This article is being written at a critical juncture in the struggle for human rights, in general, and religious human rights, in particular. At this, a defining moment in the role of human rights non-governmental organizations (NGOs), generally, and Jewish NGOs, in particular, in that struggle, a discussion including the contrasting principles and perspectives that underpin the differing advocacy roles of Jewish NGOs in the U.S. and Canada appears most opportune.

Indeed, the at times dramatically different public advocacy of American and Canadian Jewish NGOs is reflective not only of the distinct legal cultures in which they respectively repose, but in the different Jewish NGO perspectives, if not principles, which they espouse.

This having been said, the public advocacy that they engage in is taking place in a revolutionary era for human rights, where, as Father Robert Drinan put it, in a pithy and prescient dictum on the eve of the 1990s, "the elevation of human rights into an international juridical norm is the most dramatic development in the history of contemporary jurisprudence."[1]

On the one hand, there has been a literal explosion of human rights, where human rights is the organizing idiom of our political culture, and has emerged, as it were, as the "new secular religion of our times." At the same time, however, in the dialectics of revolution and counter revolution in human rights, the violations of human rights continue unabated. The homeless of America, the hungry of Africa, the imprisoned of Asia and the Middle East can be forgiven if they think the human rights revolution has somehow passed them by. While the silent tragedy of the Kurds, the ethnic cleansing in the Balkans, the horror of Sarajevo, the agony of Angola and Rwanda are metaphor and message of the assault upon, and abandonment of, human rights in our time.

What is true of the human rights revolution and counter-revolution of this Dickensian era in human rights, with its best of times and worst of times, is also true of the state of religious human rights, in particular. On the one hand, freedom of religion is one of the most fundamental of human rights — the primacy of the rights constitutionalized in both the American Bill of Rights and the Canadian Charter of Rights and Freedoms, anchored in the corpus of contemporary international law. Indeed, it is entrenched in each of the major international human rights treaties, including, *inter alia*, Articles 1(2) and 55(c) of the UN Charter,[2] Article 18 of the 1948 Universal Declaration of Human Rights,[3] Article II of the Convention on the Prevention and Punishment of the Crime of Genocide,[4] Article 4 of the 1965 International Convention on the

Elimination of All Forms of Racial Discrimination,[5] Article 18 of the 1966 International Covenant on Civil and Political Rights,[6] Principle VII of the 1975 Final Act of the Helsinki Conference on Security and Cooperation in Europe,[7] Article 7 of the International Convention on the Elimination of All Forms of Discrimination Against Women,[8] and Article 14 of the 1989 Convention on the Rights of the Child.[9] In fact, this special status of freedom of religion in international human rights law is further buttressed by the fact that it is non-derogable even in times of emergency under Article 4(2) of the International Covenant on Civil and Political Rights, 1966,[10] as well as Article 27(2) of the American Convention on Human Rights, 1969.[11]

However, notwithstanding this "critical mass" of protection for freedom of religion in both constitutional and international law, freedom of religion remains "the most persistently violated human right in the annals of the species."[12] Indeed, "religious intolerance has generated more wars, misery and suffering than any other type of discrimination or bias,"[13] and is not unrelated to much of the ethnic, tribal, or "civilizational"[14] conflict of our day.

Interestingly enough, this dialectical character of religious human rights, with its consecration in law, on the one hand, and in its massive violations of religion, on the other, finds expression in the historiography of the Jewish religion and the experience of the Jewish people.

On one level, the Jewish religion, like religions generally, is at the core of universal human rights as a whole.[15] It therefore follows that if human rights has emerged as the new "secular religion" of our time, then the Jewish religion (or Christian, Moslem, Hindu) is at the foundation of this new "secular religion," as symbolized by the normative exhortation in the Jewish religion of *Tikkun Olam* — the responsibility to "repair the world."[16]

This responsibility, as well as the notion of *BeTselem*, that we are all created in the image of God, is the essence of religions organized around the inherent dignity of the human person, and the equal dignity of all persons. Jewish lore has often elaborated on this theme, as reflected in the following story from the Talmud: "What is the most important verse in the whole Bible?" asked Ben Azai, a Talmudic sage. His answer was, "The verse from the Book of Genesis that says: 'Man was created in the Divine image.'" Clearly, that verse establishes for Jews — and for Jewish NGOs — the fundamental relationship between one person and another. All were created in the image of God. Therefore, Judaism holds, all are entitled to equal respect for their dignity and worth.

Similarly, endeavoring to highlight the intrinsic value of life, the Talmud provides that when a witness in a capital case comes to the witness stand, he must be admonished in the following words: "A single man was created in order to teach you that if one destroys a single person, it is as though he had destroyed the population of the world. And if he saves the life of a single person, it is as though he had saved the whole world."[17]

Yet, notwithstanding the Jewish religion's profound commitment to human rights (or perhaps because of it, as Norman Cohn argued in his insightful work *Warrant for Genocide*),[18] the history of the Jewish people themselves abounds with violations of Jewish religious rights — be they through forced conversions, expulsions, inquisitions, pogroms, and yes, genocide — as one of the most persistent and enduring hatreds in all of human history.

In light of this tragic history, it is not surprising, therefore, that Jewish NGOs, regarding themselves as legatees of the Jewish past and trustees of the Jewish future, should have committed themselves to the promotion and protection of human rights, in general, and religious rights, in particular. To combating human rights violations, in general, and the violations of freedom of religion, in particular.

At this juncture, a word about definition appears in order, prior to proceeding with our comparative discussion. Thus, in referring to "Jewish" NGOs, we have adopted a definition of the term "Jewish" anchored both in a more inclusive notion of Jewishness, as well as in an appreciation of what Jewish NGOs in fact do. More particularly, we have not restricted or limited the term "Jewish" to its religious or sectarian definition of a Jew as a person born of a Jewish mother or who has converted to Judaism.[19] Rather, the term "Jewish" will refer to the intersecting religious, cultural, ethnic, and national identities whose composite defines what it means to be Jewish,[20] and which in fact is the mosaic that defines Jewish NGOs, or the mosaic by which these NGOs define themselves. As well, an appreciation of the Jewish agenda, or mission statements,[21] of the major — and mainstream — Jewish NGOs reflects — and represents — this mosaic in its variegated forms.

Another way of describing this mosaic — and of the multiple configurations involved in seeing Jews as a religion, a culture, an ethnic group, a people, a nation — can be discerned from the multi-faceted approach to the category of religious rights alone.[22]

Hence, if one is to approach the meaning of the term "Jew" not from a perspective of freedom of religion, but freedom from discrimination on grounds of religion, i.e., Jewishness, a similar

configuration emerges. As Nathan Lerner put it, "In the case of the Jews, ethnicity, religion, and culture are inextricably interwoven, in the self-perception of the victims of anti-semitism as well as in the perceptions of the anti-semites."[23]

Accordingly, and linking this "typology" of being Jewish, to a typology of Jewish NGOs, the universe of Jewish NGOs, both in the U.S. and Canada, may be said to comprise twelve distinct groupings.[24]

In light of this inclusive notion of what it means to be Jewish, and having regard to the configurative nature of the Jewish NGO universe, we will now proceed to comparatively examine the human rights advocacy of Jewish NGOs, with particular reference to the protection of religious human rights along the following four themes: International Human Rights Law, Constitutional Law, Combating Discrimination, and the Lessons of Advocacy.

The Contribution of Jewish NGOs to the Development of International Human Rights Law in the Matter of Religious Human Rights, and this "Legacy's" Influence on their Contemporary Public Advocacy

During the nineteenth century and up to World War II, Jewish NGOs were instrumental in the development of five fundamental principles which constitute the foundation of contemporary international human rights law; after World War II these groups made notable contributions to the creation of important instruments of international human rights law. The role of Jewish NGOs in this process is little known, but it is a matter of great historical moment in the emergence of what is generally referred to as the international law of human rights. Significantly, in addition to sensibilizing the world community to the legalization of human rights, as it were, this involvement equally accounts for Jewish NGO participation in the contemporary human rights agenda.

Although contemporary international human rights law is popularly regarded as a post-World War II phenomenon, or "United Nations Law," as it is sometimes characterized, the "historic antecedents"[25] of international human rights, as Thomas Buergenthal put it, are in fact rooted in developments that found expression from the Congress of Vienna in 1815 to the Treaty of Berlin in 1878; from the American intervention on behalf of Romanian Jewry in 1902 to the U.S. intercession after the Kishinev pogrom of 1905; from the Treaty of Paris in 1919-20 to the Mi-

norities Treaties of 1921 — a century of historic involvement for Jewish NGOs.

