THE CONSTITUTIONAL DYNAMICS OF RELIGIOUS MANIFESTATIONS

ON ABSTRACTION FROM THE RELIGIOUS DIMENSION

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The Constitutional Dynamics of Religious Manifestations
On abstraction from the religious dimension

De constitutionele dynamiek van religieuze manifestaties
Over abstractie van de religieuze dimensie

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INTRODUCTION

The justification grounds for a special right to religious freedom have been scrutinized in the public and the scholarly debates across liberal democracies. In the public debate, the legal admissibility of some religious manifestations has been challenged for reasons that suggest religious manifestations have been favored in law qua *religious. In the scholarly debate, the focus has been on the "specialness" of religion and the justification grounds for singling out religion* qua *religion for a favored treatment in law. However, recent developments show that religion has also been singled out* qua *religion for a disfavored treatment. This project pays attention to both angles of the debate on law and religion. To this end, it combines the outcomes of six separate articles, each touching upon a different aspect of this debate. As such, it elaborates in the first four articles on the question whether religion* qua *religion deserves special legal solicitude. Subsequently, it explores in the last two articles on singling out religion* qua *religion for a disfavored treatment in law. This Introduction provides an overview of the main research question, the sub-questions and the research methods per article as well as the overarching research methodology and the research output strategy.*

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SINGLING OUT RELIGION *QUA* RELIGION IN LAW

This project that commenced on September 1st, 2015 and completed on June 27th, 2019, contributes to the field of law and religion. Somehow, the relationship between law and religion seems to remain a major source of concern as well as inspiration to legal scholars, political philosophers, policymakers and participants in the public debate.[1] This debate has been reinforced due to two developments across liberal democracies.

First, because of immigration to liberal democracies. As such, over the recent decades Western legal systems have been confronted with problematic traditions of immigrants, such as ritual circumcisions of girls.[2] Other "contentious" practices, such as wearing headscarves have reinforced the debate about state neutrality and religion in the public space.[3] Second, the rise of "theoterrorism" has urged some scholars and politicians to scrutinize the toleration regime for "intolerant ideologies."[4]

These concerns about the presence of religion in the public space, religious toleration and the proper protection of the rights and freedoms of others are addressed in this project. The role of this Introduction is to show how this project aims to dispatch questions and concerns related to both aspects of the law and religion debate: religious toleration (favoring religion) and religious animus (disfavoring religion). Part I contains the main research question of this project. Part II includes the sub-questions and research methods that have been used to answer the main research question. Part III discusses the overarching research methodology. Part IV is dedicated to the research output strategy behind this project. The Conclusion contains a recap.

I. MAIN RESEARCH QUESTION

Over the past view years, there has been a lively debate among liberal political philosophers concerning the question what role religion should play in law (related to religious accommodation concerns) and

1. Robert F. Cochran, Jr. & Michael A. Helfand, *The Competing Claims of Law and Religion: Who Should Influence Whom?*, 39 PEPP. L. REV. 1051, 1052 (2013) (claiming that the tension between law and religion will be permanently present, "given the potential for both law and religion to promote the most noble of human goods and the most depraved of human evils").
2. *Cf.* Renée Kool, *The Dutch Approach to Female Genital Mutilation in View of the ECHR*, 6 UTRECHT L. REV. 51 (2010).
3. *Cf.* Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 S. ATLANTIC Q. 9, 25 (2014) (criticizing the European Court of Human Rights jurisprudence on the admissibility of bans and restrictions on headscarves).
4. PAUL CLITEUR, THEOTERRORISM V. FREEDOM OF SPEECH (2019) (on terrorism that has been justified and practiced on religious grounds).

politics (related to the justification of public decisions).[5] This project aims to contribute to this debate. It focuses hereby on the specialness of religion for two different types of treatment in law.

First, singling out religion *qua* religion for a *favored* treatment in law. Second, singling out religion *qua* religion for a disfavored treatment in law. The focus on the specialness of religion for either a favored or a disfavored treatment in law across liberal democracies, i.e. constitutional democracies that guarantee religious freedom, helps us in two important ways, both practically and normatively.

First, it is a practical hint that helps us to design a research question that could keep together the six articles of this project. Second, it tells us something about the choice we need to make to develop a theoretical framework that helps us to solve questions concerning the specialness of religion in law. This is a normative suggestion about the paradigm we need to study for the purposes of developing the theoretical framework of this project.

Thus, our academic focus helps us to design the main research question and it shapes tentatively the contours of the theoretical framework of this study. This framework is based on what the paradigm of liberal political philosophy tells us about religious freedom, religious accommodation (on the justification grounds for granting exemptions to religious groups for religious manifestations) and the justification of public decisions (among others on the admissibility of taking public decisions with an appeal to religious values).[6]

Hence, the theoretical framework of this project should help us to solve the following two interrelated questions: what does liberal political philosophy tell us about the special legal solicitude toward religion? And, does the answer to this question help us to appraise the tendency of singling out religion *qua* religion in law for a disfavored treatment?

To develop a theoretical framework that helps us to solve these two questions, this project focuses on the following main research question.

"Should the law in liberal democracies single out religion *qua* religion for favored treatment? If not, what consequences does the answer to this question have for singling out religion *qua* religion in law for disfavored treatment?"

This question has a twofold shape. First, it wonders whether religion *qua* religion deserves special protection in law. This part of the research question aims to find out what liberal political philosophy tells us about the special legal solicitude toward religion. But it also wants to inform us

5. Sohail Wahedi, *Abstraction from the Religious Dimension*, 24 BUFF. HUM. RTS. L. REV. 1 (2017-2018).
6. *Cf.* Micah Schwartzman, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

about the justification grounds for granting religious exemptions (i.e. religious accommodation)? This means that we need to analyze the justification grounds for exemptions granted to religious manifestations that are at odds with generally applicable laws and social norms of liberal democracies.

Thus, for a better understanding of religious accommodation and for a proper assessment of the justification grounds for granting exemptions to some people because of their beliefs, we need to incorporate examples of religious manifestations that are allowed despite the fact of being considered contrary to legal and social norms of liberal democracies.

Examples of such cases are ritual circumcision of boys for religious purposes and wearing headscarves in public on religious grounds. To see whether there are differences in the legal assessment of comparable religious manifestations, we may analyze the legal approach to female circumcision that regardless of the way in which the intervention takes place, has been considered unlawful. Putting the differences in the legal approach to comparable religious manifestations under critical scrutiny, helps us to see whether religious manifestations have been singled out in law *qua* religious for a favored treatment.

If that is the case, then we need to find out whether it is justified to single out religion *qua* religion for favored treatment in law. This brings us back to the first part of our research question. But focusing on the justification grounds for religious accommodation in relation to liberal political philosophy is helpful for another reason.

The confrontation between legal philosophy and concrete cases helps us to find out whether challenging the legal admissibility of what have been considered "contentious" religious manifestations, e.g. ritual male circumcision, could be considered a paradigmatic expression of the way in which liberal political philosophy thinks about the specialness of religion for religious accommodation. Hence, this project does not contain a technical human rights analysis of cases that raise concerns about the human rights at stake.

The second part of the main research question aims to find out how liberal political philosophy should react to the tendency in which religion has been singled out for disfavored treatment. Concrete examples that attest to this tendency are among others the Swiss ban on building minarets, the French ban on headscarves and the travel bans of president Trump targeting in particular the adherents of one faith: Muslims.

Admittedly, over the recent years, the first part of our question has been discussed in depth by legal scholars and philosophers.[7] However, we posit that there is still a gap in the existing body of knowledge. This gap concerns the question whether we could identify some commonality in

7. Wahedi, *Abstraction from the Religious Dimension*, *supra* note 5 (providing an overview of different positions).

the way scholars within the paradigm of liberal political philosophy talk about the specialness of religion. Also, the rise of measures singling out religion *qua* religion in law for disfavored treatment challenges us to see whether we may discern similarities between the way religion has been discussed for a favored treatment in law within the paradigm of liberal political philosophy and the way in which religion has been discussed for the purposes of special bans and restrictions within the public and the political debate. Formulated in this way, this project has two aims. First, theorizing what liberal theories of religious freedom have in common. Second, scrutinizing policies that single out religion *qua* religion in law for disfavored treatment.

II. Research Articles and Research Methods

To answer the main research question and to fulfill the scientific goals of this project—theorizing the binding characteristic of the liberal theories of religious freedom and putting politics of exclusion under critical scrutiny—this thesis combines six separate, though interrelated articles, each representing one Chapter. Each of these Chapters raises a concrete question and has its own methods. Moreover, the twofold shape of our main research question makes it possible to separate the thesis into two broader themes.

One, and in line with the first part of our main research question: singling out religion *qua* religion for a favored treatment in law. Two, and in accordance with the second part of the main research question: singling out religion *qua* religion for a disfavored treatment in law. These two themes move back and forth between concrete debates (i.e. debates about religious accommodation and politics of exclusion) and legal theory (i.e. the scholarly debate about the specialness of religion for legal and political purposes). These two themes meander—from a methodological point of view—between doctrinal and normative research and a combination of these two.

The first theme (Chapters One, Two, Three and Four) focuses on the question as to whether religion *qua* religion should be singled out for a *favored* treatment in law. Thus, does religion deserve special protection *because it is* religion. Also, it aims to find out whether religious practices should be singled out for favored treatment in law *qua* religious. The second theme (Chapters Five and Six) scrutinizes recent developments across liberal democracies that attest to singling out one faith for special restrictions. This theme aims to create awareness about singling out religion *qua* religion for disfavored treatment. In this respect, it reflects on how liberal political philosophy should deal with singling out religion *qua* religion for disfavored treatment in law.

In fact, the second theme is the mirror image of the first theme that

mainly focuses on the justification grounds for singling out religion *qua* religion for favored treatment in law. Thus, the overarching theme of this project is the specialness of religion for legal and political purposes, focusing on the opportunities (to flourish) and risks (of exclusion).

The two themes fit the research chronology in which this thesis has been prepared. This chronological order is justified from a methodological point of view. This argument rests on the method of reflective equilibrium and will be discussed in a separate section of this Introduction, justifying the overarching methodology of this project. The following entails a brief version of the rationale behind this chronological order.

This project has started with an analysis of debates in law and society about the (un)lawfulness of ritual circumcisions of boys and girls. These manifestations of religion and culture are considered problematic for different reasons. In general, such interventions upon children's body lack proper consent. They could cause serious harm (almost all types of female circumcision cause serious health complications). And in case of male circumcision, such interventions are irreversible in nature.

Given the actual character of the debate about the (un)lawfulness of ritual circumcisions, and the question raised by some as to why different legal regimes apply to comparable rites, this project elaborates in Chapters One and Two on the narratives behind ritual circumcisions and the legal responses to these practices. It combines doctrinal and normative research to theorize tentatively the legal and political developments challenging the lawfulness of religious manifestations that are considered problematic.

Chapter Three draws mainly on normative research. It elaborates on the theoretical direction that was set out briefly in Chapter One. The in-depth analysis of the debate in liberal political philosophy on the specialness of religion for legal and political purposes results in the development of the theoretical framework of this project. This normative framework rests on liberal theories of religious freedom and aims to inform us what these theories tell us about the special legal solicitude toward religion within the liberal tradition of political philosophy.

Chapter Four draws on the normative theoretical framework of Chapter Three concerning the special legal solicitude toward religion *qua* religion to reflect on the (un)lawfulness of ritual circumcisions—i.e. the focus is on the specialness of religious manifestations *qua* religious. This Chapter combines doctrinal and normative research.

The remaining Chapters Five and Six rely on the outcomes of the previous Chapters and aim to scrutinize recent developments across liberal democracies singling out one religion for special prohibitions and restrictions. The substantive division between these two Chapters is as follows. Whereas Chapter Five warns against the reinforcement of majoritarianism, resting mainly on European experiences, Chapter Six aims to create awareness about the rise of measures that single out

religion *qua* religion for a disfavored treatment in law, drawing thereby on examples from the United States.

Chapter Six takes the form of a crescendo: the key-outcomes of previous Chapters come together. This convergence of findings extends the scope of the research in an important way. The main outcomes have been applied to another debate—immigration politics of the United States—that however shares a lot with the conventional subject of this project—the specialness of religion *qua* religion for legal and political purposes. Chapter Six is a useful exercise for two reasons. First, it shows how the main research outcomes contribute to scholarly debates about related themes, such as—but not limited to—immigration, integration and assimilation requirements for newcomers and other minority groups; and questions about diversity and segregation of groups in society. Second, Chapter Six provides some openings for new research. The rise of measures that single out some religious groups for disfavored treatment needs to be scrutinized further.

This brief rationale behind the structure of this project argues in favor of the order in which the articles were prepared and submitted for publication purposes. This Part provides an overview of the methods used and the sub-questions answered in the Chapters below.

Chapter One:

Het Beoordelingskader van Rituele Jongensbesnijdenis [*The Assessment Framework of Ritual Male Circumcision*], 7 TIJDSCHRIFT VOOR RELIGIE, RECHT EN BELEID [J. FOR RELIGION, L. AND POL'Y] 59 (2016).

Chapter Two:

De Strafrechtelijke Aanpak van Meisjesbesnijdenis in een Rechtsvergelijkende Context [*The Criminal Law Approach toward Female Circumcision: A Comparative Law Perspective*], 7 TIJDSCHRIFT VOOR RELIGIE, RECHT EN BELEID [J. FOR RELIGION, L. AND POL'Y] 36 (2016) (with Renée Kool).

Chapter Three:

Abstraction from the Religious Dimension, 24 BUFF. HUM. RTS. L. REV. 1 (2017-2018).

Chapter Four:

The Health Law Implications of Ritual Circumcisions, 22 QUINNIPIAC HEALTH L. J. 209 (2019).

Chapter Five:

Freedom of Religion and Living Together, 49 CAL. W. INT'L. L. J. 213 (2018-2019).

Chapter Six:

Muslims and the Myths in the Immigration Politics of the United States, 56 CAL. W. L. REV. ___ (2019-2020).

A. Chapter One: The Assessment Framework of Ritual Male Circumcision

Chapter One is a Dutch language article published in 2016 in the *Tijdschrift voor Religie, Recht en Beleid* [*Journal for Religion, Law and Policy*]. The first findings of this Chapter were discussed during an informal roundtable meeting at Utrecht University (Dec. 2015). The main outcomes of this Chapter were presented in Rotterdam ("Empirical legal studies: Fad, Feud or Fellowship?" Conference, Erasmus School of Law, Jan. 19-20, 2017).

1. Theoretical Embedding in the PhD project

The first Chapter of this project analyzes the debate regarding the (un)lawfulness of ritual male circumcision in order to reflect on the first theme, namely singling out religion *qua* religion for a favored treatment in law (i.e. granting religious exemptions). To this end, it underpins the arguments used in the Dutch case law and the broader political debate related to the lawfulness of ritual male circumcision in light of the debate that takes place within liberal political philosophy on the specialness of religion. As such, it anticipates on substantive research that needs to be carried out in the forthcoming Chapters.

Chapter One explores the narratives behind male circumcision, i.e. the broader story behind this practice, focusing on the arguments used to continue with male circumcision.[8] As such, this narrative gives meaning to this practice.[9] But, Chapter One also elaborates on the way authorities have dealt with these narratives for exemption purposes. Finally, it investigates the justification grounds for this ancient practice.

This Chapter paves the way to theorize in other parts of this project the way in which religious manifestations have been "repackaged" and "redescribed."

2. Sub-question One

The focus of the first article is on singling out religion *qua* religion for a special favor, namely granting religious exemptions.

8. *See* Lance N. Long, *Is There Any Science behind the Art of Legal Writing*, 16 WYO. L. REV. 287 (2016); Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology*, 18 YALE J.L. & HUMAN. 1 (2006) (on the importance of "storytelling" in law). *Cf.* also Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997).

9. Using the word "narrative" does not mean that this project is searching for the official or the right narrative behind male circumcision. *Cf.* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

Based hereon, Chapter One aims to answer the following sub-question:

"What is the narrative behind ritual male circumcision and how can we understand the legal-political responses to this practice?"

The focus of this question is on the narratives behind ritual male circumcision and how we could relate this narrative to the legal-political responses to the (un)lawfulness of ritual male circumcision (i.e. does the religious background of ritual male circumcision warrant a special legal solicitude toward this practice *qua* religious?)

The term "legal-political response" has been used to confront the Dutch case law on this practice as well as the broader European political debate on the (un)lawfulness of ritual male circumcision with the ongoing debate in liberal political philosophy concerning the justification grounds for singling out religious manifestations in law *qua* religious.

But the *specific* justification to answer sub-question one in an article has been the 2014 judgment of the Dutch Supreme Court about the legal admissibility of ritual male circumcision and the political debates within the Council of Europe about this practice. In the margins of these two developments, the question raised as to whether ritual male circumcision should be singled out in law for special protection *qua* ritual. Chapter One briefly highlights this question and gives some theoretical directions to conceptualize it.

3. Research Method

Chapter One combines *doctrinal research* with *normative research*. For its doctrinal part, Chapter One operates within the "legal field" and relies on the text of the Dutch law, on case law about male circumcision as well as on the legal scholarship debating the legal status of ritual male circumcision.[10] Thus, it focuses on what the "doctrine" has to say about the (un)lawfulness of ritual male circumcision. Selected cases come from "*rechtspraak.nl*," "*Kluwer Navigator*," and "*legal intelligence*."

The databases of these sources were used to select relevant cases for the analysis of the legal admissibility of ritual male circumcision. The selection was based on cases argued in 2016 or before. In this context, six different (Dutch) keywords were used to delineate the research domain:

10 *Cf.* Terry Hutchinson & Nigel Duncan, *Defining and Describing What We Do: Doctrinal Legal Research*, 17 DEAKIN L. REV. 83, 85 (2012).

"circumcision;"[11] "ritual circumcision;"[12] "male circumcision;"[13] "boys' circumcision;"[14] "circumcised boy;"[15] and "circumciser."[16] Eventually, 140 judgments that contain the keyword "circumcision" were analyzed for the purposes of selecting relevant cases that deal with the legal admissibility of ritual male circumcision.

The term "relevant cases" is in this context operationalized on the basis of the following three criteria: the (involuntary) non-medical (i),[17] circumcision of boys (ii),[18] on the basis of religious or traditional beliefs (iii).[19] Thus, all female circumcision cases in the context of asylum and criminal law were excluded from the analysis. The same is true for two medical liability cases. The use of the aforementioned criteria resulted in the selection of 9 relevant cases out of 140 court rulings. It should be noticed that the selected judgments cover mainly two areas of law: family law and substantive criminal law.

The normative part of this Chapter draws on the debate in liberal political philosophy that deals with the justification grounds for singling out religious manifestations for a favored treatment in law. Thus, it focuses on the role religion plays for the justification of granting exemptions from laws that are otherwise generally applicable. The selection of sources is based on the work of scholars who operate within the same field of research that focuses on the specialness of religion, i.e. the justification grounds for singling out religion *qua* religion for a favored treatment in law. These scholars pay attention to how "the

11. The Dutch keyword used, was "besnijdenis." In the database of rechtspraak.nl the use of this keyword resulted in 140 cases, most of these rulings concern immigration law cases. Legal intelligence found 257 cases spread over different areas of law. Most of the cases overlapped with cases found in other databases, for instance some cases of rechtspraak.nl are published in specific law journals. Kluwer Navigator found 184 cases that contain the word "circumcision." It should be noticed that these cases are publications of rechtspraak.nl judgments in specific law journals.

12. The Dutch keyword used, was "rituele besnijdenis." Outcomes: Rechtspraak.nl: 7 overlapping cases; Legal intelligence: 14 overlapping cases; Kluwer Navigator: 15 overlapping cases.

13. The Dutch keyword used, was "mannenbesnijdenis." Outcomes: no results.

14. The Dutch keyword used, was "jongensbesnijdenis." Outcomes: Rechtspraak.nl: 4 overlapping cases; Legal intelligence: 14 overlapping cases; Kluwer Navigator: 9 overlapping cases.

15. The Dutch keyword used, was "besneden jongen" Outcomes: Rechtspraak.nl: 42 overlapping cases; Legal intelligence: 45 overlapping cases; Kluwer Navigator: 53 overlapping cases.

16. The Dutch keyword used, was "besnijder." Outcomes: no results.

17. Some cases in the area of medical liability law, contract and tort law concern the claim that the circumcision was not performed correctly. *See* Ct. of Appeal 's-Hertogenbosch, ECLI:NL:GHSHE:2014:4784; Dist.Ct. Maastricht ECLI:NL:RBMAA:2010:BO7650 (Neth.).

18. The case law in the area of migration law includes cases concerning the asylum ground for women who risk circumcision in their countries. The database of "legal intelligence," which includes judgments from other databases (i.e. rechtspraak.nl and Kluwer Navigator) found 101 judgments.

19. 9 judgments were found that deal with the admissibility of ritual male circumcision.

category of religion" *should* be understood in law, under what conditions "religious exemptions" are justified as well as the role "religion" could play for designing and justifying public decisions.

The theories this part relies on have the following commonalities. They are not in search of "the best" definition of religion (non-semantic). Nor do these theories really engage with the sectarian justification of basic liberties, such as religious freedom. That is to say: liberal theorists of religious freedom do not argue that religion deserves special protection in law because of the specialness of God (non-sectarian). Finally, the theories Chapter One draws on emphasize the importance of equal treatment and equal access to basic liberties (egalitarian).[20]

Chapter One takes an interdisciplinary perspective, due to its combination of the study of law with liberal political philosophy.[21] It relies on a first scan of liberal theories of religious freedom to explore the way we could understand the debate about the (un)lawfulness of ritual male circumcision within the legal discourse. Also, it combines—from a methodological point of view—a normative conceptual perspective about the justification grounds for the special legal solicitude toward religion with classic doctrinal research concerning the (un)lawfulness of ritual male circumcision.[22]

B. Chapter Two: The Criminal Law Approach toward Female Circumcision: A Comparative Law Perspective

Chapter Two is a 2016 Dutch language article that was published by the *Tijdschrift voor Religie, Recht en Beleid* [*Journal for Religion, Law and Policy*].

1. Theoretical Embedding in the PhD project

Chapter Two takes the form of an intermezzo. Both thematically and theoretically it is a bit isolated from the rest of the study, as it mainly provides a theoretical explanation for why criminal law enforcement against female circumcision fails, despite the clear ambitions to combat this practice. Nevertheless, this Chapter contains an important element that makes a comparison of narratives behind ritual circumcisions as well as a comparison of the legal responses to these narratives possible. Hence, this Chapter makes it possible to map potential inconsistencies within the legal approaches to ritual circumcisions—and we could rely on this outcome to raise the question *where* such a legal distinction comes

20. *Cf.* CÉCILE LABORDE, LIBERALISM'S RELIGION (2017).
21. Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1316-17 (2002).
22. Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 533 (1997).

from and *whether* that distinction is justified.

Recall the first part of the main research question: does religion *qua* religion require special protection in law? Recall the main aim of Chapter One: finding out whether male circumcision deserves special protection. With this information in mind and anticipating on the forthcoming parts of the research, Chapter Two adds the narrative behind ritual female circumcision to the main body of this project.

The cohesion between Chapters One and Two becomes very clear in Chapter Four that aims to answer whether religious manifestations, like the cases discussed in Chapters One and Two, deserve special legal protection *qua* religious. Thus: singling out religious manifestations *qua* religious for favored treatment in law. Hence, Chapter Two helps us eventually to solve the main research question, as this answer is partly based on a thorough analysis of both theory (conceptual analysis of liberal political philosophy about the role religion plays for singling out this specific category *qua* religion for favored treatment in law) and practice (the legal doctrine) regarding two very topical and questionable manifestations of religion.

2. Sub-question Two

Taking into account the narrative behind ritual male circumcision and the legal responses to this narrative, as well as having elaborated on the possible justification grounds for this practice, and bearing in mind the relevance of confronting the narratives of both male and female ritual circumcisions for answering the main research question, sub-question two is formulated as follows:

"What is the narrative behind female circumcision and how can we understand the legal-political responses to this practice?"

The justification to answer this sub-question in an article has been the presentation of a new study about the rise of female circumcision outside Africa for religious reasons. This specific circumstance urged a timely publication that makes the comparison with male circumcision later on in this project even more plausible.

3. Research Method

Chapter Two is based on a qualitative literature research of two matters. First, it aims to define female circumcision. To this end, it makes use of field research carried out by international organizations as well as academic researchers who have studied the reasons people usually rely

on to practice female circumcision. These studies have also mapped the main health consequences of this practice. Second, this Chapter aims to find out why—despite international calls to eliminate this practice—there is still little progress in the legal fight against female circumcision.

To deal with this issue, this research develops a hypothesis on the basis of the analysis carried out by Anouk Guiné and Francisco Fuentes. They have linked the empirical differences in the criminal enforcement against female circumcision in the United Kingdom and France to different models of citizenship. Chapter Two draws on this proposition and elaborates in the absence of adequate case law related to the criminal law enforcement against ritual female circumcision—except France—on political debates in the Netherlands, France and the United Kingdom.

It focuses hereby on the question how over the past decades the debate on the (un)lawfulness of this practice has evolved. This Chapter links political debates to models of citizenship prevailing in the countries studied. The systematic comparison between notions of citizenship with political debates justifies the main claims of this article. In sum, Chapter Two draws on qualitative literature research and comparison of different models of citizenship with debates in the legal and political discourse on the (un)lawfulness of female circumcision.

C. Chapter Three: Abstraction from the Religious Dimension

Chapter Three is a 2018 article published in *Buffalo Human Rights Law Review*. The main argument of this article was discussed in Lisbon ("XXVIII World Congress of the International Association for the Philosophy of Law and Social Philosophy," University of Lisbon, Jul. 20, 2017); London ("Association of Transnational Law Schools" Agora, Queen Mary University of London, Jun. 20, 2017) and Malibu ("Religious Critiques of Law" Conference, Pepperdine School of Law, Mar. 8-9, 2017).

1. Theoretical Embedding in the PhD project

Chapter Three develops a theoretical framework for this study. This framework aims to inform us whether religion should be considered a protection worthy category in law *qua* religion. The theoretical relevance of this Chapter is that it helps us to understand the legal and political discourse concerning the legal admissibility of a wide range of religious manifestations. Based on this framework, we are able to theorize much of the arguments used within the legal and political discourse concerning religious freedom, religious accommodation and state neutrality toward religion.

This theoretical framework helps us in a further way, it looks beyond

the argument suggesting that religion is special because of religious freedom; religious accommodation and people's relationship with religion and God. The focus is much more on how liberal political philosophers have challenged this argument, drawing on a normative framework of conceptual arguments concerning the protection worthiness of religion in a special constitutional right.

Hence, this theoretical framework has also consequences for how one should approach religious accommodation cases. However, it is not limited to accommodation questions in law. It also includes arguments related to the question how authorities should deal with religion as such.

The theoretical connection between Chapters One, Two and Three becomes clear in the remaining three Chapters of this research. This follows from the following argumentative structure.

The first two Chapters deal with two problematic manifestations of religion. Chapter Three refers in general to comparable cases. However, it provides a deeper normative-theoretical basis for the way religion and manifestations based hereon have been approached by liberal theorists of religious freedom. Chapter Four draws on the findings of the first three Chapters to find out whether religious manifestations deserve special legal protection *qua* religious. The same is true for the Chapters following Chapter Four. As such, Chapters Five and Six draw on the theoretical framework that has been developed in Chapter Three to link political and societal debates about religion and religious manifestations to the debate in legal political philosophy about the specialness of religion in law and politics.

Against this backdrop, we can say that Chapter Three functions as the theoretical hub and axis of this project. Chapters One and Two anticipate on the theoretical direction this project needs to take. Chapter Three elaborates on this important suggestion and develops a theoretical framework. Chapter Four uses this framework to scrutinize the different legal responses to male and female circumcision. Chapters Five and Six do the same: both draw on the framework of Chapter Three to scrutinize measures that single out one religious group for disfavored treatment.

But there is also another reason that explains to us why Chapter Three is the theoretical axis of this project: whereas the first four Chapters of this thesis focus on the specialness of religion and religious manifestations for a favored treatment in law (concluding that religion is only special via abstraction from the religious dimension), the last two Chapters of this study focus on the specialness of religion for a disfavored treatment (concluding that abstraction is a very useful tool to repackage religious manifestations, through drawing on facially neutral arguments that limit the free exercise in an unprecedented way). The usefulness of abstraction for both angles of the specialness debate, either a favored or a disfavored treatment of religion *qua* religion in law, emphasizes the theoretical importance and relevance of Chapter Three.

2. Sub-question Three

Chapter Three aims to provide a theoretical basis for the arguments used in the public and legal discourse to challenge the legal admissibility of religious manifestations. Also, it aims to figure out how liberal political philosophy deals with religion in law. Hence, the theoretical framework we develop in this Chapter should help us in Chapter Four to provide a theoretical basis for the ongoing debate concerning the legal admissibility of ritual circumcisions.

Also, it should help us in the remaining Chapters to find out whether politics based on feelings of anxiety toward newcomers and new religions and even toward lifestyles not rooted in the dominant cultures of liberal democracies are paradigmatic expressions of the role religion should play in law according to liberal theories of religious freedom.

Against this backdrop, this Chapter answers the following question:

"Does religion *qua* religion deserve special legal protection?"

Although the formulation of sub-question three is very close to the first part of the main research question, it is mainly drafted for the purposes of developing the theoretical framework of this project.

The justification to answer sub-question three in an article has been the lively debate among legal scholars and liberal political philosophers concerning the question whether religion *qua* religion should be singled out in law for special protection. Analyzing this specific debate given its theoretical relevance for the research project as a whole, justifies our choice to publish our meta-analysis on the special legal solicitude toward religion in a separate article.

3. Research Method

Chapter Three is based on a meta-analysis of the debate in liberal political philosophy concerning the justification grounds for the special legal solicitude toward religion. This meta-analysis is made possible by developing a matrix of positions and putting authors with a comparable position under the same category, and conceptualizing these categories as certain variants of liberal theories of religious freedom. This taxonomy of liberal theories of religious freedom is a very appropriate method to map the alternatives of each position and see what the main differences are between the positions.[23]

Sources are mainly selected based on the condition that they engage

23. *Cf.* W. COLE DURHAM, JR. & BRETT G. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES 45 (2010).

in the discussion on the protection worthiness of religion in a special right, such as the right to religious freedom. However, one disclaimer should be made.

The selected publications have two important commonalities. One, they are not in search of the best definition of religion (non-semantic). Two, they do not draw on sectarian grounds to engage in the law and religion debate (non-sectarian). That is to say, the arguments discussing the specialness of religion are not based on exclusive religious grounds, meaning religion is special because of the metaphysics of religion.

D. Chapter Four: The Health Law Implications of Ritual Circumcisions

Chapter Four is a 2019 article published in *Quinnipiac Health Law Journal*. Previous versions of this article were discussed in Bologna ("European Academy of Religion" Annual Conference 2019, Mar. 4-7, 2019) and Rabat ("Religion, Law, and Security" Conference, The Fifth Annual Conference of the African Consortium for Law and Religion Studies, International University of Rabat, May 14-17, 2017). The Rabat conference proceeding version of this article was published as: *Female circumcision as an African problem: double standards or harsh reality?*, *in* CHRISTIAN GREEN, JEREMY GUNN & MARK HILL (EDS.), RELIGION, LAW AND SECURITY IN AFRICA (2018) (mainly focusing on the question whether female circumcision is still a unique problem of the African continent).

1. Theoretical Embedding in the PhD project

The theoretical relevance of Chapter Four is laid down into two specific grounds. First, it brings together the findings of Chapters One and Two through a comparative analysis of the narratives behind ritual circumcisions and the legal responses to such interventions. Second, it scrutinizes the (un)lawfulness of ritual male and female circumcisions in light of the phenomenon of abstraction from the religious dimension that is conceptualized in Chapter Three.

This confrontation results into two important findings that help us to solve the main question of this project. First, the criticism of applying "double standards" in the legal assessment of ritual circumcisions can be understood in light of the liberal criticism of favoritism toward religious manifestations. This criticism rests on an egalitarian account of religious freedom. Second, the incorporation of abstraction to the analysis—as the binding element of the liberal theories of religious freedom—reveals that religious practices should not be tolerated *qua* religious.

It is specifically this second finding that challenges us to rethink the justification grounds for freedom of religion beyond the egalitarian and sectarian defense of this liberty. Thus, Chapter Four widens our law and religion perspective and paves the way to look beyond the conventional theoretical framework. This is a useful exercise for the remaining two Chapters of this project.

As such, we are encouraged to reflect on the research problem from different—though interrelated—angles. Based hereon, Chapter Four introduces novel pragmatic arguments in defense of religious freedom. Chapter Five warns against the reinforcement of majoritarianism and Chapter Six draws hereon to warn against the rise of Islamophobia.

2. Sub-question Four

The comparison and confrontation of the narratives behind ritual circumcisions and the very different legal responses to similar practices raise naturally the following fourth sub-question to the main research question:

"Does circumcision on religious grounds deserve special protection *qua* religious?"

Sub-question four combines the rationales behind sub-questions one and two—what do ritual circumcisions entail and how can we understand legal and political responses to such interventions—and it takes into account the theoretical framework that has been set out in Chapter Three—does religion *qua* religion deserve special protection in law. Thus, sub-question four is in fact a variant to the main research question of this study, focusing on the protection worthiness of religious manifestations *qua* religious. At the same time, this sub-question is formulated in a way that allows us to think beyond positive law.

Any response to this sub-question means that we should also think about the consequences of our response. This opening justifies our choice to put our preliminary response—based on the framework that we have developed in Chapter Three—under critical scrutiny and think of novel arguments that could fit a broader sense of justice when it comes to the legal admissibility of ritual circumcisions.

The justification for answering sub-question four in an article has been the 2017 arrest and detention of some members of the *Dawoodi Bohra* Shiite sect in the United States on the grounds of circumcising girls for religious purposes. The news about the prevalence of female circumcision in the United States caused a broad wave of public outrage. Also, some critics of traditional practices concerning children challenged the lawfulness of ritual male circumcision, wondering why this practice

has been singled out for special protection. This concern shows important similarities with what this study aims to solve: should religion *qua* religion be singled out in law for favored treatment? But the main justification for answering sub-question four in an article has been the debate on the (un)lawfulness of ritual circumcisions following the detention of members of the *Dawoodi Bohra* community in the United States.

3. Research Method

Chapter Four draws on the findings of Chapters One to Three. Thus, from a methodological point of view, this Chapter relies on the methods applied in each of the first three preceding Chapters. Generally, this means that Chapter Four draws on a qualitative research method, reviewing the relevant literature on ritual circumcisions and the legality of these practices. More specifically, Chapter Four rests on a combination of *doctrinal* and *philosophical* research. The doctrinal research consists of a thorough analysis of the literature on ritual circumcisions and an analysis of legislation designed to regulate or restrict circumcisions. Also, it rests on an analysis of case law on ritual circumcisions. The literature review is made possible by a selection of the latest scholarly work that have provided a description of ritual circumcisions. These sources rest mainly on field research and provide empirical insights into the reasons people rely on to practice—a particular variant of—ritual circumcisions.

The literature on the health consequences of ritual circumcisions consists primarily of sources used by international and domestic health organizations, such as, but not limited to, the World Health Organization and the Royal Dutch Medical Association. Also, literature is selected from databases of PubMed Central and U.S. National Institutes of Health's National Library of Medicine, which provide full access to a wide range of studies about bio-ethics, medicine and human bodies. The selection of sources is based on the use of keywords, such as "circumcision;" "male circumcision;" "female circumcision;" and "female genital mutilation" in combination with "health consequences."

For its normative research, Chapter Four draws on the theoretical framework of Chapter Three. This framework rests on a meta-analysis of the scholarly debate concerning the question what role religion should play for the justification of granting religious exemptions and decisions that are generally applicable. Next, Chapter Four, puts its assumptions regarding the legality of ritual circumcisions in reflective equilibrium to develop a coherent justification for the development of its arguments and the conclusion it reaches based thereon. This is an appropriate method to solve questions of law and religion, which concern questions about

political philosophy and political morality.[24]

The application of this method to the problem of Chapter Four entails a confrontation of our first intuitive response to the legal admissibility of ritual circumcisions, with the actual legal status of these practices (legal practice angle) and with the normative framework of abstraction (legal theory and philosophy angle). Moving back and forth between the current legal status of ritual circumcisions, which allows male circumcision and outlaws female circumcision, and the normative framework of abstraction, rejecting a toleration regime for religion *qua* religion, results in the identification of a serious gap in the justification and legal prohibition of comparable practices.

If male circumcision is tolerated in law on religious grounds, then why are religious variants of female circumcision that are less invasive than male circumcision systematically outlawed?

To bring harmony between what the law says about circumcisions—allowing ritual male circumcision and outlawing female circumcision—and legal theory—religion does not warrant special protection in law *qua* religion—Chapter Four searches for novel arguments that can explain to us the asymmetrical toleration regime for comparable practices. Testing the legality of ritual circumcisions in light of the abstraction framework unveils that the infringements such practices cause upon bodily integrity can only be justified in law on *ecumenical* grounds. This Chapter finds such a serious ground for ritual male circumcision in its potential health benefits. A similar argument cannot be made for female circumcision. However, the health benefits argument hangs like a sword of Damocles above the non-sectarian justification ground of ritual male circumcision.

Hence, we need to think about other arguments that fit the actual debate: a ban on male circumcision would be ineffective and it will deprive minorities from their identity. On the other hand, allowing some variants of infant female circumcision will be considered a serious step back in time. This will also complicate the attempts of human rights organizations and health organizations to protect girls and women from—generally harmful—genital modifications. Therefore, reflecting on this problem from a religious freedom perspective—going back to the conventional design of this project—in light of our findings—moving forth toward legal theory and philosophy—and trying to underpin the asymmetrical toleration regime in a way that is coherent with how things work out in practice, legal theory and philosophy, has resulted in the introduction of two novel arguments that explain to us the asymmetry in the legal approach to ritual circumcisions. These arguments derive from a thought experiment on the consequences of banning male circumcision

24. *See* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 9 (2017) (applying reflective equilibrium as a method to solve moral reasoning problems in a recent law and religion project).

and allowing some variants of female circumcision.

E. Chapter Five: Freedom of Religion and Living Together

Chapter Five is a 2019 article that has appeared in the *California Western International Law Journal*. This Chapter began as a project for the "Religion and the Rule of Law" writing training fellowship in Oxford. This writing program was organized by the International Center for Law and Religion Studies at Brigham Young University and held at Christ Church, University of Oxford (Jul. 22-Aug.11, 2018).

The main arguments of this Chapter were discussed in Bologna ("European Academy of Religion" Annual Conference 2019, Mar. 4-7, 2019); Prague ("State Responses to Security Threats and Religious Diversity" Conference, Nov. 26-28, 2018) and Rio de Janeiro (the Fifth ICLARS Conference, "Living Together in Diversity: Strategies from Law and Religion," Pontifical Catholic University, Sep. 12-14, 2018).

1. Theoretical Embedding in the PhD project

Whereas the first four Chapters of this PhD thesis—in conjunction—are concerned with finding a proper theoretical base to understand the legal challenge many religious manifestations face in today's liberal democracies—and elaborating in this regard on the specialness of religion in law *qua* religion, and the specialness of religious manifestations *qua* religious, Chapter Five identifies a barely scrutinized angle to the law and religion debate: the rise of measures that disfavor religion *qua* religion.

Hence, Chapter Five conceptualizes the opposite side of favoring religion *qua* religion in law and politics. It illustrates and conceptualizes subsequently the tendency of singling out religion *qua* religion in law for a disfavored treatment. To theorize this phenomenon properly and bridge preceding work, Chapter Five draws on some recent developments across Europe that have targeted public manifestations of the Islamic faith as incompatible with the values of modern societies. This Chapter theorizes this specific development as the "reinforcement of majoritarianism."

To bridge the preceding Chapters, Chapter Five draws on concrete cases and public debates to anticipate on the theoretical direction we should follow to provide a theoretical basis for the indicated tendency of disfavoring religion. This formula of critically reflecting on concrete and actual discussions about the central theme of this project, has proved its usefulness in Chapters Three and Four. In order to critically reflect on the "reinforcement of majoritarianism," Chapter Five raises the question as to why majoritarian sensitivities seem to prevail in important free

exercise cases. To solve this issue, this Chapter draws on the normative framework of Chapter Three.

This confrontation helps us to find out whether the reinforcement of majoritarianism could be considered a paradigmatic expression of what liberal political philosophy tells us about the role religion should play for granting exemptions and justifying public decisions. On the basis of this, Chapter Five substantiates its suspicions against the problematic sides of abstraction from the religious dimension: the characteristic that keeps the studied liberal theories of religious freedom together.

Chapter Five contributes to the main question of this study through identifying and theorizing a new phenomenon in the field of law and religion: disfavoring religion *qua* religion in law. Thus, whereas the first four Chapters have provided a variety of liberal alternatives to deal with religion in law—the opportunities side of the debate—Chapter Five aims to connect the tendency of reinforcing majoritarianism to argumentation patterns in liberal political philosophy that have "repackaged" religious manifestations as matters of conscience, expression and association. The attention paid in this Chapter to this facially neutral, though problematic refashioning covers the risks side of the debate on law and religion.

2. Sub-question Five

Chapter Five provides a theoretical basis for the rise of restrictions that target religion *qua* religion. In this respect, this Chapter relies on the findings of Chapter Three. Also, it relies on the findings of Chapter Four to reflect on the justification grounds of religious freedom.

This merger of findings is expressed in the following sub-question:

"How can we understand and face the rise of measures across liberal democracies that have targeted religion for special restrictions and prohibitions?"

Sub-question five has a twofold design. First, it raises the following issue: is the rise of measures that single out religion *qua* religion in law for disfavored treatment a paradigmatic expression of developments in legal theory and liberal political philosophy about the role of "religion" for the justification of religious exemptions and public decisions?

Second, sub-question five wonders how we could rethink freedom of religion so that this right can form a shield against the reinforcement of majoritarianism. This concern justifies to answer sub-question five in a separate article. As a matter of fact, new developments across liberal democracies attest to singling out the Islamic faith *qua* Islam for disfavored treatment.

3. Research Method

To conceptualize the phenomenon of reinforcing majoritarianism that targets some religious minorities disproportionately, Chapter Five—among other—makes use of the normative framework of abstraction. To reflect on the consequences this phenomenon might have for religious freedom, Chapter Five makes use of the arguments developed in Chapter Four. From a methodological point of view, the method of research that is used in Chapter Five is twofold.

On the one hand, some parts rely on the outcomes of Chapters Three and Four. Thus, Chapter Five relies on doctrinal and normative research that has been carried out in those previous Chapters. On the other hand, and for a further understanding of the research subject, Chapter Five has carried out some additional doctrinal and normative research.

The additional doctrinal research consists of reviewing literature, case law and legislative documents so we could scrutinize what our first intuitions suggest about the way liberal democracies deal with religious freedom. Our first intuitions in this respect suggest that free exercise of religion has been made dependent upon majoritarian sensitivities concerning the legal admissibility of manifestations that are considered at odds with the dominant and majoritarian cultural frame of reference.

In this respect, the Chapter refers to recent developments across European countries that have singled out the Islamic faith *qua* Islam for special restrictions. Also, it rests on case law of the European Court of Human Rights (ECtHR) that have decided in different judgments on the lawfulness of domestic restrictions on Islamic manifestations. As such, it elaborates on *S.A.S.*, as in this judgment the Court allows the French ban on face-covering veils on the grounds of "living together." Also, it refers to preceding judgments in *Dahlab* and *Sahin*, both about women who faced legal challenges in Switzerland and Turkey to cover their head on religious grounds.

In these judgments, the ECtHR has set out the parameters for a strategy of reconciliation, reconciling "the interests of the various groups" in order to advance peaceful coexistence. The choice to add *Dahlab* and *Sahin* to the analysis is justified in light of the cross-reference system of the case law of the ECtHR. The analysis of the three cases points to a bias: norm-deviant religious manifestations of the Islamic minority are *per se* problematic.

To conceptualize this point of criticism, the Chapter draws on the body of literature that accuses the Court of using double standards in its approach to religious freedom: being tolerant toward the Christian majority and intolerant toward the Muslim minority. The selection of sources is based on the references made to the literature by the authors first selected for an in-depth analysis. The selected works are written by—among others—Christian Joppke, Saba Mahmood and Nehal Bhuta.

Also, Chapter Five draws on the work of Ratna Kapur, showing how court rulings can reinforce majoritarianism.

The shift toward majoritarianism has been conceptualized in light of the findings of Chapter Three. This enables us to answer the question as to whether the reinforcement of majoritarianism is a paradigmatic expression of recent developments in legal theory and liberal political philosophy concerning the role religion should play for the justification of accommodation and decisions in law and politics. These developments involve a growing support for a "religion-empty" and "God-empty" understanding of religion and religious freedom.

In order to rethink religious freedom in a way that is "diversity-friendly" and "sectarian-proof" and as such compatible with the egalitarian understating of this right that rejects religious toleration *qua* religion, Chapter Five puts its assumptions about the relationship between religious freedom and "living together" in reflective equilibrium. This part of Chapter Five draws on normative research, moving back and forth between concrete debates about propagated or enforced restrictions upon free exercise for some groups and legal theory and liberal political philosophy.

This inquiry for a reflective equilibrium departs from the question whether our conclusions about the reinforcement of majoritarianism fit together with our conclusions about the role and place of religion in liberal political philosophy.

A deeper search for coherence between our convictions reveals that there is a partial gap between our first conclusions about how things work out in practice—measures that single out some groups for special prohibitions—and legal theory and liberal political philosophy about the specialness of religion for legal and political purposes.

This gap in the body of knowledge is partial as we can understand the shift toward majoritarianism in terms of abstraction. However, we can also criticize this shift on the basis of the abstraction framework. Based hereon, we can argue that equal access to fundamental rights as well as the egalitarian understanding of basic liberties, are among the most important principles we should foster. The rise of measures that target some groups in society disproportionately hard, suggests that the principle of equality is not always guaranteed. Hence, this principle is very fragile and we therefore need to search for arguments that can help us to deal properly with the endangered equality principle.

F. Chapter Six: Muslims and the Myths in the Immigration Politics of the United States

Chapter Six will be published as part of the special Symposium Issue of *California Western Law Review*. This article was drafted for the 2019

Law Review and International Law Journal "Border Myths" Symposium in San Diego, CA.

1. Theoretical Embedding in the PhD project

The 2019 Law Review Symposium was organized to identify some of the myths that prevail in the immigration debate in the United States. Also, it aimed to conceptualize the process of mythologization in relation to immigration and immigrants living in the United States. This should help scholars to understand the broader context that shapes the right conditions for utilizing myths in the United States' immigration debate. Next, the Symposium aimed to highlight the consequences of this process and think about ways to face the challenges in relation to unregulated immigration and integration of immigrant groups into the society. These goals of the Symposium correspond with an important gap that has been addressed in Chapter Five: the phenomenon of singling out religion *qua* religion for special restrictions.

As we have discussed in the foregoing, the first four Chapters of this thesis have focused on the specialness of religion *qua* religion for the purposes of a favored treatment in law. The theoretical explanation for this focus is quite simple: a major part of the law and religion scholarship scrutinizes the justification grounds for singling out religion in law for a favored treatment *qua* religion.

However, actual events overtake the process of theory building, also in the field of law and religion. Among the topical events that have reinforced the law and religion debate from a more novel perspective are the election of President Trump in the United States, the 2015 European "migration crisis" and more generally the rise of nationalism across many democracies from the far east—such as India—to the Middle East—such as Turkey and Israel—and Europe—from Hungary to Poland, to Germany, the Netherlands and the United Kingdom.

The first and last-mentioned development are the most actual events that bring a barely discussed perspective into the law and religion scholarship. This concerns the phenomenon of singling out religion for special restrictions *qua* religion. So far, the focus of scholars in the field of law and religion has been on the specialness of religion and religious manifestations and the related question as to whether religion *qua* religion deserves special protection in law.

Hence, the specialness of religion for the purposes of creating prohibitions and restrictions that target the category of religion or its exercise covers an entirely new field of research that is in full development. Literature that explicitly discusses this phenomenon is very rare. However, there are some U.S. scholars, like Khaled Beydoun and Asma T. Uddin, and more generally Martha C. Nussbaum, who have

critically elaborated on the rise of actual or propagated discriminatory legislation against Muslims *qua* Muslims.

Chapter Six theorizes this phenomenon as singling out religion *qua* religion for disfavored treatment through designing and enforcing special restriction and prohibition laws and other regulations. The Law Review Symposium was a very welcome occasion for the purposes of introducing and further discussing this phenomenon.

To theorize the phenomenon of disfavoring religion in law Chapter Six draws on the outcomes of preceding Chapters—that rest mainly on European cases and experiences—and it refers to similar developments in the United States.

The most recent case in the United States that gives an appropriate illustration of restrictions that single out religion for special bans is *Trump v. Hawaii*, dealing with the so-called travel ban regime that was enforced days after the coming into power of President Trump, denying entry to citizens of mainly Muslim majority countries.

However, the travel ban-case is not something unique. In the past, there was a debate about the so-called "Save Our State Amendment" in the state of Oklahoma. This state amendment aimed to prohibit Courts from the use of international law or the Sharia.

Eventually, in *Awad v. Ziriax*, the Court Of Appeals for the Tenth Circuit ruled that the state amendment was discriminatory as it singled out one religion for special restrictions.

In fact, both cases share an important point of criticism on migration, varying from the fear for "theoterrorism" to saving the mainstream culture from "over there" problems and "uncivilized" habits. A deeper reflection on these American cases for the purposes of theorizing the phenomenon of disfavoring religion in law does not only extend the scope of our study. It also shows how the separate Chapters cohere.

Thus, the reference to previous Chapters does not only illustrate the interrelationship between the six articles—emphasizing the integrative research design of this project. Making use of the key outcomes of preceding Chapters shows—from a methodological point of view—our ability to guide ourselves through a new, but related topic: how immigration might affect the current state of knowledge in the law and religion scholarship.

Thus, Chapter Six focuses in a similar way as Chapter Five does on the risk-sides of abstraction from the religious dimension. And whereas Chapter Five focuses on the reinforcement of majoritarianism, Chapter Six takes a step further and focuses on the phenomenon of singling out religion *qua* religion for special restrictions.

2. Sub-question Six

Following the theoretical direction that was set out in Chapter Five about the reinforcement of majoritarianism, Chapter Six draws on some American cases to further scrutinize the tendency of singling out religion *qua* religion for special restrictions. Recall what the object of debate was in *Trump v. Hawaii* and *Awad v. Ziriax*. The travel ban in *Trump* was justified as a matter of security. The "Save Our State Amendment" was defended as a serious attempt to keep the "other" outside the country. Can we understand this way of "repackaging" religious discrimination in terms of abstraction from the religious dimension?

However, as we have seen in Chapter Five, abstraction from the religious dimension is *as such* not a justification for singling out one specific faith (*qua* that faith) for special bans in liberal democracies. Therefore, we first of all need to conceptualize what cases like *Trump v. Hawaii* and *Awad v. Ziriax* are about. Subsequently, we need to contextualize what is behind such cases.

Against this backdrop, Chapter Six deals with the following sub-question:

"What is the narrative behind the travel bans of President Trump and the "Save Our State Amendment," and how can we understand the legal-political responses to these types of measures?"

Sub-question Six has a twofold design. The "narrative-aspect" of this sub-question helps us to reconstruct what has truly driven politicians in the United States to design measures that effectively single out for disfavored treatment the adherents of one specific religion. The "how-to-understand-aspect" of this sub-question matches with the normative framework we have developed in Chapter Three.

The interplay between our analyses of the American cases (the narrative side of the sub-question) and the normative framework of abstraction as set out in Chapter Three might bring us some steps further in contextualizing what Chapter Six aims to raise awareness about: the rise of measures singling out religion *qua* religion in law for disfavored treatment.

3. Research Method

Similar to the methodology of Chapters Four and Five that mainly relies on the methods used in preceding Chapters, also this Chapter relies mainly on the methods used in Chapters Three, Four and Five. In order to expand the analysis toward singling out religion *qua* religion for disfavored treatment in law, Chapter Six draws on the research outcomes

of preceding Chapters. However, Chapter Six has also its own "unique" research methods, since it further scrutinizes a phenomenon that has not been discussed in-depth by its preceding Chapter: Chapter Five. As such, the outcomes of Chapter Six rest on legal doctrinal research, meaning that Chapter Six reviews and analyzes case law, legislative documents and literature related to immigration politics of the United States, and more specifically studies focusing on the rise of anti-Muslim measures in that country.

