RELIGION: AMERICAN AND HUMAN

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ABSTRACT: *In his lecture, "Rights: American and Human," the international law professor Louis Henkin noted the great difference between the nature of rights as conceptualized in the United States, what he calls American constitutional rights, and the nature of rights as conceptualized in the international human rights instruments. In his discussion, he found that the fundamental difference between American rights and human rights was the central focus of liberty and equality, respectively. This article explores the difference of the conception of religion between the American and international systems. The legal conception of religion in the United States is as an institution separate from the religious community while in the international human rights instruments, religion is an essential identifying factor among communities. Using Henkin's language, religion in America tends to focus on a liberty-centric relationship between the religion, the state, and the people while religion in international human rights focuses on the equality-centric relationship among religious, but ultimately human, communities. This distinction is fundamentally important in when concerning the defamation of religion, with such speech hardly invoking human rights within the United States while taking on a more defamatory character in international human rights law.*

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Introduction

In his lecture, "Rights: American and Human," Louis Henkin contrasts the idea of human rights as developed and understood in an American context with human rights as espoused in the international human rights instruments.[1] He specifies American constitutional Rights as having emerged from Eighteenth Century European ideas and antecedents while international human rights emerged during and in revulsion to the horrors of the Second World War.[2]

To Henkin, the fundamental difference between American constitutional rights and international human rights is the nature of equality within the respective systems, both in the way it is emphasized and the way it is defined. He contrasts the "limited" American understanding of equality, focusing on equal protection of the laws and equality of opportunity, with the expansive international human rights view of equality, which extends equality to the economic and social needs of individuals and groups. Henkin finds

1 Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 1 (1979).
2 *Id*. at 4.

American equality to be necessary to, but as an insufficient basis for, international human rights.[3] American and international theories differ on the topic of the liberty-equality distinction. The conception of equality is the principal theme of the international human rights instruments.[4]

This paper seeks to explore the different conceptions of religion between the American and international human rights systems. Henkin fairly argues that different views of equality are the fundamental difference between international and American approaches. However, the reason for the distinction within the religious liberty concept bases itself on the very nature of religion. The legal conception of religion and that conception's relationship with human legal subject takes on the form of a liberty-focused understanding in the United States and a more equality-focused understanding in the international human rights instruments.[5]

In America, religion exists as an institution separate from human communities, and due to the severability from individuals from their religion, a balancing of the rights of the

3 *Id*. at 22-23.

4 *Id*. at 23.

5 This paper is concerned with the legal conception of religion and not a sociological definition of religion.

people and the rights of the religious institution has created a jurisprudence focused on the liberty of individuals as opposed to the institution of religion. However, international human rights instruments understand religion as a human phenomenon and an important marker of identification among human communities. Religion bleeds outside of the individual's belief system, becoming a part of the individual's culture and identity. This approach has led to an equality-focused jurisprudence that has sought to balance the liberties between human communities whose religion demarcates their characterizing factor. I begin with a short sketch of the background of religious freedom jurisprudence in each context, followed by a short analysis of how the American and international approach would interpret the controversial matter of the defamation of religion. Finally, I end with an examination of the importance of each conception of religion to their respective tradition.

American

It is complicated to determine the direct, guiding influence of American constitutional rights. For Henkin, American rights are, by their own claim, natural and inherent.

They exist antecedent to the Constitution rather than being derived from the Constitution and retain substantial autonomy and freedoms as individual rights against the government.[6] American rights are also inherent, yet they only held legal weight once they were fleshed out through the relationship of struggle between the individual and his society.

In American law, the most important principle regarding the freedom of religion is the First Amendment of the Bill of Rights. The religion clauses of the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."[7]

The First Amendment remains the most important provision in American religious liberty jurisprudence because it enshrines a fundamental right rather than creating a new right. The right to the freedom of religion was previously and principally fleshed out and defended by the state constitutions before, and for many decades after, the ratification of the First Amendment. Henkin cites

6 Henkin, *supra* note 1, at 7.

7 U.S. Const. amend. I.

the Virginia and Massachusetts constitutions as the most influential documents in the development of the United States Constitution.[8] Thus, it is important to look at important influences on the United States Constitution and the Bill of Rights, including the 1776 Virginia Declaration of Rights, principally drafted by George Mason with amendments by Robert C. Nicholas and James Madison, as well as the 1780 Massachusetts Constitution, principally drafted by John Adams.

The Virginia Declaration of Rights, drafted in 1776, was written in tandem with the Virginia Constitution of 1776, as a proclamation of the inherent rights that later came to embody Henkin's idea of American constitutional rights. The document became an important influence on later instruments including the United States Declaration of Independence and the United States Bill of Rights. Section 16 is of the Declaration specifically handles the issue of religion, providing for the free exercise of religion.[9] The section defines religion as a "duty" which can only be

8 *Id.* at 2.

