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the vision of a beautiful, rich, and difficult world, in which a community of persons regard one another as free and equal but also as finite and needy—and therefore strive to arrange their relations on terms of justice and liberty. In a world governed by hierarchies of power and fashion, this is still, as it was from the first, a radical vision, a vision that can and should lead to social revolution. It is always radical to make the demand to see and to be seen as human rather than as someone's lord or someone's subject. I believe it is best for women to embrace this vision and make this demand.

## RELIGION AND WOMEN'S HUMAN RIGHTS

The *mullahs* say: "When they will die we shall not bury them." Villagers say, "Wherever they want, they go. They do not cover their heads. They talk with men. They will be sinners." I said: "If Allah does not see us when we stay hungry then Allah has sinned."

—A Bangladeshi wife, participant in a literacy and skills program sponsored by the Bangladesh Rural Advancement Committee (cited in M. A. Chen, *A Quiet Revolution*)

### The Liberal Dilemma

Political liberals characteristically defend two theses that appear to be closely related. First, liberals hold that religious liberty, or more generally the liberty of conscience, is among the most important of the human freedoms and must be given a very strong degree of priority in the basic structure of a political regime. This is frequently understood to entail that the freedom of religious exercise can permissibly be infringed upon only when there is an imminent threat to public order.<sup>1</sup> Second, liberals hold that human beings have various other rights, including rights to freedom of movement, freedom of assembly, freedom of speech, equal political participation, equal treatment under the law, both civil and criminal, and, finally, various rights to the integrity and inviolability of the person.

In a sense, there seems to be a strong complementarity between the first thesis and the second. For we know well that the rights on the list given in the second thesis have all too often been denied to individuals on grounds of religious membership; one clear sign of a regime's failure to honor the first thesis is its discriminatory behavior toward religious groups with respect to a wider spectrum of human rights. Thus, the German Nazi regime, unlike that of medieval Spain, was not preoccupied with the specific task of impeding the Jews' freedom

to worship. They pursued their campaign through the denial of other human rights, such as the equal right to contract a marriage; the right to mobility, assembly, and choice of occupation; and, of course, ultimately, the right to life. True religious liberty required that these other basic freedoms not be impaired on a discriminatory basis.

On the other hand, the two theses can also generate a tension, which poses difficult questions for contemporary law and political thought. For the world's major religions, in their actual human form, have not always been outstanding respectors of basic human rights or of the equal dignity and inviolability of persons. Some, indeed, have gone as far as to create systems of law that deny the equal rights of persons and justify violations of their dignity and their person. Apart from law, influential religious discourse in many parts of the world threatens the bodily integrity and equal dignity of persons—and sometimes, even, their equal liberty of worship. Consider the following six examples.

(1) In a village in rural Bangladesh in the early 1980s, impoverished women leave their homes to meet in a group organized by the Bangladesh Rural Advancement Committee. They are learning to read, to keep accounts, and to pursue various forms of work outside the home—all important ingredients in improving nutrition and health for themselves and their children. The local *mullahs* (Islamic religious leaders) make speeches saying that women who work outside the house and talk with men other than their husbands are whores. They threaten them with religious and communal ostracism (refusal to officiate at any of the woman's social or religious functions), and even with physical violence. ("If you go into the field, your legs will be broken."<sup>2</sup>) Although most of the women continue with the literacy project, they fear for their status in the community, their well-being (which, so far, is entirely dependent on their relation to men), and their physical safety.<sup>3</sup>

(2) In Pakistan, again in the early 1980s, a young blind girl named Safia Bibi complained of rape. Because she was a minor, her father filed a complaint. Under the recently promulgated Hudood Ordinance, rape convictions require four male witnesses, and complainants who fail to produce the necessary testimony may then be prosecuted for fornication (*zina*). The Sessions Court found Safia in violation of the *zina* ordinance, sentencing her to three years hard labor in prison, despite her blindness. After a storm of national and international protest, the Federal Shariat Court set the case aside on technical grounds but refused to prosecute the accused rapist.<sup>4</sup>

(3) In Madhya Pradesh, India, in 1975, a Muslim woman named Shah Bano was thrown out of her home by her husband, a well-to-do lawyer, after forty-three years of marriage and five children.<sup>5</sup> As required by Islamic personal law, he returned Rs. 3,000 (about \$300), which had been her marriage settlement from her family in 1932. Rather than accept this settlement, inadequate for survival, she sued for maintenance under Section 125 of the Criminal Procedure Code, which requires a person of adequate means to protect relations from destitution and vagrancy.<sup>6</sup> (India has a uniform criminal code, although it does not have a uniform civil code; civil matters are handled by many distinct religious systems of law.) As a result, she was awarded Rs. 180 (\$18) per month, hardly "a princely

sum," but an improvement. Her husband, however, appealed this judgment to the Supreme Court of India, holding that as a Muslim he was bound only by Islamic law. In 1985, the Supreme Court held that the provisions of the Criminal Procedure Code regarding maintenance of destitute relations were applicable to members of all religions and that a person should not lose simply by being a Muslim. In his opinion Chief Justice Chandrachud alluded to a provision of the Constitution that had instructed the state to "endeavour to secure" a uniform civil code; he deplored its failure to have done so. The Muslim Personal Law Board and other religious leaders vehemently criticized the ruling, using public rhetoric to persuade followers that their religion was in grave danger unless the government should decide to exempt Muslim women from the provisions of Section 125.<sup>7</sup> Responding to this campaign, the government of Rajiv Gandhi passed the Muslim Women (Protection of Rights on Divorce) Bill of 1986, which deprived divorced Muslim women of their right of maintenance under the criminal code<sup>8</sup>—at the same time recommending that by the year 2000 the nation adopt a uniform civil code.<sup>9</sup> Hindu political activists subsequently complained that the new law discriminated against Hindus by giving Muslims "special privileges."<sup>10</sup>

(4) In 1955, the Indian Parliament passed the Hindu Marriage Act, which for the first time gave women the right to divorce and remarriage, which men had long enjoyed. (Indeed, previously men could marry an unlimited number of times without getting divorced, although the reforms of 1955 and 1956 ruled out polygamy for Hindu men.) Conservative Hindu members of Parliament claimed that the bill had been passed to "wound the religious feeling of the Hindus" and was "against the fundamental principles of Hinduism."<sup>11</sup>

(5) In contemporary Iran, the penalty for women who do not adhere to the dress code is between thirty-four and seventy-four lashes with a whip. The actual penalties are more varied. Some women get off with a cash fine. "But, just as commonly, women who do not adhere to the dress code are punished with acts of extreme cruelty: their feet may be put in a gunny sack full of mice and cockroaches, their faces splashed with acid or cut with razor blades."<sup>12</sup> So terrifying are the penalties that in 1991, a thirteen-year-old girl who was found in violation committed suicide by throwing herself out a fifth-floor window. On August 15, 1991, the Prosecutor-General, Abolfazl Musavi-Tabrizi, addressing the controversy occasioned by this death, declared that "anyone who rejects the principle of the *Hijab* [dress code] is an apostate and the punishment for apostasy under Islamic Law is death."<sup>13</sup>

(6) In 1993, two groups of women attempted to hold prayer services at the Western Wall (the "Wailing Wall") in Jerusalem. Although they did not challenge the traditional separation of male and female prayer spaces—and thus were not in violation of any explicit provision of religious law—they did wear prayer shawls and read from the Torah scroll, which is not conventionally appropriate within Orthodox Judaism. The official in charge, representing the Ministry of Religious Affairs, forbade them to continue, holding that it would undermine custom and violate the religious feelings of orthodox worshippers. They were even labeled "provocateurs" for their organized singing. The Supreme

Court of Israel dismissed the women's petition for freedom of religious exercise, recommending that the government establish a commission to look into the issue.<sup>14</sup>

In all these cases we see an apparent dilemma for the modern liberal regime. For if the people who claim to speak for the religious traditions in these examples are to be accepted as their representatives and their claims as legitimate claims of religious liberty (and we shall see that this is not an uncomplicated matter), then there really is a tension between respect for religious liberty and respect for the basic human rights of many citizens. This tension finds its sharpest form wherever the religious traditions have arrogated to themselves, and have been permitted, the right to make law, but it arises, as well, in more informal ways, when the highly influential discourse of religious leaders poses problems for the equal worth of basic liberties—usually already guaranteed in the constitutions (or the legal traditions) of the nations in question, as well as in their commitment to the Universal Declaration of Human Rights and, in most cases, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a multilateral treaty ratified by 131 countries.<sup>15</sup> If the government defers to the wishes of the religious group, a vulnerable group of individuals will lose basic rights; if the government commits itself to respecting equal human rights of all individuals, it will stand accused of indifference to the liberty of conscience. Often government actors, like Rajiv Gandhi, make a mere pretense of serious engagement with the problem—satisfying the religious group, seeing that it is far more politically powerful than women, but saying, at the same time, that something must surely be done about this by someone in the future.

Nor is this dilemma troubling only for the liberal state: It also vexes the religions themselves. An especially poignant statement of its force can be found in the Pope's October 1995 address to the United Nations General Assembly. On the one hand, this address contained a very strong injunction to respect the world's major religions and a ringing defense of "the fundamental right to freedom of religion and freedom of conscience, as the cornerstones of the structure of human rights and the foundation of every truly free society."<sup>16</sup> These sentiments are exactly those of John Rawls, who writes that "the question of equal liberty of conscience is settled. It is one of the fixed points of our considered judgments of justice."<sup>17</sup> At the same time, however, the Pope vigorously endorsed the United Nations Universal Declaration of Human Rights as "one of the highest expressions of the human conscience of our time," and he spoke of a worldwide movement toward universal respect for the dignity and inviolability of the human person. His more recent "Letter to Women," issued just before the Beijing Women's Conference, makes it clear that he considers many of the rights at issue in my examples to be central human rights: He mentions freedom from sexual violence (including, it would appear, marital rape), equality in family rights, equality in political duties and responsibilities, equality under the law, and equality in the workplace.<sup>18</sup> Although his list does not contain all the rights that all advocates of women's rights have sought, it includes enough of

them to generate the dilemma, simply by its juxtaposition with the urgent injunction to respect the answers given by each religious tradition.

The dilemma studied here does arise in the United States as well; as I follow the international issues I shall allude to aspects of those debates. But, given that the United States has a Bill of Rights that is effective, not merely aspirational (as are relevant constitutional provisions in many other nations<sup>19</sup>), and given that by now the major religions in the United States have long accepted some fundamental shared ideas about the equal dignity and liberty of persons, such a focus cannot address the most problematic aspects of the relationship between political liberalism and religion. We simply do not hear any influential religious voice in the United States proposing, at this time, that women's legal testimony be judged unequal to that of men, that women be severely punished for dressing in a particular way, that their legs be broken for working outside the house, or that they be denied a right to divorce equal to that granted a man. None of these cases is totally discontinuous with our own past and even present; the practical difficulty of complaining of rape, for example, and the punishment meted out to women who do so complain, are real and recent, in some cases current (see chapter 5). Further back in our history all the mentioned inequalities in family law could be attested, often buttressed by appeals to religion.<sup>20</sup> Certainly Christianity and Judaism are far from blameless in the global history of women's unequal treatment, as my Israeli case attests, although in Europe and North America they have adopted a more liberal form recently, as a result of both internal criticism and legal constraint. My international examples manifest, I believe, what parts of most religious traditions (as well as many nonreligious traditions) will try to do when they are not so shaped by liberal traditions. I believe, therefore, that a focus on current international issues is valuable to give us a vivid sense of the reality of our topic. Without this focus, we might fail to acknowledge that religions (like many nonreligious political actors) can propose atrocities; we might therefore fail to ask what liberals who care about religion should say when they do.

