Which Model, Whose Liberty?
Differences between US and European Approaches to Religious Freedom
About the Religious Freedom Project

The Religious Freedom Project (RFP) at Georgetown University’s Berkley Center for Religion, Peace, and World Affairs is the nation’s only university-based program devoted exclusively to the analysis of religious freedom, a basic human right restricted in many parts of the world.

Under the leadership of Director Thomas Farr and Associate Director Timothy Shah, the RFP engages a team of international scholars to examine and debate the meaning and value of religious liberty; its importance for democracy; and its role in social and economic development, international diplomacy, and the struggle against violent religious extremism.

The RFP began in 2011 with the generous support of the John Templeton Foundation. In 2014 that support continued, while the project also began a three-year partnership with Baylor University and its Institute for Studies of Religion under Director Byron Johnson.

For more information about the RFP’s research, teaching, publications, conferences, and workshops, visit our website at berkleycenter.georgetown.edu/rfp.

About the Berkley Center for Religion, Peace & World Affairs

The Berkley Center for Religion, Peace, and World Affairs at Georgetown University, created within the Office of the President in 2006, is dedicated to the interdisciplinary study of religion, ethics, and public life. Through research, teaching, and service, the center explores global challenges of democracy and human rights; economic and social development; international diplomacy; and interreligious understanding. Two premises guide the center’s work: that a deep examination of faith and values is critical to address these challenges, and that the open engagement of religious and cultural traditions with one another can promote peace.
In the United States and Europe, religious freedom has become a dynamic, controversial, and terribly important issue. In this conference we engage a number of allied questions. Is there a “Western model” of religious liberty? What are the historical and contemporary differences in how religious freedom was conceived and implemented on both sides of the Atlantic? What is so special, if anything, about religion anyway? Does the privileging of religion harm non-religious groups? And who decides?

Through this conference, the Religious Freedom Project—in partnership with the International Center for Law and Religion Studies at Brigham Young University’s School of Law, directed by Cole Durham—provided a forum for a vigorous, thorough, scholarly (but not bookish!) airing of these topics from multiple points of view.

Our speakers included Robert Audi, professor of philosophy and management at the University of Notre Dame; Kyle Duncan, former general counsel of the Becket Fund for Religious Liberty; and Melissa Rogers, soon-to-be director of the White House Office of Faith-Based and Neighborhood Partnerships. Several distinguished senators and scholars from Europe also attended, including Rik Torfs, former senator in Belgium, and Silvio Ferrari of the University of Milan. The diverse backgrounds of our guests enabled us to entertain competing claims about religion’s relationship with democracy, legislation, and individual conscience—and explore the extent to which those claims differ in the United States and Europe.

We hosted four panels in Georgetown’s Copley Hall. The first panel, Religion in the Democratic Public Square, discussed the significance of religion to the public life of the nation. The second, The Future of Religious Autonomy, compared US and European approaches to protecting the religious convictions of individuals and institutions. The third, Institutional and Individual Conscience, focused on the historical claims about the nature of conscience. The fourth, Religious Minorities and Religious Freedom, discussed the plight of Muslim and Mormon communities in the West.

Read on. You’ll find lively and insightful debates, deep but civil disagreement, and challenging questions from the audience. We think this volume will add to your understanding of the meaning and value of religious freedom here and abroad.
## Program

### Religion in the Democratic Public Square

*Moderator:* Thomas Farr, *Director, Religious Freedom Project*

*Panelists:* Robert Audi, *John O’Brien Professor of Philosophy, University of Notre Dame*
   - Francis Beckwith, *Professor of Philosophy and Church-State Studies, Baylor University*
   - Sophie van Bijsterveld, *Senator, the Netherlands; Professor of Law, Tilburg University*
   - Fr. Raymond de Souza, *Editor-in-Chief, Convivium Magazine*

### European and American Models of Religious Freedom: The Future of Religious Autonomy

*Moderator:* Cole Durham, *Professor of Law, Brigham Young University*

*Panelists:* Carolyn Evans, *Dean, Melbourne Law School, University of Melbourne*
   - Leslie Griffin, *William S. Boyd Professor of Law, University of Nevada School of Law*
   - Kyle Duncan, *General Counsel, Becket Fund for Religious Liberty*
   - Gerhard Robbers, *Director, Institute for European Constitutional Law and Director, Institute for Legal Policy, University of Trier, Germany*

### Institutional and Individual Conscience

*Moderator:* Michael Kessler, *Associate Director, Berkley Center for Religion, Peace, and World Affairs*

*Panelists:* Javier Martinez-Torron, *Director, Department of Church-State Law, Complutense University, Spain*
   - Mark Rienzi, *Assistant Professor, Columbus School of Law, The Catholic University of America*
   - Melissa Rogers, *Director, Center for Religion and Public Affairs, Wake Forest University*
   - Rik Torfs, *Senator, Belgium; Professor of Canon Law, University of Leuven, Belgium*

### Religious Minorities and Religious Freedom: The Cases of Muslims and Mormons

*Moderator:* Timothy Shah, *Associate Director, Religious Freedom Project*

*Panelists:* Silvio Ferrari, *Professor of Law, University of Milan, Italy*
   - Muqtedar Khan, *Associate Professor, University of Delaware*
   - Lena Larsen, *Director, Norwegian Centre for Human Rights, University of Oslo*
   - Nathan B. Oman, *Assistant Professor, Marshall-Wythe School of Law, The College of William and Mary*
THOMAS FARR: The idea for this symposium was hatched a little over a year ago in a conversation between Professor Cole Durham, the director of the International Center for Law and Religion Studies and one of the world’s foremost authorities on religion and international law, and me.

A few weeks ago the Pew Research Center in Washington, DC put out the third of its annual reports on the global status of religious liberty. These reports measure government restrictions on and social hostilities toward religion. The outlook for religious freedom, according to these reports, is, in a word, grim. And it is getting worse. As of 2010, 75 percent of the world’s population lives in countries in which religious freedom is severely restricted. That is up from 70 percent just four years earlier. Most of those countries are either Muslim majority nations or communist nations, which is to say outside the West. But—and here we come to the subject of our conference today—there is little room for Western complacency.

While Western nations do not suffer the degree of violent persecution we see elsewhere, the Pew reports give ample reason for concern. For example, from the second report, the region of the world with the highest percentage of countries where social hostilities toward religion are rising was not the Middle East, Africa, or Asia. It was Europe, the region in which the very idea of religious freedom as a matter of law was first conceived. Between 2006 and 2009 social hostilities against religion in the United Kingdom increased so much that it placed the UK into the category of “high” social hostilities toward religion according to the Pew Report. That is the same category as Iran and Saudi Arabia. By 2010, a year later, the UK’s scores on social hostility had almost doubled. In other words, in the course of one year, the Sceptered Isle had gone from terrible to worse in that category.

In addition, by 2010, both France and Germany had entered the category of “high” social hostilities toward religion. Indeed, by 2010, all three of our NATO allies—two of them permanent members of the United Nations Security Council—were graded worse in this category than the likes of Iran, Sudan, and Vietnam. Their increasing government restrictions were indicating serious problems as well.
And what about the United States? In the first two reports, US government restrictions were graded as “low,” as one might expect, and social hostilities toward religion were somewhat surprisingly graded as “moderate.” But the most recent report shows substantial deterioration in the status of American religious freedom in both categories. By way of comparison—I find this astounding—in the category of social hostilities, the United States ranks worse than China, Syria, Laos, the Congo, and Uzbekistan. In the category of government restrictions, the United States has moved from “low” to “moderate,” putting us in the company of states such as the Palestinian Territories, Lebanon, and Rwanda—none of whose scores were significantly higher than ours.

Is the so-called “Western model” of religious freedom in danger? In fact, is there such a thing as a Western model, or are there many models—European, American, French, Canadian? What is the real status of religious freedom and freedom of conscience in the United States, Europe, and Canada? And what might the future hold? To discuss these and other questions, we have assembled some of the finest scholars from both continents.

The first panel is entitled “Religion in the Democratic Public Square.” When we talk about the meaning and reach of religious freedom, a key question is, “What is the role of religion in the public square?” No one in the West quarrels about freedom of belief and worship, or at least I do not think they do. But beyond that there are a host of differing opinions about religion in public life, including in civil society. The HHS mandate controversy in the United States raises that issue. The French model of religious freedom tends to discourage religious arguing in politics, while many argue that the American model has traditionally encouraged religious arguing.

We have asked each of the panelists to address three questions with respect to either Europe or the United States. First, what are the legal and cultural restraints on religion in political life? Second, does the right of religious freedom include the right of religious actors to engage in political life? Can members of the clergy or laity make explicitly religious arguments on matters of public policy or law? If those arguments are persuasive, can they prevail in the legislatures or courts on issues such as same-sex marriage, the public display of religious symbols, abortion, and the like? Third, as a general matter, what is the significance of religion to the public life of the nation?

ROBERT AUDI: I am going to address our questions under five headings. My first focus is religious freedom as a constitutive element in liberal democracy. By democracy, I mean a government committed to liberty, basic political equality, and a “one person, one vote” system. These are the default standards. Any departure from these standards must be justified. Now, it seems to me there are at least three major principles applying to democratic governments in relation to religion. First, there is a liberty principle requiring government to protect the highest level of religious liberty, compatible with public safety and all of us...
exercising it. Second, there is an equality principle calling on government to treat different religions equally. And third, in my view, there is a neutrality principle requiring government to treat religious and nonreligious citizens equally.

Now, let us contrast elements of the European conception of religious liberty with elements of the American conception. The equality principle is breached in countries with an established church, including England. Though it may be argued that religious liberty can exist at an optimal level even with an established church—and we have certainly seen a high level of civil liberty in some countries with establishment—establishment is a liability in a democracy, it seems to me.

We might compare a recent German ruling regarding male circumcision at birth and the Obama healthcare requirement calling on Catholic institutions to cover contraceptive services. In each case there is a healthcare rationale and there is a restriction of religious liberty. The restriction on circumcision is direct. The restriction imposed on some universities is indirect, in that no one is being forced to practice contraception, but only to pay for those who conscientiously wish to. Compare both of these with the French treatment of the burqa, which seems to have an ideological, arguably ethical basis. These are not things I intend to discuss in detail, but I bring them to the table.

My second focus is the legal and cultural restraints on religious expression. On the legal side, the United States prohibits government-sponsored prayer in public schools, though this is disputed. In general, this comes under non-establishment in the Bill of Rights in the US Constitution. On the cultural side, we are seeing an increasing securality in advanced societies. This is both a matter of relations between government and citizens and also a matter of religious peoples voluntarily restricting their own discourse and practices in the interest of something like social pluralism.

Let me go to my third focus: religion in civil society. I have always taken the view that religion can and should serve as a counterpoise to the power of the state. Consider, as an historically important example, conscientious objector status given to accommodate religious convictions. It is interesting that over the years this status was granted for conscientious objection for nonreligious reasons. That would confirm the application of a neutrality principle treating religious and nonreligious citizens on par in terms of legal rights.

Now, when we think about religion in civil society, we should certainly think about charitable activities and not just formally established faith-based initiatives. There is no question that the texture of civil society is affected in major ways by charitable activities, as well as the religious activities of churches and religious institutions. I am not talking just about Christianity. Religious communities at their best are microcosms of democratic governance. They certainly offer training in governance even when they are authoritarian. One understands how to deal with an authoritarian governor; that itself has some value.

My fourth focus is religious freedom in political decisions and public discourse. I think freedom of expression, including religious expression, should be as wide and extensive as possible. Here, one thinks of John Stuart Mill’s “harm principle,” in which competent adults may do whatever they choose that does not harm others. Under this principle, even the protection of people against their own bad judgment is not the business of government. Thus, religious expression should be extremely expansive. Here, we are talking about rights and it is important to the ethics of citizenship to see that rights do not carry on their face, or even in their content, indications of how and when they should be exercised.

With this in mind, I have long defended a principle of natural reason, which I used to call a principle of “secular rationale.” Natural reason is what we all share as human beings who are competent to work with basic facts and modes of reasoning. The principle of natural reason says that citizens in a democracy have a prima facie obligation not to advocate or support laws or public policies that restrict human conduct, and that is most [laws], unless they have and are willing to offer adequate natural reason for the advocacy or support.

“There is a sort of a fundamentalism that is being used on the secular side that is not neutral, but is actually trying to advance a particular doctrinal or even theological point of view—if you can call atheism theological—by the power of the state.”

Fr. Raymond De Souza
Roughly speaking, one ought to have a rationale for any restrictions of liberty that goes with the extensive liberty appropriate under democracies. And the rationale should not be peculiar to one's religious position, but shareable with others, religious and not. Public health is an example of a rationale that might suffice to enact a law. This allows for full freedom of expression, and it allows that religious reasons be respected and come into discourse and decision-making. There is, nonetheless, a role that should be played by reasons of a kind that we can share as rational citizens.

Another question is whether it is appropriate for democratic societies to pass laws that have a religious basis, or a basis in religious arguments. I think it is important to see that this question is seriously ambiguous. What is the issue? Is the issue whether enacting laws for religious reasons is ethical or otherwise permissible in a sound democracy (a question about permissible action)? Or is the question whether laws themselves are ethically justifiable and appropriate in a sound democracy if their justification is religious? One question is about what motives we may legitimately have in passing laws. The other question is about what kind of justification laws ought to have. These are quite different questions.

For religious reasons, you can pass a law that is fully justifiable apart from religious considerations. You can also, for purely secular reasons, pass a law that is justifiable only from a religious point of view. The principle of natural reason that I have proposed constrains the kinds of reasons and grounds that should be given as a minimum to justify coercive laws. Naturally, if laws are not coercive—which is not the case with very many of them—the public good is the normal standard. The public good should always figure in the rationale for law-making. The question is whether the public good can be conceived from a religious or a nonreligious point of view. I am suggesting that the nonreligious elements of it, which overlap with religious ethics at many points, should have a certain interpersonal status among us, whatever our religious positions.

Religious liberty should be very extensive, but we do have to protect the public and maintain public health. We should restrict religious liberty only where it is absolutely necessary, such as cases where children will die if not given blood transfusions. (If an adult wants to die, that is another matter.) I think there is an ethic of citizenship under which we should constrain our discourse in ways that make us good citizens toward any fellow citizen, regardless of religious conviction.

THOMAS FARR: That is a helpful distinction between motives and the justification for laws. I'm sure we'll come back to this. Okay, Frank Beckwith.

FRANCIS BECKWITH: I am going to attend to two concerns raised in the questions that were addressed to this panel: one, the contributions that religious communities have made to civil society; and two, the relationship between religious arguments and secular arguments offered by citizens in both their advocacy and formation of public policy.

Imagine approaching the issue of religious communities and their relationship to civil society by raising this question: Would our present arrangement, quality, and character of institutions and the moral intuitions and anthropological beliefs that motivated their founding have even arisen in the first place if not for the faithful practice of religious communities? Take, for example, the setting in which we find ourselves: Georgetown University. It is a Catholic institution founded by the Society of Jesus, an order of priests that was launched in response to the Protestant Reformation. My own institution, Baylor University, older than the state of Texas itself, was founded by Baptists who are rightly proud of their tradition's commitment to the separation of church and state. Baylor, like Georgetown, has done many wonderful things, such as establishing hospitals, medical schools, and countless other projects underwritten by its theological commitments.
Although magnificent accomplishments, they are hardly unique. These sorts of institutions, as well as a host of others that advance the common good, have been replicated by Presbyterians, Methodists, Jews, Mormons, Episcopalians, Muslims, the Salvation Army, and Seventh Day Adventists, to name just a few. In all these cases the religious communities maintain that the creation of these institutions is a faithful application of the moral commands found in their most sacred writings. These moral commands presuppose an understanding of human nature and the human good, that is, at its root, theological. Consequently, it is not surprising that secular attempts to justify these institutions and their practices often appeal to notions that seem to function as nonreligious versions of the theological beliefs they are employed to replace.

So, for example, John Rawls tells us that the principles of justice are derived from a thought experiment, in which a small set of human beings, blessed with both personal innocence and a God's eye point of view, is able to provide the basis on which human equality and dignity ought to rest. It is difficult to believe that Rawls would have thought such an account of justice plausible if he had not been intellectually formed in a civilization that had in its own story a creation narrative. In this narrative, human beings, though initially uncorrupted and in submission to the God's eye point of view, never lose the imago dei, the ground of their intrinsic dignity, even when they stray from Eden. It is this understanding of the human being's condition and her greatness that gives meaning to the institutions, works of mercy, and ways of life produced by the wide variety of religious communities I have already mentioned.

So, rather than asking how religious communities contribute to civil society, as if we could abstract and sequester them and still recognize what remains, I think the more interesting question we should be asking is this: In what ways would a civil society, with a tapestry of ideas and institutions woven from theological threads, risk unraveling if religious communities and their institutions were marginalized by policies and cultural trends intrinsically hostile to their mission?

The second concern I would like briefly to address is the relationship between religious and secular arguments offered by citizens in the formation of public policy. Although there is an important and influential stream of political thought—often associated with Rawls and his many followers—that maintains that only secular arguments are permissible in the creation of law in a liberal polity, I am not sure that the distinction between religious and secular arguments is as easy to make as this tradition holds, especially on the issues that so deeply divide us today.

Take, for example, the debate over abortion. The most sophisticated advocates on both sides typically zero in on one question: “Is the prenatal human being a moral subject?” Those who defend the right to abortion, pro-choice advocates, will answer this question in the negative. But the specificity of their answer will depend on what they believe is the point in a human being’s development at which it becomes a moral subject. The most dominant view in the literature is that human beings do not become moral subjects or persons until some time later in their gestation when they possess a level of organized cortical brain activity that suggests some primitive self-consciousness. This is why pro-choice advocates will refer to fetuses prior to this moment as human beings that are potential persons, but not actual ones.

Opponents of abortion or pro-life advocates often argue that the human being is a moral subject from the moment it comes into being at conception. This is because all human beings have a personal nature, even when they are not presently exercising the powers that flow from that nature’s essential properties. These essential properties include capacities for personal expression, rational thought, and moral agency. The maturation of these capacities is a perfection of a human being’s nature, and thus the human fetus can be wronged even before it can know it has been wronged. No doubt, this view is tightly tethered to a particular reading of the Hebrew and Christian scriptures that has been shaped by the development of a moral theology that employs the categories of certain realist traditions in its theological anthropology.

So there is a sense in which the pro-life argument is “religious,” but not in the way that seems relevant to the question of whether religious arguments should be excluded from the public square. Why is that? It is because the adjective “religious” contributes nothing to our assessment of the quality of the pro-life arguments. Arguments, after all, are either sound or unsound, valid or invalid, strong or weak, cogent or non-cogent. Their premises are true or false, more or less plausible, reasonable or not. It is not clear how labeling the pro-lifer’s case “religious,” despite its theological roots, reveals anything about its quality, or even if the argument is or is not an example of what is often called “public reason.”

Moreover, when a citizen’s argument is labeled “religious,” it seems to serve the purpose of indicating to our compatriots that the argument is sub-rational or without any real intellectual con-
tent. This was made plain to me eight years ago after a lecture I gave at the Texas Tech University Law School. During the question and answer session, an audience member, a professor at the university, issued this judgment of my talk: “You’ve presented nothing but religious arguments.” I responded: “I’m relieved. I thought you were going to say they were bad arguments.” Even though it is not always the case, it seems that it is generally true that when an argument is labeled “religious,” it is often perceived as equivalent to announcing that the position in question is not a deliverance of rational deliberation. It can never serve as a defeater of so-called “secular arguments.”

It seems then that if one were to suggest that the pro-life position, because it is so tightly tethered to a theological tradition, should be sequestered from the public square, while the pro-choice case is perfectly acceptable, because it seems to rest on a “secular” argument, one would in fact be creating a metaphysical exclusionary rule that seems suspiciously capricious. For what we are in fact discussing are two rival accounts on how best to answer the same question: “Who and what are we and can we know it?” It is not about two different subjects—religious belief and secular knowledge—the latter of which deals with reality while the former is just a matter of opinion arising from irrational sources.

Abortion, however, is not the only contested issue about which this sort of analysis may be applied. Other issues include critiques of same-sex “marriage,” physician-assisted suicide, and scientism, as well as defenses of morals legislation and full political participation of citizens informed by their religious beliefs. Given this reality, one should be skeptical that attempts to distinguish between religious and secular arguments, for the sake of placing limits on the former, can advance our political conversations on these contested issues in any meaningful way.

THOMAS FARR: We’ve now heard from the two Americans. I trust you’ve discerned some substantial differences between them. Now we’re going to move to Europe and the Netherlands, and hear Professor van Bijsterveld, who, I suspect, has a different approach to the questions posed to the panelists.

