

January 2017

Human Rights, Religious Freedom, and Peace

Follow this and additional works at: <http://digitalcommons.law.byu.edu/lawreview>



Part of the [First Amendment Commons](#), [Human Rights Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Human Rights, Religious Freedom, and Peace, 2016 BYU L. Rev. 1215 (2017).
Available at: <http://digitalcommons.law.byu.edu/lawreview/vol2016/iss4/6>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Human Rights, Religious Freedom, and Peace

*David Little**

I. INTRODUCTION

It was the solemn intention and expectation of the drafters of the Universal Declaration of Human Rights and of all the subsequent instruments that the promotion and protection of human rights, including the right to religious freedom, would advance the cause of peace.² However, this thesis faces strong opposition as of late. There are a number of scholars who, in the spirit of Michel Foucault, regard human rights as a “a discourse of pseudo-emancipation that serves to conceal [various] entanglement[s] with ‘power.’”³

Three books, two recently published, apply this criticism to the subject of religious freedom. The two most recent are *Beyond Religious Freedom* by Elizabeth Shakman Hurd,⁴ and *Politics of Religious Freedom* edited by Hurd, Saba Mahmoud, Peter Danchin, and Winnifred Sullivan.⁵ The third, *The Impossibility of Religious Freedom*, is an older book by Sullivan.⁶ These four authors are associated with an influential blog called the “Immanent Frame” that is dedicated to “problematizing”—in a favorite word—liberal rights discourse.⁷ Two other skeptics who approach the subject from a slightly different angle, but come to similar conclusions, are Marci

*Research Fellow at the Berkley Center of Religion, Peace, and International Affairs, Georgetown University, and retired Professor of the Practice in Religion, Ethnicity, and International Conflict at Harvard Divinity School.

2. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, preamble (Dec. 10, 1948); G.A. Res. 35/55, Declaration of the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, preamble (Nov. 25, 1981).

3. RICHARD WOLIN, *THE SEDUCTION OF UNREASON: THE INTELLECTUAL ROMANCE WITH FASCISM FROM NIETZSCHE TO POSTMODERNISM* 22 (2004).

4. ELIZABETH SHAKMAN HURD, *BEYOND RELIGIOUS FREEDOM: THE NEW GLOBAL POLITICS OF RELIGION* (2015).

5. *POLITICS OF RELIGIOUS FREEDOM* (Winnifred Fallers Sullivan et al. eds., 2015).

6. WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2005).

7. *THE IMMANENT FRAME: SECULARISM, RELIGION, AND THE PUBLIC SPHERE*, <http://blogs.ssrc.org/tif/> (last visited Oct. 3, 2016).

Hamilton in *God vs. the Gavel*,⁸ and Brian Leiter in *Why Tolerate Religion?*⁹

Other studies, such as *Formations of the Secular* by Talal Asad¹⁰—mentor of the “Immanent Frame” group—or *A Post-Liberal Peace* by Oliver Richmond,¹¹ represent related challenges to various efforts aimed at promoting peace around the world by institutionalizing human rights along with democracy and the rule of law. Some of these attacks against the connection between human rights and peace are part of a larger anti-human rights campaign that appears to be gathering momentum. One thinks of Samuel Moyn’s *The Last Utopia: Human Rights in History*,¹² along with his latest work, *Christian Human Rights*, published just last year,¹³ as well as Eric Posner’s *Twilight of Human Rights Law*.¹⁴

After providing some general comments about human rights, religious freedom, and peace, I shall deal with four of these critics, Asad, Richmond, Sullivan, and Hurd. They raise objections about the legitimacy and supposed benefits of human rights standards that need to be considered.¹⁵ My defense, in a word, is that whatever problems there are lie not with the standards themselves, but with the way they are used.

II. HUMAN RIGHTS, RELIGIOUS FREEDOM, AND PEACE

The opening lines of the Preamble to the Universal Declaration of Human Rights (UDHR) say this: “[R]ecognition of the inherent

8. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005).

9. BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013). See also DAVID LITTLE, *ESSAYS ON RELIGION AND HUMAN RIGHTS: GROUND TO STAND ON* 143–69 (2015) for a critique of SULLIVAN, *supra* note 6 and HAMILTON, *supra* note 8.

10. TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003).

11. OLIVER P. RICHMOND, *A POST-LIBERAL PEACE* (2011).

12. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010). For a critique of Moyn’s book, see DAVID LITTLE, *Critical Reflections on The Last Utopia: Human Rights in History by Samuel Moyn*, in *ESSAYS IN RELIGION AND HUMAN RIGHTS: GROUND TO STAND ON* (2015).

13. SAMUEL MOYN, *CHRISTIAN HUMAN RIGHTS* (2015).

14. ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014).

15. Incidentally, I shall be examining at greater length much of this recent literature in a survey review for the fall issue of *Law and Religion*.

dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.”¹⁶ The Preamble to the U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief says something similar:

[T]he disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to [human]kind. . . . [The] freedom of religion and belief should . . . contribute to the attainment of the goals of world peace, social justice, and friendship among peoples¹⁷

The references to peace are not incidental. Human rights in general and the right to conscience, religion, or belief in particular were explicitly designed as a set of legally enforceable rights and protections capable of preventing the reappearance of autocratic government and the exercise of arbitrary force associated with Hitler and his fascist allies that were in large part responsible for the “wars and great suffering” of the mid-twentieth century.¹⁸

Speaking of autocratic government and the arbitrary exercise of force, we should recall that Hitler rose to power on the strength of Article 48—the emergency article—of the Weimar Constitution.¹⁹ It

16. G.A. Res. 217 (III) A, *supra* note 2.

17. G.A. Res. 35/55, *supra* note 2.

18. *Id.*

19. Article 48 of the Weimar Constitution states:

If a state does not fulfill its responsibilities under the federal constitution or federal laws, the Reich President can compel it to do so with the help of armed force.