It is useful to focus on this topic for another reason as well: because these violations do not always receive the intense public concern and condemnation that other systematic atrocities against groups often receive—and there is reason to think that liberal respect for religious difference is involved in this neglect.<sup>21</sup> The worldwide mobilization against South African Apartheid was not accompanied by any similar mobilization to divest stock holdings in nations that treat women as unequal under the law. Indeed, these inequalities are often cheerfully put up with, as part of legitimate differences—as when our troops were asked to fall in with Saudi customs regarding women's dress while serving in the Gulf. One reason for the reluctance of Western liberals to face such harms and to take appropriate political action is surely the political hopelessness of it all—for how could we hope to convince our nation to take economic action against so many oil-rich nations? There may be several other reasons.<sup>22</sup> Among them, however, is surely the role of religion in the debate: Liberals who do not hesitate to criticize a secular government that perpetrates atrocity are anxious and reticent when it comes to vindicating claims of justice against major religious

leaders and groups. They are hesitant, I suggest, because they hold that the liberty of conscience is among the fixed points in our considered judgments of justice, and they are at a loss to see how they could in good conscience ask religious people to acquiesce in a judgment about sex equality that is foreign to that religious tradition. This suggests that sorting out the liberal dilemma may contribute to greater political clarity in an area where we urgently need it.

I shall focus on cases in which religions threaten basic human rights. This is not because it is these cases that generate the dilemma with which I am concerned, but because I believe that this is the primary relation religions have had to human rights. It is obvious that religious discourse has been among the major sources of support for human rights around the world, and I have focused on the Pope's statement partly to keep this fact before our minds.

We must also keep reminding ourselves that cultures are complex. It is generally very difficult to determine to what extent the religions in a nation reflect influences from other aspects of the culture and to what extent they influence the culture. In nations such as Iran, we can contrast the situation prior to the control of religious fundamentalists with the current situation; usually such assessments are more elusive, and we must exercise caution in drawing conclusions. The problem is compounded, in a nation such as India, by sharp regional variations that reflect many different cultural and political factors; differences across religions are less sharp than such regional differences, though religion appears to have some independent explanatory weight.<sup>23</sup>

Our assessments are made still more complex by the fact that when religions act politically their religious discourse is often powerfully colored by issues of political power. Thus, the Hinduism represented today in India by the Bharatiya Janata Party (BJP, the leading Hindu nationalist party) is not very much like the inclusive, loosely defined, polytheistic Hinduism of earlier tradition; political and cultural forces are likely to have shaped the BJP's selection of religious principles and emphases.<sup>24</sup> Very different political aims shaped Mahatma Gandhi's characterization of the essence of Hinduism, when he said, "If I were asked to define the Hindu creed, I should simply say: Search after truth through non-violent means."<sup>25</sup> Where women are concerned, the same has been true over the years. The Hindu tradition, as we noted in chapter 1, offers many different and contradictory pictures of women's sexual agency. An investigation of cultural context would be likely, here too, to reveal political influences at work shaping and reshaping the religious tradition; more important for our purposes, the contemporary choice to stress one aspect of the tradition rather than another itself often expresses political aims.<sup>26</sup>

Similarly, the Islamic fundamentalism characteristic of the Iranian regime has little in common with the tolerant and pluralistic form of Islam espoused by Iranian writer Alberuni, who traveled to India in the eleventh century, or with that implemented politically by the tolerant Moghul emperor Akbar in the sixteenth century.<sup>27</sup> Islam contains fundamentalists who are intolerant of other religions, but it also contains some of the earliest expressions of toleration and the transcendence of sectarian boundaries—in, for example, the great medieval religious poet Kabir, who wrote, "Kabir is the child of Allah and of Ram. He is

my Guru, he is my Pir."<sup>28</sup> In India today, Muslims include liberals and conservatives, feminists and traditionalists. Similarly, the contemporary Iranian regime interprets Islam in ways that do not reflect the entirety of that tradition, in connection with its political goals. Many devout Muslims today support more liberal views and policies. In nations such as Indonesia and Tunisia, liberalization has had large political effects. Most of us are aware that Judaism and Christianity contain such complexities; we should not refuse this recognition to religions we know less well.<sup>29</sup>

Thus the criticisms we may make of "religious practices" and "religious discourse" will be criticisms of human beings, often vying for political power; they do not presuppose that any of these religions has an unchanging and unchangeable core of misogyny, or even that the misogynistic elements are religiously central rather than political in origin. Nonetheless, because we are interested in the rights of individuals, we must approach the religions where they, or their representatives, threaten these rights.

In what follows, I do not ignore, though I shall not directly address, the difficulties involved in defining the notion of a "human right" or specifying the conditions under which a person can be said to have a right to a certain type of treatment. Clearly, given that I shall be urging legal change to do justice to women's human rights, I do not accept a positivist analysis, according to which a person has a right if and only if the law in her country has recognized such a right. I understand a human right to be a claim of an especially urgent and powerful sort, one that can be justified by an ethical argument that can command a broad cross-cultural consensus, and one that does not cease to be morally salient when circumstances render its recognition inefficient. A human right, unlike many other rights people may have, derives not from a person's particular situation of privilege or power or skill but, instead, just from the fact of being human. In my understanding, articulated in chapter 1, there is a very close relationship between a list of basic human rights and a list of basic human capabilities to function that is also very close to the Rawlsian list of "primary goods," that is, things that all persons may be presumed to need in order to carry out their plans of life, whatever the plan is. Human rights are, in effect, justified claims to such basic capabilities or opportunities.<sup>30</sup>

### Women's Human Rights: The Problem Areas

CEDAW defines "discrimination against women" as follows:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

By ratifying CEDAW—as most of the nations under discussion have—states pledge (1) to embody "the principle of the equality of men and women" in their national Constitutions or other appropriate legislation; (2) to legislate against

discrimination against women, providing appropriate sanctions; (3) to "establish legal protection of the rights of women on an equal basis with men" and to ensure this protection through "competent national tribunals and other public institutions"; (4) to ensure that public authorities do not discriminate against women; (5) to take "all appropriate measures" to eliminate existing discrimination "by any person, organization or enterprise"; (6) to change or abolish any existing discriminatory "laws, regulations, customs and practices"; and (7) to repeal all provisions of the penal law that are discriminatory.<sup>31</sup> Article 5 of CEDAW elaborates these duties by explaining that state parties agree to confront and modify "customary and all other practices" that are based on the idea of the inferiority or superiority of one sex to the other, or on ideas of stereotyped roles for men and women. Let us keep these norms in mind as we briefly survey eleven problem areas for women's human rights (closely connected to chapter 1's account of the basic capabilities) in which religious discourse, and often action, has been a major influence.

### 1. *Life and Health*

Women's lives are unequally at risk in many parts of today's world. Statistics continue to show that women suffer unequally from hunger and malnutrition and from unequal access to basic health care.<sup>32</sup> Although it is difficult to pin down the origins of practices of unequal feeding and care, cultural systems that portray female life as unequal in worth to male life must bear some of the responsibility for this egregious situation. Religious discourse has played a substantial role here: Although it is difficult to distinguish between a religion and the cultural traditions that surround it, the Hindu, Islamic, and Confucian traditions have all, with some plausibility, been accused of denigrating the value of female life in ways that have undermined women's claim to basic goods of subsistence.<sup>33</sup>

Of equal or greater importance, religious discourse has played a major and undisguised role in confining women to the home in many parts of the world, and in denying them opportunities to earn wages outside. Islamic ideas of a woman's proper role returned thousands of women to the home in Iran and, more recently, in Afghanistan; they keep women in the home in Bangladesh, India, and many other nations. Hindu caste traditions, similarly, are often invoked to resist a woman's attempt to seek outside employment. It is especially common that middle-rank "upwardly mobile" caste families will invoke norms of the Brahmin ideal of woman to forbid their women employment, thus defining the family as "Brahminizing."<sup>34</sup> Confucian values, as we saw in chapter 1, are also publicly invoked to return women to the home from the public sector. But the fact is that wage labor outside the home is highly correlated with a woman's ability to command food and other goods within it. Sometimes the connection is direct: In Rajasthan, Metha Bai, a young Hindu widow, was starving because her Brahminizing in-laws refused to let her earn money to feed herself and her children, threatening to beat her if she went out.<sup>35</sup> Sometimes it is more indirect, through a perception of a woman's importance to the future of the family. Because housework is usually not perceived as making a great contribution to

the family's well-being, whereas cash wages are, women who work outside do better at commanding food in times of shortage, and the general perception of a daughter's worth is similarly affected by her future employment opportunities.<sup>36</sup> Religious discourse is thus heavily implicated in many female deaths.

At times, religion directly urges female death. The Indian practice of *sati*, or the immolation of a widow following her husband's death, is certainly religious in origin. The practice has dwindled but has not disappeared completely. On September 4, 1987, in Deorala, Rajasthan, an eighteen-year-old university student named Roop Kanwar was burned alive on her husband's funeral pyre.<sup>37</sup> (Her husband, when he died, was an unemployed university undergraduate.) Some say that she died willingly; others that she was coerced by family pressure.<sup>38</sup> Pilgrims flocked to Deorala, revering Roop as a goddess and believing that offerings at her shrine would cure cancer. A huge public controversy erupted. Three months later the Indian Parliament passed a tough new law extending the domain of criminal culpability with respect to *sati*, even though an old law already made the practice illegal. The new law prohibits the "glorification" of *sati*, defining "glorification" to include the justification or support of the practice of *sati*, the eulogizing of a person who has committed *sati*, holding any ceremony or procession in connection with *sati*, or collecting funds to construct a temple or place of worship in connection with *sati*.<sup>39</sup> Rajiv Gandhi, decisive in this case, pronounced the practice "utterly reprehensible and barbaric." Traditionalist Hindus, however, attacked the government. "A leading Hindi journal pointed an accusing finger at secular, western-educated intellectuals, arguing that only godless people who did not believe in reincarnation would denigrate Roop's brave act."<sup>40</sup>

It is an understatement to say that most Indian widows do not commit *sati*. More common are crimes involving dowry: killings of women to get hold of their dowry or beating and threats to murder to extract further payments from the woman's family. Laws directed specifically against these abuses, in India and Bangladesh, testify to the problem they pose. Indeed, India made the entire practice of dowry illegal, starting in 1961, to cope with the abuses, which, nonetheless, persist.<sup>41</sup> One 1986 Bangladeshi case illustrates the common sordid pattern. Ferdousi Begum brought a modest dowry into her marriage with Jahangir Alam, including a 14" black and white TV set, some personal items of jewelry for the marriage, a wrist watch, a table fan, a sofa set, and "various items of wooden furniture." Her husband's family knew, however, that her father and brothers had a good income and could perhaps pay more. They therefore began a campaign of psychological and physical intimidation, with a view to augment this dowry. As the judge remarks, "Accused Md. Jahangir Alam was found after marriage to be a ruthless, cruel and greedy person. . . . All the accused persons in collusion with each other started torturing complainant Ferdousi Begum both mentally and physically immediately after the marriage with a view to squeeze money (as dowry) from the guardians of complainant Ferdousi Begum. . . ." One morning in 1985, her husband asked his wife Ferdousi Begum to "bring 20" Coloured T.V. set, Radio, Wrist Watch, and cash money amounting to Taka 25,000 from her brothers (as dowry for the marriage)." When she said her broth-

ers could not meet this demand, he became furious and the whole group of relatives began to beat her "with rod, lathi, etc." Her husband then attempted to murder her by throttling her; he kicked her, pressed her down on the floor, and dragged her out of the house by her hair. At this point the accused relatives snatched the gold jewelry off Ferdousi Begum's body and beat her further, until she lost consciousness. After she was taken to her father's house, medical examination revealed that she had received severe injuries to the legs, "traumatic collapse" of the spinal column, and a permanent hearing loss in one ear. The husband and relatives were tried under the 1983 Cruelty to Women Act, which forbids murder, attempted murder, or grave bodily harm in connection with dowry payments. A local ward chairman dismissed the complaint observing arbitrarily that the complainant Ferdousi Begum had "lodged the complaint falsely to suppress the fact of her own guilt; but the Ward Chairman has not stated what was her guilt." Judge F. H. M. Habibur Rahman of the Chittagong Bench reinstated her complaint.<sup>42</sup>

This sad case shows how difficult it is for women to protect themselves from violence, even when a special law targets these offenses. Notice that a woman's life counts less, in the thought of Jahangir Alam and his relatives, than the difference between a 14" black-and-white TV set and a 20" color TV set. Religion is not directly involved in such dowry deaths, but it is an important part of a cultural system that supports these traditions, making women highly vulnerable.