SOPHIE VAN BIJSTERVELD: My presentation deals with faith-based organizations in the Dutch state. I will first discuss the position of these faith-based organizations in the social welfare state. Then I will give an example of the current debate on faith-based organizations. Finally, I will explain this debate in terms of changes, both in the field of these charitable organizations and in the domain of the state.

First, as to the position of these organizations in the social welfare state, social activities by church-linked organizations are traditionally part of the fabric of Dutch society. Activities in the field of education, housing, and healthcare were and still are run by faith-based organizations. In the run up to the social welfare state, they became increasingly part of a system in which public authorities themselves also developed initiatives in these fields. And in the course of time they became highly regulated by the state, sharing in applicable financial schemes.

Many of these traditional faith-based organizations were subject to processes of enlargement of scale, professionalization, and specialization. Originally, they were indeed faith-based organizations, but increasingly their religious identity became merely a private aspect that needed to be safeguarded against the state, which was otherwise heavily involved in these policy areas. Furthermore, due to a process of internal secularization of these organizations, their religious identity became often less profound over the decades. Up to a point, these faith-based organizations were often regarded as mere outstations of the government itself.

Currently, faith-based organizations are being rediscovered. Many social activities are carried out by churches or other organizations based on religion and belief and they are exceeding the purely informal and private domain. Sometimes, highly professional organizations are at work such as the Salvation Army. But small, informal groups also operate at the local level, and they may be involved in a wide variety of activities, such as encouraging youngsters to refrain from heavy drinking, or, as in the case of migrant churches, just helping members to find their way around. This is true for traditional Dutch religious denom-
institutions, but also for Christian migrant churches and Islamic groups.

At the same time, the state, instead of being the main provider of social functions such as in the heyday of the social welfare state, now turns to a different role, namely, that of organizer and coordinator of activities which are not necessarily carried out by the state itself. Inevitably, this brings the state back in touch again with civil society organizations, including religious organizations, both financially and otherwise.

It is specifically here that tensions arise. The uneasiness about these issues was clearly demonstrated in the spring of 2009, when a borough of the municipality of Amsterdam granted all its youth work to an evangelical organization, Youth for Christ. All youth work was carried out through the state by Youth for Christ, as this organization won the official public tendering procedure according to the criteria the borough had set itself. The organization qualified as the best choice, but an enormous commotion followed. It even caused the chairman of the borough to step down from his office. (It is also noteworthy that in this case there was unrestricted access for all the youth and that the borough itself was mainly Muslim.) It was also agreed that no evangelization would take place. Shortly afterwards, the town council of Amsterdam voted in favor of a motion against cooperation, including financial cooperation, with faith-based organizations that recruit employees from their own denominational background. Thus, the question arises: “How can it be explained that such tensions arise over arrangements that are traditionally part of the fabric of the Dutch society?”

It transpires that the activities of faith-based organizations are not merely in the private sphere. And neither are they activities of the state. Rather, they are genuinely social and societal activities, social engagements from a faith background. It is not public, it is not private, but it is social. The discomfort lies in the fact that these faith-based organizations are now involved with social activities that were formerly either perceived as public (that is, as outstations of public authorities), or as merely private activities. As a result, either the former public activity is perceived as being downgraded to a social activity, or private activities are seen to be upgraded to social activities. In both ways of looking at it, the religious dimension becomes much more visible.

With this change, faith-based organizations are also rediscovering their original character of being faith-based (that is, of having a religious profile and of being value-driven). This adds to the discomfort in some areas of the society. Instead of being public and neutral or instead of being perceived as private and therefore largely irrelevant, they are now seen to operate in the social or public domain, as it is in the United States, according to their own biased, religious values.

The debate is especially fierce where these organizations cooperate with public authorities or when public funding is concerned. At this point, issues concerning the conditions under which this cooperation can take place come to the fore. It is here that the principle of separation of church and state, and a state’s neutrality towards its organizations, features quite prominently in the debate—in my view, in a misconceived way. But in fact we are witnessing a revival of an infrastructural pattern of the society, which had faded into the background over the last few decades. And I think there may be many more confrontations to come in this area, but I am also convinced that these developments will continue in this new direction.

THOMAS FARR: Thank you very much. Father De Souza, tell us about Canada.

FR. RAYMOND DE SOUZA: Canada is slightly in between these different traditions. For the longest part in our history, until 1982, we had the Westminster Model of an unwritten constitution. The country seemed to progress and develop without the encumbrance or the benefit—depending on your view—of an American-style Bill of Rights. But since 1982 we have had the Charter of Rights. Now, cases go before the
courts to determine the constitutionality of a law; in effect, we have both the Westminster Parliamentary tradition and also a Charter of Rights and Freedoms that is analogous to the Bill of Rights in the United States. The Charter, like the American Bill of Rights, lists freedom of conscience and religion as the first of the enumerated freedoms, so there is that similarity. We do not have an Establishment Clause, because of the idea of separation of church and state, which is an American idea, does not govern Canada constitutionally, although obviously it has great cultural importance in that the state should be neutral between religions.

What has been going on in religious liberty issues in Canada? There have been serious concerns—not really in the realm of the two categories that Professor Farr mentioned from the Pew Forum as in a statute limiting religious freedom or as in social hostility, but something in between. The concern has been private actors using the state apparatus to limit, in their view, the malevolent force of religious practice or thought, belief, and speech. These come under the rubric of the human rights commissions, which were set up in the late 1960s and throughout the 1970s, with the goal of eliminating discrimination in public accommodations. In the last ten to fifteen years they have been used to bring cases of alleged discrimination, which are not held in regular courts.

Most, though not all, cases have been questions of homosexual discrimination, in the case of church halls not renting to a same-sex marriage couple for a wedding reception, or a printer who will not do stationary for a particular organization. There have been a number of cases, about a half dozen, in which human rights commissions have leveled penalties on those people who thought that they were practicing their religious freedom.

When these cases have gone into the regular courts, they have generally sided with a broader view for religious liberty. But, as some people who have gone through the process have said, the process itself is the punishment. The process is cumbersome and expensive. There is concern that, while at the moment the regular courts seem to have a broader view of religious liberty than the human rights commissioners, they belong to the same kind of legal culture, and thus one views these developments with some concern.

One of the critical issues here was speech, whether religious speech could be brought before the human rights tribunals and be grounds for punishment. There were several cases, the most prominent of which was a Muslim organization against Canada’s biggest national news magazine for defamation of Islam. There were more minor cases which involved homosexual rights organizations against preachers or letter writers and so forth. This created an enormous chilling and controversial effect, so much so that in the past year, the federal government removed from the human rights statute the ability to bring such cases on the grounds of speech. So in that sense there was a backlash against an encroachment on religious speech.

Regarding Professor Farr’s question on legal and cultural constraints on religion in public life, the culture in Canada is obviously different from that in the United States and Europe. The forces that would articulate a religious voice in the public square in the United States exist differently in Canada. For example, the Catholic Church, which for the longest time was a minority, has actually emerged over the last twenty years as being a more vocal force in making religious arguments in the public square.

What sets Canada apart is that in the province of Quebec, which is about 25 percent of our population, the Catholic Church is a very dominant cultural voice. Throughout the quiet revolution of the 1960s this was cast aside. For many years—some say from the 1960s up until around the year 2000—the dominant Catholic approach shaped by the French experience in Quebec was not to engage in a vigorous public witness, precisely because of the heritage of perceived coercion or even oppression of a cultural, not a legal nature. The Catholic voice in the English part of the country is emerging more strongly, but from a lower starting point, because of that history I mentioned.

The evangelical presence in Canada is not as strong as in the United States, in terms of population or cultural influence. It is much weaker, so what is sometimes an influential or the least significant part of American public discourse is not the same in Canada. The Muslim minority in Canada is growing, but at the moment the dominant concerns of the Muslim community are about integration and finding their place in the Canadian society, and so specifically Muslim arguments are not usually advanced.

Canada has a small but influential Jewish community, and for the longest time it has been especially influential with human rights commissions and speech codes. The official position of Jewry in Canada was that a more secular arrangement might be more favorable for Canadian Jews. This is now in dispute, because some of the provisions that were introduced, largely with support from the Jewish community, have now been turned
against the Jewish community, mainly by some more radical elements of the Muslim communities. There is emerging a kind of a reconciliation of forces about hate speech and discriminatory speech, but for the most part, the Jewish community in Canada has advocated a more secular public square as more hospitable for Jews. This is now slowly beginning to be reexamined, because some of the greater allies and friends of the Jewish community are actually more religious voices, especially in regard to the state of Israel.

The second question that Professor Farr asked was whether it is generally acceptable to make religious arguments, whether by lay people or clergy, in the public square. I would say that there is a great cultural bias against anything that is seen as specifically religious. For example, the Archbishop of Quebec, Cardinal Villaneuve, made a rather uncontroversial—from a Catholic point of view—intervention on the question of abortion some years ago, which produced a unanimous denunciation of him in the Quebec National Assembly, the provincial parliament.

In the province of Ontario where I live, which is the largest province in terms of population and economic output, the provincial government in the realm of education has been advocating, more by rhetoric than by statute, the idea that our Catholic schools, which are publicly funded, can be Catholic as long as they accept the consensus articulated by the government on controversial issues.

We see that there are two cultural trends in Canada, one of which is that the public square should be “neutral.” This does not mean neutral between religions or neutral between secular and religious arguments. In this case, “neutrality” means anti-religious. It is the idea that religious views themselves are somehow malevolent, that religion constitutes not a benefit, but a danger. Professor Beckwith urged us to think about religious contributions to the public square or to public life in terms of what good the religion does. In Canada today there is the idea that religious institutions in and of themselves, independent of the work that they might do, constitute a danger or a malignant influence on our common life. That view is not a majority view, but it is certainly an influential view and that is a worrisome trend.

In addition, oddly enough, I would say over the last ten years, culturally speaking, the voice of religious figures in Canada—I would be one of them as I write in the secular press and have a magazine—are more articulate and well-organized, and in that sense have a greater cultural influence than in the past. But that might be a product of a more aggressive assault effecting a response rather than just a development that is taking a greater share of our public life. You might say that while you see a greater religious public voice, it is because we have to be more defensive, which causes us to be a bit more vocal.

THOMAS FARR: We see emerging in our discussion, among other things, the theme of increasing government regulation of religious groups in Europe and in Canada. Or, in the case of the Catholic schools, a growing pressure for them to accept public mores. We’ll come back to that. First I’d like to give the panelists a chance to say something in response or ask a question. Professor Audi?

ROBERT AUDI: Frank Beckwith noted quite rightly the enormous influence of religious traditions and reflections on the development of democracy. But we have to remember that just because religion has a role in producing democracy, this does not entail it being indispensable in justifying it. So although democracy may be historically inspired by the Hebrew-Christian tradition to a significant degree, it does not follow that it cannot be justified some other way. It is an interesting question whether democracy will flourish without the support and the activities of religious traditions. One can speculate here that maybe natural reason, which I emphasized, flourishes best in certain religious soils.

On the matter of religious argument, I would say this is a difficult topic and one cannot decide whether an argument is re-

“Rather than asking how religious communities contribute to civil society, as if we could abstract and sequester them and still recognize what remains, I think the more interesting question we should be asking is this: In what ways would a civil society with a tapestry of ideas and institutions woven from theological threads risk unraveling if religious communities and their institutions were marginalized by policies and cultural trends intrinsically hostile to their mission?”

Francis Beckwith
Religious in any interesting sense just by content, because one could be quite secular and say we must protect religious liberty as an important liberty, and then go on and give reasons that have to do with basic freedoms. The Catholic Church has generally supported the idea that natural reason should join theological considerations when it comes to public policy. For example, on contraception there are natural law arguments that, on their face, are secular. The thing is that people are generally not convinced by the secular arguments that come from natural reason. And so the issue becomes one of whether religious authority alone should carry this policy in the way that historically it has tended to do.

Regarding neutrality, vouchers are permissible under neutrality as long as they are available for private schools as well as public schools. We can say the same about faith-based initiatives, which can be supported by state funds if other initiatives with the same charitable range are also eligible for state funds. I am not sure any of us want to deny that. To comment on what Father de Souza was saying, it is one thing for governments to provide vouchers for parents to educate their children in schools of their choice meeting certain government-established standards. It is another thing for government to fund schools directly. In principle, you could give a neutrality argument on both sides, so long as non-religious schools and non-religious students have the same rights.

FRANCIS BECKWITH: I want to address briefly what Robert just said about the difference between justifying a particular set of beliefs versus the way in which beliefs may have influenced the formation of an institution or a variety of institutions. One of the reasons I used the example of Rawls is because the intuitions that he claims are the consequence of secular arguments—having no connection to anything theological—are in fact inspired by the kinds of intuitions that come from the Hebrew-Christian tradition. Nevertheless, there is a sense in which Robert is correct that the arguments that Rawls is offering can be assessed on their own merits. But, on the other hand, I’m skeptical that it’s really true that the reason that some people find Rawls’ arguments compelling is that the premises detached from their historical origins are perfectly plausible. I think it is because, as I have suggested, that the historical origin of Rawls’ ideas have much more of an influence on the way we assess his arguments than we may have supposed. I tend to think that when we assess the cogency of an argument, many of our background beliefs clearly influence us.

The distinction between secular and religious arguments is very complicated. Nevertheless, I have seen two ideas in the literature in the last couple of years on religious arguments that seem overly simplistic, though they are in ascendancy. One line of reasoning says that religious beliefs are somehow reducible to some other set of interests that a person has, so religion is itself subsumed under autonomy. There is another angle: since religious beliefs are in some sense not like scientific beliefs or the usual deliveries of autonomy, some authors questions whether we should even tolerate religion.

THOMAS FARR: Would either of you like to jump in on this?

SOPHIE VAN BIJSTERVELD: Yes, please. I’d like to make two remarks. First, concerning religious arguments in the public domain, traditionally in the Netherlands religion has also been a basis for political organization. Because of the fact that our electoral system is not geared to producing majorities like in the United States, but rather designed to represent the variety of opinions in the Netherlands, we traditionally have quite a large number of confessional political parties. Most confessional political parties operate on the basis of a belief and put forth rational arguments in the debate. There is one particular political party which is more geared toward Christian witness in politics, and that is perfectly allowed. This party serves its own constituency, but I would not say that it would necessarily be more effective in politics.
Second, the whole issue of religion has been a topic of debate only over the last few years, so we are not used to speaking about religion. Therefore, when these issues arise, the first thing that the general public in mind is something like separation of church and state. Of course, even linguistically this concept already produces a certain idea that there should be a separation and all the nuances get lost. There is a lot of misunderstanding and confusion about what it actually means and should mean. Because this process of secularization has been going on, the idea that religion also contributes to the common good, or at least that one can discuss the contribution of religion to the common good, has faded to the background. There is a very implicit but general feeling that religion must first prove itself as good.

THOMAS FARR: I would note, Professor van Bijsterveld, that the Netherlands has witnessed growing social hostilities toward religion, according to the Pew reports. The situation is not quite like the UK and France and Germany, but I would assume that the attitudes you are talking about bear some responsibility for this?

SOPHIE VAN BIJSTERVELD: Absolutely, and I am not surprised.

FR. RAYMOND DE SOUZA: I think one of the interesting questions is whether religious liberty is a bulwark, a protector, a ground, or a foundation for civil society as a whole, which is what Professor Beckwith was talking about. In the Danish examples, you have civil society institutions figuring out how to cooperate with the government. This is very interesting when you have a big state. When the government provides or funds services but contracts with a religious organization, is that a function of civil society, or is it a function of government?

In the province of Ontario, there was a big case recently. Almost all of the homes for disabled adults—people who are going to be in care perpetually—were given to an organization called Christian Horizons. The government provided for disabled adults by giving a contract for nursing homes and care homes to a private Christian organization. All of the money came from the government to run these homes; the agency that ran them was Christian and did it for Christian reasons. Is it a Christian organization? Is it a government organization? The government says, “It is our money, you have to respect certain norms.” The agency says, “We are Christian.” The government does not want to drive them out, because they do not have anybody else to run the homes. That is an example of a very common religious liberty conflict that we are having today.

In Canada, Catholic Relief Services oversees development agencies. In the United States and Germany it is the same way, and most of the money comes from the government. Is that a civil society initiative? In the HHS controversy in the United States, the American bishops have made an argument, I think a persuasive one, that what is at stake is whether there can be civil society institutions at all. The people who promote the HHS mandate are saying, “These organizations are not civil society. They are not independent because of government money and government mandates.” This is going to be a constant issue of conflict. What is the status of a civil society institution in a big state environment where the vast majority of the money, regardless of the agency, comes from the taxpayer?

THOMAS FARR: There is an argument in the American tradition that civil society, particularly the religious components of civil society, are protected by the notion of non-establishment, the so-called separation between church and state, which is there not to protect the state but to protect the civil society organizations.

I would like to drill down a little on this difference between Professors Beckwith and Audi if possible, on the question of religious arguing and the distinction between motive and justification for law. I would be interested in the European and Canadian responses to the Proposition Eight case in California.

In 2008 the citizens of California had a referendum with respect to amending the California Constitution on the meaning of marriage. They voted to affirm marriage as between one man and one woman, which was de facto and de jure, I suppose, a
rejection of same sex marriage. Two years later the results of this referendum were overturned by a federal judge. I want to focus on the first level federal judge’s reasoning.

Judge Walker reasoned that this referendum in favor of traditional marriage and in rejection of gay marriage was unconstitutional on a number of grounds, one of which was that the arguments against same-sex marriage were “based on religious and moral values.” Maybe this can be explained away, but it seems to me that the judge was saying that precisely because some people—and it is unclear how many—voted for religious reasons, their view is illegitimate or illegal.

**ROBERT AUDI:** One crucial question that has not received enough public discussion is whether the issue is the status of marriage, so-called, or the status of unions. The political issue would be very different if the term “union” were used, because one basic question is whether equal protection under the law is at issue. On the point about the status of the arguments, it depends on to whom you are listening, but one could argue from the point of view of natural reason that marriage’s special status is owed to the special interests of children. That would be a secular argument. I do not think it would be a very good one given how many marriages do not involve and are not intended to involve children. Children can be brought up well in one-parent families, not to mention the possibility of two parents of whatever sex. There are many arguments that bear on this issue. Actually it is not an issue, strictly speaking, of free exercise. It is more an issue of equal protection under the law.

**THOMAS FARR:** I am not sure you answered my question, but let us hear what Professor Beckwith has to say and maybe we will come back to it.

**FRANCIS BECKWITH:** It seems to me that there are a couple of different layers here. First, what is the proper role of federal judges in interpreting statutes and referenda? I published a piece several years ago in the *Hastings Constitutional Law Quarterly* called “The Court of Disbelief.” One of the points I make in the article, which gets to the heart of this issue of religious motives, is that if you could have identical statutes—one pursued because of religious motivation, the other because of secular motivation—you come to opposite conclusions, which seems absurd.

Suppose, for example, it’s 1802. President Thomas Jefferson writes his letter to the Danbury Baptists and says: “I wish that your state constitution had a disestablishment clause like the federal one.” And suppose that the Danbury Baptists wind up in fact getting their fellow citizens to pass it. But it turns out that the Danbury Baptists are totally motivated by their entrenched Baptist tradition of church-state separation. In fact, they can’t think of anything outside of a theological argument as to why other people should have religious liberty.

On the other hand, let’s say it’s Virginia and there they already have an amendment and it’s motivated by James Madison and Thomas Jefferson—and thus it turns out to be, for lack of a better term, secularly motivated. Yet both laws are identical. It seems to me that a court, especially when it comes to legislation, has to be deferential on this.

But I do not know how you would actually know the motivations of people in a referendum. How many millions of people are in California and how many voted on that? It turns out that people do things for a variety of motives. It may be the case that a vast majority of them were religiously motivated, but what is a citizen to do? The citizen votes with a bunch of beliefs he or she has. How can you un-believe things? It is sort of odd to request of people, “You can vote on this, but just come up with motives that you had never thought of before.” I do think a court can assess a law based on its content, and clearly, if a law’s content violates the Establishment Clause, then it should be discarded.

**SOPHIE VAN BIJSTERVELD:** Citizens do not have to be accountable to the states in the way they vote, but it is just the other way around. I find this quite remarkable.

**FR. RAYMOND DE SOUZA:** On this point about religious motivation, it is very much a double standard or a lack of standards. Often, ecological arguments are made on the grounds of the idea of creation or stewardship of creation. Care for the poor and healthcare reform are very often argued for on the basis of religious motivation or Biblical principles. There are many things that are done on a religious basis. It is only when it comes to sexual matters that there are objections. In that case, as you describe it, you see a judge using an argument that was convenient for the outcome that he wanted. But it certainly would not apply if there was perhaps a clean air act in California that was supported by Christian ecologists. Would it be invalid on those grounds? Clearly not.