Admittedly, the level of Jewish experience of this century represents yet another example of endless Jewish persecution, or what Robert Wistrich has called the "enduring hatred"[26] of the Jews. On another level, however, this century constituted, as Professor Feinberg pointed out in a brilliant, but largely unknown, article called "The International Protection of Human Rights and the Jewish Question,"[27] a historic watershed in the development of international human rights law in general, and religious human rights in particular. And so while contemporary international human rights law has met with a "consistent pattern of gross violations of human rights" *in spite of* the international human rights legal regime, the century from 1815 to 1921 witnessed the reverse: the development of international human rights law *in response to* the violations of that period.

Indeed, as Professor Feinberg points out, "the oppression, persecutions, and sufferings which were the lot of Jewry in many lands stirred the conscience of the world,"[28] leading to the conceptualization of five international legal doctrines that were to later form the foundation of contemporary international human rights law, particularly in the area of religious human rights. These doctrines, or principles, included first, the *Doctrine of Humanitarian Intervention*: Namely, this principle provides that a state may intervene in the affairs of another state if that other state engages in inhumane or uncivilized conduct that shocks the conscience of mankind. Second is the principle that the *recognition of the independence of a state is contingent upon that state's guarantee of freedom of religion and eschewal of discrimination on the grounds of religion.* Third is the *protection of minorities* principle, which found expression at the Paris Peace Conference in 1919-20 with the drafting of the Minorities Treaties. These were described by Feinberg as a historic step "towards the recognition of human rights as an integral part of international law."[29] Fourth, is the principle of *universalization of rights*, including religious human rights, and the *very idea of a United Nations*, an idea which itself grew out of the Minorities Treaties. Finally, out of the doctrine of humanitarian intervention — or the protection of vulnerable peoples from actions that "shock the conscience" of mankind — a *fifth* international legal doctrine emerged, namely, the principle of *accountability for Crimes Against Humanity*, which became the cornerstone of the Nuremberg Principles following World War II.

As Henri Rolin put it, the concept of crimes against humanity, from a historical point of view, is "the logical outcome of the humanitarian intervention by States against certain odious acts which aroused the conscience of the civilized world."[30] Adds Albert de la Prudelle: "Where once the law of nations knew only humanitarian interventions — be it that of the United States in Kishinev or the great powers in Rumania — it hereinafter recognized the subjection of those guilty of inhuman persecutions to an [international] criminal jurisdiction."[31]

Feinberg's article concludes with a discussion of the role of Jewish organizations in the promotion and protection of human rights in general, and Jewish human rights, in particular. His comments are of particular relevance to the understanding of Jewish NGOs today, and the "human rights" motif that drives their public advocacy. He writes:

> The oppression, persecutions and sufferings which were the lot of Jewry in many lands stirred the conscience of the world in the period between the Congress of Vienna and the Paris Peace Conference and prompted the Great Powers to intervene from time to time on their behalf. Throughout that period, and at the Conference itself, the Jews applied all their energy and initiative in the international arena to the struggle against oppression and for the assurance of Jewish rights and of respect for Jewish dignity. In doing so, they made a noble contribution to the furtherance of fundamental human rights and Man's basic freedoms, and to the development of public international law.[32]

Given this moral and jurisprudential legacy, it is not surprising, then, that Jewish NGOs should have made a notable contribution, *inter alia*, to the creation of six important post-World War II international human rights instruments, including, in particular, the development of the United Nations Charter, the Universal Declaration of Human Rights, the Convention on the Protection and Punishment of the Crime of Genocide, the International Covenants on Civil and Political Rights and Economic Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. For reasons of economy — and as we have described this contribution elsewhere[33] — we will restrict my remarks to the Jewish NGO contributions respecting the development of the UN Charter.

In addition to being present at its creation, Jewish NGOs played a formative role in the organization of the San Francisco Conference in 1945 and the formulation of the UN Charter itself. As Lerner put it, "the WJC, the American Jewish Conference and

the Board of Deputies of British Jews made joint representations to the San Francisco Conference, while their representatives approached delegations, expressing their concern that an effective system of human rights should be adopted."[34] Indeed, "the fate of the Jews at Hitler's hands was a major impetus for the decision to make the protection of human rights a principal purpose of the United Nations."[35]

And so, in the ashes of the Holocaust, and in the wake of the collapse of the special guarantees in the Minorities Treaties and the like, Jewish NGOs were prominent among those organizations who, even before the United Nations founding Conference in San Francisco, joined in publishing in December 1944 a "Declaration of Human Rights" asserting that "an International Bill of Human Rights must be promulgated."[36] In language reminiscent of contemporary international human rights law doctrine, they affirmed that "no plea of sovereignty shall ever again be allowed to permit any nation to deprive those within its borders of those fundamental rights."[37] They affirmed their belief in "the equal and inalienable rights of all members of the human family." And, in the words of Sidney Liskofsky, they acted on the credo "that the human rights of Jews would be respected and secured in the degree that the rights of all men were honored and safeguarded,"[38] the credo — and principle — that inspired the "church-state" litigation strategy of American Jewish NGOs.

The Contribution of Jewish NGOs to the Development and Critique of Constitutional Law in the Matter of Religious Human Rights

We will now proceed to offer a comparative perspective of Jewish NGO involvement in the United States and Canada in matters of religious human rights which may be instructive not only with regard to the legal cultures of the two countries, and the relationships of Jewish NGOs to the larger culture of which they are a part, but in their respective perspectives on religious human rights as well.

The United States

The activities of Jewish NGOs in the United States in the formulation of constitutional and statute law regarding religious human rights have been organized around three basic themes:

1. Ensuring guarantees of the freedom to manifest and maintain one's own belief (without coercion).
2. Ensuring maintenance of the boundaries between religion and politics — i.e., the separation of church and state — in accordance with the United States Constitution.
3. Ensuring the right to equality, equal citizenship, and non-discrimination in matters of religious human rights.

Indeed, the activities of three major U.S. Jewish defense organizations[39] in the promotion and protection of religious human rights, largely, though again not exclusively, through the courts, and largely, though not exclusively, in relation to issues of separation of church and state, embody the role of Jewish NGOs in the promotion and protection of religious human rights in general. They equally represent a case-study of the organizing principle underlying their advocacy of "promotion and protection," namely "that the rights of Jews would only be secure when the rights of people of all faiths were equally secure."[40] Faithful to this principle, the three American Jewish NGOs have filed more amicus briefs on behalf of the rights of non-Jews than of Jews.[41]

As it happened, the first major case in which the American Jewish Committee (hereinafter the AJC), the ADL, and the American Jewish Congress filed a legal brief — *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*[42] had nothing to do directly with the religious human rights of Jews, as the name of the case itself implied. The AJC filed a brief in the *Pierce* case to challenge an Oregon law, inspired by the Ku Klux Klan, that required all children to attend public schools.

The real intent — and ultimate prospective effect — of the law was to put Catholic parochial schools out of business. There were, however, no Jewish parochial schools in Oregon, and one might wonder what the nexus of this case was to a Jewish NGO. But this case was to emerge as a defining moment in the litigation strategy of the AJC, and that of its associated sister organizations, for it was through this case that these Jewish NGOs were to declare and establish the underlying theme of their litigation strategy as set forth earlier — that religious rights of Jews would only be secure if the religious rights of people of other faiths were equally secure. Hence, even though there were no Jewish parochial schools in Oregon at that time, AJC filed its brief on the side of the Catholic schools. The Supreme Court unanimously struck down the law holding that, *inter alia*, it interfered with the liberty of parents to educate their children as they wished. This decision, as

Samuel Rabinove, legal counsel to the Committee put it, "has been termed the Magna Carta of Parochial Schools."[43]

In effect, the *Pierce* case was the first of a series of cases in which the AJC was to uphold religious rights, freedoms, and practices for people of all faiths. Thus, in the 1943 case of *West Virginia v. Barnette,*[44] the compulsory "flag salute" case, the AJC supported the right of Jehovah's Witness children, in accordance with their parents' religious convictions, to refuse to salute the flag in public school. Justice Robert Jackson, speaking for the court, directly addressed the constitutional guarantee of religious freedom and pluralism: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit any exception, they do not occur to us."[45]

Likewise, in the 1963 landmark case of *Sherbet v. Verner,*[46] the AJC filed a brief in support of the right of a Seventh-Day Adventist to receive unemployment compensation benefits where she had refused to accept employment requiring her to work on Saturday. The Supreme Court held that for the state to disqualify Mrs. Sherbert for such benefits solely because she refused to work on Saturday, a decision based squarely on her religious beliefs, imposed an unconstitutional burden on her free exercise of religion. As Justice Brennan, writing for the majority, put it: "To condition the availability of benefits upon this woman's willingness to violate a cardinal principle of her religious faith effectively penalized the free exercise of her constitutional liberties."[47]