But even these much publicized dowry crimes are few and largely middle class. Dramatic cases involving upper-class or middle-class women tend to attract more press coverage and more public protest than the "endemic but quiet deprivations"<sup>43</sup> that are the lot of a large proportion of widows, especially in rural areas. A large majority have very insecure and limited property rights; because they remain in their husband's place of residence, they can expect little care or support either from their birth family or their in-laws, who frequently mistreat them; they may have no freedom to work, even if this causes malnutrition or starvation.<sup>44</sup> As Metha Bai said to Martha Chen, "I may die, but still I cannot go out. If there is something in the house we eat; otherwise we go to sleep."<sup>45</sup> Many factors are implicated in this situation, including a traditional gendered division of labor and customs of patrilocal residence and patrilineal inheritance. Religious discourse about widowhood (according to which the widow is virtually dead at the husband's death) is, then, not the only cause of these ills; it is, however, among the causes.

## 2. *The Right to Bodily Integrity*

Women suffer many abuses that violate their bodily integrity. These include rape, marital rape, other sexual abuse, domestic violence, and genital mutilation.

Rape is an underreported and underpunished crime the world over; it is more likely to be unreported when religions have constructed norms that make rape a sign of impurity. Stranger rape sometimes has a religious rationale, as in the large number of rapes and abductions that accompanied the Hindu-Muslim Partition Riots in India/Pakistan in 1947. Rape was seen as a type of forced con-

version and was condemned as such in the position statement of the All India Congress Committee that met to consider the problem.<sup>46</sup> The total number of women raped on both sides may have been as high as 100,000.<sup>47</sup> More commonly, religion, although not directly urging stranger rape, promulgates norms of female purity and submissiveness that are used to justify the rape of women who defy such conventions. Religious discourse is heavily implicated in creating the picture of women as either chaste or "fallen" that makes prosecution very difficult. The Iranian Prosecutor-General believes that any woman who violates the dress code deserves death; he is not likely, then, to deter the common practice of police rape of women under detention for such violations. There is widespread evidence of police abuse of women in Pakistan<sup>48</sup>; in India the law of rape has been rewritten for police custody cases, to shift the burden of proof onto the defendant (to deter examinations of women without female witnesses), and special women's courts have been established to hear charges of rape.<sup>49</sup> More generally, the requirements on rape evidence under Islamic laws that prevail in many nations (four male witnesses) make an accusation extremely difficult (as the Safia Bibi case shows) and highly contingent upon the good will of family members.<sup>50</sup> In Pakistan, with its Catch-22 according to which an unsuccessful accusation of rape constitutes a confession to fornication, an offense punishable by whipping, few women will complain of rape, and few men will be deterred from raping.

Domestic violence is one of the gravest problems faced by women the world over. Religions sometimes call directly for corporal punishment of a disobedient spouse: Islamic law explicitly countenances this remedy, allowing the wife to petition for divorce only if the beating is especially prolonged or severe.<sup>51</sup> Even more often, religious discourse promulgates norms of male authority—and also pictures of female wantonness and childishness<sup>52</sup>—that support these practices. (This is as true of Western as of non-Western religions.) Nations that allow the religions to take charge of family law often move very slowly to counter this problem. In India, women have long sought a civil law against domestic violence; a major obstacle is the fact that, in the absence of a uniform civil code, such laws would have to be separately made for Hindus, Muslims, and Parsis.<sup>53</sup> In both Hindu and Islamic communities, unequal access to divorce and the remedy of "restitution of conjugal rights" frequently confines women to a scene of domestic violence and sexual imposition.

The very concept of marital rape is foreign to many religious traditions, which give a husband limitless sexual access to the wife. The concept is a recent one in European and North American culture and religion and still is not recognized in many jurisdictions (see chapter 5). Indeed, the concept of "restitution of conjugal rights" that is frequently invoked in Indian and Bangladeshi family courts is of British origin and was retained in the Hindu Marriage Act and the Special Marriage Act of 1954. Nonetheless, at this point, religious law and discourse, including the Hindu and Islamic, are heavily implicated in maintaining marital rape as an option for men.

There has been opposition. The "Introduction" discussed *T. Sareetha v. T. Venkata Subbaiah* (1983),<sup>54</sup> in which Judge Choudary of the Andhra Pradesh

High Court, in an eloquent opinion, held that the remedy of "restitution of conjugal rights violates the right to privacy and human dignity guaranteed by and contained in Article 21 of our Constitution," depriving a woman of both sexual choice and control over her reproductive functioning.<sup>55</sup> Although religious issues were not directly pertinent to his constitutional argument, which rested on issues of both privacy and equal protection, Judge Choudary did address the religion question, arguing that the "restitution" remedy was not entailed by "our ancient Hindu system of matrimonial law." In that tradition, the wife has a duty to "surrender to her husband," but it is "an imperfect obligation incapable of being enforced against her will."<sup>56</sup> He traces the forcible remedy to medieval English ecclesiastical law, noting that the British abolished it only in 1970.

Thus, if we agree with Judge Choudary, there is no absolutely binding religious claim at issue here, although the law supports religion, enforcing what religion considers to be a duty. But the very fact of separate religious courts, and of their perceived importance in constituting a religious identity, leads to a demand for enforcement, even against the woman's admitted constitutional rights. And there is no doubt that the worth of the constitutional rights in question in Sareetha's case is severely limited by the insistence of religious courts on maintaining their separate domains of authority. Indeed, because of those claims, Sareetha ultimately lost: The Supreme Court reversed, praising the remedy of restitution as one that "serves a social purpose as an aid to the prevention of break-up of marriage."<sup>57</sup> The Court (perhaps influenced by Sareetha's evident autonomy) did not take cognizance of the likely financial position of most women in her position, many of whom would be forced to return to marriages from which they had fled, often for reasons of violence; nor did the Supreme Court effectively respond to the constitutional questions. In other related decisions, the Court has opined that a Hindu woman's duty is to live with her husband in the matrimonial home.

Similar cases can be found on the Islamic side. In Bangladesh, a woman who had suffered from domestic violence left the conjugal home and filed for divorce; her husband brought suit for restitution of conjugal rights.<sup>58</sup> A lower court held that the woman had "no right to divorce at her own sweet will and without any reasonable excuse." In this case, however, the High Court vindicated her rights, commenting on the inconsistency between the restitution remedy and the equality provisions in Bangladesh's constitution:

The very concept of the husband's unilateral plea for forcible restitution of conjugal rights had become outmoded and . . . does not fit with the State and Public Principle and Policy of equality of all men and women being citizens equal before the law and entitled to be treated only in accordance with the law as guaranteed in Articles 27 and 31 of the Constitution. . . . A reference to Article 28(2) of the Constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the State and public life would clearly indicate that any unilateral plea of the husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted State and Public Principle and Policy.

In these two contested cases we see our liberal dilemma. Both India and Bangladesh have sought to combine a secular liberal constitution, including guarantees of sex equality, with religious courts of family law. In both cases it remains ambiguous to what extent the equality provisions of the constitution apply to the protected family sphere. In such a situation, women's constitutional rights are bound to be fragile and contestable; sometimes things work out one way, sometimes the other.

Female genital mutilation is frequently defended with discourse that appeals to its basis in Islam. It would appear that these appeals are at the very least tentative, given that there is no authentic religious argument supporting the compulsory practice (see chapter 4). Nonetheless, religious discourse of a kind has been powerful in defending the practice and branding the attack on it as Westernizing.

The right to bodily integrity is also compromised by degrading punishments. A number of international human rights instruments speak of a right against "cruel, inhuman, or degrading treatment or punishment."<sup>59</sup> A number of punishments mandated in the Koran and Shari'a have been regarded as problematic under this description, including the mandated one hundred lashes for *zina* or fornication. These punishments are in essence religious, justified at their core by their religious textual rationale.<sup>60</sup> Even Muslims who privately view them as cruel and inhuman cannot risk the consequences of openly questioning the will of God; indeed, to dispute the binding authority of the Koran is to be liable for the death penalty for apostasy.<sup>61</sup> On the other hand, liberal Islamic thinkers agree that a great deal can be done, even within religious orthodoxy, to restrict the implementation of these punishments in practice, by stressing elements of the texts that insist they should not be inflicted if there is any doubt; a broad concept of doubt may be developed that blocks implementation in a variety of cases.<sup>62</sup>

There can be no doubt that the control of women's bodies has been a central preoccupation of many, if not most, religions of the world. These controls have usually been asymmetrical and, from the point of view of justice, discriminatory. In a wide range of cases, they violate some of the most basic rights of a human being, without which, as Judge Choudary says, human bodily life becomes degraded to a merely animal level of existence.

### 3. *Employment Rights*

Women should have the right to seek employment outside the home without intimidation or discrimination. CEDAW states that the rights to seek employment, to nondiscrimination in hiring, to free choice of occupation, and to equal pay for work of equal value are all fundamental rights that women enjoy equally with men.<sup>63</sup> Religious discourse, as I have already indicated, is prominently used to oppose women's efforts to seek and retain employment outside the home. In the Rajasthan inhabited by Meetha Bai, in the Bangladeshi village described by Martha Chen, in Islamic Iran, in the contemporary Chinese workplace—in all these places, religious norms about women's proper place are working to deny



women equality and in many cases totally to deny them access to employment. At the time of Iran's Islamic revolution, the regime fired more than 40,000 women working as elementary and high school teachers, as well as many others; women's employment fell in five years by 50% and reached a low point of 6.2%.<sup>64</sup> The 1995 United Nations *Human Development Report* gives 19% as the figure for women's economic activity, but this figure includes unpaid agricultural labor and is therefore difficult to compare with the earlier figures. The Ayatollah Mutahari, one of the architects of Islamist policy, wrote that "the specific task of women in this society is to marry and bear children. They will be discouraged from entering legislative, judicial, or whatever careers may require decision making, as women lack the intellectual ability and discerning judgement required for these careers."<sup>65</sup> More recently, the Taliban in Afghanistan has banned women from working outside their homes, exempting only a small number of female doctors and nurses from the decree.<sup>66</sup>

These views of women are similar to those that were defended by appeal to Christian norms in earlier American cases—for example, the famous *Bradwell* case in 1873 in which a woman was denied the right to practice law, in an opinion that mentioned "the divine ordinance" as a source for the view that women were naturally unsuited for the professions.<sup>67</sup> Employment rights are a central source of genuine equality for women in a modern liberal regime. They are also frequently essential for well-being and often for survival.