The selection of case law has been based on the actual debate about restrictions that have targeted religion *qua* religion. This applies to the series of travel ban regimes as enacted by President Trump. The "Save Our State Amendment" case was added after reading the work of Martha C. Nussbaum concerning the rise of religious intolerance. Literature has been selected via using keywords, such as "travel ban" and "Save Our State Amendment."

In this respect, we have first scanned briefly the outcomes of the search process and subsequently looked at a combination of most recently published and most cited articles in order to make further selections. The works of authors such as Khaled Beydoun and Asma T. Uddin is analyzed because both represent the new generation of law and religion scholars who pay attention in their work to the rise of restrictions that single out Muslims *qua* Islam for special restrictions.[25]

In order to deal properly with the question as to how we might face the rise of religious intolerance, Chapter Six draws on the work of Martha C. Nussbaum who has developed a strategy to "overcome the era of religious intolerance."[26] In fact, this part of Chapter Six aims to bring coherence between the conclusions we have reached at different points in this Chapter. Hence, also this Chapter draws on the method of reflective equilibrium to integrate the separate conclusions.

As such, it starts with the travel ban cases and adds the "Save Our State Amendment" case to reaffirm the conclusion that the travel bans of President Trump fit a longer tradition of politics of exclusion. Then, it moves toward the abstraction framework to conceptualize the identified phenomenon of singling out religion for special restrictions *qua* religion.

Again, it adjusts its conclusion about understating this phenomenon in terms of abstraction, as the abstraction framework does not allow disfavoring one particular lifestyle, simply because it does not fit majoritarian sensitivities. So, it concludes that the principle of equality is again in danger and to face this challenge, the Chapter makes use of the work of Martha C. Nussbaum and the outcomes of Chapter Four.

25. *Cf.* ASMA T. UDDIN, WHEN ISLAM IS NOT A RELIGION (2019); Khaled A. Beydoun, *Muslim Bans and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1735 (2017).
26. MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE (2012) (discussing the contemporary fear toward religious minorities, particularly the Muslim minority, in the Western world).

III. THE OVERARCHING RESEARCH METHODOLOGY

This Part aims to shed light on how separate articles are connected to each other and form a coherent thesis from a *methodological* point of view. To put it differently, this Part aims to justify the choice to answer the sub-questions in separate articles and in the order in which these articles were written and submitted to law journals. Hence, this Part aims to justify the following four steps.

First, the choice to start this project with a discussion of two specific cases of religious manifestations: Chapters One and Two (on how the law and politics deal with the (un)lawfulness of ritual circumcisions). Second, the choice to develop the theoretical framework after elaborating on two concrete cases of religious manifestations: Chapter Three (on singling out religion *qua* religion for a favored treatment in law). Third, the choice to confront concrete debates with our theoretical framework: Chapter Four (on the justification grounds for favoring religious manifestations in law *qua* religious). Fourth, the choice to draw attention on cases that attest to disfavoring religion in law: Chapters Five and Six.

The methodological narrative behind these four steps and the six Chapters is working toward a conclusion that rests on coherence between the various sub-conclusions reached in each single Chapter of this project. The overarching methodology of this project is that of reaching a "reflective equilibrium" that integrates the conclusions we have reached at different stages.[27] Hence, searching for the reflective equilibrium that integrates our "reasoned conclusions" is the overarching methodology in this research that helps to connect—methodologically—our six articles together.[28] Although, we have discussed *in extenso* the research methodology *per* article, it is necessary to show how our search for a "reflective equilibrium" has taken form.

To account for how this search has taken form we need to clarify first what role our first intuitions have played in carrying out this study. Thus, we start with accounting for how our initial insights and impressions in relation to the specialness of religion for either a favored or a disfavored treatment in law have stimulated us to conduct this research. That is to say: we reconstruct how moving back and forth between how things work out in practice—including for example public and political debates about religious accommodation, and analyzing measures that single out some groups for disfavored treatment—and legal theory and liberal political philosophy has contributed to our search

27. *See* on the method of reflective equilibrium JOHN RAWLS, A THEORY OF JUSTICE (1971).
28. *See on* "reasoned judgments" in relation to the debate on law and religion TEBBE, *supra* note 24, at 8. *See* also Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 377 (2015) (speaking in terms of "considered convictions").

for a reflective equilibrium.[29]

The emphasis on the role our first intuitions have played in reaching "reasoned conclusion" that are not taken in an arbitrary way is important for two reasons. First, and at a macro level, we can reconstruct based on our first insights how the project has started and what directions we have taken in our search for a reflective equilibrium.

Second, and at a micro level, thus at the level of thinking about each research step, our first intuitions have helped us to reach conclusions that are "backed by reasons."[30] This reconstruction gives insights in the transformation of our initial insights to initial considered judgments and to reasoned conclusions. So how did our first intuitions help us to carry out this project and to draft abstracts for paper presentations and discussions about our first ideas, preliminary considered judgments and later on considered conclusions with experts and peers at conferences and workshops?

For the answer to both question we need to take a step back and look at the history behind this project. What circumstances have driven us to draft a proposal and carry out a study in the field of law and religion?

In fact, this project was initiated as an academic response to concrete developments across liberal democracies allegedly singling out religious minorities for disfavored treatment. The two successive versions of our PhD project proposal that were designed to scrutinize this tendency were all concerned about the waning influence of religious freedom.[31]

In this respect, one specific development in the legal, political and societal debates about religious manifestations and religion in the public sphere required further attention: the phenomenon of abstraction from the religious dimension.

The proposals designed to carry out this research were all unified in expressing concerns about abstraction from the religious dimension. This phenomenon was initially seen as a rhetorical mechanism to marginalize religious freedom, bringing back religion to the margins of the society.

29. *See generally* about the role "initial intuitions" play in the search for a reflective equilibrium: Jeff McMahan, *Moral Intuition*, *in* HUGH LAFOLLETTE & INGMAR PERSSON (EDS.), THE BLACKWELL GUIDE TO ETHICAL THEORY, SECOND EDITION 103 (2013). *Cf.* for how intuitions form the starting point in the search for a reflective equilibrium: Douglas Husak, *The Vindication of Good over Evil: Futile Self-Defense*, 55 SAN DIEGO L. REV. 291 (2018).

30. TEBBE, *supra* note 24, at 9.

31. SOHAIL WAHEDI, FREEDOM OF RELIGION UNDER PRESSURE (2015) (research proposal drafted for a PhD position at the European University Institute (EUI) in Florence, Italy. This proposal was accepted for a research position at the EUI) (on file with author); SOHAIL WAHEDI, THE CONSTITUTIONAL DYNAMICS OF RELIGIOUS EXPRESSION. ON THE MECHANISM OF ABSTRACTION FROM THE RELIGIOUS DIMENSION (2015) (research proposal drafted for a PhD position at *Universidade Católica Portuguesa* (*UCP*) in Lisbon, Portugal and Erasmus School of Law (ESL) in Rotterdam, the Netherlands. Both *UCP* and ESL offered full funding for this proposal) (on file with author).

Therefore, academic research was necessary to conceptualize abstraction and create awareness about this phenomenon in order to restore and defend freedom of religion.[32]

Because we had serious concerns about the presence of something like abstraction and how this phenomenon affected negatively religious freedom. Our concerns were based on the outcomes of previous research we had carried out about the (un)lawfulness of face-covering veils, ritual male circumcision and ritual slaughter.[33]

In our previous work about abstraction, we have said that the legal admissibility of what we called "authentic religious manifestations" was made dependent on secular norms that did not properly take into account the religious dimension of such manifestations. Moreover, we theorized this waning influence of religious freedom by drawing inspiration from debates in legal philosophy concerning the justification for the special legal solicitude toward religion.

As such, and with reference to scholars who criticized singling out religion *qua* religion for a favored treatment in law, we defended the line that the category of religion does not deserve special legal solicitude.[34]

Thus, our initial hypothesis was formulated in a way that considered abstraction as a mechanism that marginalized the religious dimension of manifestations of religion through redescribing and repackaging these practices in non-religious terms.[35]

To find out whether abstraction is a problematic phenomenon in law, and thus to start with elaborating on what our first intuitions suggested in this respect, this project starts by analyzing a familiar case. Chapter One puts the debate on the legal admissibility of male circumcision under critical scrutiny. Our analysis reveals that much of the arguments used to attack the legal admissibility of ritual male circumcision *qua* ritual or

32. Wahedi, *Abstraction from the Religious Dimension*, *supra* note 5, at 37 (*see* specifically note 144: explaining how previous research considered abstraction from the religious dimension as problematic, alleging that it marginalized the religious dimension of religious manifestations).

33. Sohail Wahedi, *Een Boerkaverbod* [*A Ban on Wearing Burqa's*], 87 NJB 1572 (2012); Sohail Wahedi, *De Wederrechtelijkheid van Jongensbesnijdenis* [*The Unlawfulness of Male Circumcision*], 87 NJB 3097 (2012); Sohail Wahedi, *Geef de Ruimte aan Rituele Slachtpraktijken* [*Do Tolerate Ritual Slaughter*], TROUW (Nov. 13, 2015), https://www.trouw.nl/home/geef-de-ruimte-aan-rituele-slachtpraktijken~a7e51928/ (last visited Jun. 27, 2019).

34. *See generally* Sohail Wahedi, *Marginaliseren van Godsdienstvrijheid door Abstraheren van de Religieuze Dimensie* [*Marginalizing Religious Freedom Through Abstraction from the Religious Dimension*], 9 RELIGIE & SAMENLEVING [RELIGION & SOC'Y] 128, 134 (2014) (although this publication is critical of the mechanism of abstraction, it however does not posit that abstraction from the religious dimension is *per se* problematic, rather it considers abstraction as a useful method to assess the legality of religious manifestations that are at odds with general laws).

35. The claim that abstraction from the religious dimension is a problematic phenomenon seen from a religious freedom lens is made explicitly in the two successive versions of our PhD research proposal. *See* WAHEDI, *supra* note 31.

religious find their roots in the legal philosophical debate concerning the specialness of religion for the purposes of religious freedom.

The confrontation between the debate on the (un)lawfulness of ritual male circumcision in law and politics with our first intuitions about the phenomenon of abstraction and the debate on the specialness of religion in liberal political philosophy resulted in our first reasoned conclusion on the specialness of religious manifestations in law *qua* religious. Based on this conclusion, we nuanced the idea that abstraction is problematic *qua* abstraction.

Chapter One concluded that within the paradigm of liberal political philosophy there is seemingly no support for the argument that religion *qua* religion warrants special legal solicitude.[36] Neither is there support for the argument that religious manifestations should be tolerated in law *qua* religious. This conclusion has helped us to think about the steps we needed to take to proceed with the research.

Hence, we decided to scrutinize the debate about the (un)lawfulness of female circumcision: a case similar to ritual male circumcision with an important difference. Male circumcision is allowed, while all variants of female circumcision are considered unlawful.

The confrontation of the conclusions we have reached in the first two Chapters revealed that there are "double standards" in the way law deals with the (un)lawfulness of ritual circumcisions. But before putting this conclusion under critical scrutiny, we decided to look in Chapter Three at the specialness of religion in law. This was a useful exercise for the purpose of reaching a new reasoned conclusion about the specialness of religious manifestations.

To find out whether religious manifestations warrant special legal protection *qua* religious, in Chapter Four we analyzed the legal status of ritual male and female circumcision in light of the theoretical framework we developed in Chapter Three.[37]

Our analysis in the first four Chapters reveals that singling out religion *qua* religion for a favored treatment in law is problematic. In light of this important finding, a conclusion that is backed by strong reasons and convictions, we had to reconsider our first intuitions in this regard that considered abstraction a problematic phenomenon *as such*.

Chapter Four has done much of the work in this respect. This Chapter sets out the arguments that explain (i) why abstraction from the religious dimension is inherently related to liberal theories of religious

36. Sohail Wahedi, *Het Beoordelingskader van Rituele Jongensbesnijdenis* [*The Assessment Framework of Ritual Male Circumcision*], 7 TIJDSCHRIFT VOOR RELIGIE, RECHT EN BELEID [J. FOR RELIGION, L. AND POL'Y] 59 (2016).

37. Sohail Wahedi, *The Health Law Implications of Ritual Circumcisions*, 22 QUINNIPIAC HEALTH L. J. 209 (2019). *Cf.* Sohail Wahedi & Renée Kool, *De Strafrechtelijke Aanpak van Meisjesbesnijdenis in een Rechtsvergelijkende Context* [*The Criminal Law Approach toward Female Circumcision: A Comparative Law Perspective*], 7 TIJDSCHRIFT VOOR RELIGIE, RECHT EN BELEID [J. FOR RELIGION, L. AND POL'Y] 36 (2016).

freedom and (ii) why this approach is not problematic *per se*. As such, we reached at this stage of the research a reasoned conclusion about the phenomenon of abstraction in relation to the debate in law and religion.

However, the rise of concrete measures and bills that single out one religious minority for special disfavored treatment in law, like the French ban on face-covering veils, the Austrian Islam bill, and more recently the travel bans of President Trump, urged us to focus on the phenomenon of disfavoring religion *qua* religion in law. This focus revealed in Chapters Five and Six that abstraction from the religious dimension has played an important role in enforcing far reaching limitations upon free exercise of religion.[38]

Thus, the remaining last two Chapters of this project elaborated on our first intuitions about abstraction that considered this phenomenon as problematic. With reference to actual restrictions these two Chapters have unveiled how the use of facially neutral grounds by authorities makes abstraction from the religious dimension possible.

These two Chapters have illustrated how abstraction deprives some religious minorities from their basic rights, such as the right to free exercise of religion.

This theoretical "turn" from nuancing the claim that abstraction is *per se* problematic (the first four Chapters) to creating awareness about abstraction (the last two Chapters) informs us about the way we have carried out this research: (i) scrutinizing the specialness of religion in law (the first four Chapters could be read together) and (ii) scrutinizing how religion has been singled out for disfavored treatment (the last Chapters could be read together). This specific research design corresponds with the two themes this project elaborates on.

But the order in which we have carried out this project informs us also in a further way. It reveals that singling out religion *qua* religion is problematic for a favored treatment in law. Similarly, it is troublesome to single out religion *qua* religion for disfavored treatment in law.

Whereas the order in which we have carried out this research and our reasoned conclusions in that respect have urged us to rethink our first intuitions that considered abstraction problematic *qua* abstraction, the final part of this project shows alignment with our concerns about abstraction, specifically when abstraction has been used rhetorically to reinforce majoritarianism and enforce far reaching measures that single out certain religious minorities (e.g. Muslims) for disfavored treatment (Chapters Five and Six).

Hence, the search for a reflective equilibrium through moving back and forth between concrete debates, legal theory, legal philosophy as well

38. *See* Sohail Wahedi, *Freedom of Religion and Living Together*, 49 CAL. W. INT'L. L. J. 213 (2018-2019); Sohail Wahedi, *Muslims and the Myths in the Immigration Politics of the United States*, 56 CAL. W. L. REV. ___ (2019-2020).

as the conclusions we have reached at different stages of this project, has contributed to the identification and further theorization of a barely scrutinized phenomenon.

This is an important achievement as the identification of this phenomenon can extend the current state of knowledge in the law and religion scholarship. This phenomenon concerns the tendency of singling out religion for special restrictions *qua* religion.

The search for a reflective equilibrium has also helped us to identify the most important principle in this field of research: the principle of equality between all citizens. Finally, the search for a reflective equilibrium has helped us to develop novel argumentation patterns that justify religious freedom on pragmatic grounds. Hence, the process of moving back and forth (the zigzag as mentioned previously) has helped us to bring harmony between our first intuitions, preliminary conclusions and reasoned convictions, and integrate the six Chapters into one major project.

VI. Research Output Strategy

In the previous Part, we have provided some important insights into how our first impressions about the specialness of religion have guided us to reach reasoned conclusions, and from there carry out this study step by step. We also have provided a robust and explicit justification for the zigzag *qua* structure and content.

But our insights and conclusions about the specialness of religion have also helped us to cut the research project into smaller, independent articles. Each of this smaller projects has its own identifiable academic value, but as discussed in the previous Parts, it also contributes to the completion of a broader thematic (sub-)project. This might be a promising approach for the purposes of carrying out a PhD research that combines separate articles into one thesis.

This Part will account for the choice to conduct this project on the basis of six separate articles. Also, it will briefly highlight how our conclusions have helped us to cut the project into smaller projects. But before highlighting how our intuitions and conclusions have guided us to cut this project into smaller research projects, we need to dispatch two questions.

First, and more *generally* the question as to why it is useful to draft a PhD manuscript that combines different articles? Second, and more *specifically* the question as to why American Law Reviews, meaning by this U.S. Law School Law Reviews (Law Reviews), are suitable for carrying out a PhD project on the basis of articles? As a matter of fact, four out of six articles of this PhD thesis have been published with or will appear in Law Reviews. The choice to cooperate with Law Reviews is not

impulsive but taken deliberately. Hence, this needs some further explanation.

With regard to the first question: why is it valuable to carry out a PhD study that is based on a combination of articles? The answer to this question is threefold. First, writing articles as part of the PhD project provides a unique opportunity to get feedback at an early stage in the research phase from other researchers. This helps to improve the content of your work, but it also contributes to more visibility of the candidate who carries out research in certain field of study. Second, this approach increases research output and timely publications in a field of research contribute to the academic debate. Third, it is an appropriate opportunity to develop a professional network of scholars.[39]

With regard to the second question: why opting for Law Reviews? Before providing an overview of the arguments we had to submit four Chapters of this PhD thesis exclusively to Law Reviews, it is important to notice that PhD regulations at Erasmus University Rotterdam do not prescribe a specific form for PhD theses that are based on a collection of academic articles. Moreover, it is not mandatory by these regulations to have published or even accepted a particular amount of articles. Having said this, we now briefly discuss three specific arguments that led us to submit our work to Law Reviews.

First, with a very few exceptions, Law Reviews generally allow for multiple submissions *at the same time*. Thus, one is allowed to submit his work to a wide range of journals. This encourages authors to look at different Law Reviews that are *potentially* interested in the analysis of a paper. This is contrary to how European law journals *generally* work: each submission to these journals contains an *exclusive* submission until the board has taken a decision (which sometimes takes at least a couple of months or even a year, and in the worst case scenario longer than a year).

Second, and closely related to the first argument, Law Reviews are relatively fast in notifying the author about their decision. Probably, because most Law Reviews accept submissions one or two times a year (accepting submissions is not the same as offering publication agreements). Third, once a piece is accepted for publication purposes, an excellent team of editors will guide the author through the publication process. The editors deliver useful comments on the content to make the arguments stronger. They also do grammar and citation check.

These three arguments in combination with the more general arguments related to why one should seriously look at the option of carrying out a PhD study on the basis of several articles have driven us

39. *Cf.* also the Leiden University note on the advantages of pursuing a PhD based on a number of research articles: http://media.leidenuniv.nl/legacy/promoveren-op-artikelen-2010.pdf (last visited Jun. 27, 2019).

to focus on the opportunities Law Reviews provide. We believe strongly that a PhD thesis that consists of independent though interrelated articles *should* contain *at least* some *published* articles. To achieve this research goal, we posit that Law Reviews provide with distance the most suitable platform for PhD Candidates in the field of legal research who work on an English language PhD project.

What needs to be emphasized in this respect is the opportunity to submit your work to multiple Law Reviews and the fact that editorial boards at Law Reviews approach submitted papers with dispatch. Hence, the author does not need to wait for the outcome of an editorial decision before submitting his work to other journals. The fast editorial process following the submission also encourage authors to review the argumentation pattern, if a submitted paper is rejected repeatedly by a number of Law Reviews. Hence, a PhD thesis in law that is designed to consist of articles—that are on one the hand identifiable as independent academic publications, though on the other hand contribute to the completion of a bigger research project—should take into account the opportunities Law Reviews provide.[40]

Back to the relationship between our insights, reasoned conclusions and cutting this project into smaller and independent articles. How did our first intuitions and later on our reasoned conclusions and convictions guide us to cut this project into six independent articles that are closely connected to each other?

This project has started with securitizing the (un)lawfulness of male and female circumcisions (Chapters One and Two). To understand what is at stake in these cases, namely drawing on a religion-empty approach to discuss the legal admissibility of ritual circumcisions, we have taken a step back and looked at legal theory and legal philosophy.

What do they tell us about the role religion should play for granting exemptions and justifying public decisions? Does religion *qua* religion deserve special protection in law? Both questions have been answered in in Chapter Three. And in Chapter Four we have raised the question: how can we understand the differences in legal approaches to male and female circumcision that are in some respects comparable practices. Can we rely on the abstraction framework to understand the asymmetrical toleration regime: allowing male circumcision and outlawing female circumcision?

40. *Cf.* also the PhD thesis of Aaron Petty who has successfully defended a combination of four Law Review articles as his PhD thesis at Leiden University. *See* AARON R. PETTY, THE LEGAL CONCEPTION OF "RELIGION" (2016). This thesis combines the following research articles: Aaron R. Petty, *Faith, However Defined: Reassessing JFS and the Judicial Conception of Religion*, 6 ELON L. REV. 117 (2014) (Chapter One of the thesis); Aaron R. Petty, *The Concept of Religion in the Supreme Court of Israel*, 26 YALE J.L. & HUMAN. 211 (2014) (Chapter Two of the thesis); Aaron R. Petty, *Accommodating Religion*, 83 TENN. L. REV. 529 (2016) (Chapter Three of the thesis); Aaron R. Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 GEO. WASH. INT'L L. REV. 807 (2016) (Chapter Four of the thesis).

In Chapters Five and Six we have asked a similar question: does the framework of abstraction—the idea about redescribing and repackaging religious practices—help us to rationalize and scrutinize the way religion has been singled out for disfavored treatment across liberal democracies?

CONCLUSION

The main theme of this project has been the specialness of religion *qua* religion in law. Over the past four years, six separate articles were prepared to answer the main research question of this study. Although, each of this six articles has its own unique research question, we can say that the main research question is answered by two more general sub-questions.

This conclusion derives from the dichotomous understanding of the specialness of religion *qua* religion in law, as either a category that has been singled out for favored treatment or disfavored treatment.

Hence, the general sub-questions read as follows:

1. "Should the law in liberal democracies single out religion *qua* religion for favored treatment?"
2. "How shall we appraise restrictions that single out religion *qua* religion for a disfavored treatment?"

Sub-question one corresponds with the main purpose of our first four Chapters: putting the justification grounds for the special legal solicitude toward religion under critical scrutiny.

Sub-question two corresponds with the main goal of Chapters Five and Six: scrutinizing the rise of measures across liberal democracies that attest to singling out religion *qua* religion for disfavored treatment.

These two sub-questions will be answered in the Conclusion Chapter of this thesis.

Het beoordelingskader van rituele jongensbesnijdenis*

Sohail Wahedi

Is rituele jongensbesnijdenis een toelaatbare praktijk? Zo ja, wat zijn de grondslagen van tolerantie voor deze praktijk? Op basis van rechtspraakanalyse en de recente ontwikkelingen binnen de Raad van Europa wordt zowel in normatieve zin als conform het positief recht antwoord gegeven op deze vraag.

Inleiding

Sinds een aantal jaren wordt er binnen westerse samenlevingen een discussie gevoerd over de vraag of godsdienst bijzonder genoeg is om de uitoefening daarvan constitutioneel te beschermen.[1] In deze discussie staat de vraag centraal of er binnen een liberale democratie ruimte mag bestaan voor religieuze praktijken die normafwijkend zijn.[2] Niet zelden worden zulke praktijken binnen het dominante discours gepresenteerd als schadelijk of simpelweg onverenigbaar met de beginselen van een vrije samenleving. Denk hierbij aan maatschappelijke en politieke discussies over de toelaatbaarheid van hoofddoek,[3] gezichtsbedekkende kleding[4] en het ritueel slachten van dieren.[5] Eenzelfde kritische discussie is gaande over de toelaatbaarheid van het onderwerp van deze bijdrage: de rituele jongensbesnijdenis. Zo is er de afgelopen jaren binnen verschillende fora aandacht besteed aan het beoordelingskader van deze praktijk.[6] Dat is niet zo verwonderlijk. Rituele

* De auteur is prof. Maurits Berger, prof. Wibren van der Burg, prof. Sanne Taekema, dr. Jeroen Temperman en de redactie van het tijdschrift zeer dankbaar voor hun commentaar op de conceptversie van deze bijdrage. Ook dankt de auteur de deelnemers aan het sectieseminar van *Sociology, Theory and Methodology* van *Erasmus School of Law*, voor hun waardevolle commentaar op de conceptversie.

1 C. Laborde, 'Religion and the Law: the Disaggregation Approach', *Law and Philosophy* 2015, p. 581-600; Ch.L. Eisgruber & L.G. Sager, *Religious Freedom and the Constitution*, Cambridge enz.: Harvard University Press 2007.

2 G. Stopler, 'The Challenge of Strong Religion in the Liberal State', *Boston University International Law Journal* 2014, p. 411-448; E. Howard, 'Protecting Freedom to Manifest One's Religion or Belief: Strasbourg or Luxembourg', *Netherlands Quarterly of Human Rights* 2014, p. 159-182.

3 T. Loenen, 'Framing headscarves and other multi-cultural issues as religious, cultural, racial or gendered: the role of human rights law', *Netherlands Quarterly of Human Rights* 2012, p. 472-488; M. Saxena, 'The French Headscarf Law and the Right to Manifest Religious Belief', *University of Detroit Mercy Law Review* 2007, p. 765-828.

4 M. Hunter-Henin, 'Why the French Don't Like the Burqa. Laicite, National Identity and Religious Freedom', *International and Comparative Law Quarterly* 2012, p. 613-640.

5 S. Wahedi, 'Geef de ruimte aan rituele slachtpraktijken', *Trouw* 13 november 2015, p. 21.

6 O.a. M. de Blois, 'Jongensbesnijdenis en godsdienstvrijheid', in: C. Cardol, T. Veerman & A. Wolthuis (red.), *Jongensbesnijdenis bezien vanuit mensenrechtelijk perspectief*, Leiden: Stichting NJCM-boekerij 2015, p. 39-52.

jongensbesnijdenis maakt inbreuk op de fundamentele rechten van de jongen die wordt besneden. Echter, een niet onaanzienlijk deel van de moslims en joden hecht waarde aan het voortbestaan van deze praktijk en beroept zich op de grondwettelijk en internationaalrechtelijk gewaarborgde vrijheid van godsdienst.[7] Dit geeft aanleiding om na te denken over de vraag wat binnen liberale democratieën als legitieme uiting van godsdienst getolereerd kan worden. Toegespitst op jongensbesnijdenis gaat deze vraag over de voorwaarden en grondslagen van tolerantie voor deze praktijk.[8]

Doel van deze bijdrage is om het beoordelingskader van rituele jongensbesnijdenis helder in kaart te brengen aan de hand van de rechtspraak van onder meer de Hoge Raad en de politieke ontwikkelingen binnen de Parlementaire Assemblee van de Raad van Europa (hierna: de Parlementaire Assemblee). Immers, deze instituties hebben recentelijk een oordeel gegeven over de toelaatbaarheid van deze praktijk.[9] Om te reflecteren over het beoordelingskader wordt in deze bijdrage gefocust op een aantal filosofische beschouwingen over de constitutionele beschermwaardigheid van religieuze praktijken.

De opbouw van deze bijdrage is als volgt. Na een beknopte inleiding over de religieuze achtergronden van jongensbesnijdenis volgt een kritische analyse van de Nederlandse rechtspraak over de toelaatbaarheid van deze praktijk. Vervolgens wordt aan de hand van de twee resoluties van de Parlementaire Assemblee aandacht besteed aan de politieke afwegingen omtrent de toelaatbaarheid van rituele jongensbesnijdenis. De juridische en politieke beoordelingskaders worden hierna geanalyseerd vanuit een breder theoretisch perspectief.

Achtergrond rituele jongensbesnijdenis

Zoals bekend, vindt jongensbesnijdenis niet alleen op religieuze gronden plaats, maar ook op medische, culturele en etnische.[10] Verreweg de meeste jongetjes die worden besneden, ondergaan de zogenoemde eenvoudige circumcisie waarbij een arts of een traditionele besnijder een stuk van de voorhuid wegneemt. De meeste besnijdenissen vinden plaats binnen joodse en islamitische kringen. Voor joden bevestigt besnijdenis de verbondenheid met God en voor moslims betreft dit het

7 S. Wahedi, 'De wederrechtelijkheid van jongensbesnijdenis', *Nederlands Juristenblad* 2012, p. 3097-3105.

8 Zie in het bijzonder B. Leiter, *Why Tolerate Religion?*, Oxford/Princeton: Princeton University Press 2013. Leiter besteedt uitvoerig aandacht aan de grondslagen van tolerantie voor godsdienstuitoefening.

9 Zie wat betreft de voorwaarden die de Nederlandse rechter stelt M. van den Brink & J. Tigchelaar, 'Over de schouders van ouders: Een interne vergelijking van het Nederlandse overheidsbeleid ten aanzien van besnijdenis j/m', in: K. Boele-Woelki & S. Burri (red.), *De rol van de staat in familierelaties: meer of minder?*, Den Haag: Boom Juridische uitgevers 2015; A. Nieuwenhuis, 'De grondrechtelijke positie van de jongensbesnijdenis', *Tijdschrift voor Religie, Recht en Beleid* 2014, p. 18-33; M. Timmerman, 'Religieuze jongensbesnijdenis als mishandeling. De benadering van de Hoge Raad versus het oordeel van het Keulse Landgericht', *Strafblad* 2012, p. 474-483.

10 WHO, *Male circumcision: global trends and determinants of prevalence, safety and acceptability*, Zwitserland: UNAIDS 2007, p. 4.

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nakomen van de aanbeveling om de traditie van profeet Abraham in stand te houden. De leeftijd waarop deze handeling plaatsvindt, is zeer verschillend. Binnen de joodse kringen is het uitgangspunt dat het jongetje op de achtste dag wordt besneden door de *mohel*, de traditionele besnijder, en wel in een traditionele setting. Moslims besnijden hun zoontjes doorgaans op een oudere leeftijd, maar in ieder geval voordat hij de volwassen leeftijd heeft bereikt. Binnen islamitische kringen voeren zowel traditionele besnijders als medici de besnijdenis uit.[11]

De Nederlandse rechtspraak over jongensbesnijdenis: het juridische beoordelingskader

De vraag of rituele jongensbesnijdenis grondrechtelijke bescherming geniet, is de laatste jaren binnen verschillende westerse landen voorgelegd aan de rechter.[12] Het Keulse *Landgericht* deed de meest radicale uitspraak: de besnijdenis dient uitgesteld te worden tot het moment waarop de jongen daar zelf een oordeel over kan vormen.[13] In deze uitspraak werd geen betekenis toegekend aan de aanwezigheid van relevante ouderlijke toestemming, of de brede aanvaarding van deze praktijk binnen bepaalde religieuze kringen.[14] Anders dan het Keulse *Landgericht* kiest de Nederlandse rechter voor een voorzichtige 'ja, mits-benadering'. Deze benadering wordt hierna geconstrueerd. Daarbij zal aandacht worden besteed aan twee kwesties die een bepalende rol spelen bij de juridische beoordeling van deze praktijk: toestemming van de gezaghebbende ouder en de erkenning van een oud religieus gebruik in de context van godsdienstvrijheid.

Toestemming versus erkenning oud religieus gebruik?

De strafkamer van de Hoge Raad heeft op twee momenten in dezelfde zaak uitspraak gedaan over de strafwaardigheid van rituele jongensbesnijdenis. Deze arresten hadden betrekking op de besnijdenis van twee jongens van wie de ouders geen relatie meer hadden ten tijde van de besnijdenis. De vader had zijn zoontjes wel erkend, maar hij oefende niet het ouderlijk gezag uit. Hij had tegen de uitdrukkelijke wens van zijn ex, die dus het ouderlijk gezag uitoefende, de beslissing genomen om zijn zoontjes te laten besnijden in een kliniek. Tegen de moeder had hij in het verleden gezegd dat besnijdenis vooral van hygiënisch belang is. Aanvankelijk stond zijn ex positief tegenover jongensbesnijdenis. Later, na overleg met de huisarts, die haar erop had gewezen dat hygiëne niet langer een doorslaggevende reden kan zijn voor de besnijdenis, begon de moeder zich uitdrukkelijk te verzetten tegen de besnijdeniswens van de vader. Zij vond dat de jongens zelf een beslissing moesten nemen over deze kwestie.[15] Ondanks deze bezwaren van de moeder bracht de vader zijn zoontjes naar een kliniek om hen te laten besnijden.

11 Nieuwenhuis 2014, p. 18-33.
12 De Blois 2015, p. 39-52.
13 Landgericht Köln 5 mei 2012, 151 Ns 169/11.
14 Timmerman 2012, p. 474-483.
15 Dit blijkt in zoverre uit het vonnis van de rechtbank. Zie Rb. Amsterdam 6 mei 2008, *NBSTRAF* 2008, 233.

De moeder deed hierna aangifte wegens onder meer mishandeling met voorbedachten rade, niet alleen tegen de vader, maar ook tegen de besnijder. De vader verweerde zich met het argument dat hoewel hij niet streng gelovig was, hij toch nog heel graag wenste dat zijn zoontjes 'iets' meekregen van zijn culturele achtergrond, die in dit geval de circumcisie impliceerde. Deze zou zelfs een 'voorwaarde' zijn geweest om een kind te krijgen met zijn toenmalige partner.[16]
Het Openbaar Ministerie achtte deze zaak opportuun genoeg om over te gaan tot vervolging. De officier van justitie merkt in zijn requisitoir op dat er genoeg bewijs is voor zwaar lichamelijk letsel. Immers, de besnijdenis betreft een 'onomkeerbare medische ingreep (…) die zonder toestemming heeft plaatsgevonden'.[17]
De strafrechtelijke toon was gezet en het 'zonder toestemming-betoog' markeerde over de hele linie genomen de rode draad in de bewijsvoering door de openbaar aanklager.
De Rechtbank Amsterdam ging echter niet mee in het betoog van de officier van justitie en sprak de verdachte vrij. Volgens de rechtbank was met de besnijdenis geen zwaar lichamelijk letsel toegebracht. Doorslaggevend in dit kader was 'het lichamelijke en psychische functioneren van de besnedene na de ingreep'.[18] In het verlengde hiervan hechtte de feitenrechter waarde aan 'de maatschappelijke inbedding' van dit 'fenomeen'.[19] Volgens de rechtbank leverde de beslissing van de vader om zijn zoontjes te besnijden, in het licht van de heersende opvattingen binnen de politiek, de medische wetenschap alsmede de samenleving, geen zwaar lichamelijk letsel op. Er waren volgens de rechtbank geen aanwijzingen dat de besneden jongetjes 'als gevolg van de besnijdenis lichamelijke of psychische beperkingen hebben ondervonden'.[20] De rechtbank sprak de besnijder eveneens vrij, omdat niet bewezen kon worden verklaard dat hij – al dan niet voorwaardelijk – opzet had gehad om de jongetjes te mishandelen.[21]

Hoge Raad 2011

Tegen het vonnis van de rechtbank ging het Openbaar Ministerie in beroep. Het Amsterdamse hof sprak de vader eveneens vrij. Het hof overwoog dat hij niet de opzet had gehad om zijn zoontjes te mishandelen. Het oordeel uit eerste aanleg werd bovendien nader verfijnd door de toevoeging dat een 'oordeelkundig' uitgevoerde jongensbesnijdenis geen zware mishandeling oplevert. Het feit dat de moeder geen toestemming had verleend, maakte dit oordeel niet anders, aldus het hof in zijn arrest.[22]
In cassatie gooide het Openbaar Ministerie het over een andere boeg. Het ging niet verder in op de mate van mishandeling, maar voerde aan dat de vaststelling

16 Rb. Amsterdam 6 mei 2008, *NBSTRAF* 2008, 233, onder het kopje 'Het standpunt van de verdachte'.
17 Idem, onder het kopje 'Het standpunt van de officier van justitie'.
18 Idem, onder het kopje 'Het oordeel van de Rechtbank ten aanzien van feit 1'.
19 Idem.
20 Idem.
21 Idem.
22 Dit arrest is evenmin gepubliceerd op rechtspraak.nl. De relevante passages zijn weergegeven in het arrest van de Hoge Raad uit 2011.

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van het hof dat het ontbreken van de toestemming niet relevant is voor het bewijs van mishandeling, niet zonder meer is te begrijpen. Zo werd in het cassatiemiddel toegelicht dat noch mishandeling, noch het toebrengen van zwaar lichamelijk letsel een 'neutraal' begrip is. 'Zij drukken de onrechtmatigheid uit.'[23] Deze onrechtmatigheid, of preciezer gezegd de wederrechtelijkheid, valt weg indien voor de handeling die lichamelijk letsel veroorzaakt, toestemming is verleend. Met andere woorden: de aanwezigheid van relevante toestemming is in dit verband de enige binnen het recht relevante factor ter beoordeling van de vraag of de inbreuk die jongensbesnijdenis maakt op de lichamelijke integriteit van het kind gerechtvaardigd kan worden.[24] In een doorwrochte conclusie omarmde A-G Silvis de gedachte dat de wederrechtelijkheid van mishandeling uitsluitend weggenomen kan worden indien het toebrengen van lichamelijk letsel gerechtvaardigd kan worden in het licht van een daarvoor verleende toestemming door een persoon die zelf toestemming kan verlenen, of door degene(n) die het gezag uitoefent (uitoefenen) over die persoon. Omdat relevante toestemming voor besnijdenis in deze zaak nooit was verleend, dient het bestreden arrest te worden vernietigd voor zover dat betrekking heeft op het vrijspreken van de vader voor het al dan niet opzettelijk toebrengen van (zware) mishandeling.[25]
In de zomer van 2011 vernietigde de Hoge Raad het bestreden arrest en verwees de zaak terug naar het Hof Amsterdam. De Hoge Raad overwoog daarbij dat:

> '(...) onder mishandeling in de zin van art. 300-301 WvSr moet worden verstaan het aan een ander toebrengen van lichamelijk letsel of pijn zonder dat daarvoor een rechtvaardigingsgrond bestaat. Gelet hierop heeft het Hof door te overwegen dat niet ter zake doet "dat de besnijdenis heeft plaatsgevonden zonder toestemming van de moeder die over de zoontjes het gezag uitoefende", een onjuiste betekenis toegekend aan de in de tenlastelegging voorkomende term "mishandeld" die aldaar is gebezigd in dezelfde betekenis als toekomt aan de uitdrukking "mishandeling" in art. 301 Sr.'[26]

Hoge Raad 2014
In december 2012 boog het Hof Amsterdam, met inachtneming van het arrest van de Hoge Raad uit 2011, zich wederom over de vraag of de beslissing van de vader in deze zaak (zware) mishandeling opleverde. Het hof beantwoordde deze vraag bevestigend en nam daarbij in aanmerking dat relevante toestemming voor het handelen van de vader in dit geval volledig had ontbroken, omdat de enige bevoegde persoon, namelijk de moeder die het gezag uitoefende over de zoontjes, deze toestemming nadrukkelijk niet had gegeven. Dus, de vader mocht zijn zoontjes niet laten besnijden: hij werd daarom schuldig bevonden aan mishandeling (overigens zonder oplegging van straf of maatregel, vanwege de lange duur van het proces, de goede verstandhouding van de man met de moeder, de goede

23 HR 5 juli 2011, *NJ* 2011/466, onder het kopje 'Cassatiemiddel'.
24 Idem, onder 5.2.
25 Idem, onder het kopje 'Conclusie', overweging 29.
26 Idem, r.o. 2.4.2.

omgang met de kinderen en het feit dat hij niet eerder in aanraking was geweest met politie en justitie).[27] Tegen deze bewezenverklaring ging de verdediging in cassatie en stelde onder meer dat het hof mishandeling, in de context van deze zaak, verkeerd had uitgelegd.[28] De verdediging herhaalde in cassatie dat rituele jongensbesnijdenis, zoals annotator Keijzer had betoogd, een kwalificatie-uitsluitingsgrond oplevert, omdat zij een 'van oudsher aanvaard karakter' zou dragen.
De A-G concludeert dat de maatschappelijke aanvaarding van jongensbesnijdenis alleen een rechtvaardiging kan zijn voor de inbreuken die zij maakt, indien cumulatief wordt voldaan aan twee andere voorwaarden: de inbreuk mag niet nadelig zijn voor de persoon in kwestie, en deze moet hebben plaatsgevonden met relevante toestemming. Ter toelichting geeft de A-G het voorbeeld van ouders die hun kind 'welbewust *on*oordeelkundig op de keukentafel laten besnijden (...). Die rituele jongensbesnijdenis strekt in dat geval wel degelijk tot benadeling, en zal juist om die reden *niet* van oudsher zijn aanvaard.'[29] Dit voorbeeld heeft zich in de praktijk voorgedaan, met het verschil dat niet de ouders maar de besnijder in kwestie is vervolgd voor (poging tot) zware mishandeling. In 2005 veroordeelde de Rechtbank Utrecht een traditionele besnijder om die reden voor zware mishandeling: de besnijdenis was niet helemaal correct uitgevoerd, en bovendien was de besnijder in kwestie in Nederland niet bevoegd om een medische handeling zoals jongensbesnijdenis uit te voeren.[30] In hoger beroep is deze man overigens vrijgesproken van het toebrengen van zwaar lichamelijk letsel, omdat niet vaststond of hij de aanmerkelijke kans had geaccepteerd dat door zijn ingreep de besnijdenis verkeerd zou aflopen. Het Hof Amsterdam veroordeelde hem uitsluitend voor de overtreding van de culpoze variant van zware mishandeling.[31]
De strafkamer van de Hoge Raad hakte eind 2014 de knoop door en liet het arrest van het Amsterdamse hof uit 2012 ongemoeid. Hierbij nam de hoogste rechter het volgende in aanmerking:

> 'Het Hof heeft vastgesteld dat de verdachte – die niet het gezag had over de kinderen – de besnijdenis van zijn zoons welbewust heeft laten uitvoeren zonder toestemming van hun moeder. Die vaststellingen dragen zelfstandig het oordeel dat de verdachte wederrechtelijk heeft gehandeld. Het Hof heeft daarom zonder blijk te geven van een onjuiste rechtsopvatting en toereikend gemotiveerd geoordeeld dat sprake is geweest van mishandeling, waarbij het Hof de juistheid van het beroep op een van oudsher aanvaard karakter van jongensbesnijdenis in het midden heeft kunnen laten.'[32]

27 Hof Amsterdam 14 december 2012, ECLI:NL:GHAMS:2012:BY6521.
28 Weergegeven in de conclusie van A-G Aben van 4 november 2014, ECLI:NL:PHR:2014:2255.
29 Idem, overweging 14.
30 Rb. Utrecht 1 december 2005, ECLI:NL:RBUTR:2005:AU7293.
31 Hof Amsterdam 2 juni 2006, *NBSTRAF* 2006, 266.
32 HR 9 december 2014, ECLI:NL:HR:2014:3538, r.o. 2.4.

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Het juridische beoordelingskader

Uit de hiervoor besproken rechtspraak blijkt dat rituele jongensbesnijdenis onder omstandigheden een toelaatbare praktijk is. Het gaat hier om de volgende twee cumulatieve voorwaarden:

- *Relevante toestemming*: uit de twee arresten van de Hoge Raad kan worden afgeleid dat toestemming, verleend door degene(n) die het gezag uitoefent (uitoefenen) over het kind, de kernvoorwaarde is in de beoordeling van de toelaatbaarheid van jongensbesnijdenis.
- *Oordeelkundige besnijdenis*: hoewel de Hoge Raad zich niet expliciet heeft uitgelaten over de strafbaarheid van de aard van jongensbesnijdenis, het gaat hier om de 'technische aspecten' van het besnijden, kan in lijn met andere uitspraken worden aangenomen dat een besnijdenis die ernstige gevolgen heeft voor de lichamelijke en psychische gesteldheid, niet gerechtvaardigd wordt met een beroep op traditie of godsdienstvrijheid.[33]

Additionele voorwaarden?

Bij de beoordeling van de toelaatbaarheid van jongensbesnijdenis is het verdedigbaar om naast de besproken voorwaarden twee additionele voorwaarden te stellen. Het gaat hier om de redelijkheidstoets en de duurzame band:

- *In redelijkheid geen onaanvaardbare praktijk*: betoogd kan worden dat relevante toestemming, de eerste voorwaarde, alleen verleend kan worden voor praktijken die in redelijkheid niet als onaanvaardbaar kunnen worden gezien. De aanvaardbaarheid van de praktijk valt hier uiteen in *objectieve* en *intersubjectieve* aanvaardbaarheid. Een praktijk is in redelijkheid aanvaard wanneer zij objectief en intersubjectief gezien niet onaanvaardbaar is.

  De objectieve, of feitelijke, aanvaardbaarheid van een praktijk heeft betrekking op de wijze waarop men uitvoering geeft aan een praktijk. Het schadebeginsel is hierin leidend. Een besnijdenis die 'zowel op vroege als latere leeftijd een ernstige inbreuk maakt op het functioneren van het betreffende kind' is feitelijk niet aanvaard.[34] De vereiste oordeelkundige besnijdenis concretiseert de objectieve aanvaardbaarheid van de praktijk.

  Intersubjectieve aanvaardbaarheid heeft betrekking op de mate waarin de praktijk binnen de relevante gemeenschappen wordt aanvaard. De enkele wens om een traditie in stand te houden is niet voldoende. Bij de intersubjectieve aanvaardbaarheid gaat het om de aanvaarding van een verplichting binnen bepaalde groepen. Zo valt haast niet te ontkennen dat ritueel slachten van dieren en jongensbesnijdenis een prominente plaats innemen binnen de islam en het jodendom. Over de verplichting om meisjes te besnijden wordt zeer verschillend gedacht. Er ontbreekt met andere woorden *brede* consensus ten aanzien van de verplichting om meisjes te besnijden.[35] Wat er bovendien

33 Vgl. Rb. Utrecht 1 december 2005, ECLI:NL:RBUTR:2005:AU7293.

34 Aanwijzing opsporing en vervolging inzake kindermishandeling (*Stcrt*. 2010, 16597).

35 R.S.B. Kool & S. Wahedi, 'European Models of Citizenship and the Fight Against Female Genital Mutilation', in: S.N. Romaniuk & M. Marlin (red.), *Development and the Politics of Human Rights*, Boca Raton: CRC Press 2015, p. 206-221.

ook zij van de mogelijke intersubjectieve aanvaardbaarheid van meisjesbesnijdenis, de objectieve aanvaardbaarheid vormt een beletsel om deze in al haar vormen schadelijke praktijk te aanvaarden in de samenleving.[36] Meisjesbesnijdenis is met andere woorden een niet in redelijkheid te aanvaarden praktijk.

– *Duurzame band*: als het gaat om een omstreden maar oude traditie, is het verdedigbaar om na te gaan of er een duurzame band bestaat tussen het kind en degene die een traditie in stand wil houden. Dit additionele vereiste wordt doorgaans impliciet aanwezig geacht. Alleen in bijzondere gevallen dient het expliciet aanwezig te zijn. Het gaat hier om gevallen waarin gekeken wordt naar de band die een kind heeft of kan hebben met de omstreden traditie van zijn ouders, of degenen die het gezag over hem uitoefen. Zo oordeelde de familierechter tegen de uitdrukkelijke wens van een moeder die formeel het ouderlijk gezag uitoefende, dat zij haar uit huis geplaatste zoontje niet mocht laten besnijden.[37] In deze zaak had de moeder in lijn met de gebruikelijke traditie binnen haar familie de jeugdzorg om medewerking aan de besnijdenis van haar zoontje verzocht. Ter afwijzing van het verzoek van de moeder nam de familierechter onder meer het volgende in aanmerking: 'Er bestaat voor de minderjarige geen uitzicht op opvoeding door zijn moeder. Zijn toekomst ligt in het pleeggezin. De ingreep is in het gezin en de omgeving waarin de minderjarige opgroeit niet gebruikelijk waardoor hij daarin zou afwijken van de jongetjes om zich heen.'[38]

De Parlementaire Assemblee en jongensbesnijdenis: het politieke beoordelingskader

De Parlementaire Assemblee van de Raad van Europa[39] heeft op twee momenten resoluties aangenomen over de toelaatbaarheid van jongensbesnijdenis binnen Europese democratieën.[40] Aangezien de lidstaten van de Raad van Europa tevens lid zijn van de Europese Conventie voor de Rechten van de Mens, zijn deze politieke ontwikkelingen van grote betekenis. Immers, de Parlementaire Assemblee heeft een vertegenwoordigende functie binnen 'de belangrijkste Europese intergouvernementele organisatie op het gebied van mensenrechten'.[41]

36 Vgl. Regeling inburgering, Bijlage 5, behorende bij art. 2.5, onder 7.4.2. (*Stcrt*. 2014, 33927).

37 Rb. Zutphen 31 juli 2007, ECLI:NL:RBZUT:2007:BB0833; Rb. Groningen 11 december 1996, *KG* 1997, 36.

38 Rb. Zutphen 31 juli 2007, ECLI:NL:RBZUT:2007:BB0833.

39 Niet te verwarren met het Europees Parlement van de Europese Unie: de Europese Raad omvat ook landen als Rusland, Turkije en Azerbeidzjan.

40 Zie de Parlementaire Assemblee van de Raad van Europa, resolutie 1952 (2013), *Children's right to physical integrity*, en resolutie 2076 (2015), *Freedom of religion and living together in a democratic society*.

41 De Blois 2015, p. 39.

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'Children's right to physical integrity': de resolutie uit 2013

In 2013 riep de Parlementaire Assemblee de lidstaten van de Raad van Europa op om maatregelen te nemen tegen rituele jongensbesnijdenis en andere praktijken die schadelijk zijn voor de gezondheid van kinderen.[42] De resolutie vergeleek jongensbesnijdenis met meisjesbesnijdenis en riep de lidstaten op om de dialoog aan te gaan met groepen die vasthouden aan deze traditie en hen daarin te wijzen op de risico's van jongensbesnijdenis.[43] In het verlengde hiervan riep zij lidstaten op om maatregelen te nemen tegen dergelijke praktijken, waar het kind in kwestie zelf geen oordeel over kan vormen.[44] Kortom: deze resolutie stelde een verbod voor op onder meer religieuze jongensbesnijdenis, omdat deze inbreuk maakt op de lichamelijke integriteit van iemand die zelf geen toestemming kan verlenen voor een dergelijke ingreep.