More recently, however, in a series of cases where secular and liberal Jewish NGOs joined conservative and sectarian ones in filing amici in support of the free exercise of religion, the decisions of the Supreme Court raise some serious — and as yet unanswered questions — about the nature, scope, and efficiency of the free exercise clause. For example, in the case of *Goldman v. Weinberger,*[48] where the AJC joined with the Christian Legal Society in upholding the right of an Orthodox Jew in the Air Force to wear his yarmulke indoors while on duty, the court held that the denial of this right was not a breach of the "free exercise clause." Similarly, in *Lyng v. Northwest Indian Cemetery Protective Association,* the court held that the free exercise clause does not prohibit the construction of a road through a sacred site revered for centuries by Indians. Finally, in *Oregon Department of Human Resources v. Smith,* the court eroded the threshold principle established in the *Sherbert* and *Yoder* cases that the govern-

ment may not restrict a person's free exercise of religion in the absence of a demonstrable and compelling state interest. The decision sent "shock waves"[49] through the Jewish community, and while its effects were mitigated somewhat in the *Lukumi*[50] case where the Jewish NGOs filed their amici briefs, it required a congressional statute, the recently enacted Religious Freedom Restoration Act was required to remedy the adverse fall-out from the *Smith* decision.

Interestingly, while the AJC and its sister Jewish NGOs have been "vigorous proponents of the free exercise of religion,"[51] they have opposed, no less vigorously, any state "entanglement" with religion "or breach in the wall of separation between Church and State,"[52] be it by way of religion in the public schools, or government aid to religious schools, or religious symbols on public property. This approach stands in direct contrast, as discussed below, to the principles and perspectives underlying Canadian Jewish NGO church-state strategy.

For instance, the AJC filed amicus briefs in a series of cases involving state-sponsored organized prayer and Bible reading in public schools.[53] These cases are compelling examples not only of the church-state "separation" controversy in the U.S., but of the adherence of the major liberal and secular Jewish NGOs to the "separationist" ideology. The issue came to a head in the landmark cases of *Engel v. Vitale*[54] and *Abington School District v. Schempp,*[55] where the Supreme Court held that such state-sanctioned conduct violated the "establishment" clause. While in *Engel* the court struck down a state-composed prayer for public school use, *Schempp* went beyond that to rule that state-sponsored recitation of *any* prayer, or devotional reading from the Bible, breached the "establishment" clause. The decisions, which caused a furor at the time, and were widely denounced as being anti-religious, anti-Christian and un-American — engendered a certain backlash against the Jewish NGOs, which were accused, along with the Supreme Court, "of trying to remove God from the classroom." While subsequent attempts during the Reagan, Bush, and Clinton administrations to amend the First Amendment to permit organized school prayer have not been successful, the more recent Republican "Contract with America," supported by a Republican-controlled Congress and with conservative Democrats in support, might make it a reality; and Jewish NGOs are once again at the forefront of the opposition.

As for government aid to religious schools, just as there are those who believe that the establishment clause does not prevent state organized prayer in the public schools, there are also those

who feel that it does not bar a state from subsidizing parochial schools, even if their reason for being is to propagate a religious faith. To this effect, the U.S. Supreme Court has upheld certain kinds of state aid to religious schools in the form of bus transportation (the *Everson*[56] case), secular textbook loans (the *Allen*[57] case), and services for the health and welfare of the student (the *Wolman*[58] case), provided the performance of these services is essentially secular.

This having been said, the U.S. Supreme Court has equally stated, and the three Jewish NGOs have, in contrast to their Canadian counterparts, argued, that it is not a proper function of government to advance the religious mission of parochial schools, and so it has struck down state attempts to fund specific educational activities within parochial schools.[59] As the AJC has put it, "the predominant view of the Jewish Community is that all religions will flourish best if government keeps its hands off, neither to hinder nor to help them."[60]

Notwithstanding, in the 1993 case of *Zobrest v. Catalina Foothills School District,*[61] the Supreme Court ruled (5-4) that the establishment clause does not bar using government money to pay for a sign language interpreter to accompany a deaf student in a parochial school. Significantly, this decision marked the first time that the Court has allowed a public employee to be part of a religious school's instructional program.

It now appears that the major "parochial" battleground in the years immediately ahead in the U.S. is likely to be the issue of tax-dollar vouchers for parents to enroll their children in any school they may wish, including denominational schools. Indeed, the AJC, ADL, the American Jewish Congress, and NJCRAC are opposed to such vouchers for religious schools as well as for private schools, both on constitutional and public policy grounds. COLPA, however, the litigation arm of Agudath Israel, and other Orthodox religious Jewish NGOs, are in favor. The Supreme Court has never ruled squarely on the constitutionality of such tax-funded vouchers for religious schools. But with the various initiatives now pending, it may be just a matter of time before one is passed and a litigation challenge to vouchers for such schools reaches the court. As a review of the cases would indicate, each side in this battle can cite case law in its favor; and each side would be supported by, if not spearheaded by, Jewish NGOs.

In the matter of religious symbols on public property, following on this "separationist" theme, the AJC joined other Christian and Jewish groups in filing amicus briefs opposing government sanctioned religious symbols on public property in *Lynch v. Don-*

nolley (1982).[62] The U.S. Supreme Court upheld (5-4) the constitutional right of a city to erect a Nativity scene as part of its annual Christmas celebration. This case, in the eyes of some Jews, was so insensitive to any religious sensibility that they said it was a mistake for the ACLU to have brought this "hard" case in the first place, and an even greater mistake for Jewish organizations to have participated in it. But in 1986 the ACLU, joined by the three Jewish NGOs — was back in court again, in the dual case of *County of Allegheny v. ACLU.*[63] This time to challenge not only the display of a crèche in a courthouse, but also a menorah display, which was provided by Habad, a branch of the Lubavitch hassidic movement. In this instance, the secular and liberal Jewish NGOs challenging the displays were opposed by Habad and the Orthodox Jewish NGOs supporting them. It is a pattern that is increasingly going to characterize church-state litigation in the United States. In a dual and ambivalent ruling, the Supreme Court (5-4) declared the Nativity scene unconstitutional ("endorsement of religion"), but upheld the menorah (which had been placed alongside a Christmas tree) as a "secular expression."

Canada

The Canadian experience, and the role of Canadian Jewish NGOs in the matter of religious human rights, contrasts sharply with the situation in the United States. This contrast reflects not only the different rights cultures of the two countries, and the distinct constitutional history, but the different rights perspectives, or Jewish perspectives, of Jewish NGOs in the U.S. and Canada. These differences find expression in the manner in which, both through litigation strategy and otherwise, Jewish NGOs in the two countries have adopted dramatically different, if not opposite, principles and policies. Indeed, the "constitutionalist" and normative perspectives of Canadian Jewish NGOs invite one to ask some serious questions about the seemingly "self-evident truths" as held out by the American Jewish organizations.

(i) Canadian Constitutional Law Prior to the Charter of Rights

First, a word about constitutionalism and context. It should be noted that, for the first 115 years of the Canadian constitutional experience, Canada, unlike the United States, did not have any entrenched Bill of Rights.

Indeed, any inquiry into the Canadian constitutional process in the first 115 years of Canadian constitutional history, from 1867 to 1982, would reveal a continuing preoccupation with the powers of government at the expense of the rights of the people. More particularly, traditional constitutional analysis and reform revolved around the division of powers between the federal government and the provinces — otherwise known as "legal federalism" — as distinct from the American preoccupation with limitations on the exercise of power, whether federal or state, otherwise known as "civil liberties." The result was that the powers of government tended to precede, if not obscure, the rights of the people, when the rights of the people ought to have preceded the powers of government. The outcome was a political or legal theory in which the constitutional discourse was about federalism or power, and not about rights or people.

In a word, constitutional law developed in Canada as a "powers process," a battle of "sovereign jurisdictional rivalry" between the federal government and the provinces, with the courts as the arbiters of that process, rather than as a "rights process" with the courts as the guardians of those rights. It is not surprising, therefore, that while in the United States the popular metaphor of the American Constitution — "life, liberty and the pursuit of happiness" — is a rights-oriented, people-oriented metaphor, historically the popular metaphor in the Canadian constitution, until the Charter, was "peace, order, and good government" — a power-based, government-oriented metaphor, with a clear federalist, if not centralist, orientation.

Professor Bora Laskin, who later became Chief Justice of the Supreme Court of Canada, summed up this pre-Charter constitutional experience thusly: "The basic constitutional question was which jurisdiction should have the power to work the injustice, not whether the injustice should be prohibited completely,"[64] or as he otherwise put it, "the constitutional issue is simply whether the particular suppression is competent to the Dominion or the Province, as the case may be."[65] In this context, Canadian Jewish NGOs, like other NGOs, had no particular standing, or constitutional basis for "rights-based" advocacy.