9 V.A. Decl. of Rights, § 16 (1776).

discharged by reason and conviction.

Furthermore, the Massachusetts conception of religion also provides an important influence on religious liberty in America. The document, primarily drafted by future American President John Adams, agrees with Mason's Virginia conception of free expression, with Article II of the Massachusetts Constitution protecting citizens from being "hurt, molested, or restrained," for worshipping according to his conscience or his religious profession or sentiments as long as he does not disturb the public or obstruct on others' religious practice.

Here, Adams provides again for the freedom of religion of individual believers, with the constitution providing for the protection of free expression. To the surprise of modern Americans, the Massachusetts Constitution provides for a light form of religious establishment. Clause 1 of Article III of the constitution, shares Adams belief that religion provided an important public function and his recognition for the pragmatic need for state support of religious institutions, seeking to establish religious institution's rights within the constitution. Article III goes on

to provide that the people of Massachusetts have the right to "invest their legislature with power to authorize and require . . . the several towns, parishes precincts, and other bodies politic" provisions for public worship and the "support and maintenance of public Protestant teachers of piety, religion, and morality." However, Adams maintains that localities have the exclusive right of electing these public teachers, that the moneys paid by citizens should be directed toward the teachers of his own religious sect or denomination, and that every denomination of Christian should be "equally under the protection of the law" and that no sect or denomination should be subordinated by law.[10]

The late Judge John T. Noonan, Jr. decried the Massachusetts model, describing the state's blasphemy laws, religious tests, and financial support for religious institutions as an antiquated model of political power for the Congregationalist majority to retain their supremacy in state-level politics.[11] However, the relationship between the church

10 M.A. Const, art. III (1780).

11 John T. Noonan, Jr. *Quote of Imps* in The Virginia Statute for Religious Freedom: Its Evolution and Consequence in American History 171 (Merrill D. Peterson & Robert C. Vaughan ed., 1988).

and the state in Massachusetts should be seen in the context of Anglo-American legal history, particularly in the legal mythology of England. Adams' political theory derived from a general sense of caution in the use of political power, with Adams' pessimism taking the form of important constraints through having different segments of society maintain checks and balances on the others. It was this pessimism of political power that led him to draft the clause, following the principle that what can be enumerated can be controlled. The provision of rights to the church also creates duties of the church, as well as defining the relationship between the church and the people of Massachusetts. In some ways, the provisions for the church define the rights and duties between the church and the state similar to Chapters 1 and 63 of Magna Charta, which defined the rights of the church against the rule of King John.

The apparent friction between the free expression provisions of the Virginia and Massachusetts constitutions and the extensive but restricted form of religious establishment in the Massachusetts constitution is discussed by Joseph Story in the 1833 commentaries on the United

States Constitution. While Justice Story recognizes the importance of promoting public worship, he states that the "duty of supporting religion . . . is very different from the right to force the consciences of other men, or to punish them" for worshipping God according to their own conscience.[12] Story's commentaries on the First Amendment provide important insights into the drafting of the free exercise clause. The state constitutions suggest in their free exercise clauses that while a government may establish a religion, it must balance the liberties of religious dissenters, whose right to free expression of religion is protected. Free exercise in the United States was thus originally drafted in the context of the establishment clause and must be understood in its relationship to the clause.

The current understanding of religious freedom in the United States, however, rather than following the tradition of Mason or Adams is, ironically, heavily influenced by the thought of Thomas Jefferson. Certain Jeffersonian maxims, including the "wall of separation between Church and state" and the threat of "Public Religion" and "political ministry"

12 JOSEPH STORY, COMMENTARIES, 1869-870, (1833).

to the political realm are accepted notions in American political and legal culture.[13] However, as John Witte remarks, the Jeffersonian vision did not become prominent until the 1940s.[14] John Adams' vision of religious liberty, exemplified by the Massachusetts Constitution as a "mild and equitable establishment of religion," required the balance between the freedoms of private religions with the establishment of one public religion.[15] While the Supreme Court gradually adopted Jefferson's vision, it was the Adams model that dominated American constitutional law during the first 150 years of the American republic.[16]

The Adams model should not, however, be idealized. Witte notes how states applied Adams' model, balancing the general freedom of private religions with the "general patronage" of the common, public religion.[17] States, however, still discriminated against religious minorities,

13 H. WASHINGTON, ED., THE WRITINGS OF THOMAS JEFFERSON, 113 (1853-1854); Martin E. Marty, *On a Medial Moraine: Religions Dimensions of American Constitutionalism,* 39 EMORY L. J. 1, 16-17 (1990).

14 JOHN WITTE JR., GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION, 244 (2006).

15 *Id*. at 247.