If the public security and order of the Reich are significantly disrupted or endangered, the Reich President can take all measures needed for the restoration of public security and order, if necessary with the help of armed force. To this end he may temporarily suspend the fundamental rights granted in Articles 114, 115, 117, 118, 123, 124 and 153.

The Reich President must immediately notify the Reichstag of all measures adopted under Paragraph 1 or Paragraph 2 of this article. These measures must be rescinded if the Reichstag demands it.

DIE DERFALLUNG DES DEUTSCHEN REICHS [WEIMAR CONSTITUTION] Aug. 11, 1919, art. 48 (Ger.), *translated in* http://home.wlu.edu/~patchw/His_214/_handouts/Weimar%20constitution.htm. These suspendable articles prohibit imprisonment without due process, the search of homes without a warrant, and the opening of letters or tapping of telephone lines, and

permitted the suspension of civil rights “with almost no limit,”²⁰ including extensive censorship, widespread searches and seizures, secret and unlimited detentions, and the establishment of irregular tribunals to prosecute individuals suspected of threatening national security—in effect, authorizing Hitler to use police power to intimidate and suppress all opposition.²¹

We could almost say that the whole human rights corpus (not to mention the corpus of humanitarian law) was a response to Hitler and other fascists’ massive abuse of an appeal to public emergency. For example, Article 4 of the International Covenant on Civil and Political Rights (ICCPR), which imposes *both* stringent conditions of notification and authorization on states claiming a threat of public emergency *and* a set of nonderogable rights (rights that may not be suspended under any conditions).²² That set of rights prohibits discrimination, even during times of emergency; extrajudicial killing; torture and cruel, inhuman, or degrading treatment or punishment; enslavement; and denials of due process and the freedom of conscience, religion, or belief.²³ Both the conditions and the rights were systematically violated by the Hitler regime prior to and during World War II.²⁴ In addition, the Hitler experience reinforced the conviction of the drafters that “the cluster of rights spelled out in articles . . . 19, 20, and 21 of the UDHR [freedom of opinion and expression, of association, and participation in government] are universally the first rights dictators will seek to deny and destroy.”²⁵

they guaranteed freedom of speech, the right of assembly, the right of association, and security of property.

20. FREDERICK MUNDELL WATKINS, *FAILURE OF CONSTITUTIONAL EMERGENCY POWERS UNDER THE GERMAN REPUBLIC* 15 (1939).

21. See DAVID LITTLE, *Terrorism, Public Emergency, and International Order: The US Example, 2001–2014*, in *ESSAYS IN RELIGION AND HUMAN RIGHTS: GROUND TO STAND ON* 281 (2015), for an account of the consequences of Hitler’s appeal to the emergency clause of the Weimar Constitution for the development of international human rights and humanitarian law.

22. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 4 (Dec. 16, 1966).

23. *Id.*

24. Johannes Morsink, *World War II as Catalyst*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 36–91 (1999).

25. *Id.* at 69.

Also, the “atrocities crimes” enshrined in the Statute of Rome²⁶—namely war crimes, crimes against humanity, genocide, and aggression—are further examples of arbitrary force that were seared into public memory during the middle of the twentieth century.²⁷ In addition, disregarding or deliberately depriving people of the human rights of survival embodied in the International Covenant on Economic, Social, and Cultural Rights (ICESCR)²⁸—adequate sustenance, health, education, and cultural opportunity—would amount to “arbitrary neglect,” a close relative of arbitrary force and something also indelibly exhibited during the “Hitler time.”²⁹

It is of the greatest importance that Article 18 of the UDHR and ICCPR—the right to freedom of conscience, religion, or belief—is included among the list of nonderogable rights. That is because a key feature of arbitrary force as practiced by the Hitler regime was the relentless imposition by force of a specific set of beliefs on everyone under its control, meaning the persecution of all religious (and other) expressions of dissent. Such actions were arbitrary because coercion is not a justification for believing the truth or rightness of anything. Since, at bottom, conscience, religion, and belief involve convictions about truth and rightness, they are subject, in traditional language, to the “law of the spirit”—persuasive appeals to reason, emotion, and evidence—and not to the “law of the sword.”

This rationale underlies Article 18, paragraph 2 of the ICCPR, which states that “no one shall be subject to coercion which would impair [one’s] freedom to have or to adopt a religion or belief of [one’s] choice.”³⁰ According to the U.N. Human Rights Committee, authorized to exposit the terms of the ICCPR, Article 18 “protects theistic, nontheistic and atheistic beliefs, as well as the right not to profess any religion or belief.”³¹ Moreover, Article 18 distinguishes

26. Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 38544 (amended 2010).

27. David Scheffer has usefully introduced the terms “atrocities crime” and its relation, “atrocities law.” See DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNAL* 428–40 (2012).