Hence, this historical obsession with the division of powers not only obscured the claims to protection of civil liberties, but very often determined the disposition of the claims themselves. Ironically enough, legal federalism or "jurisdictional trespass" became the "looking glass" for the determination and disposition of civil liberties issues. Accordingly, whenever a federal or provincial statute appeared to offend against civil liberties, the cen-

tral question for judges became, "is the alleged denial of civil liberties within the legislative competence of the denying legislature?" Sometimes this jurisdictional technique worked, more often it did not. If it did not work, that was the end of the matter, however much this analysis may have obscured, let alone denied, the civil liberties issue. Even when it worked, it left the disturbing inference that if the same offensive legislation had been passed by the competing, yet competent, legislative jurisdiction, that legislation, under this jurisdictional logic, would have necessarily been held to be valid.

So it was, then, that legislation offending religious human rights was either upheld or invalidated on jurisdictional grounds only, i.e., impugned not on the grounds that the legislation was offensive, but that the wrong legislature enacted it. Accordingly, in the *Saumur*[66] case, for example, a Quebec City by-law which effectively prohibited Jehovah's Witnesses from distributing their religious tracts was struck down on the grounds that it trespassed on federal jurisdiction in relation to criminal law, (i.e. the wrong jurisdictions enacted it). While a long line of cases held that "Sunday Observance" legislation was within the exclusive federal jurisdiction over criminal law, not that it may offend freedom of religion. It is not surprising, then, that Canadian constitutional law does not record any Jewish NGO involvement in these "religious rights" controversies; for the "rights" issues were but adjuncts to the "jurisdictional" issues, and with NGOs just bystanders to an inter-governmental power process.

(ii) Freedom of Religion Under the Charter

With the adoption of the Charter of Rights in 1982, and the constitutionalization of rights in Canada; an historical transformation occurred. There was, in Kuhn's language,[67] a "paradigm shift" from a "powers process" to a "rights process," with the courts as "guardians of rights," citizens as "rights bearers," and NGOs as prospective "intervenants" on behalf of human rights. Now any law that affected freedom of religion, as in the *Saumur* case above, was vulnerable to challenge under S.2(a) of the Charter, which guaranteed to everyone the "fundamental freedom" of "freedom of conscience and religion."

Accordingly, in 1985, three years after the adoption of the Charter, the Supreme Court of Canada, in *R. v. Big M Drug Mart,*[68] struck down the Lord's Day Act, the federal Sunday observance legislation which mandated store closings on Sundays

and other days on religious grounds, i.e., Christian holidays. Significantly, in striking down an act that for seventy-five years had withstood *any* constitutional challenge until the advent of the Charter, Chief Justice Dickson offered the following definition of freedom of religion: "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."[69]

Likewise, in the *Zylberberg*[70] case, the Ontario Court of Appeal struck down an Ontario regulation mandating religious exercises, including prayer in the public schools, on the grounds that it "imposed Christian observances upon non-Christian pupils, and religious observances on non-believers."[71] Two years later, in *C.C.L.A. v. Ontario,*[72] the same court struck down another regulation requiring a public school to devote two periods per week to religious education on grounds that this was "Christian" education. The government of Ontario did not appeal these decisions, while the Canadian Jewish Congress intervened in both cases to challenge the Ontario legislation as contrary to Section 2(a) of the Charter, something that would surely not have been possible in the pre-Charter law.

Admittedly, the Charter has wrought a constitutional revolution in Canada to the point where, as Madame Justice Claire L'Heureux-Dubé of the Supreme Court put it in 1987, "the Court has stretched the cords of liberty more in five years than the U.S. Supreme Court has in 200"; and, *inter alia*, the court struck down Sunday Observance legislation; legislation mandating "religious exercises," including school prayer, in public schools; and regulations requiring religious education. In each of these cases, Jewish NGOs intervened to challenge the constitutionality of the legislation.

Allowing for a hitherto unavailable public advocacy role for Canadian Jewish NGOs, the protection of religious human rights, and the role of Jewish NGOs in Canada has otherwise been remarkably different in Canada than in the United States. The chief distinctions to this effect may be summarized as follows:

While American Jewish NGOs have gone to court to challenge government sanctioned religious symbols on public property, Canadian Jewish NGOs have avoided controversial "crèche" cases. On the contrary, they have supported, for example, the building of a Succa (symbolic shelter marking the Jewish holiday of Succot) at City Hall in Toronto, or a Chai Menorah on the grounds of the

Manitoba Legislative Assembly to mark the holiday of Hanukkah, while being singularly unconcerned with a Christmas tree at city hall plaza.[73]

Secondly, while American Jewish NGOs have challenged any government aid to Jewish education, their Canadian counterparts have supported such government assistance in Canada. In fact, Jewish NGOs like the Canadian Jewish Congress have even gone to court to secure government support for Jewish education precisely on the grounds that the absence of such support constitutes a denial of *both* the freedom of religion and the equality provisions of the Canadian Charter of Rights and Freedoms. In this sense, therefore, Jewish NGOs in Canada have interpreted the promotion and protection of religious human rights in the matter of government aid to education in a manner exactly opposite to their counterparts in the United States.

Thirdly, whereas Jewish NGOs in the United States have been steadfast in limiting government aid to public schools only, and have eschewed any government recognition of a state-supported private school system on both constitutional and policy grounds, Jewish NGOs in Canada have sought equal standing for Jewish schools within, for example, the Quebec school system, arguing that the public school system in Quebec and Ontario under the Canadian Constitution is effectively confessional, (i.e., it authorizes government aid to Catholic and Protestant denominational schools). In other words, rather than challenge the constitutionality of the "confessionality" principle in the Quebec public school system, they have sought to be recognized as another component of it.[74]

Finally, whereas American Jewish NGOs have filed amicus briefs challenging a variety of breaches of the wall of separation, Canadian Jewish NGOs have not espoused the constitutional principle of separation. Instead, on the basis of S.29 of the Canadian Charter of Rights, which expressly incorporates the "confessionality" principle from S.93 of the B.N.A. Act, effectively constitutionalizing the role of the state in religion, Canadian Jewish NGOs have accepted, even welcomed, government involvement in religious matters. Indeed, Jewish NGOs in Canada are now seizing on this "confessionality" principle, and the equality rights principle in S.15 of the Charter, to seek support for government assistance to Jewish schools.

It appears that the different approaches described above may be attributed to the divergent political and legal culture of the two countries. Whereas American constitutionalism is organized around an "individual rights" theory and culture, Canadian con-

stitutionalism is organized as much around group rights and communitarian sensibilities as individual rights. It is a legal culture, reflected both in the provisions protecting group rights and individual rights in the Canadian Charter of Rights and Freedoms, as well as in the case law interpreting and applying the Charter.[75] Indeed, the Canadian Supreme Court's definition of the values underlying a "free and democratic society" like Canada have included express reference to "cultural pluralism and group identity."

Moreover, the United States, for its part, eschews any relationship between church and state. For the mainstream American Jewish NGOs, this notion of "separationism" emerges as much an article of faith as a principle of constitutionalism. In Canada, however, the Charter of Rights acknowledges the relationship or co-mingling of the two, certainly as far as denominational rights in education are concerned, a principle upheld by the Supreme Court of Canada,[76] with Canadian Jewish NGO support.

Likewise, the socio-cultural imaging of the United States has been that of a "melting pot," or at least, a legal culture uncomfortable with the recognition of "multiculturalism" as a cultural, let alone juridical norm. By contrast, in Canada the socio-cultural imaging has been that of a "mosaic," while "multiculturalism" — a highly divisive code word in the U.S. lexicon — is entrenched as a constitutional norm in Section 27 of the Canadian Charter of Rights and Freedoms.[77]

Indeed, the United States Constitution makes no reference to God, while the Canadian Charter of Rights, in its opening Preamble, speaks of a Canada founded upon principles that recognize the "supremacy of God and the rule of law."[78]

As sociologists are fond to point out, the organizing idiom of American constitutionalism is that of "the right to life, liberty, and the pursuit of happiness," while the organizing idiom of Canadian constitutionalism, if not Canadian culture, has been that of "peace, order and good government," reflective, as Edgar Friedenberg pointed out, of the Canadian "deference to public authority" — at least in the pre-Charter culture.

Finally, Americans, born of revolution — and having endured the ravages of a Civil War — tend to regard their government as more adversary than ally. Canadians, products of a parliamentary system and spared the fall-out of revolution, tend to regard their government as more friend than foe, though the rights culture is increasingly modifying that notion.