16 *Id*. at 244.

17 *Id*.

particularly those with "high religious temperature or low cultural conformity" by delaying corporate charters, tax exemptions, and educational licenses and turning a blind eye to private abuses against minority religious groups.[18] Indeed, the history of the United States indicates that the power of institutionalized religion was often utilized as a form of control over religious minorities. Noonan contrasts the 1780 Massachusetts model with the much freer model celebrated in the Virginia Statute of Religious Freedom.[19] The utilization of institutionalized religion continued to be a means of asserting control over minorities, a form of oppression that would not be curbed until the 1940s when the United States began to take on and implement a more Jeffersonian model of religious liberty.

Public religion prior to 1940 was generally Christian, if not Protestant, as state and local governments endorsed religious symbols and ceremonies. These governing bodies inscribed Decalogues and Bible verses on the walls of public buildings, erected crucifixes on public grounds, subsidized

18 *Id*. at 244-45.
19 Noonan, *supra* note 11, at 171.

Christian missionaries, underwrote expenses for Bibles and religious books, supported mandatory courses in the Bible and religion in public educational institutions, and predicated laws and policies on biblical teachings.[20] Such a model of religious liberty in eighteenth and nineteenth-century America invokes Blackstone in that religion. Specifically, this established, ecumenical form of Christianity provided an important tradition that formed the assumptions of the national, political, and cultural structures. During those centuries, "Christianity was part of American common law."[21]

However, the Second Great Awakening (cir. 1810-1860), the ratification of the antislavery amendments to the United States Constitution (1865-1870), and waves of immigration from Europe and Latin America transformed the American religious landscape, challenging the efficacy of Adams' model of religious liberty.[22] These new religious groups challenged the traditional Calvinist and Anglican strongholds of the republic, and when neither assimilation

20 Witte, *supra* note 18, at 250-51.
21 *Id*. at 251.
22 *Id*. at 252-53.

nor accommodation policies were effective, state and local governments began to clamp down on dissenters.[23]

Beginning in 1940, the United States Supreme Court responded to discrimination against religious minorities with the landmark cases *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education* (1947), which incorporated the First Amendment religion clauses through the Fourteenth Amendment due process clause to the states.[24] At this point, the Court introduced a Jeffersonian distinction between church and state through a strong free exercise clause, protecting the rights of new religious groups against local officials, and a strong disestablishment clause, which directly outlaws the state establishment of public religion.[25] Most of these later cases were applied in jurisprudence regarding traditional state patronage of religious education, but the Supreme Court expanded this logic to all establishment clause cases through a general test in *Lemon v. Kurtzman* (1971).[26] The shift from Adamsian to Jeffersonian logic by the Supreme Court was an

23 *Id*. at 253.
24 *Id*. at 254.
25 *Id.* at 254-55.
26 *Id*. at 255-56; John Witte Jr., Religion and the American Constitutional Experiment, 193 (2nd ed. 2005).

important response to the changes of the American religious landscape in the nineteenth century.

However, the shift from the Adamsian logic to the Jeffersonian logic of religious establishment did not change the conception of religion as an institution within American law. Inherent in Jefferson's famous quote, a "wall of separation between church and state" takes for granted the Christian institution of the church as an entity separate from individual adherents and of parallel status to the state. Witte argues that the move toward a Jeffersonian separationism was spurred by the Warren Court's concern for the freedom of conscience and the right of people to choose to forgo religious education and religious ceremonies, as well as a principle of religious equality, where the rights of persons of all faiths and of no faith ought to receive the equal protection and treatment of the laws.[27] The Warren Court's concern for religious establishment echoes some of the concerns in international human rights, where establishment necessarily deprives the equality among religious groups. However, while the Court hinges upon the notion of equality, the

27 Witte, *supra* note 31, at 222.

cases maintain an emphasis on the freedom of conscience of individuals against state supported religion, placing more weight on the individual side of the scales.

The Supreme Court has slowly stepped away from its Warren Court-era separationism, with certain cases relaxing the strict *Lemon* test rules.[28] This return appears to be creating a hybrid model, taking aspects of the Adams and Jefferson vision of religious establishment which would place emphasis on the rights and freedoms of individuals against the institution of religion. The emphasis, despite its more egalitarian vision during the Warren Court, has always been placed on the liberty-centric balancing between the free expression and the freedom of conscience of individuals against the rights of an established religion. While the United States currently shows no signs of a return to state-level established churches, the current emphasis between balancing the rights of people against the rights of

28 *See* Agostini v. Felton, 521 U.S. 203 (1997); *See also* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Rosenberger v. Rector of Univ. of V.A., 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Bd. of Educ. Of the Westside Cmty. Sch. V. Mergens, 496 U.S. 226 (1990); Bowen v. Kendrick, 487 U.S. 589 (1988).

religious organizations continues in issues concerning public education and other state funding questions.

