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Book Review

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BOOK REVIEW

Intramural Dialogue and The Malaise of Religious Freedom

LAW AND RELIGION. Edited by Rex J. Ahdar. Ashgate/Dartmouth: Aldershot, Burlington USA, Singapore, Sydney. 2000. xiii, 229 pp.

Reviewed by Steven D. Smith*

Discussions of religious freedom in the United States tend to be a pretty parochial affair. Lawyers, judges, and scholars in this country usually limit ourselves to debating the meaning and significance of our Constitution, our history, and our precedents. We know, of course, that issues of religious freedom arise elsewhere—almost everywhere, in fact—and we may even address these issues when we are discussing matters of international law or foreign policy. But we seem to suppose that we ourselves have little to learn from our counterparts in other countries. Or perhaps, acting on an implicit assumption of "American exceptionalism," we imagine that our own constitutional provisions are so distinctive that discourse elsewhere would simply not be relevant to understanding our law. In any case, although scholars in other countries are often well-versed in U.S. law on religious freedom, it is rare for scholars or jurists in the United States to turn to a Canadian case or an interpretation of the European Convention on Human Rights for help in considering an issue of religious freedom that arises in the United States.[1]

This insular focus would be understandable, perhaps, if the U.S. discourse of religious freedom were in superb condition. But everyone seems to agree that it is not. The title to Marie Failinger's

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1. There are exceptions. *See, e.g.*, JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 217-30 (2000); JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 287-328 (1998); W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 BYU L. REV. 421, 447-60.

contribution to the present volume—"Wondering after Babel"[2]—is indicative. Michael McConnell's essay expresses a virtual consensus: the law of religious freedom in this country is "chaotic, controversial and unpredictable"—"hopelessly inconsistent."[3] So the time seems opportune to expand the horizons. We might benefit from some wisdom from abroad.

This book, edited by Rex Ahdar, a professor at the University of Otago in New Zealand, attempts to initiate a more inclusive dialogue by collecting original essays on law and religion written by leading scholars not only from the United States but also from England, Australia, New Zealand, and the Netherlands.[4] Such a project encounters predictable problems: the essays vary in quality, and a "ships passing in the night" character is sometimes apparent. Still, all in all, the book is a valuable contribution to the effort to bring a broader range of insights and experience to bear on the problems of religious freedom.

But the book's main value, a skeptic might object, lies mostly in dashing false hopes that a more cosmopolitan exchange will yield valuable insights. I will explain why I think this skeptical conclusion would be mistaken. Still, it is true that on one level the essays seem calculated to provide occasions for transnational commiseration more than to open up sources of fresh wisdom. If there is a legal system that has found a viable and attractive approach to the problems of religious freedom, that system is not revealed in these essays. On the contrary, despite some significant differences in different nations' approaches to religion,[5] the analyses and front-line reports from other countries often seem drearily familiar. Religious freedom, one might conclude, seems to present basically the same intractable political and conceptual problems everywhere.

Well, not quite everywhere—or at least these essays would not support that global diagnosis. In fact, although the range of legal experience reflected in this volume is admittedly much broader than that invoked in the typical U.S. discussion, the conversation is still in

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2. Marie A. Failinger, *Wondering after Babel: Power, Freedom and Ideology in US Supreme Court Interpretations of the Religion Clauses*, *in* LAW AND RELIGION 81 (Rex J. Ahdar ed., 2000).

3. Michael W. McConnell, *Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine*, *in* LAW AND RELIGION 63, 64 (Rex J. Ahdar ed., 2000).

4. A similar—and similarly titled—but heftier volume collecting essays by scholars (including Ahdar, as well as the author of this review) from an even larger number of countries recently appeared under the sponsorship of University College, London. *See* LAW AND RELIGION (Andrew Lewis & Richard O'Dair eds., 2001).

5. For example, the U.K. and the Continental legal systems typically lack the U.S. obsession with "nonestablishment" as a commitment in itself. They may even retain, at least nominally, an established church. Scholars and jurists in some countries still debate the viability of laws punishing "blasphemy"—not exactly a hot topic in the United States.

a sense intramural. All of the contributors come from countries that are firmly entrenched in what Samuel Huntington's recent and much discussed study classifies as "Western" civilization. Huntington, a political scientist at Harvard, argues that the most appropriate unit for understanding politics and culture is not the nation-state but rather the "civilization": commonalities among nations within a given civilization are more important than variations, whereas differences among civilizations provide the main lines of division that will shape politics.[6] Applying Huntington's categories, we notice that the essayists in this book are either from England, or from countries whose legal and political systems descend from England, or from just across the Channel. There are no contributors from Muslim countries, or from India, or China, or even from Russia or another legal system associated with the Orthodox branch of Christianity. And as Huntington's analysis would predict, despite their differences the essayists largely share a broad but discernible orientation toward the issues of religious freedom.

