or groups, nationalization of church property, various forms of persecution, and criminalization of religiously-motivated behavior.

V. Distortions and Challenges

That distortions and challenges arise from legal policies at the negative end of this spectrum will not be surprising. What may be more surprising is that distortions and challenges occur not only at the positive end of the spectrum as well, but also in respect of each of these types of social attitudes, public policies, and legal doctrines.

|  |  |  |  |
| --- | --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges |
| Unique and Universal Truth | Theocratic state  Establishment  Multiple  establishments | Monopoly  Exclusive privileges  and immunities  Special Protections  Religious status  Systems | Orthodoxy  Discrimination  Heterodoxy  Suppression  Unequal treatment  Bare toleration |
| Valuable | Tiered systems  Promote  Cooperation | Religious law  Compelling State Interest  Balancing  Necessity tests | Endorsed religions  State favoritism  Unfavorable  treatment of  minorities |
| Ordinary | Respect  Friendship  Tolerance  Spheres of  Influence | Religious autonomy  Equal Protection  Reasonable  Accommodations | Willful blindness  Denial of difference  Inadvertent insensitivity  Shades of hostility |
| Private | Ignore  Hands off  Cabin  Limit | Non-endorsement  General and Neutral  Separation | Unease  Marginalization  Secularism |
| Suspect | Negative  publicity  Monitor  Sect  commissions | Bureaucratic  discretion  Regulate  State oversight | Prohibit change  Control  State takeover |
| Dangerous | Oversight  Warn  Channel  Change  Control | Speech  Less protection  Assembly | Marginalize  Discriminate  Push underground  Labels (sect / cult) |
| Evil | Discourage  Suppress  Eliminate  Abolish | Special prosecutors  Target  Nationalization  Persecution  Criminalization | Us vs. Them  Enemy  Other as less than  fully human |

When one religion is viewed as uniquely true, and is promoted and protected by the state, this has the distorting effect of creating an environment where discriminatory treatment of other religious groups is likely. There is often a sharp differentiation between orthodoxy and heterodoxy, with the “right way” to be promoted and supported, and the “wrong way” to be suppressed and limited. After all, the thinking goes, it does not make sense to protect and promote error. This may result in unequal treatment, suppression, or at best, bare toleration of religious minorities. This can result for especially harsh treatment for those who are viewed as heretics or deviants within a particular religious tradition. Religious groups from altogether different religious traditions that are more completely separate may actually fare better than those that are dissenters from the majority religion.

When religion is generally viewed as valuable and a positive social force, there can nevertheless be distortions and challenges that arise from policies of cooperation. When some religions receive state endorsement, while others do not, this can result in state favoritism, where some preferred religions receive better treatment than minority or disfavored religions. From a majority point of view cooperation may seem positive and exemplary, but from a minority point of view it might seem to engage in excessive favoritism.

When religion is viewed as an ordinary and unexceptional aspect of social life, where policies of tolerance and legal oversight is based upon principles of equal protection, there is still the possibility that religion may be treated with inadvertent insensitivity, which may shade into varying degrees of hostility. This may be quite innocent, based on a lack of understanding of a religion and its particular characteristics or needs. But it can also manifest itself as a willful lack of interest in religious differences, and may especially result in unfavorable treatment of minority faiths, that lack the visibility to bring their needs to public consciousness, or the political power to achieve accommodations. More problematically, it can also result in using ordinary “general and neutral” regulation to specifically target or advance specific religious interests.

When religion is viewed as a private matter, with hands-off public policies, and legal protections that emphasize doctrines such as non-endorsement, generality and neutrality, and separation of religion and the state, the primary distortion that may arise is the marginalization of religion. This can happen in several ways. One is the conflation of the state and the public sphere; as the state expands and encompasses ever-larger aspects of our life, relegating religion to the “private” sphere is not neutral in its effects, and is often not neutral in its intent. Rather, there is a conscious effort to relegate religion to an ever-shrinking realm of private life. This can be based upon an uneasiness with religious expression and manifestations, especially when they take place in public, and it can also be based upon a muscular secularism, which moves beyond a framework of neutrality or secularity, and embraces a more ambitious state ideology that is committed to promoting a secular order at the expense of religious viewpoints.[[12]](#footnote-12)

When religion is viewed with suspicion, generating policies that monitor religious activity, and legal regimes based upon regulation and state oversight, several predictable distortions arise. On the one hand, the state may clamp down on the individual freedom to have, adopt, and change one’s religion. Religion is viewed as a kind of status with which one is born, rather than a conscientious commitment that one makes of one’s own free will and choice. On the other hand, the state may attempt to control religion (for example through a department of religious affairs), and may even undertake what amounts to a nationalization of religion, or a state takeover. This may be done to incapacitate a perceived political rival, or to exert control over the leadership and direction of a religious organization.

When religion is viewed as dangerous, the distorting impulses are even stronger. Religious groups may be marginalized or subject to overt discrimination or hostility, which will have the result of pushing some religious activity underground, where the rationale is heightened for monitoring and warning about the dangers of unauthorized illegal religious activities. Small religious groups are labeled as dangerous sects or cults, and even mainstream religious groups are pushed to the margins of society.

Finally, when religion is viewed as evil, or thoroughly anti-social, religion is transformed into the enemy. This may result in strong us vs. them dichotomies, that in their extreme forms result in characterizing the other as being less than fully human, and unworthy or undeserving of respect and civil treatment. In its most extreme forms the result is genocide or ethnic cleansing.

VI. Seven Strategies for the Effective Promotion and Protection of Freedom of Religion and

Belief

The distortions and challenges that arise from these various social attitudes towards religion, or particular religions, are not all created equal. In general, when religion is viewed as valuable, ordinary, and largely a matter of private concern, it will be much easier effectively to protect freedom of religion and belief. Nevertheless, each of these sets of attitudes, policies, legal mechanisms, and distortions and challenges have corresponding strategies for mitigation that will help promote protection of freedom of religion and belief.