**THOMAS FARR:** Let’s go to our audience.

**SILVIO FERRARI** (University of Milan): Professor Audi, how...
do you apply your argument regarding natural reason to issues like circumcision? In my opinion there is no rationale and no ethical justification for circumcision. Moreover, circumcision is performed on very young children who cannot express their consent or their opposition to that practice.

ROBERT AUDI: You are working your way to the idea, perhaps, that government has a legitimate interest in protecting children, and when it comes to altering their bodies in irreversible ways, if religion dictates doing that, there ought to be a delay under state interests until adulthood. So we have a case where free exercise can be burdened by government under a public health rationale. The issue is just how burdensome this is and just how good the public health rationale is. You are perfectly right to raise this issue and we are going to hear more about it.

NATHAN B. OMAN (William and Mary Law School): Professor Audi, I am curious as to the distinction between the reasons someone has to offer and the motivations for someone’s acts.

ROBERT AUDI: The cogency of the argument is logically independent of the motivation for giving it, but ethics reaches beyond the hand and mouth and into the heart and mind. In other works, I have suggested that civic virtue calls on us to try to get our motivation in line with the reasons we offer. There is a lack of sincerity in trying to get people to do something politically for reasons that do not move you. There is, however, a role for pointing out that people should do something given their own reasons. You may then state those reasons without endorsing them. I call that leveraging by reasons as opposed to arguing from them. There is a place for that, but it can go too far.

M. CHRISTIAN GREEN (Center for the Study of Law and Religion, Emory University): Father de Souza, at the end of your description of a Canadian decision not to take cases on religious speech, you said that it was not just about religious speech. Could you say a little bit more about the Canadian rationale for not taking those cases and something about the controversy and what other issues it might have implicated?

FR. RAYMOND DE SOUZA: In the Human Rights Act there were grounds on which one could not discriminate, and hate speech was part of that. If you got up and made some derogatory comment, someone could go to a human rights commission—provincial or federal—and say that this speech was likely to expose an identifiable group to some kind of hostility or hatred. This was introduced in the 1970s largely at the behest of the Jewish community concerned about anti-Semitic, even Nazi propaganda.

By the 1990s and early 2000s this was used in two critical cases—one by gay rights groups against Christian pastors or Christian businessmen, and most famously by a Muslim group against Maclean’s magazine for running an article they considered to be negative and defamatory towards Islam.

These created enormous controversy in the country and the government removed the whole speech provision from the human rights code. If you think you have been denied an apartment or a contract or employment based on some discrimination you can still appeal to human rights tribunals. But the whole question of speech that might expose a group to defamation or hatred has been removed, because of the way that it was used in those cases.

THOMAS FARR: Are you correct in recalling that the Roman Catholic Bishop of Calgary had written a letter on marriage and was threatened with being brought up before the Human Rights Commission?

FR. RAYMOND DE SOUZA: In 2005, the Bishop of Calgary had written a pastoral letter to the Catholics of the Diocese of Calgary on marriage, which was then an issue in the federal political scene. Two things happened. First, he got a call from Revenue Canada—the equivalent of the IRS—asking him whether this was a political intervention or not. They were making a kind of discreet inquiry, perhaps a rogue agent trying to bully him. He immediately made a big public protest about it. They backed off and disappeared.

Then there was an issue of speech. A gay rights group brought a case against the bishop, claiming that the content of his letter would fall under the category of being likely to expose a group to hatred. Here, the process itself is the penalty; the way the human rights tribunals work in Canada is not like courts. The tribunal...
prosecutes you on behalf of the aggrieved person, because presumably he has limited resources and you do not have the protections of a regular court. The bishop made a decision in terms of the resources of the Diocese to make a settlement without conceding any of the points. Today, after the repeal of that provision, it would be hard to imagine a similar situation happening.

RIK TORFS (University of Leuven, Belgium): Fr. De Souza, you said at some point that religion is not a benefit but a danger in the eyes of many people. What really is the problem? Is it the religious argument which becomes a problem, or is it religious institutions? Atheism today is almost using similar arguments to argue for its own truthfulness. On the other hand, we see that church institutions use very secular arguments, and some philosophers talk about the self-secularization of religion. So the atheists are becoming religious and the religious are becoming atheists in their argumentation. What is your opinion on that?

FR. RAYMOND DE SOUZA: Interestingly enough, in Quebec, where these items are more hotly contested, Cardinal Ouellet advocated a line of argument during his time in Quebec City wherein he said, “We are having an argument, not with neutrality, but with secular fundamentalism.” He cast this as a religious disagreement. You are correct that there is a sort of fundamentalism that is being used on the secular side that is not neutral, but is actually trying to advance a particular doctrinal or even theological point of view—if you can call atheism theological—by the power of the state.

In terms of religion being seen as malevolent, in certain influential pockets the default position is that a religious argument, because it is religious and draws somewhat on divine revelation, is at least dangerous or incompatible with reason and authentic human freedom. That view is quite influential in elite universities and the legal culture in the country.

SCOTT RICKARD (Veterans for Peace): I am interested in your opinions on the Scofield Reference Bible. It came out in 1909 and that was about the time of the rise of Zionism. I think that has a lot to do with the geopolitical state of affairs.

FRANCIS BECKWITH: The Scofield Reference Bible comes out of this nineteenth century movement called dispensationalism within the broader evangelical fundamentalist movement and it has a heavy emphasis on eschatology. It is interesting that in the United States, up until probably the 1970s, among popular evangelicalism, this was the dominant view. It has since become less dominant over the years, partly because a lot of dispensationalists have discovered that there are really no ancient Christian roots to their view.

ROBERT AUDI: I have implicitly addressed that, when it comes to laws and public policies, there ought to be adequate grounds provided from the perspective of natural reason. So this is a pretty unabashed attempt to appeal to biblical authority in a major international crisis. I do not think this is a formula for peace or good reasoning.

THOMAS FARR: But not illegal.

ROBERT AUDI: Not illegal, oh certainly not.

FR. RAYMOND DE SOUZA: On the question of Israel, it is a very interesting example of a reconfiguration of forces. What began at least ostensibly as a secular movement, the Zionist movement, and a country that was founded with a very specific national—one might even say ethnic—purpose, opposed on the other side by a pan-national Arabic project, has in recent years become increasingly involved in a religious conflict, not a national conflict. In Canada or the United States, Jews who were interested in the security and stability of the state of Israel are finding allies not on the secular left, but on the religious right. This gives a kind of a sense of why we are having so many conferences on religious liberty, tolerance, and pluralism. These questions are becoming more religious rather than less religious in the twenty-first century.

“With this change, faith-based organizations are also rediscovering their original character of being faith-based (that is, of having a religious profile and of being value-driven). This adds to the discomfort in some areas of the society, because instead of being public and neutral or instead of being perceived as private and therefore largely irrelevant, they are now seen to operate in the social or public domain, as it is in the United States, according to their own biased, religious values.”

Sophie Van Bijsterveld

SCOTT RICKARD: I am interested in your opinions on the Scofield Reference Bible. It came out in 1909 and that was about the time of the rise of Zionism. I think that has a lot to do with the geopolitical state of affairs.
COLE DURHAM: Our theme for this second panel is European and American models of religious freedom, particularly the future of religious autonomy. While the focus in the field of freedom of religion or belief is often on individual conscience, the history of protection of the autonomy of religious institutions is actually older. Even in the United States, the strand of autonomy jurisprudence goes back further in our case law than free exercise jurisprudence. The early history of religious liberty is about emancipation of religious communities and their institutions from state control.

From a comparative perspective, American and European systems are often contrasted because of the absence of an establishment clause in the constitution of European countries and within the European Convention for the Protection of Human Rights and Fundamental Freedoms. There is convergence on both sides of the Atlantic, however, in the importance afforded to the autonomy of religious institutions. One of the things that our non-establishment principle does is protect separation of religion and the state, which protects the autonomy of religious institutions. By the same token, the autonomy principle in Europe protects distinctions between state and religious power.

On both sides of the Atlantic we have had recent cases involving the principles of religious autonomy. It is our privilege to have some very distinguished experts on this: Kyle Duncan, the general counsel for the Becket Fund for Religious Liberty; Professor Leslie Griffin, author of one of the leading case books on law and religion in America; Carolyn Evans, dean of the Melbourne Law School and author of one of the premier books on religion in the European Court of Human Rights; and Gerhard Robbers of Trier, one of the leading experts in Germany on church-state issues in general and the autonomy issue in particular.

The questions addressed to the panel are as follows: To what extent do the American and European models differ on issues of institutional autonomy of religious organizations? How would you characterize these models, conceptions of autonomy, and their differences, if any? Discuss the grounding of autonomy concepts: To what extent do conceptions of religious autonomy reflect notions of the role of religion in society? How were conceptions of religious autonomy reconciled with egalitarian norms and competing rights claims? What challenges are being brought and will likely arise in the future to protections of religious autonomy?

KYLE DUNCAN: What I propose to talk about is how religious autonomy is protected under the United States Constitution. I would like to focus on the Hosanna-Tabor decision, which was a recent unanimous decision by the Supreme Court, recognizing a robust ministerial exception. (Note: In the Supreme Court’s consideration of the Hosanna-Tabor case, the Hosanna Tabor Church was represented by the Becket Fund for Religious Liberty and Professor Douglas Laycock of the University of Virginia Law School.)
I would like to distinguish that line of Free Exercise and Establishment Clause cases, which protects institutional autonomy, from the Smith line of cases, which deals with individual claims of conscience in quite a different way.

In *Hosanna-Tabor*, the Supreme Court unanimously recognized what the courts of appeals had unanimously recognized for over forty years, which is that there must be, and is, some form of exception protected by the religion clauses of the Constitution, with respect to religious organizations’ decisions about whom to hire and whom to fire as a minister. The Court said: “Both religion clauses bar the government from interfering with the decision of religious group to fire one of its ministers. The Establishment Clause prevents the government from appointing ministers and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.” The first thing to note is that the Court is asking both religion clauses of the First Amendment to do work. We see in many cases where these clauses are portrayed as fighting against each other. Here in this case, the clauses are working in tandem to protect the autonomy of religious groups.

The Court’s decision examined the historical background, all the way back to the Magna Carta, Henry VIII’s acts of supremacy and uniformity, and the propensity of the English kings to interfere with the filling of ecclesiastical offices. The Court recognized that the First Amendment was adopted against a background where colonists were afraid that government would interfere with the filling of ecclesiastical offices. Historical examples are given, such as James Madison as Secretary of State communicating to Archbishop John Carroll of the Catholic Church that the federal government is not going to weigh in on who should represent the Catholic Church in federal territories.

What about the jurisprudential background of this decision? Church autonomy is not something the Court made up in *Hosanna-Tabor*. The Court had not had a chance to address the issue of hiring and firing ministers per se, but, in a series of decisions going back as far as 1872, it had dealt with disputes involving church property or church hierarchy and had consistently held that the federal courts are not to get involved in these kinds of disputes. This is not only to protect the institutional integrity and autonomy of the religious organizations themselves, but it is also to prevent the government from intruding into ecclesiastical decisions.

For example, *Kedroff v. Saint Nicholas Cathedral* (1952) speaks of the free exercise of an ecclesiastical right. The principle of religious group autonomy is there, and in *Hosanna-Tabor* the Court held that this requires some form of exception for religious groups’ decisions, namely about who is going to occupy important roles in their organizations. Here is what the Court said with respect to the ministerial exception: “Requiring a church to accept or retain an unwanted minister or punishing a church for failing to do so interferes with the internal governance of a church. By imposing an unwanted minister, the state infringes the Free Exercise Clause. According to the state the power to determine which individuals will minister also violates the Establishment Clause.” Here you have the two clauses working in tandem as a dual protection: a protection for group autonomy, but also a shield against government interference in ecclesiastical matters.

What about the right of association? What has the Supreme Court said about the right of association? Groups, after all, whether they are secular or religious, do have rights of expressive associations that have been recognized in the Supreme Court in numerous cases. Why is that not enough to protect this sort of ministerial hiring and firing decision? The Court said: “The text of the First Amendment gives special solicitude to the rights of religious organizations.” Now we know that all nine justices of the Supreme Court are textualists.

What about this other objection: Why can we not allow courts to weigh whether a church, which has fired a minister, has done so on pretextual, or nonreligious, reasons? Allowing that sort of inquiry, which is common in employment discrimination suits, would really defeat the whole purpose of the ministerial exception itself. It would ultimately and inevitably require courts to say what was the real reason. Was it authentic religious reasons such as in *Hosanna-Tabor*, the failure to follow the internal church resolution processes, or was it some other nefarious reason? The Court unanimously said that it will not get into that. In concurrence, Justice Alito, joined by Justice Kagan, elaborated on this point and said, “If you allow a pretext inquiry, you are going to have a judge or a jury weighing the importance of a particular religious doctrine.” If you allow a decision-maker to get into that realm,
Justices Kagan and Alito said, the mere adjudication of such questions would pose grave problems for religious autonomy.

The case raises various questions that we can explore: Is it consistent with the line of decisions beginning with *Employment Division v. Smith* (1990), and also how broad is this ministerial exception? Is this going to prevent tort suits against churches for something a minister or clergy does? Is it going to prohibit a breach of contract lawsuit against a church? Is it going to prohibit the enforcement of criminal laws against a church? The Supreme Court said, “We are not dealing with any of that right now. We are dealing with employment discrimination suits.”

So in sum, we have a signal announcement from a unanimous Supreme Court on whether there is a ministerial exception implicit in the religion clauses of the Constitution. The Court gave us a resounding “yes” for an answer.

**Leslie Griffin:** In the United States, this theory of church or religious autonomy is on a collision course with liberty and equality. The reason for that is something that Kyle just mentioned. It puts tremendous emphasis on institutions and the power of institutions, and when institutions gain more power, the individuals working within those institutions suffer. I think that emphasizing the institutional aspect of religious autonomy neglects the idea that, under the Establishment Clause and during both European and American history, we should be suspicious of the power of churches as well as of the state. When the two of them combine to keep individuals out of court, individual liberty suffers.

Now, in the ministerial exception area, I congratulate Kyle, whose position won a unanimous victory in the Supreme Court. Unfortunately, I think the Court lost sight of what it did when it created a ministerial exception. It sounds like a good thing that the government cannot interfere in choosing ministers, but who counts as a minister and which laws are at stake? This puts a huge number of people outside the protection of our antidiscrimination laws. If you think that *Hosanna-Tabor* itself was only about disabilities discrimination, there are numerous age, pay, race, and gender discrimination cases that the courts have repeatedly tossed out under the ministerial exception, and that is why I say equality is at stake.

When we talked in the first panel about the expansion of religious institutions into welfare work through religious hospitals, religious universities, and religious schools, proponents of individual equality worry that none of those will be subject to the antidiscrimination laws. If you take a big swath of employers outside the protection of the antidiscrimination laws, you place fundamental values at stake, and I suggest that religious liberty for institutions should not always win those disputes. The ministerial exception threatens to harm a lot of individuals at religious institutions. “Minister” could be a narrow term, of course, but now it is also the case that the school principals, teachers, and so forth have all been deemed ministers for the purpose of the ministerial exception.
In a recent case, applying Hosanna-Tabor, a Kentucky appeals court said that a Jewish professor of Jewish Studies at a Disciples of Christ Seminary was a minister for purposes of the ministerial exception because he taught at a seminary. The dissent said it was a very disturbing situation to think that a Jewish professor had become a minister of Jesus Christ. The worry about the unanimous Supreme Court decision is that people can pick it up and run with it.

It seems to me that one additional place where people are running with the theory of institutional autonomy is in the current debate about contraception. If we say that religious institutions should enjoy religious autonomy from the healthcare laws, then religious institutions should not have to follow the contraceptive laws because it is a burden on their religious freedom. However, emphasizing institutions loses track of the individual employees, both the employees of the same religion who might want to exercise their reproductive rights and the secular employees.

The religious institution theory will now be litigated in cases of hospitals, schools, and commercial businesses run by Christian employers. I worry that this trend toward protecting institutions will forget the rights of individuals, whom I would argue the Bill of Rights is really supposed to protect.

CAROLYN EVANS: I think there is always a danger of talking about Europe as some coherent unified identity, rather than a collection of extraordinarily disparate nations with their own history, culture, political background, and religion. I will talk a little bit about the European Court of Human Rights, Hosanna-Tabor, with which Kyle was very much associated, and the Schüth case in which Gerhard was involved.

The Schüth case dealt with an organist at a church who had a child out of wedlock and was terminated from his employment because of that. The termination was upheld in Germany by the domestic courts, partly as a manifestation of the right of religious autonomy in the German constitutional structure, but was held by the European Court of Human Rights not to have paid sufficient attention to the sort of balancing of rights that Leslie was talking about.

The broad thrust of my argument is that in both the United States and Europe, there have been increasing challenges to religious autonomy, and I will focus on the significant example of control over employment of people by religious organizations. In the United States, I think autonomy is still given a comparatively higher degree of protection than it is in Europe, and the reasons for this are partly legal and constitutional. But I think they are also partly historical and cultural, and reflect the shift away from organized religion that is taking place in both continents, but is more marked in Europe than the United States.

The first question is, from whom do we need protection? Or, to put it another way, whom do we trust? The second is whether religious groups are properly seen as distinctive in a substantial or meaningful way from other groups of people who come together for particular purposes. The focus in the United States on civil liberties concerns protecting the individual from the tyrannical overreaching government. In the broad historical narrative, the Constitutional moment is one of throwing off an oppressive colonial government, and part of the constitution-making process is to try to ensure that Americans now are not subject to their own tyrannical government or their own monarchical president. The popular narrative of the American experience tells of a people who value religion and who come here, in part, to practice their religion freely. They then fight off an oppressive government, putting in place a constitutional system that protects people from such government.

There is another historical story that could be told as well, where the state is the threat to liberty. The First Amendment refers to restrictions on the power of the state rather than individual liberty. Hosanna-Tabor reflects this historical narrative in a more sophisticated and nuanced way. The Court says that the members of a religious group put their faith in the hands of the ministers. Requiring a church to accept or retain an unwanted minister intrudes on more than a mere employment decision; it interferes with governance of the church. This means that the government
is intruding where it should not intrude. The role of government in protecting liberty in this story is essentially a negative one. We have a fair degree of faith in churches as institutions and their voluntary arrangements. The members of churches put their faith in the institution; therefore, the government is the problem.

In Europe, by contrast, there is a far more active role envisioned for government. The European Convention on Human Rights is, of course, a treaty created by governments, not by the people, and the primary obligation for the protection of a range of human rights falls on governments. That role is more active and acknowledges that oppression of individual rights and liberties certainly can come from the state, but can also come from a range of other sources: corporations, religious groups, unions, and so on. The state has a legitimate role in finding a balance between competing rights and interests.

In the Schüb case, for example, religious autonomy came into conflict with the right to privacy, protected in Article 8, and the right to “family life.” In that case, the court said that, though the object of Article 8 is essential to protect the individual against arbitrary interference by public authorities, it does not compel the state to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life, and those obligations may require the state to take on certain measures. In particular, in this instance, general interest and individual interests must be fairly balanced, and in both contexts, the state has a certain margin of appreciation.

One of the reasons that religious autonomy is more restricted in Europe than in the United States is that the restriction requires some degree of faith, partly in legal institutions, but also by the people and within the culture more generally in the capacity of governments to make complex calls on the competing rights. As an outsider, my observation would be that Americans in general are more skeptical about the very notion of government, not that this particular government is a good government or a bad government. There is a cultural skepticism about the very idea of government, which plays out in this historical debate. By contrast, Americans have a much higher, though declining, degree of faith in organized religions than Europeans. Again, maybe this is partly a matter of historical narrative. While oppressive governments are most certainly part of the history of Europe, its history is also about overcoming oppressive religious practices and religious institutions that actively aided or remained silent in the face of dreadfully abusive governments, in order to protect their privileges, rights, and institutions. From a European perspective, religions have not kept themselves pure. While they need protection, others may also need protection from them.

The second issue is the extent to which religious organizations are perceived as just like any other voluntary organization. Unions, sports clubs, political parties, and religious groups are just different ways in which individuals come together to share common goals. They are institutions which can serve useful purposes, but they can also sometimes turn against their own members or those outside. Religious autonomy in its fullest sense is based on the notion that there is something separate, distinctive, and special about religion that does not exist in these other associations. Otherwise, while governments should generally let groups of citizens come together to pursue their own interests, they also have a right, and sometimes an obligation, to interfere in the life of such organizations. In the Hosanna-Táb case, it was argued [by the Obama administration] that freedom of association would be sufficient, and the Court denied that. The Court said that the text of the First Amendment itself gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view, said the Court, that religion clauses had nothing to say about a religious organization’s freedom to select its own ministers. (As a side note, the Australian Constitution uses almost precisely the same words as the First Amendment and the text has been interpreted very differently. Again, I do not think the European court sees religion as very distinctive.)
Participation in formal religious practices in institutions is declining around the Western world, even if the decline is less in the United States than it is in Europe. Members of religious groups are also becoming far more willing to criticize and stand aside from the formal positions of churches themselves. When an archbishop says, “Catholics believe that…,” the predicate is almost certainly not true about most Catholic doctrines. It would be more accurate to say, “Many Catholics believe… Most Catholics believe… It is the official church teaching that…,” and so on. There is much more debate inside religions.