28. G.A. Res. 2200A (XXI), *supra* note 22.

29. See LITTLE, *supra* note 9, at 3–4 (2015) (discussing “arbitrary neglect”).

30. G.A. Res. 2200A (XXI), *supra* note 22, at art. 18, ¶ 2.

31. U.N. HUMAN RIGHTS COMM., GENERAL COMMENT NO. 22 (1993), *reprinted in* RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS 92 (Tad Stahnke & J. Paul Martin eds., 1998).

between belief and manifestation, such that holding or avowing a conviction may in no way be limited, while manifesting or acting it out is subject only to such limitations as are “prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”³² Finally, the Committee emphasizes that Article 18 “is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics.”³³ It rules out “any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established or represent religious minorities.”³⁴

There is strong empirical support for the proposition that human rights compliance in general, and religious freedom compliance in particular, expand the prospects for peace. As to human rights in general, Todd Landman, the author of a careful comparative study concludes that “it appears that greater democracy and interdependence are associated empirically with a reduction of human rights violations and a reduction of inter-state conflict.”³⁵ He emphasizes that “it is liberal democracy . . . that is essential for rights protection, where horizontal and vertical accountability are enshrined in constitutionalism and the rule of law, [and, therefore,] where rights abuses cannot take place with impunity.”³⁶

In a more recent study, *Human Rights and Democracy: Precarious Triumph of Ideals*, Todd Landman continues to stand behind these conclusions, declaring that a strong combination of human rights and democracy significantly reduces lethal repression by elevating political participation and accountability, among other benefits.³⁷ At the same time, he admits that the capacity of democracies to uphold human rights and maintain peace, both inside and outside their borders, is sorely tested these days by the threat of terrorism.³⁸

32. *Id.* at 93.

33. *Id.* at 92.

34. *Id.*

35. TODD LANDMAN, PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY 170 (2005).

36. *Id.* at 169.

37. TODD LANDMAN, HUMAN RIGHTS AND DEMOCRACY: THE PRECARIOUS TRIUMPH OF IDEALS (2013).

38. *Id.*

By emphasizing the interconnection of human rights, democracy, and peace, Landman invokes something known in political science circles as the “Liberal Peace.” The idea of the Liberal Peace holds that the orderly and properly sequenced development of robust liberal political and economic institutions, including “a whole panoply of institutions to ensure the rule of law and [equal] rights,” is a critical condition of national and international peace, while illiberal or ethnically exclusivist institutions increase the probability of violence of either an institutionalized sort, as in autocratic systems, or outside institutional control, as in insurgencies and civil wars.³⁹

The most important claim of the Liberal Peace, based on a systematic investigation of thousands of paired or dyadic relationships between countries, is that developed democracies, especially those with a high degree of inter-state commerce and membership in international organizations, do not fight each other.⁴⁰ Please note, it does not say that developed democracies refrain from fighting nondemocracies. The whole history of colonialism together with the experience of the Cold War and the more current pattern of armed conflict between Western democracies and militant extremists disproves that.⁴¹

Rather, the more limited claim—of special interest to us, given that reaction to Hitler’s autocratic rule was the inspiration for human rights—is that “[p]airs of democracies are much more peaceful than either pairs of autocracies or mixed democratic-autocratic pairs.”⁴² “Nothing comparable to the effect of democratic norms and institutions produces a generalized pattern of dispute-avoidance among authoritarian states,” according to the authors of a well-known

39. JACK SNYDER, *FROM VOTING TO VIOLENCE: DEMOCRATIZATION AND NATIONALIST CONFLICT* 316–17 (2000).

40. See BRUCE RUSSETT & JOHN R. ONEAL, *TRIANGULATING PEACE: DEMOCRACY, INTERDEPENDENCE, AND INTERNATIONAL ORGANIZATIONS* 193–96 (2001) (summarizing findings).

41. Armed responses during the nineteenth and twentieth century by the British in India or the French in Algeria are examples from the colonial period. A Cold War example is the armed intervention led by the United States against communist forces in Indochina in the 1960s and 70s. The use of force against the Islamic State in Iraq and Syria by the United States in league with the United Kingdom and France, among others, is a contemporary example of armed conflict between democratic governments and militant extremists.

42. RUSSETT & ONEAL, *supra* note 40 at 115.

study of the Liberal Peace.⁴³ In a recent collection of essays on the subject, Michael Doyle emphasizes that the empirical case for the Liberal Peace continues to be “exceptionally strong,” while admitting that ongoing research is still required.⁴⁴ The evidence shows that “democratic institutions” “promote peace and mutual respect among democratic peoples,” “enhance human rights, produce higher levels of political participation, [] decrease state repression,” “serve to protect the mass of the population from state indifference during a natural disaster,” and stimulate economic growth and inclusiveness. Weak democratic institutions foster violence.⁴⁵

In regard to intra-state, as opposed to inter-state violence, democracies do better in general, though “partial democracies experience violent state failures more often than either full democracies or autocracies do.”⁴⁶ This suggests that political transitions are especially perilous, as confirmed by the fact that the “vast majority of civil wars in the twentieth century occurred neither in democracies nor in [autocratic] states able to repress opposition vigorously.”⁴⁷

As to the connection between religious freedom and peace, there is an important study by Brian Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century*.⁴⁸ The authors indicate that eighty-three percent of countries with more than two million people have constitutions promising religious freedom and eight percent of countries without constitutions have laws to the same effect, while only nine percent, or thirteen