'Freedom of religion and living together in a democratic society': de resolutie uit 2015

Het Comité van Ministers van de Raad van Europa keerde zich nadrukkelijk tegen de resolutie uit 2013. Zo stelde het Comité in een reactie op die resolutie dat rituele jongensbesnijdenis 'op geen enkele manier' te vergelijken is met de genitale verminking van vrouwen, die een schending is van diverse mensenrechten, en dat rituele jongensbesnijdenis op verantwoorde wijze plaatsvindt.[45] Bovendien kwam de Parlementaire Assemblee eind september 2015 terug op haar eerdere ferme oproep om jongensbesnijdenis te verbieden, dan wel uit te stellen tot een moment waarop de jongen zelf toestemming kan geven voor deze ingreep.[46]

In de laatste resolutie, *Freedom of religion and living together in a democratic society*, sprak de Assemblee haar wens uit om de 'vicieuze cirkel' van verdachtmakingen en misverstanden te doorbreken.[47] De resolutie merkte in het bijzonder op dat religieuze entiteiten, zoals kerken en andere organisaties, 'een integraal onderdeel' vormen van het maatschappelijk middenveld binnen liberale democratieën.[48] Solidariteit en verdraagzaamheid vormen de sleutelbegrippen in dit verband. De resolutie merkte nog expliciet op dat de band die burgers met hun religie hebben en die mede vormgeeft aan hun identiteit, veelal tot uitdrukking komt door participatie in religieuze tradities en naleving van religieuze voorschriften.[49]

In de resolutie werd verder opgemerkt dat wetgevers en overheden zich ervan bewust moeten zijn dat wetgeving die tot stand komt met een beroep op *secularity* mogelijk leidt tot indirecte discriminatie (*disguised discrimination*) van religieuze minderheidsgroepen. Dit is volgens de resolutie niet alleen in strijd met het recht op godsdienstvrijheid, maar ook met het principe van de scheiding tussen kerk en

42 Kritisch hierover De Blois 2015, p. 39-41.
43 Idem, overweging 3 e.v.
44 Idem, overweging 7.7.
45 Comité van Ministers van de Raad van Europa, aanbeveling 2023 (2013).
46 Resolutie 2076 (2015).
47 Resolutie 2076 (2015), overweging 1.
48 Idem, overweging 3.
49 Idem, overweging 5.

staat.[50] Beperkingen van religieuze overtuigingen kunnen religieuze minderheidsgroepen het gevoel geven dat zij niet volledig meetellen in de samenleving. Dit laat echter onverlet dat gelovigen zich er bewust van moeten zijn dat religieuze overtuigingen en praktijken die indruisen tegen fundamentele rechten, ontoelaatbaar zijn.[51] Hoewel de resolutie beaamt dat een praktijk als religieuze jongensbesnijdenis 'controversieel' is, omdat binnen Europese samenlevingen heel divers wordt gedacht over de toelaatbaarheid hiervan, roept zij de lidstaten op om deze voor joden en moslims zo belangrijke ingreep niet te verbieden, zolang de besnijdenis oordeelkundig wordt uitgevoerd door een daartoe getrainde persoon. Bovendien moeten de ouders die hun kind willen laten besnijden, geïnformeerd worden over de risico's die aan deze medisch niet-noodzakelijke ingreep kleven, waarbij de belangen van het kind te allen tijde dienen te prevaleren boven de wensen van de ouders.[52] Het belang van deze overweging wordt onderstreept in het licht van de gedachte dat religieuze minderheden in vrijheid en zonder vrees voor discriminatie blijk moeten kunnen geven van hun diepste overtuigingen.[53]

Het politieke beoordelingskader

Uit de laatste resolutie van de Parlementaire Assemblee blijkt dat zij veel waarde hecht aan de mogelijkheid om in vrijheid blijk te geven van religieuze overtuigingen. Ook als deze omstreden zijn, zoals de rituele jongensbesnijdenis en het ritueel slachten van dieren. De resolutie bevat enkele concrete handvatten voor een 'toelaatbare rituele jongensbesnijdenis' volgens joodse en islamitische rites. Het gaat hier om onder meer de plicht tot informeren van de ouders over de risico's die aan deze praktijk kleven en de vakkundige omstandigheden waaronder de besnijdenis plaats gaat vinden.

Enkele kritische bespiegelingen

Tegen welke achtergrond kunnen we de uitspraak van de Hoge Raad en de 'politieke ommekeer' binnen de Parlementaire Assemblee begrijpen? Is het mogelijk om deze te koppelen aan het rechtsfilosofische debat over de constitutionele beschermwaardigheid van religieuze praktijken?

Wanneer we kijken naar de gevolgde conclusie van de A-G en de twee resoluties van de Parlementaire Assemblee, kunnen we drie benaderingen onderscheiden in de beoordeling van de toelaatbaarheid van jongensbesnijdenis: de angst voor favoritisme, rejectionisme en de neiging tot pragmatisme door middel van praktische tolerantie.

50 Idem, overweging 7. Opmerking verdient dat de resolutie zelf over het *principle of secularity* spreekt.
51 Idem.
52 Idem, overweging 9.
53 Idem, overweging 13.

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De angst voor 'favoritisme': de gevolgde conclusie van A-G Aben

De Hoge Raad laat zich in zijn arrest uit 2014 niet uit over de juistheid van de stelling dat de relatieve aanvaardbaarheid van deze praktijk in de samenleving een zelfstandige grond kan zijn voor de rechtvaardiging van rituele jongensbesnijdenis. Kennelijk heeft de Hoge Raad zijn vingers niet willen branden aan het geven van een inhoudelijk oordeel over de juistheid van deze stelling van de verdediging.[54] Interessant is wel de conclusie van de A-G op dit punt. Met annotator Keijzer merkt hij op 'dat de maatschappelijke aanvaarding c.q. verwerping van een bepaalde wijze van toebrengen van lichamelijk letsel of pijn wel degelijk van betekenis is voor de vraag naar een grond voor rechtvaardiging van die gedraging'.[55] De A-G geeft het voorbeeld van de 'corrigerende tik' of 'pedagogische tik', om te betogen dat een verandering in het denken over de strafwaardigheid van een voorheen 'geaccepteerde' handeling een relevante factor is in de beoordeling van de vraag in welke mate die gewraakte handeling thans nog gerechtvaardigd kan worden in het recht.[56]

De vergelijking tussen de pedagogische tik en de rituele jongensbesnijdenis staat niet op zichzelf. Binnen de kritische beschouwingen over de beoordeling van de toelaatbaarheid van rituele jongensbesnijdenis zijn vergelijkbare voorbeelden te vinden die door de desbetreffende auteurs worden gebruikt om te betogen dat besnijdenis van jongens niet zonder meer een toelaatbare praktijk is. Om de discussie over een verbod op jongensbesnijdenis 'in perspectief' te plaatsen trekt Cliteur een vergelijking met de religieuze verplichting uit de oudheid om mensenoffers te brengen.[57] Ter toelichting op zijn standpunt dat het recht dynamisch is en ooit nog geaccepteerde praktijken geen 'eeuwigheidswaarde' hebben, geeft Jörg het voorbeeld van kinderarbeid en verkrachting binnen het huwelijk.[58]

Het voorbeeld van de A-G geeft aanleiding om na te denken over de vraag of de religieuze dimensie van rituele jongensbesnijdenis haar anders maakt dan de pedagogische tik. Immers, het valt niet te ontkennen dat rituele jongensbesnijdenis onlosmakelijk verbonden is met twee wereldgodsdiensten: het jodendom en de islam. Echter, rechtvaardigt dit gegeven een 'andere benadering' van rituele jongensbesnijdenis ten opzichte van de corrigerende tik? Zou dat niet grenzen aan 'favoritisme' van gelovigen?[59] Deze probleemstelling raakt de kern van een filosofisch debat dat thans wordt gevoerd in de Amerikaanse literatuur over de vraag of godsdienst als overtuigingsvorm, in het bijzonder, dat wil zeggen anders

54 Anders is het arrest van de Hoge Raad in de bekend geworden zaak 'Baby-Kelly', waarin de Hoge Raad 'ter voorkoming van misverstand' zich wel een oordeel heeft gevormd over morele vraagstukken, zie HR 18 maart 2005, ECLI:NL:HR:2005:AR5213.

55 Conclusie van A-G Aben van 4 november 2014, ECLI:NL:PHR:2014:2255, overweging 13.

56 Idem.

57 Cliteur 2014, p. 145 e.v.

58 N. Jörg, 'Jongensbesnijdenis strafbaar?', in: C. Kelk, F. Koenraadt & D. Siegel (red.), *Veelzijdige gedachten*, Den Haag: Boom Juridische uitgevers 2013, p. 157-167, i.h.b. p. 162-163.

59 Zie column van Eisgruber en Sager op de website van de *New York Times*: www.nytimes.com/roomfordebate/2012/05/09/should-churches-get-tax-breaks/religious-exemptions-can-verge-on-favoritism.

dan andere vormen van overtuiging, beschermd moet worden vanuit de constitutie.
Om te betogen dat vergelijkbare praktijken niet op grond van godsdienstvrijheid anders benaderd mogen worden, geven Eisgruber en Sager het fictieve voorbeeld van twee Thomassen. De ene Thomas is een Jehova's getuige en mag op grond van zijn religieuze overtuigingen geen tankkoepels vervaardigen. De andere Thomas is een seculiere pacifist die gewetensbezwaren heeft tegen de vervaardiging van tankkoepels. Volgens Eisgruber en Sager zou het onacceptabel zijn om de 'religieuze Thomas' wel te accommoderen in zijn bezwaren tegen de vervaardiging van bepaalde voorwerpen en de 'seculiere Thomas' niet. Immers, eenieder, religieus of niet, moet op voet van gelijkheid en dus ook in gelijke mate toegang hebben tot fundamentele rechten. Er is met andere woorden geen ruimte voor een 'geprivilegieerde behandeling' van gelovigen.[60]
De toepassing van het voorbeeld van de twee Thomassen op de vergelijking die de A-G trekt tussen de afnemende steun voor de toelaatbaarheid van de pedagogische tik en de rituele jongensbesnijdenis levert een aantal interessante gezichtspunten op. Het accepteren van de rituele jongensbesnijdenis, enkel op religieuze gronden, en het blijven verbieden van de veel minder ingrijpende pedagogische tik omdat hij niet langer breed wordt geaccepteerd, kunnen inderdaad duiden op favoritisme van gelovigen. Immers, een veel minder ingrijpende praktijk wordt wel 'aangepakt' en de rituele jongensbesnijdenis niet. Deze kritische reflectie laat zien waarom de stelling van de verdediging, dat erkenning voor een oud religieus gebruik als jongensbesnijdenis een beletsel vormt om haar onder het bereik van het strafrecht te brengen, op zich niet doorslaggevend is in de beoordeling van de toelaatbaarheid van die praktijk.[61]

Rejectionisme: de resolutie uit 2013
Staat de resolutie uit 2013 op zichzelf of kan zij begrepen worden tegen de achtergrond van een toenemende kritische houding ten opzichte van religieuze praktijken die niet langer toelaatbaar worden geacht binnen liberale democratieën?[62] Zo duidt het Europese Hof voor de Rechten van de Mens religieuze praktijken zoals vasten en jongensbesnijdenis aan als 'omstreden' en mogelijk zelfs 'schadelijk' voor de gezondheid.[63] Deze kritische benadering van een groeiende groep academici, magistraten en andere juristen maakt onderdeel uit van een breder debat binnen liberale democratieën over de publieke ruimte die godsdienst mag inne-

60 Ch.L. Eisgruber & L.G. Sager, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct', *The University of Chicago Law Review* 1994, p. 1245-1315, i.h.b. p. 1285-1294.
61 Conclusie van A-G Aben van 4 november 2014, ECLI:NL:PHR:2014:2255, onder overweging 6.
62 Om maar bij de kwestie jongensbesnijdenis te blijven: zie bijv. P. Cliteur, 'Morele en immorele religieus gelegitimeerde praktijken in het gezondheidsrecht', in: Preadvies voor de Vereniging voor Gezondheidsrecht, *Ethiek en Gezondheidsrecht*, Den Haag: Sdu Uitgevers 2014, p. 141 e.v. Cliteur ziet 'babybesnijdenis' als 'morele chantage'. Zie i.h.b. p. 150 van zijn publicatie.
63 EHRM 10 juni 2010, nr. 302/02 (Jehovah's Witnesses of Moscow and others//Russia), r.o. 144.

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men binnen samenlevingen die pluriformer zijn geworden dan een eeuw geleden.[64] Aanleiding voor dit debat is doorgaans het gedrag van een religieuze minderheid dat niet langer als aanvaardbaar wordt geacht vanuit de samenleving.[65] Dit debat mondt niet zelden uit in de meer fundamentele vraag naar de grondslagen van godsdienstvrijheid.[66] Het is deze vaak constitutioneel gewaarborgde vrijheid die het debat over de toelaatbaarheid van problematisch geachte religieuze praktijken een andere dimensie geeft dan de discussie over culturele praktijken die als schadelijk worden beschouwd, zoals eerwraak en vrouwenbesnijdenis.[67] Immers, zoiets als het recht op 'cultuurvrijheid' is minder prominent beschermd dan godsdienstvrijheid.[68] Dit laat onverlet dat er een verschuiving plaatsvindt in het denken over de constitutionele waarde van godsdienstvrijheid. Deze verschuiving werpt de vraag op of, en zo ja in welke mate, er ruimte moet of kan bestaan voor religieuze praktijken die binnen het dominante seculiere discours worden beschouwd als ontoelaatbaar, problematisch of om andere redenen onwenselijk.[69]

De resolutie van de Parlementaire Assemblee uit 2013 kan worden begrepen tegen de achtergrond van een fundamenteel debat over de ruimte die kan bestaan voor een 'geprivilegieerde behandeling' van gelovigen. De daarin gekozen politieke benadering impliceert een marginalisering van de religieuze dimensie van rituele jongensbesnijdenis in de rechtvaardiging van haar voortbestaan en een maximalisering van de vrije wil van het kind dat mogelijk wordt onderworpen aan die praktijk. Immers, de resolutie stelde voor om de besnijdenis uit te stellen tot het moment waarop het kind in kwestie daar zelf een oordeel over kan vormen. Dit kan gezien worden als een kritische benadering van een religieuze praktijk: een rejectionistische benadering die de lichamelijke integriteit in samenhang met de vrije wil van het kind als enige en doorslaggevende factor rekent in de beoordeling van de toelaatbaarheid van jongensbesnijdenis.[70] Deze rejectionistische benadering negeert in het geheel de religieuze dimensie van jongensbesnijdenis.

64 Vgl. R.T. Ahdar, 'The Vulnerability of Religious Liberty in Liberal States', *Religion & Human Rights: An International Journal* 2009, p. 177-196. Zie voor de Nederlandse discussie hierover W. van der Burg, *Over religie, moraal en politiek*, Kampen: Ten Have 2005, p. 32-42.

65 Vgl. D. Grimm, 'Conflicts between General Laws and Religious Norms', *Cardozo Law Review* 2009, p. 2369-2382.

66 B. Leiter, 'Foundations of Religious Liberty: Toleration or Respect', *San Diego Law Review* 2010, p. 935-960.

67 Vgl. A.D. Renteln, *The Cultural Defense*, Oxford: Oxford University Press 2004. Renteln ziet *religieuze* gedragingen ook als een soort culturele handelingen, zie, p. 214 van haar boek. Ongetwijfeld heeft die zienswijze iets te maken met haar cultuurbegrip, maar vaststaat dat tegenwoordig een scherper onderscheid wordt gemaakt tussen *religieuze* gedragingen en culturele handelingen.

68 De Blois 2015, p. 50-51.

69 S. Wahedi, 'Marginaliseren van godsdienstvrijheid door abstraheren van de religieuze dimensie', *Religie & Samenleving* 2014, p. 128-147.

70 Zie over het concept van 'politiek rejectionisme': Wahedi 2015, p. 21: 'Dat wil zeggen: het sterk afwijzen, afkeuren en bagatelliseren van de legitieme gronden waarop een praktijk plaatsvindt in de samenleving.'

Pragmatisme via 'praktische tolerantie': de resolutie uit 2015

In haar resolutie uit 2015 bepleitte de Parlementaire Assemblee met een beroep op solidariteit en het principe van verdraagzaamheid om de rituele jongensbesnijdenis toe te staan. Weliswaar raakt deze omstreden praktijk volgens de Assemblee ook aan kinderrechten, maar onder omstandigheden, zoals de juiste uitvoering door een bekwaam persoon, moet het mogelijk zijn voor ouders om hun religieuze traditie in stand te houden. Het belang van religieuze manifestatie prevaleert hier duidelijk boven het ontbreken van de toestemming van het kind voor zijn besnijdenis. Dit alles wordt, zoals gezegd, gerechtvaardigd met een beroep op wederzijds begrip in een tijd waarin xenofobie en radicalisme de kop opsteken.[71]

De lijn van de Parlementaire Assemblee in de beoordeling van rituele jongensbesnijdenis lijkt op wat rechtsfilosoof Brian Leiter in zijn boek *Why Tolerate Religion?* 'praktische tolerantie' noemt.[72] De vraag of godsdienst in het bijzonder dient te worden beschermd vanuit de constitutie, beantwoordt hij vanuit het paradigma van tolerantie. Het niet toelaten van de onwelgevallige praktijken van anderen zou volgens Leiter leiden tot een hobbesiaanse 'oorlog van allen tegen allen'.[73] Om dit te voorkomen worden om puur instrumentele redenen verschillende praktijken toegelaten, zonder dat bekend is wat de morele grondslagen zijn voor het laten voortbestaan van zulke praktijken. Niet zelden ontbreken deze grondslagen, omdat kennelijk het bestaan van verschillende praktijken *an sich* wordt beschouwd als een moreel recht, wat er ook zij van de heersende afkeuring ten opzichte van een bepaalde praktijk. Tolerantie is volgens Leiter in dit soort gevallen niet meer dan een pragmatisch compromis. Immers, het actief bestrijden van de onwenselijk geachte praktijken van 'die ander' is niet in het belang van de samenleving als geheel. Het uitbannen van zulke praktijken vraagt om grote offers, omdat gelovigen niet snel zullen accepteren dat een praktijk niet langer is toegestaan. Dat is onder meer aan de orde geweest bij de Duitse discussie over de strafbaarheid van jongensbesnijdenis. Duitse joden zeiden massaal in Israël of andere landen hun zonen te zullen besnijden als jongensbesnijdenis op religieuze gronden zou worden verboden.[74]

Leiter meent dat er geen principiële gronden zijn voor tolerantie van godsdienstuitoefening.[75] Daarom dient deze op praktische gronden te worden getolereerd.[76] Kennelijk meent Leiter dat het niet mogelijk is om gelovigen te overtuigen van de schadelijkheid van bepaalde religieuze handelingen. De wijze waarop Leiter praktische tolerantie presenteert, lijkt op tolerantie uit onmacht: 'men wil bepaalde

71 Resolutie 2076 (2015) van de Parlementaire Assemblee.

72 Leiter 2013.

73 Binnen de literatuur is dit argument al eens eerder genoemd om de afwijkende praktijken van minderheden te tolereren. Zie K.M. Sullivan, 'Religion and Liberal Democracy', *University of Chicago Law Review* 1992, p. 195-223.

74 Zie voor de 'bedenkelijke' gevolgen van de strafbaarstelling van jongensbesnijdenis: Jörg 2013, p. 166-167.

75 De discussie over de principiële gronden van tolerantie voor godsdienstuitoefening laat ik voor wat het is. Zij is buiten het bereik van deze bijdrage.

76 Leiter 2013, p. 22-27. Zie verder B. Leiter, 'Foundations of Religious Liberty: Toleration or Respect?', *San Diego Law Review* 2010, p. 935-959, i.h.b. p. 941-951.

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praktijken liever niet zien, maar het is even niet anders'. Anders dan Leiter zou ik willen bepleiten dat praktische tolerantie ook ruimte moet laten voor de mogelijkheid dat gelovigen door middel van voorlichting en dialoog tot inkeer komen. Inenting is een goed voorbeeld in dit kader. Hoewel een groot deel van de orthodox-gereformeerden in het verleden om religieuze gronden hier van afzag, vaccineert een steeds grotere groep gereformeerden tegen mazelen, polio en andere kwalen.[77]

Afronding

Een groot probleempunt in de beoordeling van de toelaatbaarheid van jongensbesnijdenis is dat iedere interventie van overheidswege die leidt tot fundamentele aanpassingen rondom het besnijdenisproces, zoals het moment waarop de besnijdenis plaats mag vinden, door minderheidsgroepen uitgelegd zal worden als ontoelaatbare bemoeienis in religieuze kwesties en privéaangelegenheden. De discussie rondom de toelaatbaarheid van deze praktijk legt een conflict bloot tussen verschillende waarden: adequate bescherming van godsdienstvrijheid en het waarborgen van het recht op de lichamelijke integriteit. Tegen deze achtergrond kan het beoordelingskader van rituele jongensbesnijdenis op drie verschillende manieren worden weergegeven, zoals dat ook blijkt uit de analyse van de rechtspraak en de politieke ontwikkelingen binnen de Raad van Europa. De eerste benadering is het voorkomen van favoritisme: de lijn van A-G Aben. De tweede benadering is de omarming van het rejectionisme: de resolutie uit 2013. De derde benadering is de neiging tot pragmatisme via praktische tolerantie: de resolutie uit 2015.

Is er nog een vierde benadering in de beoordeling van rituele jongensbesnijdenis? Het antwoord op deze vraag hangt samen met de twee fundamentele vragen die in de introductie van deze bijdrage zijn opgeworpen: Is rituele jongensbesnijdenis een toelaatbare praktijk? Zo ja, wat zijn de grondslagen van tolerantie voor deze praktijk? Op basis van een reconstructie van het juridische en politieke beoordelingskader van deze praktijk blijkt dat zij onder bepaalde voorwaarden als toelaatbaar kan worden gekwalificeerd. Voor het antwoord op de tweede vraag zoek ik geen aansluiting bij de principiële gronden voor tolerantie van religieuze praktijken. Dat vergt immers een andere analyse, die het bereik van deze bijdrage te buiten gaat. Ik beperk mij daarom tot de praktische gronden van tolerantie.

Deze vierde benadering biedt een werkbaar kader om de toelaatbaarheid van jongensbesnijdenis te beoordelen. Dit praktische beoordelingskader vloeit voort uit het idee van actieve tolerantie waarin de dialoog 'en dus soms [ook] de felle confrontatie' het vertrekpunt vormen om de samenleving te verrijken.[78] Dit beoordelingskader stoelt op aandacht voor het idee van vreedzaam naast elkaar leven binnen liberale democratieën; de gedachte dat de praktijk die aan de orde is, in redelijkheid niet onaanvaardbaar is; en de verplichting tot voorlichting aan ouders

77 Zie in dit verband de doorwrochte analyse van G.H. Spruyt, 'Politicians and epidemics in the Biblebelt', ingediend bij *Utrecht Law Review*.

78 Van der Burg 2005, p. 173.

over de gevolgen van de traditie die zij willen praktiseren. Deze benadering in de beoordeling van rituele jongensbesnijdenis is wat anders dan 'favoritisme' van gelovigen.

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De strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context**

Sohail Wahedi & Renée Kool

Meisjesbesnijdenis is in Nederland en andere Europese landen verboden. Ondanks dit verbod is van succesvolle handhaving geen sprake. Frankrijk vormt in dit verband een uitzondering. Deze bijdrage analyseert en vergelijkt de strafrechtelijke aanpak in Nederland, Frankrijk en Engeland. Het Franse 'succes' zal genuanceerd worden in het licht van de heersende opvattingen over multiculturalisme en de gedachten over de ruimte die het strafrecht zou moeten bieden voor afwijkende praktijken van minderheidsgroepen.

Inleiding

Westerse democratieën worstelen sinds enkele decennia met de toelaatbaarheid van praktijken die geen oorsprong hebben in hun samenlevingen. Het betreft hier enkele controversiële praktijken die ernstig inbreuk maken op fundamentele mensenrechten. Denk aan eergerelateerd geweld, huwelijksdwang en meisjesbesnijdenis.[1] De constatering dat deze praktijken op westerse bodem plaatsvinden, leidt steevast tot maatschappelijke ophef en de roep om expliciete strafbaarstelling.[2] De strafwaardigheid van dergelijke praktijken is hiermee doorgaans een gegeven, waarmee de vraag naar de betekenis van de culturele context en de religieuze dimensie voor de vaststelling van wederrechtelijkheid aan betekenis inboet. In deze benadering schuilt het gevaar voor verlies van gezag voor de strafrechtspleging. Strafbaarstelling en handhaving vereisen immers legitimiteit, te

* Deze bijdrage bouwt voort op R.S.B. Kool & S. Wahedi, 'European Models of Citizenship and the Fight Against Female Genital Mutilation', in: S.N. Romaniuk & M. Marlin (red.), *Development and the Politics of Human Rights*, Boca Raton: CRC Press (Taylor & Francis Group) 2015, p. 206-221; R.S.B. Kool & S. Wahedi, 'Criminal enforcement in the area of female genital mutilation in France, England, and the Netherlands: a comparative law perspective', *International Law Research* 2014, p. 1-15; R.S.B. Kool, 'Strafrechtelijke handhaving van meisjesbesnijdenis in rechtsvergelijkend perspectief', in: E. Bleichrodt e.a., *Onbegrensd strafrecht. Liber amicorum Hans de Doelder*, Nijmegen: Wolf Legal Publishers 2013, p. 23-35.

* De auteurs zijn prof. Maurits Berger, prof. Wibren van der Burg, dr. Jeroen Temperman en de redactie van het tijdschrift zeer dankbaar voor hun commentaar op de conceptversie van deze bijdrage.

1 Zie voor de Nederlandse discussie de dissertaties van M. Siesling, *Multiculturaliteit en verdediging in strafzaken*, Deventer: Kluwer 2006; J. ten Voorde, *Cultuur als verweer*, Nijmegen: Wolf Legal Publishers 2007; W.M. Limborgh, *Culturele vrijheid en het strafrecht*, Nijmegen: Wolf Legal Publishers 2011. Zie verder de lezenswaardige bijdrage van S.W.E. Rutten, 'Moslims in de Nederlandse rechtspraak', *Recht van de Islam* 1986, 4, p. 55-74.

2 Kritisch: M. Dustin, 'Female Genital Mutilation/Cutting in the UK', *European Journal of Women's Studies* 2010, p. 1-31, i.h.b. p. 19.

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vinden in een zo breed mogelijk gedragen aanvaarding van de strafwaardigheid van het handelen en de daaraan gekoppelde sanctionering. Binnen westerse samenlevingen die gekenmerkt worden door immigratie en daarmee gepaarde gaande import van omstreden culturele en religieuze praktijken, is het verwerven van zo'n breed draagvlak niet eenvoudig.

Over de verhouding tussen de multiculturele samenleving en het strafrecht is de afgelopen jaren veel geschreven.[3] Dat geldt ook voor de problematiek van deze bijdrage: meisjesbesnijdenis.[4] Niettemin is er voldoende aanleiding om te schrijven over dit onderwerp. Op nationaal niveau speelt de afhandeling van de eerste strafzaak waarin werd vervolgd voor meisjesbesnijdenis.[5] Hiernaast zou een tweede zaak op komst zijn,[6] maar omdat niet kon worden vastgesteld of de besnijdenis ná de komst naar Nederland of eerder had plaatsgevonden, bleef vervolging voor meisjesbesnijdenis uit.[7] Na 2014 is deze praktijk niet meer onder de aandacht van de strafrechter gebracht.[8] Dit toont wellicht aan hoe gecompliceerd de strafrechtelijke aanpak ligt. Met het oog hierop heeft de wetgever de strafvorderlijke bevoegdheden onlangs nog verruimd.[9] Op de achtergrond speelt de toenemende internationale aandacht voor het praktiseren van meisjesbesnijdenis buiten Afrika, waar deze praktijk van oudsher wijdverspreid is.[10] Zo vindt meisjesbesnijdenis plaats in onder meer Iran, Iraaks Koerdistan, Maleisië en Indonesië.[11]

Wat verder ook zij van de nationale en internationale ontwikkelingen, vaststaat dat in de theorievorming over de aanpak van dit verschijnsel geen eenduidige verklaring te vinden is voor het uitblijven van een succesvolle strafrechtelijke bestrijding daarvan.[12] Tot op heden hebben enkel in Frankrijk strafvervolgingen ter zake plaatsgevonden.[13] Frankrijk kent een geheel eigen model van burgerschap dat van invloed is op de multiculturele vraagstukken.[14] Zou dit ook 'het Franse

3 O.a. Siesling 2006; Ten Voorde 2007; Limborgh 2011.

4 We gebruiken de term 'meisjesbesnijdenis' vanwege het neutrale karakter daarvan.

5 Overigens resulteerde dit in eerste én tweede aanleg in vrijspraak: Rb. Haarlem 11 september 2009, ECLI:NL:RBHAA:2009:BJ7447; Hof Amsterdam 23 december 2010, ECLI:NL:GHAMS:2010:BO8531.

6 'Somalisch echtpaar pas later berecht', *AD/Rotterdams Dagblad* 18 januari 2013, p. 5. 'Het koppel (…) [wordt tevens vervolgd] voor de besnijdenis in het buitenland van de twee oudste dochters.'

7 Rb. Rotterdam 22 oktober 2014, ECLI:NL:RBROT:2014:9279.

8 Dat baseren we op de resultaten die zoektermen als 'vrouwelijke genitale verminking' en 'meisjesbesnijdenis' opleveren op rechtspraak.nl.

9 *Stb*. 2013, 95.

10 UNICEF, *Female Genital Mutilation/Cutting: A global concern*, UNICEF: New York 2016.

11 K. Ahmady, 'A Comprehensive Research Study on Female Genital Mutilation/Cutting (FGM/C) in Iran', 2015; Wadi, *Female Genital Mutilation in Iraqi-Kurdistan*, Frankfurt am Main: WADI e.V. 2010.

12 Vanuit de Verenigde Naties is herhaaldelijk gewezen op de gebrekkige (strafrechtelijke) aanpak van meisjesbesnijdenis. Vgl. UNFPA, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation*, New York: UNFPA 2014.

13 Een overzicht van verschillen biedt: Kool & Wahedi 2015, p. 209-210.

14 A. Guiné & F.J. Moreno Fuentes, 'Engendering Redistribution, Recognition, and Respresentation: The case of Female Genital Mutilation (FGM) in the United Kingdom and France', *Politics Society* 2007, p. 477-519.

succes' in de strafrechtelijke aanpak van meisjesbesnijdenis kunnen verklaren? Om deze relatie te onderzoeken is de centrale hypothese van deze bijdrage dat de strafrechtelijke aanpak van meisjesbesnijdenis beïnvloed wordt door heersende opvattingen over burgerschap en het multiculturalisme. Deze hypothese wordt getoetst aan de hand van de Nederlandse, Engelse[15] en Franse benadering inzake de strafrechtelijke bestrijding van meisjesbesnijdenis. Deze laatste twee landen zijn bewust gekozen vanwege hun onderling tegengestelde rechtsculturele opvattingen over de verhouding tussen het strafrecht en het multiculturalisme.[16] De focus op burgerschap en de doorwerking daarvan op de nationale besluitvorming omtrent strafbaarstelling vormen een belangrijke afbakening binnen deze bijdrage.[17]
Tegen deze achtergrond heeft onze bijdrage de volgende opbouw. Eerst wordt ingegaan op de internationaal gedeelde opvatting dat meisjesbesnijdenis noodzaakt tot strafbaarstelling. Vervolgens wordt de aanpak van meisjesbesnijdenis in Nederland, Frankrijk en Engeland geanalyseerd in het licht van de heersende opvattingen over burgerschap.

Achtergrond

Meisjesbesnijdenis wordt door de World Health Organization (WHO) ofwel Wereldgezondheidsorganisatie omschreven als 'de gedeeltelijke of volledige verwijdering van de externe vrouwelijke genitaliën of elk ander letsel aan vrouwelijke genitaliën om niet-medische redenen'.[18] Wereldwijd zijn 130 tot 150 miljoen meisjes en vrouwen besneden. Hiernaast riskeren jaarlijks nog ongeveer 3 miljoen meisjes wereldwijd de besnijdenis.[19] In Europa ligt dit aantal meisjes op jaarlijks 180.000.[20]
Hoewel meisjesbesnijdenis eerder regel is dan uitzondering in grote delen van Afrika, kent zij geen uniforme toepassing. De WHO onderscheidt vier typen, die naar ernst oplopen van relatief licht naar zwaar: clitoridectomie (type I), excisie (type II), infibulatie (type III) en een restcategorie waar incisie onder valt (type IV).[21] In de juridische analyses over de toelaatbaarheid van deze praktijk wordt doorgaans onderscheid gemaakt tussen de relatief lichte (type I en IV) en ernstige

15 Waar we spreken over Engeland doelen we op Engeland en Wales.
16 Vgl. W. Dekkers, C. Hoffer & J-P. Wils, *Besnijdenis, lichamelijke integriteit en multiculturalisme*, Budel: Damon 2006, p. 19.
17 Onze bijdrage zal de toelaatbaarheid van meisjesbesnijdenis niet beoordelen in het licht van godsdienstvrijheid.
18 World Health Organization, *An update on WHO's work on Female Genital Mutilation (FGM)*, New York: WHO 2011, p. 1.
19 World Health Organization 2011.
20 A. Macfarlane e.a., *Prevalence of Female Genital Mutilation in England and Wales: National and local estimates*, Londen: City University London 2015, p. 13.
21 World Health Organization 2011, p. 1.

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varianten (type II en III) van meisjesbesnijdenis.[22] Deze belangrijke nuance wordt in het maatschappelijke en politieke debat echter veelal genegeerd.[23]
Infibulatie en excisie gelden als relatief ingrijpende varianten. Bij deze ingrepen wordt de vaginale opening verkleind door het verwijderen en dichtnaaien van de grote of kleine schaamlippen; soms wordt ook de clitoris verwijderd.[24] Clitoridectomie, waarbij de top of de voorhuid van de clitoris wordt weggehaald, wordt vergeleken met jongensbesnijdenis.[25] Sommige auteurs menen dat deze ingreep toelaatbaar moet zijn.[26] Maar ook het omgekeerde geldt. Zo werd door A-G Silvis betoogd dat de strafbaarheid van de lichtste variant van meisjesbesnijdenis 'op voorhand niet [uitsluit] dat in een gelijkwaardig beoordelingsschema de circumcisie bij jongens onder omstandigheden ook voor kwalificering als mishandeling in aanmerking kan komen'.[27] Tot slot bestaat er een restcategorie. Deze heeft betrekking op uiteenlopende niet-medisch geïndiceerde, min of meer schadelijke handelingen, uitgevoerd op vrouwelijke genitaliën, zoals incisie: een prikje in de voorhoud van de clitoris.
Een eenduidige verklaring voor deze eeuwenoude praktijk is er niet.[28] Er zijn diverse islamitische, joodse en christelijke groepen die uit naam van het geloof meisjes besnijden.[29] Tegelijkertijd wordt in de literatuur en vanuit de geloofsgemeenschappen opgemerkt dat meisjesbesnijdenis niet zozeer een religieus maar een traditioneel gebruik betreft.[30]

Een religieuze praktijk?
Er is de laatste tijd echter in toenemende mate aandacht voor de relatie tussen meisjesbesnijdenis en de islam. Uit recente studies blijkt dat Iraniërs (vooral de relatief lichte variant),[31] Koerden (zowel de relatief lichte als ingrijpende varian-

22 Vgl. Limborgh 2011, p. 179. Zie ook W.M. Limborgh, 'Dient meisjesbesnijdenis op culturele gronden te worden getolereerd?', *NJB* 2008, p. 2514-2520; K. Bartels & I. Haaijer, *'s Lands wijs 's lands eer? Vrouwenbesnijdenis en Somalische vrouwen in Nederland*, Rijswijk: Centrum Gezondheidszorg Vluchtelingen 1992.
23 Illustrerend in dit verband is het antwoord op Kamervragen van de PVV, gesteld naar aanleiding van het proefschrift van Limborgh, die de toelaatbaarheid bepleitte van de lichtste variant van meisjesbesnijdenis. De minister schreef daarin dat meisjesbesnijdenis ongeacht haar vorm altijd een strafbaar feit oplevert in Nederland. Zie *Aanhangsel Handelingen II* 2011/12, 511.
24 D. Dubourg & F. Richard, *Studie over de prevalentie van vrouwelijke genitale verminkingen en van het risico op vrouwelijke genitale verminkingen in België*, Antwerpen: Instituut voor Tropische Geneeskunde 2010, p. 5.
25 Vgl. Siesling 2006, p. 36. Zie verder Dekkers, Hoffer & Wils (2006), die het verschil in strafrechtelijke benadering van de lichtste variant van meisjesbesnijdenis en rituele jongensbesnijdenis uitleggen in het licht van de heersende opvattingen over wat wel en niet toelaatbaar is als (afwijkende) culturele uiting.
26 Bartels & Haaijer 1992; Limborgh 2011 en 2008: hij bepleit uitsluitend de toelaatbaarheid van incisie.
27 Conclusie van A-G Silvis bij HR 5 juli 2011, *NJ* 2011, 466, overweging 10.
28 We hanteren hier bewust de neutralere term 'praktijk' in plaats van 'traditie'.
29 Duborg & Richard 2012, p. 6.
30 H.D. Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation', *Sex Roles* 2004, p. 340.
31 Ahmady 2015.

ten, zoals infibulatie en clitoridectomie),[32] Maleisiërs (de relatief lichte variant)[33] en Indonesiërs (in het algemeen de relatief lichte variant)[34] aan meisjesbesnijdenis doen. Tegen deze achtergrond wordt binnen het politieke discours gesproken over de 'selectieve aandacht' van mensenrechtenorganisaties, die deze praktijk presenteren als een 'Afrikaans probleem'.[35]

In 2006 heeft de gezaghebbende Egyptische Al-Azhar Universiteit een verklaring naar buiten gebracht waarin wordt onderstreept dat meisjesbesnijdenis weliswaar een oude traditie is die plaatsvindt binnen verschillende islamitische kringen, maar dat de Koran en de Hadith geen solide grondslag bieden voor een rechtvaardiging van deze praktijk.[36] In de periode voor en na deze stellingname is vanuit de Azhar kritiek geleverd op deze praktijk. Zo is in 2005 gezegd dat alle vormen van meisjesbesnijdenis misdadig zijn en dat er geen verband bestaat tussen de islam en deze praktijk.[37] Dat laatste is ook herhaald door wijlen Sheikh Tantawi, die als oud-grootmoefti en grootimam van de Azhar veel aanzien genoot onder moslims wereldwijd.[38]

Tegen deze achtergrond kan worden gesteld dat de relatie tussen de islam en meisjesbesnijdenis genuanceerder ligt dan soms wordt gepresenteerd in publieke debatten.[39] Dit geldt ook voor de relatie tussen deze praktijk en het christendom. Zo is meisjesbesnijdenis wijdverspreid onder Egyptische Kopten, ondanks de veroordeling ervan vanuit de koptische kerk.[40] Er is evenmin steun voor deze praktijk binnen de joodse gemeenschap, desalniettemin komt zij voor bij de Falasha's (een joodse gemeenschap uit Ethiopië).[41]

Een genderpraktijk?

Meer algemeen wordt aangenomen dat meisjesbesnijdenis ongeacht haar vorm verband houdt met de status van de vrouw binnen de gemeenschap en als een initiatieritueel moet worden gezien.[42] Via de besnijdenis onderschrijft het meisje de groepsnorm waarbinnen besneden zijn symbool staat voor kuisheid. Een kritische interpretatie hiervan klinkt door in de internationaal gedeelde opvatting dat

32 Wadi 2010, p. 8.
33 Vgl. A. Rashid, S. Patil & A. Valimalar, 'The Practice of Female Genital Mutilation among the Rural Malays in North Malaysia', *The Internet Journal of Third World Medicine* 2009, p. 4.
34 L. Octavia, 'Circumcision and Muslim Women's Identity in Indonesia', *Indonesian Journal for Islamic Studies* 2014, p. 419-457.
35 Zie Kamervragen van PVV-lid De Roon, *Aanhangsel Handelingen II* 2014/15, 2966.
36 N.M. Dessing, 'Besnijdenis en recht', *Recht van de Islam* 2010, p. 55.
37 S. Hassan, 'Reclaiming Islam', in: R.A.E. Hunt & G.C. Jenks (red.), *Wisdom and Imagination: Religious Progressives and the Search for Meaning*, Morning Star Publishing 2014, p. 183.
38 A.A. Hadi, 'A Community of Women Empowered: the Story of Deir El Barsha', in: R.M. Abusharaf (red.), *Female Circumcision*, Philadelphia: University of Pennsylvania Press 2006, p. 110.
39 J.M. Otto, 'Besnijdenis en islam, het ligt ingewikkeld', *Trouw* 27 februari 2014, Opinie, p. 21.
40 W.R. Elseesy, 'Female circumcision in non-Muslim females in Africa', *African Journal of Urology* 2014, p. 102-103.
41 I. El-Damanhoury, 'The Jewish and Christian view on female genital mutilation', *African Journal of Urology* 2013, p. 127-129.
42 N. Berkovitch & K. Bradley, 'The globalization of women's status: Consensus/Dissensus in the World Polity', *Sociological Perspectives* 1999, p. 488.

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meisjesbesnijdenis een genderpraktijk is die tot doel heeft de vrouw aantrekkelijk te maken voor de man en tevens haar seksuele gevoelens in toom te houden.[43]
Hoewel deze lezing wordt onderschreven door de internationale gemeenschap en is terug te vinden in internationale regelgeving, zijn er ook auteurs die hier vraagtekens bij zetten.[44] Zo wordt terecht of onterecht een vergelijking gemaakt met cosmetische ingrepen als schaamlipcorrecties en borstvergrotingen.[45] Getuigt de straffeloosheid van deze 'westerse' subculturele esthetische ingrepen niet van 'meten met twee maten'? En wat te denken van de absolute strafbaarstelling van oordeelkundig uitgevoerde besnijdenissen waarbij de toestemming van de vrouw irrelevant is, als neergelegd in Belgische en Engelse wetgeving?[46]
Een kritische benadering werkt verhelderend doordat zodoende de politieke aard van internationale regelgeving bloot wordt gelegd, alsook de daaraan ten grondslag liggende beeldvorming over omstreden culturele en religieuze praktijken. Zulke regels vormen immers de uitkomst van politieke onderhandelingen, waarbij, wanneer het over mensenrechten gaat, het westers liberale discours dominant lijkt te zijn.[47] Niettemin kan men de vraag stellen of een politieke benadering de kans op een effectieve aanpak van meisjesbesnijdenis beperkt. Er lijkt zodoende immers ruimte te ontstaan voor een rechtvaardiging van (bijvoorbeeld de lichtste variant van) meisjesbesnijdenis via een beroep op culturele en/of religieuze motieven. Het zou immers gaan om het 'religieuze voorschrift, waaraan de gelovige (...) zich niet wil onttrekken'.[48]

Het mensenrechtenperspectief

In 1952 werd voor het eerst in Resolutie 445C (XIV) van de Economic and Social Council de lidstaten voorzichtig gevraagd om noodzakelijke maatregelen te treffen tegen praktijken die de fysieke integriteit van vrouwen aantasten.[49] De WHO weigerde destijds medewerking te verlenen.[50] Het sociaal-culturele aspect van meisjesbesnijdenis oversteeg kennelijk de individuele belangen van meisjes. Pas in 1994 is meisjesbesnijdenis in al haar vormen veroordeeld als mensenrechtenschending vanuit de Verenigde Naties. Sindsdien hebben de Verenigde Naties sta-

43 Berkovitch & Bradley 1999, p. 488; Dubourg & Richard 2010, p. 6.
44 Dustin 2010; M. van den Brink & J. Tigchelaar, 'Shaping Genitals, Shaping Perceptions', *Netherlands Quarterly of Human Rights* 2012, p. 431-459.
45 Dustin 2010, p. 10-12. Zij zegt: 'Like FGM/C, these are therapeutically unnecessary surgeries carried out with the intention of making women fit a cultural norm.'
46 Zie art. 409 §1 Belgisch Strafwetboek respectievelijk art. 1 lid 5 Female Genital Mutilation Act 2003.
47 E. Brems, 'Enemies or allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse', *Human Rights Quarterly* 1997, p. 136-164. Voorts: H. Lewis, 'Between *Irua* and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide', *Harvard Human Rights Journal* 1995, p. 1-55; C. Smith, 'Who defines "Mutilation"? Challenging Imperialism in the Discourse of Female Genital Cutting', *Feminist Formations* 2011, p. 25-46.
48 Vgl. N. Jörg, 'Jongensbesnijdenis strafbaar?', in: C. Kelk, F. Koenraadt & D. Siegel (red.), *Veelzijdige gedachten*, Den Haag: Boom Juridische uitgevers 2013, p. 157-167, i.h.b. p. 164.
49 United Nations, Yearbook of the International Law Commission 1952.
50 United Nations, Yearbook of the United Nations of the International Law Commission 1959.

ten opgeroepen wetgeving te ontwikkelen die effectieve bescherming kan bieden tegen deze praktijk.[51] Ook in de literatuur is veel steun voor de opvatting dat meisjesbesnijdenis inbreuk maakt op het recht op lichamelijke integriteit (van belang bij alle vormen), het recht op leven, waaronder te begrijpen het recht op reproductie, en het recht niet onderworpen te worden aan martelpraktijken (met name van belang bij de zware varianten, zoals excisie).[52] De culturele achtergrond van meisjesbesnijdenis staat een veroordeling van al haar vormen niet in de weg. Integendeel, binnen internationale verdragen is het beroep op traditie als rechtvaardiging voor gewelddadige praktijken uitdrukkelijk uitgesloten.[53]

Het EVRM en overige internationale regelgeving

Het Europees Hof voor de Rechten van de Mens (EHRM) heeft nog geen zaak voorgelegd gekregen waarin werd geklaagd over een tekort aan geboden rechtsbescherming tegen meisjesbesnijdenis. Niettemin heeft dit hof in zijn uitspraken in verband met het vreemdelingenrecht meermalen beslist dat meisjesbesnijdenis, ongeacht haar vorm, in strijd is met het verbod op marteling en onmenselijke of vernederende behandeling (artikel 3 van het Europees Verdrag voor de rechten van de mens (EVRM)).[54]

Dit oordeel werpt zijn schaduw vooruit wanneer het gaat om de vraag welke bescherming lidstaten hebben te bieden in het licht van artikel 2 EVRM (het recht op leven) en meer in het bijzonder op grond van artikel 8 EVRM (het recht op privacy, met de daarin besloten aanspraak op lichamelijke en psychische integriteit). Voor beide bepalingen geldt dat het EHRM zich in die context niet heeft uitgesproken over de vraag of meisjesbesnijdenis een inbreuk daarop impliceert. Op grond van de uitspraken van het EHRM over andersoortige ernstige inbreuken op het recht op leven respectievelijk het recht op lichamelijke en psychische integriteit is echter zonder meer af te leiden dat lidstaten gehouden zijn een adequaat en effectief niveau van bescherming te bieden. Dit impliceert ook een plicht tot ade-

51 P. Wheeler, 'Eliminating FGM: The Role of the Law', *The International Journal of Children's Rights* 2004, p. 257.

52 Wheeler 2004, p. 259 e.v.

53 Vgl. Verdrag van Istanbul (Verdrag van de Raad van Europa inzake het voorkomen en bestrijden van geweld tegen vrouwen en huiselijk geweld), art. 12.

54 EHRM 20 september 2011, 8969/10 (Omeredo/Oostenrijk); EHRM 17 mei 2011, 43408/08 (Izevbekhai C.S./Ierland), par. 73; EHRM 8 maart 2007, 23944/05 (Collins & Akaziebie/Zweden). Dit standpunt wordt overigens gedeeld door de Nederlandse bestuursrechter, die in zijn oordeel niet differentieert naar de ernst van de ingreep. Zie ook: M. van den Brink & J. Tigchelaar, 'Over de schouders van ouders: Een interne vergelijking van het Nederlandse overheidsbeleid ten aanzien van besnijdenis j/m', in: Katharina Boele-Woelki & Susanne Burri (red.), *De rol van de staat in familierelaties: meer of minder?*, Den Haag: Boom Juridische uitgevers 2015, p. 137-165, zie i.h.b. p. 153-155.

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quate strafbaarstelling en handhaving.[55] Deze positieve verplichting geldt temeer wanneer het gaat om bescherming van kwetsbare individuen.[56]
Over de wijze waarop deze bescherming moet worden gecreëerd en geëffectueerd, spreekt het Europese Hof zich niet uit. Het is aan de lidstaten om daar binnen de context van het nationale recht uitvoering aan te geven. Vereist is wel dat de op nationaal niveau geboden bescherming voldoet aan de hoge maatstaven die het EHRM daaraan stelt. Het EHRM staat niet alleen in zijn opvatting. Ook andere internationale normen verplichten staten om alle vormen van meisjesbesnijdenis adequaat en effectief te bestrijden.[57] Deze internationaal gedeelde opvatting, met de daarin gelegen positieve verplichting van bescherming van kwetsbaren, werpt haar schaduw vooruit op de door de nationale autoriteiten te treffen maatregelen. De associatie van meisjesbesnijdenis met verminking versterkt dit en leidt ertoe dat er weinig ruimte is voor differentiatie: bestrijding van al haar vormen via het strafrecht ligt voor de hand. Dit wordt ook niet betwist door Europese wetgevers die geconfronteerd worden met de problematiek rondom meisjesbesnijdenis.[58] De maatregelen zijn vooral gericht op bescherming van meisjes die in Europa wonen, maar die een besnijdenis riskeren in hun land van herkomst.[59]
Echter, de strafrechtelijke bestrijding toont sterke verschillen in uitkomst. Dit doet de vraag rijzen waarom de inzet van het strafrecht niet in alle gevallen een effectief bestrijdingsmiddel blijkt te zijn.[60] Een mogelijke verklaring is het verschil in opvatting over de culturele exceptie in het strafrecht en de grenzen van erkenning voor culturele diversiteit.[61] Dit punt wordt hierna verder uitgewerkt aan de hand van het concept burgerschap.

Burgerschap en de aanpak van meisjesbesnijdenis

Republikeins, etnocentrisch of multicultureel?
De betekenis van burgerschap die centraal staat in deze bijdrage, heeft betrekking op de formele (dat wil zeggen: het beleidsniveau) en materiële (dat is het politiek-maatschappelijke niveau) ruimte die in een bepaalde samenleving bestaat voor diversiteit. Deze ruimte ziet dus op de mogelijkheden die een samenleving biedt voor het vertonen van gedragingen die in belangrijke opzichten afwijken van de

55 O.a. EHRM 26 maart 1985, 8978/80, par. 27 (X & Y/Nederland); EHRM 20 oktober 1998, 87/1997/871/1083, par. 115 (Osman/VK); EHRM 4 december 2003, 39272/98, par. 150 (M.C./Bulgarije); EHRM 27 september 2011, 29032/04, par. 108 (M. & C./Roemenië); EHRM 26 juli 2011, 9718/03, par. 51 e.v. (Georgel & Georgia Stoicescu/Roemenië).
56 R.S.B. Kool, 'The Dutch approach to female genital mutilation: the time for change has come', *Utrecht Law Review* 2010, 1, p. 51-71.
57 R.S.B. Kool, 'Appropriate and Effective Measures against FGM? A Reflection on Dutch Policy in Light of Article 5 CEDAW', *SIM special* 2010, 32, p. 67-89.
58 Kool & Wahedi 2015.
59 *Female genital mutilation in the European Union and Croatia*, European Institute for Gender Equality 2013, p. 25.
60 Voor een recent overzicht: S. Johnsdotter & R.M. Mestre i Mestre, *Female Genotl Mutilation in Europe: analysis of court cases*, European Commission, Luxemburg: Office of the European Union 2015.
61 Guiné & Fuentes 2007, p. 479.

dominante meerderheidsnorm.[62] Afhankelijk van de omvang van deze ruimte kent burgerschap drie verschillende modellen: republikeins, etnocentrisch en multicultureel.[63]

In een republikeins model, zoals het Franse, wordt de samenleving beschouwd als een ondeelbaar geheel waarin consensus bestaat over een aantal fundamentele normen en waarden. Daarom is assimilatie van groot belang om toegelaten te worden tot die samenleving. Nadrukkelijk afstand nemen van je oorspronkelijke achtergrond is daarbij een voorwaarde. Het behoud van de eigen cultuur staat geslaagd burgerschap in deze opvatting van burgerschap in de weg. Het behoud van de eigen identiteit is beperkt tot het private domein.[64] Maar ook een etnocentrisch model biedt weinig ruimte voor diversiteit: het streeft naar een homogene samenleving die zich vooral richt op culturele eenvormigheid.[65] Het verschil tussen deze twee modellen is genuanceerder dan op het eerste gezicht lijkt. Waar een natie binnen een republikeins model verenigd wordt door gedeelde waarden, zoals gendergelijkheid en de scheiding tussen kerk en staat, vindt vereniging binnen een etnocentrisch model plaats door middel van culturele integratie en dus culturele eenheid, waarbij de dominante meerderheidscultuur opgeld doet.[66]

Tot slot is er nog een multicultureel model. Dit model van burgerschap biedt veel ruimte voor diversiteit en accepteert verschillen. Engeland was jarenlang het boegbeeld van een multicultureel land. Ook voor Nederland gold lange tijd dat men een multicultureel model van burgerschap voorstond, zij het op andere wijze dan in Engeland.[67] Inmiddels bevat het Nederlandse integratiebeleid steeds meer etnocentrische aspecten.[68] Denk aan de participatieverklaring die nieuwkomers dienen te ondertekenen en waarin zij de basisprincipes van de Nederlandse samenleving, zoals 'vrijheid, gelijkwaardigheid en solidariteit', actief dienen te onderschrijven.[69] De gedachte hierachter is dat de samenleving alleen kan functioneren 'als iedereen die zich hier wil vestigen meedoet en de basisprincipes van de Nederlandse samenleving respecteert'.[70] Hoewel een dergelijke participatieverklaring begrijpelijk is, gezien de problematiek die samenhangt met de integratie van nieuwkomers, roept zij wel de vraag op hoeveel ruimte de samenleving biedt voor diversiteit.[71]

62 Guiné & Fuentes 2007, p. 480.
63 D. McCormick, 'Multiculturalism and its Discontents', *Human Rights Law Review* 2005, 1, p. 27-56.
64 WRR, *Identificatie met Nederland*, Amsterdam: Amsterdam University Press 2006, par. 4.3.
65 S. Saharso, 'Headscarves: A Comparison of Public Thought and Public Policy in Germany and the Netherlands', *Critical Review of International Social and Political Philosophy* 2007, p. 513-530.
66 Vgl. D. Meyerson, 'Multiculturalism, religion and equality', *Acta Juridica* 2001, p. 104-120, i.h.b. p. 104: 'The kind of religious freedom at issue here is the kind sought by nineteenth century German Jews who wished to be German in the street, Jewish at home.'
67 R. Koopmans e.a., *Contested Citizenship*, Minneapolis: University of Minnesota Press 2005.
68 Vgl. R.S.B. Kool, 'Drassige gronden voor strafbaarstelling. Het wetsvoorstel ter verruiming van de strafrechtelijke aanpak van huwelijksdwang', *Delikt en Delinkwent* 2011, p. 21-36.
69 *Kamerstukken II* 2015/16, 115, p. 1-2 (Invoering participatieverklaring voor nieuwkomers).
70 *Kamerstukken II* 2015/16, 115, p. 1-2 (Invoering participatieverklaring voor nieuwkomers).
71 Vgl. Guiné & Fuentes 2007, p. 479.