Furthermore, the percentage of people who describe themselves as religious is declining and the participation in organized religion is declining. At the same time, equality has gained ground as an important social norm. Other human rights are increasingly accepted and respected across a swath of the population, including by religious people. So while courts deal with these issues as purely legal, factors such as these certainly do impact the law, particularly in statute and in the decisions of courts over time.

**GERHARD ROBBERS:** To return to the first panel (on the question of the circumcision case in Germany), I wonder whether we are not at a point of overlapping fields of individual religious freedom and autonomy. It was undisputed among most lawyers that male circumcision for religious reasons is perfectly allowed in Germany and does not constitute any crime. There is a minority view held by some lawyers who were opposing that for some time, and that was taken up by a minor criminal court. It convicted a Muslim medical doctor, who, at the request of the parents, had circumcised a four-year-old boy, with some minor complications. This is why it then came to the court. The court held this to be a violation of the right of the child not to be injured. That has to be balanced with the right of the parents to determine the religion of the child. The court said that this religious freedom of the parents does not constitute a valid right to trump the right of the child to be free from bodily injury. It nevertheless acquitted the medical doctor because the court said the doctor could not have known beforehand that his activities were illegal, because it was never said to be illegal before in the courts. The case did not go to the constitutional court, so it stood as a final decision.

In Germany, there is no tradition of precedence. No other court is bound by that decision of this minor criminal court. Doctors and the Jewish and Muslim communities were highly disturbed. Meanwhile, the German government had taken an initiative to present a bill to parliament indicating that male circumcision for reasons other than medical need is allowable.
only under certain conditions. This is very similar to the Swedish law. The German law has not yet been passed.

What confuses me is not so much the reaction of the courts. It is, of course, a wrong decision because it did not even mention the right of the child to freedom of religion and to be raised in the religion of his tradition. I am alerted that this decision was highly welcomed in the German public. How do you deal with intolerance within the society? Is there a duty of government to intensify educational aims and to pursue tolerance in public schools? That would be a question of the role of government in these things.

I am somewhat puzzled by the question: “What is the difference between the United States and Europe?” There are so many differences, within Europe and probably also within the United States and Canada. I am highly intrigued by how people identify the differences. I see some differences, not so much in substance but in the degree of how arguments are being valued and what weight is given to certain approaches. I see one difference, which was already mentioned, in the way government is perceived as basically positive or negative. I also see a somewhat narrower approach in the question of taxpayers’ money. In the United States, as I experience it, the argument is that when government money, or taxpayers’ money, is involved, groups in question have to comply with some general antidiscrimination rules. In Germany, the approach is markedly different. The difference is that public money is used to support the identity and the differences of groups, to have their plurality underlined, to have their plurality supported and endorsed. The money goes into the differences and not into the making everything equal. This is a difference in approach between Europe and the United States to endorse plurality by public money rather than to suppress plurality by public money.

To the cases you already mentioned, Carolyn, in the European Court of Human Rights, there seems to me to be a tendency that exists throughout Europe, toward a tacit increase of public government involvement in the balancing processes. State courts have gradually taken over deciding what weight should be given to certain approaches, ideas, and rights.

In Germany, we have recent cases pending on the question of whether there is a right to strike within religious premises; that is, whether religious personnel or trade unions can strike within hospitals run by churches or religious communities. In Germany, it was accepted until very recently that there is no right to strike in those premises. The argument of the churches was accepted that these institutions—employers and employees—provide a service and they define themselves a service community under God, which cannot be disrupted by antagonisms like strikes and lockouts. That is now being highly disputed and the trade unions have filed cases before courts. There is a court case pending before the supreme labor court. Whatever the labor court says about the right to strike, it will go to the constitutional court and there will be a constitutional court decision. That is one very concrete point of whether there is an autonomy of religious institutions in regards to labor relations.

COLE DURHAM: For those of you who are not aware, the European Court of Human Rights has just agreed to hear in a grand chamber a case from Romania involving unionization within the Orthodox Church, and this is very interesting because it includes a union of both clergy and non-clergy so it raises a lot of these kinds of issues.

Let me open things now to the panel to let them respond to each other, and then we’ll open things to the floor.

KYLE DUNCAN: This question of individual rights versus institutional rights is an interesting one. Here is a quote from the Hosanna-Tabor decision that is very interesting on this point, and it again comes from the concurrence of Justice Alito and Justice Kagan: “Throughout our nation’s history, religious bodies have been the preeminent examples of private associations that have acted as critical buffers between the individual and the power of the state...It is easy to forget that the autonomy of religious groups both here in the United States and abroad has often served as a shield against oppressive civil laws.” It would be difficult not to think of the role of churches and other religious groups in the civil rights movement in the United States in the 1960s. I draw from this that there is not a sharp dichotomy between individual and institutional rights. Instead, the two may well reinforce each other. Indeed, they often have done so in the history of this country.

The other idea in play here is that we have a more robust notion of civil society that recognizes the autonomy of groups, which are, after all, voluntary associations. No one has to belong to a church, and no one has to work for a religious organization. We have never had a “throne and altar” arrangement in the United States, so there is no question of compulsion. These are voluntary associations that serve a function in society of ensuring and even amplifying individual rights. On that theory, a constitutional protection for religious autonomy is a good thing for both. I would also add that the Bill of Rights protects not only individuals but also groups, organizations, and even corporations against government power. The idea that we need to construe the Bill of Rights or the Establishment Clause or the Free Exercise Clause...
in order to cut back on institutional rights is a notion that runs counter to the structural theory of the Bill of Rights and the Constitution itself.

**LESLIE GRIFFIN:** There are two trends in American religion: first, religion is growing more individualized with an emphasis on individual spirituality; and second, the segment of the population that identifies as nonreligious is growing. If you consider those trends together, it should make us suspicious of religious institutions and suspicious of the idea that religion deserves special treatment under the Constitution. If you look at religious freedom and then put it up against equal protection and due process, as well as the growing number of people who are individual in their faith or have no faith at all, to repeatedly say that you need to have special exemptions for religion or special rules for religion becomes more and more problematic.

Now, regarding associations and voluntary associations, in the long term we have to develop one principle of freedom of association that governs all groups. When the Solicitor General made that point before the Supreme Court, both Justice Kagan and Justice Scalia almost jumped off the bench, thinking, “No, the fact that we have religion clauses means religion deserves special treatment.” However, I do not see how that idea can hold against the developing diversity and pluralism and non-religiousness of the population. I think that the more that you have special rules for religion or a sense that religion does something special or adds something extra, then you are always going to be undermining liberty and equality. For now, the Court is not ready to go the freedom of association route. But I see that as the best way to have voluntary associations that could stand up to the government, and that also are equal in the rule that they have to follow.

**CAROLYN EVANS:** One of the important parts of liberal democracy is the notion that people are not necessarily compelled to remain in a religion. We have to acknowledge that, at least for some religious groups, and for some people within those religious groups, there is a very high cost that needs to be paid for disassociating from the groups. The term “voluntary” needs to be taken with a grain of salt and a grain of skepticism. A lot of women, in particular, do not feel that they have that same degree of voluntarism. And there are people who exist within those associations, particularly children, for whom the term is problematic.

It becomes even more problematic when we talk about the employer-employee relationship. It is a very easy thing to say that one does not have to be employed by a religious organization. But in times such as these, in particular, many people are desper-
this institution does not exist or if it was different. The people behind the institutions have to be taken into account.

For example, in Germany, the Roman Catholic Church and a very tiny part of the Protestant Church were the only groups that were institutionally against the National Socialists. The opposition against the Nazis was within these institutions, and without these institutions such opposition would not have existed. The Protestant Church was the main factor in overcoming the repressive regime of the Eastern German Democratic Republic. Without the Protestant Church and without the Catholic Church, communism would not have been overcome in our days.

In Germany, same-sex “marriage” (technically called “same-sex couples”) was a movement from within the Protestant Church. That was a church thing. It was the Protestant Church that first blessed such couples.

COLE DURHAM: I think one of the things that is striking as one listens to contrasts between the United States and Europe is the notion that there is a kind of American sense that liberty is a zero sum game that one plays with the state, and if the state wins, the individual loses. On the other hand, in continental Europe, there is a much deeper sense that the state is a vehicle of liberty and helps to actualize it.

One of the ways this is playing out in the court cases is the state or the court agrees that there is autonomy, but it retains jurisdiction to check the ambiguous borderline questions. In the United States case of Hosanna-Tabor, there is a footnote saying that it is not a jurisdictional issue. The question of the extent to which the state retains jurisdiction to check the bad cases is an interesting one. Several of the speakers have talked about how the church can become a problem, how it can become too strong institutionally. Then one must ask why it is that we assume that the state would be the solution. For example, in freedom of speech, we talk about more speech being the solution rather than government regulation. I think one of the harder questions is how much jurisdiction courts and the state should exercise in these areas, and how much do we leave to rights of exit so that if there are institutions that are problematic, people can go elsewhere. How does one deal with those questions?

KYLE DUNCAN: One very basic idea that you see in our Constitution, well-explained in the Federalist Papers, is that we approach these questions by dividing up power and by making sure that no one locus of power predominates over others. Power is given to the federal government, to the states, and to localities. Power is divided both horizontally and vertically. This is a functional arrangement that makes sure no one can get the upper hand over anyone else, creating a kind of equilibrium.
This equilibrium has changed radically over time, particularly with the Civil War amendments to the Constitution, but there is a realistic view of how to protect people. The framers had a particular view about human nature, namely that it was not perfect and that it needed to be checked and balanced. The idea of locating a large amount of power and meaning in one institution is a really problematic thing. We see that in our concepts of federalism and separation of powers.

I go back to the “critical buffers” quote from Hosanna-Tabor. The reason I think that a religious organization needs greater autonomy than a secular organization is because historically in our country and throughout the world today, religious organizations provide a locus of meaning for people that is quite different from secular organizations, and that is desirable. We want areas of meaning and purpose for people in our society to depend not merely on the government. We want more religion and more meaning and more plurality to flourish because this is a way of protecting liberty by competition.

As a concrete example, regarding government expanding at the expense of religion, Professor Griffin brought up the HHS mandate, which we at the Becket Fund are very familiar with. There is a large movement toward a federal presence in the healthcare industry and in the insurance industry. One of the first things that comes out of this mandate, requiring all employer health insurance to cover FDA-approved contraceptives, is an exception for religious employers. This exemption is so narrow that it excludes all manner of religious institutions, such as Georgetown, Notre Dame, and even the largest Catholic broadcasting network in the world. These institutions are not religious anymore because the government has excluded them from the sphere of religious organizations that have any conscience rights. There you see a very dramatic example of government expanding at the expense of the institutional integrity and autonomy of religious organizations.

I think that emphasizing the institutional aspect of religious autonomy neglects the idea that, under the Establishment Clause and during both European and American history, we should be suspicious of the power of churches as well as of the state. When the two of them combine to keep individuals out of court, individual liberty suffers.”

Leslie Griffin

CAROLYN EVANS: I think the question of how much faith we put in government is actually an extraordinarily difficult and complicated one, because you do want a set of robust civil society institutions and there are good reasons even for nonreligious people to want to see the flourishing of liberties that allow religious groups to flourish, provided those liberties are also extended to nonreligious groups. It is foolish to put too much faith in a government, even if governments can be voted out. Religious institutions and power structures can be undermined if sufficient numbers of people reject the tenants of such institutions. The decline of the power of the Catholic Church in Australia, for example, which is still probably the single most influential religious body, is in part tracked in terms of its membership and the extent to which the membership agrees with what the religious leadership says.
In a democracy, if people are moving away from religious institutions, those religious institutions will have less power. I do struggle with defining the extent to which you want to give the government a free hand in controlling religious organizations. All of my instincts, in fact, point me toward something like a ministerial exception. Yet, when I see how it has been applied in this country and the extraordinary scope and deference that has been granted, it looks to me like bootstrapping by religious organizations, which worries me. We need to recognize that governments can be forces for good and ill.

GERHARD ROBBERS: To the question of what is special about religion, I would hesitate to make general statements, but I see the main difference between religion and other institutions in the fact that religion pervades all aspects of life and is not just one interest among others. Another difference is that religion sees to the beyond, that there is something deeply different, the other. This puts things into its place, and makes things here relative.

To the question of government, my hunch is that we are now comparing the United States with Northern Europe. But there is also Southern Europe, and that makes general statements somewhat ambivalent. In Northern Europe, I completely agree that there is a difference in respect and difference in approach to the role of government. At its core, government is something good in Northern Europe. On the other hand, in Southern Europe, in Italy for example, I see a much stronger focus on family than the state.

COLE DURHAM: Let’s open the floor. Why don’t we collect two or three questions and then we’ll take another round.

LAUREN HOMER (Law and Liberty Trust): I want to address the incendiary bomb that was thrown in, equating slavery and segregation with same-sex marriage and reproductive rights. Slavery and segregation were state actions and state laws that were oppressing certain groups of people. The corrective came by constitutional amendments and even the Civil War. Opposition to same-sex marriage and reproductive rights is not coming from the state. Yet there are individuals who are saying that religious groups have to change their doctrines which they have held for thousands of years, and I think that is a real distinction that you have failed to make. There are many religious groups; some agree with those positions, and some do not. However, for government to force them to change their doctrines, I think, is a very fundamental distinction.

TORE LINDBOHL (Norwegian Centre for Human Rights, University of Oslo): This question is for Kyle Duncan. I think that, with Carolyn, I share the inclination that the ministerial exemption should stand, except how it is often understood and practiced in the United States. There are some cases where obviously it would be right to give support to a church, mosque, or synagogue against a certain employee for certain reasons, but in other cases it should go the other way. It seems that in the United States there is a view that makes religious autonomy a sacrosanct thing, but sometimes it could be very unjust. I think the main consideration has to be not whether you should have absolute freedom or protection against what a church may decide about your job, but rather it has to be a question of basic fairness. In the Schütz case, I think the European court decided in a just way, because it was such hardship for that person to have to leave his job. As a matter of principle in the US constitutional system, should the decision always be in favor of the religious body, provided the person who is fired, for instance, has not committed a crime?

SOPHIE VAN BIJSTERVELD (Tilburg University): Professor Evans and Professor Griffin, I would like to pick up on the theme of the first panel. We were talking about “the” religious argument, but in fact there are always many different religious arguments, leading to many different religious points of view, as understood by various churches. The same is the case, I think, with the way autonomy is actually used in practice. It is not one monolithic block where all the different religious groups and churches use autonomy in the same way, but there are many ways in which this autonomy is played out in practice. Is that not just a matter of democracy at work, and should you not just let this societal democratic process take the lead? I heard you also talk about the role of the law, and indeed, I agree, many good things that have happened have been produced by the law. But the law would not have been produced if there was not support for that in the broader society, and if these things were not debated within the society from different points of view. Therefore, you need the autonomy to actually be able to discuss this.

Second, to Kyle, I am myself very much in favor for religious autonomy for all the different reasons you mentioned. Regarding the situation in the United States, do you think there are also limits on religious autonomy, not so much in the substantive sphere but in the procedural sphere? This could include requirements for procedural fair play for making certain decisions with the church, within churches and religious groups, such as the need to hear the other side before making a decision?

RIK TORFS (University of Leuven): First, we have a very conceptual approach to things, and what strikes me is that normally an Anglo Saxon system very often starts from a more inductive
method. We see here the opposite. We start from large principles which then are implemented on concrete cases. A continental European system is more often the opposite, starting from deductive notions. We see here the opposite, a balancing of various interests. So what’s going on? Are we losing our identity? That would be dramatic.

Second, what is the elasticity of a system? How far can one go in human rights? Imagine for a moment if the Hosanna-Tabor case had been a very unsympathetic case, with the church being rude and discretionary. Would then the same solution be chosen? In the Smith case on peyote smoking there was a negative decision for the defenders of religious freedom. Then we came to the Hosanna-Tabor case where we are really dealing with ministers. What is the influence of facts? Are we not too easily playing with concepts and neglecting facts from time to time?

**KYLE DUNCAN:** So there’s a cluster of questions about Hosanna-Tabor. So let me take the balancing and the fairness issue. The facts of Hosanna-Tabor were not particularly good for the church. Here you have a woman who has been diagnosed with narcolepsy, undergoing some sort of disability. She claims to have been fired for that reason. The church says, “You have not been fired for that reason. You have been fired because you went around the normal internal dispute resolution process for which we have a theological rationale, and you have created disruption, so we will fire you for that.” That does not strike me as a particularly good set of facts for the church.

What about fairness? Why did the court not try to figure out how to fairly resolve the issue on the basis of her opportunities to get a job elsewhere and the impact on her life? However, what I, and many American lawyers, hear in “balancing” and “fairness” is aggrandizing the power of a federal judge to enter into a realm of decision-making where we will quickly get into theological disputes. It would be very easy, if we got into fairness, to start considering the relative importance of the Lutheran internal decision-making process (which is based on the New Testament) in the way the church functions, versus the impact on this woman’s life of not being able to come back and teach at this church. If that is the fairness decision, to an American concerned with a genuine separation of church and state, it is a real fear about a federal judge having the power to weigh those two things. I think that is what explains the Court’s focus on the Establishment Clause, in saying there is a sphere of decision-making that we do not want courts to get into. I think that is what explains that part of the decision.

**CAROLYN EVANS:** I was not saying that slavery and segregation were the same as same-sex rights or marriage. It is very easy for us to have a rose-colored view of the role of religion in history and view religion depending on which side we happen to fall. Some might see religions as just genocidal, bloodthirsty, torturing institutions, because they have been all of those things. Others see religions as civil rights protectors, antislavery crusaders, women’s rights advocates, because they have been those things, too.

Sooner or later in those civil disputes, through laws, through constitutional change, and through the people, the state decides to back one moral position or another. In all of the cases that I gave, these were deeply held theological views. The southern slave owner who was dispossessed considered himself to have had both his property rights intruded on, but also to have been told to change his theology. Anti-Semitism in Europe was based on the theological idea that Jews were Christ killers.

And sooner or later, we are going to have to come down on a side in civil law that holds certain theologies to be wrong. This does not necessarily entail direct, forced participation in
things like same-sex marriages, but it entails a kind of public judgment on certain theologies insofar as they undermine the equality of other citizens. The state is going to protect that equality. To that extent, I think there is an equivalence between slavery, segregation, anti-Semitism, and things like same-sex marriage today.

I am not arguing against the autonomy of religions. The question is about boundaries. Can one have a healthy social debate and lots of differences and points of view? Is it absolutely necessary that religions have an unfettered right, for example, to sack anyone who works for them for any reason and with no procedural fairness? I would argue it is not necessary.

KYLE DUNCAN: That is not what the ministerial exception is, and that is not what the Supreme Court recognized. In the Hosanna-Tabor case, it is not the right to sack or fire anyone for any reason. It is the right to make decisions about the firing or hiring of ministers. There is a question of how broadly that needs to be defined, but we are talking about the hiring and firing of substantial people in the organization that have something to do with the mission and the message of the organization. It is whether we can have an employment discrimination suit about it. It does not apply to non-ministers, and it also does not apply to a whole range of lawsuits, be they private or governmental, that could affect the church.

We have a robust principle, but the breadth of the applicability of that principle is still very much up in the air. But I do not think it is right to say that it is legal to fire anybody you want for any theological reason that pops into your head.

CAROLYN EVANS: I entirely agree that that is an accurate description of the Hosanna-Tabor case, but it is also accurate to say that there are many religious groups who are arguing for a much more expansive understanding of what autonomy means.

LESLIE GRIFFIN: Before Hosanna-Tabor, starting in 1975, the lower courts had all developed a ministerial exception which tossed out many cases on equal pay, family leave, age discrimination, disabilities, and so forth. There is no good reason to think that those precedents will be cut back now that the Court has recognized a ministerial exception. In fact, they confirm the existence of a ministerial exception case, and so there is reason to be concerned that “minister” is already being defined broadly, and the scope of the antidiscrimination laws to which it applies is already very broad.

GERHARD ROBBERS: To the Schüth case, the Human Rights Court in Strasburg did not say that the interests of Schüth overruled the interests of the Church. The court just said that the German courts had not applied a proper balancing technique. One cannot say that the interests of the individual to get another job are so important that they overrule the interests of the Church.