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| --- | --- | --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges | Strategies for Mitigation /  Protecting Freedom of  Religion and Belief |
| Unique and Universal Truth | Theocratic state  Establishment  Multiple  establishments | Monopoly  Exclusive privileges  and immunities  Special Protections  Religious status  Systems | Orthodoxy  Discrimination  Heterodoxy  Suppression  Unequal treatment  Bare toleration | Pluralism |
| Valuable | Tiered systems  Promote  Cooperation | Religious law  Compelling State Interest  Balancing  Necessity tests | Endorsed religions  State favoritism  Unfavorable  treatment of  minorities | Freedom Favored  Human Rights Framework  Limitations when  Necessary |
| Ordinary | Respect  Friendship  Tolerance  Spheres of  Influence | Religious autonomy  Equal Protection  Reasonable  accommodations | Willful blindness  Denial of difference  Inadvertent insensitivity  Shades of hostility | Institutional  autonomy  Respect needs of majorities and minorities  Accommodations |
| Private | Ignore  Hands off  Cabin  Limit | Non-endorsement  General and Neutral  Separation | Unease  Marginalization  Secularism | State v. public  All are minorities  Religion in politics |
| Suspect | Negative  publicity  Monitor  Sect  commissions | Bureaucratic  discretion  Regulate  State oversight | Prohibit change  Control  State takeover | Changing religion is  not treasonous  Normalize change  Human moral agency  Freedom  Dignity |
| Dangerous | Oversight  Warn  Channel  Change  Control | Speech  Less protection  Assembly | Marginalize  Discriminate  Push underground  Labels (sect / cult) | Ordinary laws  Accommodate  Exemptions |
| Evil | Discourage  Suppress  Eliminate  Abolish | Special prosecutors  Target  Nationalization  Persecution  Criminalization | Us vs. Them  Enemy  Other as less than  fully human | Ecumenical  dialogue  Golden Rule  Live our own  Beliefs |

I will say just a few words about seven strategies for promoting and protecting freedom of religion and belief that correspond to each of these categories.

1. *Religion as Representing Universal Truth*: Pluralism as an antidote for strong claims of unique truth that result in state establishments with special protections and religious discrimination.

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| --- | --- | --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges | Strategies for Mitigation /  Protecting Freedom of  Religion and Belief |
| Unique and Universal Truth | Theocratic state  Establishment  Multiple  establishments | Monopoly  Exclusive privileges  and immunities  Special Protections  Religious status  Systems | Orthodoxy  Discrimination  Heterodoxy  Suppression  Unequal treatment  Bare toleration | Pluralism |

When John Locke wrote *A Letter Concerning Toleration* in 1689, there was a strong widespread presumption that state implementation of religious belief was necessary for religious truth to prevail, and that religious and cultural homogeneity were necessary for political stability. The idea was that an established homogeneous religious could serve as a kind of social glue and ultimate motivation for loyalty and obedience to the regime. In Europe, this impression was reinforced by the religious wars that ravaged the continent.

Locke rejected the prevailing notions of church and state in his lifetime. He offered powerful arguments that state coercion is ineffective in matters of religion, that the state can force no person to heaven. At best, state coercion can only derive outward hypocrisy. Moreover, he contended that rather than destabilizing a regime, toleration and respect could have the opposite effect, creating of minority groups a source of social stability rather than social disintegration. Locke profoundly influenced many American thinkers, most notably Thomas Jefferson and James Madison, who drew upon his work in building their case for a broad understanding of religious freedom. Locke’s insights laid the foundations for modern regimes of religious liberty. As Locke explained:

Let us therefore deal plainly. The magistrate is afraid of other Churches, but not of his own, because he is kind and favorable to the one, but severe and cruel to the other. These he cherishes and defends; those he continually scourges and oppresses. Let him turn the tables. Or let those dissenters enjoy but the same privileges in civil [matters] as his other subjects, and he will quickly find that these religious meetings are no longer dangerous. Just and moderate governments are everywhere quiet, everywhere safe; but oppression raises ferments and makes men struggle to cast off an uneasy and tyrannical yoke.[[13]](#footnote-13)

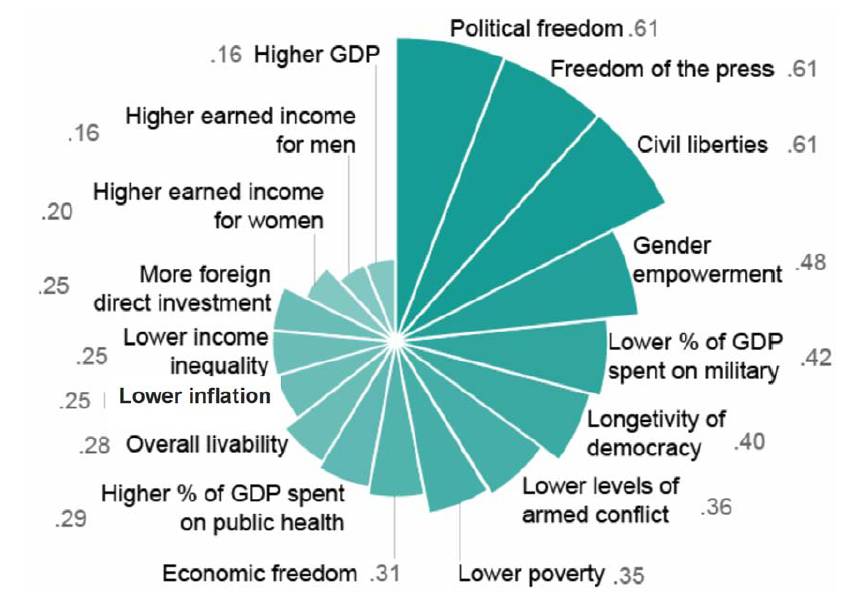
Locke’s great insight was that pluralism can contribute to political stability rather than undermine it. At the time he made his argument, this was an untested hypothesis, but 300 years of experience has proven him to be correct.

Or as Voltaire put it two-and-a-half centuries ago, in writing about Great Britain: “If there were only one religion . . . there would be danger of despotism, if there were two, they would cut each other’s throats, but there are thirty, and they live in peace and happiness.”[[14]](#footnote-14)

2. *Religion as Generally Valuable and Positive*: Freedom and Human Rights as an antidote to state favoritism and varied treatment of different religions.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges | Strategies for Mitigation /  Protecting Freedom of  Religion and Belief |
| Valuable | Tiered systems  Promote  Cooperation | Religious law  Compelling State Interest  Balancing  Necessity tests | Endorsed religions  State favoritism  Unfavorable  treatment of  minorities | Freedom Favored  Human Rights Framework  Limitations when  necessary |

There is now extensive empirical evidence that a country’s performance in protecting religious freedom correlates not only with protection of other key civil and political rights, but also with a range of other social goods. As documented by the research of Brian Grim and Roger Finke in a book published earlier this year by Cambridge University Press—research that is displayed graphically on the accompanying chart—protection of religious freedom correlates with gender empowerment, a lower percentage of GDP spent on the military, the longevity of democracy, lower levels of armed conflict, lower levels of poverty in society, higher levels of economic freedom, higher percentages of GDP spent on public health, overall livability in the society, lower inflation rates, lower income inequality, more foreign direct investment, higher earned income for women (and men, to name only some.[[15]](#footnote-15)



Not surprisingly, strong religious freedom protections correlate with heightened religious observance, and this in turn unleashes heightened altruism and social capital, which helps to explain the many other material benefits associated with religious freedom. It is also important to remember that material improvements in the quality of life will be worth much less if, after all else has been achieved, those benefited are condemned to live lives without freedom of religion or belief. It is good and vital to support many other causes, such as eradicating disease and hunger and promoting literacy and education. But none of these other social concerns can achieve their optimal benefits or their ultimate meaning without the leverage and the leavening of religious freedom.