#### 4. *Mobility and Assembly Rights*

It is obvious that women who are confined to the home and threatened with harm or opprobrium by religious leaders should they walk outside are being deprived of an essential right. It is difficult to conceive of the meaning and extent of this deprivation. Cornelia Sorabji, the first woman to take a degree in law at Oxford and the first woman admitted to the bar in India, dedicated her career to representing women who were not permitted to see a man other than their husband. (As a Parsi, Sorabji was in an unusually advantaged position, because Parsis of that era held more liberal views about women's mobility.) She reports that when she brought a rose to one young wife and mentioned having plucked it from a bush outside, the wife reacted with puzzlement. Having been married as a small child, she had never been in contact with growing things of any kind; she believed that roses lie on the ground and are picked up like stones.<sup>68</sup> The Bangladeshi women described by Martha Chen are not exactly in that position—one reason for this being that they are too poor not to have to go outside for some purposes. But their lives were utterly circumscribed by religious threats of ostracism and physical violence if they walked around in the streets and talked to males. The dress codes that obtain in Iran and, in an even more extreme form, in Taliban-ruled Afghanistan impose great restrictions on women's mobility, as do other related provisions of these regimes, such as the requirement that Iranian women sit in the back of the bus and the recent restriction on female bicycling in Teheran, now confined to a fence-enclosed trail.<sup>69</sup> In 1990, the Saudi

government justified a ban against women driving as flowing from Islamic morality and principles.<sup>70</sup>

In all countries governed in whole or part by Islamic law, women are under some form of male guardianship, and this, again, imposes various limits on mobility. To take many trips, especially trips abroad, women must secure written permission from a male. In Saudi Arabia, for example, women may not leave the country without permission of a father or husband—and female visitors are not allowed in unless accompanied by a male family member.<sup>71</sup> In the Sudan, the Personal Law for Muslims Act directs the husband to grant permission "within reason" for a woman to visit parents and relatives for short periods, but she may never travel on her own. If she is under fifty, she must be accompanied by a male relative to whom she could not legally be married; if she is over fifty, another sort of "trustworthy companion" may, with the guardian's permission, be selected. Exit visas require written permission of the guardian.<sup>72</sup>

As to assembly rights, it is of course true that in regimes that are not liberal and democratic nobody has very secure freedom of assembly, especially when political protest is involved, but assembly rights are also denied to women, further, on a discriminatory basis. When Saudi women demonstrated against the ban on driving, the government responded by prohibiting all future demonstrations by women.<sup>73</sup> In Egypt, the prominent Arab Women's Solidarity Association was suppressed in 1992, with reference to religious norms: The organization had "threatened the peace and political and social order of the state by spreading ideas and beliefs offensive to the rule of Islamic *shari'a* and the religion of Islam."<sup>74</sup> Particular reference was made to the group's criticisms of established laws regulating marriage and divorce. In China, it is similarly impossible for any independent women's organization to exist, but it is unclear to me whether religious discourse has been used to justify the repression.

Even in the constitutional democratic regimes, such discrimination in assembly rights is well-known. The women described by Chen drew the opposition of the *mullahs* primarily on the ground that they were going to meet in an organized group to mobilize for common action. Even had the women complained of a constitutional violation, it is unlikely that this complaint would have been effectual given the way religious power dominates the local scene.

#### 5. *Rights of Political Participation and Speech*

Again, these rights are severely curtailed for all citizens in many of the nations under discussion. Are they unusually curtailed for women in ways that show the influence of religious norms? The Egyptian case involves suppression of speech as well as assembly. All countries that impede women from going outside the home create barriers to political speech and participation, as do those that create barriers to women's literacy. Nations that effectively enforce constitutional guarantees of free press and free political speech, for example, India, do not often suppress women's speech or speech about women's issues in a discriminatory way. On the other hand, the fear of offending religious authorities does

at times pose acute threats to speech—consider various democratic governments' willingness to ban *The Satanic Verses*, and the relative absence of official protest against the *fatwahs* directed against authors Salman Rushdie and Taslima Nasrin, both critics of Islamic traditions regarding women. The most pervasive impediments to women's speech in the democratic nations are, however, the indirect and unseen obstacles imposed by poverty, malnutrition, impediments to mobility outside the home, illiteracy, and an exhausting round of duties. In the nondemocratic nations, speech is not free for anyone, but it is especially unfree for women who might be inclined to criticize the prevailing view of women's role—recall the Saudi ban on demonstrations by women.

As to political participation: In Iran, women were for a time banned totally from employment in government and are heavily discouraged from entering politics. Only 3% of parliamentary seats are held by women (as contrasted with 12% in Jamaica, 16% in Nicaragua, 18% in Trinidad and Tobago, 24% in South Africa, 20% in Guyana, 33% in Denmark, 39% in Finland and Norway, 34% in Sweden, 29% in the Netherlands, and 20% in Germany<sup>75</sup>), and there are no female ministers. Although women notoriously play leading roles in government in India, Pakistan, and Bangladesh, their situation is far from representative of the average women in their nations: In Pakistan 2% of parliamentary seats are held by women, in India 7%, in Bangladesh 10%. It is very difficult to gauge actual participation in elections, but we can infer that poverty, illiteracy, and lack of mobility are grave impediments to women's equal participation. Religious doctrines to the effect that women are unsuited for political functions are invoked in many nations and play at least some part in bringing about this situation.

#### 6. *The Right of Free Religious Exercise*

Once again, there is no recognition of such a right in many of the nations under discussion, a fortiori none for women. In India, however, such a right is given prominent constitutional recognition,<sup>76</sup> giving rise to many dilemmas, as we have said. The entire Indian system of civil law may be held to violate the free exercise of religion.<sup>77</sup> Individuals must be classified at birth into one of the religious systems, and it is very difficult to extricate oneself from the system to which one is assigned, particularly because ancestral property can never be extricated. Conversion to a religion of one's choice is therefore greatly impeded by the legal structure. Religions that are not among the traditional religions of India, and therefore lack a legal system, are under strong disabilities. The choice to be non-religious is even more impeded, because, although secular marriage and divorce exist, there is no secular law that can govern hereditary property; thus, individuals are forced to deal with religion, whether they wish to or not. All these provisions would be unconstitutional under our own free exercise and non-establishment jurisprudence.

Israel faces similar problems. As is well-known, the rights of conservative and reform Jews are severely curtailed under law and may become even more so. Moreover, there are no secular marriage and divorce at all, a more serious

assault on free exercise for secular people than we encounter in India. The very idea of a Jewish state violates nonestablishment, and infringements of free exercise are not far away. In my opening example, the women's free exercise of a right to worship was indeed infringed, with appeal to majority religious norms; it seems very likely that the behavior of the guard would have been declared unconstitutional under U.S. law. The fact that Israel at that time had no written constitution made the situation of basic rights, including religious rights, unclear. This indicates that whatever the tensions and confusions between the claims of free exercise and the claims of nonestablishment in our own jurisprudence, we have chosen a wise course in giving both of these values strong protection, because they support one another. It is very difficult to maintain free exercise for minorities when one has established a single religion and given it considerable political and legal power.

#### 7. *Rights of Property and Civil Capacity*

Article 15 of the Women's Convention insists on women's equality with men before the law, on their full legal capacity, and on their equal opportunities to exercise that capacity. Women are to have equal rights to make contracts, equal treatment before courts and tribunals, equal property rights, and rights to administer property. This is simply not the case for very many of the world's women, frequently on account of religious discourse and religious law. Under traditional Islamic law, women are explicitly unequal. A woman must have a male guardian to perform many contracts, including a marriage contract for herself. A woman's testimony in court is regarded as half as weighty as the testimony of a man; in the case of rape and adultery, women are forbidden to give evidence. Witnesses to contracts and other documents may be either two men or one man and two women. States vary in the degree to which this religious discourse and the laws based on it have full effect. Some, like Iran, Pakistan, and the Sudan, are quite thoroughly Islamized—though even among these there are differences of degree; in others, such as Egypt, there is an unpredictable mixture of elements; in India and Bangladesh, there is a putative distinction between private law, which is governed by religious norms, and other affairs, which are in the charge of the secular state. In none are women's human rights to legal equality fully respected.

Once again, the Indian situation provides instructive examples of the conflict between constitutional guarantees of sex equality and religious legal systems.<sup>78</sup> Because we have focused until now on Hindu and Muslim law, let us turn, for a change, to the situation of India's Christian women. Christians in India (2.4% of the population in 1981) are governed by a bewildering variety of distinct regional codes. Catholic Christians in Goa, for example, are still governed by the Portuguese Civil Code. Until recently, Christians from Kerala were governed by the Cochin Christian Succession Act of 1921 and the Travancore Christian Act of 1916. In 1983, a Syrian Christian woman named Mary Roy challenged the Travancore Act in the Supreme Court on the grounds that it violated the sex equality guarantee by denying equal inheritance rights to daugh-

ters and sons. The Supreme Court did not declare the Act unconstitutional, but overturned it on a technicality, ruling that Christians in Kerala should henceforth be governed by the Indian Succession Act of 1925, which grants daughters and sons equal rights.<sup>79</sup> The Christian community in Kerala has continued to protest this judgment as an inappropriate interference with their religious prerogatives, adding that it would "open up a floodgate of litigation and destroy the traditional harmony and goodwill that exists in Christian families."<sup>80</sup> The Synod of Christian Churches has supported these protests, arranging for legal counsel to help draft wills to disinherit female heirs.<sup>81</sup> Such clashes between constitutional rights and religious law are common throughout the Indian legal system.

#### 8. Nationality

The Women's Convention insists (in Article 9) that women and men be fully equal in matters of their own and their children's nationality. All nations that, relying on Islamic law, require a woman to obtain a guardian's permission before moving abroad are in violation of this fundamental right. In addition, quite a few nations have laws forbidding women from passing their own nationality on to their children. Although a landmark case testing such a law derives from Botswana and involves no religious element,<sup>82</sup> religious discourse is heavily implicated, elsewhere, in the maintenance of this form of discrimination against women.

#### 9. Family Law

This is an especially large and complex area of women's inequality; religious norms and laws play a direct role in it. Religious systems of family law, Islamic, Hindu, Jewish, and other, may severely limit women's degree of choice in and consent to marriage, their rights to control the lives of their children during a marriage and of child custody if the marriage ends, their access to divorce and the type of evidence required to get a divorce, and their right of maintenance after a divorce. Polygamy, insofar as it continues to exist, is a structurally unequal practice: Plural marriages are unavailable to women.<sup>83</sup>

A few examples of these practices must suffice to indicate the whole. In the Sudan (whose Personal Law for Muslims Act is closely based on the *shari'a*) a woman's guardian had absolute authority to decide on a marital partner—until a rash of suicides by young girls forced a change. Now the woman's consent is required. In the Sudan, again, a man may divorce a wife simply by saying, "You are divorced." A woman must go to court and establish a basis, such as impotence, cruelty, or inability to provide. Most religiously grounded systems of personal law are asymmetric in a similar way. In India, secular marriage is available as an option, but secular divorce is not: A couple must appeal for divorce to the religion of their birth. As to the important issue of maintenance, so dramatically exposed in the *Shah Bano* case, the uniform civil code in India that might

adjust the plight of such women is very far in the distance, even as the year 2000 rapidly approaches.