43. *Id.*; see also R.J. RUMMEL, POWER KILLS: DEMOCRACY AS A METHOD OF NONVIOLENCE (2004); MORTON H. HALPERIN ET AL., THE DEMOCRACY ADVANTAGE: HOW DEMOCRACIES PROMOTE PROSPERITY AND PEACE (2005). For other examples of support for the Liberal Peace, see generally TED ROBERT GURR, PEOPLES VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY (2000); TED ROBERT GURR & BARBARA HARFF, ETHNIC CONFLICT IN GLOBAL POLITICS (2nd ed. 2004); MICHAEL W. DOYLE & NICHOLAS SAMBANIS, MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS (2006); LARRY DIAMOND, THE SPIRIT OF DEMOCRACY: THE STRUGGLE TO BUILD FREE SOCIETIES THROUGHOUT THE WORLD (2008); ROLAND PARIS, AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT (2004).

44. MICHAEL W. DOYLE, LIBERAL PEACE: SELECTED ESSAYS 216 (2012).

45. *Id.* at 202–03.

46. RUSSETT & ONEAL, *supra* note 40, at 70.

47. *Id.*

48. BRIAN J. GRIM & ROGER FINKE, THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY (2011).

countries, offer no such promises.⁴⁹ Nevertheless, the study reveals some disturbing results on the part of governments around the world in regard to living up to the promises made, and the effects of that failure on the incidence of violent conflict. The central conclusion is this: “[V]iolent religious persecution and conflict rise as government and social restrictions on religion increase.”⁵⁰ The reverse is also true: “[W]e have demonstrated the pacifying consequences of religious freedoms. We have found that when social and government restrictions on religion are reduced, violent religious persecution is reduced.”⁵¹

Incidentally, the authors emphasize that the record of compliance with religious freedom standards is deeply intertwined with the record of compliance with other human rights indicating that violation of religious freedom is strongly correlated with the violation of rights to freedom of speech and assembly.⁵² Religious freedoms, the authors state, “are embedded in a much larger bundle of civil liberties.”⁵³ This

49. *Id.* at 27.

50. *Id.* at 212.

51. *Id.* at 210. Some critics hold that the understanding of religion, and therefore religious freedom, in Grim and Finke’s book is too narrow for being confined by a consumer’s model of religion. On that model, “[B]elieving is taken as the defining characteristic of what it means to be religious, and the right to believe (or not) [sic] as the essence of what it means to be free.” HURD, *supra* note 4, at 51. It is true their understanding is in some ways too narrow. Their “religious economies” approach, holding that deregulated religion is beneficial in the same way as a deregulated market, relies on three Enlightenment figures, Voltaire, David Hume, and Adam Smith who are, perhaps, not the most unbiased students of religion. GRIM & FINKE, *supra* note 48, at 2–6. Grim and Finke take them to believe that every religion characteristically seeks to dominate by repressing competitors, and the best way to prevent that is to increase the number of competitors, making it hard for any one religion to gain a monopoly. *Id.* at 3–6. On their account, to believe in the superiority of one’s religion is necessarily to regard competitors as “dangerous and wrong” and to warrant repression, as exemplified, they think, by the New England Puritans. *Id.* at 46, 58. Such a claim, of course, disregards radical English and American Puritans, not to mention Anabaptists, who helped constitute the “free church” tradition in Western Christianity. See FRANKLIN HAMLIN LITTELL, *THE FREE CHURCH* (1957). Members of that tradition regularly believed in the superiority of their religion, and simultaneously favored, often at great cost, the universal protection of the freedom of conscience. GRIM & FINKE, *supra* note 48, at 48–59, 66–68. Moreover, Grim and Finke’s approach does run the risk of ignoring violations of the rights of less conventional religious and cultural groups (see below for an assessment of charges to that effect). Nevertheless, they have, by any reckoning, identified significant and widespread forms of repression and persecution that must be taken into account.

52. GRIM & FINKE, *supra* note 48, at 205.

53. *Id.*

conclusion ties the consideration of religious freedom back to the broader conclusions about human rights, democracy, and peace.

III. CRITIQUES OF THE CONNECTION BETWEEN HUMAN RIGHTS, RELIGIOUS FREEDOM, AND PEACE

There are, as we mentioned, strong objections to this picture of the positive connections among human rights, religious freedom, and peace. Talal Asad, Distinguished Professor of Anthropology at the City University of New York, has attracted a devoted following for calling sharply into question the contribution of human rights and humanitarian law to peace. Though he is not entirely consistent on the matter, he frequently asserts that human rights language does not constitute, as alleged, a transnational system of accountability able to restrain arbitrary force within and among states.⁵⁴ On the contrary, it amounts to little more than a set of biased legal instruments whose function is to serve the hegemonic interests of modern nation-states.⁵⁵

Asad at times calls human rights “floating signifiers that can be attached to or detached from various subjects and classes constituted by the market principle and designated by the most powerful nation-states.”⁵⁶ His predominant example is the United States. It speaks a “secular language of [world] redemption,” which, for all its particularity, now works as a force in the field of foreign relations to globalize human rights.⁵⁷ For that language does, after all, draw on the idea that “freedom” and “America” are virtually interchangeable—that American political culture is (as the Bible says of the Chosen People) “a light unto the nations.” Hence, “democracy,” “human rights,” and “being free” are integral to the universalizing moral project of the American nation-state—the project of humanizing the world—and an important part of the way very many Americans see themselves in contrast to their “evil” opponents.⁵⁸

54. ASAD, *supra* note 10, at 137.

55. *Id.* at 148.