This observation is not intended as a criticism of the book. Intra-civilizational dialogue is a worthy project; it is more than we have typically managed in the past, and is not to be spurned just because it is not also inter-civilizational in character. Indeed, the incomprehension and suspicion that legal scholars in the United States often exhibit toward, say, Christian fundamentalists who live almost in their own backyards might prompt us to wonder whether obstacles of cultural incommensurability would preclude a genuine conversation between Western scholars and people who speak from, say, a thoroughly Islamic worldview—though the effort certainly seems worth making. My point, in any case, is that the very sameness, so to speak, of the problems encountered in other Western countries may itself be revealing: it suggests the possibility that, contrary to a common supposition, our frustrations might be less the result of peculiarities in U.S. law—of the celebrated "conflict between the clauses," for example—and more the product of deeper and longer-term assumptions and tendencies of Western civilization generally.

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6. *See generally* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996). Huntington contends that the world today divides into seven or perhaps eight major civilizations, which he calls "Sinic," "Japanese," "Hindu," "Islamic," "African," "Orthodox," "Western," and "Latin American"—which might be classified either as a separate civilization or a "subcivilization within Western civilization." *Id.* at 45-47.

THE INTRACTABILITY OF FREE EXERCISE

Consider, for example, the by now almost ancient question of whether religious objectors should be exempted from generally applicable laws that burden the exercise of their religion. Should Quakers be excused from the military draft? Should Native Americans who use peyote in worship be exempted in that context from a state's drug laws? It is well-known that after a period in which the U.S. Supreme Court purported to mandate exemptions for the exercise of religion subject to a "compelling interest" balancing test, the Court changed direction just over a decade ago and ruled that exemptions are not constitutionally required. The change was widely criticized, but congressional efforts to restore greater protection for religious exercise have been rebuffed by the Court.[7] Hardly anyone seems happy with the current state of the law in the United States.[8]

Critics who favor more ample protection often blame the current state of affairs in part on a supposed "conflict between the clauses": the First Amendment's nonestablishment clause, which has often been construed to mean that government cannot "aid" or "advance" religion, is thought to make it more difficult for courts to interpret free exercise as mandating exemptions that in an important sense aid religion. Those who adopt this diagnosis sometimes argue that one ought to treat the First Amendment as containing only a "religion clause"—in the singular—devoted to the unitary purpose of protecting religious freedom;[9] in this way, it is thought, the "no aid" impediment to full protection for free exercise might be eliminated. In addition, proponents of more fulsome free exercise protection may attribute current problems in part to the U.S. Constitution's less than lucid wording; a more carefully drafted legal provision might fend off the fettered interpretation that the modern Court has devised. Hence, these proponents may support proposals for more precise and encompassing legal language, to be adopted by statute—such as the Religious Freedom Restoration Act invalidated by the Supreme Court in *Boerne v. Flores*—or perhaps even by constitutional amendment.

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7. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act of 1993).

8. The book contains succinct overviews of these developments in the essays by Failinger and McConnell. *See* Failinger, *supra* note 2, at 86-90; McConnell, *supra* note 3, at 65-69. My own interpretation of these developments is somewhat different but need not be argued here. *See* STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 91-106 (2001).

9. *See, e.g.*, Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 n.8, 540 (1991).

Professor McConnell has contributed as significantly to these discussions of free exercise as anyone in the U.S. legal academy, consistently advocating more encompassing free exercise protection. His essay in this volume continues in this vein. The essay opens by describing the clash between the establishment and free exercise clauses and the associated tension in the purposes ascribed to the First Amendment in matters of religion. Some think the provision is mainly intended to ensure "separation" between government and religion, McConnell reports; others see the goal as "neutrality," while still others say that the overall objective is simply "religious liberty."[10] McConnell then turns to the problem of free exercise exemptions, noting that even when legislatures choose to accommodate the exercise of religion, "[t]he constitutionality of these accommodation statutes is frequently challenged under the Establishment Clause, on the theory that they 'favour' religion over non-religion."[11] After a survey of some establishment clause issues, McConnell concludes by listing possible "solutions," which he frames in terms of the possible responses to the previously described conflict between the clauses. We could maintain strong commitments to both clauses with their associated competing values (thus reinforcing the existing incoherence) or, contrariwise, retreat from both commitments (thus subjecting religious minorities to the vicissitudes of democratic politics) or we could adhere to a strong nonestablishment commitment while diluting free exercise protection, thereby turning the Constitution into a "force for secularization." Conversely, the United States could relax the nonestablishment concern while retaining the dedication to free exercise. Consistent with his long-articulated views, McConnell endorses this last alternative.[12]

McConnell's essay is concise, informative, elegantly structured, and carefully reasoned. But is his analysis sound? An essay by Malcolm Evans, though not directly responsive to McConnell's discussion, gives cause to doubt. Evans, a professor at the University of Bristol and a leading authority on international human rights law in the area of religion, mainly discusses the history of rulings by the UN Human Rights Committee on Article 18 of the Universal Declaration on Human Rights and of the International Covenant on Civil and Political Rights.[13]

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10. McConnell, *supra* note 3, at 64.