In nations governed by Islamic law, deviation from religious orthodoxy may force a divorce. In Cairo in August 1996, the Court of Cassation, Egypt's top appeals court, rejected the appeal of Nasr Abu Zeid, a professor of Arabic, against a ruling ordering his separation from his wife, Ibrithal Younis, also a professor. Islamic fundamentalists claimed that Mr. Zeid's writings make him an unbeliever; Zeid denies this, claiming that fundamentalist clerics have quoted texts out of context and made factual errors. (The couple has now moved to the Netherlands, where they have accepted teaching jobs.) The Secretary General of the Egyptian Organization for Human Rights calls the ruling "a slap in the face of civil society in Egypt."<sup>84</sup>

In most systems of Islamic law, a woman is guardian of a male child only until he is seven years old. In a recent Bangladeshi case, however, the high court ruled that a mother might retain custody of her eight-year-old son, who was afflicted with a rare disease. (The mother, a doctor, was able to give him expert care and she had also financed his medical treatment.) The judge remarked, "The principle of Islamic law has to be regarded, but deviation therefrom would seem permissible as the paramount consideration should be the child's welfare."<sup>85</sup> But the judge was also in a relatively easy position: He pointed out that this was an issue on which there was no rule in either the Koran or the Sunnah; the rule resulted from a Hanafi interpretation, not agreed to by other traditions of Islamic legal interpretation. Thus he was able to say that the rule "would not seem to have any claim to immutability." Nor did he make any general conclusion about mothers' rights: He rested his analysis on the unusual facts of the case. As for India's Hindu law, the father is regarded as natural guardian of the child, except for children under the age of five, or when the father is away. Only an illegitimate child can remain in its mother's custody.<sup>86</sup>

The right to adopt a child, a right important to many women, is another matter that is decisively affected by the domination of religion in codes of personal law. The Hindu Adoptions and Maintenance Act, passed in 1956, was for many years the only statutory law of adoptions in India. This law applies only to Hindus. Thus for many years only Hindus could adopt a child, and only a Hindu child could be adopted. Attempts in both 1972 and 1980 to enact a uniform adoption act met with determined resistance from Muslim leaders, who hold adoption to be forbidden by the Koran. (This is not a universal opinion: Tunisia in 1958 enacted a law of adoption whose provisions were very similar to the 1972 Indian Adoption Bill.) The 1980 bill was passed—thus granting Jews, Christians, Parsis, and others adoption rights—but only after Muslims were explicitly exempted.<sup>87</sup> Tariq Mahmood, of the Faculty of Law at the University of Delhi, summarized the matter well in a public letter to the Indian Council for Child Welfare:

Even if it is accepted that Islamic law prohibits adoption, how can the Muslims prevent enactment of a secular law of adoption which will be applicable only to those who wish to adopt a child? If Islamic law does not permit adop-

tion, the Muslims need not make use of the Indian adoption law. That law will certainly not impose on any person a duty to adopt. . . . If Islam does not recognize a social or economic concept, the state cannot compel every Muslim to keep away from it. If that were possible, our banking laws should not be available to any Muslim, since Islam does prohibit interest on money. . . . The demand that a special saving clause exempting the entire Muslim community from its application be inserted in the Bill cannot be accepted. There are some Muslims who do not share the belief that their personal law prohibits adoption; and there are many who do not consider personal law as a part of their religion at all. To them the benefit of the adoption law cannot be denied.<sup>88</sup>

This sensible conclusion seems right for the whole area of family law: Loyal members of a religious group should remain at liberty to follow its teachings in such matters, but this does not justify imposing such teachings on people who do not so choose, especially when imposition is unequal and when it violates a fundamental right of choice.

#### 10. Education Rights

Nothing is more important to women's life chances than education. With literacy, a woman may consider her options and to some extent shape her future. She may question tradition and discover how women in other parts of the world are managing to live. She may discover that women are actually able to achieve well in many of life's functions; that the female body is not as weak as has sometimes been said. With literacy, she may do her own accounts, read a bill, read an important notice that comes to her in the mail,<sup>89</sup> and enter trades that require literacy.

Women's educational opportunities and achievements are dramatically limited in many nations in the world. Adult female literacy rates, in the developing countries, range from 96.7% (Guyana) and 94.2% (Cuba) all the way down to 5.8% (Niger) and 8.0% (Burkina Faso). Among the nations under discussion here, we find Pakistan at 22.3%, India at 35.2%, Bangladesh at 24.4%, Afghanistan at 12%, and the Sudan at 30%; China does considerably better at 69%<sup>90</sup>; Saudi Arabia, at 40%, is extremely low among the countries sharing its general level of economic development, as is Iran at 55%. In all these cases, women are doing considerably worse than men. In Pakistan, the female literacy rate is 56% that of males; in India, 55%; in Bangladesh, 51%; Afghanistan, 29%; the Sudan, 56%; China, 79%; Saudi Arabia, 66%; and Iran, 74%.<sup>91</sup>

The reason for disproportionately low female attainments are not always religious, but in many cases one can see clearly that religious discourse has played a major part. The *mullahs* in the village described by Chen set out to oppose women's literacy—by insults to the women's moral character and, if necessary, by threats to their physical safety. As Cornelia Sorabji's memoir attests, denial of literacy has strong conventional links to *purdah* and to general notions of women's purity that are at least in part religious. In Afghanistan, the Islamic fundamentalism of the Taliban has led to a ban on women going to school. In

India, women's education is opposed or neglected for all sorts of reasons, some economic, some customary, but the major religions certainly play their role in creating an image of a woman's role. Although regional differences in policy and culture are important in explaining these differences, religion also seems to play at least some independent causal role.<sup>92</sup> In Iran, related ideas of women's proper role have led to severely curtailed educational opportunities at the level of higher education. Women are excluded from 79 of 157 courses of study in the university, including 55 of 84 courses in math and technology; they are forbidden to study, among other things, archaeology, cinematography, and graphic design.<sup>93</sup> In the United States, the successful attempt of the Wisconsin Amish community to keep their teenage children out of the last years of required schooling has a differential impact on boys and girls: Boys learn skills (such as carpentry) that are marketable outside the community; girls, confined to the home, will have a harder time leaving should they want to leave.<sup>94</sup>

And one must ask, as well, what is being taught when girls are taught. In the ultraorthodox communities of Jerusalem, all children attending state-supported schools are permitted to follow a curriculum that contains absolutely no information about world history or about the life of the world outside (just as at home television and radio are entirely forbidden). They do learn modern math and science, but women are carefully shielded from any image of a woman's proper role that is not that of the ultraorthodox community. They will not be in a position to choose their own way of life as the result of their very own reflection.

#### 11. Reproductive Rights

This is such a familiar contested area that it seems unnecessary to discuss it at length. International human rights activists agree, with few exceptions, that women's access to contraception is an extremely important ingredient of their own well-being, both because of reproductive control and because of AIDS. They agree, further, that promoting women's control of their own reproduction (along with women's education more generally) is the most effective way to control world population without unacceptable infringements of liberty.<sup>95</sup>

Both Islamic and Roman Catholic discourse have been involved in opposition to such policies, as the Cairo conference made clear, although the primary emphasis of the Catholic position was access to abortion. I know of no corresponding discourse from the Jewish or Hindu traditions, though clearly the ultraorthodox Jewish community, in Israel and to some extent elsewhere, does have a strong pronatalist bias and for its own members opposes contraception. It seems plausible that unimpeded access to contraception is a basic human right of women.<sup>96</sup> It is especially urgent to protect this right for women who have no economic or social alternative to marriage and no recourse against enforced intercourse within it.

As for abortion, the issue cuts both ways where women's human rights are concerned. On the one hand, many defenders of such rights do hold that abortion rights, at least in the first trimester, are basic to women's equality; I myself

would defend such a right for the United States on such grounds.<sup>97</sup> On the other hand, abortion has very often been used sex-selectively, to destroy female fetuses; in that sense it can also be a dangerous instrument of women's inequality. Right now it is possible to prevent the abuse without restricting abortion rights, by forbidding access to amniocentesis and by forbidding late abortions, as some governments have done, but this balancing act will not endure long into the future, as information becomes more readily available and at an earlier date. Some Indian feminists therefore favor removing the abortion right—indeed, some would like to jail women who seek abortions.<sup>98</sup> The issues are so difficult and have generated such intense, subtle, and lengthy debate that it would be foolish of me to attempt, here, to determine what an advocate of women's human rights should say.

#### Addressing the Dilemma

My starting point is a simple one: It is that human beings should not be violated, and that the protection of the basic human rights should have a very strong degree of priority, even when this interferes with some elements of traditional religious discourse and practice. To those who object that violating others is part of the free exercise of their religion, we should reply as we do when a murderer claims that God told him to do it (and he may sincerely believe this to be true): Never mind, we say, there are some things we do not allow people to do to other people. Or, as the Bangladeshi wife said in my epigraph, if Allah really said that, then he is dead wrong. (What we really mean by saying such things is that a just God cannot possibly have said such things.<sup>99</sup>)

Beyond this, we can say more about the list of basic rights that has just been enumerated. These rights, like (and closely related to) John Rawls's list of primary goods, would appear to be necessary for all people if they are to carry out their plans of life, whatever they are. They therefore have a strong claim to be recognized politically as basic in a pluralistic society, whatever the commitments of its constitutive religious groups. Because of their fundamental role, a liberal society should commit itself to protecting these rights for all individuals, regardless of whether it contains groups that do not like individuals (their own members or members of other groups) to have these rights. The list is somewhat more extensive than Rawls's list and closely related to the list of basic human capabilities defended in chapter 1.

In the view I have defended in chapters 1 and 2, the fundamental bearer of rights is the individual human being. This seems right: A violation of a person is no better when it comes from some group to which the person belongs than when it comes from the state. The hunger of A is made not less but more morally offensive when we learn that A is a loving girl child in a family in which there is, overall, enough food to go round. The rape of B is made not less and quite likely more offensive when we discover that the rapist is B's husband and therefore a member of an allegedly altruistic organic unit together with B. Nor is the bodily integrity of B a merged part of a larger whole; B's body is B's body, the only one she will ever have.

The rights, furthermore, should not be regarded as isolated atoms, which can be given or withheld independently of one another. Because they interact and support one another in so many ways, we should think in terms of a total system of liberties and opportunities and refuse to compromise on any one item not only because of its intrinsic worth but also because of the way it affects the other items on the list. Education is closely correlated with meaningful opportunities for employment, and both of these with nutrition and health. The right to protect one's bodily integrity is closely connected to, and derives support from, equality in family law and rights to mobility and assembly. The right to contraception is closely associated with increased abilities to pursue education and employment, with political participation and with health, and so forth. We want, then, to secure to individuals not only one or two liberties but a total system of liberties, and not merely the liberties in name only (as some words in a constitution) but their fully equal worth, meaning the capability to avail oneself of them.

I shall now make some normative suggestions; in a concluding section I shall ask what practical action is available.

#### *Religion and the Structure of the Legal System*

Basically, no systems of religious law should be permitted to interfere with the basic human rights of citizens. It is especially obvious that intolerant sectarian regimes, such as those of Iran, the Sudan, and Pakistan, and in some respects Israel, are unacceptable. Such systems do not raise our liberal dilemma because their violations of other human rights are accompanied by equally serious violations of the liberty of conscience—either for members of minority religions (witness, as one egregious example, the Iranian persecution of the Baha'i) or for nonorthodox members of the dominant religion.