Here we are coming to where we, from my point of view, are on the same lines. That is the question of the factual assessment of what is important and what is not important. The examples you gave are completely convincing to me. If the Church is pro-slavery or is fighting for racial discrimination, that is not acceptable. There are limitations to church autonomy and religious autonomy. The question is: Why is that not acceptable? You have mentioned extreme cases which most of us probably could not accept. We have not yet come to an explanation for when the borderline is reached. Where is the borderline?

When it is contended that same-sex marriage is as important as racial discrimination I wonder whether religious perspectives can be overcome. I have no answer to that, but I agree that when there are extreme cases one would have limitations to autonomy, as for any freedom.

KYLE DUNCAN: I have to point out that in the extreme cases that you mention—slavery, racial segregation—governments backed those policies. The Supreme Court gave us decisions like Dred Scott v. Sanford and Plessy v. Ferguson. I do not put all of my trust in religion, but forgive me if I do not put all of my trust in secular government, either. Consider how many people were killed by atheistic communism. Someone pointed
out that human beings are the common factor in all these organizations, so maybe the problem lies there.

**ANNA** (Church of Scientology, Washington DC): When you have a religious group that promotes slavery as opposed to opposing slavery, there should be some basic laws protecting individuals and guaranteeing human rights. This is an alternative to restricting the autonomy of religions, giving them extra rules and regulations, and cutting out their doctrines that they have held for a thousand years. How can we guarantee that everybody follows the Universal Declaration of Human Rights, as opposed to infringing on the rights of somebody to also have a religion?

**MARK RIENZI** (The Catholic University of America): I have two questions, one about individual rights and one about whether religion should get special treatment. It seems to me that the presentation of this as a zero-sum game, a conflict between religious organizations and individual liberty, is in part driven by a really broad description of individual liberty that is not quite consistent with the way we normally think of, say, constitutional rights. For example, Roe v. Wade says there is a constitutional right to abortion, and Casey v. Planned Parenthood confirms that. That is a right that says the government cannot stop you from getting an abortion. It is not usually thought of as a right to force other unwilling, private people to give you an abortion. Lawrence v. Texas establishes a constitutional right to gay sex. It does not establish a right to make unwilling private people participate or somehow be involved in it. It seems to me that viewing this as a zero-sum game in some ways stems from the idea of rights as forcing some unwilling private person or institution into action, and denying them their ability to disagree.

While some religious liberty cases may really be zero-sum games, it seems to me that many of them are not. The HHS mandate is a great example. If we really do believe as a society that there ought to be a right for everybody to have these drugs all of the time, the really easy answer is that the government can give them out, or willing people or parties can give them out. We do not have to drag unwilling people into the process if they do not want to be there.

Second, as to whether religion gets special treatment, Professor Griffin, I understood you to be saying that you do not think it makes sense to treat religion as special, and I am curious what that means for your view of the Establishment Clause. Do you also view religion as not special there? Or do you think at that point religion becomes special and we need to give it different treatment than we would give, say, environmentalism or any other secular philosophy?

**LESLIE GRIFFIN**: I think the mandate question is that the government passes laws, as with the ministerial exception, that regulate employers and we want the government to have some regulations. My position on the mandate is not based on a view of individual entitlement to contraceptives. It is based on a principle of religious organizations complying with the laws as other groups do. I am willing to extend the Establishment Clause to religion or anything that is equivalent to religion, such as a secular group or an environmental group. I do not mind applying the principle broadly across what seems to be non-traditionally religious groups.

**CAROLYN EVANS**: It is interesting to think about how that would work in practice. You may be a little surprised that I actually agree, at least to some extent. Where law can, it should try to be imaginative about not creating a conflict with people’s most fundamental rights. If there are other ways of serving the rights, if there are two rights that are potentially in conflict and there is a way to resolve them that allows both rights full play, it is better to take that path than to take a path which gives one right full play and restricts the other.

I do think that part of the zero-sum game is an expansive notion of individual liberty, but I also think it is an expansive notion of what religious liberty requires. Once you get to the point where religious liberty requires that people be free from law to the extent that their conscience requires in a pluralistic democracy, I think that is an overexpansion of traditional understanding of religious freedom, and I think simply an unsustainable one. If there is a conflict, I think it is also partly because of a fairly expansive view of religious liberty.

**GERHARD ROBBERS**: Anna, you have asked a rather general question on how best to implement human rights, as expressed in the Human Rights Declaration of the United Nations. I would make four points, very briefly. First, you need a legal order that is in line with those commitments. Second, you need an education for the people to follow these values that are present in the human rights. Third, you need independent courts that apply this legal order. Finally, you need a general culture of tolerance. All of these legal ideas and legal ways of doing things will not succeed if this is not based in and backed by a general culture.

**COLE DURHAM**: These issues are crucial and they will persist. Part of what is needed is finding solutions that really will work, finding the aspects that are not a zero-sum game, and finding ways that people can live together, living their differences as well as their overarching commonalities.
MICHAEL KESSLER: This panel will focus on historical claims about the nature of conscience, including how individual claims of conscience relate to institutional claims of conscience. Are there differences? Are there similarities? We will look at those questions in comparative perspective between the United States and Europe.

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JAVIER MARTINEZ-TORRON: I will provide some critical comments on the European Court of Human Rights case law on freedom of conscience. I am persuaded that Article 9 of the European Convention on Human Rights, using the language of “practice of religion or belief,” protects the right of every individual to behave in accordance with the dictates of their own conscience. This right should be understood strictly in different senses. One, we should understand the term “conscience.” We cannot call conscience anything and everything. When we talk about dictates of conscience, we refer strictly to moral obligations, not just to preferences or recommendations. In other words, we are using the term “conscience” as the supreme law of every individual that governs their inner being concerning the most serious questions.

Typically, problems with freedom of conscience arise when the exercise of this right enters into conflict with some obligations that derive from the law of the state. Here, we have a conflict of laws between my inner law of conscience and the outer law coming from the state. The right of every individual to behave in accordance with the dictates of his own conscience is not absolute. It is subject to limitations and those limitations are clearly stated in the second paragraph of Article 9 of the European Convention. This means that the state, in order to restrict my freedom to behave in accordance with the dictates of my own conscience, must provide a sound, clear justification to impose that limitation. It is not enough to generate references to “public order.” The state must demonstrate that it is strictly necessary in a democratic society to limit my right to behave in accordance with the dictates of my own conscience.
My comments on the European Court case law follow this main line. In my view, the European Court has not taken very seriously the freedom of conscience, compared to other public freedoms enshrined by the Convention. The European Court, inheriting the former activity of the European Commission of Human Rights, has been very reluctant to accept that there is a conflict between my conscience obligations and the neutral state law that allows the state to pursue legitimate secular goals. The state law always prevails without any further justification. This has been the reason why the European Court, for instance, has held that not every act inspired and motivated by my conscience should be protected by Article 9 because it is not necessarily an expression of my freedom of conscience as such. These are ambiguous terms because very often “motivation” and “expression” are virtually the same in the mind and conscience of many people.

The practical effect is that in the view of the Court, once I say that a particular behavior of a particular person is just motivated by his conscience, but is not necessarily an expression of his belief, I do not need to go to the closest limitations of Article 9, paragraph 2. This is not an expression of freedom of conscience. It is not necessarily protected by Article 9 and I do not have to justify my limitation or my restriction of this particular aspect of freedom of conscience as necessary in a democratic society. I can escape that part of the analysis, which makes things quite a bit easier for the Court on the one hand and for state laws on the other hand.

This type of reasoning has been present in some crucial cases. Even more, when the Court has found that it was impossible to deny that there was a restriction of freedom of conscience on an individual, the Court has very easily justified the restriction of freedom of conscience upon a very weak assessment of available evidence, such as generic references to the neutrality of the education centers, the need to guarantee the public order, the public peace, and so on. These have been enough to justify the limitations.

Another expression of the inappropriate protection of conscience in the European Court is the less known hunting cases. In some parts of Europe where hunting is very popular, owners of small pieces of land automatically have become by law members of hunting associations, and they must tolerate hunting on their private property. Some land owners opposed hunting on conscience grounds. It is very revealing that the Court, when deciding those cases, refused to analyze the cases from the perspective of Article 9. They decided the cases in the light of the right to private property and from the perspective of the right to association. The cases involved private property and the right to associate, but they basically emerged out of the conscience convictions of some people. It was on this point in particular that the Court refused to judge.

There has been an exception to the approach of the Court in the case of conscientious objection to military service. Here, the Court has always been very much in favor of conscientious objectors. However, contrary to what has happened in the rest of the international sphere, where it is generally held that there is a right to be exempted from military service when a serious conscience problem is present, the European Court had refused to recognize this right, based upon a very weak interpretation of Article 4 of the Convention, which regulates forced labor. The Court held that there is no right to conscientious objection under Article 9, because Article 4 already contemplates the situation.

That was very weak reasoning, but it had been the mantra repeated by the Court for decades until the recent Grand Chamber case in 2011. This case reversed the case law of the Court. The Grand Chamber basically adopted the reasoning contained in the dissenting opinion of the judge from Ireland in the chamber decision. When there is a serious and insurmountable conflict between conscience and legal duties in the case of military service, this calls for the protection provided by Article 9 under freedom of conscience.

The second interesting affirmation of the Court in this case was that the limitation must be justified as necessary for a democratic society, public order, public safety, and protec-
tion of the freedom of others. The reasoning of the Court held that you cannot pretend that a limitation of freedom of conscience is necessary in a democratic society when there are alternative means available to reconcile the two interests involved: the public interest of the state law (in this case, military service), and the protection of freedom of conscience. This was the first time I have seen a clear statement of what we may call the “European version” of the “least restrictive means” doctrine of the United States Supreme Court, which I am afraid is not very popular anymore, even in Supreme Court cases. The interesting point of this case is that this doctrine can be applicable to any other type of conscientious objection. The good news is that there is a potential for extending conscientious objection to cases of conflict between law and conscience. The bad news is that it is probably not going to happen.

Shortly after this case was decided, I was in a seminar with one of the judges of the European Court and expressed my optimism about this case privately to him. After the decision, he told me, “If I were you, I would not be so optimistic about this, because this doctrine of the Court may well be applicable exclusively to concerns of objection to military service.” The recent case law unfortunately seems to confirm the prediction of this judge. For instance, there was another case involving the right to rest on the Sabbath. There was a lawyer asking for an alternative date for a hearing. His claim was refused and the European Court, when deciding in favor of the state, held that his request was just based on personal reasons. Not a single reference was made to conscientious objection.

There are a few interesting pending cases before the European Court at this very moment. Some of them involve the wearing of Christian religious symbols in the workplace. Others involve conscientious objection of some people to participate in the adoption of children by homosexual couples. It will be problematic if the conscientious objection doctrine is not applied or even referenced. Even though conscientious objection to military service has been recognized, it would be very wrong for the Court to give itself the right to decide which consciences are deserving of protection and which others are not because they are not reasonable enough to call for the protection of Article 9.

**MARK RIENZI:** I will walk through the history of the treatment of conscience in the United States. Then I want to answer one of the normative questions about when the law should protect conscience. Finally, I will address the question of whether institutional or group conscience ought to get the same protection as individual conscience.

One of the things that jumps out as you start reading the individual conscience cases, which date back to the 1870s with the Reynolds case and the Smith case, is the distinction between conscience in terms of belief and conscience in terms of action. There is wide agreement that there really is complete and impermeable freedom of conscience in terms of freedom of belief. That is not really in doubt. That is a great thing and we should not take it for granted, but it is not something over which there is much dispute.

The real dispute comes when someone says that because of his religious beliefs or conscience there is something that he must do or there is something he must refrain from doing. I want to focus on a particular slice of history looking at a handful of different situations, in which the state or federal laws have either required people to participate in killing, or at least permitted people to participate in killing, and talk about how conscience has been understood in those contexts.

The most obvious starting point is conscientious objection to military service. There is a long history, older than this country, of pre-constitutional colonial governments affording some level of conscientious objector protection. That protection was not complete and it was not perfect. Sometimes the conscientious objector had to be willing to hire somebody else to go fight in their place, which many Quakers, for example, thought was also a violation of their religion. It also only applied to members of specifically recognized peace religions like the Quakers. If you had happened to be a Catholic who objected to military service in the eighteenth century, you would be out of luck.

Over our history, though, conscientious objection has been expanded quite a bit, so that now it is not only applied to members of certain organized religions but is open to anyone who has a religious objection. In the 1960s and 1970s, both the Supreme Court and Congress expanded it even further beyond religious objectors to people who object out of a deeply held moral or philosophical belief.

Interestingly, over the past 50 years, we have seen a handful of other situations where the state allows or compels people to participate in killings, and we have seen the development of very similar conscience clauses allowing people to opt out. In many of the cases, it has followed the same trajectory as the military service cases in that it does not protect only religious objectors,
but anybody with a deeply held moral or philosophical objection to participation in the killing. The best example of this is the abortion right after Roe v. Wade, when the country was obviously deeply divided about the morality of abortion. One of the things that happened very quickly after Roe was really broad, widespread agreement, both at the federal level within Congress and across the states, that while abortion is going to be something that is legal, it is not going to be something that unwilling people and institutions can be forced to participate in. A handful of places limited that to religious objectors. Most of them did not. At the federal level we have something called the Church Amendment for anybody who refuses to participate in abortion for any conscience-based reasons. Later federal protections do not even refer to the reasons at all. They simply allow one to refuse to participate in abortion.

In the case of capital punishment, many of the places that do have the death penalty, including the federal government, have created explicit conscience protections that take a broader view of conscience, which include religious or moral reasons for not participating in capital punishment. In other words, there is no concept here that people have to give up their rights simply because they work in this field or at that penitentiary that does executions. In fact, it is the exact opposite. It is an expressed conscience right for people who work in corrections facilities not to participate. That has been duplicated in 11 states now that have similar provisions. Some of them talk about religious and moral objections, but many more of them just say participation has to be voluntary.

I think those are all terrific developments. However, at some level, non-religious based conscientious objections do not get the same protection as religious objections. We have a free exercise of religion clause, not a free exercise of philosophy clause. Although I would say that, in light of the Smith decision [Employment Division v. Smith, 1990], there is less work that gets done by the Free Exercise Clause than there should be. We do have statutes like the Religious Freedom Restoration Act of 1993 (RFRA) that provide broader protection for religious objectors. But at least in these areas, where someone could be asked or compelled to participate in a killing, we have actually been pretty good over time in saying that we will not force unwilling people to do that. In fact, despite all the big fights about the Affordable Care Act that are going on in the courts, one thing that is great about the Affordable Care Act is that it says, “No individual or health care facility can be discriminated against based on their refusal to participate in abortions.” It does not limit the protection to religious objectors. It does not make the claim that a facility cannot possibly have a religious conscience about something. It simply says that the facility does not have to engage in abortion. I think that is a great thing.

One of the questions we were asked is, “When should conscience get protection?” My normative proposal is that in a liberal pluralistic democracy, the answer is most of the time. Most of the time in a pluralistic place we ought to be willing to say that we will not force people to violate their deeply held beliefs. Are there times when we will? Absolutely. The government obviously has a compelling interest in eradicating slavery or in not letting people engage in human sacrifice. Where there is a real serious government interest, religion and conscience must yield.

Yet, most of the conflicts that involve conflicting rights are not really those kinds of conflicts. Most of them are things that can be dealt with in much easier ways without the government saying religious individuals and religious organizations have to violate who they are, or have to give up that belief to be part of the society. Most of the time there is no great cost involved.

The last question we were asked is, “Should institutional groups and organizations get the same type of protection?” My answer is yes. I think the Hosanna-Tabor case in some ways was very much about that issue. We talked earlier about the belief-action distinction. At some level, the question of who is the public representative of a faith is very much about the mind of the church and the ability of this group of people to come to their own conclusions about important questions. There is a great constitutional value in saying we protect the right of people to come together and make those decisions. We really do have to draw some lines, even if it is sometimes at some cost, to ensure the ability of the organization to keep its own character and to be voluntary.

MELISSA ROGERS: I believe that in American history we have often used the term “conscience” interchangeably with “religious freedom” to refer to a panoply of both beliefs and exercises of faith. That is one way we can think about conscience, and it is certainly an appropriate way to think about it. Another way to think about conscience is both more narrow and more broad. It focuses on judgments about right and wrong and not necessarily on everything that we would do as part of the practice of our faith. There can be a sense of conscience that emanates from morality and is divorced from faith; that is, we could have a secular judgment of conscience as well as a religious judgment of conscience. As Mark said, we have laws deal-
Let me point to a couple of ideas that I think are not properly a part of conscience rights. I will use the context of healthcare as an example. I think a right of conscience would include, for example, the right of a doctor not to participate in performing an abortion. But it would not include the right to block others from accessing lawful healthcare services, including certain abortions. The right of conscience would similarly protect in many instances the right of a pharmacist not to fill a particular prescription if they have a conscientious judgment that they cannot do that. But it would not go further to allow the pharmacist to tear up that prescription so that the patient cannot take it next door and get it filled somewhere else. I think it is important to bear those distinctions in mind when we are talking about conscience.

Mark properly mentioned a lot of federal and state statutes that protect secular and religious conscience. He also mentioned that our First Amendment singles out religion. One of the interesting things about American law is that it not only treats free exercise as a special thing, but it also says that the government cannot establish religion. That is another way in which our government looks at religion and treats it specially. At least the Supreme Court previously interpreted the clause in this way, that the government could not unnecessarily interfere with the free exercise of faith. It also could not promote religion.

Sometimes we have discussions about the government just treating religion like everything else (as a matter of just association) instead of giving special regard for free exercise rights. Sometimes that raises the question for me: Would those who advocate this also advocate treating religion the same as secular ethical ideas on the Establishment Clause side, so that the government would have to be careful about not establishing or promoting secular ethical reasoning? That to me does not make a lot of sense. It makes more sense to me to treat religion specially on both the Free Exercise Clause side and the Establishment Clause side.

When should conscience be protected by law? Should it be any different for individuals and institutions? I certainly agree with Mark that the government should provide a high level of protection for those secular and religious conscience rights of individuals. I think usually when we try to run roughshod over individual conscience, we end up creating a deep wound with counterproductive results. For example, when the law would try to force a doctor to perform an abortion, usually that doc-
tor will not perform the abortion. Rather, he might leave the profession and leave potentially a whole area that is in need of his medical care.

The government should also protect the free exercise rights of institutions. In our country, at least, we have always appreciated that the exercise of religion is not something we just do in our own corners; it also involves coming together for worship and teaching our young people the faith so that they can carry it on to the next generation. It is hard to conceive of free exercise rights in America where we would not have communal, associational, and institutional rights as well as an individual right, and I think that is absolutely an essential part of the free exercise right. I struggle, however, with the idea of institutions having conscience rights as an institution. At the same time I wonder whether that is really not a practical problem, because most institutions that register conscientious rights are religious institutions that then would be protected by free exercise rights.

The government has two important responsibilities in this area. One responsibility is to protect conscience rights. We have valued those since our founding days. I think the government also has to be very careful and mindful about the burdens that are placed on people when it does accommodate conscience rights, even if the government is not required constitutionally to be attentive to the burdens that are placed on others by free exercise accommodations. I think we need to be very careful about being attentive to those rights, because those people often have some kind of conscience claims of their own. If a woman has difficulty procuring a particular healthcare service because a doctor would deny her that service due to conscientious objection, then the state would have some responsibility to step in and make sure that she could procure that legal healthcare service elsewhere. But in the United States, we do not have a strong tradition of the government getting heavily involved in the provision of healthcare. Sometimes that can make it a difficult task to deal with conscientious objections, as other people become burdened.

I do think it is unfortunate in our own country that some of these issues have become quite divisive. I believe that many times we can create situations that do honor the rights of conscience and honor people who might be burdened by righteous conscience by trying to remove those burdens as well. Especially with the most recent debate about the contraception mandate of the Affordable Care Act, too often our rhetoric has been reduced to one side claiming there is a war on religion and the other side claiming there is a war on women. When we do that, we miss chances to see some of the legitimate interests on each side.

RIK TORFS: I will deal with the issue in three different points. The first point will deal with norms and values because I think they are important for the setting. The second point will deal with the content of religiously-inspired conscientious objection. The third point will address oppressive conscientious objection.

I think that the whole topic of conscientious objection is becoming more important than it used to be in the past because there is a shifting in many societies, and certainly in Europe, from a value-oriented society to a society which is focusing more on norms. By that I mean in the past there was probably more social cohesion than there is today. People were, on a voluntary basis, sharing certain values that could not be enforced. Apparently, this is not working anymore. We have a more normative society with more compelling norms with penal elements. The more norms you have, the more possibilities exist to have conscientious objection against them. That is a logical phenomenon and that should always be taken into consideration when we deal with these issues. Consider homosexual partnership or marriage. If it does not exist, nobody as a civil servant can have an objection against it. The more norms you have, the more possibilities there are for objection. I think that is an important starting point.