11 *Id.* at 69. Essays in this book by U.S. scholars have been edited to conform to British spelling.

12. *Id.* at 74-76.

13. *See generally* Malcolm D. Evans, *The United Nations and Freedom of Religion: The Work of the Human Rights Committee*, *in* LAW AND RELIGION 35 (Rex J. Ahdar ed., 2000).

These provisions are, in a sense, a more expansive and elaborated international law counterpart to the First Amendment's free exercise clause, and they might seem nicely designed to avoid the difficulties that scholars like McConnell perceive in U.S. free exercise jurisprudence. In the first place, the international provisions are not encumbered by any corresponding "nonestablishment clause" with which they stand in tension. So there is no worry here about a "conflict between the clauses." In addition, the wording of the international provisions seems more forthcoming on the issue of free exercise exemptions. Article 18 of the International Covenant, for instance, expressly declares that religious freedom encompasses the right of a believer "to *manifest* his religion or belief in worship, observance, *practice* and teaching," and it specifies that the "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental freedoms of others."[14] Schooled in the criticisms of U.S. free exercise jurisprudence developed by scholars like McConnell, we might expect that by self-consciously avoiding our particular pitfalls, the international law approach would be less confused and would also provide more generous legal protection for the free exercise of religion.

Sanguine expectations such as these will not survive Evans' essay. Evans explains that in construing the international provisions, the UN Human Rights Committee has had to deal with three kinds of questions: "1 What forms of belief enjoy the 'freedom to manifest'? 2 What is a 'manifestation'? 3 What is the scope of the legitimate restrictions?"[15] These questions should seem entirely familiar to U.S. students of free exercise, though the typical wording would be slightly different. We ask: What is "religion?" How much of "religion"—belief only, or conduct as well—is protected by the First Amendment? And what state interests are sufficient to justify restrictions on free exercise?

So the questions to be addressed are similar. What may be surprising is that the answers seem similar—and similarly disappointing as well—even though the provisions are discernibly different in their wording, and even though there is no competing nonestablishment provision to inhibit the international interpretations.

Thus, in Evans' review of the Human Rights Committee's interpretations two motifs emerge. The first is uncertainty: though the international provisions are lengthier than the U.S. clause and seem calculated to achieve precision, in fact their meaning remains

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14. *Id.* at 36-37 (emphasis added) (quoting Article 18).
15. *Id.* at 37.

opaque. The provisions use terms like "religion," "belief," "thought," and "conscience," and Evans observes that the adoption and subsequent interpretation of these provisions "put into stark relief the uncomfortable fact that there was no general understanding of what any of these separate terms actually meant."[16]

Summarizing the results of the Human Rights Committee's efforts even to clarify what "religion" is, he comments that "[i]n terms of practical guidance, this amounts to lean pickings from 50 years' worth of experience."[17] A later essay by Evans' colleague Julian Rivers projects this uncertainty into the English system, which by statute has recently incorporated the international norms into the law of the United Kingdom. Rivers carefully considers a variety of specific and controversial areas—church autonomy, education, marriage, employment, blasphemy—and concludes that the law is "vague as a matter of substance, but it is also vague as to the relevance of Convention rights at all in many areas of law."[18]

The second motif that emerges in Evans' review is that despite international law texts that seem calculated to be strongly protective of religion, in reality the UN Human Rights Committee has consistently interpreted that law to provide little or no actual protection. Thus, the Committee has construed "religion" narrowly. And it has accepted almost any governmental interest as a sufficient reason for curtailing religious "manifestation." Parallels to U.S. decisions—decisions rendered under provisions that are worded quite differently—are readily apparent. In a case from Canada, for instance, the Committee rejected a complaint filed by a Sikh who had been discharged for wearing a turban at work. The Committee ruled that "requiring workers in federal employment [to] be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable. . . ."[19] The ruling is strongly reminiscent of *Goldman v. Weinberger*,[20] in which the U.S. Supreme Court held that the free exercise clause did not prevent the Air Force from forbidding a psychologist who was also a rabbi from wearing a yarmulke while working in the mental health clinic of a military base. The ruling is also evocative of *TWA v. Hardison*,[21] in which the Court through aggressively insouciant construction diluted the language of a federal

16. *Id.* at 40.
17. *Id.* at 43.
18. Julian Rivers, *From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom's Human Rights Act*, *in* LAW AND RELIGION 133, 154 (Rex J. Ahdar ed., 2000).
19. Evans, *supra* note 13, at 51 (quoting K. Singh Bhinder v. Canada, 208 Eur. Ct. H.R. (1986), ¶ 6.2).
20. Goldman v. Weinberger, 475 U.S. 503, 510 (1986).
21. *See* TWA v. Hardison, 432 U.S. 63 (1977).

statute mandating accommodation of religion in the workplace into an insipid de minimis "reasonableness" provision.

