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Islam in the Secular Nomos of the European Court of Human Rights

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ISLAM IN THE SECULAR *NOMOS* OF THE EUROPEAN COURT OF HUMAN RIGHTS

*Peter G. Danchin**

INTRODUCTION.....	664
I. THE CONCEPT OF THE SECULAR PUBLIC SPHERE.....	673
A. <i>The Antinomies of Secularism</i>	674
1. The Right to Freedom of Religion and Belief.....	675
2. Public Reason and Private Faith.....	682
3. The Authority of Public Reason.....	683
B. <i>Rethinking the Secular</i>	685
C. <i>Between Rationality and Reason</i>	690
II. RELIGIOUS FREEDOM IN ECHR JURISPRUDENCE.....	692
A. <i>The Rights of Religious Minorities</i>	692
B. <i>Freedom from Injury to Religious Feelings</i>	693
C. <i>The Claims of Muslim Communities</i>	696
III. ISLAM IN ARTICLE 9 JURISPRUDENCE.....	705
A. <i>The Scope of the Right to Religious Freedom</i>	707
1. Enlightenment Rationalism.....	709
2. Value Pluralism.....	715
3. Pluralism and Islam.....	723
B. <i>Public Order and the Rights of Others</i>	728
1. Rival Enlightenments.....	731
2. From Blasphemy to Incitement to Religious Hatred ..	735
C. <i>Is “Secularism” Necessary in a Democratic Society?</i>	741
CONCLUSION.....	744

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We inhabit a nomos—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.

—Robert Cover¹

INTRODUCTION

In 1990, Mr. Choudhury, a British Muslim, sought to bring a private prosecution in the United Kingdom for what he regarded as blasphemous attacks on Islam in Salman Rushdie's *The Satanic Verses*. The Chief Metropolitan Magistrate refused, however, to issue a summons for blasphemy against Rushdie and his publisher on the grounds that the offense could not be committed where the religion concerned is not Christianity.² Mr. Choudhury sought review of the decision in the Queen's Bench Divisional Court.³ There, Lord Watkins confirmed that "as the law now stands it does not extend to religions other than Christianity,"⁴ and the application was refused.⁵

Having exhausted his domestic remedies, Mr. Choudhury took his complaint to the European Commission on Human Rights where he claimed that the inability to prosecute Rushdie and his publisher in England for blasphemy violated his right to freedom of thought, conscience, and religion under Article 9 and constituted discrimination on the basis of religion under Article 14 of the European Convention on Human Rights (ECHR).⁶ The nature of the complaint was not without precedent

1. Robert M. Cover, *The Supreme Court: 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (footnotes omitted).

2. R v. Chief Metro. Stipendiary Magistrate (*Ex Parte Choudhury*), [1991] 1 All E.R. 306 (Q.B) at 306; see also Robert McCorquodale, *Blasphemous Verses*, 50 CAMBRIDGE L.J. 22 (1991).

3. *Ex Parte Choudhury*, [1991] 1 All E.R. 306 (Q.B) at 308.

4. *Id.* at 318.

5. *Id.* at 308-09, 318, 323 (declining to extend the common law offense of blasphemous libel to cover religions other than Anglicanism and, in certain respects, to Christianity as a whole).

6. *Choudhury v. United Kingdom*, App. No. 17439/90, 12 HUM. RTS. L.J. 172 (1991); see also Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 9, 14, Mar. 20, 1952, 213 U.N.T.S. 222 [hereinafter ECHR].

in ECHR jurisprudence. Eight years previously, the Commission had upheld the successful prosecution of a British magazine for publishing a poem found to be blasphemous to Christians partly on the basis that the “main purpose” of the English common law offense of blasphemous libel is “to protect the rights of citizens not to be offended in their religious feelings by publications.”⁷ In following the reasoning of the U.K. Divisional Court,⁸ however, the Commission determined that the British government had not interfered with Mr. Choudhury’s right to freedom of religion and belief because there was no positive obligation on states under the ECHR to protect all religious sensibilities.⁹ The fact that the English law of blasphemy extended only to the Church of England was not, accordingly, discrimination on the basis of religion.¹⁰

The Commission’s decision infuriated the Islamic community in Britain.¹¹ It was soon followed in 1994 by a decision of the European Court of Human Rights (the Court) upholding the Austrian government’s seizure of the film *Das Liebeskonzil* (*Council in Heaven*) on the basis that it constituted an attack on the Christian religion—Roman Catholicism in particular—by violating “[t]he respect for the religious feelings of believers as guaranteed in Article 9 . . . by provocative portrayals of objects of religious veneration.”¹² Then, in 1996, the Court upheld again a refusal by the British government to permit circulation of a film, *Visions of Ecstasy*, on the basis that the government had the legitimate aim to “protect ‘the rights of others’ ” and to protect “against seriously offensive attacks on matters regarded as sacred by Christians.”¹³

7. *Gay News Ltd. v. United Kingdom*, App. No. 8710/79, 5 Eur. H.R. Rep. 123, 130, ¶ 11 (1982).

8. In considering the ECHR, the Divisional Court decided that “the provisions of the Convention concerning the right to freedom of religion and to protection from discrimination on the ground of religion did not require an English law of blasphemy to protect the beliefs of Islam.” *McCorquodale*, *supra* note 2, at 23; *cf. infra* text accompanying note 282 (discussing how the Select Committee on Religious Offenses in England and Wales considered that the law of blasphemy is discriminatory).

9. *R v. Chief Metro. Stipendiary Magistrate (Ex Parte Choudhury)*, [1991] 1 All E.R. 306 (Q.B.) at 308.

10. *Choudhury v. United Kingdom*, App. No. 17439/90, 12 Hum. Rts. L.J. 172, 172–73 (1991); *see also* STEPHEN H. BAILEY, DAVID J. HARRIS & DAVID C. ORMEROD, *CIVIL LIBERTIES: CASES AND MATERIALS* 1050–53 (5th ed. 2001); Paul Kearns, *The Uncultured God: Blasphemy Law’s Reprieve and the Art Matrix*, 5 EUR. HUM. RTS. L. REV. 512, 515 (2000).

11. Javaid Rehman, *Religion, Minority Rights and Muslims of the United Kingdom*, in *RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW: A CRITICAL EXAMINATION OF MUSLIM STATE PRACTICES* 521, 531–32 (Javaid Rehman & Susan C. Breau eds., 2007).

12. *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 1, 17–18 (1994).

13. *Wingrove v. United Kingdom*, 23 Eur. Ct. H.R. 1937, 1957 (1996); *see also infra* note 105 and accompanying text (discussing the Court’s analysis in *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 1 (1994)).

As scholars have noted, these early cases in the Court's Article 9 jurisprudence provide evidence of a disparity in the treatment of the claims of majority and minority religious groups.¹⁴ Gandhi and James thus observe:

The publication in September 1988 of Salman Rushdie's book *The Satanic Verses*, as is very well known, caused outrage among both British and non-British Muslims. Copies of the book were burned publicly across the world. Riots on the Indian sub-continent resulted in deaths. The Ayatollah Khomeini issued his notorious fatwa, which is still in existence. Yet the Divisional Court concluded that, *inter alia*, the blasphemous libel of Allah (Almighty God), the prophet Ibrahim, Muhammad the Holy Prophet of Islam and the religion of Islam was not an offence known to English law. The damage done by this book to interdenominational harmony was enormous and its effects are still being felt by the author today. Yet, by contrast, an insignificant 18-minute video *Visions of Ecstasy* which would probably have passed into a minute and unnoticed public circulation if the Board had decided not to ban it, was entitled to the protection of the full panoply of the English law of blasphemy. Such disproportionality brings the law into disrepute.¹⁵

If, with the benefit of hindsight, Mr. Choudhury's case was a harbinger of the emergence of various problems associated with Islam and the rights of Muslim minorities in European nation-states, then the events of September 11, 2001 have propelled these issues to the forefront of law and politics in a way unimaginable even a decade earlier. In Denmark, cartoons depicting the Islamic prophet Muhammad as a suicide bomber have been published leading to protests and violence across Europe and

14. See, e.g., PETER W. EDGE, LEGAL RESPONSES TO RELIGIOUS DIFFERENCE 211 (2002) ("[If the ECHR] imposes some form of positive duty upon the State to protect sensibilities within the ambit of Article 9 belief systems . . . the current restriction of the offence to the Church of England may be incompatible with the Convention not simply because of non-discrimination arguments, but because the absence of a blasphemy law for non-Anglican beliefs fails to properly protect the sensibilities of non-Anglican believers." (footnote omitted)); RENÁTA UITZ, FREEDOM OF RELIGION 160 (2007) ("The predominantly Christian orientation of blasphemy provisions and their application exhibits a high potential for discrimination against non-Christian religions . . ."); T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 305, 310–11 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (arguing that the Court's Article 9 jurisprudence demonstrates a persistent denial of applications from religions that are "'new,' 'minority,' or 'nontraditional'" as well as an "institutional bias in favor of traditional religions").

15. Sandy Gandhi & Jennifer James, *The English Law of Blasphemy and the European Convention on Human Rights*, 4 EUR. HUM. RTS. L. REV. 430, 450 (1998) (footnotes omitted).

the Islamic world;¹⁶ a law prohibiting students in public schools from wearing symbols or attire through which they conspicuously exhibit a religious affiliation has been enacted in France;¹⁷ the French Parliament has proceeded to enact a law which now bans the wearing of the burqa and other Islamic face coverings in all public places;¹⁸ and a popular referendum has passed in Switzerland prohibiting the construction of minarets during which a political party used posters depicting minarets as missiles standing on top of the Swiss flag behind a woman wearing a burqa.¹⁹

This Article argues that what is most interesting about these controversies involving Islam and the place of Islamic norms in European nation-states (and the international legal sphere more broadly) is how such encounters are unsettling existing normative legal categories and catalyzing reconsideration of both the historical and theoretical premises of modern liberal political orders. These controversies raise two critical questions for ECHR jurisprudence: First, what is the nature and scope of the right to freedom of religion and belief? Does it include, for example, a right to be free from injury or offense to religious sensibilities? If so, why has the Court held that it is not discriminatory for a state to recognize and protect this right in the case of one religion (Christianity) but not another (Islam)?

16. *Muhammeds ansigt*, Jyllands-Posten, Sept. 30, 2005 (Den.), reprinted in Kevin Boyle, *The Danish Cartoons*, 24 *Netherlands Q. Hum. Rts.* 185, 188, 191 (2006); JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD* (2009).

17. Loi 2004-228 du 15 Mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of Mar. 15, 2004 REGULATING, IN ACCORDANCE WITH THE PRINCIPLE OF SECULARISM, THE WEARING OF SYMBOLS OR CLOTHING DENOTING RELIGIOUS AFFILIATION IN PUBLIC PRIMARY AND SECONDARY SCHOOLS], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190 [hereinafter Law 2004-228].

18. Law 2010-1192 Prohibiting the Concealment of the Face in Public Space was signed into law by President Nicolas Sarkozy on October 11, 2010 and will come into force on April 11, 2011. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344, available at <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&categorieLien=id>. A similar law prohibiting the wearing of the burqa and niqab in public places was passed by the Belgian lower house of parliament on April 30, 2010. Edward Cody, *Belgian Lawmakers Vote to Ban Full-Face Veils in Public*, WASH. POST, Apr. 30, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/29/AR2010042904504.html>.

19. Stephanie Nebehay, *Swiss Voters Back Ban on Minarets in Referendum*, REUTERS, Nov. 29, 2009, available at <http://www.reuters.com/article/2009/11/29/us-swiss-minarets-idUSTRESAS12D20091129>; see also Lorenz Langer, *Panacea or Pathetic Fallacy? The Swiss Ban on Minarets*, 43 *VAND. J. TRANSNAT'L L.* 863 (2010).

Second, what is the relationship between religion and morality²⁰ in the “secular” public sphere?²¹ This question applies, not only to the public realms of different European nation-states, but also to the supranational *nomos*²² of the European Court of Human Rights itself.

20. The relationship between religion and morality in the public sphere has been the subject of vigorous recent debate in legal and political theory. See, e.g., Noah Feldman, *Religion and Morality in the Public Square: Excerpts from Keynote Address*, 22 ST. JOHN'S J. LEGAL COMMENT. 417 (2007) (distinguishing “republican” and “pluralist” conceptions of the public sphere and “freestanding” and “religion-based” conceptions of morality); Symposium, *Constitutionalism and Secularism in an Age of Religious Revival: The Challenge of Global and Local Fundamentalisms*, 30 CARDOZO L. REV. 2331 (2009); *Programs: Religion and the Public Sphere*, SOC. SCI. RES. COUNCIL, <http://www.ssrc.org/programs/religion-and-the-public-sphere> (last visited May 29, 2011) (seeking to “deepen the engagement and cooperation of social scientists working on religion, secularism, and related topics, and to expand critical scholarship in this crucial area of study”).

21. The concept of the “public sphere” in liberal political theory is often traced to the 1962 book, JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., 1991). For Habermas, the public sphere “designates a theater in modern societies in which political participation is enacted through the medium of talk. It is the space in which citizens deliberate about their common affairs, hence, an institutionalized arena of discursive interaction.” Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25/26 SOC. TEXT 56, 57 (1990) (suggesting that Habermas’s conception of the public sphere is “conceptually distinct” from both the state and the “official–economy”). In this Article, the term “secular public sphere” is used in the sense of Talal Asad’s more recent work on secularism as a political doctrine, which both draws attention to and critiques the Habermasian conception:

The idea of the public sphere rests on a binary scheme: public vs. private. The public sphere is also thought of as part of a tertiary structure, the space of general communication and information that mediates between the overarching state and the many restricted spaces of daily life. Its historical origin is reflected in the growing power and need of the bourgeoisie in early capitalist society. This development has been seen not only as a step in the emergence of a modern public, but as essential to the formation of liberal democracy. Essential to that formation also is the political doctrine of secularism.

Talal Asad, *Reflections on Laïcité and the Public Sphere*, 5:3 ITEMS & ISSUES (Soc. Sci. Res. Council, New York, N.Y.), 2005, at 1. For Asad, the critical point is that the liberal public sphere is not only “a forum for rational debate but [also] an exclusionary space . . . necessarily (not just contingently) articulated by power.” TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* 183–84 (2003) [hereinafter ASAD, *FORMATIONS OF THE SECULAR*]. See *infra* Part I.

22. My use of the term *nomos* refers to the dual nature of the public sphere as simultaneously a space of discourse and exclusion. Robert Cover’s use of the term, *supra* note 1, was animated by his concern for the violence of the imposed order of the state on ways of life of plural communities. For Cover, a *nomos* was a “normative world [in which] law and narrative are inseparably related.” ROBERT COVER, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* 95, 96 (Martha Minow, Michael Ryan & Austin Sarat eds., 1995). In the *nomos* of the state “the creation of legal meaning—‘jurisgenesis’—takes place through an essentially cultural medium,” *id.* at 103, while simultaneously the state exercises its “jurispathic” mode of coercively suppressing the “fecundity of the jurisgenerative principle,” *id.* at 139. Cover’s thesis points to the radical dichotomy between the social organization of law as *meaning* and as *power*:

How does the Court imagine and construct notions of secularism and neutrality in each sphere? What role, politically and normatively, does the margin of appreciation doctrine play in this aspect of the Court's Article 9 jurisprudence?

This Article argues that *Choudhury* and subsequent Article 9 cases reveal various connections and contradictions between these two sets of questions. The nature of the public sphere is dynamically related to the scope of the right to religious freedom. This Article's central claim is that this relationship has been defined both conceptually and historically by not one but *two* rival liberal traditions each of which remain deeply entangled in the normative structure of Article 9 and continue to shape the contours of ECHR religious freedom jurisprudence. The difficulty is that the two traditions are often run seamlessly together without distinguishing their different logics and genealogies. It is thus

Karo's commentary and the aphorisms that are its subject suggest two corresponding ideal-typical patterns of combining corpus, discourse, and interpersonal commitment to form a *nomos*. The first such pattern, which according to Karo is world-creating, I shall call "paideic" The second ideal-typical pattern, which finds its fullest expression in the civil community, is "world maintaining." I shall call it "imperial."

Id. at 105–06 (discussing R. JOSEPH KARO, BEIT YOSEF AT TUR: HOSHEN MISHPAT 1 (Robert Cover trans.)). The broader notion of a "supranational" *nomos* refers to the Westphalian story of the rise and consolidation of "secular" European nation-states over the last three centuries and their reconfiguration following the Second World War into the Council of Europe. See generally Peter G. Danchin, *The Emergence and Structure of Religious Freedom in International Law Reconsidered*, 23 J.L. & RELIGION 455 (2008) [hereinafter Danchin, *Emergence and Structure*]. I have previously described the historical shift in Europe from the *ius gentium* of the homogenous *respublica christiana* to the *ius inter gentes* of the territorially delimited *jus publicum europaeum* as having had

two interrelated jurisgenerative dimensions—one as between European states *inter se* (i.e., as between the newly recognized political subjects of the former unified Christian *nomos*), and the other as between European states taken as a whole and non-European peoples and territory (i.e., as between European states separated as political subjects but united by their background identity and culture and those peoples and territories lying outside of Western Christendom).

Id. The notion of a "supranational public sphere" standing beyond but encompassing the public spheres of European nation-states raises for consideration the nature of the modern European *jus gentium* viewed against the background of the older *respublica christiana* and *jus publicum europaeum*. Carl Schmitt first used the term *nomos* as early as 1934 to describe the spatial, political, and juridical system of Europe in terms of a "total and concrete historical order." G. L. Ulman, *Introduction to CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE Jus Publicum Europaeum* 9, 19–20 (G. L. Ulman trans., Telos Press 2003) (1950) (quoting CARL SCHMITT, ÜBER DIE DREI ARTEN DES RECHTSWISSENSCHAFTLICHEN DENKENS (1934)); see also Martti Koskenniemi, *International Law as Political Theology: How to Read Nomos der Erde?*, 11 CONSTELLATIONS 492, 496 (2004) (discussing Schmitt's political conception of "concrete-order thinking" as going beyond positive laws and seeking "to grasp the substance of the choice on which a community's identity depends").

commonplace for judges and scholars alike to describe the public sphere in terms of “neutrality” and the right in terms of “freedom” when in fact these concepts serve quite distinct values in each tradition. By critically reexamining how, as a matter of history, the concept of religious freedom has become embedded in European legal norms, this Article aims to illuminate and clarify these normative dispositions in order to offer insight into a series of related dilemmas that confront us today.

In the first, older liberal tradition the public sphere was understood in terms of social peace and religious liberty conceived in jurisdictional terms. This early conception derived from a civil philosophy that sought to desacralize the state and led over time to both the churches losing their civil and political authority and to the gradual spiritualization of religion. In the second, later tradition the public sphere was reconceived in terms of a moral theory of justice and religious liberty grounded in a complex (and unstable) notion of freedom of conscience. This conception derived from a metaphysical philosophical tradition that simultaneously sacralized reason and rationalized religion.²³

Each of these traditions encompasses both rationalist *and* dialogic elements. In the case of the former, this double structure resulted in politically negotiated religious settlements and varying church-state arrangements; in the case of the latter, it generated a new secular morality and theory of liberal political order premised on distinctive (Protestant) conceptions of the individual, freedom, and religion. In each case, the demands of rationality and reason and their political implications for the state differed, as did the forms of negotiation (whether actual or imagined) between the secular and religious. But despite these national variations and theoretical differences, what each tradition shared was a conception of the public sphere and public reason on the one hand, and of the right to religious freedom on the other, which were conceived *internally* to Western Christianity and its complex relationship to the rise of the “secular” European nation-state. In each case, therefore, the neutrality of the public sphere (whether national or supranational) and the scope of the right to religious freedom should be understood as culturally and historically contingent and neutral towards neither religion in general nor distinct religious traditions in particular.

As the dominant religious tradition in Europe, Christianity continues to shape significant aspects of both the state and state law. This is an

23. This Article argues that this tradition finds its origins in Kant’s philosophy of religion and the distinction between the public and private uses of reason, a distinction that has been substantially reversed in the modern secular imaginary of freedom of conscience. See *infra* Part III.A.1.

embarrassment for liberal theories of rights and their assumption of state neutrality. Given Europe's deep history of church-state entanglement, neutrality in this context must mean nondiscrimination rather than non-establishment.²⁴ The application, however, of the nondiscrimination principle in nation-states with an established or dominant religion generates an obvious tension as to which the margin of appreciation doctrine²⁵ proves simultaneously useful and problematic: useful in allowing the European Court of Human Rights to defer to majoritarian conceptions of public order; problematic in tacitly excusing denials of individual freedom and equal treatment.²⁶

24. A number of states in Europe including Greece, Denmark, Iceland, Norway, Sweden, and the United Kingdom have official or established churches while various others have different forms of endorsed church or cooperationist regimes. *See generally* STATE AND CHURCH IN THE EUROPEAN UNION (Gerhard Robbers ed., 2d ed. 2005). The ECHR contains no equivalent to the Establishment Clause found in the First Amendment to the U.S. Constitution and thus does not prohibit member states either endorsing or cooperating with religions, including through recognition or presence of religious symbols in official settings, provided the state respects all ECHR norms including the rights to religious freedom (Art. 9) and equality and nondiscrimination (Art. 14). ECHR, *supra* note 6, arts. 9, 14. In *Darby Case*, 187 Eur. Ct. H.R. 17 (1990), the European Commission held that establishment is not *per se* a violation of the ECHR. *See also* Carolyn Evans & Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 BYU L. REV. 699, 699 (“[The ECHR] does not deal directly with the relationship between church and state in European countries. . . . [Rather it] emphasize[s] religious freedom and nondiscrimination on the basis of religion. . . . [Thus it does] not require a particular degree of separation or attachment between religions and the state and . . . [does] not explicitly prohibit establishment.”).

25. The doctrine of a “margin of appreciation” is an interpretive principle designed to balance a state’s sovereignty with the need to ensure observance of the ECHR and thereby “avoid damaging confrontations between the Court and Contracting States.” Ronald St. J. Macdonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 83, 123 (Ronald St. J. Macdonald et al. eds., 1993). It is based on the idea that the primary responsibility for the implementation of the ECHR lies with the parties themselves and thus encompasses a discretion afforded by the Court to member states to employ varying national standards of conventional protections. *See id.*; *see also* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843, 850 (1999) (“To grant margin of appreciation to majority-dominated national institutions in such situations is to stultify the goals of the international system and abandon the duty to protect the democratically challenged minorities.”).

26. *See* Malcolm Evans & Peter Petkoff, *A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights*, 36 RELIGION, ST. & SOC’Y 205 (2008). Although “[n]eutrality may be the product of a desire to create an environment in which all are able to make ultimate choices in an unfettered fashion,” *id.* at 205,

the way it has been developed by the ECHR, marks a departure from an understanding of human rights as legal tools, and as far as freedom of religion or belief is concerned, has resulted in a problematic notion of what neutrality entails. Neutrality has become associated too closely with what might be described as an alignment with the political, a politically correct use of human rights within a simplified and fairly finalised philosophical world view, hostile to other philosophical world views.

Id. at 216.

This dynamic relationship between the right to religious liberty and the nature of the public sphere has assumed different forms in European nation-states. In England, Mr. Choudhury was unable to rely on the law of blasphemy, which was found to extend only to the established Church of England and to protect the rights of Christians.²⁷ By contrast, in France, a Muslim schoolgirl is unable today to wear an Islamic headscarf in a public school.²⁸ In each case, a complex historical and normative relationship between Christianity and secularism defines the modern contours and shape of the public sphere and the right to freedom of religion and belief itself. In each case, it is also the presence of non-Christian plaintiffs asserting claims of right that makes visible both the historical contingency and cultural particularity underlying the Court's interpretation of each of these two sets of norms.

How, after all, is the Court to make these kinds of determinations and identify in a neutral way those manifestations of religion or belief to be accommodated? The controversial notion that injury to religious feelings falls within the scope of Article 9 illustrates the point. Arguably, such a claim of right is less threatening to other rights (such as free speech) and more justifiably "necessary in a democratic society"²⁹ when all the relevant factors are *internal* to a Christian or post-Christian narrative as to what constitutes religion and a proper religious subjectivity. Both *nomos* and narrative are radically disrupted, however, when the claim is of the kind advanced by Mr. Choudhury.

Similarly, the tacit background assumptions shaping the public-private divide—religion as primarily a matter of *belief* or *conscience* whose proper place is in the *private* sphere—become more visible when it is a Muslim who seeks to manifest a non-Christian belief or practice in the public sphere. At the same time, the extent to which certain secular and religious manifestations of Christian doctrine and practice remain embedded in different registers of the public sphere remains in evident contradiction to the formal claims of liberal theory.

This Article proceeds in three parts. Part I begins by considering what is meant by the term "secular public sphere."³⁰ In light of the controversies involving Islam discussed above, this Part observes how in both secular and religious fields of inquiry such events have unsettled, and led to attempts to rethink, certain core premises of secular liberalism in general and justifications for the right to religious freedom in particular. Part II then sets out the major contours and developments in the

27. See *supra* notes 2–5 and accompanying text.

28. See Law 2004-228, *supra* note 17.

29. ECHR, *supra* note 6, art. 9(2).

30. See *supra* note 21 and accompanying text.

Court's Article 9 jurisprudence. Beginning with the landmark *Kokkinakis* case in 1993,³¹ this Part examines ECHR jurisprudence regarding, first, the rights of religious minorities; second, the "injury to religious feelings"³² cases; and third, Islam and the claims of Muslim communities and individuals in European nation-states.

On this basis, Part III seeks to situate and analyze the place of Islam and Islamic norms within the normative structure of Article 9. In considering the recent enactment in the United Kingdom of the offence of incitement to religious hatred and the simultaneous abolition of the common law offense of blasphemy, this Article concludes by arguing that there is a need to recover *plural* Enlightenment traditions and to better understand how the historical evolution of liberal rights discourse continues to shape our contemporary understanding of claims to religious freedom.

I. THE CONCEPT OF THE SECULAR PUBLIC SPHERE

What is a "secular public sphere"?³³ What problems does it address and what ideals or aspirations does it embody? Further, what is the relationship between a *nomos* of this kind and the right to freedom of religion or belief? These are broad and complex questions. Drawing on the work of William Connolly in political theory,³⁴ the argument in this Part develops in three stages.

Section A begins by identifying three dilemmas for modern conceptions of secularism: first, the almost axiomatic equation of religion and religious practice with "freely chosen conscience or belief" and the double transformation that has occurred in modern understandings of the right to religious freedom (Subsection 1); second, the fragile divide between public and private spheres and the difficulties this notion generates for claims to a freestanding "rational" morality in the public sphere (Subsection 2); and third, the question of how to secure secular authority in the public sphere (Subsection 3). In response to these dilemmas, Section B outlines a number of recent theoretical shifts we see

31. *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 3 (1993).

32. *See, e.g., Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H. R. (ser A) at 18 (1994) ("The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration . . ."); *see also infra* note 105 and accompanying text.

33. *See supra* note 21 and accompanying text.

34. In particular, the argument draws upon Connolly's pluralist conception of a "possible world of intersecting publics, expressing a variety of religious and metaphysical orientations, interacting on several registers of being." WILLIAM E. CONNOLLY, *WHY I AM NOT A SECULARIST* 8 (1999).

underway in competing conceptions of liberal modernity. Finally, on the basis of the preceding analysis, Section C sets out some initial implications and conclusions as they pertain to the premises and methodology of the Article 9 jurisprudence of the European Court of Human Rights.