My second point deals with the content of religiously-inspired conscientious objection. It strikes me that many cases that are invoked as being part of religiously-inspired conscientious objection do not have very much to do with conscience, but rather with following religious norms. I can, for instance, imagine very well that some people say, “I am opposed to abortion or opposed to same sex marriages, and I do not want to participate in it as a medical doctor or as a civil servant because my church tells me so.” If that is the point, then you have another normative system prescribing certain things. While there are the norms of the state, there are also religious norms that can also be interiorized, but not necessarily so. It is very well possible...
that people just want to be obedient to a law—if not the state law, then a religious law and vice versa.

I do not think we are at the true depth and the real refinement of what conscience is. We can look into religious traditions to come to a finer description of what truly conscientious objection could mean from a religious perspective. For instance, if we look at the Catholic tradition, the conscience is the ultimate arbiter and the ultimate guidance—even against the norms of the religious system itself. That is something which is not easily underscored anymore and it may be a bit forgotten by institutionalized religions. In that regard, it would be very problematic to limit conscience objection only to clearly visible norms of religious systems, because those religious systems themselves admit more nuance when they go further. I understand, of course, the idea of people who need absolute clarity about where the limits of conscience can be. If you have the official doctrine of the church, that is easier than the deepest conviction of a person. But it is very important to take into account the latter.

I am also a little bit skeptical of notions like “deeply held beliefs.” What does that mean? When you hold something very deeply that could be a sign of stubbornness, for instance, and not always of intellectual depth. Why should beliefs be deep? They can be shallow, but also held with true sincerity. Maybe because they are shallow they are more the result of a balancing than all those very deep reflections. We should really go into the heart of the matter. Conscience is sometimes very sophisticated.

My final point deals with possible oppressive conscientious objection. Here I would like to start a bit from my experience as a senator in Belgium and the debate that we have had there regarding euthanasia. Belgium is one of the countries in the world where euthanasia is legal. There is no right to euthanasia, but rather a right to ask for euthanasia under certain circumstances, which is absolutely not the same thing.

At the first level everybody will agree that a doctor cannot be obliged to execute euthanasia. Nobody can investigate what his true motives are if he says, “I have a conscientious problem.” At the second level, can such a doctor be obliged to refer to a colleague who is willing to help in that euthanasia case? Here the debate is already a bit more sophisticated. Some would say yes because then he is not involved in euthanasia. Others—and I share this viewpoint—would say no because when you are obliged to refer to another person, then your conscience then becomes a kind of empty shell. You are participating in the process not as the person who executes, but as the person who is a go-between.

At the third level, can the institution for which the doctor is working be forced to play that role? That is one step further and it possibly involves the conscience rights of the institution. Here the problem is that in Belgium, many hospitals are religiously inspired, particularly Catholic hospitals. They are not very religious and not very Catholic, but they may be unwilling to refer to another institution in the case of euthanasia. This is a question that remains open. It should be noted that the rights of the institution can also play the other way around. What does the institution do in the case of a doctor who, although he works for a Catholic hospital, is willing to cooperate with euthanasia and claims his independence as a medical doctor and his personal conscience?

On the fourth and last level, consider the right to ask for euthanasia. If we consider the conscientious objection of the medical doctor, the non-existence of the obligation to refer, and the strong monopoly of Catholic institutions, then we may indeed end up with a patient who has not much time to request euthanasia. He may die naturally. What will be his rights and possibilities in that context? Here arises a new problem. We could come to a situation in which conscientious objection substitutes for the norm or almost becomes the norm. Given the long list of people, the right to ask for euthanasia could ultimately be denied by a kind of oppressive conscientious objection that becomes dominating and may tend to undermine the universal applicability of the law.

MICHAEL KESSLER: I want to push on the most fundamental question that was posed at the beginning of the panel about the nature of conscience. If an outside observer were to walk in and hear the four of you give very excellent positions and overviews of these issues, one could conclude this is all over the map because conscience means alternately freedom of worship, free exercise of religion, freedom of belief, and doctrine. In particular, related to religious belief, it means a moral and conscientious basis. It means obedience to external forms of authority whether religious or otherwise. It could mean some form of sincerely held belief about anything from any other source.

Each of you presented different models and different examples, in which these views have variously been held at the core of what conscience is when it is being protected by the govern-
ment. Which of these works better, and are there insights from our comparative analysis? Are there examples that you could point to that could teach the other polities from your own experiences? Are there problems that might be instructive?

JAVIER MARTINEZ-TORRON: When we look for conscience, it is a model judgment. That means to worship or to decide what is right or wrong in a particular situation. Nothing and nobody can tell you what is right and what is wrong except yourself and your own conscience. This may involve acts of worship or Sabbath rest or participation in things like abortion. It may involve a doctor, a nurse, or just the administrative person that types the name of a person arriving to the clinic. It may involve very different types of activities. This is why I think that, on the one hand, Rik was referring to conscience as a very sophisticated thing. This is true to some extent, but you cannot expect every citizen to be a philosopher or a theologian. You cannot protect the conscience of highly respected academics more than the conscience of a farmer for the same reason that both a farmer and an official count the same in the election. I have some doubts about this excessive sophistication of conscience that we do not normally ask from other public liberties. For the same reason, I think that conscience is a very individual thing.

I am not persuaded that institutional conscience is the right lens through which to view the issue. Institutions should be accorded the right to operate the enterprises of hospitals or schools in their own way, but I think this is defendable from the perspective of religious autonomy rather than conscience. If we use the term conscience too broadly, we may weaken it at the end of the day. And if we make religious autonomy and individual conscience equivalent, collective conscience is not going to be strengthened. Rather, individual conscience will be weaker in terms of the protection from the state.

MARK RIENZI: Institutions are made up of people who get together. Just like individuals, they have a right to make up their own minds and have their own conscientious and religious beliefs. We would impoverish our view of rights if we say that rights are things that are only held by people when they do things individually, but that they are not held when people come together collectively. Certainly we do not think like that about our free speech rights. One guy on a street corner with a soapbox has free speech just as the New York Times corporation also has a right to free speech. The fact that a group is made up of lots of different people coming together does not mean there is no right there. There are absolutely practical dangers to doing that.

JAVIER MARTINEZ-TORRON: People cannot act collectively. It is one thing for people to act collectively using their individual consciences adding to each other. It is a different thing to have an institution and recognize a conscience in that institution. That is a little unnatural, and if we find equal ways of protecting the rights of an institution, I think we should not distort the concept of conscience, which is more or less clear in philosophy and also in theology.

MARK RIENZI: In practical terms, it was my experience dealing with these cases in the United States that often governments respond to a group of people and say, “If you were on your own as an individual, you would have a right to religious belief. But there are three of you. If you owned your company as Joe’s Pharmacy and you were just Joe, we would let you have a religious objection.” But if Joe and Sam get together and have Joe and Sam’s Pharmacy Corp., “Sorry, there you just lost all your rights.”

Several governments have taken that position. In some ways the current administration has taken that position in some of the HHS mandate cases. Ultimately, if I knew that there was a different format in which we could protect institutional conscience and say that when people get together they still have just as much right as they would individually, I would not particularly care about the label we put on it. But ultimately, I do think we lose something if we say that when people get together, they suddenly give up a right. We do not say they gave up their speech rights. I do not see why we should say they give up their religion rights.

MELISSA ROGERS: I would very much agree that the free exercise rights of institutions are as important as the free exercise rights of individuals. I think where I worry about some of this unraveling in our own debate in the United States is with things like the contraception mandate that deal with an employer’s obligation vis-à-vis its employees. Some claims are being brought by for-profit institutions that would not have Title VII exemptions and would not be religious corporations; thus, they would
not have the rights to exercise their faith in different ways vis-à-vis their employees. They would not be able to hire and fire on the basis of religion. Yet they are making an argument that they should be able to make religious calls regarding the types of benefits that they provide to their employees.

We can talk about how strong that case is, but to an extent, courts may start being reluctant to recognize that. Courts fear that if they recognize that kind of right on behalf of a for-profit corporation, then the for-profit corporation may say, “I should be able to discriminate on the basis of religion vis-à-vis my employees, and I should be able to have exemptions from other disability laws because of my religious beliefs.” The for-profit corporation may be able to reflect its values and religious beliefs in the way it serves its products to constituents and consumers. But once it starts making religious calls on benefits that employees would get, then I worry about some of this starting to unravel and the courts being more skeptical of that kind of assertion of a conscience right.

RIK TORFS: First, with regard to the scope and definition of conscience, Javier is in favor of the logic of the farmer, but I have problems with farmers. Very often, it is said that they are almost a monopoly, but this sometimes involves simplistic reasoning and very outspoken ideas which could be dangerous.

I think we should start from another perspective, namely that people are increasingly making their own determinations about religious matters. The idea of virtual representation by church leaders is not as obvious anymore as it used to be. Therefore, we really have to look at all consciences, even strange and odd ones. As in the past, one of the steps was guaranteeing religious freedom even for the heretics and their own traditions. I think that we need that same degree of sophistication when it comes to conscience and we should certainly not ask too much. When you talk about the farmer, there is a kind of an underlying idea of consistency and logic. That is not always the case. People can be rather inconsistent in the way their consciences operate.

The next question is whether conscience should always be protected. What do we do with all those strange people? Here my answer would be that conscience should be protected, but it should not always be given precedence. I liked, in a way, what you were saying, Mark, with regard to the price of conscientious objection. Here I think we should make a distinction, because “price of fundamental rights” is tenuous. If fundamental rights
are on the market, then we are close to a decline of the rule of law. We can make a distinction here with regard to conscience between the price to pay for the state—that, for me, can be rather high because it is the price of civilization—and the price to pay for other people. When we come to the rights of others we should be very careful. In the case of a war, there is a problem with people who suddenly have a conscientious objection. When we deal with the state, the price for civilization and fundamental rights can be very high. Yet the rights of others have to be protected. There, the limit comes sooner.

MARK RIENZI: On this last point about burdens on others, again I agree with you one hundred percent that in the conscientious objection category, there are serious burdens on other people and I think it is very important. I do not think pharmacists should be able to tear up prescriptions or doctors should be able to tackle people who want to go get abortions someplace else. I think it is perfectly fine for the government to stop all those things.

Yet, it is worth pointing out that I do not think we usually have these discussions about the burden on everybody else regarding our other constitutional rights. For example, we have a right to be presumed innocent until proven guilty beyond a reasonable doubt. What is the cost of that right? The cost of that right is a lot of people get robbed and raped and killed by people who should have been convicted the first time but are not. We have the view that it is better to let some guilty people go free than to convict innocent people. Other people suffer real, actual burdens from our protection of that right. And, as Rik said, we still do it. We still say it is a fundamental right. We do the same thing with free speech rights. Letting Nazis march through a neighborhood of Jewish people who escaped the Holocaust imposes real harm on those people, but we say we are willing to allow it. With rights of conscience, often the burden is really illusory or not very high.

MICHAEL KESSLER: Who makes these calls and distinctions between these more sophisticated and less sophisticated or inconsistent views and claims of conscience? At what level is that distinction made?

RIK TORFS: In Belgium there has been an evolution of more control and inquiry into the true character of conscientious beliefs. It is difficult to enter into the analysis of one’s conscience. All kinds of conscientiousness should be taken seriously as a starting point and then you can see how far you can go with it. There was a case in Sweden where members of the Jehovah’s Witnesses went to jail because of total refusal of military service and alternative service. Here you see that there is a form of abuse which is possible and then we come to the difficult problem of dealing with the abuse of fundamental rights. It is problematic.

JAVIER MARTINEZ-TORRON: The state cannot enter in the reasons of peoples’ consciences. The consistency of claims of conscience is a different matter. Clear cases of inconsistent claims of conscience can be judged. This is not invasive. This is the right of the state to guarantee that there is no illegal fraud, but this cannot always be done.

RIK TORFS: I think you could maybe check sincerity, but not consistency.

JAVIER MARTINEZ-TORRON: No, consistency in the sense of different claims or different behaviors, not in the sense of logical consistency.
MELISSA ROGERS: I agree that sincerity can be something that the government or a court could look at. However, I do think we have to be careful for all the reasons you have talked about. In the United States, we have sometimes seen the courts try to find various ways around this so they do not have to deal with conscience by saying, “If this belief is not central to your faith, if it is not required by your faith, then we do not have to pay attention to it.” We quickly dealt with that as a matter of law, because someone should not have to prove to a court that a belief is right at the heart of a faith in theological terms in order to have that faith protected. Sincerity can be one thing that the courts can look at, but there are other aspects of this that we see courts trying to evaluate that become a threat to conscience rights.

MICHAEL KESSLER: This is just the first step. The next step is even more important because once there is the establishment of a sincere belief, the real question is whether the state’s interest is compelling enough to overcome that. That is where the real work gets done, at least in the American context.

Let’s have some questions from the audience.

M. CHRISTIAN GREEN (Center for the Study of Law and Religion, Emory University): There was a recent editorial in the New England Journal of Medicine in which Lisa Harris, a feminist bioethicist, said that discussions of conscientious objection ignore conscientious provision, that is, the perception of a positive duty to act or to do something on the basis of one’s conscience. The example that was given was a doctor who wants to provide an abortion in an institution that forbids it. It could also apply outside of the heathcare or abortion context, as in the right to proselytize. Has anyone been thinking about this concept of conscientious provision and if there is any difference of analysis there?

MELISSA ROGERS: I think that individuals may feel, for example, providing abortions or sterilizations as something that they feel compelled by conscience to do. Once the individual wants to do that within the context of a religiously-affiliated hospital that objects to that, I think that gets very difficult. I would affirm that individual’s conviction; but on the side of the institution, I could see where there would be a legitimate claim of the religious institution to say, “That is not who we are. That is not what we do. If you are going to do that, then do that somewhere else.”

JAVIER MARTINEZ-TORRON: Both things can be analyzed from the perspective of conflicts between law or contractual obligations and one’s own conscience. But very often there are fewer reasons to deny a person to adopt a passive attitude than to adopt an active attitude toward things. Very often the problem is that we live in regulatory states in which matters formerly entrusted to my private sphere have now become full of obligations of different kinds. To follow the example of abortion, there may be gynecologists that have been practicing for ages and suddenly abortion becomes decriminalized. Then at a later stage, like in Spain, it becomes a right funded with public money. Very often the problem is that we are forcing people to do something, and I think there are fewer reasons to do that than to sometimes prohibit an activity or behavior by people.

RIK TORFS: I agree with Javier, but there are also fewer norms forcing people to do something. For instance, in penal law, you can be punished when you do not help people who are in need, but there are very few examples of forced action. On the other hand, it is easy to say you have this right entirely, but in practice it will never be applicable. The result, not the means, should be guaranteed by the authorities. You cannot force a person against his conscience to do something. The conscientious objection deals with the private, concrete person saying, “I cannot do this.” I do not see a contradiction between the two. You should not balance the provision and the objection, because then it is as if the person who has to guarantee the right is the same. On the one hand, the
authorities have to guarantee it; on the other hand, it is the objection of a single individual or an institute.

JOSE MARTIN (University of Santa Croce, Rome): [Speaking Spanish, through interpreter] The first question is for Professor Martinez-Torron regarding the sentencing in the case of Bayatyan v. Armenia. I am not optimistic in thinking that that decision is going to extend to other cases, because I agree that it seems that conscientious objection is not included and it is not defended by Article 9 of the convention. I think that the Court is just making a decision based on the fact that most European countries have a professional army. We have to make a distinction between what is a right, what is a wish, what is a decriminalization of a conduct, and what is the tolerance of something that is considered reprehensible. If there is a tolerance or permission, there is an ability to exercise a certain right.

Then the question arises of whether the exercise of that right has to be paid for by the taxpayers or by the government. If the answer is in the affirmative in those situations, then there is the right of the conscience objector and the question of whether the action is decriminalized. If it is, then the question would be whether the person would have, as in the case of euthanasia, the right to ask for it or the right to demand it. We have to see who is being oppressed: the conscientious objector or the person requesting that his right be upheld.

MARK RIENZI: I agree that the question of when the conscience right becomes oppressive is an important one. I do think in many of the cases the answer is that it is not oppressive if one private person does not want to support or engage in something with another private person. For example, when many people recently boycotted Chick-fil-A, that was not infringing on anybody’s rights. That was people exercising their right either to support and be involved in something that they wanted to support or not.

Ultimately, some of this discussion stems from what I would view as an overbearing conception of rights, stemming from
cases like Roe v. Wade and Casey. With abortion, you have the right to get an abortion without the government stopping you, as opposed to a right to grab unwilling people and make them participate. I have a First Amendment right to go to a store and buy a Bible or a copy of the New York Times. There is nothing that can or should make the government force some unwilling business owner to sell that to me. We have had a long tradition in this country of saying that merely because you entered the medical profession, it does not follow that you are agreeing to perform every single medical service anyone could ever ask for. Much of this discussion comes down to how broadly we view those rights. Again, in US constitutional law, we have had cases saying that the right to abortion does not include the right to have the government pay for it. If that is the case, it seems very bizarre to suggest that it includes the right to force some unwilling private person to give it to you.

JAVIER MARTINEZ-TORRON: It is a matter of to what extent the Court does or does not want to apply the principles to other cases. No conscientious objection is absolutely guaranteed by either Article 9 or by any other law. What is guaranteed is my right to behave in accordance with the dictates of my own conscience, but it is subject to limitations. In the right of the state to restrict my right, the state must provide sound justification that the restriction of my right is necessary in a democratic society. It is a matter of balancing rights.

In this context, the distinction you were making about faculties’ rights or decriminalization of conduct is very applicable. When it comes to the balance of rights—I go back to Mark’s words—it is very different to balance my right of conscience against the proper right of another person or just the faculty to ask for a public service. The problem with abortion in Europe is that, contrary to what you were pointing out, in some countries there is no implicit assumption. In some countries, abortion is funded with public money, and you have the right to obtain it through the organization of the public health services. Many people have implicitly assumed that this is a fundamental right. Here there is something very interesting in Italian jurisprudence with regard to conscientious objection: namely, the fungibility of the obligation of the doctor. If what you are requesting from a doctor or pharmacist, or from whoever else, can be easily provided by an alternative person, why should we oblige those people to act against their consciences? This is very often neglected, and I think it is crucial.

MELISSA ROGERS: I very much agree that things like our decisions on abortion certainly do not give us a right to force unwilling people to perform that abortion. That makes perfect sense. Some of our concerns in the United States, especially on the part of women’s rights groups, is the occurrence of oppressive situations where, for example, all the hospitals in a town might be religiously affiliated and not offer any kind of abortion or sterilization services. Someone might have to go very far to get that kind of service. In other cases, I would agree with you. From what I can tell, things like Plan B are readily available. In terms of procedural surgical abortion, where all the hospitals have merged and there are only religiously affiliated hospitals in a big area that will not offer those services, I think that is where you hear women and their allies getting concerned about not being able to access those lawful services.

RIK TORFS: We can also look at this problem from a rather simple perspective. If there is a law that allows a certain attitude and if the state issues such a law, it is the task of the state to guarantee that it can be implemented—full stop. That is, in fact, something which is disconnected from conscientious objection. That is a topic that may endanger it and may not facilitate it. But the state has to guarantee the result, and, of course, conscientious objection remains intact.

MUQTEDAR KAHN (University of Delaware): I have a question about the conscience of the legal institutions themselves or the integrity of these institutions in applying the law. Do you think it is possible that cultural bias against Islam would enable these legal institutions to refuse to allow Muslims and Islamic institutions equal right of freedom of conscience that would be applied for other communities? There are laws and profound concepts but the application of the law can be so prejudicial, culturally biased, and trivial.

MARK RIENZI: You are right to suspect that there is a danger of courts applying these things differently when it is a Muslim group or a Mormon group or some other group. I would simply say I think that is bad and wrong. We at the Becket Fund have had the chance to fight that. In Tennessee we fought against a court that had said that a certain mosque cannot open because mosques are inherently controversial. Islam is somehow automatically more controversial than other religions. That is wrong. We went into federal court, and thankfully the federal judge agreed. But this is a real problem and it is something that everyone has to fight against. It is particularly important because if you allow for decisions that have a slanted view against any particular religion, the net result is that religious freedom is diminished for everyone.
Timothy Shah: For our fourth and final panel, the topic is Religious Minorities and Religious Freedom: The Cases of Muslims and Mormons. In his wonderful essay, The History of Freedom in Antiquity, Lord Acton said, “The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities.” This continues to be an important test of the freedom of Western societies, namely, how much security and freedom they accord to their religious minorities. It is appropriate to have a discussion about the state of religious freedom and religious security enjoyed by minority communities in Western European countries and in the United States. There are, of course, many cases of minority communities that one could talk about. But two very salient and important minority communities to consider today are Muslims and Mormons.