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De strafrechtelijke aanpak van meisjesbesnijdenis wordt hierna geanalyseerd in het licht van de Franse, Engelse en Nederlandse noties van burgerschap. Opmerking verdient dat werken met theoretische modellen onvermijdelijk afbreuk doet aan de nuances waarvan de omgang met culturele minderheidspraktijken op nationaal niveau getuigt. Niettemin kan op deze hypothetische wijze inzichtelijk worden gemaakt welke culturele aspecten een rol spelen bij de successen van een nationale aanpak ter bestrijding van meisjesbesnijdenis.

Frankrijk: een republikeinse benadering

Na de Tweede Wereldoorlog bestond in Frankrijk een sterke behoefte aan arbeiders.[72] Lange tijd gold een 'laissez-faire' wervingsbeleid. Onder invloed van de economische recessie maakte dit in de jaren zeventig plaats voor een 'etnocentrisch assimilatiebeleid'.[73] De Franse voorkeur voor een centralistische aanpak leidde tot een restrictiever assimilatiebeleid, gericht op het behoud van de Franse eenheid. Culturele verschillen moesten worden geminimaliseerd en nieuwkomers werden geacht zich aan te passen.[74] Het accent kwam te liggen op de integratie 'à la française', dat op tal van terreinen doorwerking vond, zo ook met betrekking tot de aanpak van meisjesbesnijdenis[75]

Overigens was binnen dit nieuwe assimilatiebeleid niet van meet af aan aandacht voor meisjesbesnijdenis. Integendeel, dankzij de overtuiging dat nieuwkomers bereid waren zich te assimileren heeft lange tijd een blinde vlek bestaan voor culturele ongelijkheden, zeker waar het de positie van vrouwen betrof. Er was geen steun voor de gedachte dat een zorgbeleid ontwikkeld zou moeten worden om 'sociaal, etnisch of religieus particularisme' binnen de minderheidsgroepen tegen te gaan.[76] Aanvankelijk werd meisjesbesnijdenis preventief aangepakt door inzet van bestaande wetgeving op het gebied van kinderbescherming. Later werd duidelijk dat met deze aanpak niet het gehoopte resultaat bereikt kon worden.

Het Franse publiek raakte in 1982 op indringende wijze bekend met meisjesbesnijdenis. In de media werd bericht over de dood van baby Bobo. Zij overleed als gevolg van zware verwondingen, opgelopen bij haar besnijdenis.[77] Deze baby was niet het enige slachtoffer. Hulpverleners werkzaam binnen de zuigelingenzorg en de jeugdgezondheidszorg (*Protection Maternelle et Infantile* (PMI)) waren vaker geconfronteerd met de gevolgen van meisjesbesnijdenis.[78] Die ontdekkingen waren mogelijk door de verplichte medische controle van kinderen tot aan het zesde levensjaar, waarbij als onderdeel van een algehele controle ook de genitaliën worden gecontroleerd.

72 WRR, *Immigratie- en integratieregimes in vier Europese landen*, Den Haag: WRR 2001, p. 83.
73 Guiné & Fuentes 2007, p. 490.
74 WRR 2001, p. 93.
75 B. Winter, 'Women, the Law and Cultural Relativism in France: the Case of Excision', *Journal of Women in Culture and Society* 1994, p. 939-973.
76 Guiné & Fuentes 2007, p. 491.
77 A. van der Kwaak & K. Bartels, 'Meisjesbesnijdenis in justitieel perspectief', *PROCES* 2002, p. 69.
78 Geschat wordt dat tussen de 42.000 en 61.000 vrouwen in Frankrijk zijn besneden. Ruim 4.000 andere meisjes lopen het risico te worden besneden; *L 'Institut national d'études démographiques* (INED) 2009, p. 3.

Mocht de PMI-arts een besnijdenis of een andere vorm van mishandeling constateren, dan is hij verplicht de *procureur de la République* in te lichten.[79] Zijn geheimhoudingsplicht staat deze melding niet in de weg.[80] Hoewel niet alle PMI-artsen en hulpverleners bereid zijn te voldoen aan deze meldplicht, werd deze vanaf de jaren tachtig van de vorige eeuw actief nageleefd in de regio Parijs.[81] Deze opstelling van de jeugdgezondheidszorg is uniek binnen West-Europa en zij is van cruciale betekenis geweest voor de ontsluiting van de problematiek aan justitie.[82]

Berechting en culturele verweren

Omdat meisjesbesnijdenis aanvankelijk niet was gekwalificeerd als een ernstig misdrijf, waren de straffen echter relatief laag.[83] Vrouwenrechtenorganisaties benadrukten dat vervolging van meisjesbesnijdenis vooral ook in het teken moest staan van preventie, en pleitten daarom voor zwaardere straffen en afdoening door het *Cour d'assises*.[84] Door zich als burgerlijke partij op te stellen in een aantal strafzaken wisten zij te bewerkstelligen dat meisjesbesnijdenis voortaan door deze hoogste feitenrechter wordt afgedaan.[85] Al met al zijn in Frankrijk tot op heden ongeveer veertig strafzaken afgedaan, waarin ongeveer negentig verdachten terechtstonden. In het merendeel van de zaken volgde een veroordeling, zij het dat de strafmaten uiteenliepen.[86]

In deze strafzaken werd regelmatig een cultureel verweer gevoerd waarin een beroep werd gedaan op de culturele achtergrond van de verdachte(n) om de besnijdenis te rechtvaardigen of afwezigheid van schuld te bepleiten. In een aantal zaken constateerden deskundigen overmacht bij de verdachte, welk verweer echter nimmer is gehonoreerd.[87] In andere gevallen beriepen verdachten zich op rechtsdwaling en stelden dat zij zich als immigrant niet bewust waren geweest van de strafbaarheid van meisjesbesnijdenis in Frankrijk.[88]

In de literatuur is gesuggereerd dat deze verweren bedoeld waren om de straftoemeting te beïnvloeden, niet om een vrijspraak of straffeloosheid te bewerkstelligen. Dat is ook deels gelukt. Ouders die vervolgd zijn voor meisjesbesnijdenis hebben betrekkelijk lage straffen gekregen. De culturele achtergrond van de ver-

79 J.H. Nijboer, N.M.D. van der Aa & T. Buruma, *Strafrechtelijke opsporing en vervolging van meisjesbesnijdenis*, Den Haag: Boom Juridische uitgevers 2010, p. 115.

80 Art. 4 respectievelijk art. 44 van de *Code de Déontologie Médicale*; de verplichting geldt voor artsen en hulpverleners.

81 In die regio is de concentratie van immigrantengroepen die meisjesbesnijdenis praktiseren hoog. Echter ook elders in Frankrijk zijn concentraties van betrokken groepen te vinden; de justitiële activiteit is daar lager. Zie: Nijboer e.a. 2010, p. 18.

82 Overigens lag de aanleiding tot het strafrechtelijk onderzoek in sommige zaken in ambtshalve bekend geworden misstanden, bijvoorbeeld naar aanleiding van medische complicaties (Nijboer e.a. 2010, p. 107).

83 Guiné & Fuentes 2007, p. 502.

84 Dit hof is belast met de afdoening van zware misdrijven (*crime*); het betreft juryrechtspraak.

85 Kool e.a. 2005, p. 66.

86 Nijboer e.a. 2010, p. 18.

87 Overigens is vanuit feministische hoek kritiek geleverd op zulke verweren; Winter 1994, p. 948. Zie voorts voor een beroep op dwaling: Johnsdotter & Mestre i Mestre 2015, p. 22-23.

88 Kool e.a. 2005, p. 75.

dachte en het niet willen doorbreken van het gezinsleven worden in dit verband als redenen genoemd. Daarentegen zijn besnijders veroordeeld tot onvoorwaardelijke hoge gevangenisstraffen, zeker wanneer zij betrokken waren bij een reeks besnijdenissen.[89]

Hoe de Franse aanpak te duiden?

In Frankijk hebben organisaties van uiteenlopende signatuur elkaar gevonden in de overtuiging dat een actieve inzet van het strafrecht noodzakelijk is in de bestrijding van meisjesbesnijdenis. Het is die eenheid die zichtbaar is naar buiten en die de aandacht heeft getrokken van andere Europese landen.[90] Echter, deze Franse eenheid is betrekkelijk. Van specifieke aandacht op wetgevend niveau was tot voor kort geen sprake, pleidooien vanuit vrouwenrechtenorganisaties om te komen tot invoering van een specifieke strafbaarstelling ten spijt.[91] Meisjesbesnijdenis valt onder commune delicten zoals (zware) mishandeling en, indien geïndiceerd, onder de levensdelicten. Specifieke strafbaarstelling werd gezien als symboolpolitiek die op gespannen voet zou staan met het legaliteitsbeginsel en het non-discriminatiegebod.[92] Niettemin is in 2010 een initiatiefwetsvoorstel ingediend, strekkende tot specifieke strafbaarstelling van alle vormen van meisjesbesnijdenis.[93]

Bovendien heeft het republikeins integratiebeleid met zijn nadruk op de gemeenschappelijke waarden van de Franse samenleving en de overtuiging dat nieuwkomers zouden assimileren, geresulteerd in 'official blindness' voor de gevolgen van diversiteit.[94] Deze beleidsmatige 'verblinding' is een struikelblok geweest voor een effectieve bescherming van vrouwen die vanwege hun culturele achtergrond terechtkomen in particularistische patronen waarin veel waarde wordt gehecht aan het behoud van de eigen, ten opzichte van de Franse samenleving 'afwijkende', praktijken, zoals de meisjesbesnijdenis.[95] Dit laat onverlet dat het Franse assimilatiebeleid aan de basis heeft gestaan van een gericht preventiebeleid vanuit de medische hoek. Ouders wordt door sommige PMI-artsen gevraagd een verklaring te ondertekenen waarin zij beloven hun dochters niet te zullen besnijden. Ook worden zij gewezen op het feit dat een besnijdenis buiten Frankrijk eveneens strafbaar is en dat de ouders bij ontdekking van dit feit vervolging riskeren. Niet zelden wordt de ouders uit 'risicogebieden' meegedeeld dat justitie zal worden ingelicht over de vakantieplannen naar hun land(en) van herkomst. Deze 'interventionistische' benadering is bekritiseerd omdat zij de besnijdenis zou verplaat-

89 Nijboer e.a. 2010, p. 141 e.v.

90 Op instigatie van de Tweede Kamer is een rechtsvergelijkend onderzoek uitgevoerd om te bezien of de Franse aanpak navolging verdient: *Kamerstukken II* 2007/08, 28345/22894, 51; *Kamerstukken II* 2008/09, 28345, 78 en 88. Voor het rapport: Nijboer e.a. 2010.

91 Waaronder de toonaangevende vrouwenrechtenorganisatie 'Ligue pour le Droit des Femmes en de Groupe pour l'Abolition des Mutilations Génitales Féminines' (GAMS).

92 Kool 2005, p. 5; Guiné & Fuentes 2007, p. 501; Nijboer e.a. 2010, p. 110.

93 Assemblée Nationale 24 juni 2010, nr. 2658, p. 3.

94 Guiné & Fuentes 2007, p. 504.

95 Guiné & Fuentes 2007, p. 504.

sen naar een moment waarop de controle door PMI-artsen komt te vervallen.[96] Niettemin wordt door ouders opgemerkt dat zij vanwege deze op preventie gerichte benadering van artsen beter in staat zijn om in hun land(en) van herkomst uit te leggen waarom zij hun dochters niet willen besnijden.[97]
Tegen deze achtergrond moet de betekenis van het strafrecht als wapen in de strijd tegen meisjesbesnijdenis niet worden overschat. Het zijn vooral waarden als *laïcité* en gendergelijkheid die een effectieve aanpak op lokaal niveau mogelijk hebben gemaakt. Deze waarden vormen volgens Guiné en Fuentes 'a double weapon that allows a more efficient fight against sexist cultural differences arising from religion'.[98] In het licht van deze relativering van het strafrecht wijzen deze auteurs ook het onvoldoende problematiseren van meisjesbesnijdenis in termen van gender aan als een belangrijke factor die afbreuk doet aan te behalen resultaten op landelijk niveau.[99]

Engeland: behoud diversiteit versus bescherming mensenrechten?
Engeland geldt in de regel als een land dat binnen het multiculturele model valt. Binnen het bredere staatsrechtelijke verband van het Verenigd Koninkrijk wordt Engeland als 'moederland' gezien, het deel van het statenverbond dat open zou staan voor culturele diversiteit.[100] Vanuit hun lange koloniale verleden gewend aan immigratie en inbreng van 'vreemde' culturen zouden de Engelsen als het ware beschikken over een multicultureel gen, dat hen onderscheidt van andere Europeanen.[101] Onder deze ogenschijnlijke multiculturele tolerantie gaat volgens sommigen echter racisme schuil dat is gevoed en gegroeid in een historisch klimaat waarin de Engelse waarden en normen als 'superieur en geprivilegieerd' werden beschouwd.[102] Toen het Engelse moederland halverwege de vorige eeuw werd geconfronteerd met toenemende immigratie als gevolg van dekolonisering was de toon tegenover deze nieuwkomers regelmatig vijandig en openlijk racistisch.[103]
Geconfronteerd met de onvermijdelijkheid van immigratie koos Engeland destijds voor een pluralistische aanpak.[104] Multiculturalisme was 'bon ton', zij het dat politieke en maatschappelijke tolerantie van multiculturele kwesties haar grens vond waar dit geacht werd afbreuk te doen aan fundamentele normen en waarden. Inmiddels is de Britse samenleving en politiek, zoals in de meeste Europese staten, ten prooi gevallen aan opkomend populisme dat de nadruk legt op de

96 Guiné & Fuentes 2007, p. 503.
97 Guiné & Fuentes 2007, p. 504.
98 Guiné & Fuentes 2007, p. 505.
99 Guiné & Fuentes 2007, p. 505 e.v.
100 In de literatuur wordt regelmatig gerefereerd aan de 'Britse' cultuur. Die term ziet echter op het bredere staatsrechtelijke verband van het Verenigd Koninkrijk, dat een amalgaam van culturen kent.
101 A.M. Fortier, *Multiculturality and the new face of Britain*, Lancaster: Department of Sociology 2000; B. Parekh, *The Future of Multi-ethnic Britain*, Parekh Report 2000.
102 Deze kwalificaties zijn afkomstig uit het Parekh Report.
103 H.S. Mirza, 'Multiculturalism and the gender gap: the visibility and invisibility of Muslim women in Britain', in: Waqar I.U. Ahmad & Ziauddin Sardar (red.), *Muslims in Britain. Making social and political space*, Abingdon: Routlegde 2012, p. 120-139.
104 Mirza spreekt over een 'hard won' politieke ommekeer; Mirza 2012, p. 121-123.

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plicht van nieuwkomers om te assimileren.[105] De Britse aanpak van meisjesbesnijdenis kenmerkt zich dan ook als overwegend etnocentrisch: gericht op bestrijding van een afwijkende, niet binnen de Britse samenleving passende praktijk.[106] In de literatuur is deze benadering bekritiseerd als eenzijdig omdat zij blind zou zijn voor de 'eigen' praktijken, die evenzeer als problematische 'culturele genderkwestie' kunnen gelden. Denk aan esthetische lichaamscorrecties.[107] Gesteld wordt dat de ruimte die etnische minderheden wordt gegund om culturele praktijken uit te oefenen die op gespannen voet staan met Engelse normen en waarden, sterk is afgenomen.[108]

De Engelse wetgeving

Kenmerkend voor de Engelse aanpak is de nadruk op de strafwaardigheid van meisjesbesnijdenis en de noodzaak tot actieve strafrechtelijke handhaving enerzijds, en het ontbreken van een coherent beleid anderzijds. Nu is dat laatste geen exclusief Engels verschijnsel. Integendeel, ook elders geldt dat de complexiteit van de problematiek met daarin gelegen conflicterende belangen coherente beleidsvoering bemoeilijkt. Maar ook met inachtneming daarvan is geen sprake van een 'ferme Engelse aanpak'. De voor het Engelse discours typerende vrees te worden beticht van racisme speelt daarbij een rol. Want hoewel de autoriteiten traditioneel genegen zijn om culturele minderheidsgroepen een zekere autonomie te gunnen, noopt het schadelijke karakter van meisjesbesnijdenis tot actief optreden.

Niettemin is Engeland in wetgevend opzicht voorloper, want al in 1985 werd de *Prohibition of Female Circumcision Act* ingevoerd. Naast een specifieke strafbaarstelling bevat deze wet een uitzondering voor aanpassing van de staat van vrouwelijke genitaliën op medische gronden, bijvoorbeeld wanneer dat nodig is ter voorkoming of bestrijding van kanker.[109] De overtuiging van de vrouw dat besnijdenis juist is omdat de traditie deze zou voorschrijven, vormde hierbij geen rechtvaardiging voor een medisch ingrijpen.[110] De medische uitzondering bleek echter een maas in de wet te zijn. Er zijn gevallen bekend van meisjesbesnijdenis op 'medische gronden', uitgevoerd in privéklinieken.[111]

In de *Female Genital Mutilation Act 2003* volgde een aanzienlijke verzwaring van het strafmaximum van vijf naar veertien jaar gevangenisstraf en een uitbreiding van de extraterritoriale rechtsmacht, zodat ook elders uitgevoerde besnijdenissen door en op Engelse onderdanen en permanent ingezetenen kunnen worden vervolgd. Opvallend is dat ook de besnijdenis van meerderjarigen die dat zelf wensen een strafbaar feit oplevert. Naar aanleiding van oproepen vanuit vrouwenorganisaties werden tussentijds in het parlement vragen gesteld over de prevalentie van meisjesbesnijdenis. Het handhavingstekort werd bekritiseerd, maar bleef onopge-

105 Fortier 2000.
106 Dustin 2010, p. 19.
107 Dustin 2010, p. 19.
108 Dustin 2010, p. 19.
109 Guiné & Fuentes 2007, p. 493.
110 Prohibition of Female Circumsion Act 1985, Section 2 (2).
111 Guiné & Fuentes 2007, p. 495.

lost.[112] Dat is overigens niet ingegeven door onwil vanuit de strafrechtelijke hoek. Integendeel, vanuit de *Crown Prosecution Service* is de *Female Genital Mutilation Guidance* opgesteld, waarin instructies worden gegeven ter vervolging van meisjesbesnijdenis. Vermoedens van kindermishandeling, waartoe meisjesbesnijdenis wordt gerekend, dienen te worden gemeld bij de politie of de lokale sociale instanties (*Children Act 1989*, sectie 47).[113] De eventuele professionele geheimhoudingsplicht staat een melding niet in de weg. Lokale autoriteiten zijn bovendien bevoegd preventieve maatregelen te nemen om de gezondheid van het kind te beschermen, maar hiervan wordt slechts zelden gebruikgemaakt.[114]

Hoe de Engelse aanpak te duiden?

Het Engelse, overwegend multiculturele model van burgerschap waarin ruimte voor culturele diversiteit centraal staat, heeft op gespannen voet gestaan met de wens om meisjesbesnijdenis effectief te bestrijden. Het risico op stigmatisering en discriminatoire benadering van een 'zwarte traditie' leidde tot een terughoudend optreden; de nadruk binnen het beleid lag op de bescherming van collectieve groepsbelangen.[115] Deze benadering is niet effectief gebleken in de bescherming van de individuele rechten van meisjes en vrouwen. Want ondanks specifieke strafbaarstelling en belendende instructies is er nog geen sprake van actieve handhaving.[116] Het Engelse beleid is dan ook vooral gericht op preventie, te bewerkstelligen door samenwerking tussen de gezondheidszorg, voorlichters, sociale diensten, belangengroepen en contactpersonen van de desbetreffende minderheidsgroepen.[117]

Nederland: multiculturele terughoudendheid versus etnocentrische bestrijding

In Nederland gold tot aan de eeuwwisseling het uitgangspunt: 'integratie met behoud van eigen cultuur'.[118] Weliswaar was het burgerschapsmodel multicultureel,[119] maar wat als culturele uiting aanvaardbaar werd geacht, was ook destijds begrensd.[120] In de periode na het jaar 2000 maakte het tot dan toe gevolgde integratiebeleid van 'aanpassen met behoud van eigen identiteit' plaats voor het 'aan-

112 Het parlementaire debat blijft steken in een oproep aan de regering om de aanpak van meisjesbesnijdenis aan te scherpen, www.parliament.uk/lords.hansard, column 1282 (*House of Lords*), en de met unanieme stemmen aangenomen motie van de *House of Commons*, www.parliament.uk/edm/2010-12/1219.

113 Home Office, *Female Genital Mutilation. Multi Agency Practice Guidelines*, www.homeoffice.gov.uk.

114 Kool & Wahedi 2015.

115 Guiné & Fuentes 2007, p. 506.

116 Vgl. J. Bindel, *An Unpunished Crime: The lack of prosecutions for female genital mutilation in the UK*, Londen: New Culture Forum 2014. De schattingen uit dit rapport over de prevalentie van meisjesbesnijdenis in het Verenigd Koninkrijk zijn kritisch ontvangen, zie: Macfarlane e.a. 2015.

117 Zie o.a. Her Majesty Government, *Female Genital Mutilation: The Case for a National Action Plan*, Londen: HM Government 2014.

118 WRR 2006, p. 81.

119 Koopmans e.a. 2005. Voor een historisch perspectief op deze 'Hollandse gastvrijheid': WRR 2006.

120 O.a. A.C. 't Hart, *Hier gelden wetten!*, Deventer: Gouda Quint 2000; Bartels & Haaijer 1992; G. Nienhuis, *Knagen aan een oude traditie*, Den Haag: Pharos 2004.

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passen via omarming van de Nederlandse identiteit'.[121] Vanaf die tijd doet een etnocentrisch model van burgerschap opgeld, met nadruk op versterking van 'de' Nederlandse identiteit.[122]

Anders dan in Frankrijk, waar het burgerschapsmodel expliciet is toegesneden op het lidmaatschap van de Republiek, heeft deze Nederlandse identiteit een wat 'impliciet en verzonken karakter' dat weinig ruimte laat tot reflectie op de daarin gelegen normatieve uitgangspunten.[123] Een verklaring voor deze 'dikke',[124] als homogeen gepresenteerde identiteit ligt in de voor Nederland kenmerkende verzuilde structuur die de samenleving lange tijd heeft geregeerd. Nederland gold weliswaar als natiestaat, maar onder de oppervlakte van ogenschijnlijke nationale eenheid ging politieke en maatschappelijke verdeeldheid tussen bevolkingsgroepen schuil. Het was binnen deze groepen waar individuele identiteiten werden gevormd en waaraan men normen en waarden ontleende. Die politiek van 'soevereiniteit in eigen kring' heeft tot het midden van de jaren vijftig standgehouden, waarna zij onder druk van interne en externe sociale ontwikkelingen plaatsmaakte voor een gerichtheid naar buiten, over de landsgrenzen.[125] Inmiddels is daarvan geen sprake meer. Integendeel, de Wetenschappelijke Raad voor het Regeringsbeleid (WRR) spreekt van 'een naar binnen gekeerde opvatting van nationale identiteit', en voegt daaraan toe: 'de angst is niet zozeer dat ze "onze" banen inpikken, maar dat "ze" onze cultuur en identiteit bedreigen'.[126]

De strafrechtelijke aanpak in Nederland

Dat het huidige politieke en maatschappelijke klimaat geen ruimte biedt voor rechtvaardiging van meisjesbesnijdenis op culturele gronden, is evident. Niettemin was Nederland, in vergelijking met andere Europese landen, laat met het op de politieke agenda plaatsen van meisjesbesnijdenis.[127] Deze praktijk werd binnen het politieke discours van de jaren negentig nog aangeduid als 'een gevoelige' kwestie.[128] Ook het gegeven dat de genitaliën van sommige vrouwen na de bevalling destijds nog werden 'dichtgenaaid', duidt erop dat van ferme stellingname in die jaren nog geen sprake was.[129] Men was overduidelijk 'bang' voor stigmatise-

121 WRR 2006, p. 36 resp. 88-89. Vanaf 2004 wordt – in reactie op o.a. het rapport 'Bruggen bouwen' van de commissie-Blok (2004), parlementaire debatten en van regeringswege – officieel afstand genomen van het 'multiculturalisme als normatief ideaal'. Zie: M. van Meeteren, *Discoursen van integratie. De omslag in het politieke debat over integratie in Nederland* (doctoraalscriptie Sociologie), Rotterdam: EUR 2005.

122 WRR 2006, p. 83.

123 WRR 2006, p. 86-90.

124 H. Ghorashi, 'Paradoxen van culturele erkenning', *Tijdschrift voor Genderstudies* 2006, p. 47.

125 J. Kennedy, *De deugden van een gidsland: Burgerschap en democratie In Nederland*, Amsterdam: Bert Bakker 2005.

126 WRR 2006, p.199 resp. p. 176. Opmerking behoeft dat de WRR de eerste kwalificatie gebruikt ter duiding van de Nederlandse opstelling richting Europa. Wij menen dat deze kwalificatie breder toegepast kan worden.

127 Voor een beschrijving van het beleid tot 2000: M. van der Liet-Senders, 'Inbreuken op seksuele en reproductieve rechten', in: I. Boerefijn, M.M. van der Liet-Senders & T. Loenen (red.), *Het voorkomen en bestrijden van geweld tegen vrouwen*, Den Haag: SZW 2000, par. 3.3.

128 *Aanhangsel Kamerstukken II* 1982/83, 964.

129 *Handelingen II* 1993/94, 6-310, bijdrage Sipkes.

ring. Typerend is de stellingname van de toenmalige VVD-leider Hans Dijkstal: 'Ter zake van [meisjesbesnijdenis] hebben wij de verplichting een en ander zorgvuldig te wegen. (...) Wij praten alleen maar over de problemen. (...) In de totale beeldvorming moeten wij bekijken, hoe wij de positieve ontwikkelingen, die er ook zijn, in beeld kunnen brengen, zodat er meer evenwicht ontstaat.'[130]
Pas in 1993 heeft de overheid stelling genomen tegen alle vormen van meisjesbesnijdenis.[131] Een jaar eerder had namelijk een onderzoekscommissie gepleit om de lichtste variant van deze praktijk toe te staan.[132] In de jaren hierop volgend is door politici, opiniemakers en juristen stevig gediscussieerd over de wenselijkheid van specifieke strafbaarstelling van meisjesbesnijdenis.[133] Er is echter nooit voldoende draagvlak gevonden voor specifieke wetgeving.[134] De Nederlandse wetsystematiek met de daarvoor karakteristieke voorkeur voor generieke bepalingen staat daaraan in de weg. Wél is voorzien in de mogelijkheid tot strafverzwaring indien de besnijdenis wordt (mede)gepleegd door (een van de) ouders.[135]
Het ontbreken van een actieve handhaving heeft eerder aanleiding gegeven tot kritiek. De vraag werd gesteld of het Franse beleid navolging verdiende, waarop een rechtsvergelijkend onderzoek werd geëntameerd.[136] De conclusie was dat er onvoldoende aanleiding was om het Franse voorbeeld te volgen. Dat berust immers op specifieke omstandigheden, onder andere op de aanwezigheid van een verplichte medische controle. Voor dat laatste was lange tijd geen draagvlak in Nederland,[137] maar er lijkt sprake te zijn van een kentering in het politieke denken. Zo werd onlangs de suggestie gedaan om een periodieke controle op de genitaliën van meisjes uit zogenoemde risicolanden in te voeren.[138] Dit voorstel werd niet gevolgd. Volstaan is met het opstellen van een handelingsprotocol genitale verminking, dat uiteenzet hoe professionals dienen te handelen bij vermoedens van meisjesbesnijdenis, ongeacht de vorm.[139]
Er is immers gebleken dat het doorsluizen van meldingen van meisjesbesnijdenis via de Algemene Meldpunten Kindermishandeling aan de strafrechtelijke autoriteiten niet goed werkte. De hoop is nu gericht op ontsluiting van de problematiek via sleutelfiguren en zelforganisaties, die als 'vooruitgeschoven posten' toegang

130 *Handelingen II* 1992/93, 4-169.
131 Dit leiden wij af uit het rapport van Vluchtelingen-Organisaties Nederland, *Meisjesbesnijdenis in Nederland, een kwestie van mensenrechten?*, Vluchtelingen-Organisaties Nederland 2007, p. 17.
132 Bartels & Haaijer 1992.
133 Zie rapport Kool e.a. 2005.
134 Zie o.a. *Aanhangsel Kamerstukken* 1990/91, 1125, p. 2, waar minister Hoogervorst in antwoord op Kamervragen stelt dat meisjesbesnijdenis een 'gevoelige kwestie' is die zich niet leent voor een nader onderzoek door het Openbaar Ministerie, zijn eerdere uitlating dat het zou gaan om een geïmporteerd delict ondanks.
135 Art. 304 Sr.
136 *Kamerstukken II* 2008/09, 28345, 78, p. 4 (Verslag werkbezoek staatssecretaris Bussemaker aan Frankrijk).
137 Een zwakke kant van dergelijke gerichte controles is overigens dat het leidt tot elders, op latere leeftijd uitgevoerde besnijdenissen die zich onttrekken aan het zicht van de autoriteiten.
138 *Handelingen II* 2014/15, 91, item 9, p. 2.
139 *Stb*. 2013, 342 (Besluit verplichte meldcode huiselijk geweld en kindermishandeling). De term meisjesbesnijdenis wordt in het besluit niet genoemd. Meisjesbesnijdenis wordt binnen het strafrechtelijk beleid echter begrepen als kindermishandeling.

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hebben tot de betrokken gemeenschappen.[140] Vanaf november 2011 ligt de verantwoordelijkheid daarvoor bij de gemeenten, in het kader van de Wet maatschappelijke ondersteuning.[141]

Het voorgaande laat onverlet dat de toon vanuit het parlement na verloop van tijd scherper is geworden. Sinds 2008 zijn diverse moties ingediend die zijn gericht op een intensivering van de bestrijding van meisjesbesnijdenis. De meeste ervan hebben betrekking op de strafrechtelijke aanpak. Zo is voorgesteld om de politie tipgeld te laten uitloven voor het melden van meisjesbesnijdenis, om een meldplicht in te voeren, het strafmaximum te verhogen en een minimumstraf in te voeren. Daarnaast is een motie ingediend om bij vermoede betrokkenheid bij meisjesbesnijdenis de asielprocedure stop te zetten, dan wel te komen tot intrekking van de verblijfsvergunning. Eerder was van de zijde van GroenLinks gevraagd om een gespecialiseerde officier van justitie aan te stellen.[142]

De recente toestroom van grote groepen migranten uit 'risicogebieden' vraagt volgens sommige politici om herwaardering van het strafrechtelijke apparaat bij de bestrijding van meisjesbesnijdenis.[143] Het feit dat in de afgelopen tijd weliswaar veertien gevallen zijn geconstateerd, maar dat in geen daarvan vervolging is ingesteld, wordt als 'zorgelijk' beschouwd.[144] Dit moge zo zijn, maar de bijdrage van het strafrecht aan de bestrijding van meisjesbesnijdenis zal van ondergeschikte aard blijven. Van de naar schatting vijftig zaken (zowel infibulatie als clitoridectomie en incisie) die zich per jaar in Nederland voordoen,[145] is tot op heden immers maar in één zaak (excisie, gezien de tenlastelegging) vervolgd.[146] Die zaak is bovendien niet ambtshalve bekend geworden, maar via een melding door de moeder.[147] Het enthousiasme voor intensivering van de strafrechtelijke aanpak lijkt zich bovendien tot een bepaald deel van het parlement te beperken; de meerderheid lijkt vooralsnog meer heil te zien in preventie.[148] Niettemin is duidelijk dat de huidige geest die door de parlementaire discussies waait van een andere orde is dan traditioneel te doen gebruikelijk in Nederlandse contreien. Hierin weerspiegelt zich een verharding van het maatschappelijke klimaat en verminderde ruimte

140 Zo wijst Pharos op het zogenoemde VETC-team, ofwel het team Voorlichting Eigen Taal en Cultuur, als ingangsmogelijkheid; Pharos, *Jaarverslag 2011*, Den Haag: Pharos 2011, p. 11.

141 *Kamerstukken II* 2011/12, 28345, 117.

142 Kool & Wahedi 2015.

143 Zie bijdrage van het Tweede Kamerlid Rebel (PvdA) tijdens het Algemeen Overleg over de aanpak van geweld tegen vrouwen, *Handelingen II* 2014/15, 91, item 9, p. 2.

144 Zie bijdrage van het Tweede Kamerlid Rebel (PvdA) tijdens het Algemeen Overleg over de aanpak van geweld tegen vrouwen, *Handelingen II* 2014/15, 91, item 9, p. 19.

145 Dit cijfer wordt genoemd in: M. Kramer e.a., 'Vrouwelijke genitale verminking nader bekeken', *TSG* 2007, 8, p. 427-433.

146 Op grond van de Aanwijzing opsporing en vervolging kindermishandeling dient vervolging te worden ingesteld wanneer voldoende bewijs voorhanden is; *Stcrt*. 2010, 19123, p. 6.

147 Rb. Haarlem 11 september 2009, ECLI:NL:RBHAA:2009:BJ7447; in hoger beroep: Hof Amsterdam 23 december 2012, ECLI:NL:GHAMS:2010:BO8531.

148 Onlangs werd vanuit de PvDA-fractie een expertmeeting georganiseerd over de preventie van meisjesbesnijdenis. M. Volp, 'Actieplan tegen Vrouwelijke Genitale Verminking', www.pvda.nl.

voor culturele tolerantie, die blijk geeft van een veranderde opvatting over burgerschap en multiculturalisme.[149]

Afronding

Het maatschappelijke discours is eenduidig: meisjesbesnijdenis wordt in al haar vormen afgewezen en dient onder andere langs strafrechtelijke weg te worden bestreden. De praktijk leert echter dat strafrechtelijke handhaving eerder uitzondering is dan regel. De rechter krijgt slechts bij hoge uitzondering te maken met deze vorm van mishandeling en ziet zich dan voor veelal onoverkomelijke bewijsproblemen gesteld. Niettemin leert de Franse aanpak dat strafrechtelijke handhaving mogelijk is, zij het op voorwaarde van ontsluiting vanuit de jeugdhulpverlening. Het Franse 'succes' kan echter niet worden gegeneraliseerd en moet worden begrepen in het licht van de achterliggende rechtsculturele opvattingen in het kader van de ruimte die het Franse republikeinse model van burgerschap biedt aan diversiteit. De verhouding tussen burgerschap en diversiteit is bepalend voor de toon in het politieke en juridische debat over de toelaatbaarheid van een omstreden praktijk als meisjesbesnijdenis. Onze analyse van de relatie tussen (een veranderd model van) burgerschap en strafrechtelijke bestrijding van meisjesbesnijdenis leert dat nationale opvattingen over diversiteit aanleiding geven tot verschil in aanpak en uitkomst. Het feit dat de internationale rechtsgemeenschap meisjesbesnijdenis eenduidig afwijst en kwalificeert als mensenrechtenschending, biedt dan ook geen garantie voor een eenduidige en succesvolle aanpak op nationaal niveau. Integendeel.

149 Dit logenstraft onzes inziens de positieve toonzetting van het WRR-rapport inzake de ontwikkeling van Nederland als immigratiesamenleving; WRR 2001.

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ABSTRACTION FROM THE RELIGIOUS DIMENSION

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INTRODUCTION

The recurring conflict between religious manifestations and existing legal norms has resulted in a principled debate in legal theory and liberal political philosophy regarding the role of religion in law and politics.[1] Ex-

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1. Robert Cochran and Michael Helfand expect that "given the potential for both law and religion to promote the most noble of human goods and the most depraved of human evils, the endless jousting between the two—each continuously seeking to tame the other—will undoubtedly remain a permanent feature of the human experience." Robert F. Cochran, Jr. & Michael A. Helfand, The Competing Claims of Law and Religion: Who Should Influence Whom?, 39 Pepp. L. Rev. 1051, 1052 (2013); see also Cécile Laborde, Liberalism's Religion (2017); Arif A. Jamal, Considering Freedom of Religion in a Post-Secular Context: Hapless or Hopeful? 6 O.J.L.R. 433 (2017); Christopher C. Lund, Religion is Special Enough, 103 Va. L. Rev. 481 (2017); Steven D. Smith, The Tortuous Course of Religious Freedom, 91 Notre Dame L. Rev. 1553, 1556 (2016) (discussing three challenges the constitutional protection of religious freedom faces); Micah Schwartzman, What if Religion is Not Special?, 79 U. Chi. L. Rev. 1351, 1353, 1427 (2012) (explaining that the "conflict between law and morality" is that religion is special for legal reasons (in the context of U.S. constitutional law) due to its

amples of concrete cases that reveal this conflict of standards can be seen in an increasing number of legislation and regulatory steps taken in liberal democracies,[2] which target religious manifestations that have been labelled as contentious in the public discourse because of their common characteristic: deviation from the dominant norms.[3] Among the examples of "high

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constitutional abilities (free exercise) and disabilities (non-establishment). However, religion is not special for normative reasons). (emphasis added).

2. The scope of the conflict of standards is broader than simply a conflict between the rules of the state and competing religious norms. This conflict also covers the tension between religious beliefs and what the dominant norms of a society expect from its citizens: e.g. the norm of having an open dialogue and being able to communicate. The latter has been presented as an argument in favor of the ban on face-covering veils among European states. Another example is the norm of shaking hands as a sign of greeting, without making a distinction in gender. This norm has been used as an argument in the Netherlands to refuse an orthodox Muslim man, who refrained from shaking hands with women, from a job as civil servant. *See* Rb. Rotterdam 6 August 2008, ECLI:NL:RBROT:2008:BD9643, ¶ 5.2.3 (Neth.).

3. In the legal discourse, some religious manifestations have been qualified as contentious. *See Jehovah's Witnesses of Moscow and Others v. Russia*, App. No. 302/02, Eur. Ct. H.R. (2010), ¶ 144, http://hudoc.echr.coe.int/eng?i=001-99221 ("The rites and rituals of many religions may harm believers' well-being, such as, for example, the practice of fasting, which is particularly long and strict in Orthodox Christianity, or circumcision practiced on Jewish or Muslim male babies. It does not appear that the teachings of Jehovah's Witnesses include any such contentious practices."); *see also* Sohail Wahedi, *Marginaliseren van godsdienstvrijheid door abstraheren van de religieuze dimensie [Marginalizing Religious Freedom Through Abstraction from the Religious Dimension]*, 9 RELIGIE & SAMENLEVING [RELIGION & SOC'Y] 128, 134-38 (2014). Not all religious manifestations that are considered contentious are immediately abandoned. At least two recent court rulings on the legality of adopted local bans on religious symbols show that an appeal to state neutrality and separation of Church and State is not enough to justify legislation that bans publicly wearing religious symbols. The Belgian *Raad van State*, Council of State ruled in October 2014, that a local ban on wearing religious symbols at school that targeted Muslim veils was incompatible with the right to religious freedom. Raad van State Oct. 14, 2014, No. 228.752, A.209.364/IX-8089, ¶ 52, http://www.raadvst-consetat.be (Belg.). Although the *Raad van State* ruled that the outcome in this case does not imply that a ban on publicly wearing religious symbols is *in general* contrary to religious freedom, it held that the risk of future disorder, which could justify such a ban, should be substantially present and not only hypothetical. *See* Sohail Wahedi, *Case no A.209.364/IX-8089*, 5 O.J.L.R. 624 (2016). Similarly, in 2015, the majority of the *Bundesverfassungsgericht*, the German Federal Constitutional Court, held that the North Rhine-Westphalia's ban on wearing religious symbols by school staff was not compatible with Germany's Basic Laws concerning non-discrimination and the right to freedom of faith. The Court held that an interference is only justified when there is proof of a concrete threat of public disorder or when the state's neutrality is in danger. In this case, the ban was not designed to respond to such a

profile" cases,[4] which deal with the disputed legality of such contentious religious manifestations, are legal initiatives taken in some European states to prohibit the wearing of religious veils such as the *Burqa* and *Niqab*.[5] Concerning the widely discussed French ban on face-covering veils, the European Court of Human Rights (ECtHR) upheld this controversial piece

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threat and it therefore constituted a breach of Basic Laws. See Bundesverfassungsgericht, BvR 471/10, 1181/10 Jan. 27, 2015. *See also* Sohail Wahedi, *BVerfG 471/10 and 1181/10*, 5 O.J.L.R. 368 (2016).

4. Although the cases this article refers to are predominantly European, this does not mean that the debate on the role of religion in law and politics is exclusively a European matter. Canadian and United States court rulings involve many cases that can be seen as equivalents of the European case law on free exercise of religion. *See Burwell* v. *Hobby Lobby* 573 U.S. (2014) (holding that the regulations promulgated by the Department of Health and Human Services requiring employers to provide their female employees with no-cost access to contraception, violated the Religious Freedom Restoration Act); *see also Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that "the Free Exercise Clause permits the State to prohibit sacramental peyote use, and thus to deny unemployment benefits to persons discharged for such use."); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the application of compulsory school-attendance law interfered with other fundamental rights, such as the Free Exercise Clause under the First Amendment); *Sherbert v. Verner*, 374 U.S. 398 (1963) (stating that this case is a prime example of what "government may not do to an individual in violation of his religious scruples."). Among the Canadian examples of court cases that have ruled on the meaning and scope of religious freedom are *Mouvement laïque Québécois & Alain Simoneau v. Saguenay* [2015] S.C.R. 2 (Can.) (holding that states must not interfere in religion and beliefs and must remain neutral. The mayor reciting a prayer at the start and end of each municipal council meeting constitutes a breach of the state's duty of neutrality) and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 256 (Can.) (holding that the school board's decision of prohibiting an orthodox Sikh, whose religion requires him to wear a *kirpan* (religious object that resembles a dagger and must be made of metal) infringed the plaintiff's freedom of religion. "This infringement cannot be justified in a free and democratic society") *Id.* at 298.

5. *See* Armin Steinbach, *Burqas and Bans: The Wearing of Religious Symbols Under the European Convention of Human Rights*, 4 CAMBRIDGE J. INT'L & COMP. L. 29 (2015); Myriam Hunter-Henin, *Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom*, 61 INT'L & COMP. L.Q. 613 (2012); Noemi Gal-Or, *Is the Law Empowering or Patronizing Women? The Dilemma in the French Burqa Decision as the Tip of the Secular Iceberg*, 6 RELIGION & HUM. RTS. 315 (2011); Reuven Ziegler, *The French Headscarves Ban: Intolerance or Necessity*, 40 J. MARSHALL L. REV. 235 (2006); *see generally* MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE (2012); Jill Marshall, *The Legal Recognition of Personality: Full-Face Veils and Permissible Choices*, 10 INT'L J. OF L. IN CONTEXT 64 (2014) (criticizing the so-called Burqa bans).

of legislation in *S.A.S. v. France*.[6] The Court held that the public interest of living together in peace exceeds an individual's belief, which prescribes face-covering veils for women.[7] A more recent example of adjustment to the dominant norms is present in *Osmanoğlu & Kocabaş v. Switzerland*.[8] In this case, the ECtHR held that the Swiss authorities' denial to exempt Mus-

6. *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. ¶¶ 122, 137-59 (2014). Although in *S.A.S.* the ECtHR considered wearing face-covering veils constituted a manifestation of personal beliefs, it did not rule that the French ban was a violation of religious freedom. In this fiercely criticized judgment, the Court held that the lack of consensus among the party states, concerning the legal admissibility of wearing face-covering veils in public, provides France with broad discretion on what types of norms are incompatible with basic rules of an open democracy, such as social communication and the idea of living together in peace. *See also* Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 128 (2005) (describing the margin of appreciation doctrine of the ECtHR and explaining how consensus among party states influences the scope of the margin of appreciation party states have).

7. The French tradition of *laïcité*, which requires a strict separation between religious and state matters, has made the free exercise of religion a private matter. *See* Eva Brems, *S.A.S. v. France: A Reality Check*, 25 NOTTINGHAM L.J. 58 (2016); Hakeem Yusuf, *S.A.S. v France: Supporting Living Together or Forced Assimilation*, 3 INT'L HUM. RTS. L. REV. 277 (2014); Sally Pei, *Unveiling Inequality: Burqa Bans and Non-discrimination Jurisprudence at the European Court of Human Rights*, 122 YALE L.J. 1089 (2013) (discussing the court ruling in *S.A.S. v. France*).

8. *Osmanoğlu & Kocabaş v. Switzerland*, App. No. 29086/12, Eur. Ct. H.R. (2017). The public call for adjustment to the dominant norms could influence the way judges balance the interests at stake in a free exercise case. An example in this context is the way judges have responded to the legality of the religious refusal to shake hands as a sign of greeting. This contentious religious manifestation was debated extensively in the Dutch society before reaching the courtrooms. In 2004, the Dutch Minister of Immigration, Rita Verdonk, was denied a hand shake by an imam (the Islamic prayer leader). This incident resulted in a heated debate about the acceptability of such behavior with reference to religious freedom. The Minister wrote in response to parliamentary questions that the refusal to shake hands is contrary to the Dutch standard of greeting everyone through shaking hands, regardless of gender. *See Tweede Kamer der Staten-Generaal [The House of Representatives], Aanhangsel Handelingen II [Parliamentary Proceedings II]* 2004/2005, at 1457-58 (Neth.). The reasoning judges have used in dealing with cases regarding refusal to shake hands on religious grounds shows analogies with public opinions that have framed this practice as an act that attests to unequal gender-treatment. *See* CRvB 7 May 2009, ECLI:NL:CRVB:2009:BI2440, ¶¶ 7.6, 7.10 (Neth.); Hof 's-Gravenhage 10 April 2012, ECLI:NL:GHSR:2012:BW1270, ¶ 13 (Neth.); Elma Drayer, *Vrome praatjes [Pious talks], de Volkskrant* (Neth.), July 15, 2015, at 2 (qualifying the convictions that shape the religious basis to refuse shaking hands of the opposite gender as "measly views" that immediately affect the acquired values within modern societies, such as gender equality).

lim girls from taking part in mixed-school swimming does not violate the right to religious freedom. The judges unanimously held that although denial of the exemption request interfered with religious freedom, this interference was justified in light of the promotion of pupils' integration into Swiss society.[9] In a similar case, a Muslim pupil had asked the Federal Constitutional Court of Germany, the *Bundesverfassungsgericht* (*BVerfG*), to review a decision of the Federal Administrative Court, the *Bundesverwaltungsgericht* (*BVerwG*). The *BVerwG* had ruled that the school authorities' refusal to exempt applicant from joint swimming lessons did not violate the right to religious freedom.[10] The *BVerfG* did not accept the complaint for adjudication, as the petitioner failed to explain convincingly why the *Burkini* could not qualify as a religious alternative for other swimming clothes.[11] Another typical example in this context is the ongoing debate in many European countries regarding the legality behind the ritual slaughtering of animals, such as the *Halal* and *Kosher* way of slaughtering.[12] Hence, the recent court rulings are among the many examples of cases that have challenged the legal admissibility of contentious religious manifestations in liberal democracies.[13]

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9. *See Osmanoğlu & Kocabaş v. Switzerland*, *supra* note 8, at ¶¶ 95-101 (holding that a child's interest to assimilate into the Swiss society supersedes religious convictions of parents).

10. *See* Bundesverfassungsgericht, BvR 3237/13, ¶ III.3.aa, Nov. 7, 2016, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/11/rk20161108_bvr323713.html (holding that the female applicant did not adequately substantiate her constitutional complaint that her *Burkini*, which covered her whole body except for her face, could not be considered an adequate substitute for swimming clothes that are clearly disallowed by her religion).

11. *Id.; See* Sohail Wahedi, *BVerfG 3237/13*, 6 O.J.L.R. 426 (2017).

12. *See* Aleksandra Gliszczyńska-Grabias & Wojciech Sadurski, *The Law of Ritual Slaughter and the Principle of Religious Equality*, 4 J.L. RELIGION & ST. 233, 237-53 (2016) (outlining European approaches to the legal acceptability of ritual slaughter of animals); Carla M. Zoethout, *Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter*, 35 HUM. RTS. Q. 651 (2013); Markha Valenta, *Pluralist Democracy or Scientistic Monocracy? Debating Ritual Slaughter*, 5 ERASMUS L. REV. 27 (2012) (discussing the Dutch debate on this matter); Jeremy A. Rovinsky, *The Cutting Edge: The Debate over Regulation of Ritual Slaughter in the Western World*, 45 CAL. W. INT'L. L.J. 79 (2014); Claudia E. Haupt, *Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter*, 39 GEO. WASH. INT'L. L. REV. 839 (2007) (discussing European case law on the admissibility of ritual slaughter).

13. With reference to either the lack of integration of migrant groups or by reliance on the central values of "the society" many European politicians have started to dispute the legal admissibility of a wide range of religious manifestations. As such, in 2014, French politicians proposed a total ban on Muslim veils in universities referring to the principles of French secularism. The Austrian parliament passed an "Islam bill"

Contentious religious manifestations that compete with legal and majoritarian norms of liberal democracies have given rise to the question whether "religion" should matter when one is thinking about the creation of exemptions for particular beliefs and practices.[14] Hence, the conflict of norms that is present in contentious religious manifestation cases opens a discussion about accommodation,[15] which in this context deals with the

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to prohibit Islamic organizations from receiving foreign funding. The bill has been presented to be an effective tool to prevent Muslim radicalization. The Swiss referendum on minarets and proposed or actual bans in various countries on ritual slaughter, ritual male circumcision and different types of religious dress codes are among the other examples of cases that have been regularly subjected to public debate. *See* RONALD DWORKIN, RELIGION WITHOUT GOD, 145 (2013) (arguing against the Swiss minarets referendum using a critical-normative theory). *See also* LABORDE, *supra* note 1, at 33 (doubting that majoritarian biases against contentious religious manifestations draw on a "liberal *philosophical* bias in favor of belief-based and voluntarily chosen religious practices.").

14. This article does not aim to provide an exhaustive description of religion. Rather, it aims to theorize the way liberal political philosophers have conceptualized religion for legal and political purposes. This approach fits Cécile Laborde's recent call that legal theorists and political philosophers do not need "a semantic or a descriptive notion of religion but, rather, an interpretive one." *See* LABORDE, *supra* note 1, at 1-3 (arguing that although "religion" has played a very important role in the development of liberal political philosophy through the history, it has remained an "under-theorized" concept). *See also* Lael Daniel Weinberger, *Religion Undefined: Competing Frameworks for Understanding Religion in the Establishment Clause*, 86 U. DET. MERCY L. REV. 735 (2009) (presenting two definition frameworks for "religion" and discussing their relevance for the First Amendment's non-establishment clause). *See* LABORDE, *supra* note 1 (elaborating on the role of religion in liberal political philosophy). *See also* Yossi Nehushtan who has rightly pointed out: "[t]he central question is whether the fact that religion is special in certain aspects justifies affording it a special weight as a reason to grant or to refuse to grant a conscientious exemption." Yossi Nehushtan, *Religious Conscientious Exemptions*, 30 L. & PHIL. 143, 149 (2011); *Cf.* Paul B. Cliteur, *Tolerantie en Theoterrorisme [Tolerance and Theoterrorism]*, *in* FRANS KRAP & WILLEM SINNINGHE DAMSTE (EDS.), OVER TOLERANTIE GESPROKEN [SPEAKING OF TOLERANCE] 157, 167-69 (2016) (criticizing the state of affairs in liberal democracies by claiming that there is a "lack of tolerance." Radicalized religious people who use violence, are *intolerant* towards social plurality. As such, they do not tolerate unpleasant messages about their Gods and prophets. On the other hand, there is "too much tolerance," as liberal democracies do not take serious steps to prevent radicalization of certain religious groups).

15. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV., 685, 686 (1992). A quick scan of the scholarly debate about the "specialness of religion" informs us that liberal political philosophers and legal theorists rely on legal judgments and public debates to develop normative arguments that are meant to answer the question what the legal definition of

possibility, feasibility and desirability of creating special exemptions for the beliefs, practices and traditions of some citizens.[16] In the liberal and non-sectarian,[17] meaning, non-religious theories of religious freedom,[18] the question of religious accommodation is put under critical scrutiny by legal theorists and liberal political philosophers.[19] As such, these scholars have either challenged or defended the constitutional value of religion: the special legal solicitude for religion.[20] An essential part of the religious accom-

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religion and religious freedom should be. Thus, the broad public debate on religious manifestations has an indispensable heuristic value for the scholarly debate about the role of religion in law and politics. *See* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 348 (2008).

16. *Cf.* Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 603 (2006) (believing that balancing the interests, which are primarily at stake when religious norms are at odds with public rules, should be related to the specific context of a particular case: it is not possible to provide a balancing formula). The best we can do is to show that we have explicitly thought about the problem of justice. One potential way to do so is to introduce a system that is focused on the question of religious exemptions. Koppelman says that due to the impossibility to "protect all deeply valuable concerns, more specific rules are necessary. Accommodation of religion is one of these." *Id.*

17. The term "sectarian" has a functional meaning in the literature on the role of religion in law and politics. It conceptualizes theories using religious arguments (sectarian) to justify the special legal solicitude towards religion.

18. Generally, sectarian theories of religious freedom justify the legal protection of free exercise with an appeal to the distinct value of religion. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15 (1985) (arguing that the liberal state is not able to exclude ultimately the possibility that religious claims might be true, which means that the transcendental authority of such claims has more value than the claims of the state). McConnell states the following:

> If there is a God, His authority necessarily transcends the authority of nations . . . . For the state to maintain that its authority is in all matters supreme would be to deny the possibility that a [transcendent] authority could exist. Religious claims thus differ from secular moral claims both because the state is constitutionally disabled from disputing the truth of the religious claim and because it cannot categorically deny the authority on which such a claim rests.

McConnell continued to defend this line in recent publications. *See generally*, Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 786-89 (2013); *Cf. also* Rafael Domingo, *A New Global Paradigm for Religious Freedom*, 56 J. CHURCH & ST. 427, 432 (2014) (defending a similar argument); *see also* Lund, *supra* note 1, at 490 (providing an overview of and discussing some of the religious arguments in favor of religious freedom).

19. *See generally* CÉCILE LABORDE & AURÉLIA BARDON, RELIGION IN LIBERAL POLITICAL PHILOSOPHY (2017).

20. *See* Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 LAW & PHIL. 581 (2015), for the theoretical distinction between sectarian and liberal

modation debate has been marked by the following two questions: accommodation for whom and for what reasons?[21] These are the two—although roughly formulated—questions legal theorists and liberal political philosophers focus on to reflect on the normative foundations of toleration for and protection of religious beliefs and practices in liberal democracies.[22]

This article argues that the scholarly debate in legal theory and liberal political philosophy about the role of religion in law and politics has been dominated by the following normative question: *should* liberal democracies care about religion *qua* religion for the public justification of decisions taken in law and politics?[23] This article consists of three substantive parts and it focuses on the question whether *the law* in liberal democracies should care about religion *qua* religion. In other words: does religion *qua* religion deserve special legal protection?

To answer this question, Part I develops a conceptual framework of normative positions, each theorizing a particular approach to religion in law and religious claims for exemptions from general laws.[24] This Part elabo-

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theories of religious freedom. *Cf.* Nehushtan, *supra* note 14, at 145-50. Nehushtan, whose work is concerned with the liberal discussion of granting exemptions, speaks of functionalist pro-religious approaches to deal with religious claims for exemptions from general laws. *See also* Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. 993, 996 (2010) (introducing and discussing the right to moral freedom as an extended version of the rights to religious freedom and arguing that this broadening is justified in light of the ecumenical and non-sectarian account of moral freedom).

21. These two questions are helpful to deal in a more systematic way with the controversies that arise out of free exercise. Brian Leiter compares an orthodox Sikh boy to a Sikh boy from a traditional family. Both want to wear a dagger: the orthodox Sikh boy for religious purposes (he wants to wear a *kirpan*, a religious object made of metal that resembles a dagger) and the other boy for reasons of tradition. BRIAN LEITER, WHY TOLERATE RELIGION? 1 (2013). This case questions what the justification would be to treat the two differently. That is to say, Leiter asks, "[w]hy the state should have to tolerate exemptions from generally applicable laws when they conflict with *religious* obligations but not with any other equally serious obligations of conscience." *Id.* at 3.

22. *See* Micah Schwartzman, *Religion, Equality and Anarchy*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 15 (2017) (arguing that the current debate in liberal political philosophy about the role of religion in law and politics consists of two more specific debates on the role of religion for the purpose of state actions (public justification debate) and its relevance for granting exemptions (the religious accommodation debate) to certain groups in society).

23. *See id.*

24. The concepts introduced and discussed in Part I stand for different theoretical frameworks present in the liberal theories of religious freedom that include arguments concerning the way liberal democracies could deal with religion in law and religious claims for exemptions from laws. This way of conceptualizing extant liberal approaches

rates on the body of arguments that has been developed by scholars in legal theory and liberal political philosophy, to discuss the special legal solicitude for religion. These influential liberal approaches are classified into *rejection*; *substitution*; *generalization*; *equation* and *representation.* This classification of extant liberal theories might look "oversimplified," but it is a useful method to bring positions that use similar arguments under the same category.[25]

Part II draws on the framework of normative positions to answer the question whether religion *qua* religion deserves special protection in law. This Part provides a threefold answer to this question. First, it provides an overview of the arguments that suggest why religion definitely does not require special legal protection *qua* religion. Second, it provides insight into the arguments used to claim that religion does not necessarily require special legal protection. Third, it draws attention to some arguments that explain why religion *qua* religion deserves special protection. This threefold response is used to introduce the synthesis of the normative positions that are conceptualized in this article. This synthesis is called *abstraction from the religious dimension.*

The synthesis of the normative positions is further disentangled in Part III, which claims that abstraction from the religious dimension is the binding characteristic of the normative framework developed in this article. This Part explains how abstraction dismisses the special legal protection of religion *qua* religion and argues that abstraction renounces arguments justifying religious freedom with an appeal to distinctly religious values. In addition, it explains how abstraction draws on a general framework of values to justify free exercise. The main argument of this Part is that abstraction stands for a non-sectarian and religion-empty understanding of religious freedom: free from distinctly religious values, though not hostile to religion.[26]

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towards the role religion could have for legal and political purposes elaborates on Cécile Laborde's discussion of the *substitution* and *proxy* approaches. *See* Laborde, *supra* note 20, at 583.

25. *See* Schwartzman, *supra* note 22 at 16 (explaining how the development of a general theory about the role of religion for legal and political purposes helps to identify the inconsistencies that are present in both, public justification theories and religious accommodation theories). *See also* Smith, *supra* note, 1 at 1568 (criticizing the wave of generalization in the scholarly debate about religious freedom).

26. Although the main purpose of this article is to introduce abstraction without having a normative judgment about this binding feature of the liberal theories of religious freedom, the framework of argumentation patterns provides an appropriate base to reflect critically on the contemporary direction of the law and religion debate in legal theory and liberal political philosophy. *See* Michael W. McConnell, *Why Protect Relig-*

The main conclusion of this article is that the liberal theories of religious freedom have one important commonality: *abstraction from the religious dimension*. The central message of this shared feature is that for the legal analysis of religious freedom or a clear case of religious manifestation, it is not possible, nor necessary to describe or understand the case at stake in distinctly religious terms. Thus, abstraction covers and connects arguments that oppose to justify the special legal protection of religious freedom, religious beliefs and practices in light of *any presumed* religious value. The argument is that liberal theories of religious freedom do not need to value, understand or engage in a semantic discussion about "religion" to talk about religious freedom. Abstraction also covers the normative response to the question: should *the law* in a liberal democracy care about religion, because it is religion? Allegedly, religious toleration should not take place due to any distinctly religious value. Rather, a broader and less specific (meaning in this context sectarian) framework of values should be used to justify and explain free exercise of religion in liberal democracies.[27]

I. THEORETICAL REFLECTIONS ON LAW AND RELIGION

What do current debates in legal theory and liberal political philosophy tell us about the way modern liberal democracies interpret, value, protect and thus deal with religious freedom? To answer this question, we must focus on a broad set of religious freedom theories. The main distinction that has been made in the literature on the role of religion for granting exemptions and justifying decisions in law and politics concerns the one between

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ious Freedom?, 10 CHRISTIAN L. 15 (2014) (warning of the "new whiff of intolerance" towards religious freedom as a "bedrock value" of constitutional democracies).

27. The main research method of this article is a conceptual meta-analysis of positions defended in the "specialness-debate" of religion, with a particular focus on the liberal theories of religious freedom. To identify the binding characteristic of the normative positions, this article has developed a matrix of positions. This matrix focuses on the arguments developed to deal with the question whether religion *qua* religion needs special legal protection. Based on the commonalities between the arguments present in the liberal theories of religious freedom, the approaches are conceptualized and classified as *rejection*; *substitution*; *generalization*; *equation* and *representation*. This classification of positions is an appropriate method to develop a normative legal-philosophical framework that theorizes the main claim of this article: *abstraction from the religious dimension* as the binding characteristic of the liberal theories of religious freedom. *See also* Schwartzman, *supra* note 22, at 28 (explaining how building up a theory in a systematic way sharpens our mind to see the inconsistencies in the existing body of knowledge).

liberal and sectarian theories of religious freedom.[28] As such, sectarian theories justify the special legal solicitude towards religion with an appeal to some values that are presented as distinctly religious,[29] although this privilege is usually limited to some officially recognized religions.[30] This Part

28. *See* LABORDE & BARDON, *supra* note 19, at 2-4 (explaining that the discussion about religion in law is a sub-theme of the broader debate among liberal political philosophers and legal theorists about the relationship between religion and the liberal state); Schwartzman, *supra* note 22, at 15. *See also* Laborde, *supra* note 20, at 582 (explaining the distinction between liberal and sectarian theories of religious freedom and arguing that the transcendental value of religion does not justify religious freedom). The paradigmatic distinction between sectarian and liberal theories of religious freedom is present within the paradigm of "religion" in liberal political philosophy. Therefore, there are non-liberal, non-sectarian theories of religious freedom, such as communist theories. *See* Paul B. Anderson, *Religious Liberty under Communism*, 6 J. CHURCH & ST. 169 (1964). Also, there are hybrid theories of religious freedom, using a mixture of liberal and sectarian arguments to justify religious freedom and the legality of certain religious manifestation. *Cf.* the Israeli approach to religious freedom. *See* Donna E. Arzt, *Religious Freedom in a Religious State: The Case of Israel in Comparative Constitutional Perspective*, 9 WIS. INT'L L.J. 1 (1990).

29. DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 116, 117 (2009) (using a transcendental argument to justify the special legal protection of religion). *See also* RAFAEL DOMINGO, GOD AND THE SECULAR LEGAL SYSTEM 79, 80-82 (2016) (considering the "protection of suprarationality" as the "ultimate justification" for protecting religion *qua* religion); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1183 (2013); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 57 (1996) (claiming that within the context of U.S. constitutional law, the "split-level character" could only be clarified in light of an exclusive "religious justification" of religious freedom).

30. *Cf.* The Constitution of the Islamic Republic of Iran that contains a sectarian explanation of "religious freedom." Articles 12 and 13 of the Constitution exhaustively enumerate religions that are allowed to practice their faiths within the legal framework of the Islamic Republic. The "recognized" religions include Zoroastrianism, Judaism and Christianity. The Shia Jafari school of beliefs is the "eternally immutable" state's religion. *See* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] (1980) (IRAN), http://www.divan-edalat.ir/show.php?page=base, (translation) (last visited Apr. 3, 2018) http://www.alaviandassociates.com/documents/constitution.pdf. Sectarian theories of religious freedom are also advocated outside theocracies. The Dutch orthodox Christian political party, *Staatkundig Gereformeerde Partij* [*The Dutch Reformed Political Party*] ("SGP") recently argued for a sectarian explanation of religious freedom. In their manifest, the *SGP* defends the argument that the state should make a distinction between religions that have shaped the Dutch tradition (including Christianity and Judaism and excluding Islam), to preserve the Judeo-Christian character of the Dutch culture and society. *SGP, Islam in Nederland* [*Islam in the Netherlands*] 3, 4 (2017), https://www.sgp.nl/actueel/manifest—islam-in nederland/6125 (last visited Apr. 3, 2018).

develops a conceptual framework of normative approaches to religion in law.[31] This framework classifies the liberal positions into five categories. First, principled rejection of arguments that justify the special legal protection of religion with an appeal to values that are presented as distinctly religious. Rejection also involves arguments that reject to qualify specific beliefs or manifestations as religious. Second, substitution that consists of arguments explaining why religion is a subset of a broader human faculty, namely conscience. Substitution also covers arguments that say religious freedom has no distinct constitutional value, as other liberties, such as the freedom of expression and association in combination with the right to non-discrimination, in practice could guarantee free exercise of religion. Third, generalization that opposes a sectarian interpretation of religion and religious freedom, arguing that religion stands for deep ethical commitments of human beings and that religious freedom is the general right that gives human beings access to ethical independence and moral freedom. Fourth, equation, which says that equality of treatment should be the norm when authorities are dealing with deep commitments of human beings who ask for exemptions from the application of general laws. Fifth, representation, which justifies the special legal protection of religion in light of values that are not necessarily religious in nature. Religion represents in this position certain values that let human beings flourish and this particular argument justifies the special legal protection of religion.[32]

A. *Rejection*

The rejectionist position rejects arguments that justify religious freedom with an appeal to values that are considered distinctly religious. This position consists of two broader categories: *principled* rejection and *non-principled* rejection. Non-principled rejection claims that the concept of religion does not apply to certain beliefs, traditions or manifestations.[33] However, non-principled rejection does not exclude the option to use the term "religion" to consider other manifestations as religious for reasons of con-

31. The term "principled" used to discuss the sub-categories of *rejection* and *substitution* does not refer to Ronald Dworkin's principles. Rather, the term is meant to indicate that the *principled* sub-categories provide a deeper philosophical justification for the argumentation pattern they defend. *See generally* DWORKIN, supra note 13.

32. The focus is on the appropriate interpretation of "the notion of religion in law (regardless of whether the category of freedom of religion is upheld or not)." Laborde, *supra* note 20, at 594.

33. *See generally* AMOS N. GUIORA, FREEDOM FROM RELIGION 19 (2009); Wibren van der Burg, *Beliefs, Persons and Practices: Beyond Tolerance*, 1 ETHICAL THEORY & MORAL PRAC. 227, 233 (1998) (using a similar typology to discuss religious toleration).

sensus and tradition. Thus, it preserves the term "religion" for particular religions and excludes other religions, as those do not fall under the specific definition of "religion." The appropriate example is the rhetorical approach that is present in the political discourse to consider Islam not a religion, but rather a totalitarian ideology with a closed internal system of rules that prescribe in detail how one should live a life. Against this backdrop, it has been argued that practices and beliefs that are based on Islam should not have access to the privileges of religious freedom.[34] Principled rejection draws primarily on the idea that there are no reasons, which could be considered principled, to tolerate religion *qua* religion within liberal democracies.[35]

1. Principled Rejection

The principled rejectionist position rejects, for principled reasons, to tolerate religion *qua* religion. This position starts from the question what the philosophical notion of pure toleration (i.e. toleration on principled grounds) says about the justification of the special legal protection of religion *qua* religion. Thus, it wonders whether the concept of toleration provides any room for arguments that justify religious toleration because of *any specialness* of religion (i.e. distinctly religious values). This sub-position defines pure toleration as the situation in which the dominant group sees on moral or epistemic grounds a reason to allow (meaning tolerate on principled grounds) another group of citizens to continue with manifestations that are considered objectionable by the dominant group. Principled rejection draws on this particular definition of toleration and concludes that the principle of toleration does not require special legal protection for religion *qua* religion.[36]

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34. *See infra* Part II.

35. LEITER, *supra* note 21, at 7, 55, 67; *see also* Schwartzman, *supra* note 22, at 22; Kenneth Einar Himma, *An Unjust Dogma: Why a Special Right to Religion Wrongly Discriminates against Non-Religious Worldviews*, 54 SAN DIEGO L. REV. 217 (2017); Cécile Laborde, *Conclusion: Is Religion Special?*, *in* JEAN LOUISE COHEN & CÉCILE LABORDE (EDS.), RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 423 (2016); DWORKIN, *supra* note 13, at 111, 144; NUSSBAUM, *supra* note 15, at 164; WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 138 (2005); James Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 943 (2005); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

36. Toleration can be justified on two grounds: moral or epistemic grounds. Brian Leiter concludes that there is nothing special, in terms of morality or epistemology, to warrant toleration of religion *qua* religion. LEITER, *supra* note 21, at 7-13; *see* LORENZO

The principled rejectionist questions whether one can identify more principled reasons, i.e. reasons that find their origins in morality or epistemology that could justify a toleration regime for religion *qua* religion. To answer this question, the principled rejectionist position makes a distinction between two potentially distinctive characteristics of religion: "the categoricity of religious commands" and "insulation of religious beliefs from evidence and reason."[37] This particular feature is closely related to the argument that religious beliefs might be distinctive, due to their involvement in a "metaphysics of ultimate reality."[38]

a. *No moral grounds to tolerate religion* qua *religion*

According to the principled rejectionist position, the moral reasons for toleration *only* justify the special legal protection of human conscience. This moral justification of liberty of conscience does not simultaneously single out religion and its categoricity of commands for special legal protection. Thus, no evidence could support the argument that people in the Rawlsian "original position" will opt for religious freedom, *next to* equal liberty of conscience.[39] Hence, the emphasis on the need for liberty of conscience does not make a distinction between the backgrounds of conscientious commands: it does not single out religion.[40] Leiter explains this argument as follows: "Rawls repeatedly lumps religious and moral categoricity together, so that it is fair to say that the only thing individuals behind the veil of ignorance know is that they will accept some categorical demands, not they will accept distinctively religious ones, that is, ones whose grounding is a matter of faith."[41] Similarly, the utilitarian moral arguments for tolera-

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ZUCCA, A SECULAR EUROPE: LAW AND RELIGION IN THE EUROPEAN CONSTITUTIONAL LANDSCAPE 8, n. 17 (2012) (providing a broader definition of toleration).

37. LEITER, *supra* note 21, at 33-34.

38. *Id.* at 47. *See also* NUSSBAUM, *supra* note 15, at 168.

39. Rawlsian morality arguments in favor of toleration states that people in the original position, when they perform behind the "veil of ignorance," will definitely accept some categorical demands, though these are not of a religious nature *per se*. In other words, this ground of toleration does not provide a principled argument to tolerate "religion *qua* religion." *See generally* LEITER, *supra* note 21, at 55.

40. *See* Simon Căbulea May, *Exemptions for Conscience*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 191 (2017) (arguing that accommodation of sincere conscientious objections to generally applicable laws face the same criticism of unfair treatment as religious accommodation does).

41. LEITER, *supra* note 21, at 55; *See* Andrew Koppelman, *A Rawlsian Defence of Special Treatment for Religion*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 31 (2017) (presenting some Rawlsian arguments in defense of religious freedom).

tion, which focus on the maximization of human well-being that, among others, depends on the ability of people to live by their conscience, do not prescribe special protection of religion. Therefore, toleration on moral grounds does not support the arguments that aim to single out religion as a matter of principled toleration.[42]

b. *No epistemic grounds to tolerate religion qua religion*

The other principled ground for toleration that has been found in the epistemic, Millian arguments, draws on the relevance of principled toleration for knowledge expansion. This principled ground seems to be at odds with the second potentially distinctive feature of religion: insulation of religious beliefs from evidence and reason.[43] As Leiter argues, it is far from obvious "to think, after all, that tolerating the expression of beliefs that are *insulated* from evidence and reasons—that is, insulated from *epistemically relevant* considerations—will promote knowledge of the truth."[44] Although this argument does not say anything about the relevance of *religious manifestations* for knowledge expansion, it is conceivable to say that principled rejection equally rejects arguments that aim to justify on epistemic grounds toleration for religious conduct, because of religion. The argument at this point is that, after all, there is no reason to deny that religious practices are, like religious beliefs, equally insulated from evidence.

c. *Conclusion*

The principled rejectionist position claims that there are no principled reasons (i.e. reasons that are grounded in morality or epistemology) to tolerate religion in law *qua* religion.[45] Principled toleration only requires equal protection of liberty of conscience and it does not require, on the same principled grounds, the special protection of religion. Toleration of conscience via liberty of conscience also provides protection to religious con-

42. LEITER, *supra* note 21, at 55, 61.

43. Leiter argues that reliance on Mill's perspective on what is "true for the right reasons" will not make a strong case to tolerate religion *qua* religion for epistemic reasons; religious faith excludes the idea that there might be some uncovered truth. *Id.* at 58.

44. *Id.* at 55-56.

45. *See also* Kimberley Brownlee, *Is Religious Conviction Special?*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 309 (2017) (arguing that religious convictions cannot be singled out for special legal treatment on moral or epistemic grounds and that religious and non-religious moral convictions that are protection-worthy should receive the same amount of protection, if they meet certain conditions).

science. There is *no principled reason* to make a *legal distinction* between human conscience *in general* and religious conscience *in particular*.[46] This position results in the conclusion that a distinct protection of religious claims of conscience is undesirable for principled reasons. Thus, no moral reason could justify a legal regime that only grants exemptions to religious claims of conscience. As Leiter says: "a selective application to the conscience of only religious believers is not morally defensible."[47]

2. Non-Principled Rejection

Non-principled rejection rejects the qualification of certain beliefs, speeches or conducts as religious and it is mainly present in the political and legal discourse. As such, one can refer to the political approach of the Dutch right-wing party, *Partij voor de Vrijheid,* the Party for Freedom, towards Islam.[48] This political party has repeatedly argued that Islam is not a religion, but a totalitarian ideology that should not have access to the privileges of religious freedom.[49] Consequently, it has proposed an immigration ban from Islamic countries, the legal prohibition of the Koran and the closure of all mosques and Islamic schools in the Netherlands.[50] Non-principled rejection in the legal discourse occurs when someone asks for permission to perform a practice that is portrayed as religious but not apparently allowed by authorities. In some of these cases that deal with the legal admissibility of norm-deviant practices, the court or other parties involved, refuse to say that the practice at stake has, at least potentially, a religious dimension.

As such, the Dutch Nijmegen municipality did not allow a Pastafarian female, a follower of the Church of the Flying Spaghetti Monster, to keep a pasta strainer on her head for her driver's license photograph.[51] According to the authorities, this Church does not belong to any religion.[52] It is rather a parody of religion and its manifestations are expressions of the freedom of speech.[53] Among other examples of Dutch court cases that contain argu-

46. Religion is a subset of the human conscience. Therefore, its free exercise should be protected through liberty of conscience.

47. LEITER, *supra* note 21, at 133. *See also* Himma, *supra* note 35, at 219.

48. *Tweede Kamer der Staten-Generaal* [*The House of Representatives*], *Aanhangsel Handelingen II* [*Parliamentary Proceedings II*], 2016/2017, at 2-6-61 and 2-6-62 (Neth.).

49. *Id.*

50. *Id.*

51. Rb. Gelderland 17 January 2017, ECLI:NL:RBGEL:2017:275, ¶ 6 (Neth.).

52. *Id.*

53. *Id.*

ments that fall under the scope of non-principled rejection, one could refer to tax exemption litigations of the Scientology Church[54] and the Church of Satan case.[55]

B. *Subsitution*

The substitution position claims that both religion and religious freedom have adequate substitutes.[56] As the rejectionist position, substitution consists of *principled* substitution and *non-principled* substitution.[57] The sub-category of principled substitution draws on arguments that say religion is a subset of a particular faculty that is worthy of special legal protection. This protection-worthy faculty concerns human conscience.[58] The argument is that free exercise of religion and the admissibility of religious claims for exemptions could be adequately ensured via freedom of conscience.[59] Non-principled substitution says that basic liberties, such as the right to free

54. Hof. Den Haag 21 October 2015, ECLI:NL:GHDHA:2015:2875, ¶ 8.16 (holding that the activities of the Scientology Church—in particular, Auditing and Training—are commercial in nature and not religious, serving primarily private interests. Thus, the Church is being ineligible for tax exemptions).

55. The case of Saint-Walburga, which focused on sisters forming the Church of Satan, turned on the question whether a brothel could be considered a religious institution. HR 31 October 1986, ECLI:NL:HR:1986:AC9553 (Neth.); *Cf. Religion Based on Sex Gets a Judicial Review*, N.Y. TIMES, http://www.nytimes.com/1990/05/02/us/religion-based-on-sex-gets-a-judicial-review.html (last visited March 3, 2018) (discussing a case in which a couple charged for pimping and prostitution claimed that the activities that took place in the Church were part of their sacred religion).

56. *See generally* Laborde, *supra* note 1; Michah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1099 (2014) (discussing the "substitution" position).

57. The philosophical grounding for principled substitution clarifies the distinction: *see supra* note 31 (explaining the relevance of the terms principled v. non-principled in the conceptual framework this article has developed).

58. This article will not engage in the discussion about the different conceptions of conscience, nor will it discuss the argument that there is a difference between human conscience and religious conscience. *See* Lund, *supra* note 1, at 503, 504. For the argument that this article aims to develop, it is sufficient to indicate that some liberal theorists of religious freedom argue that religion and religious freedom have certain substitutes.

59. *See* JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 89 (2011) (arguing that given "the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status but rather, all core beliefs that allow individuals to structure their moral identity."). *See also* LABORDE, *supra* note 1, at 66, 67 (critical of the position defended by Jocelyn Maclure and Charles Taylor).

speech and the freedom of association, in conjunction with non-discrimination and some security rights, such as the general ban on rape and murder, are *in practice* enough to guarantee the free exercise of religion. Thus, as Nickel has rightly asked: "who needs freedom of religion," when this right turns out to be superfluous?[60]

1. Principled Subsitution

Principled substitution says that religion is a subset of a broader protection-worthy category, the conscience.[61] With reference to the work of Roger Williams, Nussbaum argues:

> The faculty with which each person searches for the ultimate meaning of life is of intrinsic worth and value, and is worthy of respect whether the person is using it well or badly. The faculty is identified in part by what it does—it reasons, searches, and experiences emotions of longing connected to that search—and in part by its subject matter—it deals with ultimate questions, questions of ultimate meaning. It is the faculty, not its goal, that is the basis of political respect, and thus we can agree to respect the faculty without prejudicing the question whether there is a meaning to be found, or what it might be like. From the respect we have for the person's conscience, that faculty of inquiring and searching, it follows that we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the right of others or comes up against some compelling state interest.[62]

According to Nussbaum, this way of reasoning helps us "to make sense of our feeling that there really is something about religion or quasi-religion that calls for special protection and delicacy."[63] And this protec-

60. Nickel, *supra* note 35, at 943.

61. *See also* Koppelman, *supra* note 41, at 38 (rejecting the claim that religion is a subset of human conscience and arguing that the latter "is at best a complement, not a substitute, for teleologically loaded terms such as religion.").

62. NUSSBAUM, *supra* note 15, at 168-69. Nussbaum's conception of religion as a protection-worthy sub-category of human conscience fits her work developing a universally applicable framework for social justice. Nussbaum's normative framework—which is closely linked to political liberalism—elaborates on Aristotelian Essentialism and focuses on identifying the main characteristics of a human life. *See* Martha C. Nussbaum, *Human Functioning and Social Justice. In Defense of Aristotelian Essentialism*, 30 POL. THEORY 202 (1992).

63. *See* NUSSBAUM, *supra* note 15, at 169 (arguing that the search for meaningful answers to ultimate questions of life helps us to keep our special solicitude for religion, as a matter of respect for a broader human faculty, separated from "silly" faculties. That

tion-worthy "something" is the human conscience, which is part of the inalienable dignity people possess, regardless of their educational background, the state of richness, health, religiosity and so on.[64] Thus, no principled reason to single out religion because it is religion, but a principled argument to justify the special protection of a broad liberty of conscience that encompasses and protects the religious conscience as a matter of respect for human dignity.[65] Therefore, the reason as to why religious claims for exemptions are sometimes granted is "because they involve matters of *conscience*, not matters of religion."[66]

2. Non-Principled Subsitution

The purport of non-principled substitution is that the right application of the existing framework of basic liberties, such as the freedom of speech and association, in combination with rights that prohibit discrimination and violence, makes a separate right to religious freedom fairly unnecessary.[67] In other words: freedom of religion has, not to say many, but at least some very "adequate substitute[s]."[68] Arguments that support the replacement of religious freedom consider this right "dispensable,"[69] as other basic liberties ensure the free exercise of religion. The argument suggests that religious manifestations in the core cover a broad range of areas people are involved in, such as business, politics and association. Hence, free exercise of religion could be seen as a derivate of other basic liberties. Non-principled substitution understands religious freedom in light of the argument "that the sorts of activities it involves are covered by the most important general liberties."[70] However, the argument that says "we can adequately enumerate

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is to say, "faculties used by my car lover, who isn't engaged in a search for meaning, or the person who feels called to dress like a chicken when going to work, which is (probably) just too silly to count as a genuine search for meaning.").

64. *Id.*

65. *Id.* at 164-74; *see also* NUSSBAUM, *supra* note 5, at 61-66; *Cf.* LEITER, *supra* note 21 (discussing the line that liberty of conscience is an appropriate substitute for religious freedom). In the theoretical framework that Leiter uses to develop his argument, principled substitution arises out of what the liberal concept of toleration considers protection-worthy for principled reasons: equal liberty of conscience.

66. LEITER, *supra* note 21, at 64.

67. *See* Nickel, *supra* note 35, for a further discussion of this position; *see also* Mark Tushnet, *Redundant of Free Exercise Clause?*, 33 LOY. U. CHI. L. J. 71, 73, 94 (2001).

68. Tushnet, *supra* note 67, at 94.

69. Nickel, *supra* note 35, at 941.

70. *Id.* at 950.

the basic liberties without referring to religion"[71] and that this will ensure the free exercise of religion, has consequences for the question as to how we should understand religious freedom.

As such, non-principled substitution expects that the idea that religious freedom rests on the same basics like other basic liberties will gain ground. Thus, there is no reason to think that religion is something unique that could justify the protection of religion *qua* religion. Also, the expectation is that understanding the need for the free exercise of religion in light of the existing set of basic liberties could help to eliminate the idea that religious beliefs are privileged in society. Therefore, the granted exemptions are the outcome of a right application of basic liberties and not due to the presumed distinct value of religious beliefs. Finally, the emphasis on the protection of religious beliefs via the application of basic liberties ensures that people have a real choice to engage in or disapprove certain convictions.[72]

C. *Generalization*

Generalization advocates a *broader*, ecumenical and non-sectarian definition of religion and religious freedom. Against this normative backdrop, it defends the position that religious freedom should not be considered a *special right*—such as the right to freedom of speech—protecting only a selected group of people: the believers, but rather a *general right* to ethical and moral independence.[73] This position is ecumenical for the reason that it looks beyond the sectarian, meaning theistic account of religion and it is non-sectarian for the reason that it does not make a distinction between theistic and non-theistic convictions about the good.[74]

Generalization looks for reasons of liberal neutrality beyond the narrow, theistic conception of "religion." The argument is that God-believers and non-believers could be seen as "religious," as both could have the same deep feelings about fundamental questions.[75] The generalist position sees in the deep commitment that religious and non-religious people share an "intrinsic and inescapable ethical responsibility" to succeed in life.[76] Therefore,

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71. *Id.* at 943.

72. *Id.* at 943-51.

73. DWORKIN, *supra* note 13, at 132 (discussing religious freedom as a general right to ethical independence); *see also* Perry, *supra* note 20, at 996 (stating how broadening religious freedom will encompass moral freedom).

74. Perry, *supra* note 20, at 996; *see* Roland Pierik & Wibren van der Burg, *What is Neutrality?*, 27 RATIO JURIS 496, 507 (2014).

75. DWORKIN, *supra* note 13, at 5.

76. *Id.* at 114. I am grateful to M. Christian Green who came up with the suggestion to look at Paul Tillich's idea of "ultimate concerns" used by scholars to interpret

this position says that religious freedom should be considered the general right to ethical independence that opens the doors to moral freedom. Dworkin states:

> Ethical independence, that is, stops government from restricting freedom only for certain reasons and not for others. Special rights, on the other hand, place much more powerful and general constraints on government. Freedom of speech is a special right: government may not infringe that special freedom unless it has what American lawyers have come to call a *"compelling"* justification. Speakers may not be censored even when what they say may well have bad consequences for other people: because they campaign for forest despoliation or because it would be expensive to protect them from an outraged crowd. The right to free speech can be abridged only in emergencies. . ..[77]

The generalist position considers religious freedom the right that gives human beings full access to ethical independence. Thus, the generalist account of religious freedom emphasises the opportunities people have to make independent decisions about how to live their lives by their deeply held ethical commitments. This approach apparently extends the definition of religion.[78] The main justification for this extension is rooted in the idea that we need a deeper (meaning non-sectarian) understanding of religious freedom since the free exercise of religion cannot be protected on sectarian grounds, for distinctly religious reasons.[79] The leading normative argument behind generalization and its emphasis on rethinking religious beliefs as

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religion beyond its theistic definition. *See* James McBride, *Paul Tillich and the Supreme Court: Tillich's Ultimate Concern as a Standard in Judicial Interpretation*, 30 J. CHURCH & ST. 245, 260 (1988) (discussing this development).

77. DWORKIN, *supra* note 13, at 131.

78. The advocated extension of the definition of "religion," as defended by the generalist school of thought, falls under the so-called "*inclusive non-accommodation*" theories of religious freedom. The "*inclusiveness*" is related to the public justification debate, implying that "religion" is not something special for the justification of legal and political decisions. Thus, no limitation on the addition of "religion" to the body of categories that can be used by legal and political authorities to justify their decisions. Similarly, "religion" is not special for the accommodation question: religions and non-religions should be treated equally by granting exemptions. *See* Schwartzman, *supra* note 22, at 22. A serious concern of this "symmetrical theory" of religious freedom—on both sides (public justification and religious accommodation) religion is not something special—is the huge risk of anarchy. *See generally* DWORKIN, *supra* note 13, at 117; LEITER, *supra* note 21, at 94; NUSSBAUM, *supra* note 15, at 173 (drawing attention to the side-constraints of an all-inclusive term religion).

79. DWORKIN, *supra* note 13, at 17, 129. *See also* Matthew Clayton, *Is Ethical Independence Enough?*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN

deep ethical commitments, and religious freedom as a general right to moral and ethical independence, is the assumption that public authorities are not in the position, nor able, to judge what should count as moral or religious truth. Perry says the following:

> [government], including a political majority, is not to be trusted as an arbiter of moral truth—when no legitimate government interest is at stake; moreover, the coercive imposition of moral uniformity, when no legitimate government interest is at stake, is more likely to corrode than to nurture the strength of a democracy. Religious believers do not have less reason than nonbelievers—instead, religious believers and nonbelievers have the same basic reason—to insist that government not ban or otherwise regulate or impede a moral practice.[80]

Ethical independence is presented as a normative value of the political liberty paradigm. Hence, it restricts authorities' opportunities to disfavor a particular view on what deserves attention in life. Dworkin states:

> In a state that prizes freedom, it must be left to individual citizens, one by one, to decide such questions for themselves, not up to government to impose one view on everyone. So, government may not forbid drug use just because it deems drug use shameful, for example; it may not forbid logging just because it thinks that people who do not value great forests are despicable; it may not levy highly progressive taxes just because it thinks that materialism is evil. But of course, ethical independence does not prevent government from interfering with people's chosen ways of life for other reasons: to protect other people from harm.[81]

Thus, understanding religion in terms of access to ethical independence pursues an ideal of liberal neutrality,[82] towards what Nussbaum has called, the "ultimate questions" of life.[83] The call for liberal neutrality towards deep human commitments has been strengthened by the claim that ethical independence in the core "requires that government not restrict citi-

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LIBERAL POLITICAL PHILOSOPHY 132 (2017) (a recent defense of Dworkin's approach to religious freedom).

80. Perry, *supra* note 20, at 1012. This concerns a Lockean criticism on governmental interference in matters of morality and religion. Locke states that the main purpose of the law "is not to provide for the truth of opinions, but for the safety and security of the commonwealth and of every particular man's goods and person." *Id.* at 1003.

81. DWORKIN, *supra* note 13, at 130.

82. Cécile Laborde, *Dworkin's Freedom of Religion Without God*, 94 B.U. L. REV. 125, 1258 (2014).

83. NUSSBAUM, *supra* note 15, at 168.

zens' freedom when its justification assumes that one conception of how to live, of what makes a successful life, is superior to others. It is often an interpretive question, and sometimes a difficult one, whether a policy does reflect that assumption."[84]

To clarify why we should endorse liberal neutrality as a matter of principle, the generalist position divides basic liberties into *special* and *general* rights. The difference between these two variants is rooted in the threshold authorities have to step over when they aim to restrict a right. Special rights focus on the "subject matter" and it is complicated to limit these rights legitimately, except in cases of emergency. The focus of a general right is on the relation between authorities and people. General rights restrict the scope of arguments authorities can provide to legitimately limit the exercise of a general right.[85]

The specific distinction between *general* (restrict arguments to limit free exercise) and *special* (focus is on a protection-worthy subject) rights gives generalists a reason to argue that religious freedom should be seen a general right as the category of "religion" remains a complicated subject to interpret. Thus, the definition problem of religion that according to the generalist position is intertwined with freedom of religion is an important argument to oppose granting religious freedom a *special* status, or considering religious freedom a special right. The semantic criticism at this point states that a special right would explicitly focus on the definition of religion and it would not be able to solve the definition problem of this right.[86] Also, a special right requires high demands on restrictions that aim to limit the exercise of such a right.

Instead, the generalist position argues that approaching religious freedom as a general right to ethical independence will provide protection to the free exercise of religion. The generalist position explains that the right to ethical independence "condemns any explicit discrimination . . . that assumes . . . that one variety of religious faith is superior to others in truth or virtue or that a political majority is entitled to favor one faith over others or

84. DWORKIN, *supra* note 13, at 141-42; *see also* Pierik & Van der Burg, *supra* note 74, at 507 (stating "equal respect for autonomous citizens means that the state should not only refrain from interfering with the exercise of this freedom, but also that it should equally protect and, if necessary, support it.").

85. DWORKIN, *supra* note 13, at 132-33 (stating that "a special right of religion declares that government must not constrain religious exercise in any way, absent an extraordinary emergency. The general right to ethical independence, on the contrary . . . limits the reasons government may offer for any constraint on a citizen's freedom at all.").

86. *Id*; *see generally* LABORDE, *supra* note 1, at 30-33; SULLIVAN, *supra* note 35, at 1-4 (discussing the definition problem of religion).

that atheism is father to immorality."[87] It "protects religious conviction in a more subtle way as well: by outlawing any constraint neutral on its face but whose design covertly assumes some direct or indirect subordination."[88] However, understanding religious freedom as a general right to ethical independence might force people to adjust their religious conduct in a way that fits the rationale of laws that are not *per se* directed to them.[89] Therefore, the generalist position argues that authorities should take into account whether the bans and other restrictions on a particular practice they propose or impose, are in fact targeting what one group might consider "a sacred duty" to comply with.[90] If that is the case, "then the legislature must consider whether equal concern . . . requires an exemption or other amelioration. If an exception can be managed with no significant damage to the policy in play, then it might be unreasonable not to grant that exception."[91]

However, the generalist says that when a religious practice "would put people at a serious risk that it is the purpose of the law to avoid, refusing an exemption does not deny equal concern. That priority of non-discriminatory collective government over private religious exercise seems inevitable and right."[92] Thus, there is no principled reason to exempt the followers of the Santo-Daime Church who drink ayahuasca tea that contains DMT. The justification to deny exemption is rooted in public health grounds.[93] Nevertheless, there is a principled reason to provide equal financial grants to religious organizations that reject same-sex couples and organizations that accept them. Dworkin equally explains the reason as to why we should finance these by stating:

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87. DWORKIN, *supra* note 13, at 133-34.

88. *Id.* at 134.

89. Ronald Dworkin stated, "[i]f we deny a special right to free exercise of religious practice, and rely only on the general right to ethical independence, then religions may be forced to restrict their practices so as to obey rational, non-discriminatory laws that do not display less than equal concern for them." *Id.* at 135-36.

90. *Id.* at 136.

91. *Id.*

92. *Id.*

93. *Id.* at 136-37. In the Netherlands, some members of the Santo-Daime Church, who have been prosecuted for the import or possession of ayahuasca tea were discharged from prosecution. *See also* Wahedi, *supra* note 3, at 134-35. The lack "of any significant risks to public health" is the main reason for discharge. The ECtHR reached another conclusion on this matter and declared the applicants inadmissible as "the prohibition of the possession for use of DMT was necessary in a democratic society for the protection of health." *Fränklin-Beentjes and Ceflu-Luz Da Floresta v. The Netherlands*, App. No. 28167/07, 3 Eur. Ct. H.R. ¶ 48 (2014).

> Financing Catholic adoption agencies that do not accept same-sex couples as candidates, on the same terms as financing agencies that do, might be justified in that way, provided that enough of the latter are available so that neither babies nor same-sex couples seeking a baby are injured.[94]

D. *Equation*

Equation requires equal respect for all deep concerns of people. Thus, *in effect* religious beliefs and practices, as they concern deep human concerns, should not be favored over similar deep concerns of other citizens. Religious freedom should ensure this equal treatment of people.[95] Against this backdrop, equation opposes arguments that justify religious freedom in light of any "distinct value" of religious manifestations. Rather, it argues that believers' vulnerability to discrimination should be considered the main justification for religious freedom. In addition, equation opposes a "religious" understanding of religious freedom. In this sense, equation is very close to generalization. However, there are two main differences. First, it is not indifference or neutrality as such that requires principled equation.[96] It is rather the idea of equality of treatment of all acts and thoughts that have an intrinsic value.[97] Second, equation does not generalize religious freedom to something like the general right to ethical independence and moral freedom.[98] It rather approaches religious freedom from the principle of equality of treatment, which is considered the main constitutional value of a liberal democracy.[99] Therefore, the equation approach is part of what has been

94. DWORKIN, *supra* note 13, at 136.

95. Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?* 84 NOTRE DAME L. REV. 807, 834-35 (2009) (stating that "the point of the Religion Clauses is not to affirm (or deny) the value of religious practices, any more than the point of the Free Speech Clause is to affirm (or deny) the value of flag burning.").

96. *See* Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 496-97, 520 (2009).

97. *See* Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, at 352 (2010) (arguing that some liberal theorists of religious freedom have "[attacked] religious exemptions on the general premise that they are fundamentally unfair to nonreligious people.").

98. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51-77 (2007); *see generally* LABORDE, *supra* note 1, at 55-57; Lund, *supra* note 97, at 360 (critical of the theory developed by Eisgruber and Sager). *See also* Boyce, *supra* note 96, at 496-97 (differentiating between equality in *treatment* and equality in *effect*) (emphasis added).

99. LABORDE, *supra* note 1, at 29 (arguing that egalitarian theorists of religious freedom advocate a regime in which "all citizens—traditionally religious or not—are treated with equal concern and respect, as free and equal citizens of a democratic soci-

called the egalitarian theories of religious freedom.[100] The question is, however, equation of *what*?[101] At the outset, this position is anti-favoritism,[102] and it advocates equal treatment of all conscientious manifestations and beliefs that contain an intrinsic value.[103]

Recall the recent case of the Pastafarian who was denied by a local municipality in the Netherlands to submit a photograph with a pasta strainer on her head. Another Pastafarian who was similarly rejected by the local authorities, referred to the possibility of Muslims and Jews to submit photographs on which they have covered their heads.[104]

This case reminds us of a theoretical example about two people who do not share the same religion but share similar objections that give them a reason to ask for accommodation. A is a Jehovah's Witness and B is a

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ety."). *See also* Boyce, *supra* note 96, at 520 (stating that "[e]quality of treatment is the central principle of our constitutional order . . . [and] [t]o require or permit exemptions only for religious but not secular individuals profoundly violates that constitutional principle. Because the free exercise of religion necessarily entails the freedom to believe as well as disbelieve, granting exemptions only to believers also violates the core values underlying the Free Exercise Clause.").

100. *See* Cécile Laborde, *Liberal Neutrality, Religion and the Good?*, *in* JEAN LOUISE COHEN & CÉCILE LABORDE (EDS.), RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 249 (2016) (discussing egalitarian theories of religious freedom).

101. *See* LABORDE, *supra* note 1, at 89 (explaining what equation aims to realize. "On the one hand, people's ability to act in accordance with their deep commitments should not be subjected to unequal state burdens; on the other hand, the state should not endorse the symbols and rituals of dominant religions because they could be disparaging to racial-like minorities.").

102. SULLIVAN, *supra* note 35, at 149; *see also* LABORDE, *supra* note 1, at 42 (elaborating on the egalitarian criticism towards religious accommodation, considering this as unfair and contrary to the liberal commitment "to neutrality about the good and equality between citizens"); Boyce, *supra* note 96, at 551 (arguing that in today's era of secularization a favored treatment of religious beliefs and acts is very problematic).

103. EISGRUBER & SAGER, *supra* note 98, at 51-77; *see also* Nehushtan, *supra* note 14, at 149 (commenting on the position of Eisgruber and Sager: "[i]t is possible to give a certain priority to religious reasons, not because of their content but rather for largely neutral reasons. Eisgruber and Sager, for example, take this line in suggesting that religion is distinctive rather than unique. They claim that religion, much like race and gender, justifies subjecting government's decisions to greater scrutiny than many other topics or policies receive."); LABORDE, *supra* note 1, at 51 (arguing that an egalitarian theory of religious freedom, as conceptualized by Eisgruber and Sager, is an "attractive" alternative for "those who worry that formal legal equality leaves minority interests at the mercy of majoritarian preferences yet see little justification for a [sectarian] privileging of religious interests *qua* religious.").

104. Rb. Noord-Nederland 28 July 2016, ECLI:NL:RBNNE:2016:3626, ¶ 5.1 (Neth.).

pacifist. A and B have objections to manufacture tank components.[105] This example has been used by the proponents of the equation approach to argue that a legal regime that exempts A and not B is quite problematic.[106] This objection of improper distinction is present in the Pastafarian case. The equation position will ask why some believers, such as Muslims and Jews, are allowed to cover their heads on the driver's license photograph they submit, while Pastafarian believers are denied the same opportunity.[107]

Another appropriate example in this context is the ongoing debate in legal theory and society about the legal acceptability of ritual male circumcision. As such, several European courts have ruled about the legality of this practice. In this regard, one could refer to the German and Finnish court judgements. In both cases, the circumcision of young boys was followed by medical complications. Although the Finnish Supreme Court held that male circumcision, under particular circumstances, was an acceptable practice,[108] the German district court in Cologne held that the irreversible character of this practice violated the boy's rights to religious freedom, as they were unable to give their consent. Next, the judges argued that the parental right to religious freedom and their right to raise their children by their convictions, do not justify the practice of ritual male circumcision.[109] The recurring question is: what is the justification to keep on considering this practice permissible? The criticism is that all forms of female circumcision, better known as genital mutilation are prohibited. Even incision, which is less violable than ritual infant male circumcision. The difference in legal approaches has been criticized as discriminatory.[110] The equation position, which advocates for a similar approach to religious and non-religious argu-

105. Eisgruber & Sager, *supra* note 35, at 1292.

106. *Id.*

107. However, the question remains: what kind of beliefs, convictions and practices should be equalized? In addition, how can the comparative framework be shaped in this respect? *See also* LABORDE, *supra* note 1, at 53 (arguing that "[the] category of non-religion is too loose and imprecise to serve as a comparator to that of religion.").

108. Heli Askola, *Cut–Off Point? Regulating Male Circumcision in Finland*, 25 INT'L J.L. POL'Y & FAM. 100, 106 (2011).

109. Landgericht Köln [The District Court of Cologne], 7 May 2012, 151 Ns 169/11, ¶ III. In applying the court's reasoning, the parental right to raise their children in accordance with their Islamic faith does not justify ritual male circumcision, which is considered an irreversible intervention that lacks consent and violates bodily integrity. Circumcision does not provide children with an opportunity to make independent decisions regarding the religion they choose to adopt. Therefore, the decision to be circumcised must be postponed.

110. Sohail Wahedi, *Het beoordelingskader van rituele jongensbesnijdenis* [*The assessment framework of ritual male circumcision*], 7 TIJDSCHRIFT VOOR RELIGIE, RECHT EN BELEID [J. FOR RELIGION, L. AND POL'Y] 59 (2016).

ments concerning the way people want to live their lives, theoretically strengthens the criticism of "a double standard on the part of [those] who fail to challenge other unnecessary surgical interventions—such as male circumcision or cosmetic surgery—in their own communities and cultures."[111]

Thus, equation "requires simply that government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."[112] Meaning there is no principled reason to differentiate between deep human commitments. The norm should be an equal approach to non-religious and religious perspectives on the ultimate questions of life. This argument rests on a definition of religious freedom that does not provide religion with a base for reproduction. The equation approach rethinks religious freedom as "the right of the individual . . . to life outside the state—the right to live as a self on which many given, as well as chosen, demands are made. Such a right may not be best realized through laws guaranteeing religious freedom but by laws guaranteeing equality."[113] Therefore, the regime of religious toleration should be understood against the backdrop of human vulnerability to discrimination. Eisgruber and Sager states:

> [what] properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns. When we have replaced value with vulnerability, and the paradigm of privilege with that of protection, then it will be possible both to make sense of our constitutional past in this area and to chart an appealing constitutional future.[114]

This position allows us to claim that there are two main differences between generalization and equation. The first focuses on how we should understand religious freedom as a liberty. The second approaches religious freedom from the ideal of equality.

E. *Representation*

The main claim of representation is that the theory it has developed is not narrow in the sense of exclusively protecting one group. Hence, it is not

111. Moira Dustin, *Female Genital Mutilation/Cutting in the UK*, 17 EUR J. OF WOMEN'S STUD. 1, 8-23 (2010).

112. Eisgruber & Sager, *supra* note 35, at 1283.

113. SULLIVAN, *supra* note 35, at 159.

114. Eisgruber & Sager, *supra* note 35, at 1248.

a sectarian theory of religious freedom. It is rooted, as Laborde says: "in the ecumenical value of ethical integrity, and in the normative justifications for generic liberal rights such as speech and association."[115] Representation understands religion as a concept that stands for a set of protection-worthy values that are not necessarily "religious" in the core.[116] These values justify according to the representation position the codification of a special right to religious freedom.[117] As such, it has been argued that religion, like respect, stands for a "hypergood:" a particular category of higher goods.[118] Koppelman argues that:

> [religion] . . . has a value that can override many other goods and preferences. But religion is one among many hypergoods. It should not be privileged over the rest of them. This fundamental problem of modernity should not be adjudicated by the state. The problem of determining the appropriate hypergood, if any, and its reconciliation with the broad range of ordinary goods, is a question that occupies the same existential territory as religion. If the state is incompetent to resolve religious questions, it is likewise incompetent to resolve this one.[119]

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115. The position this article qualifies as "representation" elaborates on the "proxy" and "disaggregation" approaches. *See* LABORDE, *supra* note 1; Laborde, *supra* note 20.