In another case, the Human Rights Committee considered a complaint by individuals in the Netherlands who had converted to Hinduism and wished to change their surnames in order to train as Hindu priests. It is hard to imagine any powerful governmental interest that would be jeopardized by allowing such a change. Nonetheless, the Committee rejected the Hindus' complaint with the peremptory observation that "the regulation of surnames and the change thereof [is] eminently a matter of public order . . ."[22] Evans remarks that no real assessment of the strength of the governmental interest seems to have occurred: "It is almost as if the finding of a legitimate ground for restricting the enjoyment of the freedom of [religious] manifestation is sufficient in itself."[23]

Evans concludes his review by suggesting that "[p]erhaps the most abiding impression of an examination of the work of the [Human Rights Committee] . . . is that freedom of religion is . . . viewed as more of a problem than as an ambition—something which, although doubtless a good thing in principle, is to be viewed with caution."[24] The Committee has taken a miserly attitude "despite . . . [legal] language which often implies the opposite."[25]

In short, the results in the international context and in U.S. jurisprudence seem remarkably similar, even though the formal legal texts and commitments seem to be significantly different. What might account for these strikingly equivalent outcomes?

A "WESTERN" APPROACH TO RELIGIOUS FREEDOM

In considering this question, we might remark on one factor that is so obvious that it would usually go unmentioned: both McConnell and Evans are concerned with materials arising out of texts that, though markedly different in their wording, are legal texts; and as a result these scholars are both studying and practicing a form of legal discourse. And from this common feature, others flow.

For example, these essayists along with other scholars and lawyers in Western legal systems are engaged in a discourse that aspires to be rational in character: after all, rationality—or "reason" —has long been thought to be the very essence of Western law and

22. Evans, *supra* note 13, at 51 (quoting AR Coviel and MAR Aurik v. The Netherlands, 453 Eur. Ct. H.R. (1991), ¶ 6.1).

23. *Id.*

24. *Id.* at 52.

25. *Id.*

the source of its authority.[26] This rationalist discourse proceeds with the confidence that matters of religion can be governed by rules or principles that are articulable in words—words that can be dispassionately examined in the quiet detachment of a professor's office or a judge's chambers and that carry meanings that can be extracted and then applied with logical consistency across a wide range of seemingly disparate situations. In this exercise the vice to be steadfastly avoided, from a rationalist perspective, is "inconsistency" or "incoherence": an "inconsistent" or "incoherent" position is, after all, the antithesis of a "rational" one. McConnell is especially insistent on this point:

> It is one thing to be attentive to the specific facts of each case in applying constitutional doctrine, but it is quite another to maintain that two ostensible constitutional principles are in direct conflict, and to refuse to choose between them. When A contradicts B, they cannot both be correct. If A appears to contradict B, it is the interpreter's responsibility to decide that A is correct and not B, that B is correct and not A, or (possibly) to find a synthesis of A and B that combines the best features of both. Simply to vacillate between them on the basis of "the particular facts of each case" is an invitation to incoherence, and ultimately to perceived illegitimacy.[27]

A further feature that accompanies the legalist character of the discussion is an assumption that the ultimate interpretive and enforcing authority for the applicable texts will be courts.[28] These two essays are hardly distinctive in this respect: Sophie van Bijsterveld, a professor at the University of Tilburg in the Netherlands, notes that under both European and more global religious freedom provisions, "the predominant model is that of individual rights backed by the courts."[29]

Van Bijsterveld's observation alludes to an additional feature characteristic of the typical Western approach to religious freedom—its proclivity to frame the issues in terms of the rights of

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26. *See generally* STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON (1998) (examining this claim in the context of U.S. Constitutional law).

27. McConnell, *supra* note 3, at 76-77.

28. Evans' essay reflects a partial qualification to this statement: he reports mostly on the interpretations given international human rights law by the United Nations Human Rights Committee. But of course this law is also applied in courts—for example, the essay by Rivers, *supra* note 18, discusses how it may be applied in English courts in the wake of that country's decision to incorporate it into domestic law—so the Committee's interpretations can be seen as providing guidance to courts. Moreover, even if the Committee has no army of marshals waiting to enforce its rulings, the Committee's own procedures seem in many respects to mirror judicial proceedings.

29. Sophie C. van Bijsterveld, *Religion, International Law and Policy in the Wider European Arena: New Dimensions and Developments, in* LAW AND RELIGION 163 (Rex J. Ahdar ed., 2000).

individuals.[30] To be sure, there are those who resist an exclusive emphasis on the individualist aspect of religion. In the United States, scholars such as Douglas Laycock and Frederick Mark Gedicks have perceptively called attention to the institutional or associative dimension of religion.[31] Many faiths have an essentially communal character, they explain; to depict these faiths in terms of voluntary individual choices—or even of individuals freely choosing to associate together to promote their religious values and objectives—may distort these faiths beyond anything that the believers themselves would recognize as their own. Nonetheless, the individualist orientation of what van Bijsterveld describes as "the predominant model" makes it difficult for Western legal systems to assimilate these insights.