Muslim minority communities in all Western countries have grown dramatically in recent years. The presence of these communities has been a source of dynamism, pluralism, diversity, and an occasion for expanding security and freedom in Western countries. Yet, these communities have also posed challenges. Their different qualities have posed challenges for existing religious freedom norms and structures in almost all Western countries. Therefore, it is important to examine comparatively the state of religious freedom for Muslims across Western countries.

Mormonism is a somewhat different case. Mormons have been an important religious minority in the United States for many, many decades going back to the early nineteenth century. The existence of Mormonism has posed important challenges to the structures and norms of religious freedom in the United States, and has provided an occasion for developing, institutionalizing, and clarifying norms of religious freedom in American jurisprudence. Most of the people in this room would surely know that the very first religious freedom or free exercise case that reached the American Supreme Court was Reynolds in the late nineteenth century, which, of course, dealt with the issue of Mormon polygamy and whether it should be protected on free exercise of religion grounds.

To discuss the relationship between religious minorities and religious freedom, especially the case of Muslims and Mormons, we have an outstanding international panel. As you have seen,
all of these panels have been outstanding in terms of their diversity, their quality, and their dynamism. We have Silvio Ferrari, who is a professor in the law faculty at the University of Milan and president of the International Consortium for Law and Religious Studies. He is one of the experts on the legal status of Islam in Europe. One of his recent publications is *Law and Religion in Post-Communist Europe*. Next we will have Muqtadar Khan, an associate professor of political science and international relations at the University of Delaware and founding director of the university’s Islamic Studies Program. Among many publications, he is the author of *Debating Moderate Islam: The Geopolitics of Islam and the West*. Then we will have Lena Larsen from Norway, who is the project director of the Oslo Coalition of Freedom of Religion or Belief at the University of Oslo, where she received her doctorate in 2011. Her research interests include Islam in Europe, Islamic jurisprudence, and freedom of religion or belief. Finally, we will have Nathan Oman, who is assistant professor at the Marshall-Wythe School of Law at The College of William & Mary, where he teaches courses on contract law, economic analysis of law, and law and religion. He is the author, among other publications, of *The Honor of Private Law*.

**SILVIO FERRARI:** Regarding the Mormons, I shall be very brief. Basically, most Europeans think that Mormons have a peculiar theology, but they behave well and, therefore, they are welcome. The polygamy issue was the most contentious question, and it was settled before Mormons came to Europe. Therefore no need was felt to reconsider the notion of religious freedom because of their presence.

Muslims are a much more difficult issue, and the presence of Muslims in Europe is having an impact on the way religious freedom is understood in Europe. My main argument is that the settlement of substantial Muslim communities in Europe has compelled Europeans to reflect on how much the concept of the secular state is based on Christian presuppositions. How much is the concept of the secular state in debt with Christian theology? This has raised the question that if the secular state is based on Christian presuppositions, is the secular state able to manage religious diversity, which is growing in Europe? Is it the right tool to employ in this task?

The question was posed a few years ago by Talal Asad in a book called *Formations of the Secular*. The author’s answer was negative, and he said that the public space of a secular state, far from being neutral, is in reality a space of exclusion from which non-Christian religions are inevitably kept out because of the Christian roots of the secular state. I am less negative and less pessimistic, but before explaining why I do not share these assumptions, let me go back to my starting point and go on step by step.

I think that the Muslim presence in Europe is relevant to religious freedom for two reasons. First, it questions the widespread idea that religion is primarily a matter of individual choice. Let me give you an example to explain what I mean. The example goes back to the way you become a Christian or a Muslim or a Jew. You are born Muslim or Jew, but you are not born Christian. You become a Christian only if you are baptized. It is true that in the Roman Catholic Church and in some other Christian churches, you are baptized when you are an infant. However, baptismal promises are somebody’s choice, normally the parents. Becoming a Christian presupposes somebody’s choice. For this reason, it became possible for the Christian churches to accept the idea that religion is primarily a matter of individual choice. You choose to become a Christian (or an atheist). At least in contemporary Europe, this is taken for granted. As a consequence, freedom of religion is, first of all, the freedom to choose the religion you prefer.

Through the growing Muslim presence, however, Europeans were exposed to a different way to conceive of religion, one less focused on individual choice and more on being part of a

“It is my impression that we are afraid of discussing each other’s religion. We attempted to explain things as political, not theological. This way of reasoning, in my opinion, is wrong because we prevent ourselves from discussing each other’s religion. In the end, not only do we not understand each other’s religions, but we do not understand what is happening in the secular sphere.”

*Silvio Ferrari*
community or belonging to a group. These two different ways of conceiving religion become evident when facing issues like apostasy or conversion. The right to change religion without any negative consequence and the enjoyment of civil and political rights was taken for granted in Europe in the last century. Now this right is questioned again, and this is a problem that has to be solved.

Second, the Muslim presence in Europe questions another assumption, namely, that religion is a private affair. This concept goes back to Hugo Grotius’ phrase, *etsi Deus non daretur* (“even if God did not exist”). After the wars of religion in the sixteenth and seventeenth centuries and the confessional States that were born from them, the privatization of religion was considered the best way to avoid religious conflicts. However, this privatization had strong roots in the Christian, and particularly the Protestant, concept of religion, and, more precisely, in the idea that religion is first of all a matter of conscience and belief.

I think it is too simplistic to think that the privatization of religion has been something imposed by the liberal state on churches. Privatization of religion was possible because it was already a potentiality within the Christian concept of religion—because privatization was something possible within the horizon defined by Christian doctrine. The presence of the Muslim communities in Europe is putting a question mark on this idea that religion is a private matter.

A good example of this question mark regards the administration of justice, which is something that is, by definition, public. Starting from the creation of national states in Europe and more markedly after the French Revolution, states have claimed a monopoly on the administration of justice. All the non-state courts, including religious ones, have progressively lost much of their power. Today, the debate on religious courts, especially sharia courts, is one of the most controversial issues in Europe. This is a direct consequence of the presence of Muslim communities in Europe. They demand to have family matters decided according to Islamic law and they claim that this is a matter of religious freedom. In their view the application of Islamic law to family matters is a way to enforce and manifest the right to religious freedom.

The presence of Muslims in Europe is challenging Europeans because it is challenging the idea that religion is fundamentally a matter of individual choice and a private affair. If this is correct, we have to go back to the question, “What should we do with our secular state?” Should we give it up and go, for example, the way of Lebanon, Israel, or India? I do not think that this is possible even if Europeans were willing to do so. The secular state is rooted not only in the Enlightenment, but also in Christianity, and it is a central part of European history and tradition.

How to solve the problem, then? I think it is possible to make a distinction between the respect of some fundamental human rights on the one hand and the organization of the public space on the other. In the first category, there is the right to have a religion, to change religion, and to manifest one’s religion within the limits prescribed by international and constitutional law. This is something that, in my opinion, has to be maintained. In the second category, I would place the definition of the boundaries between private and public, as well as how the public is structured. Here, there is more freedom to plan innovative strategies, including the possibility of dealing with the issue of religious courts in a way that does not conflict with religious freedom.

**MUQTEDAR KHAN:** Religious freedom is perhaps the most important principle on which the United States has been built. I wish it was our First Article rather than the First Amendment; the First Amendment makes it an afterthought when it should have been the most fundamental brick that built our country.

Before I answer the questions that were posed to me, I think that Professor Ferrari is willing to cut corners rather rapidly when it comes to Islam. From the Qur’an, it is clear that freedom of religion is a God-given existential condition. Not only has God granted the freedom of religion, but in the Qur’an God also directly forbade the Prophet Mohammad from compelling others or taking this freedom of religion away from them. This establishes two things. It not only establishes the importance of freedom of faith, but it also underscores the necessity of freedom for faith. That is very important. I think that is why American Muslims love America; America consciously arrived at the necessity of freedom to protect religion.

I do want to read one particular letter from the Prophet Mohammad. A group of Christian monks from St. Catherine’s monastery came to the Prophet Mohammad, and this is what he wrote to them: “This is a message from Mohammad to those who adopt Christianity near and far.” It means this is not limited to Saudi Arabia or Arabia or Mecca or Medina. “We are with them. Truly the servants, my helpers, my followers will defend them. Christians are my citizens and by law I will hold out against anything that displeases them.” He said that he will
be upset if anything in the Muslim world displeases Christians.  “No compulsion is to be on them. Neither are their judges to be removed from their jobs nor their monks from their monasteries. No one is to destroy a house of their religion, to damage it or to carry anything from it. Should anyone take any of these as spoils, they are disobeying their prophet. Truly they are our allies and have my secure charter against all that they hate. No one is to force them to travel or to oblige them to fight. The Muslims are to fight for them. If a Christian is married to a Muslim, it is not to take place without her approval. She is not to be prevented from visiting her church or to pray. The churches are to be respected. Christians are not to be prevented from repairing them. No one in the nation is to disobey this covenant until the Day of Judgment.”

If Muslims want to institute freedom of religion, the sources are there. What we see today in the Muslim world is that Islam has become an instrument of geopolitics. All the opposition to blasphemy is a way of expressing anti-Americanism. It is not about Islam. It is not a theological matter. Nevertheless, there is more to this. I think the presence of Islam in the West is a profound problem for the West. Until now, I think the West got away with claiming to be religiously tolerant and claiming to believe in freedom of religion. These claims were never severely tested until Muslims showed up. Now the whole edifice is crumbling.

For example, to me it is astounding that the Europeans claim they are secular when they have two caliphs. The Queen of England is the head of state and the head of religion. The Pope is the head of religion and the head of state. This is not very different from the Muslim world, which also has only two caliphs, in Morocco and Iran. The Europeans claim they are secular, but nearly every religious clergyman in Germany is a state employee. They get their salaries from the government. Churches in France are rebuilt and modified by government funds. All Christian schools in Britain are funded by the British government. I like this secularism. The Taliban and the Saudis would like it, too. It is exactly like Saudi Arabia. The Belgian government employs 900 imams, for God’s sake. Their salaries are paid by taxpayers. Europe has reached a very interesting historical balance. Europe is a joint venture between religion and politics, and the balance is sustained by a lack of religiosity among the Europeans.

For example, when the Salman Rushdie case happened, the British had blasphemy laws that protected Jesus but not Mohammad. It was only in 2008 that they revoked the blasphemy
laws. When they would not protect the Prophet Mohammad in the 1980s, they were discriminating against Islam. Consider the movie *The Innocence of Muslims*. In the same week that David Cameron defended the free speech of the movie under “Western values,” a teenager was convicted and sentenced for writing on his Facebook page that he was happy that British soldiers had died in Afghanistan. At the same time, a British government agency pulled an ice cream advertisement that contained a disrespectful depiction of a nun on the grounds that it would offend the sensibilities of Catholics.

If I wrote a letter to Hamas encouraging them to abandon terrorism and adopt the ways of Mohandas Gandhi, I would go to prison for aiding and abetting and providing material support for terrorism, because giving advice to a terrorist organization is considered abetting terrorism. It is amazing to me that we can sit here and talk about religious freedom when people like Herman Cain, for example, promised this country that if he were to become president, there would be no Muslims in his cabinet. He made that promise and, of course, his fundraising went up. There is cultural discrimination.

We must first recognize the fact that the presence of Islam is challenging Western countries’ claim that they are believers in freedom of religion. The argument that Islam is not a religion and therefore does not deserve First Amendment rights in this country clearly shows that that prejudice is increasing. Nearly 24 states in the United States are trying to ban sharia. In Oklahoma, the courts have reversed it, but it was voted on. I would have gone to jail for 15 years for washing my feet before I pray. Europe, too, tries to privatize religion. France’s secularism and republicanism are apparently so fragile that religious symbols, like the hijab, will destroy them. So they banned such symbols through a referendum.

There is an element of fear of Islam, because it is really testing this notion that Europeans and Westerners are secular. It is also interesting that, empirically, Europe suddenly seems to be doing better than the United States. While in the United States people are trying to ban sharia, in Britain there are now nearly one hundred sharia courts operating, and 20 percent of their customers are non-Muslim. Two Christians might go to an Islamic court to resolve a business or family dispute because doing so is inexpensive and quick. We have a strange situation now; in Britain, Muslims are able to practice what they say is sharia and what is not.

Because of globalization, there is now a reciprocity going on between Western countries and Muslim countries, and I think the victim of that is the principle of religious freedom. Muslims may consider the West Islamaphobic because of the attempts to ban minarets, burkas, hijabs, and sharia. Yet, there are few attempts to ban films that insult Islam. This paradigm of hostility toward Islam will also compromise the religious freedom that Muslims might allow in their own countries. A backlash against Egyptian Christians could happen because of a movie which was made by Egyptian Christians here in the United States. If Taliban-type politics continue in the Muslim world, where they go around shooting minorities, where they go around attacking US embassies every time some provocateur makes a movie insulting any religious symbol, then I think that Islamophobia in the United States and Europe will also be strengthened.

I do not know how we can escape from this vicious cycle. To me, religious freedom is very important. I need freedom from both Western governments and crazy Muslims to be able to think and write what I do. We have to find more forums and opportunities like this to beg ourselves to restrain our politics, especially in the interest of this extremely important global public good of religious freedom.

**LENA LARSEN:** I want to relate my presentation to Professor Ferrari’s remarks. He said that Islamic law is one of the hottest issues in Europe. I agree with that, but we should keep in mind that Islamic law is not legislation. It is a legal culture entailing ethical, moral, and religious rulings that are not mandatory to follow in a minority context. This is very important to keep in mind. Muslims feel obliged to follow these rules, that is, to follow the practice of Islam. These rulings may deal with everything from how you are brushing your teeth, how you are doing the washing ritual before you pray, how you do your prayer, and how you handle your financial dealings, marriage, divorce, and education. Sharia deals with a totality of norms.

What are we going to do with the secular state? How are we going to deal with the secular state from an inside perspective? Almost all of the presentations here have been on a macro level, discussing the principles behind cases from a bird’s eye view. I want to step down and go into some material to show what is going on within the Muslim community, especially within the Muslim community in France.

The practice of sharia could be problematic or it could be seen as problematic both by the normal Islamic society as well as by Muslims themselves. In our society today, sharia has become a notorious concept linked with punishments such as cutting
hands and stoning, as well as the establishment of an Islamic state. This propaganda has become a part of the Islamophobia industry. Extremist Muslims are also making it difficult for the majority of Muslims when they destroy religious shrines or become involved in holy wars to establish what they consider to be an Islamic state.

Sharia comprises all aspects of life of the individual and should, therefore, be subject to religious freedom. In Western Europe, the question of marriage and divorce has become a key issue for many Muslims. Muslim rules for marriage and divorce are often at odds with national legislation, especially because Islamic rulings regarding marriage and divorce are based upon inequality before the law. The question involves the challenge of legal pluralism and formal legislation versus informal legal culture. The question becomes awkward since religious freedom is a basic human right, but its relation to national legislation is unclear. Marriage is obviously a religious issue that overlaps with national legislation. When the sharia debate in Europe is mentioned, UK sharia courts and the Archbishop of Canterbury’s 2009 speech have become famous.

Among European countries, however, there are differences in dealing with Muslims and Islamic religious practice. I will present an example from France dealing with the definition of what constitutes a valid marriage. By this example I want to underscore several points. First, Europe is not one country, but several countries, each with its own legal framework when dealing with religious minorities. Second, Islamic jurisprudence will present a number of traditions of applied concepts and methods, most of which we find in the West today. Third, Islamic jurisprudence is the understanding and interpretation of sharia principles. Thus, it is manmade and flexible. It is also as sophisticated as any other legal tradition. This should be taken into consideration in questions of legal pluralism and the meaning of marriage and divorce, so as to have fruitful conversation between the two legal traditions. Finally, sharia is not equal to legislation, but it is a moral, ethical, and legal system in a religious sense.

My example is a fatwa given at an annual conference in Paris in 2008. A fatwa is not a death sentence. It is an answer to a question based upon personal reasoning from a mufti, or Islamic scholar. It is not mandatory to follow, but has its own construction of informal authority which may make the believer follow the norm that is expressed. Fatwas, in Islamic legal history, have been instrumental to the development of Islamic jurisprudence. The mufti in question, a professor at the European Institute of Human Sciences at Château-Chinon in France, declared in a lecture at the annual conference of Union Organisations Islamiqes de France at le Bourget, Paris in 2008 that non-registered or free marriage is haram, or religiously forbidden. When I interviewed him afterwards, I asked him if the objective of the fatwa was to please French authorities. In France, it is forbidden to marry a couple religiously if they have not married in a civil ceremony by French authorities in advance. His answer was “no.” The challenge, as he described it, is that Muslim women are becoming victims. Muftis cannot help the women due to the fact that there is no documentation and the husband has disappeared or does not want to give a religious divorce. The objectives of the marriage and the protection of the party’s rights, therefore, cannot be fulfilled. This challenge is also described by John Bowen in his 2010 book, Can Islam be French?

How do you break a halal, or proper, marriage if there was no written contract or certificate? Many Muslims are concerned about this problem. Although a Muslim husband might divorce his wife on his own, a Muslim wife has no corresponding way of ending the marriage by herself. In countries with Muslim judges, she may ask that the marriage be annulled or the husband be asked to grant a divorce, but France has neither Islamic judges nor Islamic arbitration panels.

The mufti who declared that non-registered marriage to be forbidden based his declaration on a study entitled “Muslims in Europe between Unregistered Marriage and Marriage According to Civil Legislation.” It asks three key questions. Is it sufficient to enter into a marriage contract according to French civil legislation? Is it sufficient to enter into a non-registered marriage contract? Is it mandatory to enter into both types of contracts at the same time? He sought to answer the question by identifying the content of a non-registered marriage and proceeds by showing the differences between this kind of marriage and the marriage contract in French legislation.

Non-registered Islamic marriage is valid in Islam if certain requirements are fulfilled, such as the offering and accepting of marriage, the witnesses being present to the ceremony, and the bride receiving a gift. The French mufti discussed the case of witnesses within the science of documentation in the Islamic legal tradition in order to discuss whether these requirements are met. By mandating the presence of witnesses, he clearly disqualifies a non-registered marriage contract. Only by having it registered can one know that the couple is married in our society. If a conflict between spouses who are married in a non-
registered marriage emerges, no judge on earth will consider them married. This also goes for most Muslim countries.

Sharia protects contracts by two means: religion and the authorities of the country. This is also a requirement with regard to marriage contracts. The non-registered marriage is only based upon religious commitments, not commitments of the authorities of the country, according to the French mufti. He proceeds further by comparing Islamic marriage and French legislation related to marriage. (With regard to the question of legal representation for women, the French mufti’s view is based on the Hanafi position that there is no need for a legal representative if that woman is legally responsible.)

According to Muslim family law, it is the duty of the husband to provide for the family. The couple is an economic entity in Islamic law, and each spouse has his or her own separate economy. Marriage can only be dissolved by death or divorce. Divorce is given by a judge. The French mufti’s conclusion is that neither of the two contracts on its own fulfills the Islamic requirements for validity. The civil contract does not fulfill all Islamic requirements, but unregistered marriage is considered a marriage without witnesses. He proposed a combination of the two. This raises a dilemma because sharia does not accept two contracts for one agreement. Only a combination of the two will secure the party’s rights and obligations.

He claims that this is a temporary solution until a more satisfactory solution is put in place. Herein is found the personal voice of the mufti and the politics of the fatwa. That this is presented as a temporary solution and not the optimal solution makes it easier for a Muslim to accept the most radical fatwa on European soil on a question that has become a symbol of Muslim identity. And it clearly points to national legislation playing a role in Islamic jurisprudence, as well as to equality before the law sanctioned by a fatwa.

NATHAN B. OMAN: I was struck at the beginning of Professor Ferrari’s remarks when he said, “From our point of view the Mormons are weird but well behaved and harmless.” For Mormons, that statement represents success. We worked really hard to get there, and in American history that has not always been the position on Mormons.

The first free exercise case decided by the Supreme Court, in which the Court reads the merits of the meaning of the Free Exercise Clause, was Reynolds v. United States, which was decided in 1879. In this case, a Mormon polygamist who had entered a plural marriage because of religious beliefs was prosecuted on the basis of the Morrill Anti-Bigamy Act. That act, when challenged, was upheld by the US Supreme Court. It is interesting to trace the development of religious freedom and the development of the Mormon Church since that time.

While the doctrinal formulations under current law are different than those given in Reynolds v. United States, it is not clear to me that Employment Division v. Smith provides broader protections for freedom of religion than did Reynolds v. United States. In fact, Reynolds is positively cited in the Smith decision. Reynolds held that religious belief was protected. Religious action was not protected, and any attempt to claim, on the basis of religious belief, an exemption from an otherwise applicable criminal statute was invalid. Mormons, however, seem to be doing quite well in American society. They are about 2% of the population. They are not subject to pervasive or brutal persecution. Their neighbors think they are weird, but also think they are harmless. How did they get to that position?