At times, a tolerant liberal regime has an established state religion but protects the rights and liberties of all citizens—as is the case, in general, in today's Britain and Scandinavia. Such arrangements, I would argue, are not necessarily unacceptable, but always raise serious moral questions. In the British case, the unsavory history of discrimination against dissenters, Jews, and Roman Catholics colors the social meaning of the innocuous and bland pronouncements of the Anglican Church; its established status, even if it does nothing wrong, may still be expected to affect the self-respect of members of these minorities, and nonreligious people as well, despite liberal policies. This suggests that establishment by itself raises problems for a liberal political understanding,<sup>100</sup> although the Scandinavian cases perhaps show an acceptable form of establishment, dedicated to the protection of minority religions. (Norway's current opposition to Islamic schools suggests, however, that even benign establishment is a dangerous policy.) On the other hand, the problems are certainly different in kind from those that obtain where recognition of equal protection of the law for all citizens is not a fundamental political commitment. In Israel, there is, of course, an intense struggle over just this issue of equal citizenship, and the religious nature of the state makes its resolution extremely difficult.

For our questions about women's rights, however, the most complex and interesting situations are those in countries such as Bangladesh and India, where a basically liberal constitutional order (nominally secular, in the Indian case) has allowed the religions to take charge of part of the legal system, creating systems of religious law. Here we see the liberal dilemma in its sharpest form. Such regimes are problematic in a number of ways. First, they are simply unwieldy, creating tremendous administrative costs and inconsistencies. Second, they treat nonreligious citizens very unfairly, forcing them to deal with religion in important areas of their lives whether or not they want to. Third, they treat citizens unequally on the basis of the chance of their birth into a given religious community. Shah Bano did worse because she was a Muslim than had she been a Hindu, and she had no option of going to a different court if she did not like the way Islamic law handled things. Fourth, they encourage the maintenance of practices that are in direct violation of equality provisions recognized in many constitutions and implicit in the legal system of some nations that lack a written constitution. It is less than ideal for India to guarantee women all sorts of rights in the Constitution and then turn the all-important sphere of family law over to codes that explicitly deny women the equal protection of the laws. All such elements in religious law codes should be reformed to bring them into accord with the Constitution's list of Fundamental Rights of citizens. Finally, such systems are highly divisive politically, as we see from the endless negotiations in which the Indian government has had to engage.

The example of India<sup>101</sup> illustrates the way in which a keen sensitivity to our liberal dilemma has led, years later, to an unfortunate situation. The Indian Constitution abolishes "untouchability," arguably a core feature of Hinduism, boldly and decisively, in Article 17 of the Constitution itself, at the same time creating constitutional protections for affirmative action toward previously oppressed caste groups.<sup>102</sup> These decisive steps have led, forty years later, to a situation in which no religious leader urges the restoration of caste hierarchy; it is simply off limits as an area of legitimate free religious exercise.

Where sex equality and the separate courts of religious law were concerned, however, the framers decided to leave crucial issues for later resolution. In the original constitutional debates, Muslim leaders repeatedly held that retention of the personal laws is "a part of the fundamental right to religious freedom."<sup>103</sup> Therefore, the directive that the state shall "endeavour to secure" a uniform civil code was placed in Article 44 of the Constitution, among the unenforceable Directives of State Policy. The words "endeavour to secure" were chosen deliberately to contrast with the words "shall enact," and essentially the idea of Article 44 was that the state should gradually prepare the population to accept a uniform code at some future date. On the other hand, it is perfectly plain that the enumerated Fundamental Rights include a right for all persons to the equal protection of the laws and also a right to nondiscrimination on the grounds of religion, caste, sex, or place of birth, and Article 13(1) rendered void all "laws in force" that were inconsistent with the enumerated Fundamental Rights; at the same time, Article 13(2) forbade the state to introduce any new law abridging a Fundamental Right.

Thus a contradiction was created because the existing (and also the subsequently introduced, i.e., reformed) personal laws of both Hindus and Muslims do violate the constitutional guarantee of sex equality, and in some respects the guarantee of religious equality as well. It would thus appear that the framers deliberately left in place a route whereby such personal laws could be deemed unconstitutional—although in a 1952 decision in *State of Bombay v. Narasu Appa Mali*, two especially eminent judges held that the term "laws in force" did not include the personal laws, which he held to be distinct from other "laws in force" in that they are not just the result of legislative enactments but are grounded in religious texts. This seems perfectly beside the point, in a liberal constitutional regime with no established state religion. Clearly the state should strongly urge the internal reform of personal laws until they are in conformity with the list of Fundamental Rights.

Does this nullify the whole project of having distinct systems of personal law? Modern defenders of secularism insist that the ideal of secularism requires only symmetrical treatment of the religions, and that this can in principle be fulfilled in quite a few different ways.<sup>104</sup> We must remember, however, that the fundamental bearer of rights is the individual citizen, and that any system of personal law that groups individuals in accordance with their religious origins runs a great risk of disadvantaging those individuals who do not particularly rejoice in that classification, whether because they are nonreligious or because they do not agree with the dominant group in their own religion, or because they would prefer to make their fundamental affiliation one with a professional or gender-based group. In India, religious classifications do not require any statement of membership, belief, or enthusiasm: One is classified by origin, and everyone is put into one box or another. One does not, similarly, have the option to participate in feminist law courts, even though that affiliation might in fact be the most fundamental in one's life. Secular marriage, divorce, and property laws exist, but people whose property is tied up in one of the religious systems can rarely avail themselves of these alternatives. To reform those portions of the separate religious codes that treat citizens unequally on grounds of their religious background and membership would seem to be the bare minimum that would be compatible with justice.

More important for our purposes, a guarantee of nondiscrimination on the basis of sex, such as the one enacted in the list of Fundamental Rights in India's constitution, requires the reform of many of the provisions of most of the separate codes, in regard to marriage, divorce, and maintenance. In all the heated debate about Indian laws of marriage and divorce, the fundamental interest of women in equality before the law was rather neglected—Muslims claiming violation of religious freedom if they were held to the uniform provisions of maintenance under the criminal code; Hindus claiming that the exemption of Muslims from these provisions violated their equality rights as Hindus. In effect, they were haggling over how not to be required to pay a destitute woman \$18 per month. The woman's fundamental rights under the constitution were not taken to represent fundamental interests of either religious group. But such debates can and should be cut short by pointing to the fundamental role of the



constitutional guarantee of sex equality. If codes agree in doing away with hierarchies of gender, caste, race, and so on, then the case for allowing differences that reflect different traditions will be far stronger.

The founders clearly believed that such uniformity could not be implemented overnight in nations that contain groups with traditional hostilities. At every step in the unfolding debate about personal law, opposition to a uniform civil code was vigorous from some quarters of both Muslim and Hindu communities. On the other hand, at every stage, defenders of constitutional uniformity also included prominent members of these religious traditions. Muslim lawyer Chowdhry Hyder Hussain strongly defended a uniform civil code already in 1949, arguing that separate codes were a vestige of British rule and "wholly a medieval idea [that] has no place in the modern world."<sup>105</sup> Twenty years later another distinguished Muslim jurist, M. C. Chagla, held that an acceptable legal system was one that "applies to every individual whatever his religion or his community. . . . The Constitution was enacted for the whole country, it is binding on the whole country, and every section and community must accept its provisions and its directives."<sup>106</sup> Such influential voices, which have been heard continuously throughout the post-Independence period, show that strong rights-oriented constitutionalism is not generally opposed by Muslims any more than it is by Hindus. It is not clear, even in strategic terms, that the right choice was made. Decisive action on untouchability has created a solid social consensus in the next generation; indecisiveness on civil law has made the question of the uniform code a political football for fractious and self-interested actors. At this point, it is virtually impossible for liberals and feminists to support a uniform civil code, given that the cause of the uniform code is now championed by the BJP as part of their projected assault on the equality of Muslim citizens.

The claim that the uniform protection of the rights of individuals infringes legitimate prerogatives of free religious exercise is itself a contentious and highly political claim. Religious liberty is a right of persons, like other rights. How, then, can the religious liberty of a person possibly be infringed by the determination to protect all individual rights of the religion's members on an equal basis? The liberty to treat your co-religionists unequally is simply not a legitimate prerogative of religious freedom. The order to pay alimony to Shah Bano did not restrict her husband's freedom of worship; indeed, one may more easily argue that her freedom of worship was compromised by not getting alimony and thus being in a state of "destitution and vagrancy." The fact that Mary Roy's female descendants will now inherit equally with males does not compromise Christian worship; actions of the Christian church protesting this constitutional judgment seem related more to power than to freedom of conscience. Similarly, denial of the right to force Sareetha to return to his home does not seem to have impeded the ability of Venkata Subbaiah to worship in accordance with his conscience. It simply diminishes the power of the Hindu courts, which is a very different matter. The right to divorce does not force anyone to get divorced; the right to contraception does not force contraceptive use; the right to adopt, as Muslim jurist Mahmood eloquently insists, does not force anyone to adopt a child against his or her religious principles. The fact that prominent spokesmen

for the major religions agree with this liberal principle should be insisted on, as one makes this argument. The liberal should emphasize this individualistic concept of basic rights and religious liberty, insisting on uniform codes of law that give individuals broad latitude to choose forms of life in accordance with the dictates of their religion. We should not accept the idea that denying any fundamental right of any individual is a legitimate prerogative of a religious group. As Zoya Hasan, convener of the Committee for Protection of Rights of Muslim Women, commented on the Shah Bano case, "In the guise of freedom of religion, Muslim women are being denied constitutional and human rights. . . . It is not [a] question of the personal law of the community, but that of the abandoned getting social justice."<sup>107</sup> Danial Latifi went even further, calling the 1986 law "obnoxious to Islamic principles" and "an insult to the traditions of Islamic civilization."<sup>108</sup> In a recent statement shortly after the death of the aged Shah Bano, he writes that Muslim legal scholars who support it "have forgotten the dictum of the Prophet Mohammed who spoke as follows: 'heed the cry of the oppressed; for these shake the very Throne of God.'"<sup>109</sup>

Indeed, we should not even grant that such cases raise our liberal dilemma: The legal claims of the religious courts conflict with individual liberty of conscience as much as they do with other basic rights. The very same system that denies Shah Bano equal rights as a citizen also denies her, effectively, the option to define herself as a Christian, or an atheist, should she so choose; furthermore, it discriminates against her on the basis of her religious membership. If the system of personal laws were modified to allow the latitude for mobility in accordance with conscience that religious liberty itself would seem to require, we might well get the desirable result that the religions would seem to require, another to attract female members by instituting sex equality, a situation now heavily promoted by feminist legal scholars.<sup>110</sup>

In general, then, when any democratic government or government actor takes an action or makes a law that violates the equal rights of its citizens in response to pressure from a religious party or group, this action should be regarded as incompatible with the basic rights of citizens in a liberal democratic regime, and steps should be taken to change this practice. This is what happened in the case of Shah Bano—before Rajiv Gandhi's intervention. It is the way Judge Choudhary argued in Andhra Pradesh, defending Sareetha's privacy and equality rights—until the Supreme Court intervened, defending the Hindu Marriage Act. It is what happened in the High Court in Bangladesh, in a similar case. It is what happened in Bangladesh, again, in the child custody case, in which the judged dared to opine that deviation from Islamic legal tradition "would seem permissible" for the sake of a child's well-being. It is what happened in India's Supreme Court in the case of Mary Roy, when the unequal inheritance rights mandated by the Travancore Christian Act were declared henceforth inapplicable. It is what happened in the Unity Dow case in Botswana, not religious but a precedent for many cases involving religion because the Women's Convention was interpreted as binding on state actors.