The individualism of the prevailing perspective is itself merely one feature of a more encompassing framework that van Bijsterveld describes as "the liberal paradigm." This paradigm, she explains, divides the social world into "the 'public' and the 'private'." Religion is assigned to the "private" realm, leaving the "public" sphere entirely secular; and "[r]eligious liberty . . . is a right of the individual citizen to non-interference from the public authority."[32] Van Bijsterveld comments that although this paradigm is common to most Western legal systems, "[i]n its purest sense, this model echoes the American Jeffersonian notion of the 'wall of separation' between Church and state."[33]

This constellation of features—legalism, rationalism, individualism, assumed commitments to private religion and a secular public sphere—is apparent throughout these essays. To be sure, not all Western scholars or jurists will be equally committed to each of these features. For example, although Professor McConnell adheres to a "legalist" and "rationalist" approach, as noted, he has also been among the most persistent and articulate critics of the notion that religion must be excluded from the public sphere.[34] Still, it is hard to deny that these features, in differing combinations and to differing degrees, characterize most Western discussions of religious freedom. This book is a case in point: nearly all of the essays in this

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30. Professor Huntington argues that emphases both on human rights and on individualism are characteristics distinctive of Western civilization. HUNTINGTON, *supra* note 6, at 71, 192-98.

31. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

32. Van Bijsterveld, *supra* note 29, at 165-66.

33. *Id.* at 166.

34. *See* Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639.

collection at least acknowledge, and often endorse, these liberal and legalist commitments.

So it seems plausible to view these commitments as reflecting a distinctive "Western" approach to religious freedom. To fill out this description of the "Western" approach, however, I think we need to add at least two other features. First, because it emphasizes a legalist, rationalist, and court-centered approach to the matter of religious freedom, the Western approach also implicitly demands that controversies will be resolved by a special class of people—by lawyers and, more generally, by the more educated class of citizens. All of the contributors to this volume—as well as its present reviewer—are, of course, professors working in universities; and their audience consists largely of other professors and perhaps–or so the essayists may hope–lawyers and judges. There is an irony here, no doubt, because Western liberalism also purports to be devoutly egalitarian: equality, including religious equality, is a value prized above all others.[35] Nonetheless, the Western approach assigns decisions about the scope, meaning, and implications of equality to a specially-trained elite. So the approach entails a sort of elitist egalitarianism, or perhaps an egalitarian elitism.

In addition, it is crucial to notice what, in an engaging discussion of the controversy surrounding the decision of a public art gallery in Australia to display Andres Serrano's "Piss Christ" exhibit, Reid Mortensen of the University of Queensland describes as "the ambiguous place the Christian tradition now occupies in modern Western culture."[36] Professor Huntington has argued that a civilization is typically tied to some major religion,[37] and for Western civilization this religion has been Christianity. "Western Christianity, first Catholicism and then Catholicism and Protestantism," Huntington asserts, "is historically the single most important characteristic of Western civilization."[38] More specifically,

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35. For a lengthier discussion, see SMITH, *supra* note 8, at Introduction and ch. 1.

36. Reid Mortensen, *Art, Expression and the Offended Believer*, *in* LAW AND RELIGION 181, 192 (Rex J. Ahdar ed., 2000). Observing that the art community has seemed more sensitive to the possibility of causing offense to Maori or Muslim religionists, Mortensen comments:

> The galleries were willing to intentionally offend Christians when they would be most reluctant to offend other religionists in similar ways. Almost perversely, that arises precisely because of the dominance of Christianity in Australia and New Zealand and the ambiguous place the Christian tradition now occupies in modern Western culture.

Id. at 192.

37. *See* HUNTINGTON, *supra* note 6, at 42, 66 ("Of all the objective elements which define civilizations, . . . the most important is religion . . . . In the modern world, religion is a central perhaps the central, force that motivates and mobilizes people.").

38. *Id.* at 70.

the Western achievement of religious freedom has been a direct expression of the "prevailing dualism in Western culture" derived from the Christian emphasis on a "[s]eparation of spiritual and temporal authority."[39]

Huntington's claims in this respect are easily corroborated. Thus, early proponents of religious freedom in the United States, such as Roger Williams, argued from distinctly Christian premises.[40] In a similar but less sectarian vein, as Marie Failinger explains, Madison and Jefferson "relied on theological as well as secular arguments."[41]

> Madison's and Jefferson's rhetoric seems to be directed at a polity that they, at least, believed did not question the existence of God. Thus, some of their key arguments for religious freedom proposed that human beings were created by God precisely to be free-thinking and free-willing, to make choices, including the choice for God, of their own will and not under coercion from anyone else. Madison claimed that not only did it go against human nature to coerce religious belief but also, because no one could know what relationship God expected to have with different human beings, coercing religious belief or behaviour might threaten the Divine Plan.[42]

If Western civilization—including Western religious freedom—is in part a product of Christianity, however, it is also true that it is in part the result of a revolt against the Christian tradition.[43] Indeed, the standard assumption that the public sphere must be "secular"—an assumption that, as noted, is a staple of the Western approach—often reflects a murkily-conceived effort to cleanse the public domain of religion. Thus, while noting that the U.S. constitutional commitment was originally justified to a significant extent by theological arguments, Failinger also observes that "most members of the [U.S. Supreme] Court would never consider using [these arguments] today in a culture of religious pluralism."[44]

It may seem ironic that a commitment to religious freedom arising out of theological justifications might now have the effect of

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39. *Id.*

40. *See generally* TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY (1998).