56. *Id.* at 158.

57. *Id.* at 147.

58. *Id.*

The animating idea is the “centralizing state”⁵⁹ which rests “on coercion,” or what Asad calls, “the exercise of violence.”⁶⁰ The state comes to act as the ultimate, exclusive, and all-determining authority, not only over politics and economic affairs, but also over the place and character of morality and religion.⁶¹ As he puts it, “the nation-state is not a generous agent and its law does not deal in persuasion.”⁶² In reality, the notion of “universalizing reason”—the “myth of liberalism,” which lies at the heart the Euro-American Enlightenment project—actually “go[es] against the grain of human and social nature,” and, consequently, must be imposed and maintained violently.⁶³ Asad’s image is of a garden constantly threatened by a surrounding jungle held back only by policies of perpetual violence and destruction.⁶⁴ “[T]o make an enlightened space, the liberal must continually attack the darkness of the outside world that threatens to overwhelm that space.”⁶⁵

These conclusions lead Asad to claim that far from restraining torture or other forms of “cruel, inhuman and degrading treatment” as human rights language is supposed to require,⁶⁶ “many liberal-democratic governments” actually depend on these methods “to

59. *Id.* at 227.

60. *Id.* at 256.

61. *Id.* at 193.

62. *Id.* at 6.

63. *Id.* at 59.

64. *Id.*

65. *Id.*

66. *Id.* at 116. Asad contends that the modern state takes it upon itself to be the sole arbiter of what counts as acceptable pain and suffering. *Id.* at 117. Accordingly, it is mandated that pain and suffering should not be “excessive” or “gratuitous,” but “proportional” to the ends sought, suggesting that pain and suffering are quantifiable in reference to whatever is taken to be a “military necessity.” *Id.* The problem, Asad argues, is that “proportional” means whatever the state says, and the idea of “military necessity” can be extended indefinitely. *Id.* at 117–18. “Any measure . . . no matter how much suffering it creates, may be justified . . .” *Id.* His claim that the idea of “military necessity” has no meaning apart from what modern states arbitrarily ascribe to it is not correct. Military necessity is clearly limited by Common Article 3 of the Geneva Conventions, and, more specifically, by Geneva Convention IV, articles 33 and 34, prohibiting collective punishment and reprisals, though a thorough discussion of the subject calls for a much more extensive treatment. The idea that the quantifiability of pain, as implied in the concept of “proportionality,” is a modern idea is flatly wrong. *See, e.g.*, MAGNA CARTA art. 20 (1215) (“A free-man shall not be amerced [fined] for a trivial offence but only according to the degree of the offence; and for a great delinquency, according to the magnitude of the delinquency . . .”).

control populations of noncitizens,”⁶⁷ as the U.S. did in Vietnam; Israel in Gaza and the West Bank; and Britain in Aden, Cyprus, and Northern Ireland—all in recent memory.⁶⁸ That practice is in line with long-established Western colonial policies that colonialists saw as essential to inculcating civilization.⁶⁹ Having publicly denounced such methods and solemnly ratified international instruments outlawing them, modern states typically try to hide their violations, but the violations are nevertheless “understood [by them] as a means [to be] used strategically for the maintenance of the nation-state’s interests.”⁷⁰ Such practices are required, presumably, by the ongoing need to “hold back the jungle”⁷¹ by means of “the exercise of violence.”⁷²

There is, to be sure, some truth in Asad’s account. Modern liberal-democratic states do frequently and sometimes extensively violate human-rights norms, and those violations undoubtedly contribute to instability and occasionally to violence. Also, it has already been admitted that democratic states, however peaceful they may be in relation to each other, are not often so peaceful in dealing with nondemocratic states, nor, by any means, are their reasons for using force in such instances always justified. But even if they engage in such practices intentionally, trying to cover them up disguises their adverse effects on peace and presupposes the recognized legitimacy of the standards and their connection to peace. Indeed, the fact that states try to disguise their behavior is itself an example of vice paying tribute to virtue.

Asad’s larger claim that human rights language as such represents a threat to peace is very serious. The main problem with the claim is that, on inspection, it is rather elusive. Above all, what we need from Asad is a clearer indication of where he stands on the behavior that is now prohibited by human rights and humanitarian law standards. He was asked once in an interview why there were reports of more human

67. ASAD, *supra* note 10, at 114–15.

68. *Id.* at 114 n.19.

69. *Id.* at 110–11.

70. *Id.* at 114–15.

71. *See id.* at 59–60.

72. *Id.* at 256 (applying discussion of liberalism as a jungle that is continually encroaching); *see id.* at 59–60.

rights violations in the third-world than in Western democracies.⁷³ He responded that “there are quite a lot of dictators in power” in Latin America, Africa, and China, as well as the Muslim world.⁷⁴ His response apparently accepted the premise that autocracies violate established human rights standards more than liberal democracies do, and, by implication, that that is not a good thing. However, he returned to form in the same interview, stating that “many of the assumptions underlying rights” are biased against practices seen not to be sufficiently Western or are the result of discriminatory Western policies.⁷⁵

It is essential that Asad distinguish between the human rights standards he affirms and those that he does not. And he must identify when the problem lies with the standards and when it lies in the violation of those standards. Until he does that, it is impossible to tell whether the alleged bias involved is in the standards themselves or in the application and interpretation of the standards. Asad is ready to call third-world dictators to account for human rights violations. But that readiness raises serious questions about his picture of the liberal democratic state as the major source of repression and violence in the world.