A. *The Antinomies of Secularism*

For Connolly, secularism “combines a distinctive organization of public space with a generic understanding of how discourse and ethical judgment proceed on that space.”³⁵ The key idea is of a “self-sufficient public realm fostering freedom and governance without recourse to a specific religious faith.”³⁶ The “historical narrative” explaining and justifying this conception of secular public space is generally described as follows:

Once the universal Catholic Church was challenged and dispersed by various Protestant sects a unified public authority grounded in a common faith was drawn into a series of sectarian conflicts and wars. Because the sovereign’s support of the right way to eternal life was said to hang in the balance, these conflicts were often horribly destructive and intractable. The best hope for a peaceful and just world under these new circumstances was institution of a public life in which the final meaning of life, the proper route to life after death, and the divine source of morality were pulled out of the public realm and deposited into private life. The secularization of public life is thus crucial to private freedom, pluralistic democracy, individual rights, public reason, and the primacy of the state. The key to its success is the separation of church and state and general acceptance of a conception of public reason (or some surrogate) through which to reach public agreement on nonreligious issues.³⁷

Despite the evident power and enduring appeal of this story, there are at least three dilemmas that, from the beginning, have haunted the historical *modus vivendi* we today term “secularism.”

35. *Id.* at 20.

36. *Id.* at 21. Thus for modern liberal theorists such as John Rawls, the point is that “secularism strains metaphysics out of politics.” *Id.* at 22. In a work such as Rawls’s *Political Liberalism*, “the idea is to dredge out of public life as much cultural density and depth as possible so that muddy ‘metaphysical’ and ‘religious’ differences don’t flow into the pure water of public reason, procedure, and justice.” *Id.* at 23.

37. *Id.* at 20.

1. The Right to Freedom of Religion and Belief

The right to religious freedom is often referred to simply as “freedom of conscience or belief.”³⁸ This subtle shift in terminology is in fact the product of two deeply entangled historical and normative transformations that have occurred in modern secular *discourse* on religious freedom. The first concerns the definition of religion itself as conscience or belief in an age of what we might term “secular equality.” The second concerns the partial and unstable convergence in liberal theory between conscience on the one hand and autonomy on the other, and the resulting reversal in the secular imaginary whereby freedom of conscience is today viewed *as* autonomy. Let us briefly consider each of these transformations in turn.

a. Freedom of Religion or Freedom of Conscience?

What is the proper object of the right to religious freedom in international law? Like most national constitutions that contain clauses guaranteeing freedom of religion, none of the major international and

38. See, e.g., MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* (2008) (describing “America’s great tradition of religious freedom” in terms of the “essential idea” of “liberty of conscience”); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673 (2002) (arguing that the traditional First Amendment commitment to freedom of conscience has substantially been replaced by a commitment to equality); Symposium, *Freedom of Conscience: Stranger in a Secular Land*, 47 SAN DIEGO L. REV. 899 (2010); see also Winnifred Fallers Sullivan, *Requiem for the Establishment Clause*, 25 CONST. COMMENT. 309 (2008); cf. Winnifred Fallers Sullivan, *Religion Naturalized: The New Establishment*, in *AFTER PLURALISM: REIMAGINING RELIGIOUS ENGAGEMENT* 84, 94–95 (Courtney Bender and Pamela E. Klassen eds., 2009) (noticing in U.S. constitutional law “a shift in what religion is understood to be—a shift in religious anthropology” and a “move away from the high separationism of the mid-twentieth century toward what we might call a post-pluralistic acknowledgment of religion as natural or universal . . . [so that] [n]ow religion includes everybody, even those without religion”). Sullivan notes that Kent Greenawalt’s *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* privileges a “free church model” of religion understood as the “voluntary association of individuals with communities of others who are like-minded in their transcendent commitments . . . [but Greenawalt’s book has] very little acknowledgment that religion is changed by the freedom he celebrates.” Sullivan, *Requiem*, *supra*, at 309–310. According to Sullivan, Greenawalt thus views Anglicans in England under establishment as having diminished religious freedom without acknowledging that

[t]hose he pities would not be Anglicans if they had the capacity to choose their leaders and form of government. To be Anglican is to believe that apostolic succession is God-given and that its administration is intimately connected with the Crown. Indeed, for most religious people everywhere at most times, religious leadership, and the form of government of one’s religious community, is, in some sense, given, not chosen, and related in explicit ways to government. Those are aspects of religion that gives it its authority and its comfort.

Id. at 310.

regional human rights instruments define the term “religion.”³⁹ Instead they try to avoid this controversy by defining legal protections (rights) in terms of *freedom* of religion or by prohibiting *discrimination* on the basis of religion thereby focusing legal inquiry on what is meant by the terms “freedom” or “discrimination.”⁴⁰ The difficulty, of course, is that any attempt to define the scope and content of the right to religious liberty will necessarily involve assumptions about the underlying nature of religion itself.⁴¹ Such assumptions rest on often unarticulated premises concerning the metaphysical, psychological, or cultural aspects of religion. The danger then is that legal definitions “may contain serious deficiencies when they (perhaps unintentionally) incorporate particular social and cultural attitudes towards (preferred) religions, or when they fail to account for social and cultural attitudes against (disfavored) religions.”⁴²

These concerns arise in the context of liberal theories of religious freedom where religion is viewed primarily as “a matter of privatized belief in a set of creedal propositions to which an autonomous individual gives assent.”⁴³ Such a conception of religion as *belief* or *conscience* is

39. The most exhaustive efforts to date to define the scope of the right (although not “religion” itself) in international human rights law remain the 1981 Declaration on Religious Intolerance, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/55, at 171 (Nov. 25, 1981), and the 1993 General Comment (No. 22) of the Human Rights Committee on the scope of Article 18 under the International Covenant on Civil and Political Rights [ICCPR]. Human Rights Comm., *General Comment No. 22 (48) (art. 18)*, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993) [hereinafter *ICCPR General Comment*].

40. See, e.g., Carolyn Evans & Beth Gaze, *Between Religious Freedom and Equality: Complexity and Context*, 49 HARV. INT’L L.J. ONLINE 40 (2008) (discussing the “tension between religious freedom and non-discrimination principles” in international human rights treaties).

41. See KENT GREENAWALT, RELIGION AND THE CONSTITUTION: VOLUME I: FREE EXERCISE AND FAIRNESS 124–56 (2006); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984). At the level of theory the point is well illustrated by Rawls’s notion of an “equal liberty of conscience” as part of a political conception of justice. The idea is that “by avoiding comprehensive doctrines [i.e., basic religious and metaphysical systems] we try to bypass religion and philosophy’s profoundest controversies so as to have some hope of uncovering a basis of a stable overlapping consensus.” JOHN RAWLS, POLITICAL LIBERALISM 151–152 (1993). But as Connolly astutely observes, the “word ‘avoid’ is revealing because it mediates effortlessly between a demarcation *established* by some philosophical means and one commended because its political acceptance *prior* to introduction of an impartial philosophy of justice would reduce the intensity of cultural conflict.” CONNOLLY, *supra* note 34, at 22. In this move, the “word ‘religion’ now becomes treated as a universal term, as if ‘it’ could always be distilled from a variety of cultures in a variety of times rather than representing a *specific fashioning of spiritual life engendered by the secular public space carved out of Christendom.*” *Id.* at 23 (emphasis added).

42. T. Jeremy Gunn, *The Complexity of Religion and the Definition of “Religion” in International Law*, 16 HARV. HUM. RTS. J. 189, 195 (2003).

43. Saba Mahmood, *Secularism, Sexual Difference, and Religious Minorities: A Contested Genealogy* 2 (July 6, 2010) (unpublished paper) (on file with author); see also *infra*

said to be a “modern, privatized Christian one because . . . it emphasizes the priority of belief as a state of mind rather than as constituting activity in the world.”⁴⁴ In the wake of Enlightenment theorizing about religion,⁴⁵ this represents the supposed solution to an enduring puzzle: how is the state to be neutral between religion and nonreligion while at the same time according religion special protection?⁴⁶ As Andrew Koppelman observes, the idea of “[c]onscience promises a way out of the dilemma by describing the basis of free exercise [of religion] in a way that specifies only the internal psychology of the person exempted, without endorsing any claims about religious truth.”⁴⁷

notes 299–300 and accompanying text. As noted by Gunn, religion regarded as *belief* is only one facet of religion in the modern world. See Gunn, *supra* note 42, at 200. Religion is also a critical facet of *identity* that is “less likely to emphasize shared theological beliefs and more likely to emphasize shared histories, cultures, ethnicity, and traditions.” *Id.* at 201. It is thus “among the most potent social forces that bind communities together.” *Id.* at 202. Religion is also a “*way of life*” and thus “associated with actions, rituals, customs, and traditions that may distinguish the believer from adherents of other religions.” *Id.* at 204.

44. TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* 47 (1993).

45. See *infra* Part III.A.

46. Enduring theoretical disagreements regarding the relationship between and interpretation of the Establishment and Free Exercise Clauses in the First Amendment illustrate this dilemma in post-Enlightenment legal theory. As Steven Smith argues, the difficulty today is that the “widely accepted constraints of modern secular discourse—constraints thought by many . . . to be entailed by religious freedom itself—impede efforts to justify the venerable commitments to church-state separation and religious freedom, thus cutting the tradition off from the roots that have nourished it.” Steven D. Smith, Book Review, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1872 (2009) [hereinafter Smith, *Discourse in the Dusk*]. This in fact represents a “substantial reversal” from the justifications for religious liberty advanced during the “classical Enlightenment” or “Age of Reason” in the 18th century. See *id.* The result is that

the problem of church and state is no longer conceived of in terms of separate (and divinely ordained) jurisdictions; instead, religion and religious institutions are understood to be subject to the encompassing (and secular) jurisdiction of the state. Within the contemporary framework, however, it is hard to explain *why* religion ought to be treated as a special legal category at all and, consequently, *how* it should be treated specially.

Id. at 1873; see also Steven D. Smith, *Recovering (From) Enlightenment?*, 41 SAN DIEGO L. REV. 1263, 1297–98 (2004) (explaining that the current public discourse concerning politically controversial ideas gives the impression that “it is permissible to express views about religion, or Truth, only on the condition that the final decision does not depend on those views”).

47. Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 969 (2010) [hereinafter Koppelman, *Leiter on Respect*]. The point is that this appears to allow according religion special treatment without favoring religion *per se*. But, as Koppelman notes, much American case law on religious liberty has involved religious claims that were not necessarily conscientious. *Id.* at 965–66; see, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (involving a claim by a church to expand its building in order to hold its increasing congregation); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (involving an objection to a proposed logging road that would pass

But here we meet at least two critical objections. First, why should persons from different religious traditions (not only within, but especially beyond, Western Christianity) accede to the proposition that conscience or belief and not religion *per se* is the proper object of protection and accommodation? Muslims, for example, regard themselves more as claimed by a religious community they have not chosen. In this sense, Islamic notions of religious belonging and community, as opposed to the Lockean notion of religious belief, define for many Muslims a way of life in which the individual does not own herself.⁴⁸ This has profound implications for how the operative meanings of ritual and symbol are understood in different religious traditions and in their interrelationship with secular presentations of public reason.⁴⁹ In addition, many non-Western religious traditions such as Islam do not make the same distinction between the domains of the secular and the sacred or, as in the case of Hinduism, hierarchically subsume “the secular under the sacred.”⁵⁰

through and destroy an ancient worship site sacred to a Native American tribe); *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (holding that the state of Oregon could prohibit the sacramental use of peyote). Interestingly, the underlying facts of *Employment Division v. Smith* involve the use of peyote not out of religious conscience, but arising from an interest in exploring Native American identity or simply interest about the Church. Koppelman, *supra*, at 966 (citing Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953, 959–65, 978–85 (1998)). Indeed, in addressing “whether it is fair to single out religion for special treatment,” Koppelman concludes that “[i]n that inquiry, conscience turns out not to be an important category.” Koppelman, *supra*, at 970; see also Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 584–600 (2006) (discussing the benefits and detriments of relying on conscience in determining the treatment religion should be given).

48. The result is that “[n]ot all religious beliefs can be redescribed without loss as ‘the product of free and voluntary choice by the faithful.’” Michael J. Sandel, *Religious Liberty: Freedom of Choice or Freedom of Conscience*, in *SECULARISM AND ITS CRITICS* 73, 85 (Rajeev Bhargava ed., 1998); see also Bhiku Parekh, *Superior People: The Narrowness of Liberalism From Mill to Rawls*, *TIMES LITERARY SUPPLEMENT*, Feb. 25, 1994, at 11 (“Millian liberalism . . . linked diversity to individuality and choice, and valued the former only in so far as it was grounded in the individualist conception of man. This ruled out several forms of diversity. It ruled out traditional and customary ways of life, as well as those centred on the community.”).

49. As Connolly notes, “[w]ith the emergence of secularism and Protestantism, a symbol, in its dominant valence, becomes the representation of an inner state of belief that precedes it; and ritual is now understood to be the primitive enactment of beliefs that could also be displayed through cognitive representation.” CONNOLLY, *supra* note 34, at 25 (discussing the views of Talal Asad). This understanding overlooks how, for example, “in medieval Christianity . . . a symbol was bound up with enactment or perfection of inner states and meanings it also represented; and ritual was practiced as a means of educating and constituting appropriate dispositions of appraisal and aptitudes of performance.” *Id.* “Asad draws upon Mauss’s exploration of *habitus* as ‘embodied aptitude’ to sharpen the sense of how intersubjective dispositions, instincts, and virtues can be constituted through ritual performance.” *Id.*

50. T.N. MADAN, *MODERN MYTHS, LOCKED MINDS: SECULARISM AND FUNDAMENTALISM IN INDIA* 15 (1997). Connolly notes that even in the iconic *Democracy in America*, “Tocqueville defends a secularism contained within Christianity, while modern secularists

Second, why is it that only *theistic* notions of conscience or belief are singled out for special treatment?⁵¹ One possible response to this objection is to concede that religious belief should *not* receive special legal treatment but rather something closer to deep moral conviction is what should be protected.⁵² But this fails to explain why religious beliefs *are* often treated specially, for example when they are held to be distinctly burdened or under a special legal disability.⁵³

In addition to the question of theistic beliefs, Connolly has further argued that the secular public sphere is in fact “predicated upon a two-fold strategy of containment: to secure the public realm as it construes it, it is almost as important to quarantine certain nontheistic patterns of

generally seek to contain Christianity within the private realm.” CONNOLLY, *supra* note 34, at 24 (emphasis added).

51. The main international human rights instruments protect both theistic and non-theistic thought and belief. Thus, both the Human Rights Committee and the European Court of Human Rights have indicated that the beliefs protected by provisions recognizing the right to freedom of religion include not only religious beliefs, but, at least, other beliefs of a similar fundamental character, including atheism and agnosticism. *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 3, 17 (1993) (“As enshrined in Article 9, freedom of thought conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is . . . also a precious asset for atheists, agnostics, sceptics and the unconcerned.”); ICCPR *General Comment*, *supra* note 39, ¶ 2 (“Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.”). As noted by Malcolm Evans, however, “the second sentence of Article 9 only relates to the manifestation of a religion or belief and not to the manifestation of patterns of thought or conscience, which are covered by the general right to freedom of expression found in Article 10.” MALCOLM D. EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* 284 (1997). Further, Article 9 will protect only manifestations that actually express the belief concerned, not every act that is motivated and influenced by a religion or belief. EVANS, *supra*, at 304–14 (citing *Efstratiou v. Greece*, 1996-VI Eur. Ct. H.R. 2347, 2362 (1996); *Arrowsmith v. United Kingdom*, App. No. 7050/75, 8 Eur. Comm’n H.R. Dec. & Rep. 123 (1977)).

52. For a critical discussion suggesting that there is no good *secular* justification for treating religion as a special category, see generally STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 77–117 (1995); Anthony Ellis, *What Is Special About Religion?*, 25 L. & PHIL. 219 (2006); James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941 (2005); see also Koppelman, *Leiter on Respect*, *supra* note 47, at 969 (discussing *Welsh v. United States*, 398 U.S. 333 at 360 n.12 (1970) (Harlan J., concurring) where a law confining draft exemptions to claimants who believed in God was held to be discriminatory on the basis of religion on the rationale that Congress was constitutionally required to show “equal regard for men of nonreligious conscience”).

53. Smith, *Discourse in the Dusk*, *supra* note 46, at 1904–05. Thus, on the basis of state neutrality the government cannot promote religion (e.g., by teaching or promoting religious ideas in public schools or using tax money to help religion) even if a majority of citizens wish it to do so. Some account then needs to be given as to why religion is sometimes treated as “special and sometimes not.” For Smith, such an account “would likely require resort to the sorts of more ultimate beliefs that . . . [under a theory of secular equality] government is forbidden to evaluate or act upon” with the result that “the constraints of modern secular discourse effectively preclude . . . offering any justification for . . . prescriptions beyond unconvincing appeals to supposedly shared [cultural or traditional] axioms or commitments.” *Id.* at 1905.

thinking and technique as it is to monitor ecclesiastical intrusions into public life.”⁵⁴ For both theistic and atheistic beliefs then, the result for secularism is that

its forgetting or depreciation of an entire register of thought-imbued intensities in which we participate requires it to misrecognize itself and encourages it to advance dismissive interpretations of any culture or ethical practice that engages the visceral register of being actively.⁵⁵

b. Freedom of Conscience or Freedom of Choice?

Beyond the equation of religion with conscience or belief, the second major transformation in modern discourse on religious freedom has been the partial and unstable equation of *freedom of conscience* with *autonomy*. Modern liberal theory traditionally connects the case for religious freedom and state neutrality with a liberal conception of the person as a “free and independent self[.]”⁵⁶ Thus, for Michael Sandel “[t]he respect this neutrality commands is not, strictly speaking, respect for religion, but respect for the self whose religion it is, or respect for the dignity that consists in the capacity to choose one’s religion freely.”⁵⁷

This view of religious freedom as *freely chosen* conscience or belief has deep and complex roots in the history of Protestantism and, in particular, the paradoxical idea that “conscience was directly bound to obey and follow God and not men: a theory of the free and at the same time unfree conscience (as the ‘work of God,’ as Luther had said).”⁵⁸ Steven Smith has referred to this as the “conscience tautology” whereby “the duty to follow conscience is understood to mean, basically, that a person should do what *he believes to be right*, which in turn seems equivalent to

54. CONNOLLY, *supra* note 34, at 26. Connolly observes that the “visceral register of intersubjectivity,” which animates the thought of many theologians, also receives attention by several nonsecular, atheistic thinkers such as Nietzsche. *Id.* (noting that Nietzsche in *The Anti-Christ* distinguishes between Christian *doctrines* and *practices*, infinitely preferring the latter to the former: “[n]ot a belief but a doing, above all, a not doing of many things, a different *being*”). The notion of an “instinctive register of intersubjective judgment” is illustrated by Tocqueville’s account of “preconscious mores,” which both embody “Christian culture” and help “to regulate public argumentation.” *Id.* at 24.

55. *Id.* at 29. For a similar critique of secular reason by Pope Benedict XVI (then Cardinal Joseph Ratzinger), see *infra* note 82.

56. Sandel, *supra* note 48, at 84. For two recent influential accounts, see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007); NUSSBAUM, *supra* note 38. *But see* Marc O. DeGirolami, *No Tears for Creon*, 15 *LEGAL THEORY* 245 (2009) (providing a critique of Nussbaum’s book).

57. Sandel, *supra* note 48, at 84.

58. Rainer Forst, *Toleration and Democracy* 8 (unpublished paper) (on file with author and with the Michigan Journal of International Law).

saying that a person should do what *he believes he should do*.⁵⁹ The proposition of a moral duty to follow one's conscience is easily and often imperceptibly elided, however, with an overriding commitment to personal autonomy as a kind of "master value for modern man" that takes the form of a "Kantian-style injunction to be Enlightened, to 'think for yourself,' to make your own judgments without reliance on external authorities like tradition or churches or books of scripture."⁶⁰ Here again, however, we meet two critical objections.

First, the elision of freedom of conscience with autonomy fatally undermines the normative basis for according freedom of conscience special treatment in the first place. As Smith observes:

In its formative period . . . the commitment to freedom of conscience rested precisely on a belief that people are *not* autonomous, but rather are dependent on—and obligated by—a higher and personal Power. That belief was what justified special respect for people who were acting not just from the normal mundane motives, and certainly not as autonomous agents, but from conscience. Dissolving conscience into autonomy turns conscience on its head and deprives it of this justification for special respect.⁶¹

In this complex set of moves, the former *moral duty* to follow one's conscience is subtly transformed into a new *individual right* to do whatever a *person believes* is the right thing to do. As we shall see,⁶² the consequences of turning conscience "on its head" in this way have been profound for the modern understanding of the right to freedom of religion and belief.

Second, what does it mean exactly for a person freely to exercise her conscience by "thinking for herself"? Is it possible for a person's exercise of conscientious judgment to reach the conclusion that "what is right is precisely to follow the counsel of some wiser authority"?⁶³ For example, whether one has a duty to wear particular religious clothing will depend on what relevant religious authorities, normative traditions, or sacred texts have to say on the matter. But once conscience is dissolved into autonomy this possibility appears foreclosed, as the right in

59. Steven D. Smith, *The Phases and Functions of Freedom of Conscience* 16 (Univ. of San Diego Sch. of Law, San Diego Legal Stud. Res. Paper No. 10-024, 2010), available at <http://ssrn.com/abstract=1615625>.

60. *Id.*

61. *Id.* at 17.

62. *See infra* Part III.A.1.

63. Smith, *supra* note 59, at 16.

question is to do what *one believes* to be right not what some external authority says is right.⁶⁴

2. Public Reason and Private Faith

The second dilemma for secularism is how to draw the line between the two spheres—between private life, where religious faith, identity, and ritual are to be simultaneously contained and protected; and public life, where free, rational discourse and argument are similarly to be construed and secured. This two-fold strategy of containment raises an immediate quandary: what is the source of morality in the public sphere? If secular morality is indeed “free-standing,” can it come to terms with the moral sensibilities and sources of morality endorsed by (many) religious persons?

As noted by Connolly, in the public sphere of Euro-Atlantic nation-states the logic of secularism is thus assailed from one side as being “abstract” and “empty,” and from another as being “hypocritical.” “Abstract because the pale, secular image of the nation is drained of dense, palpable, living examples that give it vitality; hypocritical because it secretly draws cultural sustenance from the ‘private faith’ of constituencies who embody the European traditions from which Christian secularism emerged.”⁶⁵

64. The ambiguity here is related in a complex way to the distinction between objectivist and subjectivist accounts of morality. Even if morality is viewed as located “in us” in the form of “conscience” (as opposed to some external independent order), this can still be an objectivist view of morality because “it would insist that our nature or telos are somehow natural and given: they are what they are independent of our (possibly mistaken) opinions about them.” Steven D. Smith, *The Tenuous Case for Conscience* 9 (Univ. of San Diego Sch. of Law, San Diego Legal Stud. Res. Paper No. 05-02, 2004), available at <http://ssrn.com/abstract=590944>. Given human fallibility, the exercise of conscientious judgment may then indeed suggest that the best way to determine what is morally required of us is to defer to or follow the counsel of some more learned authority. Conversely, if one holds a subjectivist view of morality, which holds that what is morally obligatory for me “does not come from some outside source or inner essential nature that imposes rules on me with or without my consent” but rather is the “result of my own attitudes or prescriptions or self-legislation,” then on this view of the “autonomous subject,” reliance on any external authority will be by definition suspect. *Id.* at 10. Thinking for yourself in this sense means that “[t]here is no place for others to tell [you] what morality requires, nor has anyone the authority to do so—not [your] neighbors, not the magistrates and their laws, not even those who speak in the name of God.” J.B. Schneewind, *Autonomy, Obligation, and Virtue: An Overview of Kant’s Moral Philosophy*, in *THE CAMBRIDGE COMPANION TO KANT* 309, 310 (Paul Guyer ed., 1992), cited in Smith, *supra*, at 16 n.20. For discussion of this distinction in the context of Article 9 jurisprudence, see *infra* note 237 and accompanying text.

65. CONNOLLY, *supra* note 34, at 91. Noting Tocqueville’s observations that “[i]n the United States it is not only *mores* that are controlled by religion, but its sway extends over *reason*” and that “Christianity reigns without obstacles, by universal consent,” *id.* at 24 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 292 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1851)), Connolly suggests that one “might read this to say that while politics is *located* in a secular realm, that realm remains safe for Christianity as long as

These criticisms underpin the two challenges to the notion of a secular public sphere today. One challenge is advanced by Christian critics who question the purported neutrality of what they regard to be a form of unjustifiable secular establishment. They do so on the basis of both a majoritarian democratic argument and a collective claim of right, in other words, the right of a people to (national) self-determination.⁶⁶ Why, they ask, should the religion of the majority of the population not be present and visible in the public square? Why, indeed, should Christianity not be celebrated in national life? Why should Christians not have the right to raise their children and live their lives in a public culture that both recognizes and reflects Christian values and mores?⁶⁷

A second kind of challenge is advanced by Muslim and other religious minority communities. Here the objection is not to the presence or recognition of Christian values, symbols, or practices in the public sphere. Rather, the objection is to the *exclusion* or *restriction* of Islamic manifestations of religion or belief on the basis of what is seen as interpretations of norms which appear ineluctably grounded in Christian or post-Christian conceptions of what constitutes religion and a proper religious subjectivity.⁶⁸

3. The Authority of Public Reason

This leads to the third and arguably most intractable dilemma for secularism: the question of how to secure secular authority in the public sphere. This is in effect the story of the Enlightenment—the quest to place reliance on reason in order to give universal moral philosophy

the unconscious mores that *organize* public reason, morality, and politics are Christian.” CONNOLLY, *supra* note 34, at 24. “This is so because the instinctive register of intersubjective judgment to which Tocqueville appeals both *embodies Christian culture* and *helps to regulate public argumentation.*” *Id.* (emphasis added).

66. For discussion on this point, see Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT’L L. 1, 12–13 (2008) [hereinafter Danchin, *Suspect Symbols*] (noting that the nation-state itself “embodies the recognition that there is a morally significant connection between human freedom and a collective cultural life” and that “[n]ational self-determination is thus a ‘cultural right’ in the sense that national, cultural, and religious communities seek and require not private but ‘public spheres’ of their own in order to flourish and, ultimately, to survive”).

67. *But see, e.g.*, ELIZABETH SHAKMAN HURD, *THE POLITICS OF SECULARISM IN INTERNATIONAL RELATIONS* 6 (2008) (noting that this drive to (re)establish Christianity in the public sphere is diminished to the extent that Christian values and traditions are already inscribed in the “prediscursive dispositions” and cultural fabric of the society).