41. Failinger, *supra* note 2, at 93.

42. *Id.*

43. In a recent assessment, Charles Taylor explains that modern liberal freedom came about in part as the result of a revolt against the Christian tradition. CHARLES TAYLOR, A CATHOLIC MODERNITY? 16-19 (James L. Heft ed., 1999). *See, e.g., id.* at 17 (asserting that "the fullness of rights culture couldn't have come about under Christendom. . . ."). Even if it is not the cause of our confusions, the so-called conflict between the clauses—a conflict in which one clause is thought to mean that government cannot aid religious while the companion clause is said to mean that it must—is surely a manifestation of the prevailing Western double-mindedness toward religion.

44. Failinger, *supra* note 2, at 93.

excluding such justifications from public discourse, and thus of cutting off the commitment to religious freedom from its own source; but such is the peculiar path that the modern discourse of religious freedom has traveled. The irony is perhaps most conspicuous in the observation that a faithful application of the Supreme Court's current establishment clause doctrine, which forbids government to send messages "endorsing" religion, would surely have the effect of invalidating Thomas Jefferson's celebrated Virginia Statute for Religious Liberty. That law began, after all, by explaining its own rationale with the flagrant declaration that "Almighty God hath created the mind free" and that violations of religious freedom were a "departure from the plan of the Holy author of our religion."[45] In recent times, laws have been struck down for endorsing religion in far less wanton ways.[46]

THE EXHAUSTION OF THE WESTERN APPROACH?

It is plausible to view these features—legalism, rationalism, individualism, religious privatism combined with public secularism, a paradoxically elitist egalitarianism, and a deeply ambivalent attitude toward the Christian tradition in which many of the other features are historically rooted—as constituting a distinctively modern and Western approach to the issues of religious freedom. And if the considerable achievements in realizing religious freedom owe much to such commitments, current confusions may be traceable to these features as well.

To start with the last feature, it can hardly be surprising that a public culture that seeks to slough off its traditional Christianity and to construct a "secular" public domain devoid of religious purposes and justifications might eventually find itself tongue-tied in trying to say just what "religion" even is or why the exercise of "religion" should deserve special legal protection.[47] These difficulties are exacerbated by the elitist quality of the Western approach. What would one expect, after all, from an approach that assigns the task of defining religion and protecting the exercise of religion to the class that is most estranged from the Western religious tradition—that is, to what Rex Ahdar describes as "the international subculture of

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45. For a detailed discussion of this paradox, see Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

46. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating law providing that students could have a moment of silence for "meditation or voluntary prayer" mainly because the words "voluntary prayer" sent message of endorsement).

47. For a more elaborate argument on this point, see SMITH, *supra* note 8, at ch. 3.

persons in the knowledge sector (academics, lawyers, media people and so on)"?[48] Reid Mortensen notes that in the controversy over the Australian gallery's plan to display the Serrano "Piss Christ" exhibit, one fact emerged clearly: public officials simply lacked any genuine comprehension of the religious faith of those who were offended by the exhibit.[49]

The failure of this class to understand the real nature of religion is reflected, among other ways, in the insistent characterization of religion as simply a matter of private, individual choice.[50] And the distortion of what "religion" is can in turn lead quite naturally to a denatured understanding of what "the free exercise of religion" is even about. Professor Failinger explains how the issue has been transformed. "What began as an argument that government must ensure a free response by the individual called distinctively by the Divine within each unique religious tradition has, in modern-day cases, become an argument for the protection of human autonomy. . . ."[51] As a result, "[w]hile the word 'conscience' is still used, it has come to mean very little beyond the notion of personal existential decision-making. . . ."[52]

Neither should it be surprising, given this failure of comprehension, that scholars and lawyers would encounter difficulty in distilling the meanings of religion and religious freedom into neatly articulable rules or principles, enforceable in consistent legal fashion by courts. We might predict as well that even a textual provision explicitly mandating broad and vigorous protection for religious exercise, such as Article 18 of the International Covenant on Civil and Political Rights, would be interpreted coyly and unsympathetically, as Professor Evans' essay relates. The literal command of the text is drowned, as it were, in a sea of subcultural incomprehension. Whatever the words may seem to command, how

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48. Rex J. Ahdar, *The Inevitability of Law and Religion: An Introduction*, *in* LAW AND RELIGION 1, 4 (Rex J. Ahdar ed., 2000) (noting that this "knowledge sector" subculture is an exception to the generalization that the world is becoming more religious rather than more secular, as social scientists had long predicted).