If, on the other hand, he means to reject most or all existing standards as nothing more than “floating signifiers”⁷⁶ of the hegemonic interests of modern democracies, then he must tell us what he makes of the Nazi record of treatment both of German citizens and captured peoples. Does he object to that record? And, if so, what does he recommend as a way to prevent a recurrence? Are any of the human rights and humanitarian standards of use in helping prevent modern states from acting like the Nazi state? If so, which ones? If not, what shall replace the standards, and what is the connection between his substitute measures and peace? Until we have answers to these questions, Asad’s challenge to the Liberal Peace remains unproven.

73. Interview by Nermeen Shaikh with Talal Asad, Professor of Anthropology, City Univ. of N.Y., ASIA SOC’Y, <http://asiasociety.org/islam-secularism-and-modern-state> (last visited Oct. 3, 2016) [hereinafter ASIA SOC’Y].

74. ASIA SOC’Y, *supra* note 73.

75. ASIA SOC’Y, *supra* note 73.

76. ASAD, *supra* note 10, at 158.

Next, we take up the criticisms registered by Oliver Richmond in his volume, *A Post-Liberal Peace*.⁷⁷ Richmond's special focus is on the peacebuilding consequences that he thinks have followed from efforts to implement the conventional understanding of the Liberal Peace. He reviews a number of cases of internationally sponsored post-conflict reconstruction, like Cambodia, Bosnia-Herzegovina, Kosovo, and Timor Leste, and concludes that the going version of the Liberal Peace, which has guided these endeavors, has in large part failed to create conditions for a durable and just peace.⁷⁸ In the name of fostering "liberal institutions" (constitutionalism, human rights, etc.) that are supposed to generate peace domestically and internationally, the effects, rather, have been to strengthen political and economic elites both inside and outside government at the expense of common people at the "everyday" local level.⁷⁹ The special culprit, according to Richmond, is neoliberal economic policies that entrench extensive inequalities in wealth and opportunity, though he mentions other factors as well.⁸⁰

I do not dispute Richmond's findings, particularly in light of the experience of developed democracies like the United States with growing social and economic inequality associated with the market economy and the potential for deep frustration and serious conflict that appear to accompany it. I simply observe that when all is said and done, Richmond does not forsake the Liberal Peace, but calls instead for it to live up to the full range of its assumptions. He does this by calling for efforts to expand the reach of civil and political rights to apply equally to all citizens, in the spirit of authentic democracy, and, interestingly, to make available to all the human rights necessary for survival—adequate sustenance, health, education, and cultural opportunity—embodied in the ICESCR.⁸¹

It must be admitted that such a policy contradicts some influential interpretations of the market economy and thereby modifies

77. See RICHMOND, *supra* note 11.

78. *Id.* at 66–91.

79. See *id.* at 186–90 for a summary of conclusions.

80. *Id.* at 36.

81. RICHMOND, *supra* note 11, at 25–43 (calling explicit attention to the rights to survival codified in the ICESCR).

significantly one widespread reading of the Liberal Peace.⁸² At the same time, such a proposal is ultimately consistent with the full range of human rights—civil and political, *and* economic, social, and cultural—that are inscribed in the ICCPR and the ICESCR. If the Liberal Peace is taken, as it should be, to mean implementing all, and not just some, human rights, then Richmond is in accord, after all, with one—arguably compelling—version of the Liberal Peace.

Elizabeth Shakman Hurd and Winnifred Sullivan, authors, respectively, of *Beyond Religious Freedom* and *The Impossibility of Religious Freedom*,⁸³ go further than Richmond, and align much more closely with Asad's predominant claim against the idea of Liberal Peace. They assert that human rights language in general and religious freedom language in particular is in reality the language of political domination. Sullivan doubts it is possible to find any transnational basis above and beyond the “legal regimes” of the nation-state, presumably such as international law, that could escape the “political manipulation” to which such regimes are unavoidably subject.⁸⁴ Human rights guarantees, including religious freedom guarantees, are “undermined by the limitations of language” as well as by “the statist monopoly of law common in the modern nations of the West.”⁸⁵

Elizabeth Hurd sharpens this point: As with human rights language generally, formally employing the vocabulary of religious freedom authorizes biased understandings “of what it means to be religious, and what it means for religion to be free.”⁸⁶ Such an approach risks “exacerbating the social tensions, forms of discrimination, and intercommunal discord that [human rights language claims] to transcend.”⁸⁷

The underlying argument is that *all* universalistic language, such as that found in the human rights code, is mistaken, and not recognizing this leads to serious abuse and victimization. In regard to religious freedom, for example, there is no one thing called “religion” that applies all over the world. People in different cultures have very

82. A view extensively discussed and criticized in Jackie Smith, *Economic Globalization and Strategic Peacebuilding*, in STRATEGIES OF PEACE: TRANSFORMING CONFLICT IN A VIOLENT WORLD 247–69 (Daniel Philpot & Gerard F. Powers eds., 2010).