116. *See* Ronan McCrea, *The Consequences of Disaggregation and the Impossibility of a Third Way*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 69 (2017) (criticizing Laborde's disaggregation approach).

117. Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 332 (2001) Rutherford argues that religion, within the context of U.S. constitutional law has a special status, not on sectarian grounds, but for the reason that religion serves very important functions. Rutherford identifies "four related functions that religion serves: (1) religion helps balance power and limit the power of both the government and organized faith; (2) religion sometimes enables disempowered groups to organize and increase their power; (3) religion produces values that are neither market-driven nor controlled by the government; and (4) religion provides a source of spirituality and personal identity that enables individuals to live with purpose and dignity."). *See also* Jamal, *supra* note 1, at 439 (defending religious freedom as the right that gives protection to the minority views); Lund, *supra* note 1, at 515 (arguing that "the way to protect all deep-and-valuable human commitments is by naming certain specific deep-and-valuable commitments. There is no other way. We start with the ones we know, and we keep an open mind about the rest. Religion is not the only deep-and-valuable human commitment. But it is one of them, and that is enough.").

118. Koppelman, *supra* note 16, at 594.

119. *Id.* In his later publications, Andrew Koppelman has elaborated on considering religion a legal proxy. *See e.g.* Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 981 (2010) (stating "it is not

More specifically and to identify the relevant legal values religion stands for, the representation position reflects on the potential matches between the "different parts of the law" and "different dimensions of religion for the protection of different normative values."[120] Examples of such matches are the presentation of religion as: a conception of the good life; a conscientious moral obligation; the key feature of identity; mode of human association; a vulnerability class; a totalizing institution and an inaccessible doctrine.[121] According to the representation position, some of these matches, such as the presentation of religion as a conception of the good life, a matter of conscience, identity and association, are more "relevant to the notion of freedom of religion" than other overlapping areas.[122] Hence, the representation position could be defined as "religion-blind without being religion-insensitive, because it sees religion, not as a specialised and self-contained area of human belief and activity, but as a richly diverse expression of life itself."[123]

II. SHOULD THE LAW IN LIBERAL DEMOCRACIES CARE ABOUT RELIGION?

Should the law in liberal democracies care about religion *qua* religion? What does the classification of the normative positions tell us about the "specialness" of religion? Thus, the question is: does religion *qua* religion

possible to offer a unitary account of what religion is good for. Like a knife or a rock, it is something that people find already existing in the world, which they then put to a huge variety of uses. Religion denotes a cluster of goods."). This position has been defended more recently in ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 124 (2013). *See also* Koppelman, *supra* note 41, at 37 (repeating the view that religion encompasses many goods that people aim to purse and religious freedom enables them to do that).

120. Laborde, *supra* note 20, at 594.

121. *Id.* at 594-95.

122. *Id.* at 595-97. The argument is that the values behind the identified matches are *as such* worthy of special legal solicitude. Thus, the representation position draws on the idea that the values behind a broad set of matches provide an appropriate base to justify the legal protection of religious beliefs and practices.

123. *Id.* at 600. Formulated in this way, a religious way of life is just one way human beings could give moral substance to their lives. The normative argument behind this position is the classical liberal idea that authorities should refrain from dictating the right way of life. Citizens should find in freedom their desirable path to live their lives. Therefore, representation advocates "strong evaluations" to examine whether believers could be exempted from the application of laws that are at odds with their convictions, such as the prohibition of wearing headscarves and yarmulkes in public. The representation position claims that "the value of integrity" is the right interpretative value to deal with such "strongly valued practices" of the free exercise.

deserve special legal protection? At the outset there is no one right answer to this question. The classification of the normative approaches is an appropriate method to look beyond theoretical differences and figure out whether we can identify and subsequently theorize a binding element in the liberal theories of religious freedom. Thus, the focus is on the binding characteristic of the argumentation patterns this article has conceptualized.

A. *Does Religion Qua Religion Require Special Legal Protection?*

This section classifies the types of responses that answer this question. This classification is based on how the normative positions this article has conceptualized in the development of its theoretical framework answer this question. The similarities between the responses uncover three categories of responses. First, a *Strong No*, religion does *definitely not* qualify for special legal protection *qua* religion. Second, a *Soft No*, religion does *not necessarily* deserve special legal protection *qua* religion. Third, a *Soft Yes*, it is eligible for special legal protection, *though not for distinctly religious reasons*.[124] This section elaborates on these three responses and answers the more general question whether *the law* in liberal democracies should care about religion simply because it is religion?

1. No, Definitely Not: The Strong No

One potential answer suggests *definitely not*. The argument of this *Strong No* is that the concept of religion is on principled grounds not eligible for special legal protection *qua* religion. Thus, according to this answer, the concept of religion does not provide any room to support arguments that justify the special legal protection of religion with an appeal to the distinct values of religion. Therefore, this response rejects arguments as defended in the sectarian theories of religious freedom, justifying this liberty with an explicit appeal to values that can be considered distinctly religious, i.e. the transcendental value of religion[125] or what a particular religious dogma prescribes as protection-worthy.[126] As such, the *Strong No* corresponds with the principled rejectionist answer to the question whether religion *qua* religion requires special legal protection. The rejectionist position understands

124. I am grateful to Professor Steven D. Smith who challenged me to figure out what theoretical responses are possible to the question as to whether religion *qua* religion deserves special legal protection. The threefold response (the *Strong No*, the *Soft No* and the *Soft Yes*) is based upon his suggestion.

125. McConnell, *supra* note 15.

126. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN], *supra* note 30.

"religion" as the combination of categorical commands that are insulated from evidence.

Does this conception of religion make a strong case to tolerate religion *qua* religion? The principled rejectionist position suggests not. The argumentation pattern to deny special legal protection to religion *qua* religion starts by defining what the notion of pure toleration requires. The principle of toleration requires that a belief or practice that is objectionable and that can be stopped by the dominant group in society, is nevertheless *tolerated* for *principled reasons*. These principled reasons of toleration find their origins in what *morality* and *epistemology* consider protection-worthy. Principled rejection says that toleration on moral or epistemic grounds does not require *special toleration* of categorical commands that are insulated from evidence (i.e. religion does not require special legal protection *qua* religion). In sum, the principled grounds for toleration do not provide a fruitful basis to argue that religion needs special legal protection *qua* religion.[127]

2. No, Not Necessarily: The Soft No

Another possible response to the question whether religion *qua* religion requires special legal solicitude concerns the *Soft No*. The *Soft No* response entails that religion *as such* does *not necessarily* require special legal protection, nor is an explicit right to religious freedom required to guarantee the free exercise of religion. Reflecting on the justification grounds of the special legal solicitude towards religion uncovers that "other" broader faculties, liberties and vulnerabilities (i.e. the believers' vulnerability to discrimination due to their specific habits) require special attention and protection. This response considers religion a subset of these other broader faculties (e.g. conscience, ethical integrity and deep commitments) that justify a distinct legal protection regime because of their particular specialness. In the same manner, religious freedom has been rethought as the right that provides protection to beliefs and practices that are not necessarily rooted in a theistic understanding of religion. As such, religious freedom has been presented as the right to ethical independence and moral freedom.[128] Finally, religious freedom has been considered a subcategory of other constitutional freedoms that, without any doubt need codification and

127. The position that religion *qua* religion does not require special legal protection corresponds with the position of Brian Leiter, who has stated that Kantian and utilitarian moral grounds as well as Millian epistemic grounds of toleration only make a strong case to protect equal liberty of conscience that *encompasses* the religious conscience. Thus, there are no principled reasons to tolerate religious conscience separately.

128. DWORKIN, *supra* note 13.

legal protection in liberal democracies (e.g. basic liberties, such as the freedom of conscience, thought, association and expression). Thus, for the justification of the right to free exercise of religion, the *Soft No* response does not necessarily rely on distinctly religious values.[129] Rather, it approaches religion and religious freedom from a broader framework of faculties and liberties. This response paves the way for the suggestion that there is no need for a constitutionally protected religious freedom that gives protection *only* to religious beliefs and practices. The conflicts between law and religion are manageable, even without an appeal to the distinct values of religion. The main message of this response is that although religion does not necessarily require special protection simply because it is religion, it deserves special legal attention under some other general and apparently non-religious faculties, categories and rights, e.g. conscience, ethical independence, moral freedom and a combination of basic liberties, such as the freedom of speech, association and expression.

3. Yes, Though Not For Distinctly Religious Reasons: The Soft Yes

The *Soft Yes* concerns the final possible response to the question whether—according to the liberal theories of religious freedom—religion *qua* religion deserves special legal solicitude. This response does not justify religious freedom with an explicit appeal to distinctly religious values. It implies a "*yes*" as it says that religion deserves special legal protection *qua* religion. However, it takes a "*soft*" turn immediately, as it is a liberal answer that for principled reasons refrains from the adoption of an argumentation pattern that justifies the special legal protection of religion on the grounds that are perceived distinctly religious. Against this backdrop, the *Soft Yes* response corresponds with the representation position. The "*yes*" of this response suggests that religion is eligible for special legal solicitude as it represents a set of values and functions that are worthy of legal attention and protection. However, in correspondence with the "*soft*" nature of this response, these values are not necessarily religious. Recall the representation argument suggesting that religion stands for a proxy of goods, social functions and the pursuit of non-profit values that *as such,* justify the special legal solicitude for religion. Thus, the *Soft Yes* response entails that religion deserves special protection in law, though not necessarily for reasons that find their origins in the distinct value of religion.

129. The *Soft No* response corresponds with the substitution, generalization and equation positions.

B. *The Synthesis of Abstraction From The Religious Dimension*

This article has focussed on the liberal theories of religious freedom and their main contribution to the debate on the role and place of religion in law. Based on this, Part I has developed a conceptual framework that consists of normative positions, each theorizing a particular approach towards religion and religious claims for exemptions from laws. The argumentation patterns of this conceptual framework have proved to be useful in answering the question whether religion *qua* religion deserves special legal protection in liberal democracies. The question remains however, whether the threefold response to the special legal solicitude towards religion (the *Strong No*, the *Soft No* and the *Soft Yes*), provides a fruitful base to identify and subsequently theorize a particular feature that can serve as the binding element of the liberal theories of religious freedom. To this end, it is important to figure out what the overall message of the threefold response may be concerning the question whether religion *qua* religion requires special protection in law.

The clear message across the three types of responses is that distinctly religious values are not considered eligible to justify the special legal solicitude towards religion. Thus, the synthesis of this threefold response is the dismissal of the special legal protection of religion *qua* religion. Moreover, this synthesis renounces arguments that justify religious freedom with an appeal to *any* distinct value of religion. What clarifies and justifies the special legal attention for religion is a broader and apparently religion-empty (i.e. free from distinctly religious values) framework of faculties, liberties and vulnerabilities.[130] The question is, what does this predominantly negative answer to the question as to whether religion *qua* religion requires special legal protection suggest about the binding feature of the liberal theories of religious freedom? Can we say that the threefold response that we have given is an illustration of "decoupling religion from a god?"[131] Alternatively, does the synthesis of our threefold response fit the "tendency, among legal practitioners, to re-describe" religious matters in non-religious terms?[132]

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130. LABORDE, *supra* note 1, at 42 (criticizing the "vague" broader framework that is adopted by egalitarian theorists of religious freedom to justify the special legal solicitude towards religion).

131. DWORKIN, *supra* note 13, at 132 (stating that "the problems we encountered in defining freedom of religion flow from trying to retain that right as a special right while also decoupling religion from a god.").

132. Laborde, *supra* note 20, at 590 (arguing that "there has been a tendency, among legal practitioners, to re-describe [particular religious] practices in the language

The synthesis of our negative response encompasses both when it reacts to the justification grounds of the special legal solicitude towards religion. It decouples religion from *any* God. Essentially, it presents religion as one subcategory in the more general and apparently non-religious categories of human conscience and the conceptions of the good life. It decouples religion from *any* God in a further sense. The threefold response conceptualizes religion in a God-empty way, free from distinctly religious values. An appropriate example of a God-empty conception of religion is the definition of religion as the combination of categorical demands that are insulated from evidence and reason.[133] Other God-empty conceptions of religion are concerned with the identification of general and apparently non-religious values that are *as such* worthy of legal protection. Examples of such intrinsic and valuable aspects of religion are the values behind human conscience,[134] ethical integrity,[135] deep ethical commitments,[136] hope,[137] vulnerability to injustice,[138] and so on. These valuable—though not specifically or distinctly religious—aspects to religion justify *as such* the special legal protection of religious beliefs and manifestations.

The synthesis of our threefold response fits similarly the tendency of re-description, which suggests that for the legal analysis of a case of relig-

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of conscientious obligation, so as to accommodate them under the label of freedom of religion.").

133. LEITER, *supra* note 21, at 33-34. Koppelman is critical of Brian Leiter's conception of religion, referring to it as "a radically impoverished conception." Koppelman, *supra* note 119, at 962; *see* McConnell, *supra* note 18, at 784 (suggesting, "it is futile to draw up a list of features descriptive of religion and only of religion. What makes religion distinctive is its unique *combination* of features, as well as the place it holds in real human lives and human history.") *See also* François Boucher & Cécile Laborde, *Why Tolerate Conscience?*, 10 CRIM. L. & PHIL. 493, 496 (2016) (stating "Leiter fails to establish insulation from reasons and evidence as the demarcating feature of religion. This is because he draws on incompatible interpretations of 'insulation from reasons and evidence' to reply to different challenges regarding either the under-inclusiveness or the over-inclusiveness of his definition of religion.").

134. NUSSBAUM, *supra* note 15, at 168-69. *But see* KOPPELMAN, *supra* note 119, at 153 (arguing that "[i]t is not clear how Nussbaum can maintain the distinction between her position and a libertarian view in which any regulation of anyone's conduct is presumptively invalid . . . [As such], [t]he boundaries of protection in Nussbaum are thus uncertain."). *See also* Laborde, *supra* note 20, at 589 (arguing that the substitution position is not able to provide equal protection to all religious practices that are valuable, though not always on conscientious grounds).

135. Laborde, *supra* note 20, at 589.

136. DWORKIN, *supra* note 13, at 5.

137. KOPPELMAN, *supra* note 119, at 122.

138. Eisgruber & Sager, *supra* note 35, at 1248.

ious manifestation, it is neither necessary, nor useful to define or understand that case in specific and distinct religious terms. This tendency of re-description arises from projects that aim to rethink religious freedom in a religion-empty way that is not *only* protecting theistic beliefs and manifestations. The normative argument is that both theistic and non-theistic beliefs and manifestations that have an intrinsic value, which attaches to valuable aspects of a human life, should be treated with the same amount of respect and concern. For this reason, religious freedom has been rethought, approached and defended as the liberty of conscience,[139] the right to moral freedom,[140] the right to ethical independence[141] and the citizens' equal right to live outside the state.[142]

So far, we have argued that the synthesis of our threefold response decouples religion from *any* God and relies mainly on a non-religious language to re-describe religious matters.[143] The question is whether we could provide a more coherent description of our synthesis that encompasses both the decoupling side as well as the re-description aspect of the debate in jurisprudence about law and religion. In other words, is it possible to identify and subsequently define in a more systematic way the feature that serves as the binding characteristic of the liberal theories of religious freedom? This feature looks beyond the varieties of normative positions and connects these perspectives from their common point of focus: the justification grounds for the special legal protection of religion. With this presumption in mind, we can say that the starting point of our reflections for the identification of the potential binding element of the liberal theories of religious freedom is the *interpretative concern* of these theories about the *proper legal definition* of religion and religious freedom and the *fair application* of this specific definition in practice. This *interpretative concern* guides us to define the *binding characteristic* of the liberal theories of religious freedom. First, we have seen that these theories aim to provide the most appropriate definition of religion in law. Second, they have one important *concern*: the egalitarian attention to fair treatment of deep human com-

139. MACLURE & TAYLOR, *supra* note 59, at 89; NUSSBAUM, *supra* note 15, at 169.

140. Perry, *supra* note 20, at 996.

141. DWORKIN, *supra* note 13, at 130.

142. SULLIVAN, *supra* note 35, at 159.

143. *Cf.* McCrea, *supra* note 116, at 71 (arguing that religion does not exist in the disaggregated form); Peter Jones, *Religious Exemptions and Distributive Justice*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 162 (2017) (explaining that the non-religious description of religious exemptions, such as the use of a cultural frame, fits the egalitarian strategy to defend religious exemptions on non-sectarian grounds).

mitments and beliefs. Hence, the binding characteristic we aim to theorize is a normative response to the question: how should liberal democracies understand and accordingly deal with the concept of religion in law? This binding feature of the liberal theories of religious freedom encompasses the entire body of arguments that pave the way to deal with the indicated *interpretative concern* of the debate about the role of religion in law within the paradigm of liberal political philosophy. The binding characteristic we aim to define takes the form of *an interpretative shield*: it is embedded in philosophical arguments that can resist the justification of religious freedom with an appeal to distinctly religious values. In addition, it draws on a non-sectarian language to conceptualize religion and religious manifestations.

What does this *interpretative shield* suggest about the binding feature of the liberal theories of religious freedom? Does it help us to provide a more coherent definition of our synthesis that covers the decoupling and the re-description aspects of the law and religion debate in jurisprudence? Yes, it does. The negative answer to the question as to whether religion *qua* religion requires special legal protection stands for *abstraction from the religious dimension.* Thus, abstraction is the binding element of the various normative positions discussed in this article. Abstraction dismisses arguments that justify the special legal solicitude towards religion *qua* religion. Moreover, it renounces arguments that justify religious freedom with an appeal to *any* distinct value of religion. Subsequently, abstraction proposes a general framework of ecumenical values that justify free exercise of religion and it rethinks religious claims for exemptions from laws, from that general framework of ecumenical values.[144]

144. *See* Wahedi, *supra* note 3, at 134. In earlier research that aimed to provide a better understanding of how contentious religious manifestations were presented and framed in contemporary legal, political and societal debates, abstraction was introduced as a mechanism that, by the use of different rhetorical means and arguments, marginalized or even disregarded the specific religious dimension of a particular religious manifestation. This research suggested that the mechanism of abstraction covered at least three different approaches to deal with contentious religious practices: *marginalization*, *neutralization* and *reframing* of the religious dimension.

Marginalization conceptualized the entire body of arguments suggesting that the religious dimension is not sufficiently distinctive or important for understanding a religious manifestation and therefore this particular dimension could be ignored largely in the legal assessment of the religious manifestation at stake. For example, the former Dutch Minister of Justice compared face-covering veils to nudists, leaving aside the religious significance of covering the whole body. *Cf. also* the suggestion of Professor Ellen Hey on a draft version of my PhD proposal: "[a]bstraction is an omnipresent but little noticed phenomenon in the marginalization of religious values." (available upon request). *See also* Wibren van der Burg, *Homogeniteit versus diversiteit – schuivende verhoudingen* [*Homogeneity versus diversity – sliding relationships*], 5 RELIGIE &

III. ABSTRACTIONS FROM THE RELIGIOUS DIMENSION DISENTANGLED

The dismissal of the arguments that aim to justify the special legal protection of religion *qua* religion, which is the origin of abstraction, takes place at different levels. As such, abstraction dispenses with philosophical arguments in mind the special legal protection of religion *qua* religion, at the *conceptual level of religion*, *religious values*, *constitutional value of religion* and finally at a practical level—*the protection of the free exercise of religion in practice*. The overall claim is that for the analysis of a clear case of religious manifestation, such as ritual male circumcision or wearing headscarves and yarmulkes, it is neither possible, necessary, nor useful to

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SAMENLEVING [RELIGION & SOC'Y] 103 (2010) (discussing the marginalization of the religious dimension).

Neutralization conceptualized the body of arguments suggesting that religious freedom is superfluous, as other fundamental rights—e.g. free speech and the freedom of association—provide enough protection to religious manifestations. As such, this approach aimed to "neutralize" the religious dimension of a manifestation as a matter of speech or association. An example is considering a Church's decision to ban female priests as a matter of freedom of association. *See* EISGRUBER & SAGER, *supra* note 98, at 63; Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, *in* MICAH SCHWARTZMAN, CHAD FLANDERS & ZOË ROBINSON (EDS.), THE RISE OF CORPORATE RELIGIOUS LIBERTY 77, 88 (2016) (stating that "[the] group-centered right of close association, like the dyadic version of the right, offers a justification for the right of the Catholic Church to discriminate in its choice of priests. And . . . the group-centered right is in principle available outside the realm of religion. Here there are numerous possibilities. The Thursday Club is an obvious candidate; so too might well be the Tarpon Bay Women's Blue Water Fishing Club.").

Reframing conceptualized the body of arguments suggesting that there is a shift away from the traditional frame that a particular religious manifestation is supposed to be protected, based on religious freedom, unless there are strong reasons (e.g. violation of other fundamental rights) to restrict it. The new alternative frame starts from the description of a contentious manifestation as *prima facie* unacceptable and merely asks whether it might nevertheless be tolerated on the basis of religious freedom. Thus, the burden of proof is completely reversed. An appropriate example is male circumcision. The legal permissibility of this practice was rarely questioned in the past as it concerned an admissible religious manifestation. Today, a shift is visible towards the idea that ritual infant male circumcision is unacceptable as it concerns a harmful manifestation that violates fundamental rights. *See* DONALD A. SCHÖN & MARTIN REIN, FRAME REFLECTION. TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES (1994); *See also* Abbie J. Chessler, *Justifying the Unjustifiable: Rite v. Wrong*, 45 BUFF. L. REV. 555 (1997). *But cf.* Rhona Schuz, *The Dangers of Children's Rights' Discourse in the Political Arena: The Issue of Religious Male Circumcision as a Test Case*, 21 CARDOZO J.L. & GENDER 347 (2015).

describe or understand such type of cases in specific and distinct religious terms.[145]

A. *The Concept of Religion*

Abstraction focuses at this level on the interpretative concept of religion.[146] In general, it does not describe religion in distinctly religious terms, but instead it defines religion broadly, that is to say in non-religious terms.[147] The argumentation pattern of this step of abstraction focuses on what religion entails and identifies the characteristics that follow from that question in non-religious terms. Recall, the conception of religion as a combination of categorical demands to act and beliefs insulated from evidence and reason. These features of religion do not justify singling out religion *qua* religion.[148] Hence, in the case of conflict of norms, the concept of human conscience provides a fruitful base to solve that conflict. Thus, religion is a subset of human conscience. That faculty, conscience, is worthy of protection and not religion as such.[149] Another non-religious and general definition of religion is embedded in the philosophical idea that says, the category of religion stands for deeply held ethical commitments of human beings to succeed in life.[150] In these definitions of religion, there is abstraction from the religious dimension, as for the description of religion they do not refer to distinctly religious values.[151] Accordingly, religion has been defined religion-empty,[152] and the language that has been used to talk about religious manifestations is merely religion-empty.[153]

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145. The interplay and confrontation between theories of religious freedom and debates about concrete cases of free exercise will have an indispensable theoretical value in defining the latitude of abstraction.

146. LABORDE, *supra* note 1, at 30 (arguing that egalitarian theorists of religious freedom elaborate on "an interpretative, *not a semantic*, conception of religion.").

147. *Id.* at 31 (stating that egalitarian theorists of religious freedom focus mainly on what is *potentially* "protection-worthy" about religion).

148. *Id.* at 28 (stating that "religion may be paradigmatic of beliefs, identifications, and practices that people have a particular interest in pursuing in their own way, individually or collectively. But . . . while religion is a paradigm of those valuable concerns, it does not uniquely capture them.").

149. LEITER, *supra* note 21, at 33-34.

150. DWORKIN, *supra* note 13, at 114.

151. LABORDE, *supra* note 1, at 32 (arguing that the category of religion has been defined less specific, "ethnocentric and biased" by the egalitarian theorists of religious freedom).

152. This part points to the de-coupling process of religion from God.

153. This aspect refers to the re-description process of religious matters in non-religious terms. *See* LABORDE, *supra* note 1, at 14 (criticizing the liberal religion-empty

B. *The Distinct Value of Religion*

The argumentation pattern of this step of abstraction focuses on the question whether religion is a valuable category in law. Although the argumentation framework does not doubt that the category of religion can have particular values, such as balancing the power and mobilizing people to do non-profit work,[154] it shifts from these values towards a more general and broad (i.e. less sectarian) framework of values when it aims to justify the special legal solicitude towards religion. This shift results in the claim that religion *as such* does not have a distinct value and the values attached to religion are general of nature. Thus, there is abstraction from values that are considered distinctly religious, such as the transcendental and suprarational values of religion,[155] towards a more general framework of values, such as those concerning the human conscience,[156] ethical integrity[157] and ethical commitments.[158] Hence, what has been presented as a distinct value of religion fits more general values. Therefore, the argument to justify the distinct value of religion and accommodate accordingly a particular religious manifestation applies simultaneously to comparable non-religious practices, arguments and projects that ask for exemptions.[159] One might think of the desire to become a vegetarian and the desire of not eating pork meat for religious reasons.[160] The value of both cases at this level of abstraction is similar, as being a vegetarian or refraining from eating pork can be understood in terms of acting in accordance with deeply held ethical commitments about how to live a life.

The argumentation pattern at this level of abstraction entails that it is not necessary to rely on transcendental (meaning sectarian) grounds to justify the free exercise of religion.[161]

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concept of religion and stating "that the analogy between religion and "conceptions of the good" (or similarly loose terms) is unsatisfactory, and that the slogan "equal liberty" sometimes obfuscates what is being equalized.").

154. Rutherford, *supra* note 117, at 332.

155. *See generally* McConnell, *supra* note 15.

156. *See generally* McConnell, *supra* note 26.

157. *See* NUSSBAUM, *supra* note 15, at 168-69; KOPPELMAN, *supra* note 119, at 153; Larbode, *supra* note 20, at 589.

158. *See* Laborde, *supra* note 20, at 589-90.

159. *See* May, *supra* note 40, at 191 (arguing that non-religious moral projects could be worthy of legal protection, as some religious moral projects require exemptions).

160. *See* MACLURE & TAYLOR, *supra* note 59, at 77.

161. LABORDE, *supra* note 1, at 28 (rejecting the idea that religion is special, meaning "that religious citizens should receive uniquely privileged treatment in the law—say, in the form of exclusive exemptions on the ground of religious belief. Relig-

C. *The Consitutional Value of Religion*

The argumentation pattern of this level of abstraction draws on the conclusion that religion does not have any distinct value that might justify the special protection of religion *qua* religion.[162] Instead, a broader category that encompasses religion is worthy of legal protection, which could be the liberty of conscience, the right to ethical independence or the right to moral freedom. Also, the constitutional value of religion is defined in non-religious terms of liberal neutrality, which entails that free exercise of religion prohibits authorities from favoring or disfavoring a particular way of life, except in cases of harm prevention. Another constitutional value of religion is found in the way religious groups are vulnerable to discrimination. Formulated in this way, religious freedom covers the right that gives protection to general values, such as the ability to search for ultimate questions of life and the independence to have an attachment to ethical commitments and moral decisions about right and wrong. Therefore, for the legality of a religious manifestation, religious arguments do not count.[163] One might think of the justification given to allow headscarves: it is not because of the specialness of your Gods that 'we' allow headscarves. It follows rather from our political commitment to respect human conscience. In this particular case, the constitutional value that justifies the allowance of headscarves is not found in religious arguments, but rather found in our respect for human conscience that is protection-worthy *qua* conscience.[164]

D. *The Protection of the Free Exercise of Religion in Practice*

The argumentation pattern suggests at this level of abstraction that for the free exercise of religion a special right to religious freedom is not necessary in practice. It is rather superfluous. The main argument is that the free

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ious beliefs and activities might be *specially* protected, but not *uniquely* so: if and when they are, it is as a subset of a broader category of respect-worthy beliefs and activities.").

162. *See* Lund, *supra* note 1, at 494 (engaging in the debate on the constitutional value of religion inside secular states).

163. LABORDE, *supra* note 1, at 31 (stating that egalitarians theorists of religious freedom do not ask "whether the law adequately captures what is ordinarily meant by religion. From a normative perspective, [they ask:] what is it about religion that is protection-worthy? What deeper normative values underpin protection of freedom of religion?").

164. *See* George Letsas, *The Irrelevance of Religion to Law*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 44, 49 (2017) (arguing that the concept of fairness could be used to explain and justify granting exemptions to religious manifestations).

exercise of religion is in fact guaranteed by a combination of different rights, such as the freedom of speech and association and the non-discrimination norm. The claim is that religious freedom does not add anything new to the existing body of basic liberties and human security rights.[165] As some theorists of religious freedom have asked: do we need religious freedom to tolerate practices of gender discrimination that are clearly present in religious institutions? To argue why we do not need religious freedom in this context, they refer to a combination of basic liberties, such as freedom of expression, association and the more basic rule that says: in a free society, everyone should have the right to make choices regarding the establishment or disestablishment of relationships.

This framework of general liberties helps us to understand why a clear case of gender discrimination in religious institutions that is considered a "contentious" religious manifestation, *could* be tolerated without *any reference* to religious freedom. The argumentation pattern at this level of abstraction entails that liberal democracies do not need religious freedom to deal properly with the legal admissibility of religious manifestations that are at odds with some basic liberties, such as the non-discrimination right.[166]

E. *Again: Any Reason to Care About Religion Because it in Religion?*

The theoretical suggestion that draws on the *interpretative shield* of abstraction says that it is not necessary to care *in law* about religion *qua* religion. Abstraction suggests that for the involvement in the law and religion debate, it is not necessary to be aware of what religion in the core entails.[167] Thus, there is no need to take the sectarian transcendental or suprarational aspects of religion into account when we are dealing with questions of law and religion.[168] Abstraction is in this sense religion-eva-

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165. LABORDE, *supra* note 1, at 32 (drawing attention to a particular concern raised by some egalitarian theorists of religious freedom who argue that "freedom of religion protects a generic capacity, it can be adequately guaranteed through basic liberal freedoms such as freedom of thought, speech, and association.").

166. *Cf.* EISGRUBER & SAGER, *supra* note 98, at 63.

167. *See* John R. Munich, Comment, *Religious Activity in Public Schools: A Proposed Standard*, 24 ST. LOUIS. U. L.J. 379, 388 (1980) ("This definition does not consider the content of the belief nor is it concerned with the institutional manifestations of a belief.").

168. Traces of abstraction are visible in many debates about religious practices that are considered contentious, harmful or for different reasons just inappropriate to the ideals of liberal democracies. One example is the approach of some politicians to ban face-covering veils as a matter of security, emancipation and the social norm of being visible. Another example is the way courts have defined ritual male circumcision in

sive, which makes it abstraction *from* the religious dimension.[169] The *interpretative shield* of abstraction that suggests there is no need in law to care about religion simply because it is religion, is embedded in two philosophical premises. First, there is no distinctly religious—that is to say a transcendental—justification for religious freedom (*the opposition premise*).[170] Second, the justification for free exercise arises from a framework of non-sectarian values (*the proposition premise*).[171] In other words, there is no principled reason to adopt or to provide a sectarian understanding of religion to deal with questions concerning the free exercise of religion. Thus, the law in liberal democracies does not need to care about religion simply because it is religion.

CONCLUSION

Liberal theories of religious freedom have one important feature in common: *abstraction from the religious dimension.* Abstraction involves

terms of bodily integrity, public health and the right to self-determination. Similarly, the proposed bans on ritual slaughter have been defended as a matter of "animal well-being." Even though it is undisputed that ritual slaughter and male circumcision are inherently related to Judaism and Islam, abstraction largely leaves aside the religious dimension of these acts and almost only secular values, presented as universal and general, are decisive in the assessment of the legality of such manifestations. The Dutch debate on the relationship between law and religion should be understood against the backdrop of two factors. First, the Dutch history of multi-religious minorities has never meant a total freedom to religious manifestations in public (e.g. the partial prohibition of religious processions until the late eighties of the last centuries). Second, the situation of relative religious toleration based on the presence of a multitude of seemingly permanent religious minorities has substantially changed over the last five decades. *See* Wahedi, *supra* note 3, at 134; Geurt Henk Spruyt, *Politicians and Epidemics in the Bible Belt*, 12 UTRECHT L. REV. 114, 124 (2016); Marjolein van den Brink & Jet Tigchelaar, *Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision*, 30 NETH. Q. HUM. RTS. 417 (2012) (utilizing different frames to discuss the legal admissibility of male and female circumcision).

169. It is reasonable to argue that when the religious dimension of a contentious manifestation is *translated* to a framework of general legal terms, such as, bodily integrity or gender equality, the original religious dimension (e.g. the Jewish Covenant theory that is of importance for circumcision) becomes completely superfluous. Thus, a very particular dimension that is considered special by a particular group of people (believers) is abstracted from that area and subsequently discussed in abstract terms.

170. This premise corresponds with the suggestion that abstraction dismisses arguments that aim to justify the special legal protection of religion *qua* religion.

171. This premise corresponds with the suggestion that abstraction proposes a more general framework to justify free exercise and it rethinks religious claims for exemptions from general laws, from that particular framework of general values.

arguments that advocate the adoption of a non-sectarian, God-empty and religion-empty understanding of religion in law. This common feature of the liberal theories of religious freedom dismisses arguments justifying the special legal protection of religion *qua* religion. Moreover, abstraction renounces arguments that justify religious freedom with an appeal to *any* distinct value of religion. Subsequently, abstraction proposes a general framework of ecumenical values in order to justify the free exercise and it rethinks religious claims for exemptions from general laws, from that framework of non-sectarian values.

THE HEALTH LAW IMPLICATIONS OF RITUAL CIRCUMCISIONS

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Many countries around the globe, including liberal democracies, have forbidden ritual female circumcision, better known as female genital mutilation in all its variants, while ritual circumcision of young boys and female genital modifications for esthetic reasons are allowed. This difference in the legal treatment of comparable practices, such as male circumcision, the least invasive version of female circumcision and female genital cosmetic surgeries, receives criticism for the "double standards" that favors religious believers and the cosmetic surgery industry. To address properly the "double standards" criticism, this article focuses mainly on the legality of ritual male and female circumcision. It adopts a health law perspective to put the legality of both types of circumcision under critical scrutiny. This is a fruitful approach to explain why ritual male circumcision is generally allowed as an exception in law. That is not because of its religious narratives, but, because it has been considered a medical intervention that seems in the best interest of the child. The health law perspective also posits why female circumcision in its most severe variants should remain a crime. These variants of female circumcision have no health benefits and harm young female bodies significantly. The final part of this article reiterates that the health law perspective rejects convincingly exemptions for female circumcision and allows ritual male circumcision conditionally and temporarily. This conclusion gives an unsatisfactory feeling as the ban on male circumcision hangs like a Damocles sword above this traditional practice. To face the "Damocles sword" criticism and to develop an argumentation pattern that would fit a broader sense of justice concerning the legality of male circumcision, this article introduces two novel pragmatic arguments that explain the "double standards" regime beyond the health law perspective.

I. Introduction

The 2017 arrest and detention of some members of the *Dawoodi Bohra* sect in Detroit,[1] caused a broad wave of public in-

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dignation over the alleged performance of female circumcision (FC) in the United States (U.S.).[2] As a result, some in the U.S. claimed, FC was no longer an "over there" concern.[3] In the upcoming and first federal landmark trial on FC in the U.S., the defendants have been accused of performing this practice on the genitals of "countless" girls and of assisting the circumciser.[4] The most striking

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male Circumcision as an African Problem: Double Standards or Harsh Reality?, in M. Christian Green, T. Jeremy Gunn & Mark Hill (Eds.), Religion, Law And Security in Africa 385 (2018). (mainly focusing on the question as to whether female circumcision is still a unique problem of the African continent). I would like to thank M. Christian Green, Wibren van der Burg and Jeroen Temperman for their helpful comments on the previous version of this article. For the current version of the article, I have benefited tremendously from the talks with Frank Ravitch, Benjamin Berger, Anna Su, Kinnari Bhatt, Brett G. Scharffs, Mary Jensen, Jane Wise, and Lance N. Long. Also, I would like to express my sincere gratitude and appreciation to Katherine Lovallo, and the rest of the QUINNIPIAC HEALTH LAW JOURNAL staff for their tireless editorial efforts, helpful comments and fruitful suggestions. Errors remain mine. Feedback, comments and criticism could be sent directly to wahedi@law.eur.nl.

[1] The *Dawoodi Bohra* is a branch of the Shia Ismaili sect. The majority of the members of this community live in India. Other members of this sect live in Africa, the United Kingdom (U.K.) and the United States of America (U.S.). *See* INNES BOWEN, MEDINA IN BIRMINGHAM, NAJAF IN BRENT: INSIDE BRITISH ISLAM 175 (2014) (providing background information about the members of the *Dawoodi Bohra* sect who live in the U.K.).

[2] The use of the more "neutral" term "female circumcision" instead of "female genital mutilation" is not meant to breach the broad consensus that the modification of female genitals without any medical need is a problematic practice. Rather, it aims to answer the question as to whether it is justified to treat religious male circumcision differently in law than the least invasive variants of female circumcision. In addition, the use of the term "genital mutilation" suggests in advance the inadmissibility of the practice in all its variants, while that is an issue this article aims to put under critical scrutiny. *See* Marjolein Van den Brink & Jet Tigchelaar, *Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision*, 30 NETH. Q. HUM. RTS. 417, 422 (2012) (discussing the sensitivities concerning the use of the term circumcision instead of genital mutilation). However, the use of the term "female circumcision" is quite controversial. *See* Lynne Marie Kohm, *A Brief Assessment of the 25-Year Effect of the Convention on the Rights of the Child*, 23 CARDOZO J. INT'L & COMP. L. 323, 338 (2015) (criticizing the use of the term female circumcision instead of female genital mutilation and referring in this regards to the negative health consequences of this practice). *Cf.* Obiajulu Nnamuchi, *Hands off My Pudendum: A Critique of the Human Rights Approach to Female Genital Ritual*, 15 QUINNIPIAC HEALTH L. J. 243, 253 (2011) (raising the question why female circumcision for traditional reasons is generally associated with harm and mutilation, while the same language and approach is not applied to discuss cosmetic interventions upon female bodies).

[3] Shireen Qudosi, *Why Freedom of Religion is an Illegitimate Defense for Doctor Accused of Performing FGM on 2 Young Girls*, WOMEN IN THE WORLD (Apr. 12, 2017), https://womenintheworld.com/2017/04/21/why-freedom-of-religion-is-an-illegitimate-defense-for-doctor-accused-of-performing-fgm-on-2-young-girls/ (arguing that for a long time, female circumcision has been considered an "over there" issue, "confined to dirt-floor shacks in third-world countries and carried out by the uneducated and ignorant. We don't imagine it happening in America, in clinics run by American-born U.S. citizens."). This is a remarkable denial of the history of female circumcision in the U.S., which was carried out by professional practitioners to encourage the "married, heterosexual, vaginal intercourse," *see* SARAH B. RODRIGUEZ, FEMALE CIRCUMCISION AND CLITORIDECTOMY IN THE UNITED STATES 3 (2014).

[4] Robert Snell, *Doctor in Genital Mutilation Case Freed on $4.5M Bond*, DET. NEWS (Sept. 19, 2017), https://eu.detroitnews.com/story/news/local/detroit-city/2017/09/19/doctor-female-genital-

charge is against the emergency room physician, Juamana Nagarwala,[5] charged for the circumcision of at least two minor girls from Minnesota. In addition, the prosecutor has accused her of circumcising a larger number of other girls from across the U.S. over a twelve-year period. The defense team has disputed the unlawfulness of what it has called a harmless "benign religious procedure" that consisted of separating the mucous membrane from the genitalia.[6] As such, the defense team has questioned the applicability of the term "genital mutilation" that suggests *a priori* the unlawfulness of any medically unnecessary modification of female genitals.[7]

Parallel to the public outrage in the U.S. and abroad about FC for seemingly religious purposes, some have criticized the impunity of ritual male circumcision (MC). The critics have raised the question why young boys who are at risk of being circumcised for non-therapeutic reasons are not protected against this practice.[8] In

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mutilation-case-freed-bond/105782924/.

[5] Mayra Cuevas, *Michigan Doctors Charged in First Federal Genital Mutilation Case in U.S.*, CNN (Apr. 25, 2017), https://edition.cnn.com/2017/04/22/health/detroit-genital-mutilation-charges/index.html (reporting on the charges against Nagarwala); *See also* Complaint, United States of America v. Jumana Nagarwala (E.D. Mich. Apr. 12, 2017). In January 2018 the Michigan District Court dismissed the charge of "conspiracy to transport minor with intent to engage in criminal sexual activity," the Court ruled that "[the] facts alleged in the indictment do not support this charge because, as a matter of law, FGM, while a prohibited criminal act, is not "criminal sexual activity."" *See* United States of America v. Jumana Nagarwala and Fakhruddin Attar (E.D. Mich. Jan. 14, 2018).

[6] Robert Snell, *Judge Keeps Doctor Jailed in Mutilation Case*, DET. NEWS (Jul. 19, 2017), https://eu.detroitnews.com/story/news/local/detroit-city/2017/07/19/nagarwala-genital-mutilation-case/103828160/. *Cf.* Lori Ann Larson, *Female Genital Mutilation in the United States: Child Abuse or Constitutional Freedom*, 17 WOMEN'S RTS. L. REP. 237, 242 (1996) (discussing the usefulness of "cultural defenses" in avoiding criminal liability). Indeed, if the *Dawoodi Bohra* only separates the membrane, it is very hard to prove that such a minor intervention would harm gender equality (what about male circumcision?), the right to reproduction (what about cosmetic surgeries?) and the women's capability of sexual pleasure.

[7] In the U.S., female circumcision has explicitly been prohibited since 1997. *See* 18 U.S.C. § 116, (prohibiting the medicinally unnecessary circumcision, excision or infibulation of any part of the genitalia of girls under the age of eighteen). *Cf.* Larson, *supra* note 6, at 251 (arguing that criminalization of female circumcision is not at odds with the right to free exercise, as guaranteed in the First Amendment); *See also* Allen E. White, *Female Genital Mutilation in America: The Federal Dilemma*, 10 TEX. J. WOMEN & L. 129 (2001); Gregory A. Kelson, *Female Circumcision in the Modern Age: Should Female Circumcision now be Considered Grounds for Asylum in the United States*, 4 BUFF. HUM. RTS. L. REV. 185 (1998) (discussing female circumcision from the migration law angle). However, recently in United States v. Nagarwala, 350 F. Supp. 3d 613 (E.D. Mich. 2018) Judge Bernard A. Friedman held that the Federal law banning this practice is unconstitutional because "Congress had no authority to pass this statute under either the Necessary and Proper Clause or the Commerce Clause."

[8] Tresa Baldas, *Protesters in Detroit Say Male Circumcision Should Also be Outlawed*, DET. FREE PRESS (Apr. 19, 2017), https://eu.freep.com/story/news/local/michigan/detroit/2017/04/17/genital-mutilation-circumcision-protest/100562504/.

this context, some critics have implicitly pointed to the presence of favoritism towards religious groups.[9] The legal distinction implies allowing some extant religious rituals, such as MC, while outlawing other rites, such as FC, as contrary to the norms of civilized societies, even though some FC variants are quite comparable to MC.[10]

The 2017 Detroit criminal case involving "horrifying acts of brutality" fits in two ways with the most recent developments facing the area of FC.[11] First, the prevalence of this "over there" problem in the U.S. and other countries around the globe challenges the still

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[9] The normative criticism asks whether authorities should make distinctions among comparable religious practices. *Cf.* Eugene Volokh, *Religious Exemptions and the Detroit Female Genital Mutilation Prosecution*, WASH. POST (May 29, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/23/religious-exemptions-and-the-detroit-female-genital-mutilation-prosecution/?noredirect=on&utm_term=.654dd110f4b2 (doubting whether the federal government can rely on the argument that there is a compelling state interest "in preventing any cutting of children's bodies," arguing that "it's hard to see how the government can label such an interest as compelling when a wide range of cutting of children at their parents' behalf is allowed. One obvious example is male circumcision; to be sure, there are plausible (but contested) arguments that male circumcision is medically beneficial, but many parents have it performed for entirely nonmedical reasons."); *See generally* Kenneth Einar Himma, *An Unjust Dogma: Why a Special Right to Religion Wrongly Discriminates against Non-Religious Worldviews*, 54 SAN DIEGO L. REV. 217 (2017); Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481 (2017); NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017); CÉCILE LABORDE, LIBERALISM'S RELIGION (2017); STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM (2014); BRIAN LEITER, WHY TOLERATE RELIGION? (2014); RONALD DWORKIN, RELIGION WITHOUT GOD (2013); ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013); Micah Schwartzman, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. 993 (2010); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE (2008); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005) (engaging in the ongoing debate within liberal political philosophy on the role of religion for the purposes of religious accommodation and paying in this regard attention to the criticism of favoritism).

[10] Sohail Wahedi & Renée Kool, *De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context [The Criminal Law Approach Towards Female Circumcision: A Comparative Law Perspective]*, 7 TIJDSCHRIFT VOOR RELIGIE, RECHT EN BELEID [J. FOR RELIGION, L. AND POL'Y], 36 (2016); *See generally* Nnamuchi, *supra* note 2, at 253; Moira Dustin, *Female Genital Mutilation/Cutting in the U.K.*, 17 EUR J. OF WOMEN'S STUD. 1, 8-23 (2010); Abdulmumini A. Oba, *Female Circumcision as Female Genital Mutilation: Human Rights or Cultural Imperialism*, 8 GLOBAL JURIST 1 (2008); Jacquelyn Shaw, *Sacred Rites, Sacred Rights: Balancing Respect for Culture and the Health Rights of Women and Girls in Islamic Canadian Communities Seeking to Practise Female Genital Mutilation*, 3 J. L. & EQUALITY 31, 54 (2004) (paying attention to the use of different legal regimes within liberal democracies to assess the legality of cultural practices, such as male circumcision, female circumcision and cosmetic surgery).

[11] Jacey Fortin, *Michigan Doctor Is Accused of Genital Cutting of 2 Girls*, N.Y. TIMES (Apr. 13, 2017), https://www.nytimes.com/2017/04/13/us/michigan-doctor-fgm-cutting.html. The use of such heroic language to talk about this case complicates a fair trial, as this strategy may result in a "trial by media" situation.

prevailing view that FC is above all a major concern of Africa.[12] Second, the application of seemingly different legal regimes regarding ritual circumcisions fits the criticism of using "double standards" in the legal assessment of comparable practices.[13] The close link between religion and the rise of FC outside Africa challenges us to reflect on and question the legal assessment framework of this practice. This challenge draws on the question whether FC, at least the variants comparable to or less invasive than MC, could be accepted as religious exemptions in law. The main aim of this article is to engage in the current debate in legal theory that questions the justification grounds for the different approaches in the law and politics of liberal democracies towards ritual circumcisions and other comparable practices, such as intersex and cosmetic surgeries. However, in order to address properly the "double standards" criticism in this context, this article focuses mainly on the different legal regimes that apply to ritual male and female circumcision.[14] To this

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[12] The rise of female circumcision on religious grounds outside Africa and the fall or decrease of toleration for male circumcision in liberal democracies may have implications for the legal assessment frameworks of ritual circumcisions. *See* Wahedi & Kool, *supra* note 10, at 40 (discussing that within the Dutch political discourse some have criticized the presentation of female circumcision as a unique problem of Africa). A counter-narrative approach is a useful and promising method to challenge the dominant perspective, resulting in new insights that give room for discussion. *Cf.* Candace N. Hill, *Selling Sex: The Costs of Criminalization*, 21 QUINNIPIAC HEALTH L. J. 131, 133 (2018) (challenging the dominant view that relates prostitution to abuse, human trafficking and drugs and arguing that this perspective neglects completely the circumstance that many sex workers "are often willing participants in the work that they do."); *See also* on the relevance of developing a narrative Lance N. Long, *Is There Any Science Behind the Art of Legal Writing*, 16 WYO. L. REV. 287, 288 (2016).

[13] Dustin, *supra* note 10, at 12 ("A double standard is visible when comparing attitudes to FGM/C with those to various surgeries routinely carried out in the West. It is often pointed out that FGM/C bears little relation to male circumcision, hence the rejection of the term female circumcision. But while male circumcision is less invasive than clitoridectomy or incision, there are similarities between the circumcision of girls and boys"). *Cf. also* Melinda Jones, *Intersex Genital Mutilation - A Western Version of FGM*, 25 INT'L J. CHILD. RTS. 396 (2017); Ekaterina Yahyaoui Krivenko, *Rethinking Human Rights and Culture through Female Genital Surgeries*, 37 HUM. RTS. Q. 107 (2015); Theodore Bennett, *Beauty and the Beast: Analogising Between Cosmetic Surgery and Female Genital Mutilation*, 14 FLINDERS L.J. 49 (2012); Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of Cultural Practices*, 40 HARV. C.R.-C.L. L. REV. 71 (2005); Hope Lewis & Isabelle R. Gunning, *Cleaning Our Own House: Exotic and Familial Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123, 132 (1998); Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 213 (1992) (all criticizing the fact that the law in Western democracies generally singles out all types of female circumcision for special prohibitions, leaving completely unpunished comparable practices).

[14] *Cf.* Marie Fox & Michael Thomson, *Short Changed? The Law and Ethics of Male Circum-*

end, it describes in Part I what male and female circumcision entail, as well as their geographical prevalence and the main reasons behind these two major types of circumcision. This Part also discusses how both major types of circumcision affect human bodies. In addition, it gives an overview of the legal status of ritual circumcisions.

Part II discusses the criticism of "double standards". The main claim of this Part is that the criticism of "double standards" arises out of the liberal approach to extant religious practices that are protected *qua* religious. This approach draws primarily on a non-sectarian, religion-empty language to discuss the legality of contentious religious manifestations, such as ritual circumcisions of young boys and girls.[15] This Part briefly highlights this approach as abstraction from the religious dimension. The liberal approach of abstraction dismisses arguments that justify religious practices *qua* religious. The liberal argument's justification for a religious accommodation identifies a framework of general and non-sectarian values that are ecumenical in nature. To put the legality of both types of circumcision under critical scrutiny, the liberal perspective adopted in this article, gives rise to draw on a health law perspective, which is clearly non-sectarian of nature. This is a fruitful approach to explain why ritual MC is generally allowed as an exception in law. That is not because of its religious narratives, but, bebecause it has been considered a medical intervention that seems to be in the best interest of the child. The health law perspective also posits why FC in its most severe variants should remain a crime. These types of FC harm young female bodies without any medical need.

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cision, 13 INT'L J. CHILD. RTS. 161 (2005) ("while female circumcision is constructed as morally and legally unacceptable within a civilised society, male circumcision is characterised as a standard and benign medical practice."); *Cf. also* Johan D. Van der Vyver, *International Standards for the Promotion and Protection of Children's Rights: American and South African Dimensions*, 15 BUFF. HUM. RTS. L. REV. 81, 105 (2009) (arguing that within the South-African legal regime all variants of female circumcision are prohibited. The same is true for cultural male circumcision, while religious male circumcision is not prohibited).

[15] Refusing child vaccinations on religious grounds concerns another appropriate example of a contentious religious manifestation. *Cf.* Stephanie A. Ferraiolo, *Justice for Injured Children: A Look into Possible Criminal Liability of Parents Whose Unvaccinated Children Infect Others*, 19 QUINNIPIAC HEALTH L. J. 29 (2016); Geurt Henk Spruyt, *Politicians and Epidemics in the Bible Belt*, 12 UTRECHT L. REV. 114, 124 (2016).

This Part also illustrates how the health law perspective rejects exemptions for FC and allows ritual MC conditionally and temporarily. This conclusion gives an unsatisfactory feeling as the ban on MC hangs like a Damocles sword above this traditional practice. To face the "Damocles sword" criticism and to develop an argumentation pattern that would fit a broader sense of justice concerning the legality of MC, this article introduces two novel pragmatic arguments that explain the "double standards" regime beyond the health law perspective.

This article concludes with the argument that FC is no longer a unique problem of Africa. The rise and presence of the relatively less invasive versions of this practice outside Africa for religious reasons and the decreasing toleration for MC challenge us to rethink the legal assessment frameworks of FC and MC. Such reflection, based on a liberal framework of rights and liberties, and a health law perspective results in the conclusion that the religious dimension of ritual circumcisions does not justify legal exemptions for medically unnecessary interventions that irreversibly modify the human body.[16] Moreover, the health law perspective adopted by this article supports the argument that any liberal justification for exemptions that allow serious interventions upon human bodies should rest on grounds that are comprehensible to a broad public of believers and non-believers. The health law perspective is a very useful approach in this regard.