Human

International rights, on the other hand, do not reflect a "single, comprehensive theory of the relation of the individual to his society," being instead an "article of faith" that would appeal to diverse global political systems, designed to correspond to human nature and human society.[29] Henkin notes that international human rights have a "less-exalted status" than American rights.[30] Despite the influence of American rights on international human rights, there exist major systemic differences between the two. Most importantly, American rights are part of a larger theory of representative democracy while international human rights were designed to be acceptable in very different political systems.[31]

Freedom of conscience and religion are mentioned in Article 18 of the Universal Declaration of Human Rights. This article allows that everyone has the right to freedom

29 Henkin, *supra* note 1, at 9.
30 *Id.* at 14.
31 *Id.* at 19.

of thought, conscience and religion, including the right to change one's religion and the freedom to manifest one's religion in teaching, practice, worship and observance.

Religion also appears within the Declaration as a category not to be infringed upon. Article 2 declares that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status" (emphasis added). Moreover, Article 16 mentions religion as a category not to be limited in guaranteeing the right to marriage. Article 7 proclaims that all people are entitled to equal protection against discrimination and the equal protection of the law.

Brice Dickson adds that Article 7 is not confined to the other rights specified in the Declaration. He states that a person's religion, along with other personal attributes, must not be permitted to affect the person's entitlement to the equal protection of the law.[32]

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32 Bruce Dickson, *The United Nations and Freedom of Religion*, 44 Int. and Comp. L. Q. 333 (1995).

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) reiterates the UDHR's protection of religious freedom. It further adds that coercion cannot be used to impair or force a person into or out of a religion and limitations on religious freedom must be "prescribed by law" and must be necessary for public safety, order, health, or morals or the fundamental rights and freedoms of others.

Dickson notes that Article 18 of the ICCPR should not be read in isolation from Article 19, which "guarantees the rights to hold opinions without interference and to freedom of expression," overlapping with Article 19 regarding the protection of the right to disseminate religious ideas.[33] Dickson adds that this is bolstered and limited by Article 20(2), which stipulates, "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[34] Article 27 also provides for religious minorities, entitling them to "enjoy their own culture," to "profess and practice [sic] their own religion," and "to use their own language."

33 *Id.* at 340.
34 *Id*.

International human rights norms are designed to address the pluralism of various confessions and faiths. They note the distinct functions of parents, teachers, and religious officials as well as the special place of religious minorities and non-traditional religions, with states obligated to be "particularly solicitous" of their needs. Furthermore, "equality of religions before the law is not only to be protected but to be affirmatively fostered by the state."[35]

Both national and international authorities struggle to arrive at a proper legal definition of religion. For instance, T. Jeremy Gunn notes how the legal definition of religion often varies due to the different outlooks upon familiar and unfamiliar belief systems. Widely practiced forms of religion are more easily recognized under the law while obscurer beliefs are excluded from legal protections.[36] Bruce Dickson remarks that religion is characterized by the UN Charter as a personal attribute, akin to race, sex, and language.[37] On November 25, 1981, the General Assembly unanimously

35 Witte, *supra* note 26, at 242.

36 T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law,* 16 HARVARD HUM. R. J. 189, 195-96 (2003).

37 Dickson, *supra* note 32, at 332.

adopted and proclaimed a declaration, specifying in the Preamble that religion or belief is "one of the fundamental elements in [an individual's] conception of life and that freedom of religion or belief should be fully respected and guaranteed."[38]

Article 2(1) of the 1981 Declaration states that "no one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief."[39] The declaration clarifies in Article 4 that member states must "take effective measures to prevent and eliminate discrimination on the grounds of religion or belief."[40] Furthermore, Article 7 provides that "the rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice."[41] Dickson argues that these three articles, when read together, call on national laws to protect

38 G.A. Res. 63/181 A, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (March 16, 2009).

39 *Id.* at 344-45.

40 *Id.* at 345.

41 *Id.*

all persons against religious discrimination from all other persons, which is a "bold attempt" to outlaw both public and private religious discrimination.[42] The emphasis remains on human beings, with religion categorized as an identifying factor akin to sex, race, or ethnicity.

Both American constitutional rights and international human rights provide for the freedom of conscience and the free exercise of religion. While the protections of individual freedom of conscience contain general similarities, significant differences remain between the two approaches. However, the fundamental difference between free exercise in the United States and international human rights is that free exercise in America is interpreted in the context of religious establishment. In contrast, international human rights interprets free exercise in the context of religion as an identifying factor of populations. The American approach attempts to balance the rights of individual people, and their freedom to exercise, with the rights of religious institutions that exist separate from human populations. It is thus concerned with the *liberty* of individuals against

42 *Id.* at 344.

the government and the government's established religion. In international human rights, religious institutions do not appear to have a separate legal status. Instead, religion is considered an identifying characteristic among a people, with nations balancing the interests of religious majorities with religious minorities. International human rights thus concerns itself with the *equality* among religious groups to be able to practice their religion according to their individual consciences.