The empirical research aligns with related normative requirements that have been repeatedly emphasized by the European Court of Human Rights. For example, In *Serif v. Greece*, the Court stated:

It is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other . . . .[[16]](#footnote-16)

In other words, there is a temptation when tensions arise due to religious differences to impose government regulations that will eliminate or minimize the differences, typically by curtailing religious freedom. The reality is that the result insisted upon normatively by the Court—i.e., affirming respect for difference by protecting religious freedom—is in fact empirically most likely to assure stability and peace as well.

3. *Religion as Ordinary*: Respecting the needs of majorities and minorities as an antidote for inadvertent insensitivity and hostility.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges | Strategies for Mitigation /  Protecting Freedom of  Religion and Belief |
| Ordinary | Respect  Friendship  Tolerance  Spheres of  Influence | Religious autonomy  Equal Protection  Reasonable  accommodations | Willful blindness  Denial of difference  Inadvertent insensitivity  Shades of hostility | Institutional  autonomy  Respect needs of majorities and minorities  Accommodations |

The primary strategy for mitigation is to develop a measure of respect for the needs of both religious majorities and religious minorities. Majorities may be respected by recognizing that public holidays, the character of civil religion, and expressions of religion in the public sphere will reflect the majoritarian presence. Minorities may be respected by accommodating their needs, which may be viewed as idiosyncratic, and by being sensitive to the ways that majoritarian religious expressions may be experienced by minorities.

Two practical ways that the rights of both minority and majority religious groups can be respected are registration and church autonomy.

*Registration*

One important way of treating religion as ordinary and respecting the needs of majority and minority groups is to normalize the process of registering religious organizations, enabling them to obtain entity status. A country’s law and practice regarding religious entities constitutes a crucial test of its performance in facilitating freedom of religion or belief. This may seem surprising. The intricacies of the law of religious associations are not the most dramatic religious freedom problem. But on closer reflection, it is obvious that the law governing the creation, recognition, and registration of appropriate legal entities is vital for the life of most religious communities in a modern legal setting. While there are a small number of groups that object to being required to obtain legal entity status, most groups desire to register and obtain recognition, because only in this way can they gain the benefits of juristic personality. The precise set of rights associated with such status varies from legal system to legal system. But at a minimum, in the contemporary world it is extremely difficult for a group without entity status to engage in the most rudimentary legal acts – opening a bank account, renting or acquiring property for a place of worship or for other religious uses, entering into contracts, and so forth. Legal entity status is vital because, as a practical matter, a religious organization cannot operate effectively and efficiently without such status.

Over the past two decades, substantial progress has been made in recognizing and protecting the rights of religious communities to acquire the legal entity status they require in various legal systems to carry out the full range of their legitimate religious affairs. This can take any of a number of forms: the right to incorporate, to have a religious association recognized, to create a trust or religious corporation, and so forth, depending on the particular legal system involved.[[17]](#footnote-17) The right of access to such legal structures, long taken for granted in the United States[[18]](#footnote-18) and Western Europe,[[19]](#footnote-19) is now firmly entrenched in the case law of the European Court of Human Rights[[20]](#footnote-20) and the commitments of the Organization for Security and Cooperation in Europe.[[21]](#footnote-21)

*Autonomy and self-determination*

A closely related issue is the right of religious groups to operate autonomously. In recent years substantial progress has been made in many countries in recognizing the right to autonomy and self-determination of religious communities in their religious affairs. This right has a lengthy history and is deeply embedded in legal systems with any substantial history of protecting religious freedom.[[22]](#footnote-22) There is now a significant body of case law in the European Court of Human Rights affirming this right, which includes the right to autonomy in determining matters of belief and doctrine, as well as matters of ecclesiastical structure.[[23]](#footnote-23)

A recent set of cases have also recognized the right of religious communities to autonomy with respect to personnel matters. The case law has protected broad authority of religious communities to terminate employees serving in representative[[24]](#footnote-24) or teaching capacities,[[25]](#footnote-25) but has qualified this right to some extent by insisting on a careful balancing of interests and state supervision where the credibility of a religious community and its teaching mission is less clearly at stake. Thus, in *Schüth v. Germany*[[26]](#footnote-26) the European Court of Human Rights sustained a privacy claim brought by an organist at a Catholic Church who was terminated for extra-marital paternity of a child. The Court held that the German courts that had considered the case had not adequately balanced all the interests at stake in the case.[[27]](#footnote-27)

4. *Religion as a Private Matter*: Recognizing that all religious are minorities with the vulnerabilities of minorities as an antidote to the marginalization of religion.

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| --- | --- | --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges | Strategies for Mitigation /  Protecting Freedom of  Religion and Belief |
| Private | Ignore  Hands off  Cabin  Limit | Non-endorsement  General and Neutral  Separation | Unease  Marginalization  Secularism | State v. public  All are minorities  Religion in politics |

When considered from a global perspective, no religion represents a majority. Even a billion Muslims and a billion Christians represent small minorities in a world with seven billion inhabitants. I sometimes think that most of the problems relating to the protection of religious freedom could be solved if we were each willing to acknowledge our status as a religious minority – especially at times and in places where we find ourselves in a majority. If we behaved as majorities the way we would like to be treated when we are a minority, many of our difficulties could be resolved. If we adopted laws when we are in the majority that we would want to live with if we were a small minority, those laws would likely be quite protective of religious freedom.

5. *Religion Viewed with Suspicion*: Recognizing that religious choice and change is not an act of treason, but a normal exercise of human moral agency, freedom, and dignity.