But even apart from different constitutions and cultures in Canada and United States, there is also a different Jewish sensi-

bility regarding the particular promotion and protection of religious human rights, and a different public advocacy deployed to achieve it. For example, in the United States the notion of separation of church and state not only protects Jews from "established" religion, but protects them from their own inner religious establishment as well. In Canada, Jews have been more generally responsive to a traditional sensibility, which influences their approach and sensibility regarding religious human rights as a whole.

Moreover, in the United States, Jewish NGOs have been largely secular activist organizations — with even religiously Jewish NGOs more prominently associated with Reform Judaism and espousing a "separationist" ideology. In Canada, Jewish NGOs, while also secular activist organizations, tend to have a more "traditionalist" sensibility, while religious Jewish NGOs tend to be more orthodox, and traditional, while eschewing a "separationist" ideology.

The mainstream American Jewish NGOs, like other human rights NGOs, are highly "Americanized" and "secularized" in their identity, eschewing more "tribal" configurations, let alone government aid for Jewish "parochial" education. Canadian Jewish NGOs, like other Canadian ethno-cultural NGOs, assert the "ethno-cultural" — or Jewish — configuration of their identity; and they seek government support for their "Jewish" schools — as much as an expression of the multicultural mosaic to which they belong, as an assertion of the "tribal" requisites for their development as a "community," if not as a "people." The factums of the Jewish appellants in the *Adler* case,[79] and of the intervenant Canadian Jewish Congress, resonate with a communitarian and traditionalist Jewish discourse and sensibility that would simply be inconceivable in the amicus briefs of the secular and liberal American Jewish NGOs.

Fourth, American Jewish lawyers and academics — the legal support system for American Jewish NGOs in their litigation strategy — have largely shared an "American Civil Liberties Union" (ACLU) sensibility; they can be found, therefore, for the most part, on the same side as the ACLU in church-state litigation. In Canada, the core NGO support group of Canadian Jewish lawyers and academics have regarded their Jewish and human rights sensibilities as complementary and convergent, and anchored in the values of equality, human dignity, group identity, multiculturalism and the like, a community sensibility. These are also the very values that the Canadian courts, and the Canadian

constitution, have held out as the normative referents of a "free and democratic society."

It is not surprising, then, that in the *Adler* case, the most important church-state case to have reached the Supreme Court of Canada, Canadian Jewish NGOs and the Canadian Civil Liberties Association (CCLA) were on opposite sides of the issue. Indeed, while the CCLA factums could well have been written by the mainstream American secular and liberal Jewish NGOs, they could never have been argued or supported by the mainstream *Canadian* Jewish NGOs, or the legal academics and lawyers who support them.

In addition, it is interesting to note that the very litigation strategy is itself more of an American phenomenon. Indeed, Canadian Jewish NGOs, even with the advent of the Charter and their prospective role as intervenants, continue to prefer parliamentary or representational advocacy, which has not yet been impoverished by the Charter culture. Admittedly, however, the Charter is operating its own rights-based litigation and intervention strategy in Canada.

Indeed, the American Jewish NGOs have not only focused more on a litigation strategy than their Canadian counterparts, as set forth above, but the very notion of a "litigation" strategy is absent from the Canadian Jewish NGO approach. Moreover, and as part of their litigation strategy, American Jewish NGOs have developed a "strategic public advocacy" that is far more developed, organized and funded than their Canadian cohorts.

Accordingly, while Canadian Jewish NGOs like the Canadian Jewish Congress made a historic contribution to the development and adoption of a Canadian Charter of Rights, anchoring their public advocacy in a "kinship" with the Charter and its underlying normative referents, their actual court interventions have been more *ad hoc* than strategic, and more insular than the broad-based public advocacy of their American Jewish counterparts.

In other words, with some notable exceptions, Canadian Jewish NGOs have been prepared, or obliged for budgetary considerations, to consign "human rights" advocacy to other human rights NGOs, reserving for themselves a more narrow, and limited, conception of their role in Charter litigation to one where there was a direct "Jewish nexus." Effectively, then, they have not embraced the principle that guided American Jewish NGO involvement in the religious liberty cases, namely, that the human rights of Jews would be respected and secured in the degree that the rights of all people were safeguarded and respected.

Also, by absenting themselves from human rights litigation where they did not discern a Jewish nexus, Canadian Jewish NGOs unsuspectingly acquiesced in a prospective "adverse impact" from this litigation for matters of Jewish concern, such as in the equality rights litigation.

Most importantly, and unlike the situation in the U.S., the absence of a clear strategy on these issues resulted in situations where the Canadian Jewish Congress (CJC) did not intervene in cases even where a Jewish nexus was discernible, such as in the historic "Sunday Observance" cases, whose outcome was of direct interest and consequence for Canadian Jewry.

To be fair, the CJC, like any NGO, had to adjust commitments to capacities; and, in the absence of any legal department within the organization, such as exists with the American Jewish NGOs, its court involvement was necessarily much more restrained. Nevertheless, while the CJC did not appear to map out its interventions in such matters as equality rights and religious liberty as part of an overall litigation strategy as, for example, did the Women's Legal Education and Action Fund (LEAF) on equality and gender issues , the CJC and the League for Human Rights of B'nai B'rith did make an important contribution in the cases and areas where they did intervene.

In particular, mention should be made of two areas where Canadian Jewish NGOs intervened in every case before the courts: hate speech and the bringing of Nazi war criminals to justice. For reasons of brevity, this discussion will now focus on one of them, hate speech, an issue which will equally serve as a major case study of the contrasting public advocacy of American and Canadian Jewish NGOs in the matter of combating discriminatory practices.

The Role of Jewish NGOs in Combating Violations of Human Rights in Canada and the U.S.

The following discussion will focus on two areas where Canadian and American NGOs have made significant, however dramatically different, contributions to the protection against discrimination — namely, hate speech and discrimination in employment on grounds of religion.

Hate Speech as a Discriminatory Practice: The Constitutionality of Anti-Hate Legislation

If there is one area and issue that has galvanized the involvement of every single Canadian Jewish NGO, it has been the right of minorities to protection against group vilifying speech. Indeed, all of the major Canadian Jewish NGOs supported the *enactment* of the anti-hate law, as they had supported earlier federal and provincial anti-discrimination legislation, and have regarded such anti-hate legislation as part of the *genre* of legislation protecting, *inter alia*, against discriminatory practices.

Moreover, they have also intervened in support of the constitutionality of the legislation in *every hate speech case* that has come before the Supreme Court of Canada, including supporting the constitutionality of the criminal law remedy, or "group libel" legislation, prohibiting the public and willful promotion of hatred against an identifiable group.

Admittedly, American Jewish human rights NGOs might be surprised to learn that their Canadian counterparts were largely responsible for the *enactment* of Canada's anti-hate legislation to begin with, let alone the *intervention* of Canadian Jewish NGOs in all the "hate speech" cases in support of the constitutionality of such legislation. For unlike the Canadians, *all* the major American Jewish NGOs regard hate speech as protected speech under the First Amendment, and have filed amicus briefs in support of the constitutionality of hate speech, or have challenged legislation seeking to combat it.

What follows, therefore, is a comprehensive snapshot of the contrasting positions of American and Canadian Jewish NGOs in hate speech litigation using Holocaust denial hate speech directed against Jews as a case-study. What emerges are deeply divergent views not only from a legal or rights perspective, but also from a cultural-religious or Jewish one, reflecting not only the different legal cultures that these Jewish NGOs inhabit, but the different Jewish perspectives of the NGOs themselves.