The fundamental difference between these approaches is that the direction of American law has come to value the rights of individuals over the rights of religious institutions. In international human rights, however, the balance is not between groups of individuals and institutions, but between different groups of individuals, with the rights of both groups inviolable. The intrinsic nature of religion to human communities in international human rights law has made issues of rights balancing more difficult as it has created more protections for religious ideas given their connection to groups of people. It is along these lines that the liberty-equality distinction becomes most clear, with the liberty

of individual religious believers being asserted against institutionalized religion in the American context, and the equality of different religious groups being emphasized in the international context. These different emphases lead to different outcomes in deciding issues that concern the free exercise of religion among different groups. One example between the different outcomes is observable in the matter of the defamation of religions.

The Defamation of Religions

The defamation of religions is a controversial issue that invokes both the right to free speech and expression and the right to religious freedom. The extent of freedom of speech and expression in American and international contexts is very different, with the right being much more expansive in the United States. The debate over the defamation of religion in the United Nations has a long history, being one of the overriding motivations for the Organization for Islamic Cooperation (OIC), which argued that "the right to freedom of thought, opinion and expression could in no case justify blasphemy."[43]

43 Robert C. Blitt, *Defamation of Religion: Rumors of Its Death are Greatly Exaggerated,* 62 Case W. Res. L. Rev. 347, 352; *See also* U.N. GAOR, 49th Sess., 65th mtg. para 44, U.N. doc. A/C.3/49/SR.65 (Dec. 13, 1994).

In 1999, Pakistan, on behalf of the OIC submitted a draft resolution subtitled "Defamation of Islam" to the United States Commission on Human Rights. In its resolution, Pakistan expressed "deep concern that Islam [was] frequently and wrongly associated with human rights violations and with terrorism," as well as concern that Islam was the target of increasing intolerance while encouraging states to "combat hatred, discrimination, intolerance and acts of violence" in order to "encourage understanding, tolerance and respect in matters relating to freedom of religion or belief."[44] Despite the resolution's facial preference for Islam, the Commission passed the resolution without a vote.[45] Similar resolutions were passed in 2000 and 2001.[46]

After the attacks on September 11, 2001, the Commission, concerned by the impact of the events on Muslim minorities and communities within some non-

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44 Allison G. Belnap, *Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights* 2 BYU L. Rev. 635, 637-38 (2010); *quoting* ESCOR, 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 (Apr. 20, 1999).

45 *Id*. at 638; *citing* CHR Res. 1999/82, at 280-81, U.N. ESCOR, 55th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1999/167 (Apr. 30, 1999).

46 CHR Res. 2000/84, at 336-38, U.N. ESCOR, 56th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2000/167 (Apr. 26, 2000).

Muslim countries, the negative projection of Islam by the media, and laws specifically targeting and discriminating against Muslims, called for a vote on the defamation of religions resolution, passing with a majority vote of twenty-eight States in favor, fifteen opposed, and with nine abstaining.[47] However, there remained a continuing concern that the resolution specifically favored Islam, though some references to "religion" and "religions" implied the inclusion of other religions.

However, defamation of religion drew controversy after the *Jyllands-Posten* incident in 2005, in which the Danish newspaper printed cartoons of the Prophet Muhammad in a "less than favorable" light.[48] The cartoons incited acts of violence, with Muslim extremists directing death threats, violent acts, and subsequent casualties in response to the publication of the cartoons. Addressing the issue of defamation of religion, the United Nations General Assembly passed a resolution to combat religious defamation.[49] The resolution pits the protection of Islam

47 Belnap, *supra* note 42 at 634-35; *citing* ESCOR, *supra* note 41, at 1.
48 *Id.* at 639.
49 *Id*. at 640.

against the free expression of the press. The United States, considering the implications the resolutions could have on First Amendment free speech principles, joined with other Western states in vigorous opposition.

In 2011, the United Nations Human Rights Council, the successor body of the Human Rights Commission, agreed to condemn "any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence" and set out suggestions to foster an environment of religious toleration, respect, and peace.[50] However, Robert Blitt argues that while these remarks espouse a consensus approach, the legitimacy of the prohibition of defamation of religion remains alive and well.[51] Some critics go so far as to interpret the previous resolutions and the rather weak consensus to amount to an international blasphemy law. Despite this, defenders of the consensus claim that a blasphemy law would be offensive to the Resolution, with Comment 34 expressly providing that

50 Blitt, *supra* note 41, at 361; *citing* Human Rights Council Res. 16/18, Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief, 16th Sess., Mar. 24, 2011, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011).