68. *See, e.g.*, ASAD, *FORMATIONS OF THE SECULAR*, *supra* note 21, at 175 (“[In relation to Muslim communities in France] [t]he crucial difference between the ‘majority’ and the ‘minorities’ is . . . that the majority effectively claims the French state as its national state. In other words, to the extent that ‘France’ embodies the Jacobin narrative, it *essentially* represents the Christian and post-Christian citizens who are constituted by it.”).

primacy over ecclesiastical theology.⁶⁹ This project is usually traced to the eighteenth century thought of Immanuel Kant. In positing that freedom consists in the acceptance of what reason dictates as duty, Kant made three critical philosophical moves. First, he elevated a generic Christianity (“rational religion”) above sectarian faith, anchoring it in a “metaphysic of the supersensible” that ostensibly binds moral agents simply in virtue of their rationality.⁷⁰ Second, in order to secure the authority of moral philosophy over theology, Kant reduced moral judgment to practical reason alone.⁷¹ And third, while he retained the “command model of morality of Augustinian Christianity,” in doing so Kant shifted “the proximate point of command from the Christian God to the moral subject itself.”⁷²

69. The modern drive to secure the authority of secular reason in the public sphere has both a visceral and political sense; visceral in reiterating the “Christian and Kantian demands to occupy the authoritative place of public discourse,” and political in response to the fear that a “non-Kantian, religiously pluralized world would fall into either disorder or religious tyranny if its participants did not endorse a single standard of rational authority, regardless of the extent to which such a standard can in fact be secured transcendentally.” CONNOLLY, *supra* note 34, at 38–39; *see also* RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 18 (1983) (“[For modern philosophy,] [t]he specter that hovers in the background of this journey is not just radical epistemological skepticism but the dread of madness and chaos where nothing is fixed, where we can neither touch bottom nor support ourselves on the surface.”).

70. CONNOLLY, *supra* note 34, at 33. Moral obligation (“morality as law”) is drawn from the “supersensible realm” by practical reason and is thus “anchored only in the ‘apodictic’ recognition by ordinary human beings of its binding authority.” *Id.* at 31. The purity of practical reason is assured only if “it is uncontaminated by desire or inclination.” William E. Connolly, *A Critique of Pure Politics*, 23:5 *PHIL. & SOC. CRITICISM* 1, 3 (1997). Thus, “everything must be done to protect the moral will from such contamination” as “the *motivation* to duty becomes uncertain when it is infiltrated by sensible desire, and what *counts* as duty becomes culturally variable when inclination is allowed to enter into its determination.” *Id.*

71. In this move, “rational religion” is anchored “in the law of morality rather than [morality anchored] in ecclesiastical faith.” CONNOLLY, *supra* note 34, at 31.

For unless the supersensible (the thought of which is essential to anything called religion) is anchored in determinate concepts of reason, such as those of morality, fantasy inevitably gets lost in the transcendent, where religious matters are concerned . . . and there is no longer any public touchstone of truth.

IMMANUEL KANT, *THE CONFLICT OF THE FACULTIES* 81 (Mary J. Gregor trans., 1979), *quoted in* CONNOLLY, *supra* note 34, at 31.

72. This means that

Kant’s rational religion still shares much structurally with the “dogmatic” ecclesiology it seeks to displace. First it places singular conceptions of reason and command morality above question. Second, it sets up (Kantian) philosophy as the highest potential authority in adjudicating questions in these two domains and in guiding the people toward eventual enlightenment. Third, it defines the greatest danger to public morality as sectarianism within Christianity. Fourth, in the process of defrocking ecclesiastical theology and crowning philosophy as judge in the last instance, it also delegitimizes a place for several non-Kantian, nontheistic perspectives in public life.

The challenge in post-Kantian philosophical thought has been to secure the achievement of the “Kantian effect” while disavowing any reliance upon a “metaphysic of the supersensible.”⁷³ But, again, such efforts remain haunted by the twin charges of abstraction (emptiness) and hypocrisy. In relation to the former, modern secularists are said to invoke “authoritative conceptions of thinking, reason and morality that draw them perilously close to the Kantian metaphysic of the supersensible.” In relation to the latter, the supposedly apodictic recognition of Kantian morality simply in virtue of a shared or universal rationality is seen instead as merely a “secondary formation reflecting the predominant Christian culture in which it is set.”⁷⁴

B. Rethinking the Secular

These three dilemmas are increasingly recognized today, especially as new identities seek public recognition in Western nation-states and the social and political need to find new forms of *modus vivendi* between diverse groups in public life accelerates. This is causing legal and political theorists to make two course corrections. First, in acknowledging the *limits* of reason and rational discourse and recognizing that *any* account of the public sphere will include contestable normative assumptions; and second, in acknowledging the extent to which extant secular philosophies already enfold specific cultural and contingent elements within them.⁷⁵

Consider, for example, Jürgen Habermas, the leading exponent of post-Kantian philosophical history for whom Kant’s metaphysics of noumenal community devolves into a politics of liberal democratic deliberation in the public sphere. As noted by Connolly, “Habermas now acknowledges more actively the role of sensibility in reflection and the

CONNOLLY, *supra* note 34, at 32.

73. *Id.* at 33; see also ONORA O’NEILL, *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT’S PRACTICAL PHILOSOPHY* chs. 1–2 (1989) (asking how *any* conception of reason has standing to judge the limits and competence of reason itself and how, if reason cannot in fact be judged, appeals to reason gain any authority). Rawls’s notion of “political not metaphysical” is a useful illustration of this move. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223 (1985).

74. CONNOLLY, *supra* note 34, at 33. If these critiques are correct, then of course the same objections that Kant levied against the dogmatism and arbitrariness of ecclesiastical authority can be levied equally against his account of morality as law.

75. See, e.g., Micah Schwartzman, *The Relevance of Locke’s Religious Arguments for Toleration*, 33 *POL. THEORY* 678, 678 (2005) (discussing the “role that religious arguments can play in justifying liberal political principles”); Jeremy Waldron, *Two-Way Translation: The Ethics of Engaging with Religious Contributions in Public Deliberation* (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Res. Paper No. 10-84, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708113 (considering the role of religious argument and insights in ethical discourse in the public sphere).

role of contingency in the formation of sensibility.”⁷⁶ In 2006, Habermas surprised his critics and admirers alike with the following statement regarding the nature and origins of egalitarian universalism:

Christianity has functioned for the normative self-understanding of modernity as more than a mere precursor or a catalyst. Egalitarian universalism, from which sprang the ideas of freedom and social solidarity, of an autonomous conduct of life and emancipation, of the individual morality of conscience, human rights, and democracy, is the direct heir to the Judaic ethic of justice and the Christian ethic of love. This legacy, substantially unchanged, has been the object of continual critical appropriation and reinterpretation. To this day, there is no alternative to it. And in the light of the current challenges of a postnational constellation, we continue to draw on the substance of this heritage. Everything else is just idle postmodern talk.⁷⁷

Once we acknowledge that “secularism is a *political settlement* rather than an uncontested dictate of public discourse itself,” and we admit that *any* ideal of rational agreement in the public sphere is both inherently problematic and necessarily incorporates visceral and contingent elements within thinking and discourse, then space opens up for rethinking the secular insistence on leaving controversial religious and metaphysical judgments out of the public sphere.⁷⁸

Again, we see this in the recent work of Habermas, who has now advanced the notion of a “post-secular” society in which the relation of mutual dependence between faith and knowledge and between religious and secular citizens is more openly acknowledged and engaged.⁷⁹ In this

76. CONNOLLY, *supra* note 34, at 38.

77. JÜRGEN HABERMAS, *A Conversation About God and the World, in* TIME OF TRANSITIONS 149, 150–51 (2006). As Connolly thus observes,

metaphysical abstinence increases the pressure on secularists to pretend that actually operative reason . . . is sufficient to the issues at hand, even in the face of their own insights into how cultural specificities, contingent elements, and artificial closures help to set operative conditions for actual practices of discourse and judgment.

CONNOLLY, *supra* note 34, at 37.

78. CONNOLLY, *supra* note 34, at 36 (emphasis added); see also Elizabeth Shakman Hurd, *The Political Authority of Secularism in International Relations*, 10 EUR. J. INT’L REL. 235, 237 (2004) (arguing that “secularism arrogates to itself the right to define the role of religion in politics” and in doing so it not only “shuts down important debates about the moral bases of public order and incites a backlash against its hegemonic aspirations,” but also “operates unaware of the contingency of its assumptions and the consequences of its universalizing tendencies”).

79. I believe a similar evolution can be seen in the progression of Rawlsian philosophical thought. See JOHN RAWLS, *A THEORY OF JUSTICE* 124, 250, 302 (1971) (defending the

conception, one of the presuppositions of the secular state is that democratic majority decisions always depend on the prior ethical convictions of their citizens and encompass moral stances that stem from pre-political sources such as religious traditions and ways of life.⁸⁰ Integral to Habermas's shift in position is the recognition that Kant

construes reason too broadly when he integrates the postulates of religious faith into its practical dimension. The justification of morality and that of the existence of God are fundamentally separate issues for Habermas Hence philosophy must understand religion in the end as something *external* to it.⁸¹

In a parallel fashion, but from an opposing perspective, Pope Benedict similarly indicts Kant's philosophy of religion and self-limited account of practical reason, although unsurprisingly reaching different conclusions as to the proper relation of faith and reason.⁸² Most of the

priority of liberty over other values by advancing the "Greatest Equal Liberty Principle," according to which each individual has the most extensive liberty subject to others having the same, restrictable only for the sake of liberty); JOHN RAWLS, *POLITICAL LIBERALISM* XXI (1993) (replacing the idea of the most extensive system of liberty with an account of the "basic liberties" and seeking to justify a strictly *political* conception of justice in contrast to a moral doctrine of justice general in scope); JOHN RAWLS, *THE LAW OF PEOPLES* 65 (1999) (advancing an even more minimalist account of "special class of urgent rights" and the need for toleration of "non-liberal but decent societies" in the more religiously and culturally diverse conditions of international law).

80. Michael Reder & Josef Schmidt, *Habermas and Religion*, in *AN AWARENESS OF WHAT IS MISSING: FAITH AND REASON IN A POST-SECULAR AGE* 1, 7 (Ciaran Cronin trans., Polity Press, 2010). *But cf.* Nadia Urbinati, *Laïcité in Reverse: Mono-Religious Democracies and the Issue of Religion in the Public Sphere*, 17 *CONSTELLATIONS* 4, 5 (2010) (arguing, contrary to Habermas's conception of a post-secular democratic society in which religious citizens have a right to participate in public discourse in accordance with their own principles and convictions, that "[i]n matters that have a direct impact on the individual freedom of religion and social peace such as the presence of religion in the public sphere, political theorists should pay close attention to the ethical context and the historical tradition of a given society without deducing practical conclusions from an ideal conception of democracy" on the basis that "a political practice that is liberal in a religious pluralistic environment may turn to be anti-liberal in a mono-religious society [such as Italy]").

81. Reder & Schmidt, *supra* note 80, at 8 (emphasis added). The key move is made by Habermas in a 2004 essay. See JÜRGEN HABERMAS, *The Boundary Between Faith and Knowledge: On the Reception and Contemporary Importance of Kant's Philosophy of Religion*, in *BETWEEN NATURALISM AND RELIGION* 209, 210 (Polity Press, 2008) (2005) ("Kant's self-criticism of reason was aimed both at the stance adopted by theoretical reason toward the metaphysical tradition and at the stance of practical reason toward Christian doctrine. Philosophical thought proceeds from transcendental self-reflection both as postmetaphysical and as post-Christian."). Again, the dilemma for Kant is that he treats religion as both a *heritage* ("the source of a morality that satisfies the standards of reason") and as an *opponent* ("an obscure refuge to be cleansed of obscurantism and zealotry by philosophy"). *Id.* at 227.

82. According to Pope Benedict XVI, the idea that metaphysics was a "premise derived from another source" led to Kant's statement "that he needed to set thinking aside in order to make room for faith." Pope Benedict XVI, Lecture at the University of Regensburg: Faith, Reason and the University: Memories and Reflections (Sept. 12, 2006), *available at*

commentary and protest following his now infamous 2006 Regensburg lecture has focused on the early critical comments regarding Islam. But as Asad has observed, what is more intriguing about the lecture

is the way [Benedict] links his discursive attack on Islam to his critique of European reason. According to Benedict, Islamic theology separates the concept of God from reason (making God utterly unpredictable, therefore irrational), whereas Christianity maintains their inseparability in its harmonization of Hellenic rationality with the status of the divine.⁸³

The main target of the lecture is thus “successive waves of de-Hellenization in European thought—from the Reformation via Kant and liberal theology to scientific positivism—by which . . . the inner bond between faith and reason is ruptured. . . . Benedict’s critique is . . . aimed . . . at reaffirming the identification of reason with divinity”⁸⁴ and at unsettling the modern understanding of the Enlightenment.⁸⁵ Indeed, for Benedict, the “Enlightenment is of Christian origin and it is no accident that it was born precisely and exclusively in the realm of the Christian faith.”⁸⁶

Both Habermas and Benedict see a close connection between Europe’s secular traditions and Christianity. What is striking, and curious, about this position is the perfect correlation it imagines between secular modernity on the one hand and Europe as a unique Christian civilizational *nomos* on the other—Europe as simultaneously universal *and* exceptional. As Charles Hirschkind observes, this argument rests on a double maneuver. On the one hand, it “naturalizes one particular form of

http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html. The result was that Kant’s modern self-limitation of reason “anchored faith exclusively in practical reason, denying it access to reality as a whole.” *Id.* Modern thought is thus left in the position “that only positivistic reason and the forms of philosophy based on it are universally valid.” *Id.* The difficulty, however, is that the “world’s profoundly religious cultures see this exclusion of the divine from the universality of reason as an attack on their most profound convictions.” *Id.* Such a conception of reason has two fatal disabilities underlying its rationality. First, it is “deaf to the divine,” and having relegated religion into the “realm of subcultures,” it is incapable of “entering into the dialogue of cultures.” Second, “with its intrinsically Platonic element, [it] bears within itself a question which points beyond itself and beyond the possibilities of its methodology.” *Id.*

83. Talal Asad, *Free Speech, Blasphemy, and Secular Criticism*, in *IS CRITIQUE SECULAR?: BLASPHEMY, INJURY, AND FREE SPEECH* 20, 52 (Talal Asad et al. eds., 2009).

84. *Id.*

85. See JOSEPH RATZINGER, *EUROPE: TODAY AND TOMORROW* 93–96 (2004).

86. Cardinal Joseph Ratzinger, Lecture in Acceptance of the St. Benedict Award: Christianity: “The Religion According to Reason” (Apr. 1, 2005), available at <http://www.zenit.org/article-13705?1=english>.

religious expression as the end point of religion's logical development;"⁸⁷ on the other, it asserts that "Christian heritage is essential to the civilizational identity of Europe."⁸⁸ For scholars such as Marcel Gauchet and Charles Taylor, this close intertwining of Christianity with secular modernity does not cause any sort of theoretical complication.⁸⁹ Rather, it confirms Christianity's unique ability to transcend its own particularity and sees the inexorable rise of modern liberal political orders as a signal achievement of Latin Christendom. The result, as Hirschkind argues, is that

[t]he incorporation of what had been modernity's other—religion—into its very fabric does not decenter the conceptual edifice of European modernity in any way that might allow a reconsideration of Europe's religious minorities, but on the contrary redoubles it, deepening the fundamental otherness of those who cannot inhabit its Christian genealogy. Both secular politics and private belief emerge as the inheritors of the arc of religion returning to itself.⁹⁰

This notion of Christianity as at once foundational to modernity and exceptional as a collective identity is both circular and self-reinforcing; the former defining the universal in terms of a *particular* religious tradition and its encounters with its others, the latter defining the particular in terms of a conception of the universal—religion in its *true* form. Any non-Christian or non-Western religion such as Islam which deviates from this notion of religion as private belief and subjective experience thus faces a double charge: not only is it a threat to the secular political order but it is also not religion in its true, modern form.⁹¹

87. Charles Hirschkind, *Religious Difference and Democratic Pluralism: Some Recent Debates and Frameworks*, 44 *TEMENOS* 123, 126 (2008) (noting also that on this argument "it turns out that the modern concept of religion as private belief conforms to religion in its essence" and that a "certain post-Reformation understanding of Christianity is valorized as true religion in its undistorted form, while all other religious traditions and forms of religiosity are recognized as incompatible with modernity, lacking all the doctrinal resources that would enable them to accede to the modern").

88. *Id.* at 69 (observing that proposals to recognize the "Christian roots of Europe" in the Constitution of the European Union occurred at precisely the moment debates regarding the presence of Muslims in Europe were intensifying).

89. See MARCEL GAUCHET, *THE DISENCHANTMENT OF THE WORLD: A POLITICAL HISTORY OF RELIGION* 3–6 (Oscar Burge trans., Princeton Univ. Press 1997) (1985); CHARLES TAYLOR, *A SECULAR AGE* 15, 20–21 (2007).

90. Hirschkind, *supra* note 87, at 126. Hirschkind further notes that "Muslims whose religious practices make claims on public life are [thus] not merely a threat to the necessarily secular foundation of a pluralist democratic society; their claims also distort religion's essential nature." *Id.* at 126–27.

91. Hirschkind argues that we can see this kind of double-move in Slavoj Žižek's characterization of Christianity as the "religion of modernity." *Id.* at 127; see also SLAVOJ ŽIŽEK,

C. *Between Rationality and Reason*

What conclusions can we draw from these interrelated dilemmas for secularism and the theoretical shifts we see underway in competing secular and religious conceptions of liberal modernity? In particular, what implications arise for our understanding of the premises and evolution of the Article 9 jurisprudence of the European Court of Human Rights?

The central thesis of this Article is that the right to freedom of thought, conscience, and religion in Article 9 encompasses within it both of these *rationalist* and *dialogic* elements.⁹² As a matter of legal and political philosophy, the status of Article 9 as a fundamental right rests on its purportedly rational, objective, and neutral character, and its grounding in “free-standing” secular reason. And yet, as we have seen, the philosophical concept of right is itself in part a reconstruction of “the categorical ought of the divine imperatives in discursive terms” and, at the same time, deeply indebted to and grounded in the history and cultural dimensions of Western Christianity.

We need to pay careful attention then to how the Court imagines and constructs concepts such as “secularism,” “equality,” and “freedom.” We need also to be sensitive to the possibility that a rationalist mode of justification may in fact jeopardize the freedom of religion and belief of minority (especially non-Western) religious groups by tacitly subsuming or incorporating majority cultural norms (whether secular or religious) into the meaning and scope of Article 9. This is precisely the contamination of practical reason by “sensible desire or inclination” that makes what counts as duty “culturally variable” and against which the notion of “right” was intended to be the solution in the first place.

The paradox is that conventions such as the ECHR aim to “create space for a non-political normativity in the form of human rights that would be opposable to the politics of States but that is undermined by the experience that what rights mean, and how they are applied, can only be determined by the politics of States.”⁹³ Once we abandon the notion

ON BELIEF 150 (2001). On this view, the threat posed to the modern secular political order is not seen as coming from “religion” *per se*, which is “now understood as one of Europe’s greatest moral assets,” but rather “fundamentalism[,] namely, those traditions of religious practice that fail to accede to the universality of post-theistic Christianity and therefore sit uncomfortably with the liberal sensibilities of modern Europeans,” while correspondingly, Muslims within Europe are accused, “echoing Kant, of failing to attain adulthood.” Hirschkind, *supra* note 87, at 128.

92. See *infra* Part III.A.

93. Martti Koskeniemi, *Human Rights, Politics, and Love*, XIII FINNISH Y.B. INT’L L. 79, 79 (2002). For Koskeniemi, this means realizing that “rights defer to politics in the context of professional practice” and application in at least four ways: (1) “field constitution” (the process by which different areas of social life “come[] to be characterised in terms of rights”);

that rights exist in some sense *above* or *outside* of politics and ideology, once we see them not as a *condition* or *limit* on politics in an objectively ascertainable moral order but rather as an *effect* or *outcome* of the politics and history of a particular *nomian* sphere, what implications follow?

Here we need to recognize the *dialogic* element already internal to rights discourse and the extent to which existing forms and interpretations of rights both distance themselves from and enfold within them the values and premises of (particular) religious traditions. We thus need to pay careful attention to the constantly shifting forms of accommodation and negotiated settlements that animate the *praxis* of rights in public life. In the place of a pure morality of law or “ideal of a consensus between rational agents,” we might imagine instead an ethically sensitive “ethos of engagement between a plurality of constituencies inhabiting the same territory and honoring different moral sources.”⁹⁴ A central question in the analysis that follows is what recognition of such an ethic of cultivation might mean for the attitude of the European Court of Human Rights to interpretive questions under Article 9, for example, as regards the scope and application of terms such as “necessary in a democratic society” and “margin of appreciation.”

In critiquing how human rights law itself constructs and imagines the category of religion and the right to religious freedom according to certain distinctive conceptions of public reason and individual freedom, I have argued previously that considerations such as these require us to move beyond classical liberalism toward value-pluralist approaches to rights.⁹⁵ The central features of value pluralism are its antimonic position as an ethical theory, its view that conflicts of values are an intrinsic part of human life and that there is no single right answer in choosing between them, and that conflicts between entire ways of life suggest that not only individuals but also communities may be the principal bearers of rights (and duties) in pluralist political orders.⁹⁶ If correct, this has profound implications for our understanding of religious freedom and liberal toleration in international law.

(2) “indeterminacy” (rights have “no meaning independent from the way [they are] interpreted by [a] relevant authority” in a relevant context); (3) “right-exception” (“rights always come with *exceptions* while the scope or conditions for the application of the exception” are determined by choices which ultimately rely on “alternative conceptions of good society”); and (4) “conflicts of rights” (in any conflict, the opposing sides will describe their claims in terms of rights). *Id.* at 82–85.

94. CONNOLLY, *supra* note 34, at 35–36.

95. See Danchin, *Suspect Symbols*, *supra* note 66, at 59–61; Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT’L L.J. 249 (2008) [hereinafter Danchin, *Of Prophets and Proselytes*].

96. While the formal structure of international human rights law reflects this reality by recognizing norms of self-determination and minority rights, in general these collective rights have been undertheorized in the literature on religious freedom.

II. RELIGIOUS FREEDOM IN ECHR JURISPRUDENCE

Part I explored competing critiques of secularism, reason, and public space. In Part II, we now turn to the European Court of Human Rights' Article 9 jurisprudence to consider the ways in which these rationalist and dialogic elements have functioned in the Court's reasoning in cases involving Islam and the claims of Muslim communities and individuals (Section C).⁹⁷ For comparative purposes, it is helpful first to set out briefly two early lines of cases that accorded a relatively high degree of protection to freedom of religion and belief, at least in relation to the claims of majority religious groups. These cases involved the rights of religious minorities (Section A) and the right to be free from injury to religious feelings (Section B). It should be noted that each of these lines of cases involved predominantly Christian groups—Catholic, Protestant, Eastern Orthodox, and Jehovah's Witness.

A. *The Rights of Religious Minorities*

The Court's first Article 9 decision was *Kokkinakis v. Greece*,⁹⁸ in which Greece prosecuted a Jehovah's Witness for proselytism directed toward a member of the dominant religion, Christian Eastern Orthodoxy. In a 6–3 decision, the Court held that a state may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of ideas and information—in this case proselytism—judged incompatible with the respect for the freedom of thought, conscience, and religion of others. While the application of the Greek proselytism law in this case was held to be unacceptable, the Court upheld the facial validity of the law and accepted that at least certain forms of proselytism could be made criminal.⁹⁹ The case is thus known for the

97. What follows is a partial and selective discussion of certain aspects of the cases decided under Article 9 since 1994 as they pertain to the themes discussed in Part I.

98. *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 3 (1993).

99. *Id.* at 21. For a detailed discussion and a critique of the Court's decision in *Kokkinakis*, see Peter Danchin & Lisa Forman, *The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities*, in PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 192, 200–10 (Peter G. Danchin & Elizabeth A. Cole eds., 2002). Other early cases involving the rights of minority religions include: *Manoussakis v. Greece*, 1996-IV Eur. Ct. H.R. 1346 (accepting the legitimacy of the Greek government's regulation of religious practice in requiring explicit civil authorization to open a place of public worship, but finding a violation of Article 9 on the basis of factual evidence that Greece had used its laws to impose rigid or prohibitive conditions on the practice of religious beliefs by certain non-Orthodox movements); *Larissis v. Greece*, 1998-I Eur. Ct. H.R. 362 (upholding the criminal conviction of officers of the Pentecostal faith in the Greek air force for proselytizing subordinates). The Court has also upheld the compulsory participation of Jehovah's Witness students in school parades commemorating war as not violating their or their parents' religious freedom. *Efstratiou v. Greece*, 1996-VI Eur. Ct. H.R. 2347, 2362; *Valsamis v. Greece*, 1996-VI Eur. Ct. H.R. 2312. For two less well-known early cases

Court's elliptical *proper* versus *improper* proselytism distinction, which I have discussed at length elsewhere.¹⁰⁰

What we can see already in *Kokkinakis* are the early signs of various normative difficulties in the Court's approach to Article 9. First, the case involved a conflict not simply between free speech and freedom of religion, but a conflict *internal* to the right to religious freedom itself; in other words, both sides in the dispute advanced their claims on the basis, *inter alia*, of freedom of religion and belief. Second, the case raised the question—later to be so controversial—of the scope of the right to have or maintain a religion and the right to be “free from injury to religious feelings.”¹⁰¹ Finally, the case raised for consideration the paradigmatic issue of the background relationship between a majority national group, defined in part by an established or dominant religious tradition, and a new or unpopular religious minority.

B. Freedom from Injury to Religious Feelings

The second of these difficulties became apparent in two subsequent cases in the mid-1990s in which the Court upheld two state bans on films deemed offensive to Christian sensibilities. In 1994 in *Otto-Preminger-Institut v. Austria*, the Austrian government defended seizure of a film on the basis that it constituted an attack on the Christian religion, and Roman Catholicism in particular, stressing the role of religion in the everyday life of the people of Tyrol—which was “as high as 87%” Catholic.¹⁰² On this basis, the government's main argument was that there was a “pressing social need for the preservation of religious peace” and a necessity “to protect public order.”¹⁰³ The Court concurred stating that it

cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.¹⁰⁴

involving state interference in the organizational leadership of Muslim communities, see *Hasan & Chaush v. Bulgaria*, 2000-XI Eur. Ct. H.R. 118 (finding an Article 9 violation); *Serif v. Greece*, 1999-IX Eur. Ct. H.R. 73 (finding an Article 9 violation). For an early case involving Jewish communities in France, see *Cha'are Shalom Ve Tsedek v. France*, 2000-VII Eur. Ct. H.R. 231 (upholding French authorities' refusal to grant approval for access to slaughterhouses to perform ritual slaughter in accordance with ultraorthodox religious prescriptions).

100. See *Danchin, Of Prophets and Proselytes*, *supra* note 95, at 273.

101. *Id.* at 272.

102. *Otto-Preminger-Institut*, 295 Eur. Ct. H.R. (ser. A) at 1, 20 (1994).

103. *Id.*

104. *Id.* at 21.