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| --- | --- | --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges | Strategies for Mitigation /  Protecting Freedom of  Religion and Belief |
| Suspect | Negative  publicity  Monitor  Sect  commissions | Bureaucratic  discretion  Regulate  State oversight | Prohibit change  Control  State takeover | Changing religion is  not treasonous  Normalize change  Human moral  agency  Freedom  Dignity |

The issue of the right to change one’s religion has been controversial since the beginning of the human rights project. It wasn’t until the third committee draft that the Human Rights Committee finally settled upon the language that was ultimately adopted as Article 18 of the Universal Declaration of Human Rights. Article 18 reads:

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

Jamil Baroody, Saudi Arabia’s delegate on the Human Rights Commission, argued that the draft’s provisions for religious freedom were Western in concept. Specifically, Article 18’s recognition of the freedom and right to change one’s religion caused division among nations with large Muslim populations. The Chinese delegate on the Human Rights Commission, P.C. Chang, became one of the most effective spokesmen on behalf of the universality of the Declaration.

Chang joined forces with Hernan Santa Cruz from Chile to rebut the accusation that the Declaration reflected a Western bias. According to Professor Glendon, “Chang pleaded once again for ‘two-man mindedness,’ the ability to see things from another’s standpoint as well as one’s own particular point of view. ‘As only he can do,’ wrote the Canadian Humphrey in his memoirs, Chang reminded his fellow delegates that each culture’s contributions had to be made with a view toward producing a document ‘meant for all men everywhere.’

As the debates proceeded, Chang’s position received some support from delegates representing nations with large Islamic populations.”[[28]](#footnote-28) For example, Muhammad Zafrulla Khan, the foreign minister of Pakistan and a Muslim himself, promised the full support of his country. Citing a passage from the Koran, “Let him who chooses to believe, believe, and him who chooses to disbelieve, disbelieve,” and noting that Islam itself is a proselytizing religion, Khan expressed his view that the freedom to change one’s religion was consistent with Islam and that faith could not be obligatory. Nevertheless, based upon its objections to this provision as well as several others, Saudi Arabia abstained from the final General Assembly vote approving the Declaration.

For westerners, it is difficult to understand the view that freedom of religion does not include t he right to change one’s religion. In the United States, for example, changing one’s religion is commonplace. According to a 2009 study by the Pew Forum on Religion and Public Life, about half of American adults change their religious affiliation at least once during their lives.[[29]](#footnote-29) But treason is a concept that Americans understand, and is a crime that is punished severely. If changing one’s religion is seen as a form of treason, then it not surprising that it is viewed very negatively. If religious freedom is to be effectively protected, the right to change one’s religion or belief must come to be viewed as a reflection of a choice, rather than an act of treason.

6. *Religion Viewed as being Dangerous*: Recognizing that marginalizing religion makes it more dangerous, and that addressing religion through ordinary laws and making reasonable low-cost accommodations will tend to make religion less dangerous.

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| --- | --- | --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges | Strategies for Mitigation /  Protecting Freedom of  Religion and Belief |
| Dangerous | Oversight  Warn  Channel  Change  Control | Speech  Less protection  Assembly | Marginalize  Discriminate  Push underground  Labels (sect/cult) | Ordinary laws  Accommodate  Exemptions |

Viewing religion as dangerous often makes the mistake of failing to differentiate between individuals, who have committed crimes, and groups to which those people belong. The ease of making the mistake of equating individuals and groups is evident in the case of terrorists who use religion to justify their violent actions. Unfortunately, it is easy to find examples of people who respond to religiously-motivated violence by condemning an entire religion, or even blaming the very idea of religion itself. Fundamental principles of justice are violated when groups are held responsible for the crimes of individuals. In addition, when a group comes under attack, it can easily have the unintended effect of inducing members of that group to rally around and come to the defense of the most extreme members of that group. Criminals will often try to turn efforts to punish them into an attack upon a group of which they are a part. They will do this in an attempt to engender sympathy and solidarity with their group. We should not make it easier for such people to make this kind of argument. If we attack or blame the group, we inadvertently help terrorists bolster sympathy for themselves.

A related strategy for facilitating freedom of religion and belief is to look first to existing legal categories when responding to religiously-motivated criminal activity. When crimes are committed for a particular motive, such as religion, there is a strong impulse to create a new criminal category to cover such crimes. Such efforts can have several negative, and often unintended, consequences. First, they can create additional problems of proof. It is more difficult to prove motivation and intent if you have to prove a specific type of hate underlying the crime. Second, you can unintentionally minimize the harm to victims of similar crimes that are not based on the same underlying motive. Third, you can contribute to the creation of a martyr syndrome, where those who are (perhaps secretly) sympathetic to racism or religious bias will feel more sympathy for a criminal who is motivated by racial or religious hatred. Fourth, you can easily end up criminalizing thought and speech. This can have the consequence of eliminating a safety valve where frustrations and grievances can be aired with words rather than in secret with violence.

Rather than creating new crimes or criminal categories to address crimes motivated by religion, in most circumstances existing legal categories are likely adequate to address terrorism and other crimes motivated by religion. For example, most religiously motivated violence can be prosecuted under existing criminal laws, including laws that punish murder, insurrection, fraud, treason, and conspiracy.

In general, it will often be possible to adopt laws that accommodate religious differences, including conscientious objection, objections to taking religious oaths or participating in patriotic ceremonies, and religious dress such as headscarves and yarmulkes. When we make reasonable accommodations, we are not so much engaged in making an exception to general rules, as we are making rules with the requisite sensitivities to difference and human dignity that is a prerequisite to rules having normative appeal.

7. *Religion Viewed as being Evil*: Recognizing that suppressing, targeting, creating an enemy of religion is unlikely to be a successful strategy for achieving social peace and prosperity. Better strategies include living the Golden Rule (variations of which are propounded in nearly every religious and secular philosophy), ecumenical dialogue (based upon understanding ourselves and each other), and holding ourselves accountable for living our own beliefs.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges | Strategies for Mitigation /  Protecting Freedom of  Religion and Belief |
| Evil | Discourage  Suppress  Eliminate  Abolish | Special prosecutors  Target  Nationalization  Persecution  Criminalization | Us vs. them  Enemy  Other as less than  fully human | Ecumenical  dialogue  Golden Rule  Live our own  Beliefs |

One significant development relates to a recent and groundbreaking consensus resolution dealing with offenses to religious sensibilities. For over a decade, the Organization of Islamic Conference has succeeded in securing the passage of a series of resolutions condemning “defamation of religion” at the United Nations in the Human Rights Commission,[[30]](#footnote-30) the Human Rights Council,[[31]](#footnote-31) and the General Assembly.[[32]](#footnote-32) These resolutions have attracted increasing criticism in recent years because, while they address an issue of genuine concern, they do so in a fashion that unnecessarily threatens freedom of religion and freedom of expression rights.[[33]](#footnote-33)

The difficulty is that they focus on protecting religions, not individuals, with the result that less popular religions and those speaking critically about religions are put at risk. Moreover, in practice, defamation of religion rules can be used selectively to entrench power of autocratic regimes while allowing offenses against the most vulnerable groups to go unchecked.