	American	*Canadian*
1	Free speech issue	Equality issue — Discriminatory Practice
2	Absolutist Approach — All hate speech is protected speech — no limits	Balancing Approach — Competing Right: The right of minorities to protection against group vilifying speech
3	Individual rights	Group rights — rights of minorities

4	Content neutral	Context relevant
5	Ahistorical: no reference to Holocaust, to Jews as victim, or to historical oppression of Jews	Historically grounded: reference to Holocaust and "catastrophic effects of racism," to Jews as target, and as historically oppressed group
6	Political speech: government as censor — establishment as target	Abhorrent speech — parliament as protector — minority as target
7	Underlying values of free speech — marketplace of ideas, democratic participation, individual self-realization — need to be promoted and protected	Agreement on promotion and protection of underlying values of free speech; but hate speech regarded as "assaultive" of each of these values
8	No reference to international law — U.S. not even a state Party to International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	International law as "relevant and persuasive authority"; Canada as state party to both ICCPR and CERD, which prohibit hate speech as a discriminatory practice
9	No reference to international jurisprudence	Reference to international jurisprudence prohibiting hate speech
10	No comparative perspective — no reference to legislative and judicial experience of other "free and democratic societies"	Reference to comparative jurisprudence of other free and democratic societies; courts uphold anti-hate legislation in order that, *inter alia*, such societies remain free and democratic
11	No reference to U.S. as a multicultural society, or to multiculturalism as a normative referent	Canada held out as multicultural society, multiculturalism as a constitutional norm, and hate speech as an assault on multiculturalism
12	No "harm-based rationale" regarding injury caused by hate speech	"Harm-based" rationale for limiting hate speech regarded as injurious to members of the target group, to the target group itself, and to society as a whole
13	Anti-hate legislation will lead us inevitably down the slippery slope into censorship	Danger of different "slippery slope" not into censorship but into hate — "a swift slide into a marketplace of ideas, in which bad ideas flourish and good ideas die"
14	The value/virtue of tolerance	The more that hate speech is tolerated the more it is likely to occur — the "paradox of tolerance" is that it breeds more intolerance

15	The answer to hate speech is more speech	More speech is desirable and always possible; but hate speech silences its victims

In a word, Canadian Jewish NGOs have regarded hate speech not as "protected" speech, but as "assaultive" speech; not as protective of the core values underlying free speech, but as assaultive of these values; not as contributing to a free and democratic society, but as destructive of such a society, particularly a multicultural domestic polity; not as expressive of the autonomy of the individual, but as assaultive of the inherent dignity of the human person, let alone the equal dignity of all persons; not as "political speech" with the government as censor, but as "abhorrent speech" with minorities as targets — and parliament as protector; not as a "libertarian" issue, with hate speech as protected speech, but as an equality issue, and hate speech as a discriminatory practice; not as abstracted from international obligations — or the comparative experience of other free and democratic societies — but as anchored in international human rights law, prohibiting such racist hate speech; or in the jurisprudence of other liberal democracies which have upheld such anti-hate legislation in order that such societies remain free and democratic.

Clearly, the hate speech controversy is a dramatic case study of the contrasts between the American and Canadian legal cultures. It is also a looking glass into the dramatically different perspectives — and sensibilities — underlying the public advocacy of American and Canadian Jewish NGOs. In a word, the sensibility of the American Jewish NGO appears as secular, individualistic, libertarian, and ahistorical — an "American" sensibility.

But the sensibility of the Canadian Jewish NGOs appears as multicultural, communitarian, egalitarian, historical; in a word, a Jewish ethno-cultural-religious sensibility, a "Jewishly distinct" public advocacy with its own *Je me souviens* — or *Zachor* (Remember) — and not entirely unrelated to the dynamics and discourse of "distinct society" in the Canadian polity.

Combating Discrimination in Employment on Grounds of Religion in Canadian and American Law: The Role of Jewish NGOs

In June 1994, in an important case[80] involving "adverse impact discrimination," the Supreme Court of Canada reversed a lower

court opinion which had upheld the refusal of a Catholic School Board to compensate Jewish teachers for loss of pay for not working on Yom Kippur. In doing so, the court relied on a line of precedents[81] and principles in anti-discrimination law in the matter of religion which Canadian Jewish NGOs had helped establish through their interventions in those cases. (Interestingly enough, notwithstanding the clear "Jewish" nexus in this case, no Canadian Jewish NGO intervened in the litigation.)

In particular, the court held that adverse impact discrimination will arise where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a different and discriminatory effect upon another employee or group of employees based on a prohibited ground of discrimination, i.e., religion. This principle and proposition can be expected to guide the court in cases of this kind.

In the United States, both the litigation process and the outcome have been dramatically different. From a statutory perspective, the American law is similar to the protection against religious discrimination in Canadian legislation with Title VII of the Civil Rights Act of 1964 prohibiting discrimination in employment on the basis of religion, while Section 70(j) was added to Title VII by amendment in 1972. It defines "religion" as follows: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business" (42 U.S.C. Section 2000e(j)).

However, in its decision in similar cases,[82] the U.S. Supreme Court has interpreted this provision narrowly, so as to place relatively little restraint on an employer's ability to refuse to provide religious accommodation. Regrettably, the American Supreme Court has tended to interpret the legislation through the principle of the establishment clause, rather than that of the free exercise clause of the First Amendment. Indeed, the court has appeared to ignore the fact that the principle of the disestablishment of religion was itself rooted in the Free Exercise Clause, and that "the spirit, if not the letter of this clause points to the conclusion that Title VII should be interpreted to afford meaningful protection against religious discrimination."[83]

The court's interpretation is inconsistent with the principle that religious discrimination — or lack of accommodation — should be treated as seriously as any other type of discrimination. Since what the court has done involves interpretation of legisla-

tion, rather than constitutional doctrine, the matter is susceptible to correction by the Congress, and American Jewish NGOs are now engaged in helping to draft legislation to provide greater protection against religious discrimination for observant members of all faiths. It is not without some irony, however, that these same NGOs helped develop the very "separationism" and disestablishment jurisprudence that has been used to inhibit the free exercise clause and the protection against religious discrimination.

What Can the Role of Jewish NGOs in the Promotion and Protection of Religious Human Rights Teach Us?

Some summary observations: The foregoing analysis of the role of Jewish NGOs not only confirms the anchorage of religious human rights in the pantheon of international human rights law — which cynics and skeptics alike will regard as trite law and trite observation — but it demonstrates the persuasive authority of international law in the matter of human rights, and the efficacy that can be made of it. In a word, whether it be the struggle for the religious human rights of oppressed Jewry abroad, or the constitutionality of anti-hate legislation at home, international human rights law in the matter of religious human rights has had a significant impact.

For example, in the case of the former Soviet Union, preoccupied as it was with law and legitimacy, the invocation of international law and remedy by Jewish NGOs were crucial instruments in the "mobilization of shame against the Achilles heel of the human rights violator," as Andre Sakharov put it. For its part, the Supreme Court of Canada, in upholding the constitutionality of anti-hate legislation, invoked international law, adduced by Jewish intervenor NGOs, as a "relevant and persuasive authority."[84] On both the levels of principle and precedent — as well as tactics and strategy — the observation may be trite, but the law is not.

The principle of separationism — or the "wall of separation" between church and state — is as much "culture bound" as it is "rights-based." For how else to explain that American and Canadian Jewish NGOs have come down on opposite sides of church-state issues in the matter of state aid to religious education, or religious symbols on public property. For the Canadian Jewish NGO, it is a matter both of the free exercise of religion, and the equality of all religions, and should be supported. For the American Jewish NGO, it is a matter of the establishment of religion

and should be rejected. One thing, however, is clear: For both sets of NGOs, church-state issues are part of the larger struggle for human rights, and central to their respective agendas.

Similarly, the contrasting Canadian and American Jewish NGO approaches to the constitutionality of anti-hate legislation — reflected in the earlier snapshot of the syntax of opposing legal arguments — represent not only "two views of liberty," but different views of equality. Indeed, the American perspective is different not only from the Canadian, but from the European, Asian, African, and Latin American Jewish NGOs, whose views on hate speech are more communitarian than individualistic, more egalitarian than libertarian, and more inclusive than exclusive. In a word, for all Jewish NGOs, save for American ones, combating racist hate propaganda is not only a compelling issue of fighting discrimination on grounds of religion, but a priority on the Jewish NGO agenda, again reflecting the converging influence of legal cultures and NGO sensibilities.

One of the more interesting findings of this inquiry is that the articulated major premise for Jewish NGO advocacy in the matter of religious human rights reposes in the teachings of the Jewish religion itself. Indeed, the teachings of the Jewish religion find expression in the very mission statements of the Jewish NGOs, which speak of the responsibility that Jews have for the "repair" of the world, as they do for each other; or that the saving of a single life is tantamount to saving the entire world, because we are all created in the image of God.

But an even more encouraging outcome of this inquiry is the appreciation of the importance that each of the major religions attaches to religious human rights, and the principle of universality which finds expression in the teachings of the major religions — the notion that all human beings have been created in the image of God. This not only holds out much promise and hope for the value and validity of inter-faith dialogue, but also for joint "trans-religious" NGO advocacy in the promotion and protection of religious human rights. Such "trans-religious," and where appropriate, trans-national advocacy organized around a universalist perspective and principle can be an enormously powerful and effective voice in the struggle for human rights and human dignity in our time.