In a related way, the Israeli public school setup should be held unlawful and presumably would be unconstitutional if Israel had a constitution enumerating

basic rights in keeping with the Women's Convention. There are many issues here, including the egregious separate and unequal treatment of Arab children. But let me focus for now on the case of Jerusalem's ultraorthodox community, permitted to receive state funding for schools that produce gross ignorance of the modern world. This is inappropriate for all sorts of reasons, but in keeping with my theme let me simply focus on the fact that such systems prevent women from having access to information about their role in the world and norms of sex equality in modern democratic constitutions. They are thus a kind of *pardah*, and this ought to be deemed a violation of education rights. Were a religious school to operate in this manner in the United States, it probably would not win accreditation by any regional or local agency, much less receive public funding.

Special issues arise when a nation-state contains within its borders a distinct national minority that has in effect been conquered and subdued and now claims the right to a separate legal system. Will Kymlicka has given an extensive analysis of the situation of tribal populations in Canada, urging that in such cases broader latitude be granted to such groups to form distinct political communities. If such groups rule illiberally, violating individual rights, he holds that it is legitimate for constitutional arrangements to immunize them from judicial review at the federal level. Liberals should hold that such a minority acts unjustly, should speak out against such injustices, and should promote the development of international human rights policies that would ultimately give international courts the power to handle complaints of rights violations from such communities. But intervention from the federal level in the internal affairs of a minority would be justified, he argues, only in cases of "gross and systematic violation of human rights, such as slavery or genocide or mass torture and expulsions, just as these are grounds for intervening in foreign countries."<sup>111</sup> Remarks elsewhere in the chapter indicate that Kymlicka does not regard the denial of legal and political rights to women as the type of "gross and systematic" violation that would justify intervention.<sup>112</sup>

This position seems to me totally inadequate. It is of course desirable that ultimately international courts should become strong defenders of individual rights. But what is to happen in the meantime with women who are not only suffering what ought to be called gross and systematic rights violations but, precisely on account of those deprivations (of political voice, mobility, assembly, education, often equal nutrition, and health care), also are unable to move their own community in the direction of change? Should this subgroup within the nation even be thought of as "their" community, just because they are in it and unable to leave? We think that the family is a type of community. Nonetheless, if a husband beats a wife or tries to prevent her from voting or going out of the house, we do not hesitate to intervene—or if we do hesitate, we should not. I see no reason why a tribal or religious group should have any more latitude than a family in abridging the fundamental rights of adult citizens.

It is of course another matter to decide how to implement that judgment politically. Kymlicka seems right that such cases are less tractable than the Indian case, in which the two largest religious groups have been intertwined for

years and each has considerable political power at the federal level. In India, it seems plausible for defenders of a unified civil code to say, with Muslim jurist M. C. Chagla, that Muslims who wish to influence the law are already empowered to do so: "After all fifty million Muslims<sup>113</sup> have a voice in the election of that Parliament through adult suffrage."<sup>114</sup> The election of 1996 showed the world exactly how decisive that power can be: Muslim parties form a major part of the coalition that eventually managed to form a government, after the BJP was unable to do so.<sup>115</sup> (Today, that political power is in jeopardy; Islamic courts should therefore probably be protected, though also urged to reform.) In Kymlicka's case, by contrast, the tribal peoples are few, uninfluential, and bitterly opposed to cooperation with the former oppressor. But it is hard to understand how the sad history of a group can provide a philosophical justification for the gross denial of individual rights and liberties to members of the group. What is a "group" anyway? As Joyce's Leopold Bloom said of that equally overrated concept "nation," it is neither more nor less than "the same people living in the same place"<sup>116</sup> (or, as the case may be, not in the same place). A "group" is, then, not a fused organism but a plurality of individuals, held together in some ways but usually differing in many others. The voices that are heard when "the group" speaks are not magically the voice of a fused organic entity; they are the voices of the most powerful individuals; these are especially likely not to be women. So why should we give a particular group of men license to put women down, just because they have managed to rise to power in some group that would like to put women down, if we have concluded that women should have guarantees of equal protection in our nation generally?<sup>117</sup> To do so is condescending to that group—we don't hold them up to the same moral standard to which we hold ourselves—and it is grossly unfair to the women, who are simply being told that because they are tribal women, or whatever, they do not enjoy the same guarantees of liberty that other women do. (And what of the "group" of women? Are they not as much a group as the tribe? And do they not have their own sad tale to tell?)

No religious group, then, should maintain a separate system of law that either violates the basic rights of any citizen, as specified above, or involves the religions in inequality *vis-à-vis* one another. If all this is firmly guaranteed, the case for permitting religions some latitude in areas such as marriage and divorce contract may at least be argued. For example, it ought to be possible, as it is virtually everywhere, to enter into a religious marriage contract—provided that the state guarantees equality of treatment to all citizens regardless of religion in areas such as consent, divorce, and maintenance, provided that secular marriage also exists and is regulated in an evenhanded way by the state, and provided that individuals of religious origin may choose whether or not to avail themselves of religious marriages when they marry. In such cases, the devotional and spiritual meaning of religious marriage and divorce may still be great; what is important is that these rules do not impose an obligation on citizens in violation of their equal rights and liberties. (Thus, a religious Roman Catholic may decide to regard the availability of secular divorce as spiritually unimportant and may focus on annulment as the only way in which a marriage may be validly termi-



nated; what is important is that the state does not impose these Roman Catholic views on all people of Catholic origin but maintains a secular system of divorce open to all citizens.)

#### *Religions Actors under the Legal System*

Religious actors should be governed by the same legal system as everyone else. This is not always the case. In Thailand, Buddhist monks can be indicted and tried only by courts composed of themselves; they may not be indicted by the general legal system. They tend, however, to hang together. In a recent case, a monk charged with sexual harassment and refusing to support an illegitimate child (he had allegedly told various women that their spiritual status was in grave jeopardy if they did not sleep with him) could not be publicly prosecuted, and the other monks refused to prosecute him. Only after a prolonged scandal did the Ministry of Education order the monk to take a DNA paternity test<sup>118</sup> or risk being defrocked, and even then its authority to do anything was in doubt.<sup>119</sup> Needless to say, this should not be permitted to happen.

Should religious organizations and their members be treated as unequal under the law for certain purposes connected with gender? United States constitutional law has standardly granted special latitude to religion, by contrast with other forms of commitment and affiliation. Religious reasons for exemption from military service,<sup>120</sup> or for refusing to work on a particular day,<sup>121</sup> are granted a latitude that is not granted to other forms of conscientious commitment, such as the familial or the artistic or even the ethical. This remains controversial for the way it appears to privilege religion over nonreligion and thus, it might seem, to violate the Establishment Clause. The future of this issue remains uncertain, and this is not the place to make a normative argument on such a complex and vexed matter. Suffice it to say that such privileges given to religion, though highly contestable, can be strongly supported by pointing to the special importance of the liberty of conscience as a fundamental right and the consequent need to give religious freedom special protection from the incursions that, throughout history, have threatened it.

Religious bodies have also claimed exemption from certain laws of general applicability, including nondiscrimination laws. A Catholic church may refuse to accept a Jew as a member just because she is a Jew; such action, usually unconstitutional, seems perfectly legitimate here. The crucial question is how many jobs within a religious organization should be covered by such an exemption. Currently, Title VII permits discrimination on the basis of religion when it is a "bona fide occupational qualification reasonably necessary to the normal operation" of the enterprise, and it makes a specific exemption for religious educational institutions, permitting them to discriminate on the basis of religion in the hiring of "employees." This seems excessively broad. While it seems reasonable (though controversial) that Notre Dame should seek a "preponderant number" of Catholics on its faculty, it hardly seems reasonable that janitors and construction workers should be so selected. Some clearer demarcation of the exemption is in order.

More difficult still—and more important for our purposes—are demands by religious groups to be exempted from the reach of other nondiscrimination statutes, for example, those dealing with gender and sexual orientation. The state does not require the Roman Catholic Church to admit women to the priesthood on equal terms, although in almost all other occupations a denial on the basis of sex would be illegal. But this affects other appointments, as when the president of a Roman Catholic university is required by statute to be a member of a particular order of priests. One can argue that the priesthood lies within the core of worship and should be protected on that account; the presidency of a university seems hard to defend on this basis, especially when it has been granted that female faculty and administrators are a valued part of the institution.

As for sexual orientation, some local nondiscrimination laws on sexual orientation, for example, that of the city of Denver, have exempted religious institutions. These are borderline cases, difficult to distinguish from those of private clubs and educational institutions, whose liberty to discriminate on grounds of religion and gender has steadily eroded. Again, the legal questions are complex; we can only gesture in the direction of a recommendation. But a promising approach would be to insist that any form of discrimination on the basis of gender, race, or sexual orientation should face heightened scrutiny under the Equal Protection Clause—or the analogue of this in the legal system in question: Only a compelling state interest can justify such restrictions. On the other hand, it should be possible to hold in some cases that the protection of religious liberty may supply such a compelling interest, as long as the law in question is narrowly tailored to protect that particular interest.<sup>122</sup> My own view is that such narrow tailoring should involve specifying which functions lie within the core of worship and which are other activities that happen to be undertaken by a religious body.

A further area of controversy is the role of state benefits and subsidies: Should the state be permitted to grant tax-exempt status to an institution that does engage in discriminatory activity? In *Norwood v. Harrison*,<sup>123</sup> the Court held that a state-supported textbook program was unconstitutional as applied to schools with racially discriminatory policies. In *Bob Jones University v. United States*,<sup>124</sup> the Court upheld the Internal Revenue Service's denial of tax-exempt status to a religiously grounded institution<sup>125</sup> that had a racially discriminatory admissions policy.<sup>126</sup> The Court argues that "[t]he Government's fundamental, overriding interest in eradicating racial discrimination in education substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. Petitioners' asserted interests cannot be accommodated with that compelling governmental interest, and no less restrictive means are available to achieve the governmental interest" (2020–2021). A religious institution that refused to admit women, or treated them in a discriminatory way, might possibly receive similar treatment, and state subsidies to such institutions might be struck down, although this is unclear. The question is, however, what other practices of religious institutions qualify as discriminatory for these purposes? Hardly any religion fails to allow women in as members; the question is, how does it treat them when they are there? Should the Roman Catholic Church

lose its tax-exempt status because women are not admitted to the priesthood? Should the University of Notre Dame lose federal funds because only a male can serve as its president? Such questions may well be answered in favor of broad latitude for the religious group, but they must be honestly confronted and debated. If we take them off the table, we suggest that such forms of discrimination, unlike racial discrimination or religious discrimination, are permissible and innocuous expressions of cultural variety—and that, I think, is an assumption from which women have suffered far too long. If we debate these questions openly, we will come to a better shared understanding of the limits of religious liberty even in voluntary organizations, within a liberal regime committed to the protection of fundamental rights.

There are many other controversial issues of religious free exercise that bear on sex discrimination: those, especially, involving parental rights to control children's schooling in accordance with religious beliefs and practices. This complex issue needs full and separate treatment; suffice it to say that one important issue, not always sufficiently stressed in such cases, will be the quality of education granted to girls, and its relation to their equal rights to education that will fit them for employment and citizenship.