In a breakthrough consensus resolution passed on 24 March 2011, the Human Rights Council changed its approach and dropped references to the controversial notion of “defamation of religion” in its latest effort to condemn violence, discrimination, and incitement to religious hatred.[[34]](#footnote-34) As noted by Tad Stahnke of Human Rights First,

This new text adopted by the UN Human Rights Council is a huge achievement because, for the first time in many years, it focuses on the protections of individuals rather than religions. The consensus behind today’s resolution should put the divisive debates on defamation of religions behind us. Instead, states need to do more to adopt measures to combat violence and discrimination on the basis of religion or belief, as well as address religious hatred without restricting speech. The resolution is a start, but recent events across the globe remind us that much more work needs to be done.[[35]](#footnote-35)

The new approach retains focus on religious sensitivities, but it does so in a way that focuses on the real problems, while striving to retain sensitivity for individual rights to freedom of expression and freedom of religion or belief.

*Ecumenical Dialogue*

Talking with others of different faiths can also have several commendable effects. Sometimes common ground can be found. Even when that is not possible, there are benefits of dialogue other than achieving consensus or convergence of belief. It may help us understand each other better, which is itself a significant human good. It may also help hold ourselves accountable to our own professed beliefs. As Michael Perry has noted, “If necessary we must revise our convictions until they are credible to ourselves, if not always or even often to our interlocutors. We must be willing to lend credibility to our convictions by being faithful to them in our lives and not merely in our polemics and our posturing.”[[36]](#footnote-36) In other words, by giving an account of our convictions, we can be expected to live up to our own asserted principles. We can have high expectations of ourselves, while being more lenient and forgiving of others.

*The Golden Rule*

Finally, nearly every religious tradition, as well as nearly every secular philosophy, advocates some variation of the Golden Rule, the simple admonition to treat others as we would like to be treated ourselves. Also known as the ethic of reciprocity, the Golden Rule provides a religious basis for recognition of and respect for religious freedom. To mention only a few of many:

Buddhism: “. . . a state that is not pleasing or delightful to me, how could I inflict that upon another?” (Samyutta Nlkaya v. 353); “Hurt not others in ways that you yourself would find hurtful.” (Udana-Varga 5:18)

Christianity: “Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets.” (Matthew 7:12, King James Version); “And as ye would that men should do to you, do ye also to them likewise.” (Luke 6:31, King James Version).

Hinduism: “This is the sum of duty: do not do to others what would cause pain if done to you” (Mahabharata 5:1517)

Islam: “None of you [truly] believes until he wishes for his brother what he wishes for himself” (Number 13 of Imam ‘Al-Nawawi’s Forty Hadiths’).

Judaism: “. . . thou shalt love thy neighbor as thyself” (Leviticus 19:18); “What is hateful to you, do not to your fellow man. This is the law: all the rest is commentary” (Talmud, Shabbat 31a).

Love of neighbor and treating others as we would be treated is the simple, and the deep, answer to the question of how meaningfully to protect freedom of religion and belief.

VII. Conclusion

Knowing what strategies to adopt to promote and protect freedom of religion and belief will depend to a large extent on what the underlying social attitudes, public policies, and legal mechanisms for analyzing religious freedom claims are. It will also depend upon what the particular distortions or challenges to religious freedom are.

Nevertheless, several general observations are possible. We should try to facilitate:

• Policies that recognize the value of pluralism;

• Policies that are based upon a human rights framework that favors freedom and recognizes limitations on freedom of religion only when they are genuinely necessary;

• Policies that respect the needs of both majorities and minorities, including institutional autonomy and the need for religious accommodations;

• Policies that recognize that we all belong to a religious minority, and policies that will be friendly to minorities;

• Policies that view changing religion as a normal exercise of human moral agency, freedom and dignity, rather than as an expression or treason or rebellion.

• Policies that strive to accommodate religious differences through appropriate exemptions, and that address crimes committed in the name of religion thorugh ordinary laws;

• Policies that embrace ecumenical dialogue, that encourage us to live our own beliefs, and attitudes based upon the Golden Rule.

Appendix

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| Social Attitudes | Public Policies | Legal Protections /  Mechanisms | Distortions / Challenges | Strategies for Mitigation /  Protecting Freedom of  Religion and Belief |
| Unique and Universal Truth | Theocratic state  Establishment  Multiple  establishments | Monopoly  Exclusive privileges  and immunities  Special Protections  Religious status  Systems | Orthodoxy  Discrimination  Heterodoxy  Suppression  Unequal treatment  Bare toleration | Pluralism |
| Valuable | Tiered systems  Promote  Cooperation | Religious law  Compelling State Interest  Balancing  Necessity tests | Endorsed religions  State favoritism  Unfavorable  treatment of  minorities | Freedom Favored  Human Rights Framework  Limitations when  necessary |
| Ordinary | Respect  Friendship  Tolerance  Spheres of  Influence | Religious autonomy  Equal Protection  Reasonable  accommodations | Willful blindness  Denial of difference  Inadvertent insensitivity  Shades of hostility | Institutional  autonomy  Respect needs of majorities and minorities  Accommodations |
| Private | Ignore  Hands off  Cabin  Limit | Non-endorsement  General and Neutral  Separation | Unease  Marginalization  Secularism | State v. public  All are minorities  Religion in politics |
| Suspect | Negative  publicity  Monitor  Sect  commissions | Bureaucratic  discretion  Regulate  State oversight | Prohibit change  Control  State takeover | Changing religion is  not treasonous  Normalize change  Human moral  agency  Freedom  Dignity |
| Dangerous | Oversight  Warn  Channel  Change  Control | Speech  Less protection  Assembly | Marginalize  Discriminate  Push underground  Labels (sect/cult) | Ordinary laws  Accommodate  Exemptions |
| Evil | Discourage  Suppress  Eliminate  Abolish | Special prosecutors  Target  Nationalization  Persecution  Criminalization | Us vs. them  Enemy  Other as less than  fully human | Ecumenical  dialogue  Golden Rule  Live our own  Beliefs |