Furthermore, the advocacy and litigation strategy of the major American Jewish human rights NGOs in the matter of religious human rights proceeds from the assumption that the "human rights of Jews would be respected and secured to the degree that the rights of all people were safeguarded and respected." Again, this

not only reaffirms the importance of religious human rights to the larger agenda of human rights but the importance of religious human rights to the Jewish NGO agenda

Accordingly, most of the cases in which Jewish NGOs filed amicus briefs were on behalf of non-Jews. But while this principle is to be welcomed, it can also be a double-edged sword. To the extent that the Jewish NGO intervenes to challenge the constitutionality of policies and practices that are part of the mainstream Christian sensibility, they run the risk not of being respected for their intervention, but of being resented for it.

The internationalization of human rights — or humanization of international law — has been paralleled by the internationalization of Jewish NGO advocacy. Indeed, it is arguable that it was the early internationalization of Jewish NGO advocacy around religious human rights that may have inspired the Jewish contribution to the development of international human rights law as a whole. As well, in an increasingly interdependent universe, transnational public advocacy may be the defining characteristic of the human rights NGO of the twenty-first century. Accordingly, transnational Jewish NGO advocacy in the promotion and protection of religious human rights may serve as both case-study and model for strategic advocacy by human rights NGOs in the matter of the promotion and protection of human rights generally.

The struggle for Jewish religious rights in the decade ahead will contain its own *internal* struggle for gender equality. Indeed, while the plight of *agunot* is more a struggle for equality than it is for religion, this denial of equality is rooted in religion itself — a matter which may presage the struggle for equality in all religions as part of the larger struggle for human rights itself — and central to the NGO role in the promotion and protection of religious human rights.

Notes

1. D. Oaks and R. Drinan, *The War Between Church and State* (Chicago: Chicago University Press, 1963).
2. While the UN Charter was being drafted, Chile, Cuba, New Zealand, Norway, and Panama suggested detailed provisions on the right to freedom of thought, conscience, and religion. The suggestion was not adopted. The UN Charter did however become the first international agreement to incorporate the idea of universal human rights, and one of the world organization's principal purposes was to encourage "respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"

(Article 1). The Charter pledged all Member States, jointly and separately, to pursue this goal (Articles 55 and 56). For a general compilation of the general instruments relevant to the freedom of religion or belief and freedom from discrimination based on religion or belief contained in international and regional instruments. See UN Doc. E./CN.4/L. 1417 (197a).

3. UN G.A. Res. 217(III)(A) (1948), 2 United Nations Resolutions, Series I, 135, 138 (D.J. Djonovich, ed.).
4. For a general text of United Nations human rights instruments mentioned in this article, see *Human Rights: A Compilation of International Instruments*, United Nations, (1988). The *Genocide Convention* appears on p. 143.
5. For text, see *Human Rights* (1988): 56.
6. UN Juridical Y.B. (1966):178, 184.
7. 14 I.L.M. (1975):1292, 1295.
8. *Human Rights* (1988): 56.
9. 28 I.L.M. (1989):1457, 1462.
10. Under this provision, no derogation may be made from Article 18 (guaranteeing freedom of religion) even in times of emergency.
11. Unlike other rights, freedom of religion, as guaranteed by article 12, may not be suspended in "time of war, public danger, or other emergency that threatens the independence or security of a state party."
12. Yoram Dinstein, *Freedom of Religion and the Protection of Religious Minorities* (New York: American Jewish Committee, 1981), p. 2.
13. *Ibid.*
14. *Ibid.*
15. This "universalist" perspective finds expression in both the *halakhah* and *aggadic* literature. For example, the rabbis say that Adam was made from the dust gathered by God from the four corners of the earth so that no person could say later that he was made from dust gathered only in his part of the world. In another Talmudic passage, the rabbis ask: "Why were there not several Adams and several Eves?" And they answer: "So that it might not be said that some races are better than others." In similar vein, the rabbis tell us that the Torah was revealed in the desert in order to make it accessible to all. No man's land was every man's land.
16. This moral injunction is found in the Jewish prayer "Aleinu," which is said three times daily.
17. M. Sanhedrin 4:5.
18. Norman Cohn, *Warrant for Genocide* (California: Scholars Press, 1982).
19. Izhak Englard, "Law and Religion in Israel," *American Journal of Comparative Law,* 35(1987):184.
20. See, for example, the "multi-issue" public affairs agenda of the National Jewish Community Relations Advisory Council (NJCRAC), the umbrella planning and coordinating body for the organized

Jewish community. Its advocacy agenda reflects and represents the Jewish mosaic.

21. See, for example, the agenda or mission statements of international Jewish NGOs like the World Jewish Congress, B'nai B'rith, American Jewish Joint Distribution Committee, Hadassah, and International Council of Jewish Women; or those of the major American Jewish NGOs, which are themselves becoming increasingly internationalized, such as the American Jewish Committee, the Anti-Defamation League, the American Jewish Congress and the Simon Wiesenthal Center; or Canadian Jewish NGOs such as the Canadian Jewish Congress, B'nai B'rith of Canada and its League for Human Rights, Hadassah-WIZO, and the National Council for Jewish Women. Even the so-called single issue NGOs, such as the National Conference for Soviet Jewry or the Union of Councils for Soviet Jewry, dealt with the Soviet Jewry issue in its religious, cultural, ethnic, and national dimensions, thereby reflecting and representing this Jewish composite or mosaic of intersecting identities that define what it means to be Jewish or the mosaic by which these Jewish NGOs define themselves. Indeed, even the religious or sectarian NGOs, like the Union of Orthodox Jewish Congregations of America, or the United Synagogue of Conservative Judaism/Women's League for Conservative Judaism, and the Union of American Hebrew Congregations (Reform) have an agenda that embraces the intersecting religious, cultural, ethnic and national identities. The Joint Program Plan of the National Jewish Community Relations Council, the voluntary association of Jewish community relations agencies, is a case-study of this inclusive notion of a Jewish NGO.
22. • The religious rights of Jews as individuals involved in the free exercise of religion.
    • The religious rights of Jews as a group where the free exercise of religion can only be exercised in community with others.
    • The religious rights of Jews as a community with respect to, inter alia, the responsibilities of Jews as a community or collectivity in the diaspora.
    • The religious rights of Jews as a culture, referring to the transmission of ideas, heritage, values, norms, morals, and the like that make up the composite of a culture.
    • The religious rights of Jews as a people, where such rights are inextricably bound up with the Jewish right of self-determination.
    • The religious rights of the Jews as a nation in their homeland, Israel, particularly respecting those rights that may be fulfilled only in Israel, and referring, conversely, to the centrality of Israel to the Jewish people.
23. Natan Lerner, *Group Studies and Discrimination in International Law* (Dordrecht: Martinus-Nijhoff, 1991), p. 122.
24. 1) There are religious or sectarian Jewish NGOs that are organized around and represent denominational or sectarian branches only — or even a particular feature of the sectarian or denomina-

tional branch. There are, therefore, religiously Orthodox, Conservative, Reconstructionist, or Reform Jewish NGOs devoted to the promotion and protection of their particular sectarian interest. It should be noted that these sectarian Jewish NGOs increasingly pursue a broad domestic and international public affairs agenda.

2) There are secular and liberal American Jewish NGOs, sometimes referred to as Jewish "human rights" NGOs, that concern themselves primarily with the promotion and protection of religious human rights from a constitutional or rights perspective, and that, inter alia, use church-state litigation as a main prong in their strategic advocacy. The counterpart secular and liberal Jewish NGOs in Canada — like the Canadian Jewish Congress — tend to have more of a "traditionalist sensibility," with "church-state" litigation representing a less prominent feature of their advocacy.

3) There are Holocaust-centered Jewish human rights NGOs. Although this group does also include some of the Jewish NGOs in the second above mentioned category, they themselves do not belong to it. Instead, they are particularly concerned with protecting Jews from discrimination, in general, and from Jew-hatred, in particular. For these organizations, Holocaust remembrance is an organizing idiom, Holocaust denial a "clear and present" danger, and bringing Nazi war criminals to justice a special responsibility.

4) There are international human rights NGOs such as the World Jewish Congress who serve as the "diplomatic" arm of the Jewish people, and whose mission "is to address the interests of Jews and Jewish communities all over the world" (see Mission Statement, World Jewish Congress). Indeed, the mission statement of the World Jewish Congress is both an expression and example of the integrative advocacy of such international Jewish NGOs organized around the concern for Jews and Judaism in their religious, cultural, ethnic, and national configurations as well as involvement in the broader international human rights agenda.

5) There are international Jewish NGOs, such as the American Jewish Joint Distribution Committee (JDC), whose ongoing mission is the "relief, rescue, and reconstruction of Jews and Jewish communities in distress" (see Mission Statement, JDC, 1994), citing the mishnaic injunction that "to save one person is to save an entire world."