Citing its earlier judgment in *Kokkinakis*, the Court then explained how certain forms of “gratuitous offense” might amount to a violation of an adherent’s right to freedom of religion under Article 9:

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. . . . The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.¹⁰⁵

As noted in the Introduction, two years later in *Wingrove v. United Kingdom*, the Court upheld the British government’s refusal to permit circulation of the film *Visions of Ecstasy* found to be offensive to Christian sensibilities.¹⁰⁶ While the Court made clear its disapproval of British blasphemy laws,¹⁰⁷ it held that it was within Britain’s margin of appreciation to restrict freedom of expression under Article 10 because the government had the legitimate aim “to protect ‘the rights of others’, and more specifically to provide protection against seriously offensive at-

105. *Id.* at 18. On this basis, the Court found that the applicant could be required “to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights.” *Id.* at 19; *cf. id.* at 24 (Palm et al., JJ., dissenting) (opposing the idea that the right to freedom of religion includes the right to be free from injury to religious feelings but agreeing with the majority that “the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed . . . [and thus] it must also be accepted that it may be ‘necessary in a democratic society’ to set limits to the public expression of such criticism or abuse”).

106. *Wingrove v. United Kingdom*, 23 Eur. Ct. H.R. 1937 (1996).

107. *Id.* at 1956 (“[I]t is not for the European Court to rule *in abstracto* as to the compatibility of domestic law with the Convention. . . . The uncontested fact that the law of blasphemy does not treat on an equal footing the different religions practised in the United Kingdom does not detract from the legitimacy of the aim pursued in the present context.”).

tacks on matters regarded as sacred by Christians.”¹⁰⁸ The Court further stated that this aim “is also fully consonant with the aim of the protections afforded by Article 9 to religious freedom.”¹⁰⁹

Unsurprisingly, these decisions have been criticized, *inter alia*, for accommodating religious sensibilities at the expense of freedom of expression.¹¹⁰ But what is most relevant for present purposes is how the Court uses the twin conceptual categories of *margin of appreciation* and *public order* on the one hand, and *the rights and freedoms of others* on the other, in ways which give priority to the values of the majority religious culture.¹¹¹

This reflects the controlling paradox of the liberal project: “[T]o preserve freedom, order must be created to restrict it.”¹¹² The difficulty, as acutely observed by Agrama, is that while “on the one hand, everyone is ‘equal before the law,’ [and has equal rights] . . . on the other hand, the aim of the law is to create and maintain public order—an aim that necessarily turns upon the concerns and attitudes of its majority population.”¹¹³ Thus, religions well-established within a state, either because they are an official religion or have a large number of adherents, are more likely to have their core doctrines recognized as manifestations of religious belief.¹¹⁴ Given the dangers of this approach for a liberal theory of human

108. *Id.* at 1957.

109. *Id.* at 1955. Furthermore, “[a] wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.” *Id.* at 1958.

110. See, e.g., Peter W. Edge, *The European Court of Human Rights and Religious Rights*, 47 INT’L & COMP. L.Q. 680, 682–83 (1998) (arguing that “[i]t is open to question whether an entirely passive state, which is dependent upon the inaction of others rather than the inaction of the believer, properly constitutes a manifestation of those beliefs” and that the case “should be treated with caution as an authority on the extent of Article 9 protection”); see also George Letsas, *Is There a Right Not to Be Offended in One’s Religious Beliefs?*, in LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS (Lorenzo Zucca ed., Cambridge Univ. Press, forthcoming 2011) (advancing a conception “of democracy and liberal equality that shows why there is no right not to be insulted in one’s religious beliefs in public space”).

111. On the interrelated issues of *public order* and *the rights of others*, see *infra* Part III.

112. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 71 (Cambridge University Press, reissued with new epilogue, 2005) (1989) (“The fundamental problem of the liberal vision is how to cope with what seem like mutually opposing demands for individual freedom and social order.”).

113. Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide?*, in IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH 64, 85–86 (Townsend Ctr. For the Humanities, Univ. of Cal. Berkeley ed., 2009) (citing Hussein Ali Agrama, *Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?*, 52 COMP. STUD. IN SOC’Y & HIST. 495, 506 (2010)).

114. See Danchin, *Of Prophets and Proselytes*, *supra* note 95, at 287 (“[I]t is apparent that the court has generally construed individual rights in terms of the collective good of the majority as against that of minority religious groups. This approach does not prevent minority

rights or any regime that privileges individual freedom, the Court has employed a variety of techniques including the margin of appreciation and tests of reasonableness or proportionality to mask the partiality and contestability of its reasoning in determining outcomes.

C. *The Claims of Muslim Communities*

None of these previous controversies concerned Islam. Let us turn then to the Court's third line of cases which deal directly with Islam and the rights of Muslim communities (both majorities and minorities) to have and maintain their religious beliefs and traditions. This sequence of cases begins with *Dahlab v. Switzerland*¹¹⁵ and extends through the Court's decisions in *Refah Partisi v. Turkey*,¹¹⁶ *Şahin v. Turkey*,¹¹⁷ and most recently *Dogru v. France*.¹¹⁸ Each of these cases (with the exception of *Refah*) involved the wearing of the Islamic headscarf in public schools or universities. An important national-level case also relevant to this discussion is *Regina [Begum] v. Denbigh High School*¹¹⁹ in which the English courts relied extensively (although in different ways) on the Court's judgment in *Şahin*, which in turn relied on its earlier judgment in *Refah*.¹²⁰

In the first case, *Dahlab v. Switzerland*, a Swiss primary school teacher converted to Islam and decided to cover her hair at work. The Swiss Director General of Public Education issued a direction that she cease wearing religious clothing at school. She refused, challenged the decision in the Swiss courts, and after losing took her case to the European Court of Human Rights. There, Switzerland argued as a jurisdictional matter that the case was "manifestly ill-founded" and should not proceed to the merits. The Court agreed.¹²¹

In the second case, *Refah*, the Grand Chamber upheld a ban on the largest political party in Turkey, the Welfare Party, on the basis that its activities violated the constitutional principles of secularism and democ-

religious groups from freely practicing their beliefs as guaranteed under article 9—at least not in those 'private' spaces of the private sphere such as homes or places of worship [I]t [does] mean[] that in cases of conflict, the court will prefer the majority nation's conception of the collective good including the limits to individual freedom implied by that conception.").

115. *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 463.

116. *Refah Partisi v. Turkey*, App. No. 41340/98, 37 Eur. H.R. Rep. 1 (2003).

117. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 99 (2007).

118. *Dogru v. France*, App. No. 27058/05, 49 Eur. H.R. Rep. 179, 182 (2008).

119. *R [Begum] v. Denbigh High Sch.*, [2006] UKHL 15, [2007] 1 A.C. 100.

120. See, e.g., David Dyzenhaus, *Headscarves, Extreme Speech, and Democracy* 13–14 (unpublished manuscript), available at http://www.law.uwo.ca/publiclaw/PublicLaw_Documents/Headscarves_ExtremE_Speech.pdf.

121. Carolyn Evans, *The 'Islamic Scarf' in the European Court of Human Rights*, 7 MELB. J. INT'L. L. 52, 59–60 (2006); see also *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 456–57.

racy.¹²² As noted by David Dyzenhaus, the Court in its reasoning endorsed the findings of both the Turkish Constitutional Court and the majority of the Chamber of the Third Section of the European Court “that shariah is ‘incompatible with the fundamental principles of democracy, as set forth in the Convention’ because it is a ‘stable and invariable religion’ in which principles ‘such as pluralism in the political sphere or the constant evolution of public freedoms have no place.’”¹²³

The Welfare Party was found to have plans to “set up a plurality of legal systems, leading to discrimination based on religious beliefs,” and it intended to “apply sharia to the internal or external relations of the Muslim community within the context of this plurality of legal systems.” Certain statements of the party’s leaders were said not to rule out the use of force to achieve these aims.¹²⁴ Even in the absence of such threats, however, the Court found that both *Shari’ah* and “plural religiously-based legal systems” were—even if democratically adopted—inherently incompatible with the ECHR and its concomitant notions of democracy and the rule of law.¹²⁵ As John Finnis has observed, in taking this line the Court adopted the concept of “militant democracy”: the notion that a democracy might find it necessary to sacrifice democratic rights and freedoms in order to sustain itself.¹²⁶

A number of judges, however, in both chambers expressed disagreement with these findings. Three of the seven judges in the Chamber

122. *Refah Partisi v. Turkey*, App. No. 41340/98, 37 Eur. H.R. Rep. 1, 35 (2003) (“[A] political party . . . which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention’s protection against penalties imposed on those grounds.”).

123. Dyzenhaus, *supra* note 120, at 16 (quoting *Refah*, 37 Eur. H.R. Rep. at 47).

124. *Refah*, 37 Eur. H.R. Rep. at 41.

125. John Finnis, *Endorsing Discrimination Between Faiths: A Case of Extreme Speech?*, in *EXTREME SPEECH AND DEMOCRACY* 430, 436 (Ivan Hare & James Weinstein eds., 2009). The Court held that a regime of plural religious legal orders would run counter to the ECHR’s guarantees of both equality and the rule of law. *Refah*, 37 Eur. H.R. Rep. at 42. This was because it “would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms.” *Id.*

Since plans to implement shariah “were incompatible with the concept of a ‘democratic society,’ the opportunities open to Refah to implement such a policy made the danger to democracy ‘more tangible and more immediate.’ Hence, the dissolution of the party could ‘reasonably be considered to have met a “pressing social need.””

Dyzenhaus, *supra* note 120, at 16 (citing *Refah*, 37 Eur. H.R. Rep. at 47).

126. Finnis, *supra* note 125, at 437; see also Patrick Macklem, *Militant Democracy, Legal Pluralism and the Paradox of Self-Determination*, 4 INT’L. J. CONST. L. 488, 490–91 (2006) (“Informed by a commitment to democratic government, [the *Refah* framework] reveals the limits and possibilities of subjecting conflicting claims of self-determination to the rule of law and constitutes a legal site of contestation over the constitutional boundaries of legal pluralism and militant democracy.”).

of the Third Section dissented from the majority's findings of fact,¹²⁷ while in the Grand Chamber, Judge Kovler entered a separate concurring opinion rejecting a number of the majority's findings regarding both Islamic law and the notion of legal pluralism in the context of the ECHR.¹²⁸ In a remarkable passage, Judge Kovler indicated his regret that the majority had missed the opportunity to

analyse in more detail the concept of a plurality of legal systems, which is linked to that of legal pluralism and is well-established in ancient and modern legal theory and practice. Not only legal anthropology but also modern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status. Admittedly, this pluralism, which impinges mainly on an individual's private and family life, is limited by the requirements of the general interest. But it is of course more difficult in practice to find a compromise between the interests of the communities concerned and civil society as a whole than *to reject the very idea of such a compromise from the outset*.¹²⁹

127. In their dissent, Judges Fuhrmann, Loucaides, and Bratza state that what is lacking in the majority's reasoning is

any compelling or convincing evidence to suggest that the party, whether before or after entering Government, took any steps to realise political aims which were incompatible with Convention norms, to destroy or undermine the secular society, to engage in or to encourage acts of violence or religious hatred, or otherwise to pose a threat to the legal and democratic order in Turkey.

Refah Partisi v. Turkey, App. No. 41340/98, 35 Eur. H.R. Rep. 56, 105 (2002) (Fuhrmann, J., dissenting).

128. Judge Kovler states that he is bothered by some of the Court's findings because

in places they are unmodulated, especially as regards the extremely sensitive issues raised by religion and its values. I would prefer an international court to avoid terms borrowed from politico-ideological discourse, such as "Islamic fundamentalism" [paragraph 94 of the judgment], "totalitarian movements" [paragraph 99 of the judgment], "threat to the democratic regime" [paragraph 107 of the judgment], and so on, whose connotations, in the context of the present case, might be too forceful.

Refah, 37 Eur. H.R. Rep. at 50 (Kovler, J., concurring).

129. *Id.* at 50–51 (emphasis added) (footnotes omitted). Judge Kovler further stated that the notion of legal pluralism is critical to the assessment to be made of *Shari'ah* which constitutes the

legal expression of a religion whose traditions go back more than 1,000 years, and which has its fixed points of reference and its excesses, like any other complex system. In any case legal analysis should not caricature polygamy (a form of family organisation which exists in societies other than Islamised peoples) by reducing it to . . . 'discrimination based on the gender of the parties concerned' [paragraph 128 of the judgment].

Id. at 51.

This passage illuminates the degree to which the reasoning of the majority assumes rather than justifies certain unarticulated *liberal* premises regarding the scope and nature of the right to freedom of religion and belief.¹³⁰ By holding *a priori* on the basis of the nondiscrimination principle that such claims to legal pluralism are repressive and threaten individual freedom, the Court obscures the degree to which these are in fact *competing claims* to freedom, autonomy, and self-determination. The Court's analysis misconstrues the true nature of the conflict in Turkey, which, quite apart from questions of liberal rights and freedoms, centers on the *locus* of Islam as a source of political legitimacy among different elite groups in the historical context of Kemalism as a state-building project.¹³¹ Patrick Macklem thus concludes that the Court's conception of militant democracy in *Refah* "now authorizes a state to assume a militant stance toward the exercise of religious freedom that threatens substantive conceptions of democracy instantiated in its constitutional order."¹³²

130. See *infra* Part III.A.

131. As suggested by Murat Akan, the Kemalism–Islam opposition is actually a "political dichotomy representing an elite conflict." Murat Akan, *Contextualizing Multiculturalism*, *STUD. COMP. INT'L DEV.* 57, 71 (2003). Secular elites in Turkey, who seek to preserve the legacy of Kemal Atatürk in establishing a secular republican nation-state, have traditionally sought to use and control Islam in utilitarian terms "to bind the majority to the nation-building project." *Id.* Article 24 of the 1982 Turkish Constitution provides that "teaching and education in religion and morals is conducted under the guidance of the state." *Id.* Founded in 1924, the Ministry of Religious Affairs has the authority to instruct citizens on "correct Islamic practices" in the face of the divergent interpretations and local practices of Islamic sects. *Id.* at 70. In this respect, Turkish secularism does not entail a mutually exclusive sphere separate from Islam. The founding elite made religion subject to the republican state in order both to build a uniform nation-state and to eliminate religion as a rival autonomous source of legitimacy. In the 1980s, however, "the monopoly of the Kemalist state elite on capital and political power was challenged by a rising Islamist elite," which made a "counter-claim on the very religious sphere which the republicans have striven to control and monopolize as a source of legitimacy." *Id.* at 71. For a contrast of the "assertive secularism" of the Kemalists, who seek to confine Islam to the private sphere, with the "passive secularism" of the conservative parties that seek greater public visibility of Islam, see also Ahmet T. Kuru, *Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies Toward Religion*, 59 *WORLD POL.* 568, 582 (2007).

132. Patrick Macklem, *Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe 2* (Apr. 17, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660649 ("The migration of militant democracy . . . signals an ominous shift in the way in which the European Court of Human Rights comprehends the relationship between religion and state power. . . . [T]he Court has begun to reframe religious freedom as a threat to democracy and immunize states from judicial oversight when they take preemptive measures to curb its exercise."); see also Kevin Boyle, *Human Rights, Religion and Democracy: The Refah Party Case*, 1 *ESSEX HUM. RTS. L. REV.* 1, 3, 12 (2004) (arguing "that the Grand Chamber judgment in the *Refah* case was unfortunate and wrong" and noting that "*Refah* did not challenge democracy as such, but rather sought to question an ideology imbued in the institutions of the State and enforced by the Turkish military" and on the basis of "such questioning that implicitly challenged the undemocratic control of the military over Turkish political development . . . it was removed").

The Court's third major decision, *Şahin v. Turkey*, further illustrates this complex dialectic between Islam and the secular public sphere. The case involved a fifth-year medical student at the University of Istanbul who was denied enrollment on the grounds that she was wearing the Islamic headscarf. The applicant came from a traditional family of practicing Muslims and regarded it as her religious duty to wear the headscarf.¹³³ The Court accepted that the regulations at issue interfered with her right to manifest her religion under Article 9(1) but held that they constituted a valid limitation under Article 9(2) because, as they pursued the legitimate aims of protecting the "rights and freedoms of others" and "public order," they could be regarded as "necessary in a democratic society."¹³⁴

The "necessity" of the interference was held to be based on two principles—secularism and equality—that reinforced each other.¹³⁵ The Turkish constitutional principle of secularism was held to be necessary for the protection of the democratic system in Turkey.¹³⁶ The Court clearly linked the principle of secularism to the notion of militant democracy from *Refah* in holding that the Islamic headscarf is a symbol of political Islam and thus, like in *Refah*, a "genuine threat to republican values and civil peace."¹³⁷ The principle of gender equality—recognized in both the Turkish constitution and the ECHR—provided a further justification.¹³⁸

Unsurprisingly, the decision has been questioned for uncritically endorsing religious intolerance, tacitly relying on a paternalistic and static conception of gender equality, and advancing an illiberal conception of religious freedom.¹³⁹ While *Refah* was principally concerned with the

133. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 99, 105–06 (2007).

134. This was especially the case given the margin of appreciation left to the Contracting States. *Id.* at 124–30.

135. *Id.* at 127–29.

136. Viewing the regulations as intended to preserve "pluralism in the university," the Court pointed in particular to "extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts." *Id.* at 128.

137. *Id.* at 111.

138. *Id.* at 110, 112–13 (discussing the Turkish Constitution); *id.* at 127, 128–29 (discussing ECHR jurisprudence).

139. See, e.g., Evans, *supra* note 121, pt. IV.B–C; Macklem, *supra* note 132, at 17 (criticizing the Court for giving "Turkey a wide margin of appreciation, permitting it to act in a preemptive manner against religious extremism where the conduct in question—the wearing of a head scarf—in no way can be characterized as posing an imminent threat to democracy as understood by the Court in *Refah*"). These criticisms were also powerfully expressed in the dissenting judgment of Judge Tulkens who criticized the majority for refusing to allow Ms. Şahin to act in accordance with her personal choice on the basis of an essentialized and unexamined set of assumptions regarding the "connection between the ban and sexual equality." *Şahin*, 44 Eur. H.R. Rep. at 143 (Tulkens, J., dissenting).

limits of liberal pluralism, *Şahin* can be seen to have been concerned with competing conceptions of secularism in the public sphere.

The fourth case, *Dogru v. France*, shares many of the same features regarding secularism and the public sphere as *Şahin*, but also an important difference. The case involved an eleven-year-old French Muslim student who refused to remove her headscarf in physical education classes.¹⁴⁰ The state secondary school expelled her on the basis of an internal school rule that while “[d]iscreet signs manifesting the pupil’s . . . religious convictions shall be accepted in the establishment,” all students must attend physical education classes in “sports clothes.”¹⁴¹ The Court agreed with the French government’s argument that the purpose of the restriction “was to adhere to the requirements of secularism in state schools” noting that the policy was consistent with the jurisprudence of the Conseil d’Etat.¹⁴²

Citing both *Refah* and *Şahin*, the Court thus held unanimously that the restriction was justified under Article 9(2) as it was directed towards a legitimate aim and necessary in a democratic society.¹⁴³ In explicitly invoking the margin of appreciation left to states “with regard to the establishment of the delicate relations between the churches and the state, religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention.”¹⁴⁴

140. *Dogru v. France*, App. No. 27058/05, 49 Eur. H.R. Rep. 179, 182 (2008).

141. *Id.* at 186. The rule also prohibited students from wearing “conspicuous signs which are in themselves of proselytizing or discriminatory effect.” *Id.* In applying these rules, the school allowed the applicant to wear the headscarf other than in physical education classes. *Id.*

142. *Id.* at 198. At the request of the Minister for Education, the Conseil d’Etat gave a ruling on November 27, 1989, on “the compatibility with the principle of secularism of wearing signs at school indicating affiliation to a religious community.” In that ruling, the Court stated that the freedom to manifest religious beliefs did not extend to displaying

signs of religious affiliation, which, inherently, in the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytism or propaganda, undermine the dignity or freedom of the pupil or other members of the educational community, compromise their health or safety, disrupt the conduct of teaching activities and the educational role of the teachers, or, lastly, interfere with order in the school or the normal functioning of the public service.

Id. at 187.

143. *Id.* at 196–200. The Court states that the decision by the French authorities “that the wearing of a veil, such as the Islamic headscarf, was incompatible with sports classes for reasons of health or safety is not unreasonable.” *Id.* at 199. The Court offers no reasons for this conclusion, however, or why less restrictive means are also unacceptable (such as wearing a hat, as proposed by the applicant) stating that this “falls squarely within the margin of appreciation of the State.” *Id.* at 200.

144. *Id.* at 199.

The Court's reasoning invoked the historical evolution of *laïcité* in the French Republic with its concomitant notions of the public-private divide and state "neutrality" in strictly secular terms.¹⁴⁵ In this respect, *Dogru* reinforces the way in which *l'affaire du foulard* has been understood to date in France: Islam, as symbolized by the headscarf, whether viewed through the lens of French nationalism from the left or the right, is a threat to the secular character of the Republic.¹⁴⁶ But there is an important difference here from *Şahin*. In that case, the struggle was over the meaning of the public sphere *within* a single majority nation and religious tradition. Here, the Court's conception of liberal toleration—that *laïcité* requires the state to be neutral, blind, and indifferent to religious diversity in order to honor the nondiscrimination principle and treat everyone equally—defines neutrality in terms of the "essential" collective identity of the majority while denying public recognition of the "essential" collective identity of a religious minority.¹⁴⁷

In this approach religious diversity is indeed to be respected, but only on terms that conform to the majority's conception of the good. The French state's right to defend its essential or "inviolable" secular personality in this way trumps the right to freedom of religion or belief to the extent that the latter is interpreted to conflict with the former. This raises critical questions about the specific meaning of the concept of neutrality being employed here. As Galeotti has observed: "Before the headscarf case broke out, no one was even aware of whether religious symbols were present in school or not. This might suggest that, as the critics of liberalism have remarked, neutrality is not so neutral after all, and the secular state not so thoroughly secularized."¹⁴⁸

145. Article 2 of the 1958 French Constitution states that "France is a Republic, indivisible, secular, democratic, and social. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs." 1958 CONST. art. 2 (Fr.).

146. As I have argued previously, *laïcité* defines the collective public identity of the French nation. The French national personality is embodied in the secular, rational Jacobin republic founded out of the French Revolution, which denounced religious intolerance and attacked ecclesiastical power under the banner of "humanity." This collective personality is the precondition of French citizenship. The collective narratives that define what it means to "be French" and the practices that they authorize thus construct French citizens as carriers of a secular heritage. See Danchin, *Suspect Symbols*, *supra* note 66, at 21–22.

147. Given that public schools are the primary means by which French Republican citizenship is to be fostered, the prohibition of all religious symbols is merely a "reaffirmation of the boundaries of the secularized public sphere against any religious interference." ANNA ELISABETTA GALEOTTI, *TOLERATION AS RECOGNITION* 123 (2002). This is not regarded as intolerance by either the French majority or the Strasbourg Court, but rather as a "limit to liberal tolerance in order to preserve the neutrality of the public school and the equality of the students as would-be citizens, beside and beyond any particular memberships." *Id.* at 123–24.

148. *Id.* at 124.

Finally, as mentioned above, it is instructive to review briefly the decisions of the Court of Appeal and House of Lords in *Regina [Begum] v. Denbigh High School*.¹⁴⁹ This case involved a fourteen-year-old Muslim girl's claim to freedom of religion under Article 9 to wear the *jilbab* to a coeducational community school in Luton, England.¹⁵⁰ The Court of Appeal ruled in her favor holding that Begum had a sincere belief that her religion required her to wear a *jilbab* on reaching puberty and that the school's rules were not necessary in a democratic society and thus in violation of Article 9.¹⁵¹ The House of Lords, however, overturned this decision ruling that even if there had been an interference with Shabina Begum's right to manifest her religion under Article 9(1), the school's policy constituted a justifiable limitation on that right under Article 9(2).¹⁵²

In the course of their reasoning, the judges relied extensively on *Şahin* and, in particular, the European Court of Human Rights' jurisprudence on the legitimate aims of restricting manifestations of religious belief to ensure "the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broad-mindedness"¹⁵³ and of "[f]ostering a sense of community and cohesion."¹⁵⁴ Unlike in *Şahin* and *Dogru*, however, the concepts of secularism and republicanism respectively were not what animated the judgments of the House of Lords. The United Kingdom after all has an established church and various manifestations of religious belief, and the wearing of religious clothing are already permitted in the public schools. Rather, the question before the judges was the limits of toleration and the need to find and justify a reasonable form of accommodation between the competing claims and interests at stake.¹⁵⁵

149. R [Begum] v. Denbigh High Sch., [2006] UKHL 15, [2007] 1 A.C. 100.

150. *Id.* About seventy-nine percent of the students at Denbigh High School were Muslim, and female students were given the option of wearing a *shalmar kameeze* and headscarf. *Id.* at 107–08. Shabina Begum requested to be allowed to wear a *jilbab*, which would have more fully concealed the contours of her body. *Id.* at 109.

151. *Id.* at 101.

152. Each of the Lords presented a separate opinion. For the analysis given by one, see *id.* at 132 (Baroness Hale).

153. *Id.* at 116 (Lord Bingham).

154. *Id.* at 134 (Baroness Hale).

155. This is most obvious in the judgment of Baroness Hale, which goes so far as to consider policy reports on women and multiculturalism in Britain. *Id.* at 132–34 (Baroness Hale); see also CLEMENS N. NATHAN, THE CHANGING FACE OF RELIGION AND HUMAN RIGHTS: A PERSONAL REFLECTION 103–04 (2009) (suggesting that *Begum* was not about the public display of "overtly religious symbols" as in France but rather "the balance to be struck between the school's right to determine its school uniform policy within proportionate and legitimate boundaries and a pupil's right to assert her choice of clothing beyond the school uniform options offered to her").

For John Finnis, however, the case is an illustration of the “conceptual slackness of human rights law-in-action,” and he has criticized the Lords’ judgments for being “thin, conclusory, and result-oriented.”¹⁵⁶ In particular, the judges fail to explain “why what was evidently not ‘necessary for the protection of the rights and freedoms of others’ in at least two nearby schools *was* necessary in Denbigh High School.”¹⁵⁷ Rather, it is in *Şahin* and *Refah* that the “real premise and thrust of *Begum* can be found.”¹⁵⁸ This is because the only way to explain how the use of a religious symbol to manifest one’s beliefs can threaten the rights of others is if it is associated with a “definite and particular kind of religious culture,” one that has some or all of the following features:

[A] disrespect for equality (here the equality of females, especially girls and young women); a denial of immunity from coercion in religious matters (including matters of apostasy from that religion or rejection of all religion), the immunity now central to Christian political teaching; a mandating, encouragement, or permission of intimidation of apostates, backsliders and others; and a treatment of all arenas, educational or political, as in principle subject to threatening pressure, indeed compulsion, in the name of religious truths and precepts and of promoting adherence to them.¹⁵⁹

156. Finnis, *supra* note 125, at 433. While Baroness Hale does find “evidence of other girls’ fear of being pressured,” she concludes from this only that “the school’s policy was ‘a thoughtful and proportionate response to reconciling the complexities of the situation’ given ‘the social conditions in that school, in that town, and at that time.’” *Id.*

157. *Id.* at 431. Finnis notes that the question of *necessity* under Article 9(2) is distinct from “the question whether the school made a *reasonable judgment* about what would ‘best serve’ the interests of its pupils.” *Id.* Further, Article 9(2) requires restrictions on manifestations of religious belief to be in response to a “pressing social need” (as Judge Tulkens emphasized in her dissent in *Şahin*) and to be the “*least restrictive*” means available. *Id.* at 432.