1. Francis R. Kirkham Professor of Law, J. Reuben Clark Law School, Associate Director, International Center for Law and Religion Studies, Brigham Young University; B.S.B.A., M.A. Georgetown University, B.Phil, Oxford University, J.D., Yale Law School. Tel.: 1-801-422-9025. E-mail: [scharffsb@law.byu.edu](mailto:scharffsb@law.byu.edu). Thanks to Donlu Thayer of the ICLRS for her assistance with this paper and the accompanying powerpoint presentation. Thanks also to the organizers of this conference for the invitation to participate. [↑](#footnote-ref-1)
2. The right to freedom of religion or belief is not only important. It is foundational. It lays legitimate claim to being the grandparent of all the other rights, albeit sometimes a neglected grandparent in our secular age. It is foundational for our other rights in at least four respects. It is *historically foundational* because so many other rights emerged as additional supports for or expansions of legal protections originally provided in the name of religious freedom. It is *philosophically foundational* because it protects the comprehensive belief systems and world views in which our other ideas are rooted and from which they derive their meaning. It is *institutionally foundational*because it protects and fosters the institutions that engender the vision, the motivation and moral support that translate religious and moral ideals into personal and communal practice. It is also *empirically foundational,* because the empirical reality is that protection of religious freedom helps strengthen and assure the protection of numerous other social goods, including other rights. It often overlaps with other rights, such as freedom of expression, freedom of association, rights to non-discrimination, rights to protection of an intimate or private sphere, and so forth, but its sum is greater than any of these individual parts. See Cole Durham, Asymmetries in the Protection of Freedom of Religion or Belief, at 1-2. [↑](#footnote-ref-2)
3. The universal human rights approach to the protection of freedom of religion and belief arose in the aftermath of World War II. The fountainhead of further developments in this regard was the Universal Declaration of Human Rights (“UDHR”) adopted by the United Nations General Assembly in 1948. The key provision on religious freedom is Article 18, which provides:

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

   The language of this Declaration became the basis of a formally binding multilateral treaty with the ratification of the International Covenant on Civil and Political Rights (“ICCPR”). As of March 2011, 167 countries are parties to the ICCPR, and an additional five countries (the People’s Republic of China, Comoros, Cuba, Nauru, and Sao Tome and Principe) have signed but not ratified the treaty. The internationally protected right to freedom of religion or belief has been further solidified by the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the “1981 Declaration”), and in a variety of regional international instruments. [↑](#footnote-ref-3)
4. An absolute theocracy is often associated with stereotypical views of Islamic fundamentalism. In fact, a range of regimes are possible in Muslim theory and practice, depending on the scope given to Muslim beliefs about toleration and also depending on the extent to which flexible interpretation of Islamic law (Shari’a) leaves open normative space for adherents of other belief systems. What is significant about the absolutist position is their claim to monopolize religious space. Certain historical forms of Christian, Hindu, and Buddhist beliefs, among others, have asserted monopolistic positions in various societies over time. [↑](#footnote-ref-4)
5. The category of “established church” is vague and can in fact cover a range of possible church-state configurations with very different implications for the religious freedom of dissenters and minority groups. At one extreme, a regime with an established church that is granted a strictly enforced monopoly in religious affairs may closely resemble theocratic rule. Spain, England, and many other European countries following the peace of Westphalia in 1648 had such systems, as have countless systems in other parts of the world. Some countries that have an established religion nevertheless tolerate a restricted set of divergent beliefs. In fact, the historical pattern has been for established religions to become more tolerant over time. A country in which Islam is the official religion but that tolerates “people of the Book” is another example. A country with an established Christian Church that tolerates a number of major faiths but disparages others is another. Another position is a country that maintains an established church but guarantees equal treatment for all other religious beliefs. Contemporary Great Britain is a prominent example. [↑](#footnote-ref-5)
6. In a number of countries, multiple religions have official status in the sense that at least portions of the religious law of differing traditions are binding on those belonging to those traditions. For example, in Israel, India, and a number of countries with substantial Muslim populations, personal law (typically including laws governing marriage, family, divorce, succession, and related fields) depends on one’s religious status. If one is Jewish, Jewish law applies; if Muslim, Shari’a applies; and so forth. These religiously plural systems may be more or less flexible in recognizing rights of exit from the officially recognized group. [↑](#footnote-ref-6)
7. See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972). [↑](#footnote-ref-7)
8. See, e.g., Kokkinakis v. Greece, App. No. 14307/88, Eur. Ct. H.R. (25 May 1983). [↑](#footnote-ref-8)
9. See, e.g., Lynch v. Donnelly, 465 U.S. 668 (1984) (O’Connor, J., concurring) (holding that Christmas display that included crèche as well as other secular symbols was not an “endorsement or disapproval of religion”). [↑](#footnote-ref-9)
10. See, e.g., Employment Division v. Smith, 494 U.S. 872 (1990) [↑](#footnote-ref-10)
11. See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971) (adopting what came to be known as the Lemon test, which requires, “First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster ‘an excessive government entanglement with religion.’”). [↑](#footnote-ref-11)
12. I have examined in detail the distinction between secularity and secularism elsewhere. Both secularity and secularism are linked to the general historical process of secularization, but as I use the terms, they have significantly different meanings and practical implications. By ‘secularity’ I mean an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that endeavors to provide a neutral framework capable of accommodating a broad range of religions and beliefs. By ‘secularism’, in contrast, I mean an ideological position that is committed to promoting a secular order. Secularity is a more modest concept, committed to creating what might be called a broad realm of ‘constitutional space’ in which competing conceptions of the good (some religious, some not) may be worked out in theory and lived in practice by their proponents, adherents, and critics. Secularism, in contrast, is itself a positive ideology that the state may be committed to promoting, an ideology that may manifest itself as opposition to religiously-based or religiously-motivated reasons by political actors, hostility to religion in public life and an insistence that religious manifestations, reasons, or even beliefs be relegated to an ever-shrinking sphere of private life, or even an aggressive proselytizing atheism, or what has been called “secular fundamentalism.” See e.g., W. Cole Durham, Jr. and Brett G. Scharffs, Law and Religion: National, International, and Comparative Perspectives (New York: Aspen Publishers/Wolters Kluwer, 2010), pp. 121-122, and developed further in Brett G. Scharffs, Four Views of the Citadel: The Consequential Distinction between Secularity and Secularism, 6 Religion and Human Rights 109-126 (Martinus Nijhoff publisher, forthcoming 2011). [↑](#footnote-ref-12)
13. John Locke, *A Letter Concerning Toleration* (William Popple, trans., Huddersfield 1796). [↑](#footnote-ref-13)
14. Voltaire, *Letters on England* 41 (Penguin Books 1980) (1733). [↑](#footnote-ref-14)
15. Brian J. Grim and Roger Finke, *The Price of Freedom Denied* (Cambridge: Cambridge University Press, 2011), 206. [↑](#footnote-ref-15)
16. Serif v. Greece, ECtHR, App. No. 38178/97 (14 December 1999), § 53. [↑](#footnote-ref-16)
17. For a brief description of the types of legal structures available in the United States, Europe and formerly communist states, and of the international legal norms protecting the rights of access to such structures, see W. Cole Durham, Jr., “Legal Status of Religious Organizations: A Comparative Overview,” *Review of Faith & Int’l Affairs* (2010) 8:3-14, <http://www.informaworld.com/smpp/section?content=a923076944&fulltext=713240928>. *See also* W. Cole Durham, Jr., “Facilitating Freedom of Religion or Belief through Religious Association Laws,” *in* Lindholm, Durham and Tahzib-Lie, *supra* note **Error! Bookmark not defined.** at 321-405. [↑](#footnote-ref-17)
18. Durham, “Legal Status of Religious Organizations,” *supra* note at 3-5. [↑](#footnote-ref-18)
19. *Id.* at 6-7. *See also* Lars Friedner, ed. *Churches and Other Religious Organisations as Legal Persons: Proceedings of the 17th Meeting of the European Consortium for Church and State Research*, Höör (Sweden), 17-20 November 2005. [↑](#footnote-ref-19)
20. Canea Catholic Church v. Greece, 27 EHRR 521 (1999) (ECtHR, App. No. 25528/94, 16 December 1997) (legal personality of the Roman Catholic Church protected); United Communist Party of Turkey v. Turkey, 26 EHRR 121 (1998) (ECtHR, App. No. 19392/92, 30 January 1998); Sidiropoulos & Others v. Greece, 27 EHRR 633 (1999) (ECtHR, App. No. 26695/95, 10 July 1998); Freedom and Democracy Party (ÖZDEP) v. Turkey, 31 EHRR 27 (2001) (ECtHR, App. No. 23885/94, 8 December 1999); Hasan and Chaush v. Bulgaria, 34 EHRR 55 (2002) (ECtHR, App. No. 30985/96, 26 October 2000); Metropolitan Church of Bessarabia v. Moldova, 35 EHRR 13 (2002) (ECtHR, App. No. 45701/99, 13 December 2001); Moscow Branch of the Salvation Army v. Russia, 44 EHRR 46 (2007) (ECtHR, App. No. 72881/01, 5 October 2006); Church of Scientology Moscow v. Russia, 46 EHRR 16 (2008) (ECtHR, App. No. 18147/02, 5 April 2007); Svyato-Mykhaylivska Parafiya v. Ukraine (ECtHR, App. No. 77703/01, 14 September 2007); Kimlya v. Russia (ECtHR, App. Nos. 76836/01, 32782/03, 1 October 2009). Note that cases of the European Court of Human Rights and the European Commission of Human Rights are available on the Court’s website through the HUDOC search portal at <http://www.echr.coe.int/echr/en/hudoc/>. More conveniently, the cases involving freedom of religion, conscience, or belief are available in a table on the website of the Strasbourg Consortium, <http://www.strasbourgconsortium.org/cases.php?page_id=10#portal.case.table.php>. [↑](#footnote-ref-20)
21. Key OSCE Commitments in this regard are spelled out in Principle 16.3 of the Vienna Concluding Document, *supra* note **Error! Bookmark not defined.**, and are more particularly spelled out in OSCE, *Guidelines for Review of Legislation* (2004), <http://www.osce.org/publications/odihr/2004/09/12361_142_en.pdf>. A summary of specific protections is provided in Durham, “Legal Status of Religious Organizations,” *supra* note at 7-8. These include the right to freedom of religion without registering; the right to acquire such status without burdensome bureaucratic obstacles; the right to clear rules to qualify for legal entity status administered in a non-arbitrary and non-discriminatory fashion; the right to acquire such status without high minimum membership requirements, lengthy residency requirements, and non-neutral substantive review of religious beliefs; the right to acquire such status promptly; and the right to judicial review of denials of such status. [↑](#footnote-ref-21)
22. For a comparative overview, see Gerhard Robbers, ed., *Church Autonomy: A Comparative Survey* (Frankfurt: Peter Lang, 2002). [↑](#footnote-ref-22)
23. *See,* e.g.,Hasan and Chaush v. Bulgaria, 34 EHRR 55 (2002) (ECtHR, App. No. 30985/96, 26 October 2000); Metropolitan Church of Bessarabia v. Moldova, 35 EHRR 13 (2002) (ECtHR, App. No. 45701/99, 13 December 2001); Svyato-Mykhaylivska Parafiya v. Ukraine (ECtHR, App. No. 77703/01, 14 September 2007). [↑](#footnote-ref-23)
24. Obst v. Germany (ECtHR, App. No. 425/03, 23 September 2010). [↑](#footnote-ref-24)
25. Siebenhaar v. Germany (ECtHR, App. No. 18136/02, 3 February 2011). [↑](#footnote-ref-25)
26. ECtHR, App. No. 1620/03, 23 September 2010. [↑](#footnote-ref-26)
27. That is, while the German courts had balanced the church’s autonomy interests against the employee’s interests in continued employment, they had not adequately considered: (1) the decision’s impact on the private and family life of the applicant; (2) the fact that Germany’s payroll tax system prevented the applicant from concealing from his employer civil status events such as divorce or the birth of a child; (3) the proximity of the employee’s work to the proclamation mission of the church; (4) the fact that an individual right was being balanced against a collective right; (5) the fact that one could not automatically assume a life-long commitment to abstinence from divorce from the signature on an employment contract; (6) the fact that the employee had not publicized the fact that his lifestyle was inconsistent with the moral teachings of the church; and (7) the difficulty for the employee of finding alternative work.