Are there, and should there be, any legal restrictions on the speech of religious actors? Any form of religious discourse that constitutes a threat of violence against an individual or group should be, and probably already is, illegal under the state's system of criminal law. It is obvious that proposing a *fatwah* should be an illegal act, and that all who had a part in it are international criminals and villains, but because they are also the makers of law in their country, we cannot use their case to speak about how a constitutional democracy should operate its legal system.<sup>17</sup>

Let us therefore turn to cases that arise within democracy. The *mullahs* who threatened to break women's legs should have been arrested. The fact that they are *mullahs* should give them no special rights; insofar as they are advocating leg breaking, they are no different from Mafia crime bosses making similar threats. What is their crime? Presumably assault: Take, for example, the Model Penal Code's definition, according to which one sufficient condition for assault is that the person "attempts by physical menace to put another in fear of imminent serious bodily injury" (211.1.c). Given that the actions of the *mullahs* restrained women from going outside to seek education, we might also focus on the crime of "felonious restraint," which occurs if a person "(a) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury or (b) holds another in a condition of involuntary servitude" (212.2). Other statutory solutions could involve notions of stalking, harassment, and so forth that have more recently been developed. Probably their threat of social ostracism should receive similar treatment, because in that situation it was like a death threat.

In a gray area is discourse that incites other people to commit violent acts against women. This is a large and heterogeneous class. The case of *sati* is instructive. Direct incitement to commit *sati* (itself illegal as a form of suicide) was illegal under Indian law for some time; and similar acts can be criminalized in

the United States. But the new law passed after Roop Kanwar's death criminalized a far broader area of speech: "glorifying," "eulogizing," and holding ceremonies and processions in connection with *sati*. Some of this speech, at least, lies within the core of political speech protected by our First Amendment; the Indian Constitution explicitly permits the State to "impose reasonable restrictions on the exercise of the right" of free speech "in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign States, public order, decency or morality, or in relation to . . . incitement to an offense." The prohibition is thus more likely defensible within this constitutional regime. Although we may find the Indian restriction overly broad, it must be interpreted within the history of tremendous religious violence and violence against women; the judgment was that only such a restriction could prevent a widespread outbreak of a practice that would put many women in jeopardy.

Similarly in a gray area are speeches saying that women who do thus and so (say, dress in a certain way, or talk immodestly) deserve to die; speeches saying that such women are whores and fair game for rape; speeches simply saying that such women are whores; speeches saying that widows are virtually dead and their wishes do not count; speeches saying that women are childlike and immoral and in need of stern home discipline; and a host of others. Such incitements are a major cause of battery, rape, and even death of women: At what point should the religious speaker be held to have committed a criminal offense? It seems obvious, here again, that the strongest case for criminality exists when the incitement is directly targeted at a particular individual and is an incitement to immediate action. For example, a brother whose sister has gone off to work in the big city and comes home in short skirts is told that a woman like her deserves to die without further ado,<sup>128</sup> or a man is told by a religious leader that he should assert his domestic authority more and a little thrashing when he gets home today won't hurt, or village men are urged by *mullahs* to feel free to beat up these particular women as they go to school. Just in this way, the Cruelty to Women laws in both India and Bangladesh criminalized mental as well as physical abuse of women in connection with extraction of dowry. Even when no threat is involved, expressions of hate targeted narrowly against a particular individual may legitimately be criminalized.<sup>129</sup>

When threatening speech or hate speech is more general, we should be cautious. Much speech against women's equality is political speech, and general expressions of a political sentiment, however odious, should receive a high degree of protection. And yet, a country may legitimately, in keeping with its particular history, judge that some forms of speech expressing hatred and stirring up hostility are too dangerous not to be made illegal. Most European nations, including Britain with its Race Relations act, set narrower limits to hate speech than does the United States. In Germany, anti-Semitic speech is illegal, even if it is clearly political or religious speech and would obviously, as such, be protected under the U.S. Constitution. Such a course seems right, given Germany's particular history. A nation in which millions of women are "missing" might legitimately judge that some forms of speech denigrating the value of female life are to be forbidden, even if the speech is religious and, indeed, the expression of a deeply rooted reli-

gious tradition. In practical terms, such laws are likely to cause more problems than they solve—for the religious groups in question, unlike the Nazis, are not defeated and mostly dead and therefore will make no end of trouble with clever use of ideas of free speech. Nonetheless, it seems important to point out that there is a moral case to be made for such laws. India has possibly gone too far in restricting speech in some areas, with the ample laws against blasphemy that permitted suppression of Rushdie's novel. But it is obvious that such line drawing must be done with a concrete understanding of the threats to public order faced by each nation, and therefore it is unwise to comment further here.<sup>130</sup> This large and controversial topic deserves separate treatment.

#### *Moral Constraints on Religious Discourse in the Public Realm*

Even when religious discourse is not legally regulable, it may still be judged immoral in some cases. Here, finally, we approach the topic of most of the current U.S. debate. In a constitutional or otherwise democratic regime that has adopted a guarantee of sex equality or ratified the Women's Convention, it should be straightforwardly immoral and inappropriate, though legally protected, to speak in ways that contradict or undermine these fundamental rights. Thus, any discourse that denies women's equal humanity (or, indeed, the equal humanity of all citizens); any discourse that portrays women as by nature whorish or childish or unfitted for citizenship; any defense of practices that violate women's human rights as guaranteed in the constitution, such as marital rape or female genital mutilation—all should be deemed highly inappropriate. (And I do mean to include here any religious speech attacking contraception in international fora, because, as I have said, I take contraception to be a basic human right of women.) We could legitimately view a history of such speech as a reason against confirming a judge for office; a religious leader who uses such speech in the public realm should be strongly criticized as a subverter of the constitution.

As for other forms of religious discourse, my view is essentially that of John Courtney Murray (and close to the view defended in the new paper edition of John Rawls's *Political Liberalism*<sup>131</sup>): that such discourse is appropriate, even in debates about basic constitutional issues, provided it can be made publicly assessable and intelligible to citizens who do not share the speaker's religious starting point, and provided it takes care to indicate its harmony with the fundamental principles of the constitution (or the principles implicit in the democratic political culture, if there is no written constitution). Thus, the Pope's address to the United Nations<sup>132</sup> seems to me fully appropriate, because he is always at pains to make his moral argument available to others who may come to the issue from a different metaphysical starting point, and because he is careful to show its consistency with fundamental principles of, in this case, international law and morality.

Special care should be taken, however, to avoid offense to minorities: Thus, a judge in India who cites the *Ramayana*, however compatibly with the prin-

ciples I have set forth, may send a political signal that many will construe, in the present climate of opinion, as denigrating Muslims and expressing the sentiment that India is basically a Hindu society.<sup>133</sup> A judge who cites the *Laws of Manu*, even as a storehouse of wisdom of the ages, could be suspected by some feminists of holding its views regarding women, even if the portion he has cited has nothing to do with women's issues; a Hindu judge who criticizes a portion of Islamic scripture unwisely suggests that he is exercising authority over a minority group in an intimate area of religious self-definition.<sup>134</sup>

Are these acceptable constraints? Certainly they will not be acceptable to many participants in many religions because they involve the curtailment of traditional prerogatives. We should insist, however, that there is a basic core of international morality that constrains all religious actors in the public realm, that to be held to this morality in the ways I have described is no more violative of religious free exercise than is the requirement to obey the criminal law.

If any of these proposals should be greeted with charges of "Westernizing," liberals should insist, once again, that the loudest voices in a religious tradition do not define the totality of its possibilities; that political actors use religious appeals as a vehicle for their own power, not always as legitimate attempts to capture the essence of the tradition in question; that all religions are plural and contain argument and dissent; and finally, that all religions contain the voices of women, which have not always been heard in the statements that are usually taken to define what the religion is and requires. It is, moreover, just false, and chauvinistic, to hold that the idea of the fair treatment of the diverse groups comprising a population is Western in origin. It has been on the Indian agenda since the edicts of Ashoka in the fourth century B.C., and ideas of toleration were elaborately developed in the legal system under the Moghul emperors, well before the European Enlightenment. An Indian judge who extends these ideas to women is not borrowing an external concept but extending one that has deep roots in Indian history.

#### What Can Be Done

One form of action in which liberals concerned with religion can very definitely engage is to encourage pluralistic and comparative religious discourse on these topics, discourse that brings to light and publicizes the plurality of views on all these matters within the religious traditions and also brings members of the different traditions together for consultation and comparative discussion.<sup>135</sup> In the process, many appeals to religion that do violate women's rights will be exposed as at the least narrow and partial accounts of a tradition, and often as simple misrepresentations—as has been happening with the relation of Islam to female genital mutilation. This is one area in which the old adage that it is best to drive out bad speech with more speech seems to be just right. Religious discourse, if a villain in many of my examples, is also, in multiple and powerful ways, a major source of hope for women's future. We should therefore not accept any solution to the liberal dilemma that unduly marginalizes religious speech

or asks people to cut themselves off from humanitarian motivations that may motivate them in a specifically religious form. I believe that my own proposal does not do this.

It is, moreover, a legitimate function of a liberal state to encourage the liberal elements in the religious traditions. Here I agree with John Courtney Murray and with Rawls: By giving prominence to the type of religious speech that accords with constitutional fundamentals and to its speakers, a state legitimately strengthens the political consensus around these fundamentals and dramatizes to citizens the fact that religious argument in the major traditions can support them. Thus, in India, it would be highly advisable for major state actors to spend time insisting (as intellectuals such as Tariq Mahmood and Amartya Sen have long insisted) that both Islamic and Hindu traditions are diverse and plural and contain prominent liberal elements. Such public emphasis weakens the claim of antiliberal parties and individuals to speak for the entirety of a religious tradition.

Beyond this, it seems crucial for all who are concerned with these facts to promote and support local forms of group action that are the most promising avenues of change. This means supporting NGOs like the Bangladesh Rural Advancement Committee (organizer of the literacy project), which are free from government pressure and able to pursue a highly effective grass roots agenda. At the same time, recognizing that governments are more fully accountable to people than are NGOs, especially international ones, women and their supporters should also try to bring pressure to bear on governments and on multinational corporations to alter the problematic aspects of women's situation, as was done so successfully in the case of South Africa. Women from other nations may join a domestic struggle if they do so with proper deference and sensitivity. Women who are fighting these injustices on the spot need reinforcement. Frequently, too, the fact that an international body or a foreign government has made compliance with certain human rights practices a condition of some form of economic or diplomatic cooperation gives women a way to support such changes without fear.

Meanwhile, in acute cases, individuals who suffer human rights violations on account of being female should be granted political asylum, as in the case of Fauziya Kassindja, who fled to the United States to avoid genital mutilation (see chapter 4). Clearly, however, we should not rely on this remedy, which is arbitrary in its benefits (it helps only those people who can get on a plane and go somewhere), and which can hardly address problems that affect millions of people.

The best way to promote the role for religious discourse defended in this chapter is to produce active, unintimidated, educated democratic citizens. Such citizens will be likely to demand that religious discourse play a role compatible with constitutional guarantees of human equality. And this means that their role toward their own religious tradition will also be active and reflective, not merely submissive to the powerful interpreters of the moment. In many parts of the world, women have not been encouraged to become such citizens. But this situation is changing. At the conclusion of the literacy project, some women said that

they no longer took advice from the local religious leaders. One woman said that she still went to get advice. Asked whether she found the advice helpful, she replied, "I will think myself whether he gives me good suggestions or bad ones. If he gives me a good suggestion, I will try to understand how far it is good for me. Or whether it is a bad suggestion." This clearly did not mean that the speaker was losing her religious convictions: She was the one in the group still interested in religious advice. It meant that she had ceased to assume that male religious leaders are infallible, and she had adopted a reflective attitude to her own religious practice. This is exactly the response that a society truly committed to religious liberty should encourage.