158. *Id.* at 433 (explaining that the premise of *Begum* can be found in *Şahin*).

159. *Id.* at 435. Finnis summarizes the “contours and grounds” of the Grand Chamber’s judgment in *Şahin* as follows:

For the present, they can be summarized by reference to a statement which, on its surface, seems not to discriminate (differentiate) between religions: “when a particular dress code [is] imposed on individuals by reference to a religion, the religion concerned [is] perceived and presented as a set of values that [are] incompatible with those of contemporary society.” That incompatibility . . . is elaborated in terms of two further but related considerations: the equality rights of women; and the rights and freedoms of all those, whether Muslim, ex-Muslim, or non-Muslim, who choose not to conform to what some Muslims perceive and present as a religious duty—a right, in other words, to be free from intimidation or pressure. . . . Measures, such as those in issue in *Şahin*, forbidding the Islamic headscarf, “have to be viewed in that context and constitute a measure intended to achieve the legitimate aim” of protection of rights and freedoms and public order.

Id. at 434.

All of this, says Finnis, is what lies just below the surface of the Lords' terse allusions to the school's fear of "adverse repercussions" if they allowed the *jilbab*. Both the House of Lords and European Court of Human Rights made findings not about all religions, but about a *particular* religion.¹⁶⁰ Once that distinction was made, the Lords in *Begum* were able to reject discrimination arguments under Article 14 regarding the unjustifiability of the *jilbab* ban on the basis that a pressing social need was established under Article 9(2) for restricting the relevant particular religious belief in question.¹⁶¹

It is not the conservative political conclusions that Finnis draws that are of interest here,¹⁶² but rather the mutually reinforcing relationship he imagines existing between Christianity and the English constitutional order and the wider *nomos* of the European Court of Human Rights more generally. The differential treatment of Islam and Christianity in ECHR jurisprudence is justified, in other words, because Islam is a threat to, whereas Christianity is compatible with, the right to freedom of religion and belief.

In conclusion, four interrelated themes emerge from the cases involving the claims of Muslim communities. First, in *Refah* we see the extent to which Article 9 is premised on a liberal conception of right that excludes from its scope certain nonsecular notions of the collective good and collective identity. Second, in *Şahin* we see the ways in which secularism and neutrality define and discipline the place of religion in the public sphere. Third, in *Dogru* we see the place of religious minorities in secular liberal democracies and the protections to be accorded to them. And fourth, in *Begum* we see the effects of the historical and conceptual relationship between Christianity and the right to religious freedom in the Western liberal tradition. It is to these underlying theoretical concerns we now turn.

III. ISLAM IN ARTICLE 9 JURISPRUDENCE

The three lines of cases discussed in Part II illustrate the basic contours and fault lines in the European Court of Human Rights' Article 9

160. For example, the assertion that *Shari'ah* and "quasi-*millet* legal pluralism" are "simply incompatible with the ECHR is equivalent to an assertion of their illegitimacy." *Id.* at 436.

161. *Id.* at 436–37.

162. He argues that "[c]onfronted by the grave warnings thus issuing from courts of great pan-European authority," citizens in European states may consider "whether it is prudent . . . to permit any further migratory increase in that population, or even to accept the presence of immigrant, non-citizen Muslims without deliberating seriously about a possible reversal—humane and financially compensated for and incentivized—of the inflow." *Id.* at 439–40.

jurisprudence. As argued in the Introduction, they expose two critical and deeply entangled domains of contestation: the first concerning the nature and scope of the right to religious freedom; the second concerning the place of religion in the public sphere. If we compare the cases in Parts II.A and II.B, most of which involved claims made by Christian groups, with the cases in Part II.C, all of which involved claims made by Muslim communities and individuals, we see an apparent paradox.

In relation to the former, the Court has adopted a mode of reasoning that we might term “liberal pluralism.” The right to have or maintain a religious tradition was accorded a wide scope in *Kokkinakis* and the right to be free from injury to religious feelings was similarly recognized and given substantive content in *Wingrove* and *Otto-Preminger*. In each case, the Court’s reasoning pushed the limits of liberal theory by acknowledging the collective dimension of freedom of religion and belief and the ongoing role and significance of Christianity in the way of life of the affected communities. More broadly, the fact that many European states—including Greece and the United Kingdom, the respondent states in *Kokkinakis* and *Wingrove*—have official or established churches has not apparently been seen to raise existential dangers to secularism, democracy, or the rule of law.¹⁶³

In relation to the latter cases, however, the Court has adopted a mode of reasoning that we might term “liberal antipluralism.”¹⁶⁴ The scope of

163. See Alfred Stepan, *Religion, Democracy, and the “Twin Tolerations,”* 11 J. DEMOCRACY 37, 43 (2000) (“From the viewpoint of empirical democratic practice . . . secularism and the separation of church and state have no inherent affinity with democracy . . .”). Even within a modern European nation-state such as Greece, the Greek Constitution is proclaimed in the name of the Holy Trinity and affirms that the “dominant religion in Greece is that of the Christian Eastern Orthodox Church.” *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 3, 11 (1993) (quoting 1975 SYNTAGME [SYN] [CONSTITUTION] 3 (Greece)). As François Thual notes, “Slavic, Greek, Balkan, Caucasian Orthodox Christianity has never known secularism . . . based on the separation of Church and State.” François Thual, *Dans le monde orthodoxe, la religion sacralise la nation, et la nation protège la religion* [In the Orthodox World, Religion Sanctifies the State, and the State Protects Religion], LE MONDE (Fr.), Jan. 20, 1998, at 13.

164. The notion of “liberal antipluralism” is recognized in political theory. See, e.g., JOHN GRAY, *TWO FACES OF LIBERALISM* (2000); William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516 (1995) (juxtaposing opposing liberal conceptions of autonomy and diversity in the context of *Wisconsin v. Yoder*, 406 U.S. 205 (1972)); David Owen, *Political Philosophy in a Post-Imperial Voice: James Tully and the Politics of Cultural Recognition*, 28 ECON. & SOC’Y 520 (1999) (distinguishing two Enlightenment traditions of public reason: one an abstract and universalizing activity that reflects on historically and culturally situated practices of practical reasoning “from above” and legislates their character and limits; the other always dependent to some extent on historically and culturally situated practices of practical reasoning and so the methodological extension of the self-reflective character of such practices). The term is also recognized in international legal theory. See, e.g., Gerry Simpson, *Two Liberalisms*, 12 EUR. J. INT’L L. 537 (2001) (juxtaposing historically situated Charter liberalism (diversity) and ahistorical liberal anti-pluralism (autonomy) in the context of relations between states in international law).

Article 9 was read narrowly in *Refah* to exclude claims to legal pluralism and collective autonomy, and in *Dogru* and *Begum* to deny the claims of Muslim minorities in European nation-states to manifest their religious beliefs and collective identities. At the same time, both Turkey and France were accorded wide margins of appreciation in *Şahin* and *Dogru* to limit religious freedom on the grounds of protecting the public order values of secularism and neutrality. In *Refah* and *Şahin*, this was the case even though the claims had been made democratically and in accordance with majority will.¹⁶⁵

Part III explores this paradox with a view to elucidating the contours and shape of both the right to freedom of religion and belief and the secular public sphere of the supranational *nomos* of the Court itself. Section A discusses the scope of Article 9(1) and argues that certain unarticulated premises underlie the Court's interpretation of the right to freedom of religion and belief. Section B turns to the question of limitations on religious freedom as set out in Article 9(2) and, in particular, how the Court constructs the notions of "public order" and the "rights and freedoms of others." Finally, Section C returns to the themes set out in Part I and analyzes how the Court imagines the connection between secularism and the notion of a limitation being "necessary in a democratic society" as that term has developed in Article 9 jurisprudence.

A. *The Scope of the Right to Religious Freedom*

Article 9(1) provides that "[e]veryone has the right to freedom of thought, conscience and religion . . . [including] freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."¹⁶⁶ In this Section, I argue that the Court's attempts to interpret the claims of a non-Western and non-Christian religious community within the terms of this Article reveal both the contingency and contestability of ECHR rights discourse and the Court's self-understanding of liberal neutrality itself.

As discussed in Part I, the defining ideas of the liberal state are neutrality and a putative public-private divide. Religion is seen as separated from the state ("disestablished") and "privatized"; that is, removed to a private, intimate sphere. This leaves a "neutral" public sphere that seeks to maintain its neutrality through rigorous commitment to a scheme of individual rights. The state may thus have no cultural or religious

165. See Zehra Ayman & Ellen Knickmeyer, *Ban on Head Scarves Voted Out in Turkey*, WASH. POST, Feb. 10, 2008, at A17 (using the 2008 Turkish Parliament vote of 411 to 103 ending the ban on women wearing headscarves at universities as an illustration of majority support in Turkey for Muslims' claims to manifest their religious beliefs and collective identity).

166. ECHR, *supra* note 6, art. 9, ¶ 1.

projects, or indeed any collective goals of its own, beyond the protection of the liberty and security of its citizens.

This view of religion, and religious freedom, imposes significant constraints on both the individual and the state. The individual must restrain her will according to the dictates of universal reason by transcending any “distracting sensuous inclinations” and by containing her religion to the private sphere of conscience or belief. The state, for its part, must remain “neutral” between all religions and beliefs, and between religion and nonreligion, by both rigorously protecting the neutrality of its public sphere and not interfering in the (private) autonomous sphere of conscience and belief. Saba Mahmood describes the consequences of these complex moves for secular liberalism as follows:

[C]ontrary to the ideological self-understanding of secularism (as the doctrinal separation of religion and state), secularism has historically entailed the regulation and reformation of religious beliefs, doctrines, and practices to yield a *particular normative conception of religion* (that is largely Protestant Christian in its contours). Historically speaking, the secular state has not simply cordoned off religion from its regulatory ambitions but sought to remake it through the agency of the law. This remaking is shot through with tensions and paradoxes that cannot simply be attributed to the intransigency of religionists (Muslims or Christians).¹⁶⁷

The process of democratic self-government and the space of public debate can in this respect be seen as a space, not simply of expression and rational deliberation, but “of *formation*, in which both coercive, regulatory, and rhetorical power is necessary in order to produce the *right kind of citizen subject* who can inhabit the norms of a liberal democratic polity.”¹⁶⁸ In its supranational supervisory role, the European Court of Human Rights can be seen to be acting not only as an independent protector of rights but also as instrument of governance maintaining a particular social order. The difference between these two roles is between a rights-based *culture of justification* on the one hand and a *managerial culture* of rights as *têchne* on the other.¹⁶⁹

167. Mahmood, *supra* note 113, at 87 (emphasis added).

168. Comments by Saba Mahmood, Assistant Professor of Anthropology, Univ. of Cal. Berkeley, on Una’s Lecture delivered by Robert Post, the David Boies Professor of Law, Yale Univ., Religion and Freedom of Speech: Cartoons and Controversies 2 (Mar. 14, 2007) (emphasis added), available at http://townsendcenter.berkeley.edu/pubs/post_mahmood.pdf. The public sphere is thus “not simply a domain of unhindered communication, but also a disciplinary space that inhibits certain kinds of speech while enabling others, equipping people to hear specific types of arguments while remaining deaf to others.” *Id.*

169. For further discussion, see *infra* Part III.C.

1. Enlightenment Rationalism

Part I.A observed that the basic liberal ideas of individual right and a public-private divide are often traced back to the Enlightenment of the late eighteenth century. In his famous 1784 essay, Kant distinguished between the public and private uses of reason: the idea that reason must be “free” in its public use (*aude sapere*; exercised in “broad daylight”), and “submissive” in its private use (the subjection of completely free reason to particular shared public ends).¹⁷⁰ But as Michel Foucault acutely observed, this is “term for term, the opposite of what is ordinarily called freedom of conscience.”¹⁷¹

What Foucault noticed was the “substantial reversal” in modern secular discourse posited more recently by Steven Smith.¹⁷² For Kant, the submissive role of reason in the private sphere was on account of the moral *duty* to follow one’s conscience whereas the free use of reason in the public sphere was on account of the *right* to “use reason publicly in all matters.”¹⁷³ Two centuries later, however, these distinctions have effectively been reversed. In the private sphere, the *duty* to follow conscience has been transformed into the notion of *freedom of conscience* understood now as a personal right to do whatever one believes is the right thing to do. While the equation of conscience with autonomy has

170. Immanuel Kant, *An Answer to the Question: What Is Enlightenment?*, in WHAT IS ENLIGHTENMENT? EIGHTEENTH-CENTURY ANSWERS AND TWENTIETH-CENTURY QUESTIONS 58, 59–60 (James Schmidt ed., 1996). See generally Onora O’Neill, Kant on Reason and Religion: Lecture I: Reasoned Hope, Tanner Lectures on Human Values Delivered at Harvard University (Apr. 1–3, 1996), in 18 THE TANNER LECTURES ON HUMAN VALUES 269, 271 (Grethe B. Peterson ed., 1997), available at <http://www.tannerlectures.utah.edu/lectures/documents/oneill97.pdf> (discussing Kant’s philosophy of religion generally and considering whether critics are correct in their assessment that Kant’s arguments for practical reason “cannot escape the colossal wreck of rationalist metaphysics and theology and the threat to religious faith”).

171. Michel Foucault, *What Is Enlightenment?*, in THE FOUCAULT READER 32, 36 (Paul Rabinow ed., 1984).

172. See *supra* note 46 and accompanying text.

173. Kant, *supra* note 170, at 59. O’Neill has explained the meaning of this statement in O’NEILL, *supra* note 73, at 32–34. On the meaning of Kant’s statement that “the public use of reason should be free,” see O’NEILL, *supra* note 73, at 30–39. One must be cautious not to read a Millian conception of autonomy (i.e., one premised on rational autonomous choice or individual self-determination) back into Kant’s notion of the free public use of reason. See Onora O’Neill, *The Inaugural Address: Autonomy: The Emperor’s New Clothes*, 77 ARISTOTELIAN SOC’Y (SUPPLEMENTARY VOLUME) 1, 3–8 (2003) (explaining the basic differences between Kantian and Millian conceptions of autonomy). Indeed, “[Kant] commends Frederick the Great’s ranking of intellectual above civil freedom in his statement ‘Argue as much as you like about whatever you like, but obey!’ ” O’NEILL, *supra* note 73, at 32. Kant’s argument thus assumes the authority of an absolutist state beyond the reach of critical reason itself. As O’Neill notes, “Kant has some misplaced faith in the self-restraint of enlightened despots as a route of advance.” O’NEILL, *supra* note 73, at 39. I am grateful to Saba Mahmood for this point.

been partial and unstable, the result today is that the private sphere is paradoxically viewed as a space of *freedom* in terms of noninterference by the state and religious authority alike.¹⁷⁴ Thus, in political liberalism the demands of equality and nondiscrimination are viewed as not extending into the private sphere (where individuals and religious institutions remain *free* to discriminate on the basis of, *inter alia*, religion and belief itself)¹⁷⁵ while, conversely, conscience is viewed as “freely chosen” and the coercive authority of religious institutions in enforcing the demands of conscience is denied.¹⁷⁶

174. O’Neill states that the priority accorded to public use of reason by Kant does indeed constitute “an apparent ‘inversion’ of traditional liberal priorities” but “that the traditional precedence accorded private uses of reason (and other private affairs) in much liberal thinking is less central to liberalism than is often assumed.” O’NEILL, *supra* note 73, at 35. On the logic of Kant’s thinking, this is because

[s]ome private uses of reason . . . may hinder or prevent communication with the world at large [e.g. expressions that denigrate or mock or bully others or foment divisions between persons and groups], and so may hinder the emergence of public standards of reasoning and of a just polity. There are no good reasons for tolerating any private uses of reason that damage public uses of reason. . . . Hence some forms of censorship and restriction of private uses of reason may be acceptable (indeed required) when (but only when) they are needed to foster or sustain capacities for communication with the world at large. Kantian liberalism can provide reason for specific restraint and censorship when their absence would lead to forms of defamation or harassment that damage capacities for agency or for recognition of others’ agency.

Id. at 49.

175. See, e.g., Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1402 (2003) (“[The] Enlightenment compromise . . . justified reason in the public sphere by allowing deference to religious despotism in the private . . .”). What Sunder overlooks is that—for Kant at least—the deference that was owed in the private sphere was to “conscience,” understood in recognizably Protestant or “privatized” terms, as opposed to “religion” *per se*. Thus, the problem of “religious despotism” in the form of absolute religious authority was implicitly dealt with in the (re)definition of religion and religious subjectivity. For further explanation of Kant’s views on religion, see Peter Danchin, *Good Muslim, Bad Muslim*, THE IMMANENT FRAME (Apr. 21, 2010, 9:40 AM), <http://blogs.ssrc.org/tif/2010/04/21/good-muslim-bad-muslim>.

176. As noted by Smith, “the Protestant Reformation altered the significance of conscience in a way that profoundly affected, and to some extent redirected, historical commitments to the separation of church and state.” Smith, *Discourse in the Dusk*, *supra* note 46, at 1877. This occurred in two ways. First, by bringing churches under state control in “Erastian” arrangements based on the notion that “the church had no proper coercive jurisdiction independent of the civil magistrate.” *Id.* at 1877 n.34 (quoting Richard W. Garrett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 513 (2007)). Second, by changing the concept of the church itself in the sense that “whereas Catholic teaching had emphasized the necessity of the church as an intermediary between God and humans, Protestants sought to cut out (or at least downsize) the middle man . . . and to encourage a more direct relation between the individual and God.” *Id.* at 1877. The words of Thomas Paine in 1794, “[m]y own mind is my own church,” marked the shift that had occurred “as the position and functions formerly controlled by the church came to be transferred to the individual and his or her [own] conscience.” *Id.* at 1878 (quoting

In the public sphere, the situation is reversed. What for Kant was seen as a fundamental *right* to reason freely has been transformed into a moral *duty* to follow the demands of (universal) reason. Today, the public sphere is thus viewed as a space where rationalism itself imposes disciplinary limits and secular constraints on freedom of thought, conscience, and speech.¹⁷⁷ Foucault describes this as Kant's "contract of rational despotism with free reason: the public and free use of autonomous reason will be the best guarantee of obedience, on condition, however, that the *political principle that must be obeyed itself be in conformity with universal reason.*"¹⁷⁸

In this sequence of terms, we recognize the key elements of modern liberal discourse: *autonomy* (the "public and free use of autonomous reason"), *neutrality* (the "political principle"), and the *right* ("universal reason"). While rhetorically powerful as an apparently apodictic or *external* means by which to secure secular authority in the public sphere,¹⁷⁹ the insuperable difficulty is that each of these notions depends upon distinctive and contingent *internal* reasons and substantive values.¹⁸⁰ As Ian

THOMAS PAINE, AGE OF REASON 6 (1794), reprinted in THE THEOLOGICAL WORKS OF THOMAS PAINE (1879).

177. The dominant assumption is that "[m]odern political discourse, including constitutional discourse and in particular the discourse of religious freedom, is thoroughly secular in character," *id.* at 1881, "based on assumptions which confine religious and theological matters to the private sphere," GRAEME SMITH, A SHORT HISTORY OF SECULARISM 5 (2008) (citations omitted). It is thus commonly assumed

that a constitutional discourse based on religious assumptions or commitments would violate the constitutional commitments to religious freedom and the separation of church and state. Perhaps paradoxically . . . the very commitment to religious freedom has worked to render inadmissible the rationales that historically generated and supported that commitment.

Smith, *Discourse in the Dusk*, *supra* note 46, at 1881–82. In this respect, "[a] more complete account would depict this change not so much as one from a 'religious' to a 'secular' framework as a transformation in the conception of what 'secular' means." *Id.* at 1881 n.56 (emphasis added). The result has been the gradual loss of the *jurisdictional* premises used to justify the early tradition of religious freedom and the rise of modern *liberal theories of justice* that, somehow, must explain how the state is to be neutral between religion and nonreligion while at the same time according religion special legal treatment. As Smith concludes, "the bottom line is that actual legal and political jurisdiction now belongs to the state," with the result that "the church will ultimately enjoy as much freedom or immunity, and only as much, as the state and its (secular) constitution see fit to grant." *Id.* at 1882.

178. Foucault, *supra* note 171, at 37.

179. See *supra* note 70 and accompanying text.

180. See Peter G. Danchin, *Defaming Muhammad: Dignity, Harm and Incitement to Religious Hatred*, 2 DUKE F.L. & SOC. CHANGE 5, 8–9 (2010) [hereinafter Danchin, *Defaming Muhammad*] ("What characterizes classical arguments for secular liberal principles advanced by thinkers as diverse as Mill, Locke, Kant and Rawls is the assumption that there are *external* reasons that all rational people should be bound by, simply in virtue of their rationality. The difficulty [as we saw in Part I.C] is that while rationality is a shared human faculty, there are no such uncontested external or *a priori* universal reasons. All reasons appeal, at some level of

Hunter has observed, Kant's principles of morality and right are grounded in a comprehensive "Christian-Platonic anthropology deeply embedded in the history of north-German Protestant university metaphysics."¹⁸¹ On the basis of this metaphysical view, Kant characterized man as "the empirical harbinger of a pure rational being" (*homo noumenon*) who, by intelligizing "the pure forms of experience, and [governing] the will by thinking the 'idea' or form of its law [was] supposed to free himself from the 'sensuous inclinations' that otherwise tie the will of empirical man (*homo phenomenon*) to extrinsic ends or goods."¹⁸² It is this metaphysical account of human rationality that provides the basis for the two central tenets of Kant's moral philosophy, namely

his conception of the good will as one that transcends distracting sensuous inclinations by spontaneously conforming itself to pure reason's intellection of the idea of the law; and his conception of moral community as the "kingdom of ends in themselves" that is formed when the universe of rational beings is joined through transparent reciprocal willing in accordance with this intellection.¹⁸³

Under this view, the liberal-autonomous subject remains in part a religious subject, but only in the private sphere where religion is tacitly assumed or (re)defined in Protestant terms to take the form of private "belief or conscience," which paradoxically is seen as "freely chosen."¹⁸⁴ As noted above, the neutrality of the state then simultaneously mediates and circumscribes this private sphere through a scheme of individual rights and the right to freedom of religion and belief in particular. The notion of secular or universal law is encompassed in the categorical rationalism of the liberal algebra itself: "Act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law."¹⁸⁵ Each of these moves involve fraught and

justification, to substantive value commitments and these may or may not be shared by persons of divergent religious and cultural backgrounds."). On the distinction between external and internal reasons, see Akeel Bilgrami, *Secularism and Relativism*, 31:2 BOUNDARY 2, Summer 2004, at 173 ("It is a theoretical fallacy to declare the opponents of secular liberalism irrational by standards of rationality that all rational people accept.").

181. Ian Hunter, *Kant's Regional Cosmopolitanism*, 12 J. HIST. INT'L L. 165, 173 (2010).

182. *Id.* at 173–74.

183. *Id.* at 174.

184. See *supra* note 159 and accompanying text.

185. Jeremy Waldron, *Toleration and Reasonableness*, in THE CULTURE OF TOLERATION IN DIVERSE SOCIETIES: REASONABLE TOLERANCE 13, 14 (Catriona McKinnon & Dario Castiglione eds., 2003). For Kant, this uniquely "rational" normative understanding of

contested claims that in effect define enlightenment as the discovery of an exit, a “way out,” a “process that releases us from the status of ‘immaturity’” (a state where religious authority takes the place of our conscience) by a “modification of the preexisting relation linking will, authority, and the use of reason.”¹⁸⁶

There are two points I wish to make regarding this metaphysical conception of rationality and its incorporation into the notion of “right.” The first concerns the type of constraint that is imposed on religion by Kant’s notion of the good will. In this recognizably Protestant understanding of religion in terms of interiorized (or “privatized”) and simultaneously “freely chosen” conscience or belief, we can see the unique double bind that today defines the secular liberal notion of religious freedom as an individual right.¹⁸⁷

The second point concerns Kant’s derivation of a pure norm of right from man’s “rational being.” Given the regional character of Kant’s view—not only to, but within Europe, and to a local branch of Protestant German metaphysical philosophy at that—it is difficult to see how this account of universal reason can form the basis of a supranational normative order able to harmonize not only rival European but also non-European religious, cultural, and political metaphysics.¹⁸⁸

freedom was not the indiscriminate realization of one’s passions or interests—indeed, this was immaturity . . . Freedom could exist only as looking beyond such contingencies. To be free was to make one’s will harmonious to universal reason—a reason according to which one should always act in accordance with what one can simultaneously will as universal law. Where enlightenment lay in reliance on reason, *freedom consisted in the acceptance of what reason dictated as duty.*

MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* at 191 (2001) (emphasis added). On the implications of categorical rationalism for liberal rights theorizing, see *infra* Section III.B.

186. Foucault, *supra* note 171, at 35.

187. The idea of a “double bind” between consent and justice in international legal argument is powerfully developed in KOSKENNIEMI, *supra* note 112, *passim*; see also Peter G. Danchin, *Who Is the ‘Human’ in Human Rights? The Claims of Culture and Religion*, 24 MD. J. INT’L L. 99, 103 (2009) (querying whether the terms “conscience” and “reason” in Article 1 of the Universal Declaration of Human Rights are “perhaps the two ascending and descending argumentative positions captured in our singular notion of ‘right’—a notion which itself straddles between the Human and a transcendent or metaphysical notion of (universal) Liberty”).

188. See, e.g., Ian Hunter, *Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations*, in *LAW AND POLITICS IN BRITISH COLONIAL THOUGHT: TRANSPOSITIONS OF EMPIRE* 12 (Shaunnagh Dorsett & Ian Hunter eds., 2010) (“[The] ‘regional’ . . . character of European *ius gentium* discourses cannot be comprehended in relation to a transcendent global justice or universal history that these discourses failed to realize . . . [but instead] can be grasped only by situating them in the immanent conflicts among the rival intellectual cultures on which they were based, and the clashing religious and political programs in which these discourses were anchored.”).

If this is correct, the real challenge confronting the European Court of Human Rights is whether it is possible to recover the noninstrumental dimensions of Kant's project of freedom without necessarily adopting the historically and culturally contingent aspects of its metaphysical philosophy. In this respect, the significance of Kant's ideals lies in the notion that principles of right (the communal will of a rational community) are necessary conditions for a political project which seeks to reconcile self-interest with a cosmopolitan legal order. Such a project requires both *political contestation* and the use of *critical judgment*, each of which are incapable of being derived from instrumental reason and must encompass the perspective of the whole (the ideal of the "kingdom of ends in themselves").¹⁸⁹

For Koskenniemi, this constitutes a project of freedom in two distinct senses:

First, it holds political judgment open to different, even opposing, alternatives, highlighting the (legal) accountability of the one who makes the judgment. Second, its concept of legal expertise is not that of instrumental skill but a mindset—a "constitutional mindset"—that is constantly measuring any judgment or institutional alternative against the ideal of universality embedded in the very idea of rule by law (instead of by expert decision).¹⁹⁰

Under this view, the significance of autonomy is not on account of a particular conception of the good (for example, that personal autonomy is a precondition for the good or just life), but rather on account of the demanding moral-political virtue to respect others as "reason-giving" and "reason-receiving" subjects with a right to justification.¹⁹¹ Further, the significance of critical judgment lies in the notion that human rationality must recognize its own boundaries and finitude, and—with full knowledge, not of ends, but of indeterminacy and contingency—accept the unavoidability of conflict between plural values.