II. Ritual Circumcisions

The legal admissibility of female circumcision and that of young boys for ritual and religious reasons is put under critical scrutiny by a growing number of legal scholars, politicians, human rights organizations and other internationals institutions. The broad consensus among human rights scholars, some politicians and regulatory authorities to eliminate and combat the circumcision of girls and women, is lacking, or at least not to the same extent present re-

[16] This argument rests in particular on the role of religion for the purposes of justifying religious exemptions within the paradigm of liberal political philosophy. *See* Micah Schwartzman, *Religion, Equality and Anarchy*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY (2017).

garding the legal admissibility of ritual male circumcision. Nevertheless, over the recent years, a growing number of scholars and predominantly European courts have questioned the legality of the so-called irreversible practice of infant male circumcision.[17] This Part describes from different angles the practices of ritual male and female circumcision. First, it defines female circumcision. Second, it provides a description of male circumcision.

A. Female Circumcision

The description of female circumcision includes the scope of this practice; the types of circumcision; the health effects of different types of circumcision; the grounds people usually rely on to circumcise and finally the legal status of this type of intervention upon the human body.

i. Scope and Prevalence

The scope of female circumcision concerns the estimated scale on which young girls and women are at risk of circumcision, or have been subjected to this practice. In a recent study, the World Health Organization (WHO) has estimated that on a global level, approximately 200 million young girls and women have undergone one of the variants of FC, varying from very serious to relatively light. Moreover, this leading source on the scope of FC has estimated that three million girls are annually at the risk of FC.[18] Over the last decade, in most of the practicing countries, girls and women undergo circumcision before the age of five. Research reveals that up to 90%, and even close to 100% of girls and women undergoes circumcision. This list of countries where a large number of girls and women in the age category from fifteen to forty-nine years old

[17] This fits a broader tendency in which the legal admissibility of a wide range of traditional religious manifestations are questioned. This tendency to challenge the legality of religious manifestations that are considered 'contentious' because of their 'norm-deviant' character is mainly present in liberal democracies. *See* Sohail Wahedi, *Abstraction from the Religious Dimension*, 24 Buff. Hum. Rts. L. Rev. 1 (2017-2018). *See also* Robert F. Cochran, Jr. & Michael A. Helfand, *The Competing Claims of Law and Religion: Who Should Influence Whom?*, 39 PEPP. L. REV. 1051, 1052 (2013) (expecting that "the endless jousting" between law and religion "will undoubtedly remain a permanent feature of the human experience.").

[18] WORLD HEALTH ORGANIZATION (WHO), (2016).

experienced one of the variants of FC is led by African countries, such as Somalia (98%), Guinea (97%), Djibouti (93%) and Sierra Leone (90%).[19] In other FC practicing countries, about or nearly half of the girls have been circumcised in the period immediately after the birth, but before the age of fifteen. The African countries with more than or approximately 50% of girls circumcised are led by Gambia (56%), Mauritania (54%) and Guinea (46%).[20] Given the very high percentages young girls and women who have been circumcised, it should be clear that the case of female circumcision does not stand for some small or marginal problem. Circumcision of female genitals directly affects the health and lives of millions of women.

Therefore, it is *at least* very remarkable that for a very long time FC was not considered a specific health concern of international organizations.[21] Rather, the practice received particular concern in Africa.[22] Hence, the main focus was on helping African countries to

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[19] UNICEF, FEMALE GENITAL MUTILATION/CUTTING: A GLOBAL CONCERN (2016). Including nations with percentages just below 90% such as: Mali (89%) Egypt (87%) and Sudan (87%) makes the list of countries practicing female circumcision even greater.

[20] *Id.*

[21] Initially, female circumcision fell under practices "that had been firmly established for centuries" and for this reason, practices such as female circumcision should be approached step by step. Against this "cultural" backdrop, the World Health Organization ("WHO") initially declined to study the health consequences of female circumcision. *See* Nitza Berkovitch & Karen Bradley, *The Globalization of Women's Status: Consensus/Dissensus in the World Polity*, 42 SOC. PERSP. 481, 489 (1999) (referring to Resolution 680 B II (XXVI) of the Economic and Social Council that had called upon the WHO "to undertake a study of the persistence of customs which subject girls to ritual operations." However, the WHO rejected this and said in response "that the ritual operations in question are based on social and cultural backgrounds, the study of which is outside the competence of the [WHO]."); *See also* Obiajulu Nnamuchi, *"Circumcision" or "Mutilation"? Voluntary or Forced Excision? Extricating the Ethical and Legal Issues in Female Genital Ritual*, 25 J.L. & HEALTH 85, 87 (2012) (referring to the "consensus that the influx of Africans and Arabs into Western countries contributed to international involvement in what, heretofore, was generally regarded as a legitimate cultural practice worthy of deference and respect.").

[22] *Cf.* Van den Brink & Tigchelaar, *supra* note 2, at 427 (developing a typology for male and female circumcision: African, American and Abrahamic and arguing that while female circumcision only fits the African category, male circumcision seems to fit all the three categories). Critical of presenting female circumcision as an African issue: Wairimũ Ngarũiya Njambi, *'One Vagina to Go'*, 24 AUS. FEMINIST STUD. 167, 169 (2009) (arguing that "[by] framing female genital practices as the only theme that defines the presence of African vaginas, (...) African women now become the example of the 'problem/practice' and the Western women the 'solution/theory'. It is in such reductive representations that some postcolonial feminists (...) have recognised the legacy of colonialist discourse hidden well beneath the (often well intended) universalising rhetoric of women's common experience."); Makau wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, 5 BUFF. HUM. RTS. L. REV. 75, 89 (1999); *See also* RODRIGUEZ, *supra* note 3 (on the pres-

combat this practice.[23] Today, the international community uses an entirely different language to discuss FC. It considers this practice a "global concern."[24] The shift of focus from local to global gains understanding against the backdrop of recent studies revealing that many girls and women from outside Africa have been subjected to FC. As such, there are reports of FC in Iran, Iraqi Kurdistan, Indonesia, and Malaysia.[25] The same is true for countries across Europe, the United States and Australia.[26] Therefore, FC is not a unique problem of the African continent. It is rather an omnipresent phenomenon that is practiced from North America to Europe, Asia and Oceania. The Detroit case in the U.S. is recent proof of the "global presence" of FC.

ii. Variants

The practice of FC or genital mutilation refers to any non-therapeutic interventions on female genitalia. The literature on this practice categorizes FC, in accordance with the classification made by the WHO, into four types, which gradually vary from serious (Types I to III) to relatively less invasive interventions (*generally* Type IV) on the female genitalia. These four types concern clitori-

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ence of female circumcision in the U.S.).

[23] *See* WHO, FEMALE GENITAL MUTILATION: PROGRAMMES TO DATE (1999) (demonstrating the first WHO publication on programs meant to combat female circumcision).

[24] UNICEF, *supra* note 19.

[25] KAMEEL AHMADY, A COMPREHENSIVE RESEARCH STUDY ON FEMALE GENITAL MUTILATION/CUTTING (FGM/C) IN IRAN 26 (2015) (reporting on the prevalence of female circumcision in Iran amongst the Sunni Shafi'i minority in the western and southern provinces of Iran); WADI, FEMALE GENITAL MUTILATION IN IRAQI-KURDISTAN (2010) (reporting on the prevalence of female circumcision in the northern part of Iraq that is home to a large Kurdish population). In 2013, WADI has reported that in certain areas of Iraq a significant decrease in practicing female circumcision exists. *See Significant Decrease of Female Genital Mutilation (FGM) in Iraqi-Kurdistan, New Survey Data Shows*, Stop FGM in Kurdistan (Oct. 21, 2013), http://www.stopfgmkurdistan.org/html/english/updates/update018e.htm.; *See also* Alissa Koski & Jody Heymann, *Thirty-year Trends in the Prevalence and Severity of Female Genital Mutilation: A Comparison of 22 Countries*, 2 BMJ GLOB. HEALTH 1 (2017) (reporting on the prevalence of female circumcision in Indonesia, Malaysia and India).

[26] SARA JOHNSDOTTER & RUTH M. MESTRE, FEMALE GENITAL MUTILATION IN EUROPE: AN ANALYSIS OF COURT CASES (2015) (reporting on the legal enforcement against female circumcision in Europe); Howard Goldberg, et al, *Female Genital Mutilation/Cutting in the United States: Updated Estimates of Women and Girls at Risk, 2012*, 131 PUB. HEALTH REP. 340 (2016) (estimating the amount of girls and women who are at risk of circumcision in the U. S.); Juliet Brough Rogers, *The First Case Addressing Female Genital Mutilation in Australia*, 41 ALTERNATIVE L.J. 235 (2016) (reporting on the first case about female circumcision in Australia).

dectomy (Type I), excision (Type II), infibulation (Type III) and a rest category (Type IV). The WHO defines Type I as the removal of the clitoris, either partly or completely. It also makes a distinction between the removal of the clitoral hood that has been called circumcision and clitoridectomy that involves the removal of both the clitoris and the clitoral hood. Type II is the removal of the clitoris and the labia minora, either partly or completely and either in combination with or independently of excising the labia majora. The WHO distinguishes Type II in three specific interventions. First, is the complete removal of the labia minora. Second, is the removal of the clitoris in combination with the labia minora, either partly or completely. Third, is the removal of the clitoris, the labia minora and majora, either partly or completely.[27] Type III is the most severe intervention on female genitalia, as it almost closes the vaginal opening and subsequently creates "a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris."[28] The rest of the categories of FC included in Type IV cover a wide range of interventions, varying from pricking and piercing to incision and cauterization.[29] The Detroit case is an example of Type IV circumcision.

According to the WHO, the vast majority of circumcised girls and women have undergone one of the variants of Type I, II and IV. Only 10% of circumcision cases concern Type III.[30] However, in some countries, such as Somalia,[31] and previously Djibouti and Sudan,[32] a large number of girls and women experienced the most severe circumcision, Type III, infibulation. The same is true for particular ethnic minorities in Eritrea who practice FC. Almost all circumcision cases within these minority groups include sewn closure of the vaginal opening.[33] However, in a 2013 report, the

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[27] WHO, *supra* note 18, at 1-4.

[28] *Id.* at 4.

[29] *Id.*

[30] WHO, ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT (2008).

[31] UNICEF, FEMALE GENITAL MUTILATION/CUTTING: A STATISTICAL OVERVIEW AND EXPLORATION OF THE DYNAMICS OF CHANGE 47 (2013).

[32] WHO, FEMALE GENITAL MUTILATION: AN OVERVIEW 8 (1998).

[33] UNICEF, *supra* note 31, at 48 (estimating that the vast majority of girls who belong to the following ethnic minorities have undergone infibulation: Hedarib (100%); Afar (96%); Nara (92%);

United Nations International Children's Emergency Fund (UNICEF) has indicated that infibulation is less common among groups that practiced this type of circumcision.[34] Outside the FC hotspot in Africa, for example, in Indonesia and Malaysia, girls and women are subjected to the relatively lighter variants of FC, such as Types I and IV.[35] However, in Iraqi Kurdistan both the relatively lighter and the more severe variants prevail.[36]

iii. Health Risks of Female Circumcision

There is consensus amongst researchers that FC, if practiced on non-therapeutic grounds, there is consensus amongst researchers that FC, if practiced on non-therapeutic grounds, such as, for traditional and religious purposes, provides generally no health benefits.[37] On the contrary, its consequences for bodily integrity and health could be very devastating. This is due to the fact that most girls and women are circumcised in an unsterilized setting by traditional circumcisers who are generally not aware of the complexities of the female body.[38] Depending on the type of circumcision, FC af-

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Bilen (88%); Saho (83%); Tigre (75%). Only two practicing ethnic minorities seem to choose for the less invasive variants of female circumcision: Kunama (31% practices infibulation) and Tigrigna (only 2% practices the most severe type of female circumcision).

[34] *Id.* at 114.

[35] Abdul Khan Rashid, Sapna S. Patil & Anita S. Valimalar, *The Practice of Female Genital Mutilation Among the Rural Malays in North Malaysia*, 9 INTERNET J. OF THIRD WORLD MED. 1, 4 (2009); Lanny Octavia, *Circumcision and Muslim Women's Identity in Indonesia*, 21 INDONESIA J. FOR ISLAMIC STUD. 419, 423 (2014) (reporting on the presence of symbolic nicking and cutting in Malaysia and Indonesia). *See also* Jennifer Baumgardner, *A Multi-Level, Integrated Approach to Ending Female Genital Mutilation/Cutting in Indonesia*, 1 J. GLOB. JUST. & PUB. POL'Y 267, 272 (2015) (female circumcision "in Indonesia is divided between "symbolic only" circumcision, where there is no incision or excision, and "harmful" forms, which can include both incision and excision."). Cf. Valeska David & Julie Fraser, *A Legal Pluralist Approach to the Use of Cultural Perspectives in the Implementation and Adjudication of Human Rights Norms*, 23 BUFF. HUM. RTS. L. REV. 75, 94 (2016-2017) (describing the challenge Indonesia faces to combat female circumcision.)

[36] *Cf.* Berivan A Yasin et al., *Female Genital Mutilation Among Iraqi Kurdish Women: A Cross-sectional Study from Erbil City*, 13 BMC PUB. HEALTH 809 (2013) (reporting that in the Iraqi city of Erbil the most common type of circumcision concerns clitoridectomy (Type I in the WHO classification).

[37] WHO, *supra* note 18, at 1. Although, it has been reported that in the past some groups believed that circumcision is necessary to save lives, *see* WHO, *supra* note 23, at 6 (reporting that "in Nigeria some people believe that if the head of the baby touches the clitoris, the baby will die.").

[38] WHO, *supra* note 18, at 1. However, the WHO has rejected the "medicalization" of female circumcision. *See* WHO, GLOBAL STRATEGY TO STOP HEALTH-CARE PROVIDERS FROM PERFORMING FEMALE GENITAL MUTILATION 9 (2010) ("The involvement of health-care providers in the performance of FGM is likely to create a sense of legitimacy for the practice. It gives the impression that the

fects female bodies in different ways. The WHO has categorized the health risks of female circumcision into five categories, varying from immediate risks to long-term consequences. Other risks that might significantly affect female bodies concern obstetric dangers, sexual functioning complications and psychological damages.

As such, pain, shocks, infections, and death caused by severe bleedings after circumcision are all qualified as the *immediate* risks of FC.[39] Caesarean, episiotomy and resuscitation of a new born baby are amongst the *obstetric* dangers of practicing FC that are not only threatening to females but also their newborn babies.[40] The removal of some parts of the genitals that influence the sexual satisfaction experience of females, such as the practice of a clitoridectomy, causes *sexual functioning* complexities, such as dyspareunia: pain during sexual intercourse. Girls and women who have been subjected to infibulation face a much higher risk of dyspareunia. Less sexual pleasure and orgasms are some other serious negative consequences that FC might cause upon the sexual functioning of females.[41] The *psychological* risks of this practice include various mental disorders such as depression, post-traumatic stress syndrome and anxiety disorders.[42] In the long-term, FC might cause, amongst

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procedure is good for health, or at least that it is harmless."). *See also* G.I. Serour, *Medicalization of Female Genital Mutilation/Cutting*, 19 AFR. J. OF UROLOGY 145 (reporting on the rise of health care professionals who circumcise females); Bettina Shell-Duncan, *The Medicalization of Female "Circumcision": Harm Reduction or Promotion of a Dangerous Practice?* 52 SOC. SCI. & MED. 1013 (2001) (outlining the ethical debate on the "medicalization" of female circumcision).

[39] WHO, *supra* note 18, at 6. Additional *immediate risks* include: hemorrhage, genital tissue swelling, high risk of HIV transmission, and various urinary infections and complexities. Furthermore, circumcision could have fatal consequences., *see* Bronwyn Winter, *Women, the Law, and Cultural Relativism in France: The Case of Excision*, J. OF WOMEN IN CULTURE AND SOC'Y 939, 944 (1994) (discussing the death of several babies in France due to female circumcision and its effects on the criminal enforcement against practicing circumcision upon female genitals).

[40] WHO, *supra* note 18, at 5-6.

[41] WHO, *supra* note 18, at 6. *Cf.* Abo Bakr A. Mitwaly et al., *A Recent Look for the Implication and Attitude of Practicing Female Genital Mutilation in Upper Egypt: a Cross Sectional Study*, 6 INT. J. REPROD. CONTRACEPT. OBSTET. GYNECOL. 4224, 4226 (2017) (describing that over 40% of the circumcised women participating in this project faced complications in the field of sexual functioning); *See also* Rodriguez, *supra* note 3, at 3 (doubting whether practicing clitoridectomy in the U.S., a few decades ago, was meant to restrain sexual pleasure or rather increase satisfaction during sexual intercourse. Rodriguez concludes that the ultimate goal of female circumcision was to move "female sexual behavior to married, heterosexual, vaginal intercourse.").

[42] WHO, *supra* note 18, at 7; *See also* Jeroen Knipscheer et al., *Mental Health Problems Associated with Female Genital Mutilation*, 39 PSYCH. BULL. 273, 276 (2015) ("Circumcised immigrant women in this study are likely to report emotional disturbances that relate to FGM, with about a sixth

others, chronic vaginal complexities, such as vaginal discharge and itching, urination problems and menstrual difficulties.[43]

Although there are many studies confirming these negative health consequences of FC, a big challenge remains according to the WHO to create awareness amongst professionals who deal with FC. Unfortunately, they "are still often unaware of the many negative health consequences and remain inadequately trained to recognize and treat them properly."[44]

iv. Justification Grounds

Groups rely on no single specific ground to justify practicing FC. Therefore, no single explanation accounts for the continued practice of FC. Rather, a combination of grounds and circumstances are mentioned as rationales for FC. The most common: that the circumcision of girls and women is meant to stress femininity, chastity, the transition to adulthood and cultural expectations about the role and identity of the women in society.[45] Against this backdrop, some have argued that FC constitutes a "gendered practice."[46] FC has also been practiced on religious grounds within particular Islamic, Jew-

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of them reporting scores above the threshold for [post-traumatic stress disorder] and a third reporting severe levels of depression or anxiety.").

[43] WHO, *supra* note 18, at 7. Also, the WHO mentions reproductive tract infections, painful urinations and recurring urinary tract infections as some other long-term risks of undergoing female circumcision. *See also* Renée Kool, *The Dutch Approach to Female Genital Mutilation in View of the ECHR. The Time for Change Has Come*, 6 UTRECHT L. REV. 51, 54 (2010) (evaluating the legal approach in the Netherlands to female circumcision in light of the European Convention on Human Rights and the case law of the European Court of Human Rights, arguing that "[notwithstanding] the 'good intentions' underlying the cultural tradition, FGM expresses a gendered image of female sexuality, resulting in serious damage to the reproductive rights of women.").

[44] WHO, *supra* note 18, at 5.

[45] *Id.* at 1. *Cf.* Preston D. Mitchum, *Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, and Health as a Human Rights Framework*, 19 WILLIAM & MARY J. WOMEN & L. 585, 590-91 (2013); Christina Sibian, *Female Genital Mutilation/Circumcision: Reconciling the Ongoing Universalist/ Cultural Relativist Debate to Promote a Cross-Cultural Dialogue*, 33 WINDSOR REV. L. & SOC. ISSUES 72, 74 (2013); Patricia A. Broussard, *The Importation of Female Genital Mutilation to the West: The Cruelest Cut of All*, 44 U.S.F. L. REV. 787, 790 (2010) (generally confirming that female circumcision has been justified for a wide range of reasons, varying from religious to more cultural meant to stress femininity).

[46] Kool, *supra* note 43, at 54 (claiming that female circumcision "expresses a gendered image of female sexuality"); *See also* Patricia A. Broussard, *Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture; Shaming, Blaming, and Utilizing the Convention against Torture*, 15 DUKE J. GENDER L. & POL'Y 19, 32-33 (2008) (providing an overview of arguments claiming that female circumcision aims to reaffirm the superiority of men).

ish and Christian traditions.[47] Recent studies reveal that in Iran, Malaysia, Indonesia and Iraqi Kurdistan, female circumcision has been justified on religious grounds in a significant number of cases.[48] The high-ranked Al-Azhar University in Egypt has repeatedly emphasized that the relationship between Islam and FC is very complicated.[49] More specifically, in 2006, the Al-Azhar declared that neither the Quran, nor the Hadith support the "violent" practice of FC, despite the fact that some girls and women undergo circumcision within particular Islamic traditions.[50] Jewish and Christian scholars have adopted the same critical approach towards the religious justification of the practice.[51]

v. The Legal Response

Today, FC is considered a serious concern and violation of human rights.[52] However, this human rights perspective on FC has

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[47] Mitchum, *supra* note 45, at 593; *Cf.* I. El-Damanhoury, *The Jewish and Christian View on Female Genital Mutilation*, 19 AFR. J. OF UROLOGY 127 (2013); Lyda Favali, *What is Missing: (Female Genital Surgeries Infibulation, Excision, Clitoridectomy - in Eritrea)*, 1 GLOBAL JURIST 1, 38 (2001).

[48] AHMADY, *supra* note 25, at 14. *See also* Rashid, Patil & Valimalar, *supra* note 35, at 3; Baumgardner, *supra* note 35, at 268; Rozhgar A. Saleem et al., *Female Genital Mutilation in Iraqi Kurdistan: Description and Associated Factors* 53 WOMEN & HEALTH, 537, 543 (2013).

[49] Wahedi & Kool, *supra* note 10, at 40; *See* Maurits S. Berger, *Understanding Sharia in the West*, 6 J. L., RELIGION & ST. 236, 253 (2018) (regarding the complexity of this relationship, arguing that the broadly supported call amongst religious leaders concerning the fragile relationship between Islam and female circumcision, does not refrain Sudanese and Egyptian communities from performing female circumcision as a religious practice).

[50] *See also* Urfan Khaliq, *Beyond the Veil: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 18 (1995) (arguing that the practice of female circumcision cannot rest on religious grounds). *Cf.* Hend El-Behary, *Female Genital Mutilation is Forbidden in Islam: Dar Al-Ifta*, EGYPT INDEP. (Jun. 5, 2018), https://www.egyptindependent.com/female-genital-mutilation-is-not-islamic-dar-al-ifta-says/; Amira El Ahl, *Theologians Battle Female Circumcision*, SPIEGEL (Dec. 6, 2006), http://www.spiegel.de/international/spiegel/a-small-revolution-in-cairo-theologians-battle-female-circumcision-a-452790.html.

[51] Wahedi & Kool, *supra* note 10, at 40.

[52] WHO, *supra* note 18, at 5; *See also* Anouk Guiné & Francisco Javier Moreno Fuentes, *Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France*, 35 POL. & SOC'Y 477, 505 (2007) (arguing that in the French context, the process of secularization and pursuing gender equality pave the way to combat female circumcision "but only if secularization does not become arrogant and oppressive universalism."); Amy Bartholomew, *Human Rights and Post-Imperialism: Arguing for a Deliberative Legitimation of Human Rights*, 9 BUFF. HUM. RTS. L. REV. 25, 37 (2003) (criticizing Michael Walzer's position regarding female circumcision by some scholars as "culturally intolerant," "because it is based simply on conventional or social acceptance of the relevant rights and the hegemonic objections" of

been adopted relatively recently.[53] After all, FC in all its variants has been considered a human rights violation only since 1994,[54] despite earlier international calls to combat all practices that are harmful to women. Indeed, the Economic and Social Council urged back in 1952 that all of its member states take necessary steps to prevent practices that violate the physical integrity of women. In 1958, the Council called upon the WHO to provide an overview of the harmful practices that girls around the globe face and to consider how such acts could be eliminated. However, given the traditional and cultural sensitivity over problematic rituals, the WHO declined to carry out this study, arguing that it lacked jurisdiction to focus on practices that have primarily a cultural nature and not a medical one.[55] Thus, for a long time, it was not self-evident that FC fell into the context of a human rights issue. Nevertheless, in the aftermath of the 1994 international recognition of FC as a serious violation of fundamental rights, a quick shift was visible toward the adoption of concrete measures.[56]

Today, many states around the globe, including African states, have developed specific legal provisions that explicitly ban circumcision of girls and women for non-therapeutic reasons[57]. Some states, such as Belgium, have even criminalized circumcision of adults. This approach has been criticized fiercely as applying "double standards," since cosmetic surgeries and other medically

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complex cultural practices of minority groups.). *Cf.* Saul Levmore, *Can Wrinkles be Glamorous? in* Saul Levmore & Martha C. Nussbaum, Aging Thoughtfully: Conversations About Retirement, Romance, Wrinkles, And Regret 104 (2017) (pointing out that criticizing the practice of female circumcision is considered as "cultural colonialism", but these critics of the opponents of female circumcision are considered "moral relativists"); Van den Brink & Tigchelaar, *supra* note 2, at 430 (clarifying why some communities prefer a more neutral medical frame to discuss female circumcision instead of the normative and sensitive human rights frame); Nnamuchi, *supra* note 21, at 91; Njambi, *supra* note 22, at 172; Gunning, *supra* note 13, at 198 (criticizing the universalistic human rights discourse in combatting the traditional practice of female circumcision).

[53] Nnamuchi, *supra* note 21, at 87.

[54] United Nations, Economic and Social Council, "Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children," E/CN.4/Sub.2/1994/10/Add.1 (1994).

[55] Berkovitch & Bradley, *supra* note 21, at 489.

[56] Renée Kool & Sohail Wahedi, *European Models of Citizenship and the Fight Against Female Genital Mutilation, in* Scott N. Romaniuk & Marguerite Marlin (Eds.), Development and the Politics of Human Rights 205-221 (2015).

[57] Bettina Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, 47 L. & SOC'Y REV. 803, 806 (2013).

non-necessary interventions are not prohibited equally.[58] Countries that have not adopted specific provisions to combat this practice within the European Union, for instance, rely on general criminal law provisions that ban, for example, bodily injury and removal of body parts.[59] Despite these firm condemnations and legislation designed to eliminate the practice of female circumcision, serious concerns about the lack of "successes" in the criminal law approach towards this practice persist.[60]

The complexity of successfully enforcing criminal laws to combat FC is exacerbated in part by a lack of coherence in the legislature's approach towards banning it. In countries where FC is conducted on a large scale, such as some African states, the criminal laws implemented and condemnations of the practice are often insufficient to eliminate it.[61] For example, in Mauritania, it is not forbidden by law to circumcise girls and women at certified healthcare centers. In South Africa, the circumcision of female adults is not explicitly criminalized.[62] Further complicating the legal fight against FC is the large-scale support for circumcision within the practicing groups as well as the fear of making circumcision an "underground" intervention. Therefore, some argue that criminalizing a practice that is so widely supported is not only ineffective, but also problem-

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[58] Wahedi & Kool, *supra* note 10. *Cf.* Nnamuchi, *supra* note 21, at 102 (relying on a comparison between the lighter version of female circumcision, clitoridotomy, and ritual male circumcision and developing the following argumentation pattern: "[circumcised] males throughout the ages have lived normal and fulfilling lives and have not suffered any of the consequences associated with FGM. Because there is no evidence that the lives of circumcised men became intolerable as a consequence of having lost penile prepuces (foreskin), it is reasonable to assume that circumcised females would be similarly situated. Therefore, though it may be a moral wrong, we cannot label as evil subjecting non-consenting women to a clitoridotomy unless we are prepared to also ascribe evil to male circumcision.").

[59] *European Inst. for Gender Equal., Female Genital Mutilation in the European Union and Croatia* 43 (2013).

[60] *See* Christopher T. Paresi, *Symbolic Rites: Examining the Adequacy of Federal Legislation Addressing the Problem of Female Excision in the United States*, 8 BUFF. HUM. RTS. L. REV. 163 (2002); Holly Maguigan, *Will Prosecutions for Female Genital Mutilation Stop the Practice in the U.S.?*, 8 TEMP. POL. & CIV. RTS. L. REV. 391 (1999) (questioning the positive effects of criminalizing female circumcisions has on the elimination of this practice).

[61] *See* Lwamwe Muzima, *Towards a Sensitive Approach to Ending Female Genital Mutilation/Cutting in Africa*, 3 SOAS L.J. 73, 92 (2016) (arguing that criminalization is not *per se* an appropriate instrument to eliminate female circumcision. Governments need to support non-profit organizations in order to bring the concerns about female circumcision under the attention of a broader public).

[62] Meda Couzens, *The Prosecution of Female Genital Mutilation: A Discussion of its Implications for South Africa in the Light of a Recent Australian Case*, 134 S. AFR. L. J. 116 (2017).

atic as it practically implies criminal liability for large groups of people.[63]

To date, France is the only country that has enforced criminal law on a relatively large scale in the fight against this practice. The French's "success" in this regard may be explained by the French republican model of citizenship that is strongly intertwined with national assimilation policies toward ethnic minorities and "newcomers." The French ethnocentric policies provide hardly any room for minority groups' practices that are considered contrary to the majoritarian perspective. Additionally, the French systematically control the medical health of children under the age of six, which also includes control of the genitalia. Because of this, a number of cases of pertaining to circumcision of children have come before the criminal court.[64]

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[63] Muzima, *supra* note 61, at 91.

[64] Wahedi & Kool, *supra* note 10. However, the French duty to "report" cases of female circumcision to the public prosecutor, based on Art. 434-3 CODE PENAL [PENAL CODE] (Fran.), causes an ethical dilemma for many professional practitioners. The question is whether such a reporting does not conflict with the duty of confidentiality, especially since this duty does not only relate to what a patient confides to the professional, but also to matters that the professional may observe. This rule has been explicitly codified in Art.4 of [CODE DE DÉONTOLOGIE MÉDICALE] CODE OF MEDICAL ETHICS (Fran.):

"Le secret couvre tout ce qui est venu à la connaissance du médecin dans l'exercice de sa profession, c'est-à-dire non seulement ce qui lui a été confié, mais aussi ce qu'il a vu, entendu ou compris."

However, Art. 44 of CODE DE DÉONTOLOGIE MÉDICALE (Fran.) requires professionals to report cases of child abuse to the authorities. This rule states:

> Lorsqu'un médecin discerne qu'une personne auprès de laquelle il est appelé est victime de sévices ou de privations, il doit mettre en oeuvre les moyens les plus adéquats pour la protéger en faisant preuve de prudence et de circonspection. Lorsqu'il s'agit d'un mineur ou d'une personne qui n'est pas en mesure de se protéger en raison de son âge ou de son état physique ou psychique, il alerte les autorités judiciaires ou administratives, sauf circonstances particulières qu'il apprécie en conscience.

Despite these clear regulations on the reporting duty of professionals, it appears from various studies that French professionals are either not aware of the duty, or they have serious troubles with this duty.

See Hans Nijboer, Neyah Van Der AA & Tamara Buruma, Strafrechtelijke Opsporing En Vervlging Van Vrouwelijke Genitale Verminking: De Franse Praktik [Criminal Investigation and Prosecution of Female Genital Mutilation: The French Approach] 115 (2010).

B. Male Circumcision

The description of male circumcision ("MC") consists of the scope and prevalence of this practice, the types of circumcision, its health consequences, the grounds relied on for circumcision, and finally the legal status of this practice.

i. Scope and Prevalence

According to a 2010 major study by the WHO, one in three males around the globe experiences circumcision.[65] The WHO further estimates that just under 70% of all circumcised males are Muslim. Thus, Muslims are by far the largest group who (still) practice MC. As such, in countries with a Muslim majority, like Turkey, the states in the Gulf region and North Africa, over 95%of boys are circumcised.[66] Like Muslims, Jews form another religious group that practices MC on a global level. A 2007 WHO study indicates that in Israel, the United Kingdom and the U.S., up to 99% of Jewish babies were circumcised.[67]

The circumcision of boys occurs in North America, Europe, the Middle East, Central and Southeast Asia and major parts of Africa.[68] In some countries, boys are circumcised by "traditional circumcisers," such as the *mohel* (Israel), the *motaher* (Middle East) and the *sunnatji* (Turkey).[69] In other states, like the U.S., Egypt, Saudi Arabia and other Gulf States, physicians, or at least medically skilled personnel, are in charge of MC.[70]

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[65] WHO, Neonatal and Child Male Circumcision: A Global Review 25 (2010).

[66] Id. at 8.

[67] WHO, Male Circumcision: Global Trends and Determinants of Prevalence, Safety, and Acceptability 3 (2007).

[68] Id. at 9-12.

[69] WHO, *supra* note 65, at 22; *See also* Jacob Ben Chaim et al., *Complications of Circumcision in Israel: A One Year Multicenter Survey*, 7 ISR. MED. ASS'N J. 368 (2005) (reporting that although traditionally *mohelim* were in charge of Jewish male circumcision in Israel, a growing number of parents choose to circumcise their child in a therapeutic session).

[70] *Id.* at 5. *See* Laura M. Carpenter, *On Remedicalisation: Male Circumcision in the United States and Great Britain*, 32 SOC. OF HEALTH & ILLNESS 613, 617 (2010) (regarding the medicalization of male circumcision; *See also* M.G. Pang & D.S. Kim, *Extraordinarily High Rates of Male Circumcision in South'Korea: History and Underlying Causes*, 89 BJU INT'L 48 (2002) (providing insights in the culture of male circumcision in South Korea and arguing that while this is to a high extent influenced by the practice in the United States, it is not practiced in the period immediately after the birth).

The age at which a boy is circumcised varies by region. For example, in Israel, the U.K. and the U.S.,[71] almost all male babies of Jewish parents are circumcised shortly after birth.[72] Similarly, in some parts of West Africa and the Gulf region, male babies are circumcised soon after birth.[73] Conversely, in states such as North Africa, the Middle East and parts of Asia, MC is not carried out at a fixed age.[74]

ii. Variants

The practice of MC is considered one of the most ancient surgical procedures in the history of mankind.[75] MC is generally defined as the (partial) removal of the foreskin.[76] However, the literature surrounding MC has categorized this practice into four types. The less contentious variant is simple circumcision: the partial removal of the foreskin.[77] Sub-incision, another variant of MC, that has been practiced among Bedouins and aborigines, combines simple circumcision with "slitting of the penis to expose the glans."[78] The third category concerns *salkh*, which "[flays the skin] from just below the navel to the upper thigh."[79] Super-incision that is practiced in Polynesia is the fourth category of MC.[80] It entails "longitu-

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[71] Am. Acad. of Pediatrics, *Male Circumcision*, 130 PEDIATRICS 757 (2012).

[72] WHO, *supra* note 67, at 3.

[73] WHO, *supra* note 65, at 6. According to the WHO, circumcision at a younger age reduces risks of health complication. However, circumcision of "younger boys" causes ethical dilemmas concerning the lack of consent for the ritual intervention. *Cf.* Marie Fox & Michael Thomson, *Older Minors and Circumcision: Questioning the Limits of Religious Actions*, 9 MED. L. INT'L 283 (2008).

[74] WHO, *supra* note 67, at 3-4. There are some exceptions, including the Jewish community in Israel and Iran. The same is true for many Muslims who circumcise their sons traditionally on the seventh day of their birth, following the prophetical tradition, according to which the prophet had circumcised his sons seven days after their birth. However, there are also Muslim communities that practice circumcision at a later stage. As such, Turkish Muslims generally circumcise when the boy is between three and seven years old. Indonesian Muslims circumcise boys who have passed the age of five years, but are still under eighteen.

[75] WHO, *supra* note 65, at 7.

[76] *Id.*, at 9-10 ("The goal of circumcision is to remove enough shaft skin and inner foreskin to uncover the glans.").

[77] Abbie J. Chessler, *Justifying the Unjustifiable: Rite v. Wrong*, 45 BUFF. L. REV. 555, 564 (1997).

[78] Id. at 564.

[79] Id.

[80] *See also* William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337 (1984) (reporting on the presence of super-incision in Polynesia).

dinally cutting the preputium from the upper surface and extending the cut to the pubic region."[81]

Jews generally circumcise in a traditional celebratory setting. During the ceremony, the *mohel* uses instruments that are sterilized to insert the boy's foreskin into a metal shield in order to protect the glans. Hereafter, "[a] scalpel is run across the face of the shield, removing the foreskin. The remaining inner foreskin is subsequently pulled back away from the glans and excised with small scissors, and the wound is bandaged without the use of stitches."[82] Some Hasidic Jews perform another ritual, known as *metzitzah b'peh*. The *mohel* orally suctions the blood that is released after the circumcision.[83] This practice is quite controversial as it can transmit serious diseases, such as herpes.[84] In New York, the legality of *metzitzah b'peh* was challenged, after the city had decided to regulate this tradition.[85] In 2015, the city reversed the policy that was designed to warn against the health risks of the *metzitzah b'peh* tradition.[86]

Unlike Jewish circumcision by the *mohel*, Muslims, the largest group practicing MC, may choose to circumcise by either the traditional circumciser or medically skilled circumcisers.[87] The latter often use a device called Plastibell to control bleeding after circumcision. The WHO writes that "[by the use of] the Plastibell, bleeding is controlled by using a ligature device which acts as a tourniquet, interrupting the blood supply to the foreskin and causing it to separate over time. Wound healing is usually complete within a week. A disadvantage of the Plastibell's ring and ligature must stay

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[81] Chessler, *supra* note 77, at 564.

[82] WHO, *supra* note 65, at 25.

[83] *Id.*

[84] Hanoch Ben-Yami, Circumcision: What Should be Done?, 39 J. OF MED. ETHICS 459 (2013). See also Brian F. Leas & Craig A. Umscheid, Neonatal Herpes Simplex Virus Type 1 Infection and Jewish Ritual Circumcision with Oral Suction: A Systematic Review, 4 J. OF THE PEDIATRIC INFECTIOUS DISEASES SOC'Y 126 (2015).

[85] Central Rabbinical Congress v. New York City Department of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014) (overruling the district court on appeal, stating that the city regulation was not neutral).

[86] Jessica Firger, *New York City Eliminates Restrictions on Orthodox Circumcision Ritual*, NEWSWEEK (Oct. 9, 2015), http://www.newsweek.com/new-york-city-eliminates-restrictions-orthodox-circumcision-ritual-370934 (last visited 10/2018).

[87] Ayesha Ahmad, *Do Motives Matter in Male Circumcision?*, 28 BIOETHICS 68 (2014).

in place for several days before the skin separates. During this time complications can occur related to the retained ring."[88]

iii. Health Risks of Male Circumcision

MC's health consequences consists of immediate and long-term risks affecting the human body depending on the particular type of circumcision, the circumciser and the age at which the circumcision takes place. The immediate consequences of this practice are pain, bleeding and swelling. These health complications are generally not life-threatening. However, there are exceptions to this "rosy" presentation of the MC intervention. Similar to some types of FC, MC could have fatal consequences due to bleeding, wrong circumcisions, and amputations.[89] The long term consequences vary from urination complexities to problems regarding sexual functioning.[90] Whether or not health complexities occur depends on the type of circumcision and the circumciser. As such, less risk of serious health consequences exists when the circumcision is carried out by a professional practitioner who uses, for example, a Plastibell. On the other hand, "freehand" circumcisions bear a higher risk of complexities.[91] The same is true for circumcisions carried out at "an older age," rather than neonatal.[92]

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[88] WHO, *supra* note 65, at 13.

[89] *Id.* at 35. In Germany and the Netherlands health complications due to unfortunate circumcisions have led to criminal investigations and court cases; *See* Bijan Fateh-Moghadam, *Criminalizing Male Circumcision*, 13 GERMAN L.J. 1131 (2012); *See also* District Court of Utrecht, ECLI:NL:RBUTR:2005:AU7293 (Dec. 1, 2005) (Neth.). In December 2005, the District Court of Utrecht sentenced a traditional circumciser for serious assault. The circumcision caused health complexities for the child, due to the removal of too much skin from the foreskin and hitting thereby an artery. The court rules that male circumcision, whether or not practiced on religious grounds, concerns a "medical practice" that according to Dutch law should be practiced by a professional.

[90] WHO, *supra* note 65, at 35. Other "postoperative" consequences of male circumcision include infections, meatal ulcer, impetigo, decrease of penile sensitivity, edema of the glans and "the formation of a skin bridge between the penile shaft and the glans." Also, some studies have claimed that male circumcision will cause psychological damages. *See* KONINKLIJKE NEDERLANDSCHE MAATSCHAPPIJ TOT BEVORDERING DER GENEESKUNST (KNMG), NON-THERAPEUTIC CIRCUMCISION OF MALE MINORS 8 (2010) (referring to a study carried out by Boyle concerning the mental health risks of male circumcision); *See* Gregory J. Boyle, *Male Circumcision: Pain, Trauma and Psychosexual Sequelae*, 7 J. OF HEALTH PSYCH. 329 (2002).

[91] WHO, *supra* note 65, at 36.

[92] *Id.* at 46 ("complications occur less frequently among neonates and infants than among older boys, with the majority of prospective studies in neonates and infants finding no serious complications and relatively few other adverse events, which were minor and treatable. The prospective stud-

iv. Justification Grounds

For Abrahamic religions, circumcision has a special meaning.[93] Within Judaism, the practice of MC has both a religious and a cultural meaning. In line with the text of Genesis 17:10, where God requested Abraham to remove his foreskin,[94] Jews circumcise (*brit milah* in Hebrew) a boy on the eighth day after the birth.[95] MC has also a cultural dimension for many Jews. It marks their identity and enables the circumcised boy to integrate into the Jewish community.[96] Unlike Judaism, the practice of MC is not explicitly mentioned in the Quran. Circumcision confirms within the Islamic faith the existence of a believer's relationship with God. Circumcision, which is called *tahera* in Arabic, occurs in accordance with the instructions the Prophet Mohammed received to continue the rites of Abraham.[97] Only the Shafi'i Sunni School of jurisprudence considers MC as *wajib*, a religious commitment that must be obeyed. Other Islamic schools of jurisprudence strongly recommend this practice as a concordant with the prophetic tradition of the Sunnah.[98]

Although most of the circumcisions have a religious ground,[99] various studies suggest that non-religious grounds also

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ies in older boys also found virtually no serious adverse events, but a higher frequency of complications.")

[93] Van den Brink & Tigchelaar, *supra* note 2, at 427-428 (calling the religious variant of male circumcision, the "Abrahamic" circumcision, that is to say: "[religious, more or less ritualistic, predominantly in Judaism and Islam, but also among Christians, particularly in Africa.").

[94] *Genesis* 17:10 (King James): "This is my covenant, which ye shall keep, between me and you and thy seed after thee: every male among you shall be circumcised".

[95] There are some exceptions: illness or the presence of other immediate health risks. Nick Wyatt, *Circumcision and Circumstance: Male Genital Mutilation in Ancient Israel and Ugarit*, 33 J. FOR STUDY OF THE OLD TESTAMENT 405, 411 (2009) (arguing that although "[the] norm in Jewish circumcision is a rite performed on the eighth day after birth (...), much of the evidence we have noted suggests that this was not the original pattern of observance."); *See also* MARY VAN VEENVIËTOR, HET VERBONDSTEKEN [THE COVENANT OF CIRCUMCISION] 163-164 (2000) (studying the covenant theory from a cultural-sociological perspective and concluding that male circumcision plays a very important cultural role within the Jewish tradition).

[96] Yoram Bilu, *From Milah (Circumcision) to Milah (Word): Male Identity and Rituals of Childhood in the Jewish Ultraorthodox Community*, 31 ETHOS 172 (2003) The religious importance of this practice is reaffirmed by the fact that babies and other members of the Jewish community who die uncircumcised, are subjected to circumcision before the burial ceremony takes place.; *See* Ari Z. Zivotofsky & Alan Jotkowitz, *In Defense of Circumcision*, 15 ISR. MED. ASS'N J. 39 (2013).

[97] WHO, *supra* note 65, at 7.

[98] WHO, *supra* note 67, at 3.

[99] Elmar W. Gerharz & Claudia Haarmann, *The First Cut is the Deepest? Medicolegal Aspects of Male Circumcision*, 86 BJU INT'L 332 (2000).

play an important role in the justification of MC. For example, MC is considered a cultural practice that is justified for ethnic reasons,[100] as well as a *rite de passage* and a sign of adulthood.[101] Additionally, medical reasons are sometimes used to justify MC, since some reports indicate that circumcision of boys reduces the risks of prostate cancer or infection by the HIV-virus.[102] However, some authors have suggested that further research is absolutely necessary to indicate the risks and benefits of this practice, since most of the results concerning the benefits MC are based on studies that have been carried out outside North America. [103]

v. The Legal Response

In an unprecedented step, Denmark has recently recognized MC as a human right: the right of the parents to circumcise as a manifestation of religious beliefs.[104] Other states and regions, such as South Africa,[105] Sweden,[106] Germany,[107] and some states in the U.S., such as California,[108] have specific laws concerning the legality of

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[100] See WHO, supra note 65.

[101] WHO, *supra* note 65, at 7.

[102] Brian J. Morris et al., *CDC's Male Circumcision Recommendations Represent a Key Public Health Measure*, 5 GLOBAL HEALTH: SCI & PRAC. 15 (2017).

[103] Jennifer A. Bossio et al., *A Review of the Current State of the Male Circumcision Literature*, 11 J. OF SEXUAL MED. 2847 (2014) (claiming that the current state of art shows important gaps that makes the applicability of studies reaffirming the health benefits of male circumcision questionable. "Such gaps include a need for rigorous, empirically based methodologies to address questions about circumcision and sexual functioning, penile sensitivity, the effect of circumcision on men's sexual partners, and reasons for circumcision. Additional factors that should be addressed in future research include the effects of age at circumcision (with an emphasis on neonatal circumcision) and the need for objective research outcomes.").

[104] Vilhelm Carlström, *Denmark Defends Circumcision as a Human Right - Even Though 75% are Against It*" NORDIC BUSINESS INSIDER (Jun. 16, 2016), https://nordic.businessinsider.com/the-danish-government-defends-circumcision-as-a-human-right---even-though-75-are-against-it-2016-6/ (last visited Oct. 12, 2018).

[105] Julia Sloth-Nielsen, A Foreskin Too Far: Religious, Medical and Customary Circumcision and the Children's Act 38 of 2005 in the Context of HIV/Aids, 16 LAW, DEMOCRACY & DEV. 69, 75 (2012).

[106] Kimberley A. Greenfield, Cutting Away Religious Freedom: The Global and National Debate Surrounding Male Circumcision, 15 RUTGERS J. L. & RELIGION 353, 362 (2014).

[107] Stephen R. Munzer, Secularization, Anti-Minority Sentiment, and Cultural Norms in the German Circumcision Controversy, 37 U. PA. J. INT'L L. 503, 545 (2015).

[108] Eric Rassbach, *Coming Soon to a Court Near You: Religious Male Circumcision*, 2016 U. ILL. L. REV. 1347 (2016).

MC.[109] Case law on MC is a bit more unsettled. Over recent years, litigation across Europe and the U.S. has established diverse criteria for determining the legality of MC.[110] These cases concern questions about civil damages, criminal liability and parental disputes about the necessity of male circumcision at a young age.[111] To date, the practice of MC has not been completely forbidden. Although the Dutch Supreme Court was challenged in 2014 to address the legality of MC, the judges declined to rule on that matter.[112] In short, MC for religious purposes has not been outlawed yet, nor is this practice limited to individuals who are of sufficient age to decide for themselves the status of their foreskin.[113]

However, there are judgments, for example in Germany and Finland, which have banned ritual MC or postponed the age at which this practice should take place. Following heated and emotional debates, these rulings have been either overruled by higher courts, or by the national parliaments.[114]

The existing legal rulings clarify the circumstances under which MC can be carried out legally. These legal decisions fall within the human rights framework embraced by the United Nations and the Council of Europe, which considers MC with parental permission a legitimate religious manifestation. However, a few "exceptional judgements" mirror the growing public calls across Western societies to stop MC. These decisions consider the current legal

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[109] *See also* TASMANIA LAW REFORM INSTITUTE, NON-THERAPEUTIC MALE CIRCUMCISION (2012).

[110] Rassbach, *supra* note 108 (criticizing these specific criteria).

[111] *Id. See also* Sohail Wahedi, *Het Beoordelingskader Van Rituele Jongensbesnijdenis [The Assessment Framework of Ritual Male Circumcision]*, 7 TIJDSCHRIFT VOOR RELIGIE, RECHT EN BELEID [J. FOR RELIGION, L. AND POL'Y] 59 (2016).

[112] *Id.* (holding that the presence or absence of a *proper permission* for circumcision is the decisive factor to prove serious assault in court).

[113] *Id.* (judges have used the specific circumstances of the case, such as disputes between parents with different cultural backgrounds; no view of return to the parental home where ritual circumcision is a tradition, to rule that the circumcision decision should be postponed for the best interests of the child, given the irreversible nature of the practice); *See also* Van der Vyver, *supra* note 14, at 105 (discussing the South African "Children's Act 38 of 2005" that explicitly prohibits male circumcisions for non-religious or non-therapeutic reasons on minors under the age of 16). Iceland designed bill to outlaw ritual male circumcision. Harriet Sherwood, *Iceland Law to Outlaw Male Circumcision Sparks Row Over Religious Freedom*, THE GUARDIAN (Feb. 18, 2018), https://www.theguardian.com/society/2018/feb/18/iceland-ban-male-circumcision-first-european-country.

[114] Wahedi & Kool, *supra* note 10.

approach to MC balanced against the best interests of the child. Due to the high health risks of MC, including the risk of developing sexual and mental health problems, the non-therapeutic ritual circumcision of boys should be postponed until the child is of an age that he can competently consent to the procedure.[115]

The most outspoken court ruling embracing this line of reasoning is the 2012 German Cologne *Landgericht* ruling.[116] A similar decision was reached a few years earlier in Finland.[117]

III. Rethinking The Legal Framework

International human rights law, as well as the domestic law of many countries around the globe, is clear about the unlawfulness of FC. It condemns all the variants of this "harmful and violent" practice. Furthermore, it obliges states to eliminate this practice. Thus, FC cannot be legally practiced even for traditional or religious reasons, but while MC has been legally challenged in a number of jurisdictions, this practice is not yet banned completely. Instead, courts have clarified the circumstances under which parents are allowed to practice MC. These different legal approaches to male and female circumcision have been criticized as using "double standards", without clarifying convincingly why ritual MC should be treated differently from ritual FC.[118] This Part claims that the "double standards" criticism is rooted in the equality ideal that is prominently present within liberal democracies and the liberal theories of justice.[119] Based on this anti-favoritism ideal that supports the equal treatment of similar cases, it becomes much easier to question the

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[115] Peter W. Adler, *Is Circumcision Legal?*, 16 RICH. J. L. & PUB. INT. 439 (2013). *Cf. also* KNMG, *supra* note 90, (warning against the negative health risks of male circumcision, saying this practice should be banned like female circumcision, however expressing concerns about such a ban).

[116] The court ruled that a parents' right to religious freedom generally does not justify an irreversible practice, like MC, if the intervention is not medically required. The child should have the opportunity to decide himself in freedom upon the status of his foreskin and the religion he wants to adhere. *See* for a detailed discussion of this ruling: Fateh-Moghadam, *supra* note 89.

[117] The Tampere District Court held that religious freedom does not justify the violation of bodily integrity. The court referred to the ban on female circumcision and argued that toleration of male circumcision would result in discrimination. *See* Heli Askola, *Cut-Off Point? Regulating Male Circumcision in Finland*, 25 INT'L J.L. POL'Y & FAM. 100 (2011).

[118] Adler, *supra* note 115; Dustin, *supra* note 10.

[119] Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 496-97, 520 (2009); EISGRUBER & SAGER, *supra* note 9.

different legal approaches to ritual male and female circumcision. It also helps us to reconstruct in a critical way the argumentation pattern that is used to single out MC for special protection in law. The criticism challenges this special status of MC in light of the fact that all variants of FC are prohibited, even the types that are less invasive than MC, like "symbolic circumcision".

A. The Law and Ritual Circumcisions: Using "Double Standards"?

To address this fundamental "double standards" criticism, this Part examines the liberal framework of rights (e.g. religious freedom) and obligations (e.g. respecting the right to physical integrity) that challenges the legality of FC and MC.[120] It is especially the legal obligation of respecting bodily integrity that challenges within the liberal tradition of equal rights any protection regime for ritual circumcisions *qua* ritual or religious. The main argument is that both ritual male and female circumcision lack health benefits. Moreover, these ritual and religious interventions upon human bodies could cause serious health consequences either immediately or on a long term base, such as sexual functioning problems and mental health issues. However, the empirical argument suggests that religious MC is allowed not merely on medial grounds, but even *qua* religious within some jurisdictions.[121] The question remains whether a jurisprudence that allows one type of circumcision on religious grounds, e.g. MC,[122] while outlawing all other kinds of circumci-

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[120] Adler, *supra* note 115.