83. See HURD, *supra* note 4; SULLIVAN, *supra* note 6.

84. SULLIVAN, *supra* note 6, at 157.

85. *Id.* at 156–58.

86. HURD, *supra* note 4, at 61–64.

87. *Id.*

different understandings of the term. Therefore, what qualifies as “religious freedom” is bound to vary accordingly. The upshot is that proponents of a universal human right to religious freedom wind up coercively and arbitrarily imposing their own ideas and biases on others who have very different notions. The undertaking is an exercise in oppression and discrimination. And, as such, it causes “intercommunal discord” and, likely increases violence. The particular culprits are national governments, who in the name of advancing “freedom, justice, and peace in the world,” actually advance their own parochial ideas and interests, which makes for conflict, not peace. This approach is a direct and systematic assault on the idea of the Liberal Peace, even the revised view of it suggested in the discussion of Oliver Richmond above.⁸⁸

There are several problems with the approach. First, it fails to prove that the violations identified by Grim and Finke⁸⁹ do not occur, and do not have the violent consequences they report. Nor do the proponents of this approach prove that the violations they describe amount to anything like the extent of oppression and violence Grim and Finke report.

Second, the authors do not succeed in divorcing themselves completely from something like a human rights approach to religious freedom. For example, Elizabeth Hurd says there is no such thing as “religion” as such, and then proceeds to argue that something called “lived religion”⁹⁰—a fluid, loosely organized, nondoctrinaire experience “as practiced by everyday individuals and groups”⁹¹—is regularly subverted around the world by what she calls “governed religion”⁹²—the religion sponsored and imposed by the state—and by “expert religion”⁹³—an understanding of religion invented by scholars and lawyers and forced upon people against their wishes. In effect, Hurd has simply substituted her own alternative definition of religion, together with an ambitious theory of religious freedom that is based on her account of how religion is supposed to be repressed around the world.

88. *See supra* notes 77–81 and accompanying text.

89. *See supra* notes 48–53 and accompanying text.

90. HURD, *supra* note 4, at 13–15, 51–54.

91. *Id.* at 8.

92. *Id.* at 15–19.

93. *Id.* at 9–12.

The emphasis on “lived religion” is meant to show that the ideas enshrined in the human rights code are biased in favor of a Western (and especially American) notion of what religion “really” is. All the talk of “conscience” and “belief” in the code bears the stamp of “hyperprotestantism,” something that favors a voluntaristic, highly rationalized, tightly organized form of religion that ignores or plays down ritual and ceremony as well as the kind of flexible, unreflective religious experience that is so much a part of the “everyday” lives of people around the world.⁹⁴

However, Sullivan and Hurd do not avoid using human rights concepts altogether. At one point, Sullivan states that “[t]o be religious is, in some sense, to be obedient to a rule outside oneself and one’s government, whether that rule is understood to be established by God, or otherwise. It is to do what *must* be done.”⁹⁵ This is, in fact, a conventional description of freedom of conscience—a rule outside oneself *and one’s government* to which one is ultimately loyal.⁹⁶ In her view, a religiously informed conscience, or something like it, stands above and beyond the coercive power of the state, which is exactly the message of Article 18, paragraph 2 of the ICCPR.⁹⁷

My guess is that whenever fundamental commitments—whether religious or not, and whether in the form of “lived religion” or not—come in conflict with the state, they quickly crystallize into what we would recognize as conscientious beliefs. It does not matter whether they are principles or doctrines or rituals or cherished practices lived out in “everyday life,” committed persons in face of persecution are forced to give reasons—to *express beliefs*—as to why their commitments are of paramount importance to them, and why those commitments

94. *Id.* at 56–57.

95. SULLIVAN, *supra* note 6, at 156 (emphasis in original).

96. *Id.* Sullivan and her Immanent Frame colleagues frequently criticize defenders of the right of religious freedom for holding that the convictions of conscience are the result of a process of voluntary selection, close to the idea of “consumer choice,” rather than the experience of “being claimed” by some binding religious or moral mandate “to do what *must* be done.” *Id.* at 7–8, 156; HURD, *supra* note 4, at 51. But this is to confuse things. On a traditional Christian understanding of conscience, “[t]o be religious is not to be free, but to be faithful,” as Sullivan puts it, is true in regard to conscience, and *not* in regard to the state. SULLIVAN, *supra* note 6, at 156. Because one is bound by conscience, one claims the right to freedom of choice so far as the state goes. See Paul W. Taylor, *Religion and Freedom of Choice*, in RELIGION AND HUMAN RIGHTS, 170–87 (John Witte, Jr. & M. Christian Green eds., 2012), for a thoughtful discussion of the subject in respect to the jurisdiction of the state.