189. O'Neill argues that in fact for Kant "reason . . . has no transcendent foundation, but" rather relies for its authority on "agreement based on principles that meet their own criticism." O'NEILL, *supra* note 73, at 38. Thus, "principles of reason vindicate their authority by their stamina when applied to themselves. . . . [S]uch self-criticism is best sustained in the form of free, critical and universal debate." *Id.*

190. Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EUR. J. INT'L REL. 395, 415 (2009).

191. See Danchin, *Defaming Muhammad*, *supra* note 180, at 33–37 (comparing John Locke's liberal argument with the reflexive account of religious toleration advanced by Pierre Bayle); see also Rainer Forst, *Pierre Bayle's Reflexive Theory of Toleration*, in TOLERATION AND ITS LIMITS 78 (Jeremy Waldron & Melissa Williams eds., 2008).

If we apply these principles to Islam and the claims of Muslim communities, we can see that serious engagement in a project of this kind would require a comparative dialogue across the putative divide between Western and non-Western traditions of critique and practice. Saba Mahmood suggests that the viability of such a dialogue depends on

making a distinction between the labor entailed in the analysis of a phenomenon and defending our own beliefs in certain secular conceptions of liberty and attachment. The tension between the two is a productive one for the exercise of critique inasmuch as it suspends the closure necessary to political action so as to allow thinking to proceed in unaccustomed ways.¹⁹²

It is disappointing in this regard that the European Court of Human Rights has to date employed an excessively rationalist mode of justification in its jurisprudence on Islam. To the extent that the Court has been prepared to incorporate dialogic elements in its reasoning, it has done so only in cases involving Christianity, such as in *Wingrove* and *Otto-Preminger*, where a right to be free from injury to religious feelings was found to be within the scope of Article 9(1).¹⁹³

Whether in its rationalist or dialogic modes then, the Court has constructed narratives of secularism, freedom, and equality that, by tacitly subsuming or incorporating Christian or post-Christian norms into the meaning and scope of Article 9, has placed in jeopardy and marginalized the religious freedom claims of Muslim (and other religious) communities. The Court's jurisprudence thus squarely raises for consideration what constitutes religion and a proper religious subjectivity in the modern world, and what practices may be necessary to make certain types of claims to religious freedom not mute but intelligible within the rights discourse of the ECHR.¹⁹⁴

2. Value Pluralism

Let us recall again the first two lines of cases discussed in Part II. Section II.A argued that the controversy in *Kokkinakis*, involving proselytism directed at a member of the Eastern Orthodox majority in Greece, cannot be understood without taking into account the collective dimensions of Article 9. This includes not only the interests and conceptions of the good protected by the right to religious freedom but also the relationship

192. For Mahmood, our ability to think outside this set of limitations necessarily requires the labor of critique, which rests, not on its putative claims to moral or epistemological superiority, but rather its ability to recognize and parochialize its own affective commitments that contribute to the problem in various ways. Mahmood, *supra* note 113, at 90–92.

193. See *infra* Part III.B.

194. Mahmood, *supra* note 113, at 70–71.

between both the individual and the state, and between differently situated groups within the state. The controversy, in other words, requires a complex understanding of the corresponding tensions that arise from different individual and collective claims of right.¹⁹⁵

Similarly in Section II.B, the conclusions in *Wingrove* and *Otto-Preminger* that “respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration”¹⁹⁶ require the prior recognition of the presence (and sensitivity) of religious beliefs or practices in public space. Indeed, it is precisely for this reason that liberal theorists have criticized the Court’s wide reading of the scope of Article 9(1) in *Otto-Preminger*, questioning “whether an entirely passive state, which is dependent upon the inaction of others rather than the inaction of the believer, properly constitutes a manifestation of those beliefs.”¹⁹⁷ It is only if one already has assumed that the proper place of religion is in the *forum internum* of private thought, belief, and conscience that such criticisms become plausible.¹⁹⁸ The fact that the Court has been prepared to recognize certain collective aspects of religious freedom suggests that religion and religious values are not in fact as absolutely privatized and disestablished as liberal theory would have us presume.

Such controversies over the presence of religion in the public sphere are strongly contested in Europe today. In the 2009 case of *Lautsi v. Italy*, the Second Chamber of the European Court of Human Rights held unanimously that the presence of crucifixes in Italian public school

195. See Danchin, *Of Prophets and Proselytes*, *supra* note 95, at 272 (arguing that the Court in *Kokkinakis* faced not one but two types of conflict: the first between various individual rights claims, some of which were internal to Article 9 and others which were between Article 9 and other related rights such as free speech; the second between incompatible conceptions of the collective good).

196. *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 1, 18 (1994); see also *supra* note 105 and accompanying text.

197. Edge, *supra* note 110, at 682.

198. See Danchin, *Defaming Muhammad*, *supra* note 180, at 29–30.

The *forum internum* or *internal* sphere of personal thought, conscience, or belief of speaker and listener alike is absolutely protected from interference by the law, i.e. is nonderogable and not subject to limitation by the state. The critique of *ideas, symbols* or *traditions* — each located on the “value” side of the fact/value distinction — is within the sovereignty of this realm and thus inviolable. While critique does involve *action* or *manifestation of belief* in the form of speech or other expression and is thus potentially subject to reasonable limitation in the *forum externum*, it is not seen to interfere with the *forum internum* of listeners who, while potentially offended, insulted, and even threatened by the speech, remain free to believe in the tenets of their faith or religious tradition.

Id.

classrooms violates the right of children to religious freedom under Article 9.¹⁹⁹ The decision was met with outrage in Italy, which appealed to the Grand Chamber of the Court in conjunction with seven other European states.²⁰⁰

Central to the Second Chamber's reasoning was the proposition that the "[s]tate's duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions."²⁰¹ From this initial premise, the outcome of the case was all but determined. The decision to place "a crucifix on the wall of a classroom" is quite obviously "an assessment of the legitimacy of a particular religious conviction,"²⁰² Christianity.

But as Joseph Weiler argued on appeal before the Grand Chamber on behalf of eight intervening states, this formulation of neutrality is based on a number of conceptual errors that fail to take into account the tensions between individual rights and collective identity on the one hand, and between the uniform values of the ECHR and the rich European tradition of diversity of values on the other.²⁰³ For Weiler, the supranational legal order of the ECHR represents a unique balance between the individual liberty of (and from) religion and the collective liberty to define both state and nation in terms of religious symbols—even to the extent of having an established or official religion as in the United Kingdom, Greece, or Denmark.²⁰⁴ By insisting on a rigid U.S.-style separation of

199. *Lautsi v. Italy*, App. No. 30814/06, ¶¶ 48–58 (Eur. Ct. H.R. Second Section Nov. 3, 2009), *referral to* Eur. Ct. H.R. Grand Chamber (Mar. 1, 2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=857725&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (“[T]he compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe.”).

200. The appeal was heard in Strasbourg on June 30, 2010. *See* Joseph Weiler, Editorial, *Lautsi: Crucifix in the Classroom Redux*, 21 *EUR. J. INT’L L.* 1, 1 (2010), <http://www.ejil.org/pdfs/21/1/1985.pdf> (“[T]he decision of the Second Chamber of the ECtHR is an embarrassment.”). The judgment of the Grand Chamber was released on March 18, 2011. *See infra* note 210 and accompanying text.

201. *Lautsi* (Second Section), ¶ 47(e).

202. Oral Argument at 1:15, *Lautsi v. Italy*, App. No. 30814/06 (Eur. Ct. H.R. Grand Chamber June 30, 2010) (quoting *Lautsi* (Second Section), ¶ 47), http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+pupubl+hearings/webcastEN_media?&p_url=20100630-1/en (stating that, according to *Lautsi*, the crucifix on the wall of a classroom was violative of the “states’ duty of neutrality and impartiality”).

203. *Id.* at 1:13.

204. Weiler, *supra* note 200, at 2 (“How one draws the line between the identitarian aspects of the state which might have religious elements and the need for an education which is free and not religiously coercive is an important and delicate issue. But you cannot even begin to draw that line if you do not acknowledge that in Europe there is such a line to be drawn The European landscape which accepts as legitimate a UK and a France, a Malta

church and state or a *laïque* form deriving from the French Revolution, which treats religion solely as a private matter,²⁰⁵ the Second Chamber's antipluralist judgment is not neutral in that it implies that religious Europeans cannot be trusted because they have opted for a non-*laïque* state and wish to live by the principles of toleration, pluralism, and nondiscrimination.

A more robust pluralist liberalism rejects any notion that to be democratic you must not be religious and, while insisting on respect for individual freedom of religion and belief, recognizes that the state may nevertheless define itself and its public spaces by reference to the religious heritage, symbols, and collective identity of its people. There is thus no duty for a state to be *laïque*, but rather a democratic right of peoples to determine for themselves the place of religion in the public sphere of the state.²⁰⁶ This claim is not only legal and political, whether in the form of the right of a nation to a state, or of a minority to sub-state minority rights. The claim is also *ethical* and *cultural*, in the form of a collective right to preserve the existence of a unique social group. When these two claims are conjoined—when a cultural or religious group asserts legal autonomy in the form of a state—statehood becomes the means of enhancing or protecting cultural and religious identities. By securing the public space of the state to preserve national customs or traditions, the state in this way assumes a “cultural essence.”²⁰⁷

The cultural function of the nation-state has particular importance for our understanding of religious freedom. This is because the culture and historical traditions of national groups have been shaped, to varying degrees, by particular religious traditions. Virtually all national constitu-

or Greece or Ireland as well as an Italy, is a unique and uniquely promising model of tolerance and pluralism.”)

205. Danchin, *Suspect Symbols*, *supra* note 66, at 21–25; *see also supra* note 146 and accompanying text. “*Laïcité* is an idea that describes a specific conception of the public-private divide and state ‘neutrality’ in strictly secular terms.” Danchin, *Suspect Symbols*, *supra* note 66, at 21 (citing 1958 CONST. 2 (Fr.)).

206. It is a basic axiom of international law that “peoples” have a right to self-determination. *See, e.g.*, U.N. Charter art. 1, para. 2; International Covenant on Civil and Political Rights, art. 1(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, art. 1(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3. Many scholars today argue that the nation-state itself embodies the recognition that there is a morally significant connection between human freedom and a collective cultural life. National self-determination on this view is a “cultural right” in the sense that national, cultural, and religious communities seek and require not private but “public spheres” of their own in order to flourish and ultimately to survive. *See, e.g.*, Yael Tamir, LIBERAL NATIONALISM 8–9 (1993) (“[The] demand for a public sphere in which the cultural aspects of national life come to the fore constitutes the essence of the right to national self-determination.”).

207. Yael Tamir, *The Right to National Self-Determination*, 58 Soc. RES. 565, 585–86 (1991).

tions recognize a distinct relationship between the state on the one hand, and religion in general, or one or more religions or beliefs in particular, on the other.²⁰⁸ At the same time, constitutions also recognize fundamental rights, including the right to freedom of religion or belief, the right to equality and nondiscrimination on the basis of religion, and the right of religious minorities to practice their own religion.

The critical question then in cases such as *Lautsi* is whether (and how) the state is able to honor *both* of these sets of commitments and handle the potentially far-reaching conflicts to which they give rise. Recognition of a special relationship between the state and a particular religion may, for example, conflict in various ways with the principle of nondiscrimination. Conversely, constitutional recognition of a belief system of an antireligious or aggressively “secular” character may conflict with the full protection of the right to freedom of religion. The *laïque* tradition seeks to resolve this dilemma through a particular binary form of secular rationalism that is neutral neither towards specific religions nor religion in general.²⁰⁹ The more robust value-pluralist tradition which has historically defined the secular *nomos* of the ECHR—at least as regards European nation-states *intra se*—rests instead on notions of liberal toleration and the recognition of a diversity of forms of legal accommodation between religion and the state, as reflected in the wide scope accorded to both Article 9 and the margin of appreciation.

These themes are reflected in the various separate opinions of the Grand Chamber in its final judgment in *Lautsi*, which was handed down on March 18, 2011. By a majority of 15 to 2, the Grand Chamber reversed the judgment of the Second Chamber, holding that “the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State.”²¹⁰ The majority agreed with the Second Chamber that the right to religious freedom in Article 9 includes the freedom not to belong to a religion and imposes a duty on the State of “neutrality and

208. For a review of the variety of religion-state relationships as expressed in national constitutions, see Johan D. van der Vyver, *Introduction: Legal Dimensions of Religious Human Rights: Constitutional Texts*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE, *supra* note 14, at xi.

209. See Danchin, *Suspect Symbols*, *supra* note 66, at 24.

210. *Lautsi v. Italy*, App. No. 30814/06, ¶ 70 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v_italy.pdf. While the regulations “prescribing the presence of crucifixes in State-school classrooms . . . confer on the country’s majority religion preponderant visibility in the school environment . . . [such visibility] is not in itself sufficient . . . to denote a process of indoctrination on the respondent State’s part and establish a breach of the requirements of Article 2 of Protocol No. 1,” which requires the state to respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. *Id.* ¶ 71.

impartiality.”²¹¹ On the two central questions of the scope of Article 9 and the nature of the public sphere, however, the majority disagreed with the reasoning of the Second Chamber. The Court held first, that “a crucifix on a wall is an essentially passive symbol . . . [and] cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities”;²¹² and second, that “the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation.”²¹³ The reasoning underlying each of these arguments, however, is conclusory at best. The first argument fails squarely to confront the inherent tensions between the individual and collective aspects of the right to religious freedom; the second fails to explain how, or whether, the rich diversity of religious values and traditions in the public sphere of European nation-states is compatible with the Court’s earlier, more demanding conceptions of neutrality and secularism in *Refah, Şahin*, and *Dogru*.²¹⁴

The first of these concerns was addressed by the dissenting opinion, which asks whether states’ duty of impartiality and neutrality can be maintained “where they mainly have regard to the beliefs held by the majority?”²¹⁵ For the dissenters, in states with a dominant majority religion such as Italy, the Court should accord a narrower margin of appreciation²¹⁶ and should be cognizant of the fact that “negative freedom of religion . . . deserves special protection if it is the State which displays a religious symbol and dissenters are placed in a situation from which they cannot extract themselves.”²¹⁷

211. *Id.* ¶ 60.

212. *Id.* ¶ 72. The majority distinguished *Dahlab v. Switzerland* on the basis that the measure at issue in that case prohibited “the applicant from wearing the Islamic headscarf while teaching” and concerned children of “tender age . . . for whom the applicant was responsible.” *Id.* ¶ 73. The Court further noted that crucifixes are “not associated with compulsory teaching of Christianity”; that Italy “opens up the school environment in parallel to other religions”; that there is no evidence that school authorities are “intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions”; and that there was no claim that “the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytizing tendency.” *Id.* ¶ 74.

213. *Id.* ¶ 68. Noting the divergent views of the Italian courts on the meaning of the crucifix, the majority further notes that the Court must “take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development.” *Id.*

214. See *supra* notes 122–140 and accompanying text.

215. *Lautsi* (Grand Chamber), at 47–48, ¶ 1 (Malinverni and Kalaydjieva, JJ., dissenting). “We now live in a multicultural society, in which the effective protection of religious freedom and of the right to education requires strict State *neutrality* in State-school education” *Id.* at 48–49, ¶ 2.

216. Cf. *Urbinati*, *supra* note 80.

217. *Lautsi* (Grand Chamber), at 50–51 ¶ 5 (Malinverni and Kalaydjieva, JJ., dissenting). The dissenting opinion thus expressly rejects the majority’s attempt to distinguish *Dahlab v. Switzerland*:

In finding Italy in violation of Article 2 of Protocol No. 1 and Article 9, the dissenting opinion itself fails, however, to squarely address the second issue concerning the nature of the public sphere and the deeper conceptual questions concerning the normative meaning of neutrality. Here, the separate concurring opinions of Judges Bonello and Power are illuminating. For Judge Bonello, writing in rather polemical terms, “[n]o court, certainly not this Court, should rob the Italians of part of their cultural personality” and “before joining any crusade to demonise the crucifix, we should start by placing the presence of that emblem in Italian schools in its rightful historical perspective.”²¹⁸ Central to Judge Bonello’s conception of neutrality is the distinction between freedom of religion and secularism:

The Convention has given this Court the remit to enforce freedom of religion and of conscience, but has not empowered it to bully States into secularism or to coerce countries into schemes of religious neutrality. It is for each individual State to choose whether to be secular or not, and whether, and to what extent, to separate Church and governance. What is not for the State to do is to deny freedom of religion and of conscience to anyone. An immense, axiomatic chasm separates one prescriptive concept from the other non-prescriptive ones.²¹⁹

In adopting what we may term a “liberal nationalist” account of religious freedom,²²⁰ Judge Bonello concluded by arguing that removing the crucifix from Italian schools would not be neutral but instead “a positive and aggressive espousal of agnosticism or of secularism” while conversely

The presence of crucifixes in schools is capable of infringing religious freedom and schoolchildren’s right to education to a greater degree than religious apparel that, for example, a teacher might wear, such as the Islamic headscarf. In the latter example the teacher in question may invoke her own freedom of religion, which must also be taken into account, and which the State must also respect. The public authorities cannot, however, invoke such a right.

Id. at 51, ¶ 6.

218. *Id.* at 38, ¶ 1.2–1.3 (Bonello, J., concurring). After detailing the long relationship between Christianity and education in Italy, Judge Bonello observes that the “scansion of the Italian school calendar further testifies to the inextricable historical links between education and religion in Italy, obstinate ties which have lasted throughout the centuries.” *Id.* at 39, ¶ 1.6.

219. *Id.* at 40, ¶ 2.3. Thus, freedom of religion is not the “seductive notions” of “separation of Church and State” or “religious equidistance”; “[i]n Europe, secularism is optional, freedom of religion is not.” *Id.* at 40, ¶ 2.5.

220. *See supra* notes 206–207 and accompanying text (noting the ethical and cultural aspects of religious freedom viewed as a collective right).

“[k]eeping a symbol where it has always been is no act of intolerance by believers or cultural traditionalists.”²²¹

Judge Power in her separate concurring opinion agreed with Judge Bonello that neutrality does not require a secularist approach.²²² But she proceeded to set out a more genuinely value-pluralist approach that is sensitive not only to the values of the majority but also those of religious (and nonreligious) minorities. For Judge Power, crucifixes in school classrooms are not simply “passive symbols” as the majority asserts, but rather “carriers of meaning . . . [that may] speak volumes without, however, doing so in a coercive or in an indoctrinating manner.”²²³ What is pivotal to her concurrence is the fact that

Italy opens up the school environment to a variety of religions and there is no evidence of any intolerance shown towards non-believers or those who hold non-religious philosophical convictions. Islamic headscarves may be worn. The beginning and end of Ramadan are “often celebrated.” Within such a pluralist and tolerant context, a Christian symbol on a classroom wall presents yet another and a different world view. The presentation of and engagement with different points of view is an intrinsic part of the educative process. It acts as a stimulus to dialogue. A truly pluralist education involves exposure to a variety of different ideas including those which are different from one’s own. Dialogue becomes possible and, perhaps, is at its most meaningful where there is a genuine difference of opinion and an honest exchange of views.²²⁴

Judge Power’s concurrence can be read as a powerful response to the two main arguments made in the dissenting opinion. In reply to the claim that neutrality cannot be maintained in states with dominant majority religions, Judge Power emphasized the duty on the state to respect the religious freedom of all persons and groups (both majorities and minorities). In reply to the second claim that the presence of religious symbols in the public sphere violates the negative freedom of followers of other

221. *Lautsi* (Grand Chamber), at 41, ¶ 2.10 (Bonello, J., concurring). “Millions of Italian children have, over the centuries, been exposed to the crucifix in schools. This has neither turned Italy into a confessional State, nor the Italians into citizens of a theocracy.” *Id.* at 41, ¶ 2.11.

222. “To my mind, the Chamber Judgment was striking in its failure to recognise that secularism (which was the applicant’s preferred belief or world view) was, in itself, one ideology among others. A preference for secularism over alternative world views—whether religious, philosophical or otherwise—is not a neutral option.” *Id.* at 44–45 (Power, J., concurring).

223. *Id.* at 45.

224. *Id.* at 45–46.

religions or of nonreligionists, Judge Power argued that what neutrality properly requires is a pluralist and inclusive rather than secularist and exclusionary approach by the state.

Judge Power's pluralist approach also provides the means by which to critique the various contradictions plaguing the majority judgment. By accepting Judge Bonello's position that Christianity is historically rooted in the public sphere of European nation-states (and *vice versa*),²²⁵ Judge Power's opinion implicitly challenges the solely individualistic account of the right to religious freedom advanced in the majority judgment. Further, the distinction drawn between pluralism and secularism throws into question the Court's earlier reliance on substantive notions of secularism and equality to justify restrictions on religious freedom in cases such as *Şahin* and *Refah*. The Court barely masks this inconsistency by broadly invoking the margin of appreciation rather than confronting more openly the relationship between neutrality and secularism. Judge Power's opinion thus exposes a double contradiction in the Court's Article 9 jurisprudence: first, finding a danger of pressure or proselytizing when a medical student wears an Islamic headscarf to a public university (*Şahin*) but not when a state officially adopts a majority religious symbol in its public schools (*Lautsi*); and second, finding the (democratic) decision "whether or not to perpetuate a religious tradition" in the public sphere to be a violation of the principle of secularism in a Muslim-majority state (*Refah*) but within the margin of appreciation in a Christian-majority state (*Lautsi*).

3. Pluralism and Islam

How do we explain these various inconsistencies and contradictions? If the value-pluralist thesis is correct, the puzzle is why the majority of the Court in *Refah* assumes, without argument, that a "plurality of legal systems," even if democratically adopted, is incompatible with the ECHR. Both normatively and factually this is erroneous given the many secular democratic constitutions around the world that recognize the collective claims of right by religious, ethnic, and linguistic communities. In India, for example, religious freedom consists in the state giving various religious groups juridical autonomy over family affairs in the form of family or personal status laws. Accordingly, various religious groups, including Hindus, Muslims, Sikhs, Christians, Buddhists, Jains, and Parsees are legally recognized as both the addressees and bearers of claims

225. "Judge Bonello has pointed to the fact that within the European tradition, education (and, to my mind, the values of human dignity, tolerance and respect for the individual, without which there can be no lasting basis for human rights protection) is rooted, historically, inter alia, within the Christian tradition." *Id.* at 45.

of right.²²⁶ These claims are recognized as extending to both individual and collective aspects of freedom of religion and to the protection of separate (majority and minority) religious and cultural identities.²²⁷

The same point is applicable in many liberal democratic states. In South Africa, for example, the post-apartheid constitutional order explicitly incorporates the full array of human rights norms recognized in international law regarding self-determination, minority rights, freedom of religion, and substantive equality.²²⁸ For the first time in that country's history, intensive law reform efforts are now underway to recognize the claims of and redress past discrimination against different religious communities, including tribal groups living under customary law and religious minorities with their own family and personal status laws.²²⁹

It is striking how the norms and assumptions defining these debates differ markedly from the logic of the majority judgment in *Refah*, which, as Judge Kovler observes, rejects "the very idea of such a compromise

226. See Tahir Mahmood, *Religion, Law and Judiciary in Modern India*, 2006 BYU L. REV. 755 (2006).

227. Such a conception of religious freedom is not without paradoxes, as exemplified by continuing political struggles in India over the status of family law. Feminist critics often assert that these laws privilege group rights over the rights of women as individuals. See, e.g., Catherine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and "Personal Laws,"* in ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 120, 136–37 (2006). Others respond that establishing a uniform civil code for adjudicating family affairs would compromise the autonomy accorded to religious minorities. See Flavia Agnes, *The Supreme Court, the Media, and the Uniform Civil Code Debate in India*, in THE CRISIS OF SECULARISM IN INDIA 294 (Anura dha Dingwaney Needham & Rajeswari Sunder Rajan eds., 2007). Such cases illustrate the contested and polyvalent nature of claims to religious freedom in situations where the collective aspects of the right are expressly included. See also Brenda Cossman & Ratna Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 HARV. INT'L L.J. 113, 169–70 (1997) (arguing for a "democratic secularism" in India based on a "substantive approach to equality, toleration, and freedom of religion" in which "cultural minorities must be free to pursue their own beliefs, and the state must be willing to accommodate their group differences").

228. The 1996 South African Bill of Rights guarantees cultural and religious communities the right to enjoy their culture and practice their religion, and in effect makes both religious-based law and secular law available for the adjudication of family matters. S. AFR. CONST., 1996, ch. 2, §§ 9 (equality), 15 (freedom of religion, belief and opinion), 31 (cultural, religious, and linguistic communities), 235 (self-determination). In particular, section 15(3)(a) provides that the constitution does not prevent legislation recognizing (i) "marriages concluded under any tradition, or a system of religious, personal or family law" or (ii) "systems of personal and family law under any tradition, or adhered to by persons professing a particular religion." S. AFR. CONST., 1996, ch. 2, § 15(3)(a). See Peter G. Danchin, *Freedom of Religion and the Recognition of Muslim Marriages in South Africa* (on file with author), in VARIETIES OF RELIGIOUS ESTABLISHMENTS (Lori Beaman & Winnifred Fallers Sullivan eds., forthcoming 2012).

229. SA Law Commission Report Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders (Project 90) (Jan. 2003) (S. Afr.); SA Law Reform Commission Report Islamic Marriages and Related Matters (Project 59) (July 2003) (S. Afr.).

from the outset.”²³⁰ Even within European states themselves, the question of recognizing a plurality of legal systems has been a matter of political debate. In 2008, the Archbishop of Canterbury gave a widely-publicized lecture in which he discussed the relationship between civil and religious law in England and affirmatively raised for consideration the “presence of communities which, while no less ‘law-abiding’ than the rest of the population, relate to something other than the British legal system alone.”²³¹ Given these evolving conceptions in both rights discourse and democratic theory, the Court’s reasoning in *Refah* requires serious reconsideration.

The Court’s interpretation of Islam itself in both *Şahin* and *Dogru* is troubling for similar reasons. As many scholars have argued, wearing the Islamic headscarf has no single or fixed meaning. Muslim women and girls wear the *hijab* for many, often conflicting and conflicted reasons, some of which are expressions of autonomy, self-realization, resistance, and freedom.²³² In the absence of evidence to the contrary, a woman such as Leyla Şahin must be taken to have freely or traditionally adopted the headscarf. The notion that the headscarf is *imposed* on individuals by Islam and is thus incompatible with contemporary democratic values says more about a particular liberal conception of religion and religious subjectivity than about coercion or harm in Islamic religious practices.²³³

230. *Refah Partisi v. Turkey*, App. No. 41340/98, 37 Eur. H.R. Rep. 1, 50–51 (2003) (Kovler, J., concurring); see *supra* note 129 and accompanying text.

231. Rowan Williams, Archbishop of Canterbury, *Islam in English Law: Civil and Religious Law in England*, Lecture Given at Lambeth Palace (Feb. 7, 2008), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/07_02_08_islam.pdf. For discussion of similar proposals regarding the creation of “sharia tribunals” in Canada, see Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES IN LAW 573, 579 (2008) (arguing for “a more context-sensitive analysis that sees women’s freedom and equality as partly *promoted* (rather than inhibited) by recognition of their ‘communal’ identity . . . [that] can help inform creative paths for cooperation that begin to match the actual complexity of lived experience in our diverse societies”).