    Careful consideration of these factors will make it more difficult in future cases for religious communities to establish religiously-based behavior requirements for employees whose tasks are not closely connected to their expressive identity and mission. However, given the European Court’s emphasis on the fact that Schüth’s work was integrally involved in the celebration of the eucharist, and that a religious organization may require its employees to respect certain principles, and that it is the role of national courts to make the relevant factual findings in such matters, it is conceivable that the European Court would sustain termination of an employee by a religious organization where an employment contract conditions continued employment on conformity with religious teachings, where the job description explicitly links responsibilities to the expressive dimension of the community’s activities, and where a national court adequately considers the kinds of factors described above. That is, a national court reviewing *Schüth* after considering all the factors might reasonably conclude that autonomy considerations justify termination. The holding in *Schüth* does not preclude that possibility. From the standpoint of expressive organizations, whether religious or ideological, the conduct of employees is critical because of the message it sends concerning the seriousness and authenticity of the organizations beliefs. Failure to protect the right of expressive organizations to maintain their authenticity in this way attacks pluralism at its roots. The European Court’s opinion that various additional employee-side interests should be explicitly taken into account is reasonable, and particularly where there is evidence that deviations from the expressive community’s ethos are not in fact significant to the community, greater protection of the employee may be warranted. But requiring an expressive organization to retain an employee who acts inconsistently with the normative aspirations of that organization, even if done in the name of protecting broader societal pluralism, in effect requires every organization to be pluralistic in exactly the same way, and is wrong-headed for that reason alone. If the employee secures employment based on a commitment that he will abide by the behavioral requirements of an expressive community, the community should have the right to terminate him or her when that fundamental commitment is breached. [↑](#footnote-ref-27)
28. Mary Ann Glendon, A World Made New, at 141-2, quoting Humphrey, On the Edge of Greatness, 55-56. [↑](#footnote-ref-28)
29. Pew Forum on Religion & Public Life, Faith in Flux, Changes in Religious Affiliation in the U.S., April 29, 2009, <http://pewresearch.org.pubs/1204>, revised February 2011. The report notes, “The reasons people give for changing their religion -- or leaving religion altogether -- differ widely depending on the origin and destination of the convert. The group that has grown the most in recent years due to religious change is the unaffiliated population. Two-thirds of former Catholics who have become unaffiliated and half of former Protestants who have become unaffiliated say they left their childhood faith because they stopped believing in its teachings, and roughly four-in-ten say they became unaffiliated because they do not believe in God or the teachings of most religions.Additionally, many people who left a religion to become unaffiliated say they did so in part because they think of religious people as hypocritical or judgmental, because religious organizations focus too much on rules or because religious leaders are too focused on power and money. Far fewer say they became unaffiliated because they believe that modern science proves that religion is just superstition.” [↑](#footnote-ref-29)
30. The first such resolution was introduced in 1999, U.N. Econ & Soc. Council [ECOSOC], Comm’n on Human Rights, Pakistan, Draft Res. *Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination,* U.N. Doc. E/CN.4/1999/L.40 (20 April 1999). A similar resolutions were passed in 2000 (CHR Res. 2000/84 at 336, U.N. ESCOR, 56th Sess. Supp. No. 3, U.N. Doc. E/CN.4/2000/167 (25 April 2000), which like the 1999 resolution passed with no vote. In 2001, a similar resolution passed with twenty-eight States in favor, fifteen opposed and nine abstaining. CHR Res. 2001/4, at 47, U.N. ESCOR 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2001/167 (18 April 2001). The Commission voted to pass similar resolutions in each of the subsequent four years. CHR Res. 2002/9, at 56, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2002/200 (15 April 2002); CHR Res. 2003/4, at 34, U.N. ESCOR, 59th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2003/135 (14 April 2003); CHR Res. 2004/6, at 28, U.N. ESCOR, 60th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2004/127 (13 April 2004). In 2005, there were 101 votes in favor of the resolution, and only fifty-three opposed. Twenty abstained from the voting. G.A., 60th Sess., 3d Comm., Yemen: Draft Resolution: Combating Defamation of Religions, U.N. Doc. A/C.3/60/L.29 (31 October 2005). [↑](#footnote-ref-30)
31. Human Rights Council Resolution 7/22, A/HRC/RES/7/19 (adopted 27 March 2008, with 21 in favor, 10 against, and 14 abstentions); Human Rights Council Resolution 10/22, A/HRC/RES/10/22 (adopted 26 March 2009 with 23 in favor, 11 against, and 13 abstentions); Human Rights Council Resolution 13/16, A/HRC/RES/13/16 (adopted 25 March 2010, with 20 in favor, 17 against, and 8 abstentions). [↑](#footnote-ref-31)
32. U.N. GAOR, 64th Sess., 65th plen. mtg., U.N. Doc. A/64/156 (adopted 18 December 2009 by a recorded vote of 80 in favor, 61 against, with 42 abstentions); U.N. GAOR, 63rd Sess., 70th plen. mtg. at 17-18, U.N. Doc A/63/PV.70 (adopted 18 December 2008, with 86 in favor, 53 against, and 42 abstentions). [↑](#footnote-ref-32)
33. *See*, e.g., Joint Declaration on Defamation of Religions and Anti-Terrorism and Anti-Extremism Legislation, Frank La Rue, UN Special Rapporteur on Freedom of Opinion and Expression, Miklos Haraszti, OSCE Representative on Freedom of the Media, Catalina Botero, OAS Special Rapporteur on Freedom of Expression, and Faith Pansy Tlakula, ACHPR Special Rapporteur on Freedom of Expression, page 2 (December 10, 2008), available online at <http://www.osce.org/documents/rfm/2008/12/35705_en.pdf>; Annual Report of the United National High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Study of the United Nations High Commissioner for Human Rights compiling existing legislations and jurisprudence concerning defamation of and contempt for religions, A/HRC/9/25 (5 September 2008), ¶¶ 36-37. [↑](#footnote-ref-33)
34. The action was based on a draft resolution submitted by Pakistan on behalf of the Organization of the Islamic Conference, “Combatting intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief,” U.N. Human Rights Council, A/HRC/16/L.38 (21 March 2011). The resolution was passed as submitted by unanimous vote. [↑](#footnote-ref-34)
35. # Human Rights First Press Release, <http://www.humanrightsfirst.org/2011/03/24/groundbreaking-consensus-reached-to-abandon-global-blasphemy-code-at-the-united-nations/>.

    [↑](#footnote-ref-35)
36. Michael Perry, Morality, Politics and Law 183 (Oxford University Press 1988). [↑](#footnote-ref-36)