51 *Id*. at 362.

blasphemy laws among other prohibitions are "incompatible with the Covenant."[52]

The defamation of religion controversy pits the freedom of religion and the freedom of speech against each other. While American law provides more explicit protections for the freedom of speech, both rights are important to both contexts. In Europe, however, freedom of religion is typically prioritized over freedom of speech. In an October 27, 2018 article in *The Atlantic*, Graeme Wood reported on a determination of this nature by the European Court of Human Rights (ECHR). The ECHR determined that Austria did not violate the rights of a woman when they required her to pay a fine of 480 euros or spend 60 days in jail for holding seminars in which she claimed that the Prophet Muhammad was a child molester.[53] The ECHR, weighing the accused's "right to freedom of expression with the right of others to have their religious feelings protected" found that Austria's law abridging the accused's freedom of expression served the "legitimate aim of preserving religious peace in

52 Comment 34.

53 Graeme Wood, *In Europe, Speech Is an Alienable Right*, The Atlantic, Oct. 27, 2018.

Austria."[54] The ECHR upheld the woman's conviction for "disparagement of religious precepts," which is a crime in Austria. This case is particularly interesting because the accused woman was fined for attacking the Prophet Muhammad as opposed to attacking individual Muslim people, an important distinction as defamation jurisprudence is specifically directed toward individuals or groups. The case also illustrates the difference in freedom of speech and expression jurisprudence between the United States and other advanced democracies. Abroad, freedom of speech is not as fundamental as it is in the United States.

Defamation of religion as an idea, indeed even the defamation of a religious group, is likely to be protected speech in the United States. In *Joseph Burstyn, Inc. v. Wilson* (1952), the Court determined that provisions in the New York Education Law restrained freedom of speech, violating the First Amendment, because it censored content in a motion picture that it deemed sacrilegious.[55]

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54 Chase Winter, *Calling Prophet Muhammad a pedophile does not fall within freedom of speech: European court,* DW, Oct. 26, 2018, https://www.dw.com/en/calling-prophet-muhammad-a-pedophile-does-not-fall-within-freedom-of-speech-european-court/a-46050749.

55 Justin Burstyn Inc. v Wilson, 343 U.S. 495 (1952).

While other Western nations limit the freedom of speech in cases of hate speech, no such exception appears to exist in the United States. Indeed, University of California at Los Angeles law professor, Eugene Volokh, argues that there is no hate speech exception in the United States.[56] Volokh allows that there is some case law indicating a special exception for "group libel." In *Beauharnais v. Illinois* (1952), the Supreme Court upheld a "group libel" law claiming that the Constitution "does not prohibit a state from passing a statute penalizing publication of any lithograph which 'portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion' or which exposes them to 'contempt, derision, or obloquy, or which is productive of breach of the peace or riots."[57] Despite *Beauharnais*'s move toward creating a hate speech exception, and though *Beauharnais* has never been overturned, it is not generally deemed relevant.[58] In

56 Eugene Volokh, *No, there's no 'hate speech' exception to the First Amendment*, Wash. Post, May 7, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment/?utm_term=.79723084b570.

57 Beauharnais v. Illinois, 343 U.S. 250 (1952).

58 Volokh *supra* note 56; *citing* Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 672 (7th Cir. 2008); Dworkin v. Hustler Magazine

New York Times Co. v. Sullivan (1964), the Court rejected the view that libel is categorically unprotected by the First Amendment, and that the libel exception requires a showing that libelous accusations be "of and concerning" a particular person.[59] In *R.A.V. v. City of St. Paul* (1992), the Supreme Court struck down a Minnesota city ordinance that made placing symbols, objects, appellations, characterizations or graffiti, which "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," which is a misdemeanor offence.[60] Therefore, American law asserted that the free speech provision of the First Amendment does not provide special protection for religious groups on the basis of their religion.

Philosopher Jeremy Waldron, however, has been a

Inc., 867 F.2d 1188, 1200 (9th Cir. 1989); Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985); Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978); Tollett v. United States, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1043-45 (4th ed. 2011); Laurence Tribe, *Constitutional Law,* §12-17, at 926; Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, WM. & MARY L. Rev. 211, 219 (1991); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 330-31 (1988).