232. As argued by Bhikhu Parekh, the wearing of the *hijab* by Muslim girls in Europe is a

highly complex autonomous act intended both to remain within the tradition and to challenge it, to accept the cultural inequality and to create a space for equality. To see it merely as a symbol of their subordination, as many French feminists did, is to miss the subtle dialectic of cultural contestation.

Bhikhu Parekh, *A Varied Moral World*, in IS MULTICULTURALISM BAD FOR WOMEN? 69, 73 (Joshua Cohen et al. eds., 1999). Given this multitude of meanings and ways in which the *hijab* actually works as a religious symbol, its blanket restriction by the state on the assumption that it symbolizes the oppression of women is open to serious question. For a nuanced analysis of the practice of veiling in Muslim societies, see Nancy Hirschmann, *Eastern Veiling, Western Freedom?*, 59 REV. POL. 461 (1997). See generally SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* (2005).

233. For a detailed discussion, see Danchin, *Suspect Symbols*, *supra* note 66.

In relation to the Court's construction of secularism as a basis for restricting religious freedom, we might ask whether the history of Kemalism and militarily enforced secularization in Turkey should provide the normative underpinnings for interpreting Article 9.²³⁴ As Judge Tulkens argued in her dissent in *Şahin*, while secularism is an essential principle in a democracy, so is religious freedom; even given the "pressing social need" to prevent radical Islamism, one cannot simply assert without more a link between the headscarf and fundamentalism.²³⁵ Similarly, the notion that the restriction on the headscarf was necessary for the protection of the rights of other students on the basis that they would feel pressured, threatened, or otherwise subjected to proselytizing, raises contested factual and normative questions that cannot easily be assumed to meet the standard of *necessity* in a democratic society.

Finally, it is revealing that the House of Lords in *Begum* placed reliance on, and deferred to, the fact that the school uniform policy of wearing the *hijab* but not the *jilbab* was approved after consultation with the Imams at three local mosques.²³⁶ As John Mikhail has argued, the Lords' reliance on religious authority in *Begum* is "deeply ironic."²³⁷ Luther's declaration of autonomy against the Church—"Here I stand, I can do no other"—has long been held to mean that no one should be compelled to accept the authority of intermediaries in matters of conscience. The question is why this cherished principle of the liberal tradition does not appear to apply to Muslims such as Leyla Şahin or Shabina Begum:

The message [in *Begum*] is that Reformation and Enlightenment ideals of individualism, autonomy and the sanctity of the individual conscience are for people like *us*—not for people like *you*. We celebrate human rights, heroic individualism and the stubborn vindication of self-determination against established legal, political or religious authorities. You, meanwhile, should avoid making unnecessary assertions of your so-called "rights," and you must conform to the beliefs of whatever religious authorities of yours we choose to recognise. We are distinct

234. See *supra* note 131.

235. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 99, 139 (2007) (Tulkens, J., dissenting).

236. R [Begum] v. Denbigh High Sch., [2006] UKHL 15, ¶¶ 7, 15 (Lord Bingham).

237. John Mikhail, *Dilemmas of Cultural Legality: A Comment on Roger Cotterrell's 'The Struggle for Law' and a Criticism of the House of Lords' Opinions in Begum*, 4 INT'L J.L. IN CONTEXT 385, 392 (2009); cf. *Manoussakis v. Greece*, 1996-IV Eur. Ct. H.R. 1346, 1365 ("The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.").

individuals, while you are an indistinct collective. You cannot represent yourself; you must be represented.²³⁸

The deep historical and normative connections in the liberal imagination between Christianity and the right to religious freedom are here evident: on the one hand, there is *conscience*, which is freely chosen, private, and disestablished; on the other there is *religion*, which is unchosen, adopted by custom or tradition, public, and sensitive. This tacit or background conception of *religion as conscience* is what defines the basic shape and contours of Article 9 jurisprudence.

On this basis, Saba Mahmood concludes that “secular liberal principles of freedom of religion and speech are not neutral mechanisms for the negotiation of religious difference and that they remain quite partial to certain normative conceptions of religion, subject, language, and injury.”²³⁹ The consequence is that

European Muslims who want to lay claim to the language of public order (enshrined in the recent [European Court of Human Rights] decisions) remain blind to this normative disposition of secular-liberal law to majority culture. In its concern for public order and safety, the sensitivities and traditions of a religious minority are deemed necessarily less weighty than those of the majority, even in matters of religious freedoms. This is not simply an expression of cultural prejudice; it is constitutive of the jurisprudential tradition in which the right to free speech and religious liberty is located.²⁴⁰

If correct, this makes the question of translatability of practices and norms across ethical differences under the framework of ECHR norms intrinsically difficult.²⁴¹ In order to see this more clearly, let us turn to the possible grounds on which the state may seek to limit the freedom to manifest religion or belief under Article 9(2).

238. Mikhail, *supra* note 237, at 392.

239. Mahmood, *supra* note 113, at 90. Legal mechanisms are “encoded with an entire set of cultural and epistemological presuppositions that are not indifferent to how religion is practiced and experienced in different traditions.” *Id.* at 88. Thus, “[t]o subject an injury predicated upon distinctly different conceptions of the subject, religiosity, harm, and semiosis to the logic of civil law is to promulgate its demise (rather than to protect it).” *Id.*

240. *Id.* Finally, it is important to realize that “[t]his is not due to a secular malfeasance but to a necessary effect that follows from the layers of epistemological, religious, and linguistic commitments built into the matrix of the civil law tradition.” *Id.* at 90–91.

241. Mikhail, *supra* note 237, at 387 (arguing that “what passes for reasoned elaboration in judicial opinions often manages to conceal an underlying political reality, which itself mainly consists of relations of power and subordination”).

B. Public Order and the Rights of Others

Article 9(2) provides, in part, that “[f]reedom to manifest one’s religion or beliefs shall be subject only to such limitations as . . . are necessary in a democratic society . . . for the protection of public order . . . or the protection of the rights and freedoms of others.”²⁴²

The idea that religious freedom may be limited to protect either public order or the rights and freedoms of others has been a feature of the cases discussed in Part II. In cases involving Islam such as *Refah*, *Şahin*, and *Dogru*, the Court has advanced a wide conception of public order, extending beyond the more limited and narrowly defined ground of *ordre public*²⁴³ to encompass substantive notions of secularism and democracy. It has also invoked the rights and freedoms of others to justify imposing limits on the freedom to manifest Islamic beliefs or practices in cases such as *Dahlab*, *Şahin*, and *Dogru*.²⁴⁴ This has assumed two forms: The first, to protect the rights of other students to be free from the display of religious symbols that “individually or collectively, or [due] to their ostentatious or demonstrative character, constitute an exercise of pressure, provocation, proselytizing or propaganda.”²⁴⁵ The second, to protect women, especially girls, from the discriminatory or coercive effects of what are regarded as patriarchal religious traditions and practices.²⁴⁶ As argued in Section III.A, this is a complex set of moves that rely on substantive underlying notions of autonomy and individual freedom.

In the cases involving Christianity, however, we have seen the Court invoke these same two grounds to limit other fundamental rights in order to protect the right to religious freedom. Thus, the right to freedom of speech in Article 10 was limited in *Otto-Preminger* and *Wingrove* to protect religious sensibilities (the rights of others) and to ensure peaceful

242. ECHR, *supra* note 6, art. 9, ¶ 2.

243. See, e.g., Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 209, 212–13 (Louis Henkin ed., 1981) (“[L]imitations on freedom to manifest one’s religion cannot be imposed to protect *ordre public* with its general connotations of national public policy, but only where necessary to protect public order narrowly construed, i.e., to prevent public disorder. A state whose public policy is atheism, for example, cannot invoke Article 18(3) [of the ICCPR] to suppress manifestations of religion or beliefs.” (footnotes omitted)).

244. See *supra* notes 134–148 and accompanying text.

245. See L. Elizabeth Chamblee, Note, *Rhetoric or Rights? When Culture and Religion Bar Girls’ Right to Education*, 44 VA. J. INT’L L. 1073, 1111 (2004).

246. In *Dahlab*, the Court asserts that wearing the headscarf is incompatible with gender equality because “it appears to be imposed on women by a precept which is laid down in the Koran.” *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 463.

coexistence between different groups in society in light of an assessment of likely threats to personal and state security (public order).²⁴⁷

Before proceeding, it is important to note a certain ambiguity regarding how the notion of “the rights and freedoms of others” operates as a ground of limitation. The question is whether this term refers to other rights enumerated in the ECHR (in which case it is arguably redundant) or to some other category of unspecified fundamental interests (in which case it is indeterminate).²⁴⁸ Thus, in *Otto-Preminger* the limitation imposed on freedom of expression was justified on the basis that respect for the religious feelings of believers was guaranteed in Article 9.²⁴⁹ In *Wingrove*, however, the need to protect against “seriously offensive attacks on matters regarded as sacred by Christians” was justified on the basis of protecting the “rights of others,” which was then said only to be “fully consonant with the aim of the protections afforded by Article 9.”²⁵⁰

This is important because the act of balancing one right against another requires a different mode of analysis than balancing a right against some identified individual or collective interest (such as reputation or collective identity). It is unclear on the basis of these cases whether the “right to be free from injury to religious feelings” is thus encompassed within the terms of Article 9(1), as suggested in *Otto-Preminger*, or within the “rights and freedoms of others”—read as a limitation on free speech in Article 10(2)—as suggested in *Wingrove*.

This ambiguity derives from an ambivalence on the part of the Court regarding through which of two rival liberal traditions to interpret the proper scope of religious freedom and the meaning of public order. In many of the cases it is often difficult to disentangle the two grounds of

247. See *supra* note 104–109 and accompanying text. The same point can be applied in the case of *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 3 (1993).

248. See, e.g., *Chassagnou v. France*, 1999-III Eur. Ct. H.R. 21, 65–66.

Where these “rights and freedoms” are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. . . . It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect “rights and freedoms” not, as such, enunciated therein. In such a case only *indisputable imperatives* can justify interference with enjoyment of a Convention right.

Id. (emphasis added); see also Jacco Bomhoff, *The Rights and Freedoms of Others: The ECHR and Its Peculiar Category of Conflicts Between Individual Fundamental Rights*, in *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* 619 (Eva Brems ed., 2008).

249. *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 1 (1994).

250. *Wingrove v. United Kingdom*, 23 Eur. Ct. H.R. 1937, 1957, 1958 (1996); see also *Barthold Case*, 90 Eur. Ct. H.R. (ser. A) at 23 (1985) (holding that a veterinary doctor could be disciplined for violating a ban on advertising as the measure was imposed “in order to prevent the applicant from acquiring a commercial advantage over professional colleagues,” a justification found to come within the category of the “rights of others”).

limitation that the Court tends to run seamlessly together. In *Şahin*, for example, was the limitation on the freedom to wear the Islamic headscarf justified by the threat posed by militant Islam to republican values, or state security, or both (“public order”); or by the patriarchal and coercive nature of Islam and the pressure this exerts on other Muslim and non-Muslim students, or the threat posed to peaceful relations between groups, or again both (the “rights of others”)?

If it was the former, how exactly was the Court to draw the line between the right to religious freedom and amorphous terms such as “militant democracy” or the proper nature of “secularism”?²⁵¹ If it was the latter, are concerns about pressure or proselytizing sufficient to outweigh the exercise of a fundamental right? Consider, for example, the harm caused by the hurtful and offensive speech at issue in the Danish cartoons controversy.²⁵² For many commentators, this offense to religious sensibilities was not thought to justify any limitation on the right to free speech in Article 10, either because it did not fall within the scope of Article 9 or because it was outweighed by the superior normative value placed on free speech in a democratic society. Why then does the more attenuated notion of harm at issue in the wearing or display of a religious symbol justify limitations on the right to religious freedom? No right to be free from the presence of religious symbols can be said to be protected by Article 10, and even if the wearing of a headscarf does constitute *some form* of pressure or proselytization, why—without additional argument—does this justify a limitation on Article 9, which (as noted by Judge Tulkens in *Şahin*) is equally fundamental to a democratic society? This seems plausible only if one has already assumed *a priori* a particular conception of the right to religious freedom (for example, in the form of a belief or conscience that is private and autonomously chosen) and of the public sphere (for example, in the form of neutrality in the *laïque* sense).

In this Section, I argue that the different approaches in the Court’s reading of Article 9(2) can be traced to two rival traditions in liberal thought. In the first, a “civil” philosophical tradition, public order is defined in terms of social peace, and the right to religious liberty is conceived in broadly jurisdictional terms. In the second, a “metaphysical” philosophical tradition, public order is defined in terms of a substantive theory of justice (the “secular public sphere” discussed in

251. See *supra* text accompanying note 137.

252. See Danchin, *Defaming Muhammad*, *supra* note 180; cf. Andrew F. March, *Speech and the Sacred: Is Religiously Injurious Speech a Problem for Secular Political Theory?* (2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642754 (arguing that secular arguments should not value religious sentiments over other values).

Part I) and the right to religious liberty is conceived in terms of the values of autonomy and freedom of conscience.

In its Article 9 jurisprudence the Court has, often imperceptibly, invoked each of these traditions at different times either to accept or to deny claims to religious freedom. In the discussion that follows, I first briefly describe the history of these two intellectual traditions and their emergence from the moral and political thought of the early modern Enlightenment before illustrating their contemporary significance in light of recent reforms in England abolishing the offense of blasphemy and introducing a new offense of incitement to religious hatred.

1. Rival Enlightenments

In his seminal work reinterpreting early modern German intellectual history, Ian Hunter rejects the notion of a single Enlightenment and shows how what he calls “[t]he jurisprudential or civil enlightenment of the 1680s [differed profoundly] from the (Kantian) philosophical [or “metaphysical”] enlightenment of the 1780s,” a century later.²⁵³ It is here that we start to see the origins of two distinct conceptions of the public sphere and of the distinction between the public and private in modern liberal thought.

In the civil tradition, “it is religion and morality that define the private domain, their inward and unenforceable character defining the kingdom of truth.”²⁵⁴ Conversely, the public sovereign domain is defined by the use of coercion to preserve social peace. By partitioning theology *via* a statist natural law, it was sought to “separate the pursuit of moral regeneration from the exercise of civil sovereignty.”²⁵⁵ Under this view, civil authority is understood “in terms of the maintenance of social peace by a government exercising supreme power in a religiously or morally indifferent manner.”²⁵⁶ Contrary to the later Kantian view, the private sphere is thus to be “unconditionally free” unless it disturbs social peace.

This civil philosophy gave expression to the “desacralization of politics” that had been achieved in the mid-seventeenth century by jurists who were “seeking a way out of religious civil war. The civil philosophers were thus not attempting to institute a new integral moral-political governance of a total society—one based on a secular political philosophy—but to separate the maintenance of political order from the pursuit of moral regeneration.”²⁵⁷ This led over time to the “spiritualisation of religion,”

253. IAN HUNTER, RIVAL ENLIGHTENMENTS: CIVIL AND METAPHYSICAL PHILOSOPHY IN EARLY MODERN GERMANY 7 (2001).

254. *Id.* at 376.

255. *Id.* at 367.

256. *Id.*

257. *Id.*

which undermined religious orthodoxy, and to the argument that “salvation came instead from a purely personal inner relation to God.”²⁵⁸

Conversely, the public civil domain would be governed “absolutely,” according to jurists such as Hugo Grotius, Samuel Pufendorf, and Christian Thomasius, but only “on the condition that the sovereign power remained indifferent to all transcendent truths.”²⁵⁹ This led to the “desacralisation of politics” and thinking about the purposes “of the state in quasi-Hobbesian terms; that is, in terms of maintaining external and internal security while eschewing all higher-level religious and moral aims.”²⁶⁰ The purpose was *not* “to defend individual freedom of conscience,” but “to deprive the churches of all civil and political authority, thereby . . . establishing a de-confessionalised state as the means of maintaining a legally enforced toleration between the rival religious communities.”²⁶¹

In both instances, Hunter argues that the “key elements of early liberalism—varying degrees of toleration and church-state separation—formed part of the religious settlements that brought these wars [of religion] to an end . . . [and] laid down the central cultural, political and legal protocols for the liberal governance of multi-religious societies.”²⁶² Today, we see resonances of this philosophy in political theories such as Stepan’s notion of the “twin tolerations”²⁶³ and in laws outlawing incitement to religious hatred.²⁶⁴ We also see these resonances in legal regimes regulating the relationship between church and state in countries such as Germany, which continue to be shaped by the principles of “separation, secularity of the state, freedom of religion, and equal rights for all religions and religious communities within a pluralistic system.”²⁶⁵

258. Ian Hunter, *Religious Offences and Liberal Politics: From the Religious Settlements to Multi-Cultural Society* 8 (Feb. 2005) (unpublished manuscript), available at <http://espace.library.uq.edu.au/eserv/UQ:9933/SacrilegeUQ.pdf>.

259. HUNTER, *supra* note 253, at 367.

260. See Hunter, *supra* note 258, at 8.

261. *Id.* at 9–10.

262. See *id.* at 3.

263. See Stepan, *supra* note 163, at 37–57. “[T]win tolerations [are defined as] the minimal boundaries of freedom of action that must somehow be crafted for political institutions vis-à-vis religious authorities, and for religious individuals and groups vis-à-vis political institutions.” *Id.* at 37.

264. See *infra* Part III.B.2.

265. Martin Heckel, *The Impact of Religious Rules on Public Life in Germany*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE*, *supra* note 14, at 191–92. The contemporary relevance of the liberal civil philosophical tradition can be seen in Heckel’s observation that at least five “complicating factors” in relations between the state and religious communities continue to exist in Germany today: (1) the “aim and function of the secular law is to secure outward peace and earthly welfare” whereas “all institutions and activities of the church are dependent on and limited by the confession of faith,” with the result that they are “deeply incommensurable, heterogeneous, and quite often incompatible”; (2) the secular state “does

The difficulty, however, is that these “liberal political and legal regimes contain features which are irreducible to their main modern forms of philosophical justification.”²⁶⁶ One response is to say that these historical settlements are merely factual or “non-ideal” in relation to post-Kantian political philosophies. But as Hunter argues, this risks overlooking the “normative dimensions of the historical arrangements themselves” as well as a “kind of philosopher’s self-delusion” which imagines that “political norms arrived at through rational introspection have an intrinsic moral force, regardless of their capacity to engage the historical political-legal order.”²⁶⁷

This becomes evident when we consider the second metaphysical tradition. As discussed in Part III.A, in this regime it is the “individual’s official duties that define the private domain,” while the public domain is constituted by noncoercive intellectual communication and community; a rational public sphere that will gradually displace the state altogether through the creation of a people no longer in need of political coercion—a “self-governance and self-perfection of a democratic moral community.”²⁶⁸

not derive its legitimacy from any normative theological assumption or even ecclesiastical authorization” whereas the “spiritual and sacramental aspects of ecclesiastical law transcend the competencies and the tasks of the secular state” with the result that church and state “meet as independent entities, in ways however which are much more complex than those addressed by public international law”; (3) the “legal powers of both church and state *compete* and thus create conflicts and problems of loyalty . . . within the same human being (*idem civis et christianus*), on the same territory (both secular and ecclesiastical), [and] concerning the same social and cultural subject matters”; (4) the “*difference* between ecclesiastical and secular *values* also creates problems,” for while the “Christian churches have accepted the secularity of the state and the responsibility of the ‘secular’ for its own sphere . . . in the church’s teaching, even this secular sphere must be aligned with and limited by theological explanations of the world as the good creation of God, on the one hand, and as a sinful world to be contained by secular power according to the commandments of God, on the other”; and, (5) each of these factors combine to ensure that “*tensions* between church and state and their respective legal orders are inevitable” especially in “matters of education, matrimonial and penal laws.” *Id.* at 192–95.

266. See Hunter, *supra* note 258, at 1. Consider, for example, the historical relationship between the Vatican and the Italian state, or the Church of England and the United Kingdom.

267. See *id.*

268. HUNTER, *supra* note 253, at 376. Like Foucault, see *supra* note 171, Hunter observes that this Kantian “inversion of the usual conception of private and public has understandably struck many commentators as anomalous.” HUNTER, *supra* note 253, at 376. “It is . . . in envisaging the moral renovation of political governance through the figure of the rational community—the figure known today as ‘rational communication in the public sphere’—that Kantian metaphysics assumes its full neo-confessional form.” *Id.* The “intense pressure to make the state ethical and accountable [threatens to collapse] the hard-won separation of the pursuit of moral regeneration and the exercise of civil authority.” This is because, while the culture of civil philosophy “treats this separation as the condition of governing a liberal society,” the culture of metaphysical philosophy “regards it as something to be overcome.” *Id.*

The Kantian philosophical system thus effects a double transformation by simultaneously *rationalizing* religion and *sacralizing* reason in a morally grounded state. Thus, in his *Religion Within the Boundaries of Mere Reason*,²⁶⁹ Kant develops the notion of a purely “rational religion,” which is premised on the exclusion of theology from theoretical reason and the grounding of faith in only practical (moral) reason. In this way, religion is to be controlled by the demands of morality.²⁷⁰ At the same time, moral aspiration is also central to Kant’s system of ethics. In his *Groundwork of the Metaphysics of Morals*, he argues that the “proper object of aspiration” for rational agents is the “good will,” which, in order to be good without limitation, is a “*transcendent* object of aspiration.”²⁷¹ This moral aspiration for a good will is “not just a hope for external results, but also, and no less important, for a perfection of the agent’s own inner moral life.”²⁷² On the basis of these two critical moves, the political community thus becomes treated

as the devolved “sensible” form of the moral or spiritual community. As a result, in rationalist political metaphysics, political and legal rule appear as a debased mode of governance, required only until the moral community regains its capacity for reciprocal collective self-governance, which will appear in the form of the general will of a total or “unlimited society.” At this point the need for law and state will wither away, displaced by the moral sovereignty of the community of rational beings, who . . . will form an “ethico-civil society” or “kingdom of God on earth.”²⁷³

269. Immanuel Kant, *Religion Within the Boundaries of Mere Reason*, in RELIGION WITHIN THE BOUNDARIES OF MERE REASON AND OTHER WRITINGS 31 (Allen Wood & George di Giovanni eds., trans., 1998).

270. Robert Merrihew Adams, *Introduction*, in RELIGION WITHIN THE BOUNDARIES OF MERE REASON AND OTHER WRITINGS, *supra* note 269, at vii–viii (noting that, for Kant, “the inability of our theoretical faculties to prove the truth or falsity of religious claims leaves room for our practical reason to determine our religious stance”); *see also* O’Neill, *supra* note 170 (explaining that, for Kant, religion is a vehicle for maintaining a sense of hope and morality). While critical of both theology and organized church practice, Kant’s rational religion was the “product of intense engagement with the Protestant Christianity in which he was raised, and which was the established religion of the Prussian state of which he was a subject.” Adams, *supra*, at xi. Kant’s critique of organized religion meant that, for him, the aim of the ideal church is strictly *ethical*, i.e., “to inculcate *voluntary* compliance with the laws of *virtue*, which cannot properly be enforced by any human institution because they extend to motivation and govern the inner life.” *Id.* at xxviii.

271. Adams, *supra* note 270, at xiii–xiv.

272. *Id.* at xxvi.

273. HUNTER, *supra* note 253, at 376. “The Kantian critique of positivist jurisprudence thus represents the anti-judicial revenge of a metaphysics dedicated to reversing the law’s desacralisation of civil governance.” *Id.* at 370.

What conclusions can we draw from Hunter's analysis for contemporary analysis under Article 9(2)? To the extent that modern liberal theory remains committed to a politics founded in rational moral self-governance in the Kantian and Rawlsian modes, it misunderstands the statist character of early modern liberalism and the normative dimensions of the early modern religious settlements. Founding liberal rights, such as the right to religious freedom as today codified in the ECHR, were not derived from the moral capacities of rational individuals or moral communities. Rather, they were grounded in the state's capacity to pacify warring communities by withdrawing civil power from the moral domain and concentrating it solely in the maintenance of external order.

The suggestion that the more recent history and philosophy of liberal thought—eighteenth century Enlightenment ideas of the rights of man and democracy—led to the ascent of modern, tolerant, inclusive, liberal states is deeply mistaken. The European state was a *nation*-state first, which emerged in the early modern era following massive religious conflict, intolerance, and exclusion.²⁷⁴ As contemporary liberal-nationalists remind us, it is the assumption of membership in a *nation*-state coextensive with a single national culture that underlies accounts of rights and obligations in the *liberal* state.²⁷⁵ Certainly, individual religious liberty as an ideal is more realizable in a state *already* comprised of a dominant majority that shares the same understanding of the public-private divide and conception of the good. By the late eighteenth century, the idea that “personal security and religious toleration depended on the pacification of fratricidal moral communities by a desacralised state” was largely forgotten and replaced by the notion of individual rights held by self-governing moral communities *against* the state.²⁷⁶

2. From Blasphemy to Incitement to Religious Hatred

In order to illustrate what is at stake in limitations analyses based on the grounds of public order and the rights of others, let us briefly consider the debates and reforms that have led to the abolition of the common law offenses of blasphemy and blasphemous libel in the United Kingdom. Following the September 11th terrorist attacks, the British

274. See Peter G. Danchin, *Emergence and Structure*, *supra* note 22, at 501–22.

275. Thus, various scholars draw a connection between individual liberty and the need for a collective cultural life, which is said to be possible only in a nation-state. See TAMIR, *supra* note 206; Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990). Others link democratic consent theory to national self-determination. See Harry Beran, *Self-Determination: A Philosophical Perspective*, in SELF-DETERMINATION IN THE COMMONWEALTH 23, 27 (W. J. Macartney ed., 1988). Yet others view national self-determination within a communitarian conception. See Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 21 (1990).

276. HUNTER, *supra* note 253, at 368.

government introduced the Anti-Terrorism, Crime and Security Bill which sought, *inter alia*, to amend the Public Order Act 1986 to extend its provisions on incitement to racial hatred to include incitement to religious hatred.²⁷⁷ The effort failed initially in the House of Lords, but in 2005 the government reintroduced the Bill and Parliament finally enacted the Racial and Religious Hatred Act 2006, which creates a new offense of stirring up hatred against persons on religious grounds.²⁷⁸ On May 8, 2008, the Criminal Justice and Immigration Act 2008 then proceeded to abolish the “common law offences of blasphemy and blasphemous libel” in England and Wales.²⁷⁹

As already seen in the case of Mr. Choudhury’s failed petition to the European Commission on Human Rights,²⁸⁰ the English law of blasphemy historically “extended only to the Church of England and in certain respects to Christianity as a whole.”²⁸¹ It was for this reason that the offense became subject to review by a House of Lords Select Committee during the 2003 debate over whether to introduce a new offense of incitement to religious hatred which would extend in effect the law’s

277. See Anti-Terrorism, Crime and Security Bill, 2001-2, H.C. Bill [49] cl. 36-38, available at <http://www.publications.parliament.uk/pa/cm200102/cmbills/049/2002049.pdf>. For discussion, see generally Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?*, 65 MODERN L. REV. 724 (2002).