6) There are general purpose, grassroots, mass membership international Jewish NGOs such as B'nai B'rith, the "oldest and largest Jewish service organization in the world" (see B'nai B'rith Mission Statement, 1994). Indeed, its name, B'nai B'rith — meaning Sons (children) of the Covenant, its emblem, the seven-branched menorah, and its motto have a clearly discernible "religious" motif.

7) One of the oldest human rights NGOs, and the oldest Jewish human rights NGO, is the Paris-based Alliance Israelite Universelle. Founded in 1866, the AIU, together with the Anglo-Jewish Association and the Board of Jewish Deputies, made an important

contribution to the early development of international human rights law, in general and religious human rights, in particular. See, for example, reference to AIU in Nathan Fineberg, "The International Protection of Human Rights and the Jewish Question (A Historical Survey)," *Israel Law Review,* 3(1968):487.

8) There are "Jewish" NGOs that are almost exclusively devoted to a universalist agenda, as in the work of those NGOs who operate to alleviate hunger in the developing world, such as the American Jewish World Service Organization, which operate largely in "countries without Jews," inspired by the injunction of "Tikkun Olam."

9) There are legal or juridical Jewish NGOs, such as the International Association of Jewish Lawyers and Jurists, again with both American and Canadian sections, who seek to act as "Counsel to the Jewish people," in the promotion and protection of their international human rights.

10) There are single-issue or special purpose Jewish NGOs who have organized themselves around a particular, and compelling issue, such as the struggle for Soviet Jewry. Indeed, during the period that the Soviet Jewry issue became a major human rights issue on the East-West agenda, American NGOs like the National Conference on Soviet Jewry had a major impact on the development of U.S. human rights foreign policy, while Canadian Jewish NGOs promoted the development of a Canadian "Helsinki" foreign policy, referring to the principles adopted in the Final Act of the Helsinki Conference, 1975.

11) There are Jewish women's NGOs — of both a national and international character — like the International Council of Jewish Women, engaged in the struggle for Jewish human rights in general and women's rights and the rights of Jewish women in particular. Some of these organizations have had to challenge violations of Jewish women's rights carried out ostensibly in the name of the Jewish religion itself, such as in the case of *agunot* (Jewish women whose husbands refuse to grant them a divorce, thereby "chaining" them, and preventing their remarriage).

12) The mission statements of all the major Jewish NGOs include reference, in some form, to the "survival, security, and well-being of the State of Israel" (see, for example, Mission Statements of WJC, B'nai B'rith, WIZO, and any of the major American, Canadian or European NGOs to this effect). Indeed, an appreciation not only of the mission statements but of the advocacy of Jewish NGOs demonstrates the extent to which Israel has emerged as the "civil religion" for organized Jewry.

25. Thomas Buergenthal, *International Human Rights* (St. Paul: West Publishing, 1988), p. 1.
26. Robert Wistrich, *Antisemitism: The Longest Hatred* (London: Thames Methuen, 1991).

27. Nathan Fineberg, "The International Protection of Human Rights and the Jewish Question (A Historical Survey)," *Israel Law Review,* 3(1968):487.
28. *Ibid.*, at 500.
29. *Ibid.*
30. *Ibid.*, at 500.
31. *Ibid.*
32. *Ibid.*
33. Irwin Cotler, "Human Rights in Judaism: Jewish NGOs and Religious Human Rights," in Michael J. Broyde and John Witte, eds., *Human Rights in Judaism: Cultural, Religious and Political Perspectives* (Northvale, NJ: Jason Aronson, 1998).
34. Natan Lerner, "The World Jewish Congress and Human Rights," (New York: World Jewish Congress, 1978), p. 7.
35. Sidney Liskofsky, "The International Protection of Human Rights," in L. Henkin, ed., *World Politics and the Jewish Condition* (New York: Quadrangle Books, 1972), p. 277.
36. *Ibid.*
37. *Ibid.*
38. *Ibid.* at 278.
39. The American Jewish Committee, the Anti-Defamation League, and the American Jewish Congress.
40. The oft-quoted statement of Jacob Blaustein, President of the American Jewish Committee, is cited, *inter alia,* in David Sidovsky, Sidney Liskofsky, and Jerome Shestack, "Essays on Human Rights: Contemporary Issues and Jewish Perspectives," (Philadelphia: Jewish Publication Society of America, 1979), p. 11; and by S. Liskofsky, "The International Protection of Human Rights," in L. Henkin, ed., *World Politics and the Jewish Condition* (New York: Quadrangle Books, 1972), p. 277. It appears also in the Mission Statement of the AJC, 1994, published on the 80th anniversary of its founding.
41. What follows is a snapshot of the advocacy of the American Jewish Committee in this regard, offered with three caveats:

    (a) It is a snapshot of the litigation strategy which, while crucial to Jewish NGOs in the protection of religious human rights, is not the only strategy deployed.

    (b) In many of these cases the American Jewish Committee was joined by the other two major Jewish NGOs — the Anti-Defamation League and the American Jewish Congress.

    (c) More recently, and in the last ten years, in particular, the shared, albeit distinctive, perspectives and litigation strategy of these three Jewish NGOs have increasingly been challenged by religiously Orthodox Jewish NGOs. In particular, the Commission on Law and Public Affairs, the litigation arm of Agudath Israel, has filed opposing amicus briefs in matters pertaining to the litigation of religious human rights, in general, and matters of separation of church and state in particular.

42. 268 U.S. 510 (1925).
43. Samuel Rabinove, "How — and Why — American Jews Have Contended for Religious Freedom: The Requirements and Limits of Civility," *Journal of Law and Religion,* 8(19):141.
44. 319 U.S. 624 (1943).
45. *Ibid.,* at 642.
46. 374 U.S. 398 (1963).
47. *Ibid.,* at 406.
48. 475 U.S. 503 (1986).
49. Conversations with Marc Stern, Director, Commission on Law and Social Action, American Jewish Congress, and Nat Lewin, Counsel, Commission on Law and Public Affairs, Union of Orthodox Jewish Congregations.
50. 936 F.2d 586, (1991), *rev'd,* 61 U.S.L.W. 4587.
51. Samuel Rabinove, "Separationism for Religion's Sake," *First Things*, 1990.
52. "Wall of Separation" principle (*Everson v. Board of Education*, 330 U.S. 1 (1947)), cited by Samuel Rabinove, "The Supreme Court and the Establishment Clause," (New York: American Jewish Committee, 1994), p. 1.
53. See, for example, AJC briefs in *Zorach, Engel, Schempp,* and *Weisman* cases.
54. 370 U.S. 421 (1962).
55. 374 U.S. 203 (1963).
56. 330 U.S. 1.
57. 392 U.S. 236.
58. 433 U.S. 229.
59. See Samuel Rabinove, "The Supreme Court and the Establishment Clause."
60. *Ibid.*
61. 509 U.S. 1 (1993).
62. 465 U.S. 668 (1984).
63. 109 S. Ct. 3086 (1989).
64. Peter Hogg, *Canadian Constitutional Law*, 3rd ed. (Toronto: Carswell, 1992), p. 775.
65. Bora Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto: Carswell, 1960), p. 971.
66. *Saumur v. Quebec*, [1953] 2 S.C.R. 299.
67. Kuhn's paradigm thesis has become part of contemporary legal jargon.
68. (1985), 18 D.L.R. (4th) 321.
69. *Ibid.,* at 336.
70. (1988), 52 D.L.R. (4th) 577.
71. *Ibid.,* at 654.
72. (1990) 71 O.J. (2d) 341 (C.A.).
73. Manuel Prutschi, "Church-State Separation in Canada," *Reconstructionist* (Jan-Feb 1986):17.

74. While in Ontario, Jewish parents supported by the Canadian Jewish Congress have now gone to court to secure standing and assistance for Jewish parochial schools in Ontario, not unlike that which has been part of the "constitutional practice" in Quebec.
75. See, for example, Sections 16-23 of the Charter of Rights, protections of minority language rights education; Section 25 respecting aboriginal rights; Section 27 respecting multiculturalism; Section 28 respecting women's rights; and Section 29 respecting denominational rights in education.
76. See, for example, Bill 30 (Ontario Separate School Funding) [1987] 1 S.C.R. 1148.
77. Section 27 reads: "The Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."
78. The Preamble reads, in full: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."
79. Adler v. Ontario, [1996] 3 SCR 609.
80. Commission scolaire régionale de Chambly v. Bergevin, [1994] 2 S.C.R. 525.
81. *Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd.,* [1985] 2 S.C.R. 536; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* [1990] 2 S.C.R. 489; *Central Okanagan School District No. 23 v. Renaud,* [1993] 2 S.C.R. 970.
82. *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).
83. *Ibid.*
84. *R. v. Keegstra* [1990] 3 S.C.R. 697.