59 New York Times Co. v. Sullivan*,* 376 U.S. 254 (1964).

60 R.A.V. v. St. Paul, 505 U.S. 377, 380 (1992).

noted defender of laws against hate speech, which he also describes as "group libel."[61] Waldron considers special protections provided by European governments to specific groups to be beneficial. To Waldron, group libel goes beyond "fighting words" and creates a public threat by challenging another person's social or legal status.[62] It is an attack on the dignity of individual members of the group, a dignity which includes the person's basic social standing as persons bearing human rights and constitutional entitlements.[63]

Given the international human rights regime's focus on protecting the inherent dignity of religious groups, the defamation of religion in international human rights must be limited to speech directed against the individual dignity of religious groups. Defamation of religions is overbroad, providing protections for religious institutions rather than protecting the human dignity of religious groups. Waldron expounds on the difference between preserving individual dignity and protecting people from offenses, even when

61 *See generally* Jeremy Waldron, *Dignity and Defamation,* 123 Harvard L. Rev. 1596 (2010).

62 *Id*. at 1604.

63 *Id*. at 1610.

such offenses go "to the heart of what they regard as the identity of their group."[64] Thus, speaking specifically on the topic of defamation of Islam, the community of Muslims, as Muslims, should be protected. However, the insult against Islam, the Quran, and the Prophet Muhammad should not be protected. While the danger of denigrating the Muslim community is a matter of group libel, the matter of insulting Islam as an institution does not encroach upon the inherent dignity of the Muslim community, despite the offense felt by Muslims to such speech. Waldron's view, therefore, cannot be taken as the logical product of the Austria case. In such an instance, he would likely take the accused woman's assertion that Muhammad was a child molester as an attack upon Islam as a religion rather than one directed at Islamic communities.

While it can be argued that American law simply favors free speech, the nature of the different views of religion plays a role in identifying how American courts would rule differently from European courts on the matter of defamation of religion. In international human rights law, religion is an

64 *Id*. at 1612.

important identifying factor among religious communities and groups. The defamation of religion thus attacks the religious community, potentially violating their human dignity. This human-centric vision of human rights law has weakened the individual's freedom of speech because it challenges the religious identity of another group of human beings. Since the rights of humans with their identifying factors are inviolable within international human rights law, an attack on another individual's religion becomes an attack on that individual's identity and, consequently, on their dignity. By lowering the status of religion to a human identifying factor, seemingly removing religious considerations from the law, international human rights law has unexpectedly provided religion with even more protections than it previously possessed. Under this definition, religious principles have nearly unchallengeable protection from outside opinions. Challenging these principles risks attacking the religion-at-large, which in turn risks attacking the identity of religious communities.

In United States law, the religion and the religious community are severable. However, neither of the groups

receive protection from hurtful speech. While a religion and a community may be inexorable in international human rights law, they are separable in American law. In examining the two relationships between speech and religion under the liberty-equality distinction, American law's liberty-based approach would find that an individual's free speech rights likely outweigh the interests of a religious institution. By contrast, under international human rights law's equality-based approach, the free speech rights of an individual may not necessarily overcome the interest in protecting a religious group's collective dignity from offensive speech.

Religion: American and Human

Henkin notes that the most fundamental difference between American and international human rights is each contexts' respective focus on equality. The American conception of equality is considerably more limited than the international conception of equality.[65] International human rights take equality as a principal theme.[66] The difference between the American and international approaches regarding

65 Henkin, *supra* note 1, at 22.
66 *Id.* at 23.

the freedom of religion, while most easily interpreted by the liberty-equality distinction, also differ in each systems' respective conception of religion.

In his magisterial 1833 commentaries on the United States Constitution, Justice Joseph Story writes that the right and duty of the government to interfere and promulgate a religion is "uncontested" and that the real issue is the "limits" of the government's right to foster and encourage religion.[67] To Story, the purpose of the First Amendment was to:

> …exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government.[68]

John Witte, commenting on religion in America, seems to agree with Story's characterization. Witte notes that a theme common to American jurisprudence on religious freedom is the freedom of public religion. This freedom sometimes requires the support of the government though with a recognition of an open public square of various religious

67 Joseph Story, Commentaries, 723 (1865-66).

68 *Id.* at 728, (1871).

beliefs and with a guarantee of freedom *from* public religion.[69]

This American notion of religion differs greatly from the international notion of religion. Religion in American law appears to exist as an institution outside of the religious community. Indeed, religion in America may not even need to be held by a natural person at all, as even closely-held corporations can be said to have a religion.[70] The late Antonin Scalia, a former Associate Justice on the United States Supreme Court, said that the religion clauses were interpreted to guarantee a freedom from establishment of religion, though this was not the original interpretation of the establishment clause. To Scalia, the First Amendment's language saying, "Congress shall make no law *respecting* an establishment of religion. . ." (emphasis added), meant that Congress will not pass a law to establish a national church nor disestablish a church due to many of the individual states having established churches.[71] As Scalia notes, the original interpretation of the First Amendment is