278. Racial and Religious Hatred Act, 2006, c. 1, §§ 29A-29B (Gr. Brit.), available at <http://www.opsi.gov.uk/si/si2007/20072490.htm> (defining religious hatred in Section 29A as “hatred against a group of persons defined by reference to religious belief or lack of religious belief” and the offense itself in Section 29B as being committed by “[a] person who uses threatening words or behavior, or displays any written material which is threatening . . . if he intends thereby to stir up religious hatred”).

279. Criminal Justice and Immigration Act, 2008, c. 4, § 79 (U.K.), available at http://www.opsi.gov.uk/acts/acts2008/ukpga_20080004_en_1.

280. Choudhury v. United Kingdom, App. No. 17439/90, 12 HUM. RTS. L.J. 172 (1991).

281. Danchin, *Defaming Muhammad*, *supra* note 180, at 23.

In *R v. Lemon*, [1979] 1 All E.R. 898, 921-22, Lord Scarman criticized blasphemous libel at common law on the grounds that it did not extend to “protect the religious beliefs and feelings of non-Christians” (which was necessary in an “increasingly plural society such as that of modern Britain”) but rather belonged to a “group of criminal offences designed to safeguard the internal tranquility of the kingdom.” The rationale for the limited scope of the offences is related to the historical relationship between the state and nation (which is dominantly Protestant) in Britain.

Id. at 23 n.84. Thus, in the Salman Rushdie case it was stated that

all offences of this kind are not only offences to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together; and it is upon this ground that the Christian religion constitutes part of the law of England.

R v. Chief Metro. Stipendiary Magistrate (Ex Parte Choudhury), [1991] 1 All E.R. 306 (Q.B) at 306, 313 (quoting *R v. Williams* [1797] 26 STATE TR. 654, 714).

protection to Britain's Islamic and other religious communities. The Select Committee made the point as follows:

The law of blasphemy is discriminatory. It prevents (say) a Muslim from speaking about the sacred entities of Christianity in ways that would not be criminal if a Christian were to speak in similar terms about Islam. This violates Article 14 (prohibition of discrimination) taken together with Article 10, unless an objective and rational justification for the difference in treatment can be shown. Furthermore, failure to protect a Muslim against abuse of his religion might also violate Article 14 taken together with Article 9. Although the European Commission rejected an application based on Article 14 taken together with [Article] 9 in the "Satanic Verses" case, that predated the heightened respect for protection against abuse shown by the Court in *Otto-Preminger Institut* . . . and might not be decided in the same way today.²⁸²

At the conclusion of its proceedings, however, the Committee was unable to make any specific recommendations regarding either abolition of existing blasphemy laws or the creation of a new offense of incitement to religious hatred. As Hunter has argued, the Committee's underlying problem was the apparent incompatibility between the language of the ECHR and the terms in which European political and legal orders have historically resolved problems of sectarian conflict and freedom of religion:

As the inheritors of these settlements, liberal political and legal orders are not involved in the game of balancing potentially conflicting fundamental rights, but in the quite different task of adjusting degrees of freedom (whether of speech or religion) in light of an assessment of the likely threats to personal and state security arising.²⁸³

The Committee thus acknowledged that "continued tranquility" in the United Kingdom between all groups in society—religious and nonreligious—depended not only on "mutual tolerance" but also on "equality of protection from intolerance on the basis of religion or belief or no belief."²⁸⁴ But, not only was there no apparent way of reconciling such a conception of toleration with the liberal rights algebra, this approach was further in tension with the traditional conception of England as a "state

282. Select Committee on Religious Offences in England and Wales (London: House of Lords, 2003) vol. I, ¶ 41 [hereinafter Select Committee Report].

283. Hunter, *supra* note 258, at 15.

284. Select Committee Report, *supra* note 282, ¶ 13.

whose church is part of its constitution;" a state where "religious belief continues to be a significant component, or even determinant, of social values;" and thus a state that should "have the role of embodying the religious identities of its constituent communities."²⁸⁵ Caught then between the three interrelated policy objectives of needing to maintain religious peace and public order, ensure respect for fundamental rights, and protect the religious liberty and collective identity of the nation, the Committee was paralyzed in a situation where "the actual organisation of the liberal political and juridical order remains out of reach of a central mode of modern moral reflection."²⁸⁶

In this respect, the abolition of blasphemy offenses and the enactment of a new offense of incitement to religious hatred in England reflects the complex dialectic between the two rival liberal traditions. Further, it is the presence of a non-Christian minority asserting specific claims to liberty and security in a Christian or post-Christian state during a situation of heightened religious conflict that makes visible these deeper currents in the English law on religious freedom.

Consider once again the dilemmas facing the House of Lords Select Committee. One option, urged by the Muslim Council of Britain, was to extend the laws on blasphemy to all religious communities.²⁸⁷ This, in effect, was the basis of Mr. Choudhury's complaint to the European Commission. Another option, urged by the Muslim Council for Religious and Racial Harmony, was to enact new protections against incitement to religious hatred, including against "sacrilege and abuse of religious sanctities."²⁸⁸ The Select Committee was in the end unable to choose between these proposals because of the complex way in which the English law on religious offenses is entangled in matters of both public order *and* religious freedom.

The law of blasphemy is in this respect both a public order offense *and* a law that protects the religious liberty of English Christians. The public order of England rests in part on the political establishment of the Church of England as reflected in the Anglican Settlement. Extending the law of blasphemy to include Muslim or other religious minorities could destabilize these historical and deeply embedded foundations of

285. Hunter, *supra* note 258, at 17.

286. *Id.* at 16.

287. Select Committee Report, *supra* note 282, ¶ 35.

288. Hunter, *supra* note 258, at 13 (quoting the Muslim Council for Religious and Racial Harmony). This proposal reflects the extent to which blasphemy offenses are today viewed as having lost their basis in sacrilege and transformed instead into public order offenses in the deconfessionalized liberal state. As it gradually evolved in the nineteenth and twentieth centuries, the crime of blasphemy no longer was defined in terms of violating "things and places inhabited by a transcendent divinity," but rather as the "giving of offence in a manner that might lead to civil disorder or violence." *Id.* at 10–11.

the state itself. As a law that protects the religious freedom of Christians in England, the scope of this protection extends beyond an individual right to have or maintain a religion to a collective right of the nation itself to determine the place of religion in the public sphere of the state. Again, extending the law of blasphemy to protect the religious freedom of Muslims could destabilize this contingent religious settlement and increase the likelihood of conflict, not only between Christians and Muslims, but also between secularists and believers of all faiths. And yet, as Mr. Choudhury correctly argued, maintaining the *status quo* constituted a clear double standard and discrimination on the basis of religion against British Muslims in violation of England's obligations under the ECHR. For all these reasons, abolition—as opposed to extension—of the law of blasphemy appeared the more sensible path.

The enactment of the Racial and Religious Hatred Act 2006 represents an attempt to mediate between these complex tensions and claims of right by employing the civil or pluralist tradition's notion of public order. The Act does not create a right to be free from injury to religious sensibilities as demanded by various members of the British Muslim community.²⁸⁹ It therefore avoids the vexed question from *Otto-Preminger* of the precise scope of Article 9. It does, however, impose limitations on freedom of speech in order to protect religious adherents and their communities from advocacy intended to stir up religious hatred and hostility. In this respect, it strikes a balance between the rights to free speech and freedom of religion that favors neither exclusively and focuses the interpreter instead on the more fact-based criterion of the need for the state to maintain social peace and public order.²⁹⁰

At the same time, the abolition of the law of blasphemy eliminated the prior double standard in English law that privileged the collective

289. Section 29J of the Act expressly excludes

discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytizing or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Racial and Religious Hatred Act, 2006, c. 1, § 29J (Gr. Brit.), available at <http://www.opsi.gov.uk/si/si2007/20072490.htm>.

290. The Act is therefore not strictly “liberal” in the American free speech sense as it violates the principle of “no content regulation” and imposes a content-based classification. See KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 16 (1995) (arguing that the “principle of ‘no content regulation’ has emerged as a central doctrine of First Amendment law”). *But cf.* Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1656 (2010) (arguing, in the context of restrictions on speech imposed by hate speech laws, that the content-based restriction doctrine is a “blind-alley” and an example of “path-dependency” in First Amendment jurisprudence).

identity of solely the dominant constituent religious community. Nevertheless, the Church of England remains the established religion of the state, reflecting the collective right of the English people to self-determination and public expression of their collective identity.²⁹¹ In this respect, the public sphere is not secular in the antipluralist sense of the metaphysical Kantian tradition, but more genuinely value pluralist in the older jurisprudential sense of the civil philosophical tradition.

It is finally interesting to observe how legal and political philosophers today are turning to the notion of *human dignity* as a mediating concept between these older discourses which emphasize social peace on the one hand and individual freedom on the other. Jeremy Waldron thus invokes John Rawls's idea of a "well-ordered society"²⁹² to argue that human dignity is the value underlying the need to protect social groups, such as racial and religious minorities, from certain forms of group libel. On this view, legal restrictions on hate speech are set up to "vindicate *public order*, not just by preempting violence, but by upholding against attack a shared, public sense of the basic elements of each person's status, dignity, and reputation as a citizen or member of society in good standing—particularly against attacks predicated upon the characteristics of some particular social group."²⁹³ This notion of public assurance and freedom from visible manifestations of hatred defines public order *in terms of* the equal dignity and status of persons in an effort to avoid—or at least better manage—controversies over the scope of competing rights.²⁹⁴ Whether such a maneuver succeeds is beyond the scope of the

291. Weiler makes the point that Britain, "with its established Church, in which the Monarch is not only the Head of State but the Head of the Church of England," has a "constitutional structure [that makes] some kind of judgment that in some way at least Anglicanism is not illegitimate." Weiler, *supra* note 204, at 2.

292. Waldron, *supra* note 290, at 1618.

293. *Id.* at 1605 (emphasis added).

294. Waldron states that dignity is a "complex idea, with philosophical as well as political . . . resonances" and, in the sense he is using the term, "*dignity* is not just a Kantian philosophical conception of the immeasurable worth of humans considered as moral agents" but "a matter of status—one's status as a member of society in good standing." *Id.* at 1611–12. It is a social and legal status that requires us "in our public dealings not to act in a way that undermines one another's dignity in this socio-legal sense—and that is the obligation that is being enforced when we enact and administer laws against group libel." *Id.* at 1612. In the case of hate speech directed against religious minorities—such as the Danish cartoons controversy—group libel does not protect Islam or its founders but rather individual Muslims *qua* Muslims: the "civic dignity of the members of a group stands separately from the status of their beliefs, however offensive an attack upon the Prophet or even upon the Koran may seem." *Id.* at 1612–13. Here, Waldron directs his analysis towards concerns of *civic* dignity in a *well-ordered* society rather than to issues of injury to religious feelings or religious distress, thus avoiding the kind of complex issues involving religious freedom addressed in *Otto-Preminger* and *Wingrove*. See also Jeremy Waldron, *Toleration and Calumny: Bayle, Locke, Montesquie and Voltaire on Religious Hate Speech* 23 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Res. Paper No. 10-80, 2010), available at <http://ssrn.com/abstract=1699895>

present discussion,²⁹⁵ but it amply demonstrates how theorists continue to search for ways to reconcile the two liberal traditions regarding the limits of toleration in conflicts between religious groups.

C. Is “Secularism” Necessary in a Democratic Society?

In this final Section, I offer some concluding thoughts on the relationship between the two conceptions of the secular public sphere discussed in Section III.B and the injunction in Article 9(2) that the freedom to manifest religion or belief shall only be subject to limitations which are “necessary in a democratic society.”

In her dissent in *Şahin*, Judge Tulkens expresses concern that the majority invokes the margin of appreciation and the principles of secularism and equality in Turkey as being essential in democracy in a way that reverses the usual logic of the right to freedom of religion and belief.²⁹⁶ It is the state that has the onus of showing that a limit under Article 9(2) is “necessary” and does not impose excessive burdens on those whose rights are to be limited. And it is further axiomatic to say that the judicial role of the Strasbourg Court is to protect fundamental rights *against* the potentially unjust demands of public order asserted by states.

The Court’s apparent willingness to adopt, often without argument, state justifications regarding militant democracy, secularism, and the nature of Islam is therefore troubling. This Article has argued that there are deep unarticulated premises underlying the Court’s reasoning regarding Islam and the claims of Muslim communities that conceal an underlying historical and political reality consisting of relations of power, cultural hegemony, and subordination. The case law dealing with both Muslim minorities living in European nation-states and competing conceptions of secularism and democracy in Turkey reveals more about the Court’s anxiety and prejudices toward what is perceived to be the rise of

(arguing that for the “Enlightenment *philosophes* . . . public order means more than just the absence of fighting: it includes the peaceful order of civil society and the dignitary order of ordinary people interacting with one another in ordinary ways,” and “[a]bove all, it conveys a principle of inclusion and a rejection of the calumnies that tend to isolate and exclude vulnerable religious minorities”).

295. For a critical discussion, see Danchin, *Defaming Muhammad*, *supra* note 180, at 28–32 (arguing that the distinction between defamation and offense rests on controversial claims regarding the belief-action distinction and conventional (mainly Christian) understandings of speech, religion, and harm).

296. See *supra* notes 157, 235, and accompanying text; see also notes 218–222 and accompanying text (concurring separate opinions of Judges Bonello and Power in *Lautsi v. Italy*, which sharply distinguish between religious freedom and secularism and argue that the latter is “optional” in Europe).

Islamic fundamentalism in Europe and beyond than about any coherent theory of religious freedom under the ECHR.

In their decision making, the European Court judges have too readily adopted an excessively rationalistic mode of reasoning in their encounters with Islam, while forgetting—or at a minimum under-theorizing—the rival dialogic mode which has been so pivotal to the existence of pluralism in the history of religious freedom in Europe (even though this has emerged both *internally* and *externally* within the historical development of Western Christianity).²⁹⁷ This has had two distorting effects. First, it has created the paradox that the form of secularism said to be *necessary* in a democratic society in cases involving Islam neither exists in fact, nor have its various non-ideal alternatives precluded the flourishing of democratic values in many of the states within the secular *nomos* of the Court itself.

Second, this has generated what I term a “managerial culture of governance” under which the Court’s reasoning seeks to instrumentalize certain antipluralist and substantive conceptions of both the scope of religious freedom and the nature of the public sphere. The result is that in cases like *Şahin*, the Court has devoted its efforts to defending and reaffirming its own beliefs in certain secular conceptions of liberty and attachment rather than addressing the claims to justice—and real harms facing—the claimants before it.

This shift confirms what Mahmood suggests are the two contemporary challenges to the dominant understanding of secularism as “the separation between religion and politics so that an individual may practice her faith freely without coercion and state intervention (the right to religious freedom).”²⁹⁸ First, much recent work in this area argues “that the secularization of modern society has historically entailed not so much the withdrawal of the state from the religious domain, but the state’s reconfiguration of substantive features of religious life.”²⁹⁹ Second, this has entailed “not so much the elimination of religion from politics or public life but its reformulation in accord with a normative model of religiosity—one that is amenable to practices of liberal political rule.”³⁰⁰

By contrast, a genuinely pluralist “culture of justification” adopts an *ethos* of cultivation animated not by a comprehensive moral theory governing all ways of life, but rather the search for peaceful coexistence between different ways of life. Value pluralism in this sense is best un-

297. See *infra* note 315 and accompanying text.

298. Mahmood, *supra* note 43, at 1.

299. *Id.*

300. *Id.* at 2 (“This normative model regards religion primarily to be a matter of privatized belief in a set of creedal propositions to which an autonomous individual gives assent.”).

derstood as an attempt to reach political settlements and forms of reconciliation between the claims, values, and practices of diverse religious and cultural communities, and the assertions of right and justice to which they continually give rise. How this is to be achieved in any particular situation involving a manifestation of religion or belief can only be the result of a contingent and circumstantial consensus, derived through intersubjective hermeneutics and critical dialogue.

Such an approach holds that the freedom to manifest religion or belief does not include the right of Muslims in Europe, or any other majority or minority religious group, to elevate their faith to the established faith governing all others in a political regime. At the same time, value pluralism requires a “reassessment on the part of secular, enlightened Europeans of their own tendency to treat belief as neatly separable from disciplinary practices, cultural routines, and the education of sensory experience.”³⁰¹ I have thus argued previously that, by pursuing an *ethos* of engagement in the public sphere among a plurality of controversial theistic and nontheistic perspectives, a value pluralist approach offers the possibility of opening new ways to transcend this impasse and reimagine the limits of liberal theory.³⁰²

Judge Kovler was accordingly right in *Refah* to be concerned about the majority’s uncritical adoption of “terms borrowed from politico-ideological discourse such as ‘Islamic fundamentalism’, ‘totalitarian movements’, [and] ‘threat to the democratic regime.’”³⁰³ He was also right to express his deep reservations regarding the majority’s rejection *in toto* and without argument of *Shari’ah*, which constitutes a regime premised on “the concept of a plurality of legal systems” and is the “legal expression of a religion whose traditions go back more than 1,000 years.”³⁰⁴ Indeed, there is a vast and growing literature today on Islam and human rights as scholars continue to advance sophisticated accounts of the relationship of Islamic law to international human rights norms.³⁰⁵

301. WILLIAM E. CONNOLLY, *PLURALISM* 58 (2005).

302. See Danchin, *Suspect Symbols*, *supra* note 66, at 61.

303. *Refah Partisi v. Turkey*, App. No. 41340/98, 37 Eur. H.R. Rep. 1, 50–51 (2003) (Kovler J., concurring); see *supra* note 128.

304. *Refah Partisi v. Turkey*, App. No. 41340/98, 37 Eur. H.R. Rep. 1, 50–51 (2003) (Kovler J., concurring); see *supra* note 129 and accompanying text. For a critical discussion of the meaning of *Shari’ah* in the conditions of modernity, see WAEL B. HALLAQ, *SHARĪ’A: THEORY, PRACTICE, TRANSFORMATIONS* pt. III (2009).

305. See, e.g., MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* (2003) (discussing the connection between Islamic law and international human rights covenants); MAHMOOD MONSHIPOURI, *ISLAMISM, SECULARISM, AND HUMAN RIGHTS IN THE MIDDLE EAST* (1998) (discussing the interplay between Islamism, reform, and human rights in Turkey, Pakistan, and Iran); ABDULLAHI AHMED AN-NA’IM, *TOWARDS AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW* (1990); Mohammad H. Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law*

A pertinent example is recent scholarship on Article 2 of the Egyptian Constitution³⁰⁶ and the reasoning of the Egyptian Supreme Court in cases involving claims of right (including claims to religious freedom) under Islamic law.³⁰⁷ In a notable 1996 case involving the challenge by a father of two schoolgirls to a ministerial regulation forbidding girls in public schools from wearing the *niqab* and requiring parental permission to wear the *hijab*, the Court interpreted relevant Qur'anic verses and the opinions of jurists to hold that the regulation was not *ipso facto* contrary to the goals of *Shari'ah*.³⁰⁸ Regardless of the merits of the decision or the strength of its reasoning, what is striking about the case is the degree to which the interpretive methodology of the Court—although expressed in the vernacular and idioms of *Shari'ah*—closely tracks the main doctrinal categories of analysis found in much contemporary human rights discourse.³⁰⁹ It is sadly ironic that even the possibility of this kind of value-pluralist contestation is both overlooked and foreclosed by the majority judgment in *Refah*.

CONCLUSION

Since 2001, the Article 9 jurisprudence of the European Court of Human Rights has raised anew the question of the relationship between religion and public order. In its reasoning, the Court has constructed competing normative accounts of secularism, neutrality, and equality, either to accept or deny claims to religious liberty while at the same time granting states a wide margin of appreciation to accommodate majoritarian religious sensibilities in the name of public order.

and International Human Rights Law, 8 CHI. J. INT'L L. 1 (2007) (attempting to reconcile doctrines of Islam with norms of international human rights law).

306. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sept. 11, 1971, *as amended*, May 22, 1980, May 25, 2005, Mar. 26, 2007, *available at* <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>. Article 2 provides that "Islam is the Religion of the State . . . and the principle source of legislation is Islamic Jurisprudence (Sharia)." *Id.* art. 2. Article 46 further provides that "[t]he State shall guarantee the freedom of belief and the freedom of practising religious rights." *Id.* art. 46.

307. *See, e.g.*, Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379 (2006).

308. Nathan J. Brown & Clark B. Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 21 AM. U. INT'L L. REV. 437 (2006) (translating Case No. 8/1996/Supreme Constitutional Court of Egypt).

309. *See, e.g.*, Kilian Bälz, *The Secular Reconstruction of Islamic Law: The Egyptian Supreme Constitutional Court and the 'Battle Over the Veil' in State-Run Schools*, in LEGAL PLURALISM IN THE ARAB WORLD 229 (Baudouin Dupret, Maurits Berger & Laila al-Zwaini eds., 1999) (reading the Egyptian Supreme Court's decision as a defense of the secular legal order).

This Article has argued that the Court's interpretative divisions over the scope of religious freedom in Article 9(1) and the meaning and shape of the public sphere in Article 9(2) can be traced to two rival liberal traditions: one deriving from a civil philosophy that views the right to religious liberty in jurisdictional terms and the public sphere in terms of social peace; the other from a metaphysical philosophy that views the right to religious liberty in terms of freedom of conscience and the public sphere in terms of a comprehensive moral theory of justice. Both traditions combine rationalist and dialogic elements, and these remain encoded in complex ways in the normative logic and structure of Article 9.

The difficulty with the interpretive methodology of the European Court of Human Rights in cases involving the claims of Muslim communities is that any assertion of universal authority in the form of "free-standing" reason is ultimately unpersuasive and tacitly subsumes majoritarian cultural norms (whether secular or religious) into the meaning and scope of Article 9. Conversely, innovative work is now being done to reimagine liberal legal orders so as to encompass more genuinely pluralist conceptions of the right to religious freedom. It is thus becoming recognized that religious freedom entails not simply securing the rights of an individual against incursions by the state or community, but is also tied to and dependent upon different models of state-religion accommodation and different traditions of religious tolerance and pluralism.

A better understanding of how religious freedom emerged in the early modern period, and how secular European public spheres arose from contingent political settlements rather than the categorical demands of universal reason, suggests the need for a more reflexive self-understanding of the premises of Article 9 jurisprudence. This Article has aimed to make visible how modern secular power both authorizes certain "religious subjectivities" while simultaneously defining and excluding other "unruly subjects," whose otherness is "not only the product of their unruly actions but also an effect of how secular power establishes its claims to truth and normativity."³¹⁰

This dialectic of formation and exclusion has further been argued to rest on a paradox: the idea that the political secularism of the supranational European *nomos* is simultaneously *exceptional* and *universal*.³¹¹ The antinomies haunting this contradiction have revealed particular value commitments in both the rationalist and dialogic aspects of the right

310. Saba Mahmood, *Can Secularism Be Other-wise?*, in *VARIETIES OF SECULARISM IN A SECULAR AGE* 282, 294 (Michael Warner, Jonathan VanAntwerpen & Craig Calhoun eds., 2010).

311. *Id.* at 290; see *supra* note 87 and accompanying text.

to religious freedom. The claim successfully to have secured secular authority in the public sphere has been shown to rest on the notion of a unique “vantage point of epistemic neutrality above history, politics and culture, from which other histories and political formations can be marked as either tolerable (assimilable, non-recalcitrant, redeemable, universalizable) or intolerable (barbaric, inhumane, backward-looking, pure particularity).”³¹² But as Part I argued, such accounts of neutrality and secularity quickly devolve into the “unarticulated liberal strategy of hypostasis or reification of a historically specific political order.”³¹³ This was seen, in particular, in the ways in which the term “religion and belief” has been defined and the divide between public and private spheres demarcated.

At the same time, political secularism claims for itself the mantle of *universality* by asserting norms, such as the right to religious freedom, conceived as entirely separable from specific histories and relations of power between different groups. Part III argued, however, that only by engaging the competing histories of the emergence of the right to religious freedom in international law can we start to grasp the norm’s *particular* meaning and social significance. Historical inquiry reveals that rival intellectual traditions and normative dissonances and conflicts are internal to the right itself. This in turn suggests that the right to religious freedom is not a singular, stable principle existing outside of culture, spatial geographies, or power, but is a contested, polyvalent concept existing and unfolding within the histories of concrete political orders.³¹⁴

Once the right is historically relativized and normatively pluralized in these ways, the form of nondialogic reasoning employed by the European Court of Human Rights in cases such as *Refah* and *Şahin* is unpersuasive. Properly understood, the deep and continuing history of

312. Nehal Bhuta, *On Common Ground* 2–3 (Oct. 2010) (unpublished manuscript) (on file with author).

313. *Id.* at 2. The point is well-illustrated in *Lautsi* in the Grand Chamber’s reasoning that the crucifix is a “passive symbol” whose presence in Italian state-school classrooms does not impact the principle of neutrality while, conversely, the Islamic headscarf worn by a public school teacher in *Dahlab* was a “powerful external symbol,” the prohibition of which was “intended to protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools enshrined in domestic law.” *Lautsi v. Italy*, App. No. 30814/06, ¶¶ 72–73 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011); see *supra* note 212 and accompanying text.

314. Thus, while Italy has a positive obligation under the ECHR to respect parents’ religious and philosophical convictions, “the fact that there is no European consensus on the question of the presence of religious symbols in State schools” means that this is “a matter falling within the margin of appreciation of the respondent State.” *Lautsi* (Grand Chamber), at ¶ 70. The meaning of the right, in other words, is here not a matter of universal reason but overlapping consensus (which is contextual and varies between states).

entanglement between Christianity and political secularism—and of encounters between European and non-European traditions of secularism³¹⁵—makes the notion of Islamic legal norms and *Shari'ah* “within the context of a plurality of legal systems” uncontroversial. The failure to critically engage Europe’s own warring histories of political secularism thus results in a failure of recognition and a managerial mode of imperial liberalism at the very moment when a reflexive *ethos* of engagement is most needed.

The asserted *uniqueness* of the liberal political order as neutral and secular is, at bottom, a problem of illusion. The asserted *universality* of the right to religious freedom is, at bottom, a problem of power and of failures of recognition resulting from its exercise. It is only by better understanding the latter—the historical relationship of the European supranational *nomos* to its others—that space may conceivably be found to reimagine the former, and thus to see beyond the current limits of the Court’s jurisprudence.

315. The history of “Christian secularism” has both internal and external dimensions to its relationship with its others. Saba Mahmood thus criticizes Charles Taylor for his sharp delineation in *A SECULAR AGE*, see *supra* note 89, of a spatial geography—the “North Atlantic West”—without taking into account Christianity’s encounters with its others.

These others are both internal to the geospatial boundary of the North Atlantic (Judaism in Europe marked the outer limits of Euro-Christian civilization well into the twentieth century) and external as Christianity encountered numerous other religious traditions in the course of its missionary and colonizing projects (across Latin America, Australia, Africa, Asia, and the Middle East). These encounters did not simply leave Christianity untouched but transformed it from within, a transformation that should be internal to any self-understanding of Christianity.

Mahmood, *supra* note 310, at 285. Until such encounters become “internal to Christianity’s current preoccupations,” there can be no possibility of intrareligious dialogue given that the “other is not even acknowledged in political, existential, or epistemological terms” and Christian secularism thus “remains blind to the normative assumptions and power of Western Christianity.” *Id.* at 299; see *supra* note 87 and accompanying text.