49. Mortensen, *supra* note 36, at 190. Mortensen observes:

> All too frequently public officers underestimated the depth of the resentment felt in some Christian communities, and that this resentment could spill into violence. . . . However, the judge's assessment that religionists should not feel wounded by degrading representations of their sacred symbols envisions a rational, passionless Utopia that has no parallel in any human society. . . . There was little appreciation that a person's suffering "offence" can represent his or her genuine anger, frustration and rage.

Id. at 190-91.

50. *See* van Bijsterveld, *supra* note 29, at 166 (pointing out the inadequacy of the prevailing individualist view of religion).

51. Failinger, *supra* note 2, at 93.

52. *Id.* at 94.

much commitment can we expect, after all, from officials who do not understand just what they are supposed to be protecting or why they are supposed to be protecting it?

In short, for all of its past achievements, the Western approach today seems to have lost its moorings; it has great difficulty in understanding its own subject matter. A concrete example of these shortcomings is supplied by Davina Cooper's fascinating study of the eruv controversy in Barnet, a borough in northwest London. An eruv, Cooper explains, is a "Talmudic, symbolic perimeter" created in order to permit Orthodox Jews to engage in necessary travel within a limited space without violating Jewish law regulating movement on the Sabbath. Although the perimeter is symbolic, it is designated by physical markings, and the requirements for establishing a valid eruv can be complicated. In the London controversy, Jewish authorities had concluded that the symbolic enclosure could be formed mainly by already existing railway lines, fences, and walls; but a few open spaces needed to be filled in, so proponents of the project applied to the Barnet Planning Committee for permission to erect "a series of poles joined by thin, high wire" in these spaces. This application generated widespread and passionate opposition. Purporting to ignore the religious dimension of the controversy, the Planning Committee denied the application with the explanation that the poles would be "visually intrusive and detrimental to the character and appearance of the street scene."[53] After considerable investigation and delay, this decision was eventually reversed by the Secretary of State, who found the visual impact of the poles to be negligible but, like the Planning Committee, declined to take any official notice of the dispute's religious dimension.[54]

Cooper, a professor at Keele University who studied the dispute and interviewed a number of residents and participants, notes that "on the surface it does seem hard to fathom why a few poles joined by thin, high wire should have engendered such panic, hatred and fear."[55] Attempting to account for the passions generated on both sides by the issue, she explores the underlying cultural and symbolic significance of the proposed eruv. Opponents saw the eruv, she explains, as "fundamentally irrational in its expression of premodern norms."[56] And they "emphasized both the importance of, and threat posed to, stable, planned neighbourhoods regulated according to rational, coherent norms."[57] These premodern and ostensibly

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53. Davina Cooper, *'And Was Jerusalem Builded Here?' Talmudic Territory and the Modernist Defensive*, *in* LAW AND RELIGION 199, 201-03 (Rex J. Ahdar ed., 2000).

54. *Id.*

55. *Id.* at 215.

56. *Id.* at 207.

57. *Id.* at 207.

irrational commitments were especially troublesome because eruv supporters were attempting to project them into the public sphere, which is supposed to be under the reign of secular rationality. Thus, opponents perceived a huge difference between an eruv and a synagogue or church. Even though the latter is much more visible, the important distinction is that "people go *into* a building to worship; with its doors closed, only attenders know what takes place. By contrast, creating a perimeter around a neighbourhood or district makes difference a 'public' matter."[58] In threatening the rational and secular character of the public sphere, moreover, eruv supporters were viewed as subverting the foundations of citizenship and of legality itself. Their proposal to set up a few poles was thus perceived as a menace to the very "discursive authority of the law."[59]

Cooper's account underscores two features of the controversy. First, the fervid resistance to the eruv was motivated by an effort to defend, on the crucial level of public symbolism, commitments that are central to the prevailing Western approach to religious freedom: legality, rationalism, a secular public sphere. Second, those very commitments paralyzed public officials in their efforts to address the actual character of the dispute. Cramped by the constraints of secular, legalistic rationalism, those officials could not take formal cognizance of what everyone else knew—that is, of the symbolic and religious character of the dispute. So officials confined themselves to treating the controversy as one about visual clutter. Such is the level of discourse to which the Western approach in its current modern version may reduce us.

TRANSCENDING (OR RECOVERING?) THE WESTERN TRADITION?

The essays in this book, as noted, do not provide the kind of payoff that one might have hoped for from a more international discussion of religious freedom. They do not disclose, that is, any legal system in which the engagement with issues of religious freedom is discernibly more efficacious than that of the United States and to which one might therefore look for guidance. On the contrary, approximately the same daunting problems appear to arise almost everywhere—or at least in the legal systems represented in this

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58. *Id.* at 208. Though eruv opponents were attempting to defend "the 'secular' character of the public sphere," however, this commitment to secularism sat in uneasy tension with a residual loyalty to Christianity. *Id.* at 215. Cooper notes that Christianity and secularism are supposed to be antitheses. And on the face of things, opponents of the eruv were fighting to maintain a "secular" public sphere. *Id.* But "[i]n this conflict, the abstract citizen did not have to be scratched too hard to find its Christian traces." *Id.* at 211.