97. G.A. Res. 2200A (XXI), *supra* note 22, art. 18.

should be tolerated and not suppressed. It is this very predicament of *conscience versus state* that Grim and Finke report on in such distressing and extensive detail, and it is by no means clear how the practitioners of lived religion escape that predicament when confronted with state repression. In fact, Hurd repeatedly calls attention to the way “governed religion” and “expert religion” harm groups by disregarding what *they believe* about themselves!⁹⁸

Hurd invokes the example of what she thinks are abuses inflicted on the Alevis of Turkey by defining them officially as a homogenous “religious minority” in a way that seriously misrepresents the understanding of Alevis of some members.⁹⁹ Classifying Alevis in accord with the categories imposed by “governed” and “expert religion” “sanctifies particular understandings of Alevis as orthodox while marginalizing others.”¹⁰⁰ “Dissenters and those making claims on behalf of Alevis deemed unorthodox or threatening by ‘leading Alevi men of faith’ are disenfranchised.”¹⁰¹ According to Hurd, this is done in part by ignoring the fact that some of the convictions in question are not thought of as “religious” at all.¹⁰²

It is hard to see this description (if accurate) as anything other than a case of unwarranted government (and “expert”) interference with the conscientious beliefs of some Alevis—those “*making claims on behalf of Alevis deemed unorthodox . . .*” For one thing, the idea of “lived religion” as something indifferent to belief seems to have been forgotten. For another, the critical question, on a human rights understanding, is not whether the beliefs in question are “religious” or not, but whether they are “conscientious”—that is, whether they are of paramount importance and considered worth defending at substantial cost. If they are, governments (and experts) are bound to find ways to respect those beliefs, subject to specified limitations. That is the meaning of “religion *or* belief.”

The same applies to another example Hurd gives. She complains that “the logic of religious rights renders politically invisible less established religions, collective ways of life, and modes of being and

98. As illustrated in the following discussion.

99. HURD, *supra* note 4, at 101–03.

100. *Id.* at 104–05.

101. *Id.* at 105.

102. *Id.* at 104–05.

belonging that do not qualify as “religious.” Nontraditional religions, unprotected religions, and nonreligions are pushed into the wings.”¹⁰³ She illustrates the point by referring to the perceived mistreatment of the K’iche’, a “Maya ethnic group” living in the western highlands of Guatemala.¹⁰⁴ The K’iche’ people strongly objected for “religious and cultural reasons” to mining operations undertaken on their land by multinational corporations backed by the state.¹⁰⁵ Their objections were ignored because devotion to the land was not regarded by the authorities as “legally . . . religious” according to the standards of “governed and expert” religion.¹⁰⁶ “When [the case is] cast in terms of religion understood as the right to believe or not, violations of the K’iche’ religio-cultural heritage fall below the threshold of [what is politically or judicially adjudicable].”¹⁰⁷

But such a judgment by officials seems, on its face, to be blatantly inconsistent with existing human rights law and jurisprudence. Since “religious and cultural reasons” were explicitly given in defense of their objections, the issue is not whether an artificial standard of belief is being imposed on the K’iche’ people; they are clearly citing beliefs in defense of their position. In addition, we have seen that protected beliefs need not be religious, but only conscientious, and that “nontraditional religions, unprotected religions, and [conscientious] nonreligions” are explicitly covered by human rights jurisprudence.¹⁰⁸ Finally, Article 27 of the ICCPR (which Guatemala ratified in 2000) guarantees that persons belonging to “*ethnic, religious, or linguistic minorities*” “shall not be denied the right, in community with the other members of their group, *to enjoy their own culture, to profess and practice their own religion, or to use their own language.*”¹⁰⁹

Hurd and Sullivan do succeed in providing some egregious examples of the international religious freedom campaign gone wrong by discriminating against practitioners of lived religion. But what the authors do not prove, despite their protests to the contrary, is that the vocabulary of religious freedom is incapable of resolving these troubling examples fairly. The language and categories of religious

103. *Id.* at 49–50.

104. *Id.* at 50.

105. *Id.*

106. *Id.* at 51.

107. *Id.* (alterations in original).

108. GENERAL COMMENT NO. 22, *supra* note 31.

109. G.A. Res. 2200A (XXI), *supra* note 22, art. 27 (emphasis added).

freedom, as elaborated in the commentary of the U.N. Human Rights Committee above, are quite capacious, and are able to supply remedies for the kind of oversight and mistaken judgment by governments and experts that Sullivan and Hurd identify. The fact that the standards are not always scrupulously applied reflects negatively, to be sure, on the officials in question, but *not* on the standards themselves.

I close by illustrating my point about the capacity of persons charged with upholding religious freedom standards for sensitivity and broadmindedness, remembering that such persons are typically associated in Hurd's mind with the prejudices of "governed religion" and "expert religion." I am referring to a memorable dissent by Justice Brennan in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, a 1988 U.S. Supreme Court decision overruling a lower court judgment that the U.S. Forest Service had violated Navajo religious rights by constructing a road across a mountain sacred to the Navajo.

In supporting Navajo rights that he believed the majority opinion had disregarded, Justice Brennan wrote as follows:

[F]or Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories.

. . .

In marked contrast to traditional Western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established universal truths—the mainstay of Western religions—play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land.¹¹⁰

Justice Brennan's opinion should surely have prevailed, but whether it did or not, his opinion proves that prominent judicial officials charged with upholding religious freedom standards are in fact profoundly capable of appreciating the special perspective and distinctive interests of indigenous peoples.

110. *Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 459–61 (1988) (Brennan, J., dissenting).

IV. CONCLUSION

There is a close connection between human rights, religious freedom, and peace. So far, at least, the sustained and apparently growing drumbeat of opposition against the connection has not succeeded. Too often, as critics assert, human rights and religious freedom standards are not properly applied. This causes serious injury and no doubt jeopardizes the prospects for justice and peace where such mistakes occur. But the fault is with those interpreting and applying the standards, not with the standards themselves.