69 Witte, *supra* note 26, at 256-57.

70 *See generally* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

71 University of California Television (UCTV), *Legally Speaking: Antonin Scalia*, YouTube (Mar. 17, 2011) https://www.youtube.com/watch?v=KvttIukZEtM.

no longer jurisprudential canon in the United States because both the establishment and free exercise clauses have been incorporated in *Everson v. Board of Education* (1947) and *Cantwell v. Connecticut* (1940), respectively.[72] While established churches are no longer humored in the individual states, religion continues to be interpreted as an institution rather than solely as an identifying factor. The American government has rapidly swallowed up the utilization of religious language and symbols so that traditional symbols are identifiable with other government-supported meanings.[73]

The distinction between the religious institution and the religious community is important in American law because, even if America should move toward Waldron's position, creating stronger hate speech laws to uphold the human dignity of individual people and groups, such protections would not be extended toward the religious institution. This diverges from the international human rights approach which, despite attempts to showcase how

72 Everson v. Board of Education, 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940).

73 American Legion v. American Humanist Association, 588 U.S.__(2019); *See also,* Freedom from Religion Foundation v. County of Lehigh, no. 17-3581 (3d Cir. 2019).

religion as an idea is not protected, has had more difficulty implementing such an interpretation, given the identarian nature of religion as a defining characteristic of groups and peoples.

American law values both the freedom of religious individuals and groups as well as the freedom of religious institutions. International human rights law, on the other hand, takes religion as a major factor of a group's identity. A decent respect to the equality of people requires the international human rights regime to provide protections for groups' religious identities in order to uphold the groups' human dignity. Alternatively, American law acknowledges religious institutions, existing almost independently of human communities as well as the political role that these institutions play. Thus, the American legal regime emphasizes protecting the freedom of individuals who do not belong within the religious institution. Religious institutions, existing outside of human identity, are not protected from defamatory speech in the same way as religious groups in other countries. While offensive speech against a religion in the United States would be directed against unprotected religious institutions, such

offensive speech in other democracies would be directed against protected religious groups.

The international human rights regime, because of its principal focus on humans and human communities, cannot implement an American approach balancing the rights of people with the rights of religious institutions. Doing so would open international human rights law to the complicated jurisprudence of attributing rights to religious institutions, which are not bearers of human dignity. However, the United States' model may also face difficulties as it must consider other religious institutions. Many of these institutions do not share models similar to the Christian church, a structure with which courts have grown familiar and comfortable. Some criticize the United States legal approach because its interpretation of religion founds itself on the religious notions within its specific country. By contrast, international human rights defines religion following a multinational, human-focused approach. However, the benefits of the American approach still offer a few important takeaways.

The severability of religion as an institution from individuals maintains individual liberty, fleshing out the

relationship between the individual and the state, the religion and the state, and the individual and the religion. Rather than being born from a single document, this approach developed gradually as Anglo-American legal experience progressed. While the separation and defining of rights of each group appears to have led to a state level recognition of religion, it has also defined religions' limits. This separation, initially indicating a special place for religion in society, has been the fundamental tool used to uphold American constitutional rights against religious institutions, and to balance different constitutional rights, such as the freedom of speech and the freedom of religion. However, the American model has experienced change through the introduction of Jeffersonian philosophical concepts. These concepts have edged American religious liberty jurisprudence to a model closer to international human rights law. Naturally, international human rights law encapsulates many concepts within religious liberty which the United States may seek to incorporate. Similarly, the Jeffersonian philosophy implemented by the Warren Court also incorporated a model of religious liberty that allowed the legal system to consider

the various religious backgrounds of new immigrants. Unfortunately, this incautious human-centered philosophy espoused by Jefferson has led to an incongruence between the freedom of religion and the freedom of speech. While a Jeffersonian vision, like Waldron's theory, would see nothing wrong with offensive speech directed at a religion, the internationalist tendency to define religion solely within the context of human communities has made attacks against ideas indistinguishable from attacks against human identities. International human rights law must be wary of attributing religion completely within the realm of human communities. This attribution could potentially provide religions with excessive dignitarian protections reserved for humans.

The development of Jeffersonian optimism, shared as much by the international human rights instruments as modern American thought, is necessary for the changing landscape of religion in the United States. A tempered and healthy dose of Adamsian pessimism is also necessary to define and constraint the political power of any group,

whether it be the church, the state, or the people.[74] Therefore, the United States must seek to harmonize an internationalistic tolerance that incorporates religious pluralism with the traditional Adamsian approach that allows individual and specific constitutional rights to coexist within the American constitutional framework.

74 *See generally* Aaron J. Walayat, *Adams and Jefferson: American Religion and the Ancient Constitution,* 11 Faulkner L. Rev. (forthcoming).