59. *Id.* at 203.

collection. But that observation itself may point to a different but valuable insight. Difficulties in understanding and addressing religious freedom, it seems, may result less from the distinctive characteristics of the U.S. constitutional regime than from the limitations inherent in a pervasive Western approach to these issues.

Do the essays hold out any hope of escape from these difficulties? The answer to that question must be tentative. Studies like Professor Cooper's at least suggest the possibility of achieving a better understanding of what is at stake in religious freedom disputes by adopting perspectives that are less purely rationalistic and legalistic and more sensitive to underlying cultural and symbolic concerns. In a related vein, Professor van Bijsterveld detects a gradual shift in the "intellectual mood;" one that permits a greater recognition of the social dimension of religion and that relies less on the "'hard law'approach" to controversies in favor of greater use of "the 'soft' approach—promotion, consultation, dialogue and education."[60] This change, she foresees, will lead to reduced reliance on "the individual-liberty, non-interference model" for addressing religious liberty issues, and also to a greater willingness to accept religious communities as "co-builders of a 'soul of Europe.'"[61]

These hopeful observations are impressionistic and speculative, to be sure. It would be easy to dismiss them as amounting to little more than platitudinous pleas for greater mutual respect and understanding. A more substantive and perhaps radical possibility is also imaginable, though it is only hinted at here obliquely—mostly in Professor Ahdar's thoughtful but somewhat surprising introduction.

Ahdar's first paragraph notices the once familiar view that "[t]he ultimate source of law is God or some God analogue."[62] He draws upon a classic essay by Yale law professor Arthur Leff[63] in which Leff claimed that "[t]he ultimate source of authority in a legal system (the 'god' of that system) would seem to be either divine and transcendent, on the one hand, or temporal and earthly, on the other. The choice is between God (or Gods) and Man (or mankind)."[64] Claims such as these might once have seemed almost axiomatic, Ahdar goes on to observe, and they are still accepted, for example, in Muslim cultures. Such claims, however, are controversial in our current Western

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60. Van Bijsterveld, *supra* note 29, at 177.

61. *Id.* at 176-77. In a similar spirit, Professor Mortensen rejects the application of blasphemy law as a remedy for offense to the sensibilities and faith of religious believers, but he urges public officials and others to take greater ethical responsibility for their decisions instead of treating legality as a license for disregarding such concerns. Mortensen, *supra* note 36, at 190-93.

62. Ahdar, *supra* note 48, at 1.

63. Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.

64. Ahdar, *supra* note 48, at 1.

culture—or rather they would be controversial, at best, if they were considered seriously at all.

Ahdar explains how the increasingly systematic separation of law from religion has pushed such claims from view, leaving law–and public culture generally—increasingly secular. On the plus side, we may ascribe our realization of religious freedom to that development. But the separation also has its costs. Ahdar quotes Wolfhart Pannenberg's assertion that a secular public order generates "a feeling of meaninglessness" in citizens, and he adds that "[t]he *anomie* experienced by postmodern man is a much noted phenomenon."[65] In such a situation, it is doubtful that authority and law can continue to flourish. "To work effectively," Ahdar asserts, "law must rely on more than coercive sanctions (there are simply not enough policemen in the world); it must attract people's trust and commitment. Quite simply, citizens must (in a certain sense) place their faith in it. . . ."[66]

These observations may seem unduly portentous as an introduction to the essays that follow—and that Ahdar's introduction then proceeds to summarize. Surely none of the following essays addresses or explores these claims and questions in any deliberate way. Nonetheless, in these opening pages, it seems that Ahdar is seeking to re-engage the questions that characterized the Western tradition from which our modern issues in law and religion descend, but which that tradition in its modern form has by now largely suppressed. The implication, it seems, is that in order to address the issues of the interaction of law and religion in an efficacious way, we must not only acknowledge that religion is a social phenomenon—although it is that, as Professor van Bijsterveld suggests—or that it has a symbolic dimension—as Professor Cooper recognizes. Beyond these adjustments, we would probably need to move beyond talking about "religion" as a reified or discrete phenomenon to be inspected, discussed, and dealt with, and again engage the more ultimate claims that "religion" has typically encompassed.

At this point, the suggestions posed by Ahdar seem to converge with the analysis of Professor Huntington. Huntington argues, in a remarkably matter-of-fact and pragmatic tone, that Christianity lies at the heart of Western civilization with its accomplishments, and that if this civilization is to remain viable it will eventually have to make its peace with its Christian heritage.[67] If there is a chance of getting beyond our current frustrations, in short, it may lie not so much in either softening or transcending the Western approach as in

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65. *Id.* at 4 (quoting Wolfgang Pannenberg, *How to Think About Secularism*, FIRST THINGS, June-July 1996, at 27, 30).

66. Ahdar, *supra* note 48, at 1-5.

67. HUNTINGTON, *supra* note 6, at 70, 305.

more completely recovering it—in recovering, that is, the philosophical and theological sources that lie at the foundation of our civilization's achievements in, among other things, religious freedom.

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