It is well known that Mormons abandoned the practice of polygamy at the end of the nineteenth century. It is also well known that that was related in some way to what the Supreme Court decided. What I think is less well known is the tortuous path toward that reconciliation. The Supreme Court’s decision in 1879 did not resolve that issue for Mormons or for the federal government. In fact, the response of Mormons to the 1879 Reynolds decision was massive resistance to federal law. The Supreme Court was castigated and dismissed by Mormons, and

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Lena Larsen
they did not comply with the law. Congress replied by passing a series of laws that were designed to ramp up the amount of legal pressure that could be put on the Latter Day Saints. New criminal offenses were devised to make prosecution easier. The procedural safeguards, which had been afforded in the territorial courts where most Mormons were prosecuted, were streamlined to facilitate prosecution. Ultimately, thousands of Mormons were prosecuted and incarcerated for violating anti-polygamy laws, as well as for violating other statutes such as fornication laws, adultery laws, or unlawful cohabitation laws.

What was the shift that happened? What broke the back of Mormon resistance, if you will? The decisive shift came not with the case of Reynolds v. United States, but with the case of Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, which was decided by the Supreme Court in 1890. In that case, the Supreme Court was asked to consider the constitutionality of the Edmunds-Tucker Act which had been passed in 1887. Under the Edmunds-Tucker Act, the Church of Jesus Christ of Latter Day Saints as a legal entity was dissolved. All Mormons had been deprived of the right to vote under territorial statutes which had been upheld by the Supreme Court in Davis v. Beason. All of the property of the Church of Jesus Christ of Latter Day Saints was to be confiscated by the government. That money was going to be applied to the territorial schools. Applying the money to the territorial schools was not a religiously neutral act. The territorial schools were staffed and controlled by the federal authorities and were seen as a way of indoctrinating Mormons to become good American citizens.

It was at this point, when Mormons were faced with the prospect of perpetual political disenfranchisement, mass incarceration, and institutional annihilation, that in 1890 they issued the Manifesto, as it is known, in which they publically disavowed the practice of polygamy. Even so, they kept doing it in secret for at least another 15 years on an insistent and ad hoc basis. The final Mormon abandonment of polygamy did not actually come until 1902, when a Mormon by the name of Reed Smoot was elected to the United States Senate, and the United States Senate conducted a four-year investigation of the Mormon Church and its activities. The committee conducting that investigation reached the conclusion that because Smoot was a high Mormon official, because Mormons were continuing to practice clandestine plural marriages on a limited basis, and because they were involved in other un-American practices, he should not be seated in the United States Senate. At that point, the Mormon Church and hierarchy moved decisively to end all polygamy in the United States, and in Mormon settlements in Canada and Mexico. The Church itself began excommunicating polygamists; it was at that point that the US Senate, seeing the actions of the Mormon Church, voted to reject the suggestion of the committee and seated Reed Smoot. This was a very long, tortured process that extended from at least the passage of the Morrill Anti-Bigamy Act in 1862 up to 1907, when the United States Senate finally agreed to seat Reed Smoot.

What happened over the course of that period of time? The Mormons lost virtually every single court battle they fought. What did Mormons do? They changed. Mormonism changed dramatically, in fact, especially in the last quarter of the nineteenth century.

As it was originally founded, Mormonism was seen as a radical restoration of primitive Christianity. There was the sense that Mormons needed to establish an ideal Christian society, called Zion, and that was to take the form of an autonomous religious commonwealth in the American West. At one point, they even tried to organize that as a separate political entity in the wake of
the Mexican-American War in 1848. That religious common-
wealth was not simply going to sanction the religious practice of
polygamy, which had been taught by early Mormon leaders, but
it was also going to involve radical economic experiments.

Almost all of that was abandoned over the course of the nine-
teenth century. The lesson that the Mormons learned was that
religious freedom, as it was interpreted under American law,
meant that the closer you were to essentially looking like a
Protestant denomination, the more likely you were to get re-
ligious freedom protection for your actions. It was possible to
push out from the margins of the Protestant model, but you
could not push out very far.

Today, Mormons are viewed as having strange theological be-
liefs. But in terms of the practice of their religion, they look
much like a Protestant de-
nomination in many ways,
and, accordingly, they are
afforded a great deal of le-
gal protection. The other
thing that the Mormons
learned from this experi-
ence is that one should not
rely too heavily on formal
legal guarantees and con-
stitutional litigation. One of
the things that is interesting
about the Mormon experi-
ence is that ultimately they
were able to negotiate their settlement. The end of the confron-
tation between the federal government and the Mormons did
not happen in a law suit. It happened in the halls of Congress.
That was possible because, despite being a very small minor-
ity of the population, they were geographically concentrated
enough to win representation in the political process and ne-
gotiate a solution.

What lessons might this have for the case of Muslims? Full en-
joyment of legal protection for religious practice in the United
States and Europe will require the evolution, reinterpretation,
and alteration of religious practices to bring those practices
more closely into line with the norms of religious conduct with
which those host societies are most comfortable. The extent to
which one can radically differ from those dominant norms of
religious conduct are fairly limited. Furthermore, much of the
process of assimilation will necessarily come through a process
of political negotiation. That political negotiation requires par-
ticipation in the political process. One cannot place too much
hope in the process of constitutional litigation as the exclusive
way of solving these problems.

When we encounter different religious systems, it is very nat-
ural to understand those religious systems not on their own
terms, but in terms of what we already know. You see this in the
United States. The issue that has been most often litigated in
US courts regarding sharia law is the treatment of Islamic mar-
rriage contracts, particularly the promise that is made in those
contracts of an amount of money settled to the wife by the hus-
band upon marriage. Upon divorce, how should this contract
be treated under American law? American courts consistently
look at this contract and say, “If it is a contract made around
the time of marriage, it looks like a pre-nuptial agreement. As
a pre-nuptial agreement, would we be willing to enforce it?”
It does not comply with the standards for pre-nuptial
agreements under American law, and therefore it is not
enforced.

That reading of the Islamic marriage contract is per-
verse from the point of view
of most Muslims. It is not
intended as a pre-nuptial
agreement. Furthermore,
these contracts are often not
enforced on the grounds that
the failure to enforce them somehow protects Muslim women
from unequal situations in divorce, when in fact the purpose
of these provisions is to increase the status and financial inde-
pendence of the wife in the marriage. That is the understanding
within Islamic law and Islamic practice. However, because of the
power of analogy, these are consistently misunderstood and mis-
interpreted by American courts.

That is my very pessimistic story. Here is the optimistic story.
In 2007, the Pew Forum conducted a poll on American atti-
attitudes toward religion. That poll produced a lot of commentary
in the press. What the poll found was that the religious groups
in the United States that had the worst public profiles were athe-
ists, Muslims, and Mormons. This was seen as being evidence
of the extreme difficulty and social prejudice under which these
groups labor. There is no doubt that there are various forms of
anti-Mormonism in this country, and there is no doubt there
are various forms of Islamophobia in this country. On the other

“I think the presence of Islam in the West is a profound problem for the West. Until now, I think the West got away with claiming to be religiously tolerant and claiming to believe in freedom of religion. These claims were never severely tested until Muslims showed up. Now the whole edifice is crumbling.”

Muqtedar Khan
hand, the poll found that of the groups—Mormons and Muslims—that were at the very bottom in terms of the perceptions of their neighbors, 53 percent of Americans had a positive view of Mormons and 53 percent of Americans had a positive view of Muslims. Despite all the difficulties that we have with dealing with religious minorities and the issues of religious freedom, I actually think there is a lot of basis for optimism. My ancestors were driven out by mobs. Their property was confiscated; some of them were incarcerated. Yet, I do not worry about any of those things, and that is a cause for optimism.

**AL GOMBIS** (Congressional Staffer): This question is for Professor Oman. Back in the 1800s, was the practice of polygamy a requirement of the faith or was it simply an option that was available to Mormons? If it was simply an option that was available, does it then become a matter of conscience or is it simply something that the faith will allow, but the government’s laws would not allow? Does it make a difference in light of the panels that we heard earlier this morning in terms of freedom of conscience? I would pose the same question for the Islamic faith. Is it a requirement that polygamy be practiced, and if not, what are the implications for conscience with regard to that?

**NATHAN B. OMAN:** Regarding nineteenth-century Mormons, they regarded polygamy as supererogatory. Exceptionally righteous or good people would become polygamists. There were many monogamous Mormons. When you do the math you have to have a certain number of monogamous marriages if you have roughly equal numbers of men and women. You end up having a lot of unmarried males. Those people were not necessarily regarded as bad Mormons, but the Mormons who were polygamists were better Mormons. Also, church leaders would call upon members to take a second wife or to enter polygamy as a test of faith.

The question of whether or not it was required is actually muddy. The short answer is that it was not required of everyone. But in terms of getting at the issue of conscience, for those people that practiced it, they thought it very much a religious obligation. It was required of them by their conscience and they spoke about it in terms of conscience. The people that were incarcerated spoke of themselves as being prisoners for conscience’s sake.

**MUQTEDAR KHAN:** The words in the Qur’an that permit Muslim men to practice polygamy actually say that if you can be just and equal to all these women that you want to marry, then you can have three or four wives. But of course you cannot be equally just to them all. The Islamic position is that you cannot practice polygamy except under a few rare circumstances where the first wife will give you permission. Unfortunately, Muslims did not develop a social service system which would go and check later if the polygamists are treating their wives equally. If they are not, they should be jailed.

The best way to look at the sharia is to see what it requires and what it forbids. There are certain things that Muslims must do to be Muslims. And there are certain things they must not do if they are to be Muslims. The American Constitution—and, until now, the American legal system—does not force Muslims to do what they must not do and does not prohibit what they must do.

**LENA LARSEN:** In Europe, you are not forced to marry more than one spouse. That is an option that everybody agrees upon. Sharia does not exist anywhere except Saudi Arabia as a law. And it is always codified in family law. What is going on in Europe is that sharia is only a notion or an idea. Of course, the men very often have the upper hand; they are practicing sharia according to their own interpretation and as they see fit. For example, a man may have married one wife officially and then marries a second wife unofficially according to sharia. This presents a lot of conflicts.

I discussed the question of polygamy with an imam. Based upon religious counseling and solving marital problems, they are well aware of the reality of polygamous families and the suffering it entails for all, especially the women. This imam said, “If you have hidden marriages, there are clandestine families, and we do not want clandestine families. We want to be open and transparent toward the wider society.” One of the reasons why the Moroccan family law was taken up and reformed in 2004 was the high number of divorces. The men threw the women and children out of the house and then married again and created a new home. Now the new law makes it much more difficult to divorce. That is one hindrance to polygamy. Another new provision in the law is that they need not only the consent of the wife, but also to assess whether the husband has the economic means to provide for two families.

We also had the Tunisian family law code from 1956 under Islamic modernism, which does not permit polygamy. This code is now under pressure from Salafi forces. This is an ongoing battle and struggle. I must also say that there is a growing awareness of a right to join the discourse and debate among Muslim women worldwide who do not accept polygamy at all.
SCOTT RICKARD (Veterans for Peace): My first question deals with capital punishment, specifically in Saudi Arabia. I would like a comment from Mr. Khan on how well regarded executioners are in society. To Mr. Oman, the history of Joseph Smith was very controversial. As it evolved, Jesse Knight was very instrumental in Utah in making the Mormon religion very rich through silver mining, as well as in winning recognition for the religion in the country. I would like to hear your comments on that.

MUQTEDAR KHAN: To give you an example, the Islamic legal school has five schools of thought: Hanafi, Shafi’i, Maliki, Jafari (the Shi’a sect), and Hanbali (the smallest sect and the only one practiced in Saudi Arabia). Empirically speaking, the Saudi understanding of sharia is only the Saudi’s. No one else practices Islamic law the way they do. For example, they punish people for possessing drugs with capital punishment. Even according to Hanbali law, I do not think that would qualify for such a punishment and, therefore, I do not think it is a sharia law. It is a positive law established by the state of Saudi Arabia. I do not feel the need to defend it as a Muslim.

Even so, in those aspects of sharia law in which the Saudis practice capital punishment, if you look what the other schools have taught, you can see how jurists, in interpreting the law, have agonized enough to make it next to impossible to implement those laws. In the case of adultery, in order to actually implement capital punishment, you need four eyewitnesses, and that is really impossible.

An undeveloped society that cannot afford to house criminals in prison for life might use capital punishment out of economic necessity or as a deterrent. The House of Saud rules by right of conquest, so for them Islam is a sort of legitimization of their government, and, therefore, these symbolic elements are very important. It is a tragedy in the Muslim world that these kinds of things have become the litmus test of an Is-
Islamic state. For example, there is never reference to the ideal Islamic state as a state where there is no poverty.

LENA LARSEN: It is very important to remember that when one is discussing how disgusting all these laws are and how little we like it, the topic remains very politicized. The whole region of Saudi Arabia and the Gulf are part of global politics because now Iran is the big issue. The opposition that is there demanding democracy is silenced. For example, in the United Arab Emirates, 61 members of the branch of the Muslim Brotherhood are now in prison. Those voices are speaking about democracy, an independent judiciary, equality between men and women, and labor rights, but those voices are silenced because they do not fit the agenda of the political establishment. We have to be aware of what is going on.

NATHAN B. OMAN: Was Mormon assimilation facilitated by the fact that Mormons got rich? No. Actually, part of early nineteenth-century Mormonism was a very strong denial of the distinction between the sacred and the profane. For a nineteenth-century Mormon, digging irrigation ditches so you and your neighbors can water your farm was a religious activity and an act of worship that would be blessed and presided over by priestly authorities. The notion of bettering the material well-being of their communities, which were impoverished communities in the West, was a Mormon religious obligation. As a result of that, the Mormon Church as an institution became deeply involved in a lot of industrial and other business activities to try and achieve that kind of collective welfare.

One of the things you will notice historically is that the anti-polygamy crusades of the 1880s coincide with the first major push toward the regulation of business corporations in the United States. It coincides with things like the passage of the Sherman Anti-Trust Act and the creation of the Federal Trade Commission. Mormons were sucked up and seen as an example of another overweening corporation that had its nefarious tentacles in every aspect of society doing bad things. They needed to be stomped on. The idea was that because the Church, through these collective enterprises, had amassed wealth and was involved in secular activities, it was not really a religion but a kind of Ponzi scheme. This is a stereotype about Mormonism that will still show up sometimes in the popular press. Every five to ten years some newspaper will do a story about the real estate holdings of the Mormon Church. This is one of the places where the Mormon Church has chosen not to behave entirely like a Protestant denomination and maintained the denial of that distance between sacred and secular activities. This probably did not help Mormonism.

However, people have been lynched. In fact, very recently they have had horrible episodes in which people, usually Christians but now also Muslims, are being attacked and penalized for blasphemy. In Iran, this problem became much more well-known because a priest who was a convert to Christianity was put on death row, but then he was not executed.

TORE LINDHOLM (Norwegian Centre for Human Rights, University of Oslo, Norway): I have a question concerning Muslims. Some Muslims want to create an Islamic state, which I think is a huge mistake. I understand Professor Ferrari’s argument that it is not so easy to have Islamic support for freedom of religion, since freedom of religion seems to be facilitated by a secular state which has specifically Christian roots. I believe this is nonsecularism. Yes, maybe secularism has Christian roots; but it does not follow that Islam and Muslims may support freedom of religion for other very good Islamic internal reasons. I have heard you and Mr. Khan saying that Muslims find the United States to be very much in line with Islamic aspirations and values, and I understand and respect that.

I have done in-depth interviews with Norwegian Muslims who are second or first generation immigrants from Pakistan, and they say that Norway is what an Islamic country should be because of its non-corruption, social services, and care for the poor and sick. Norway has a state religion. The Muslims would rather have that than a secular state.

Is there really an urge for an Islamic state that has deep Islamic foundations? My understanding of Islamic history is that before colonization there were no Islamic states, but rather a
duality between political and religious power. I think that this urge for an Islamic state is the product of colonialism. After the demise of the colonial regimes in Muslim countries, some Muslims misguidedly think they should now impose sharia rules, which is a violation of sharia.

SILVIO FERRARI: I did not say that the Christian roots of the secular state built a legal regime favorable to religious freedom. I said that the Christian roots of the secular state built a legal regime that was favorable to a concept of religion based on individual choice on the one hand and religion as a private matter on the other hand. It is possible that a concept of religion based on individual choice is closer to the idea of religious freedom that is characteristic of a liberal state. This is all I wanted to say.

I was a bit surprised by the turn taken by the debate. It is my impression that we are afraid of discussing each other’s religion. We attempted to explain things as political, not theological. This way of reasoning, in my opinion, is wrong because we prevent ourselves from discussing each other’s religion. In the end, not only do we not understand each other’s religions, but we do not understand what is happening in the secular sphere. If we do not try to understand the religious roots of the secular sphere, we shall always have a partial vision of what is happening in the secular sphere. We think that everything is the consequence of the state. Yet, we never try to find the roots of that state, in particular, the religious roots of that state. This is, in my opinion, a methodological mistake we should avoid.

To Professor Ferrari, I actually think there is more discussion of Islamic theology in European and American sources than there is an equal interest and response from Muslims. In fact, when Muslims talk about other religions, they do so only in the context of their own theology rather than actually bothering to study the other religion’s theology. I think there is an underlying perception that all we need to know comes from our sources.

I would rephrase what the professor is saying. If we reexamine our normative contentions in the light of our own practice, as Muslims and Europeans and Americans, then it will spark an element of self-criticism, and that self-criticism will allow us the moral license to criticize the other. If that is happening, then I think the dialogue will take place.

LENA LARSEN: We have to discuss each other’s theologies and each other’s challenges. But my experience in the New Directions in Islamic Thought project has shown me that when Muslims come together and only Muslims speak together, they speak about real issues and real challenges. When Muslims come together, the discussions about reform and the limits of reform are very lively. All this is going on within the intra-Islamic dialogue.

When non-Muslims want to discuss Muslim theology, they want to set the agenda. They want to discuss the topics that are important for them. Muslims are so polite in interreligious dialogue. They defend themselves as best they can. However, Muslims must deal with the most important issues within their own framework.

At a certain point, we have to discuss each other’s theology. We should have the courage to do so, but sometimes I feel that we take some escape route and say, “It is not religion. It is political.” In my opinion, this is a legacy of colonialism, because Europeans feel guilty for what they have done and colonized peoples are weary of any European critiques. This is a mistake.

MUQTEDAR KHAN: I think the call for an Islamic state is fundamentally contradictory. It is a modern concept and Muslims are calling for a modern concept as a way to reject modernity. That is the fundamental contradiction.

Regarding the push for an Islamic state, I think this is fueled, in part, by feeling like orphans without the Ottoman Empire, which fell in 1923. There have been so many attempts at solutions since then, and one solution is the Islamic state. The Muslim Brotherhood was carrying that idea for many years, but now they seem to have gone back on it, as they call for a civil state and put secular people in the government. Turkey may have a fair possibility to come to terms with its Islamic heritage in modern times. What we also see is that some of the extremist movements are growing, and they perpetuate the myth of the political unification of the Muslim community. That is obviously not supported by the majority of Muslims.

“We must first recognize the fact that the presence of Islam is challenging Western countries’ claim that they are believers in freedom of religion.”

Muqtedar Khan
NATHAN B. OMAN: I agree with Professor Ferrari. There is a sense in which when we talk about law and religion, we are having an imaginary conversation, because I am not sure that religion exists. There are religions, but, as George Santayanna puts it, “The attempt to have a religion that is no particular kind of religion is very much like the attempt to speak a language that is no particular kind of language.” If we are going to have a real discussion about the law’s impact on religion and religion’s interaction with the law, we have to talk about real religious traditions. We cannot talk about something called “religion” that is somehow abstract and beyond those real traditions.

COLE DURHAM: In my experience, most people who care about religious freedom care about it because they know what it means for their own religious tradition. They know something about the internal discourse going on in their own traditions. We care about whether you can use religious premises in the public square because we all want to be participants in the public square. We care about autonomy because we know times when the autonomy of our own traditions has been impeded. We care about conscience because we know that it really makes a difference in people’s lives. We wanted to talk about concrete things for the reason that Professor Oman mentioned, that unless you are talking about some real traditions, you do not fully see things.

I have to also second what Professor Ferrari said. What Lena said is difficult and true, that it is very hard to fully understand what is going on inside a tradition. We learn a lot about our own traditions from each other and our discussions are profoundly important, because they underscore the significance of our values and we see them in different perspectives. We need to leave each other room to work within our respective traditions, to face challenges that we all face as human beings.