[121] A similar toleration regime lacks usually for the lightest version of female circumcision, which has also been practiced on religious grounds. *Cf.* The South African Children's Act 38 of 2005, § 12 (3) (outlawing female circumcision) and § 12 (8) (allowing religious male circumcision, while the non-religious variant is prohibited for boys under the age of 16). *Cf. also* STRAFGESETZBUCH [STGB] [CRIMINAL CODE], §226 (a) (Ger.) (outlawing female genital mutilation) and BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1631(d)(2), (Ger.) (allowing religious male circumcision, on the condition that the circumciser is a well-trained person).

[122] The same is to a certain extent true for some non-religious rites that violate the bodily integrity of children, such as ear piercings. *Cf.* Levmore, *supra* note 52, at 105 (discussing the lack of criticism on the practice of "ear piercings": "[ear piercings, at least in the United States, are inflicted (or gifted or celebrated) predominantly on girls, and so it might be surprising that mutilation of this kind is not also protested. But piercings are generally reversible, or at most leave a small scar. If they were difficult to reverse, then law would likely require children to await maturity, or even the age of majority, before being pierced.").

sion, e.g. FC, even the ones that are less invasive than all other types of circumcision, such as pricking and "symbolic circumcision" of females is acceptable?[123] Thus, the normative question is whether the religious dimension of circumcisions requires special legal solicitude?[124] To ask this question differently, are exemptions for ritual modification of genitals *qua* ritual or religious acceptable in law?[125] Thus, does religion *qua* religion deserve special legal solicitude?

To answer these questions, this Part draws on the liberal theories of religious freedom. Within the paradigm of liberal political philosophy no consensus exists about the specialness of religion, meaning singling out religion *qua* religion for favored treatment in law.[126] Nevertheless, all liberal theories of religious freedom presuppose, of *abstraction from the religious dimension*. In short, abstraction entails that religion does not deserve special protection in law *qua* religion. Religion receives *only* a special treatment *via* abstraction, meaning via the non-sectarian, protection-worthy categories that serve as proper liberal substitutes for the category of religion, such as, for example conscience.[127] This is due to the egalitarian approach of the liberal theories of religious freedom to theistic and non-theistic beliefs and the emphasis of these theories on neutrality toward any particular worldview.[128]

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[123] Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1292 (1994) (discussing the cases of two persons who are asking for exemptions from general laws: "The first involves (...) a Jehovah's Witness whose religious scruples make it impossible for him to manufacture tank turrets. The second involves (...) a pacifist who is in all respects identical to the [Jehovah's Witness], except that his pacifism is secular in character. A constitutional jurisprudence that permitted intervention on behalf of one (...) but not the other would be unacceptable.").

[124] In fact this question aims to find out whether the justification grounds people rely on to circumcise, could also be used as grounds for exemptions in law.

[125] In other words: do religion, culture and possibly conscience justify the creation of exemptions for ritual circumcisions? *Cf.* MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE 125 (2012) (discussing ritual circumcisions from a cultural perspective).

[126] Schwartzman, *supra* note 16.

[127] For the development of this particular argument, I have benefited tremendously from the feedback of professor Bejamin Berger on the presence of abstraction from the religious dimension within liberal theories of religious freedom.

[128] Cécile Laborde, *Liberal Neutrality, Religion and the Good, in* JEAN LOUISE COHEN & CÉCILE LABORDE (EDS.), RELIGION, SECULARISM AND CONSTITUTIONAL DEMOCRACY 249 (2016). (for a discussion of the egalitarian theories of religious freedom).

Abstraction manifests itself by refusing to justify religious freedom through appeals to religious values, thus rejecting the toleration of religion *qua* religion (i), justifying free exercise by appealing to a more general framework of values that are not theistic *per se* (ii), and insisting that justifications for religious exceptions, like for any other type of legal exception, need to be ecumenical—not in the religious meaning of the word, but rather in the sense of being widely accessible to a broad public (iii).[129] As with ritual dietary restrictions, the liberal argument suggests that exemptions are granted *not* because of *any* religious narrative, but because of the commitment that says we should respect human conscience equally.[130] The liberal approach to what justifies free exercise could help to put the current state of art regarding the legality of male and female circumcision under critical scrutiny. Abstraction is helpful because it favors the use of a religion-empty language, meaning religiously neutral, to discuss the legality of religious manifestations. In other words, it opposes strongly the discussion of religious exemptions on sectarian grounds, meaning exclusive religious grounds. Therefore, we need to find out whether we could identify liberal grounds in order to justify exemptions for ritual circumcisions.

B. Female Circumcision, Law and Religion

We start with FC. Through abstraction, which means at this point rethinking ritual FC in a religion-empty way, two aspects of FC emerge that suggest strongly why justifying exemptions for FC is problematic. First, given the very high risks of health complexities following the severe types of circumcision, there is a problem of proper consent if the intervention takes places on young girls. Second, clitoridectomy, excision and infibulation cause *as such* serious health problems varying from psychological problems to chronic problems regarding urination, menstruation and reproduction.[131] Therefore, the immediate and long-term health risks, in combination

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[129] Wahedi, *supra* note 17, at 19.

[130] JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 77.

[131] WHO, *supra* note 18 at 3-7.

with the lack of proper consent in cases of infant FC,[132] provide strong arguments against creating religious exemptions for these severe types of FC.[133] This conclusion gives rise to two questions.

The first question is whether we can justify the ban on genital modifications in cases where women themselves want to adjust the status of their body, as is the case with cosmetic surgeries, such as labiaplasty and breast augmentation?[134] Liberal theories of religious freedom strongly oppose laws that favor or disfavor people's life choices, given that those choices do not violate the rights of others.[135] Therefore, arguably all women should have equal access to the genital modification services that are provided by the cosmetic industry, even if that preference is for FC.[136]Make no misunderstanding that this argument does not suggest the acceptance of infibulation and other harmful variants of FC if proper consent is present.[137] It appears from various studies that such interventions have serious and chronic long-term health consequences, varying from sexual functioning problems to urinary and vaginal complexities. The second question regards how to deal with the least invasive variants of FC, such as incision or the slight cut in the clitoris? This question will be answered in light of the implications abstraction from the religious dimension has for the legality of MC.

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[132] *See* Wahedi & Kool, *supra* note 10, (the European Court of Human Rights considers female circumcision an inhumane act, the lack or presence of consent in this respect, would not lead to another conclusion).

[133] *See* Martha C. Nussbaum, *Women's Bodies: Violence, Security, Capabilities*, 6 J. OF HUM. DEV.167 (2005) (a liberal rejection of the serious types of female circumcision).

[134] Wahedi & Kool, *supra* note 10, (referring to the fact that legislation in Belgium and the U. K. even prohibit female circumcision of women who are able to give their consent).

[135] *See* Dworkin *supra* note 9, at 130 (arguing that a liberal state should not abandon a particular lifestyle because another lifestyle is "intrinsically better". It should be left to citizens to decide which way of life better suits them); Perry, *supra* note 9 (arguing that the state should not prescribe how people should live their lives).

[136] Wahedi & Kool, *supra* note 10; Nnamuchi, *supra* note 21, at 118. *Cf. also* Natalie Rezek, *Is Self-Harm by Cutting a Constitutionality Protected Right?*, 12 QUINNIPIAC HEALTH L. J. 303 (2008) (arguing that "the government should not be allowed to civilly commit someone who cuts without further evidence that the person is a danger to themselves or others.").

[137] *Cf.* Nnamuchi, *supra* note 21 (defending a similar position).

C. Male Circumcision, Law and Religion

Liberal democracies allow MC as a medical treatment if certain criteria are met.[138] This religion-empty allowance of MC fits abstraction from the religious dimension. Accepting MC as a medical practice has some serious implications for the long term legality of this practice. In theory, it is possible that an influential health organization, such as the WHO, could conclude that MC has not only no significant health benefits,[139] MC is moreover a harmful intervention that lacks proper permission and medical need.[140] The attention shifts from the presence of parental permission and sterilized conditions for the circumcision to the potential and serious health risks of this practice and therefore the possibility the child should get to decide upon his foreskin. This conditional and religion-empty acceptance of MC, that is to say no reliance on religious grounds to debate the legality of religious practices, has implications for the "double standards" criticism. As such, it suggests why it is justified to keep on banning the most severe types of ritual FC: the immediate risk of harm and the lack of the permission. It also provides an important argument to oppose the lighter versions of FC when adult consent is lacking: no health benefit to bring a slight cut on the clitoris.[141]

However, it is very hard within this liberal framework to keep on arguing that even "symbolic" circumcision of rational and consenting women should be prohibited, as many other and even more severe and risky interventions upon female bodies are allowed under the umbrella of "cosmetic surgeries". Furthermore, since some legal regimes *explicitly* allow religious infant male circumci-

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[138] Wahedi & Kool, *supra* note 10. However, there are some exceptions on this medicalized approach to ritual male circumcision: the law in South Africa and Germany allows religious male circumcision *qua* religious.

[139] The WHO rejected in the past to study the health implications of female circumcision, today it is the most prominent champion in the rejection of this practice. *See* Berkovitch & Bradley, *supra* note 21 at 491. Thus, a same approach could be adopted towards MC.

[140] KNMG, *supra* note 90.

[141] Nussbaum, *supra* note 52, at 104 (arguing that the "asymmetrical objection to female circumcision may reflect not simply the shifting sands of medical opinion about male circumcision, but the absence of any known medical advantage to female circumcision and the association, in a subset of cultures that traditionally practiced female circumcision, between circumcision and views about female modesty and sexual suppression.").

sion *qua* religious, which is from a normative point of view a very objectionable position in law, it becomes –from an egalitarian perspective– very hard to keep on defending the ban on the lightest version of FC, such as "symbolic circumcision" upon the genitals of both rational and consenting adults and youngers.[142] Indeed, if the slight cut upon the genitalia of a young girl will be reversible and would not cause serious health risks on a long-term base, such as, for example, sexual functioning problems, then it is hardly impossible to defend the "double standards" regime. So far, the liberal justification of allowing ritual MC has been based upon the argument that this intervention is serving medical purposes, regardless its religious significance for many Jews and Muslims. However, when the empirical argument suggests that ritual MC has been tolerated *qua* ritual and religious within some liberal jurisdictions, the question arises why the law does not single out –similarly– for a favored treatment infant religious and ritual variants of FC that are reversible and not harmful on a long-term. Thus, why lumping all variants of ritual FC together for a special ban, while allowing ritual MC *qua* ritual and religious? The defense team of Jumana Nagarwala could point to this favored treatment of ritual MC to raise a religious establishment question before the Court.[143]

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[142] Nnamuchi, *supra* note 21, at 102; Nussbaum, *supra* note 125, at 125 (developing an argumentation pattern similar to the one this article has developed based on the abstraction theory and defending the following regarding the legality of ritual circumcisions:

> it is reasonable to argue that female genital mutilation practiced on minors should be illegal if it is a form that impairs sexual pleasure or other bodily functions. (A symbolic prick is a different story.) Male circumcision seems to me all right, however, because I do not see solid evidence that it interferes with adult sexual functioning; indeed, it is now known to reduce susceptibility to HIV/AIDS. Other forms of bodily alteration of children—ear piercing, for example, or orthodonture, or plastic surgery repairing an ear that is alleged to stick out too much—are not legally regulable because they do not impair a major functioning.)

[143] This favorable treatment of one specific religious practice *qua* religious, e.g. ritual MC, is very hard to reconcile with the non-establishment clause of the First Amendment to the U.S. Constitution. *Cf.* Dworkin, *supra* note 9, at 115. *See also* Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, 2017 BYU L. REV. 915, 953 (2017) (criticizing the Indian Supreme Court's introduction of an "essentiality" test that aims to examine which practices do belong to a faith, "[elevating] the judiciary to the status of clergy.").

D. Ritual Circumcisions and Minorities

The liberal framework we have developed rejects convincingly exemptions for variants of FC that cause serious harm immediately and on a long term base. Also, it points to the presence of a legal regime that favors ritual MC *qua* ritual and disfavors the less significant type of ritual and religious FC *qua* ritual, regardless the fact that this light version of ritual FC is reversible and little risky in terms of causing serious and chronic health complications. The rejection for the most severe types of FC is based on the following argumentation pattern that targets this rite because of it serious health consequences. It lacks medical need and health benefits. It is harmful as its affects female bodies immediately and seriously on a long-term base. Moreover, if practiced on young girls, it lacks proper consent. Thus, to protect girls and women, as a vulnerable group and for reasons of health, bodily security and integrity, there is no justification to allow the most severe types of FC.

The situation is different regarding MC. Our liberal framework accepts this practice conditionally and probably temporarily. Conditionally, as its allowance depends on the fulfilment of certain criteria, such as parental consent and sterilized circumcision circumstances. This strategy is temporary, as the framework here does not exclude the option to ban MC, if the medical benefits are at a future time determined to be non-existent. This gives an unsatisfactory feeling, as the ban hangs like a Damocles sword above MC. To address the "Damocles sword critique" of the liberal approach to the legality of MC, we need to develop argumentation patterns that are closer to reality. That is to say argumentation patterns that can explain the "double standards" regime. This requires the development of arguments that look beyond the sectarian and liberal justifications of ritual circumcisions and suggest both why we should refrain from the acceptance of FC in law and why we should restrain from the creation of further restrictions upon MC at this moment.

How can we develop argumentation patterns that would fit a broad sense of justice when we talk about the legality of ritual cir-

cumcisions?[144] Reflecting on the implications a potential ban on MC would have internally and externally helps us to develop the sort arguments we need to explain the "double standards" legal regime. Regarding the internal effects, we can say that a total ban on this practice would give Jews and Muslims the impression that they do not enjoy equal respect from authorities.[145] Liberal democracies must encourage mutual understanding between different groups of citizens. This "anti-alienation" argument helps to maintain the legal status quo of MC, not because of its sectarian nature, but rather because a total ban on this practice would potentially further alienate marginalized groups that attach great importance to continue MC.[146] This enormous and global sensitivity about a potential ban is lacking in the area of FC.[147]

Next to the anti-alienation argument, we can also think about the external effects of a ban on MC. The question asks about the implications a ban on MC would have for the foreign policies of liberal democracies. Such policies are, among other matters, concerned with the protection of the rights of non-believers, atheists, proselytes and critics of religion in countries that lack fundamental rights, such as the freedoms of speech, conscience and association.[148] Not to mention in this regard the absence of religious freedom that within the human rights discourse is understood as the right to believe, to

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[144] Brett G. Scharffs, *Why Religious Freedom? Why the Religiously Committed, the Religiously Indifferent, and Those Hostile to Religion Should Care*, 2017 BYU L. REV. 957 (2017).

[145] Specifically, because a ban on MC would *prima facie* deprive Jewish and Muslim parents from their right to raise their child in accordance with their own beliefs. However, given the irreversible nature of MC, this non-sectarian argument in favor of allowing MC is problematic and loses persuasiveness. *See also* the Cologne decision at this point, *supra* note 116 (the child should have the right to decide himself which religion, *if any*, he wants to adopt). *See also* Yaser Ali, *Shariah and Citizenship—How Islamophobia is Creating a Second-Class Citizenry in America*, 100 Calif. L. Rev. 1027 (2012) (on how law singling out Muslims for disfavored treatment reinforce alienation of this group in the American society).

[146] U.N. DOCS., Office of the United Nations High Commissioner for Human Rights, *Report of the Special Rapporteur of Religion and Belief on His Mission to Denmark* (2016).

[147] Levmore, *supra* note 52, at 104-5 ("the fact that so many thoughtful people find female but not male circumcision abhorrent, suggests that a critical difference is that one is practiced on a group that is, at least to Western eyes, seriously constrained and subjugated by a variety of practices.").

[148] The European Union has even a Special Envoy, Ján Figel, former Slovak diplomat, who promotes religious freedom as part of the European Union's foreign policy. *See also* Ján Figel, *The European Union and Freedom of Religion or Belief: A New Momentum*, 2017 BYU L. REV. 895 (2017).

not believe, to change religion and to be able to criticize religion. Therefore, a complete ban on MC, which has also been practiced in countries that do not have a strong human rights record, would further complicate and narrow down our possibilities to ask attention for the rights of vulnerable groups around the globe. In other words, such a policy would send the wrong signal about religion and related freedoms.[149]

This "wrong signal" argument accepts that within liberal democracies, religious freedom has no intrinsic liberal value. It understands this freedom as a religion-empty liberty that provides protection to a wide range of beliefs and practices, without making a distinction between the theistic and non-theistic beliefs people may have. However, in line with the political commitment to draw attention to the human rights situation of vulnerable groups, such as atheists, adherents of new religions and critics of religion, in countries that lack religious freedom, we need this freedom to discuss their vulnerable human rights situations. We need to draw attention to the insecurity that threatens these groups in countries that do not recognize the right to religious freedom. Therefore, any serious restriction, such as a total ban, on important religious practices, such as MC, which is so relevant to Muslims and Jews, regardless of where they live, creates a complex situation for liberal democracies.

The "anti-alienation" and "wrong signal" arguments are pragmatic arguments that could explain the "double standards" regime. The use of these arguments reveals that acceptance of FC would call for resistance internally and externally. After all, local, national and international efforts are focused on the elimination of this practice. Concerning the legality of MC, these pragmatic arguments warn us for the implications of a ban internally and externally. As such, they help us to face properly the "Damocles sword" criticism of a liberal approach to MC. Thus, we could understand on pragmatic grounds the "double standards" regime and the im-

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[149] Hakeem Yusuf, *S.A.S. v France: Supporting Living Together of Forced Assimilation*, 3 INT'L HUM. RTS. L. REV. 277, 293 (2014) (comparing the French ban on face-covering veils based on the French "living together" ideal to the assimilation policies that are enforced in China against the Muslim minority, leaving barely no ["any" Instead of "no"?] room for free exercise of religion).

portance to maintain it. It protects us from creating exemptions for FC and it imposes restraints on a further restriction regime of MC.

IV. Conclusion

This article has put the use of different legal standards to assess the legality of ritual male and female circumcision under critical scrutiny. In this respect, it has developed a normative framework of liberal rights to address this criticism of using "double standards." The liberal perspective rejects convincingly exemptions for the most severe types of FC. These variants lack *any* health benefit. The normative framework has also pointed to the existence of a problematic and objectionable toleration regime in favor of religious MC *qua* religious. The liberal argument is that this practice can only be tolerated in law as a medical exemption. Otherwise, it is not possible to keep on defending the ban on the less significant of FC, which is, like ritual MC, also practiced on religious grounds. To reaffirm the "double standards" regime this article has developed two novel pragmatic arguments that look beyond the sectarian and medical justification of ritual circumcisions.

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FREEDOM OF RELIGION AND LIVING TOGETHER

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ABSTRACT

Despite the international recognition of religious freedom as a fundamental human right, recent developments in the United States and Europe reveal that the Islamic faith has been singled out *qua* Islam for special prohibitions. The question is whether this sectarian approach is compatible with the normative liberal approach to religious freedom that emphasizes egalitarianism and neutrality. The answer to this question is, no. Although religion within the paradigm of liberal political philosophy does not warrant special legal protection *qua* religion, this article contends that it is equally troublesome to single out religion *qua* religion for special disfavored treatment, even if the justification is facially neutral. This article uses facially neutral examples, such as: the French burqa-ban case, the Travel Ban project of President Trump, and the anti-Sharia debacle in the state of Oklahoma. This article draws on the dichotomous approach of liberal political philosophy to religion and develops a non-sectarian framework of arguments to defend religious liberty.

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INTRODUCTION

In June 2018, the Austrian government decided in an unprecedented step to close seven mosques and expel dozens of imams.[1] The closure was based on the 2015 "Islam-bill" that singles out Islamic organizations for a special ban: the prohibition on receiving foreign funding.[2] The government reasoned the closure would protect

1. Tom Barnes, *Austria to close seven mosques and deport imams in crackdown on 'political Islam'*, INDEPENDENT (June 8, 2018), https://abcnews.go.com/International/wireStory/austria-close-mosques-expel-imams-crackdown-55742091.

2. Section 6. (2) of the Austrian Islam Bill prohibits Islamic Organizations from accepting foreign funding: "The procurement of funds for the usual activity to satisfy religious needs of [the] members [of the Islamic Religious Society] has to be

diversity by standing against the spread of political Islam and thus prevent radicalization and the creation of parallel societies in Austria.[3] At the same time, regarding the same issue, and by reference to the same concerns, an overwhelming majority of the Dutch *Tweede Kamer* (House of Representatives) has urged the government to intensely monitor the sources of funding for Dutch mosques.[4] The majoritarian concern is that foreign money has been used as a tool to create support for a message opposing the dominant standards of the Dutch society. Under the guise of combatting the "undesirable influence" from "unfree states," the *Tweede Kamer* adopted eight resolutions.[5] These resolutions varied from the call for a new study about the financial sources of Dutch mosques to the ban on government subsidies for Islamic organizations that disturb the integration process of immigrants.[6] The European concern about the unwanted influences from the "unfree states," referring to states in the Gulf region, has also manifested itself in another way. In the aftermath of the *theoterrorist* attacks, meaning terrorism justified on religious grounds,[7] and in

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undertaken inland by the Religious Society, the local communities respectively their members." *Islamgesetz 2015*, StF: BGBl. I Nr. 39/2015 (Austria), *translated in: Federal Law on the External Legal Relationships of Islamic Societies – Islam Law 2015* https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Islamgesetz/Islam_Law.pdf (last visited Feb. 27, 2019).

3. Nadine Schmidt & Judith Vonberg, *Austria to close seven mosques, expel imams*, CNN (June 8, 2018), https://edition.cnn.com/2018/06/08/europe/austria-mosques-imams-intl/index.html.

4. *See Agenda Tweede Kamer der Staten Generaal*, vergaderjaar 2017–2018, ag-tk-2018-06-01, nr. 11, at 3 (Neth.) (discussing the amount of resolutions submitted during the parliamentary debate about the funding of mosques in the Netherlands).

5. *Kamerstukken II* 2017/18, 29 614, nr. 82 (resolution Sjoerdsma/Segers); *Kamerstukken II* 2017/18, 29 614, nr. 82 (resolution Becker/Segers) (Neth.) (on file with author); *see generally* Tamar de Waal, *"Make Sure You Belong!" A Critical Assessment of Integration Requirements for Residential and Citizenship Rights in Europe*, 25 BUFF. HUM. RTS. L. REV. (forthcoming 2019) (on file with author) (discussing the "integration debate" in Europe).

6. *Id*

7. *See* Paul B. Cliteur, *Tolerantie en Theoterrorisme* [*Tolerance and Theoterrorism*], *in* FRANS KRAP & WILLEM SINNINGHE DAMSTE (EDS.), OVER TOLERANTIE GESPROKEN [SPEAKING OF TOLERANCE] 167-69 (2016); s*ee also* Paul Cliteur, BARDOT, FALLACI, HOUELLEBECQ EN WILDERS [BARDOT, FALLACI, HOUELLEBECQ EN WILDERS] 2016 (on file with author)*;* Donna E. Arzi, *The Role of*

reaction to the political developments in the Middle-East,[8] some European authorities decided to critically scrutinize the work of Islamic preachers.[9] A minimally noticed and criticized instrument that is widely used in this context concerns the policy of targeting a particular category of Islamic preachers for special restrictions.[10] This category of religious leaders is usually accused of spreading messages of hatred and violence.[11] This approach of targeting Islamic extremism manifests itself in multiple ways and on different levels. As such, on the level of public and political debate, the language used to address Muslim radicalization is quite aggressive in tone.[12] The concepts of "hate

Compulsion in Islamic Conversion: Jihad, Dhimma and Ridda, 8 BUFF. HUM. RTS. L. REV. 15 (2002) (exploring the content of Islamic dogmas, such as Jihad and apostasy).

8. *See* KARIN VEEGENS, A DISRUPTED BALANCE? (2011) (discussing the criminal law developments in reaction to terrorist attacks under the flag of religion); *see also* Mark D. Kielsgard, *A Human Rights Approach to Counter-Terrorism*, 36 CAL. W. INT'L L.J. 249 (2006).

9. Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651 (2017) (discussing the debate in the U.S.); Michiel Bot, *The Right to Offend: Contested Speech Acts and Critical Democratic Practice*, 24 LAW & LITERATURE 232, 238 (2012) (paying attention to the Dutch debate on reducing the influence of radical Imams).

10. *See generally* Khaled A. Beydoun, *Muslim Bans and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733 (2017) (providing some insights in the background of targeting Muslims in the U.S.); Jeroen Temperman, *Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech*, 2011 BYU L. REV. 729 (2011) (discussing the challenges of religious sensitivity to free speech and how this right to free expression has been affected by those sensitives); *see also* Robin Edger, *Are Hate Speech Provisions Anti-Democratic: An International Perspective*, 26 AM. U. INT'L L. REV. 119 (2010) (assessing the Canadian attempts to deal with "hate speeches" from an international law perspective); Helen Ginger Berrigan, *"Speaking Out" about Hate Speech*, 48 LOY. L. REV. 1 (2002) (defining hate speech).

11. This article does not aim to challenge the positive obligation states have under international law to protect minorities from hate speech. However, it aims to create awareness about framing the followers of one particular religious faith as potential terrorists and thus singling out that religion for special bans. *See* Nazila Ghanea, *Minorities and Hatred: Protections and Implications*, 17 INT'L J. ON MINORITY & GROUP RTS. 423, 425 (2010); Robert A. Kahn, *Flemming Rose, the Danish Cartoon Controversy, and the New European Freedom of Speech*, 40 CAL. W. INT'L L.J. 253 (2010) (discussing the clash between free speech and religious freedom).

12. The anti-radicalization policies developed in this regard fit the propagated idea of tolerating only those versions of the Islam that fit European values. *See*

Imams" and "hate preachers" seem to be completely integrated in this debate.[13] On the level of anti-radicalization policies, the instruments addressing Muslim-extremism appear to be as severe as the tone of the anti-radicalization debate. These policies include the following: (1) indefinitely and "without delay" shutting down mosques and Islamic institutes;[14] (2) frustrating the broadcast of TV channels;[15] (3) explicit refusal of permissions to build mosques;[16] (4) withdrawal of residence permits;[17] (5) imposition of area bans;[18] (6) invalidating issued travel

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EUROPEAN PARLIAMENT, DRAFT REPORT ON FINDINGS AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON TERRORISM recommendation 15 (2018).

13. *See* Beydoun, *supra* note 10 (critiquing this development in the U.S. context).

14. *Cf.* EUROPEAN PARLIAMENT, *supra* note 12 (explicitly calling upon its member-states to close "without delay" mosques and other Islamic institutes that violate EU values); Susanne Schröter, *Debating Salafism, Traditionalism and Liberalism: Muslims and the State in Germany*, *in* MOHA ENNAJI (ED.) NEW HORIZONS OF MUSLIM DIASPORA IN EUROPE AND NORTH AMERICA 215 (2016) (on file with author); *see also* Harriet Agerholm, *Muslims stage mass prayer in protest over closure of mosques in Italy*, INDEPENDENT (Oct. 23, 2016), https://www.independent.co.uk/news/world/europe/muslims-stage-mass-prayer-protest-over-closure-mosques-italy-rome-demonstration-islamophobia-a7376286.html (reporting that Italian authorities have closed mosques on remarkable "administrative grounds" and highlighting that politicians have expressed their concerns about the existence of unofficial "garage mosques").

15. EUROPEAN PARLIAMENT, *supra* note 12 (without providing a clear definition of "hate preacher," the European Parliament urges the committee in its draft report to take legislative steps meant to measure the effectiveness of knocking down foreign TV channels spreading messages contrary to EU values).

16. *Cf.* Giorgio Ghiglione in Sesto San Giovann, *The fall of 'Italy's Stalingrad': symbol of left wages war on migrants and poor*, GUARDIAN (May 22, 2018), https://www.theguardian.com/cities/2018/may/22/fall-italy-stalingrad-sesto-san-giovanni-milan-symbol-of-the-left-wages-war-on-migrants-and-the-poor (reporting on how the presence of a terrorist in a small Italian town unfairly played a role in not granting construction permission for the building of a mosque).

17. *Cf.* Human Rights Without Frontiers, *Belgian court decision blocking deportation of Brussels grand mosque imam appealed to the council of state*, (Nov. 30, 2017), http://hrwf.eu/belgian-court-decision-blocking-deportation-of-brussels-grand-mosque-imam-appealed-to-the-council-of-state/ (paying attention to the highly controversial deportation case of the Egyptian imam Abdelhadi Sewif who lived for 13 years in Belgium and was accused of spreading radicalism. Eventually, a Belgium court stopped the deportation process).

18. The Dutch *Raad van State*, Council of State May 30, 2018, no. 201709324/1/A3, ECLI:NL:RVS:2018:1763 (Neth.) (ruling that the imposed area ban

visas to attend conferences and symposia;[19] and (7) proposals aimed at amending criminal law enforcing the law against the "hate Imams" and *takfiri* Islamists,[20] who label other Muslims as apostates.[21]

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on a Muslim preacher was justified in light of the risk of radicalizing believers in those particular neighborhoods of The Hague, leaving aside the argument of the preacher that he is manifesting his religion).

19. *See* Teis Jensen, *Denmark bans six 'hate preachers' from entering the country*, REUTERS (May 2, 2017), https://ca.reuters.com/article/topNews/idCAKBN17Y1MV-OCATP (last visited Feb. 27, 2019); *see also* https://www.rtlnieuws.nl/nieuws/binnenland/stichting-verbijsterd-over-intrekking-visa-imams (in 2015 the Dutch Minister of Foreign Affairs invalidated the issued travel visas of three controversial Islamic preachers that aimed to attend a money raising "gala" in the Dutch city of Rijswijk); *cf.* Regional Court of Oost-Brabant December 23, 2015, no. SHE 15/6861, ECLI:NL:RBOBR:2015:7607 (Neth.) (the mayor of Eindhoven banned the organizers of an Islamic conference)*; see also* Regional Court of Oost-Brabant January 30, 2017, no. SHE 16/2650, ECLI:NL:RBOBR:2017:415 (Neth.) (the court overturned the 2015 interim judgment and ruled that the ban was an inadmissible violation of the right to religious freedom and the freedom of association).

20. *See Tweede Kamer der Staten-Generaal* [*The House of Representatives*], *Aanhangsel Handelingen II* [*Parliamentary Proceedings II*] 2017/2018, at 68-35-12 (Neth.) (showcasing a recent debate in the Netherlands). Amending criminal law for this purpose is highly controversial. The liberal criticism is of Ayaan Hirsi Ali, a former member of the Dutch House of Representatives, saying that according to our modern standards, the Islamic Prophet is a warlord. If he is allowed to say this then why should a local conservative imam not be left room for saying that the mayor of Rotterdam is an apostate, however shocking and objectionable the content of both statements may be. *Cf.* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1292 (1994) (arguing that it would be "unacceptable" from a normative point of view to give a different treatment to very similar cases).

21. Eli Alshech, *The Doctrinal Crisis within the Salafi-Jihado Ranks and the Emergence of Neo-Takfirism*, 21 ISLAMIC L. & SOC'Y 419, 437 (2014) (explaining what the *takfiri* ideology entails and providing an overview of the recent developments regarding the thinking of this sect).

These recent developments have two key commonalities. First, a latent presence of Islamophobia,[22] a kind of Islam and Muslim fear.[23] As highlighted by Justice Sotomayor in her dissenting opinion in *Trump v. Hawaii*,[24] this fear is gradually growing and institutionalizing. Second, the deep commitment to undo beliefs, expressions, and manifestations that deviate from the required and dominant standards to save mainstream culture fuels the façade of the anti-terrorism and anti-radicalization agenda. One example of attempting to preserve mainstream culture is highlighted in the case of *Awad v. Ziriax*, which was brought before the Court in the aftermath of the so-called "Save Our State" Amendment.[25]

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22. Sohail Wahedi, *EU wil islam anders behandelen* [*EU wants to treat Islam differently*], ND (July 31, 2018), https://www.nd.nl/nieuws/opinie/eu-wil-islam-anders-behandelen.3082450.lynkx (last visited Feb. 27, 2019) (defining Islamophobia as fear for the Islam and Muslims and warning for the institutionalization of Islamophobia); *see also* ENES BAYRAKLI & FARID HAFEZ, EUROPEAN ISLAMOPHOBIA REPORT 2017 (2018); *cf.* Yaseen Eldik & Monica C. Bell, *The Establishment Clause and Public Education in an Islamophobic Era*, 8 STAN. J. C.R. & C.L. 245 (2012).

23. Christian Joppke, *Pluralism vs. Pluralism: Islam and Christianity in the European Court of Human Rights*, *in* RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 88 (Jean Louise Cohen & Cécile Laborde eds., 2016) (analyzing the case law of the European Court of Human Rights (ECtHR) in religious freedom cases and claiming that the Court interprets pluralism as a value that is threatened by the Islamic faith and needs therefore be protected).

24. *Cf.* Trump v. Hawaii 138 S. Ct. 2392, 2433 (2018) (Sotomayor, S., dissenting) (Justice Sotomayor criticizes the contentious "Travel Ban" that was designed and enforced just shortly after President Donald J. Trump came to power. She notes the Supreme Court's majority fails to see that the travel ban is a violation of religious neutrality and a clear sign of Muslim fear. Sotomayor says that "repackaging" the ban as a security need, knowing that its background is laid down in the electoral promise of shutting down the U.S. borders for Muslims, "does little to cleanse [the Travel Ban] of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus . . . The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the [Travel Ban] inflicts upon countless families and individuals, many of whom are United States citizens.").

25. *See* Brenna Bhandar, *The Ties that Bind Multiculturalism and Secularism Reconsidered*, 36 J.L. & SOC'Y 301, 304, 326 (2009) (discussing multiculturalism and secularism as established dominant political doctrines dealing with diversity. Bhandar claims that these political theories "reproduce and hold in place a unitary, sovereign political subjectivity. Despite their ostensible differences as political ideologies, both multiculturalism and secularism are deployed as techniques to govern

This strategy of reconciliation[26] touches on diversity and issues related to diversity, from a biased and dominant majoritarian perspective.[27] The main aim of this reconciliation strategy is to make diversity as a concept, "majoritarian-proof."[28] That is to say, what is considered to fit the diversity concept passes through the majoritarian

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difference." She concludes by saying that both political theories have in common the objective "to govern and manage difference that is perceived to violate dominant norms and values, defined in reference to the Christian cultural heritage of the nation state."); *see also* Steven M. Rosato, *Saving Oklahoma's Save Our State Amendment: Sharia Law in the West and Suggestions to Protect Similar State Legislation from Constitutional Attack*, 44 SETON HALL L. REV. 659 (2014); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011).

26. S.A.S. v. France, App. No. 43835/11, Eur. Ct. H. R. ¶ 126 (2014) (Fr.) (the Court rules that for "democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."); *see also Kokkinakis v. Greece*, App. No. 14307/88, Eur. Ct. H. R. ¶ 33 (1993) (Greece) (the ECtHR formulated in this first religious freedom judgment the "reconciliation formula," using the same language as in S.A.S. v. France); *see also* Mark Hill, *Tensions and Synergies in Religious Liberty: An Evaluation of the Interrelation of Freedom of Belief with Other Human Rights; Parallel Equality and Anti-discrimination Provisions; Enforcement in Competing European Courts; and Mediated Dispute Resolution*, 2014 BYU L. REV. 547 (2014) (providing some insights and background in the case law of the ECtHR on religious freedom).

27. Eoin Daly, *Fraternalism as a Limitation on Religious Freedom: The Case of S.A.S. v. France,* 11 RELIGION & HUM. RTS. 140, 165 (2016) (criticizing the way contentious practices of religious minorities have often been approached from an ethnocentric perspective that has been grounded on majoritarian cultural norms that provide little room for the habits of cultural and religious minorities); *see also* Anna Triandafyllidou, Tariq Modood & Ricard Zapata-Barrero, *European challenges to multicultural citizenship. Muslims, secularism and beyond*, *in* ANNA TRIANDAFYLLIDOU, TARIQ MODOOD & RICARD ZAPATA-BARRERO (EDS.), MULTICULTURALISM, MUSLIMS AND CITIZENSHIP. A EUROPEAN APPROACH 1, 3 (2006) (saying that "there is a widespread perception that Muslims are making politically exceptional, culturally unreasonable or theologically alien demands upon European states.").

28. *Cf.* Irene Zubaida Khan, *The Rule of Law and the Politics of Fear: Human Rights in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 1, 2 (2008) (outlining her "Afghanistan experience" and claiming: "What I saw in Kabul in 2003 is a microcosm of what I see is happening across our world today; a world where the interests of the powerful and the privileged prevail over those of the poor and the marginalised, and security trumps human rights.").

lens of skepticism and beats the criticism of favoritisms toward religious believers or immigrants. Thus, what diversity should entail is made dependent upon the desires and wishes of a dominant majority.[29] This idea of making diversity majoritarian-proof has serious consequences for the true free exercise of fundamental rights (i.e., freedom of religion, freedom of expression, and freedom of association). The non-sectarian and thus the egalitarian approach to fundamental rights is threatened.[30] In addition, the reconciliation strategy involves another highly unpleasant risk.

Specifically, the reconciliation strategy concerns the emergence of a "Chrisotcracy" and the shifting away from the religion-neutral liberal democracy.[31] Here, Christocracy does not refer to a theocracy that is governed by Jesus' words or following God's divine revelations in the Holy Bible.[32] The type of Christocracy emerging here takes the form

29. *Cf.* Bhandar, *supra* note 25, at 315 (discussing the British dilemma of how to deal with religious manifestations of Muslims in the aftermath of theoterrorism and the rise of radicalism and extremism).

30. The egalitarian interpretation of religion and religious freedom is not affected by the specific beliefs that form the basis of certain claims for exceptions. *See* RONALD DWORKIN, RELIGION WITHOUT GOD, 146 (2013). Another appropriate example in this context is the local French ban on wearing the so-called *Burkini* that covers the whole body except the face, arguing that this piece of clothing is not "respectful of good morals and of secularism," completely ignoring similar clothing worn by non-Muslim women. *See* Alissa J. Rubin, *French 'Burkini' Bans Provoke Backlash as Armed Police Confront Beachgoers*, N.Y. TIMES (Aug. 24, 2016), https://www.nytimes.com/2016/08/25/world/europe/france-burkini.html; s*ee also* Mohamed Abdelaal, *Extreme Secularism vs. Religious Radicalism: The Case of the French Burkini*, 23 ILSA J. INT'L & COMP. L. 443, 454 (2017) (discussing the way French courts have dealt with the legality of the ban on wearing *burkini*). One of the *sectarian* arguments that is used to justify a non-egalitarian application of religious freedom is laid down in the idea that Christianity stands for peace while Islam is inherently violent: STAATKUNDIG GEREFORMEERDE PARTIJ ("SGP") [THE DUTCH REFORMED POLITICAL PARTY], ISLAM IN NEDERLAND [ISLAM IN THE NETHERLANDS] 3, 4 (2017), https://www.sgp.nl/actueel/manifest—islam-in nederland/6125 (last visited Feb. 27, 2019).

31. Wahedi, *supra* note 22 (raising up the question as to whether liberal democracies are moving toward a regime that is democratic for the "native" majority and "reactionary" in its approach toward the minorities' claims for exemptions from general laws).

32. *Cf.* Erik J. Krueger, *God versus Government: Understanding State Authority in the Context of the Same-Sex Marriage Movement*, 7 LIBERTY U. L. REV.

of a democracy for the "natives," which consists of a Christian majority who have full access to the basic liberties.[33] However, this privilege is not reserved for religious minorities.[34] The concept of Christocracy is quite ethnocentric in its response to the claims, manifestations, and beliefs of other religious minorities.[35] This response is meant to promote the Christian, and as claimed by some, the Judeo-Christian heritage of Westerns societies. The proponents of this line consider this historic heritage the cradle of European civilization that has brought liberties and prosperity to Western nations.[36]

The emergence of the reconciliation strategy, and the rise of ethnocentrism across Western democracies such as the United States and Europe, might affect the propagated egalitarian understanding of religious freedom and the idea of "living together in diversity."[37] Thus,

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235, 237 (2013) (Krueger describes Christocracy as "a community of Christians governed by Christ through the Church according to the immutable divine law.").

33. *See* SGP, *supra* note 30, at 3-4.

34. *See generally* Najmeh Mahmoudjafari, *Religion and Family Law: The Possibility of Pluralistic Cooperation*, 82 UMKC L. REV. 1077, 1085 (2014) (on file with author) (wondering whether the Muslim community could benefit from the same privileges of religious arbitration, as this option is for example available for the Jewish community).

35. Joppke, *supra* note 23, at 96 (in the religious freedom case law of the ECtHR, Joppke has discovered "a laxness for Christianity and an unforgiving stance toward Islam," which he qualifies as "a double standard at work"); s*ee also* Sohail Wahedi & Renée Kool, *De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context* [*The criminal law approach toward female circumcision: a comparative law perspective*], 7 TIJDSCHRIFT VOOR RELIGIE, RECHT EN BELEID [J. FOR RELIGION, L. AND POL'Y], 51 (2016) (on file with author) (highlighting the emergence of ethnocentrism in the enforcement of laws against the practice of female genital mutilation).

36. Yasser Louati, *Islamophobia in France. National Report 2017*, *in* ENES BAYRAKLI & FARID HAFEZ (EDS.), EUROPEAN ISLAMOPHOBIA REPORT 2017 225 (2018) (commenting on how French politicians have referred to the Judeo-Christian background of France to promote their political opinions. Louati says, "[w]hile [some French politicians] constantly pose as staunch advocates of a repressive *laïcité* when speaking of the religious rights of Muslims, they nevertheless invoke religious freedoms or the "Judeo-Christian roots" of France to justify special arrangements for their political base."); *see also* Leyla Yildirim, *Islamophobia in Netherlands. National Report 2017*, *in* ENES BAYRAKLI & FARID HAFEZ (EDS.), EUROPEAN ISLAMOPHOBIA REPORT 2017 431 (2018) (for similar rhetoric used in the Netherlands).

37. Ilias Trispiotis, *Two Interpretations of Living Together in European Human Rights Law*, 75 CAMBRIDGE L.J. 580, 582 (2016) (arguing that "the historical

where does our analysis bring us in terms of the widely advocated egalitarian understanding of religious freedom in liberal political philosophy and the idea of "living together in diversity"? To develop a robust theoretical framework that helps us reflect on this question, we should deal with two intertwined matters. On the one hand, we have to deal with the question of religious freedom and its propagated non-sectarian and egalitarian understanding. On the other, we need to properly address the rise of ethnocentrism across Western democracies and the related concerns about the reconciliation strategy.[38]

Our analysis begins with the question of whether the move toward ethnocentrism and the use of a reconciliation strategy reflect the propagated non-sectarian role religion should play for the purposes of religious accommodation and decisions taken in liberal democracies.[39] To explore more on this matter, we need to take two steps. First, we need to conceptualize the reconciliation strategy. Second, we need to provide a clear theoretical framework that helps us find out what role religion plays, for legal and political purposes, within the paradigm of liberal political philosophy. A recent draft report of the special European Parliamentary committee on anti-terrorism provides a helping hand regarding this first step; the report urges member states to combat Islamic manifestations that violate European values.[40] The same is true for the case law of the European Court of Human Rights ("ECtHR"). The ECtHR has used the concept of "living together," as used in *S.A.S. v. France* (*S.A.S.*), ruling that norms prohibiting or restricting "contentious religious manifestations" do not violate religious freedom. The Court held that such prohibitions are meant to protect the rights and freedoms of others through ruling out religious practices that challenge the core values of a democratic society.[41]

Part I of this article draws on relevant case law and the recommendations of the special committee to theorize the

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emphasis on peaceful coexistence" reveals much of the way European authorities deal with religion).

38. *Cf.* Micah Schwartzman, *Religion, Equality and Anarchy*, *in* RELIGION IN LIBERAL POLITICAL PHILOSOPHY 15 (Cécile Laborde & Aurélia Bardon eds., 2017) (explaining the relevant methodology).

39. *Cf.* CÉCILE LABORDE, LIBERALISM'S RELIGION (2017); CÉCILE LABORDE & AURÉLIA BARDON, RELIGION IN LIBERAL POLITICAL PHILOSOPHY (2017).

40. EUROPEAN PARLIAMENT, *supra* note 12.

41. S.A.S. v. France, ¶ 126 (2014).

reconciliation strategy. Although this theorization rests heavily on European experiences, a similar development of reinforcing majoritarianism is happening in the United States. The most recent case in the United States that illustrates reinforcing majoritarianism is *Trump v. Hawaii*. However, the "Travel Ban" preceding this Supreme Court ruling is not unique in its effect of singling out one faith for a special ban. The "Save Our State" Amendment in Oklahoma, resulting in *Awad v. Ziriax*,[42] and the upcoming *United States v. Nagarwala*,[43] contain elements of what this article theorizes as the reinforcement of majoritarianism that causes feelings of anxiety toward the "stranger."[44]

Part II of this article focuses on whether the reconciliation strategy could be considered a paradigmatic expression of the most recent theoretical developments regarding the place of religion within liberal political philosophy.[45] These developments involve a growing support

42. This case concerned the lawfulness of State Question 755 that aimed to ban the use of Sharia Law in the courts of the state of Oklahoma. Its author, Rex Duncan, presented his initiative as a necessary mean in the battle against an evil culture. Both the District Court as well as the Court of Appeals decided that the ban—which was approved by more than 70% of the Oklahomans participating in the ballot—was clearly aimed at singling out the Islamic law for a disfavored treatment and for these reasons both legal instances held that challenger would likely be able to challenge this ban because it was unconditional and violated the Establishment Clause. Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010); Awad v. Ziriax 670 F.3d 1111 (10th Cir. 2012); *see* Amara S. Chaudhry-Kravitz, *The New Facially Neutral Anti-Shariah Bills: A Constitutional Analysis*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 25, 31 (2013); Lee Tankle, *The Only Thing We Have to Fear Is Fear Itself: Islamophobia and the Recently Proposed Unconstitutional and Unnecessary Anti-Religion Laws*, 21 WM. & MARY BILL RTS. J. 273 (2012); Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363 (2012).

43. United States v. Nagarwala, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (the legality of female circumcision, which involves separating the mucous membrane from the genitalia, however the District Court held that the Federal law banning this practice is unconstitutional because "Congress had no authority to pass this statute under either the Necessary and Proper Clause or the Commerce Clause." The District Court referred in this respect to United States v. Lopez, 514 U.S. at 566, 115 S. Ct. 1624 and Bond v. United States, 572 U.S. at 858, 134 S. Ct. 2077. This case is pending appeal).

44. Trispiotis, *supra* note 37. Here, "stranger," means those who do not belong to an established majority, either because they adhere to another religion or because they have an immigrant background.

45. Part II includes and revises the analysis on the role of religion in liberal political philosophy that has been published previously. *See* Sohail Wahedi,

for a "religion-empty" and a "God-empty" understanding of religion and religious freedom.[46] Such understanding draws on non-sectarianism, anti-favoritisms, and thus, an egalitarian approach to the beliefs, views, expressions, and manifestations of citizens.[47] Part II helps us understand why religion *qua* religion does not require special protection. Thus, each liberal protection provided for the exercise of religion takes place through finding suitable substitutes for the category of religion. This means religion is only special because of abstraction. Allegedly, it is not possible to provide a liberal protection regime for religion *qua* religion.[48] This theoretical framework helps us to answer the question of why majoritarian sensitivities seem to prevail in important free exercise cases.

As we will see, in *S.A.S. v. France*, the ban on religious face-covering veils has been justified as a matter of "living together."[49] The "Travel Ban" in *Trump v. Hawaii* was justified as a matter of security.[50] The "Save Our State" Amendment was a serious attempt to keep the "stranger"[51] outside the territories of the state—a policy of fear that

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Abstraction from the Religious Dimension, 24 BUFF. HUM. RTS. L. REV. 1 (2017-2018).

46. *See generally* Wahedi, *supra* note 22.

47. *Id*.

48. STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 83 (2014).

49. The French ban on face-covering veils did not violate the right to Religious Freedom, as France had "a broad margin of appreciation" to make a choice regarding the lawfulness of face-covering veils.

50. For example, the first version of the travel ban, Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, explicitly said that

> Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

Exec. Order No. 13,769, 82 FR 8977 (Jan. 27, 2017).

51. Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment*, 2017 BYU L. REV. 779, 825 (2017); Eunice Lee, *Non-Discrimination in Refugee and Asylum Law (Against Travel Ban 1.0 and 2.0)*, 31 GEO. IMMIGR. L.J. 459, 464 (2017) (both saying that the aim—as explicitly mentioned in the first version of the travel ban, Executive Order 13,769—to keep honor killers outside the United States is an obvious reference to Muslims).

advanced the political agenda of spreading anxiety toward the "stranger." Another example is *United States v. Nagarwala,* where the interventions were based on protecting girls, leaving zero room for analogies.[52] Moreover, why do authorities allow religious male circumcision *qua* religious,[53] while religious and ritual female circumcision has been outlawed in all its variants? Part II also suggests that we can understand this way of "re-packaging" religious cases as "abstraction from the religious dimension," which does not justify singling out one faith for special bans in liberal democracies.

Part III draws on the liberal critique of singling out religion *qua* religion for special protection in law and the emergence of the reconciliation strategy. Part III also addresses the shift toward ethnocentrism to provide a more "close-to-reality" conception of religious freedom that is "diversity-friendly," "sectarian-proof," and compatible with the egalitarian view of this right that rejects religious toleration *qua* religious.[54]

This article concludes that although the presence of the reconciliation strategy and the shift toward ethnocentrism can be

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52. *Cf.* United States v. Nagarwala, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (outlawing the Federal law on banning female circumcision and saying with reference to United States v. Morrison, 529 U.S. 598, 607 (2000) that "as the Supreme Court found in *Morrison*, rape and other forms of sexual assault against women are not economic or commercial activity, and therefore not part of an interstate market, no different conclusion can be reached concerning FGM, which is another form of gender-related violence.").

53. *Cf.* Cent. Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014) (on file with author) (holding that a local regulation banning the practice of immediate oral suction of the circumcision wound—also known as *metzitzah b'peh* and practiced by some Orthodox Jews—preventing the spread of (Herpes Simplex Virus) is not neutral nor generally applicable. "The Regulation is not neutral because it purposefully and exclusively targets a religious practice for special burdens. And . . . the Regulation is not generally applicable either, because it is underinclusive in relation to its asserted secular goals: the Regulation pertains to religious conduct associated with a small percentage of HSV infection cases among infants, while leaving secular conduct associated with a larger percentage of such infection unaddressed." In fact, the Court accepts at this point that ritual male circumcision is a *permissible* religious practice as it points out that the Regulation mainly "targets a religious practice for special burdens.").

54. Part III includes and revises the analysis on the pragmatic defense of religious freedom that has been published previously. *See* Sohail Wahedi, *The Health Law Implications of Ritual Circumcisions*, 22 QUINNIPIAC HEALTH L. J 209 (2019).

theorized in light of the abstraction theory, as developed and defended in this article, we need to be very cautious about this justification. After all, non-sectarianism and egalitarianism are two sides of the same coin. This means authorities need to be very careful about disfavoring harmless, though very different lifestyles that deviate from the desired standards. This religion-empty understanding of religious freedom supports the proposition that people should be free to organize and live their lives as they choose.[55] However, the reconciliation strategy and the emergence of strong ethnocentrism give cause to rethink religious freedom in a way that endorses diversity for pragmatic reasons, intending to avoid a Hobbesian "war of all against all."[56] Hence, this defense of religious freedom is rooted in grounds that are non-sectarian, non-majoritarian, and non-violent toward the advocated egalitarian conception of religious freedom.[57]

I. THE RECONCILIATION STRATEGY

Hidden behind the façade of "unity in diversity" that aims to combat "radical Islam" and support the moderate Muslim, a special anti-terrorism committee of the European Parliament has proposed in its recent report to only tolerate variants of Islam that are "in full accordance with EU values."[58] These values include respect for human rights, fundamental freedoms, human dignity, equality, and solidarity.[59] Mosques and other Islamic institutes that violate these values should be closed immediately.[60] This radical proposal is the first serious and most comprehensive legislative attempt to create a legal basis for state interventions against norm deviant beliefs, expressions, and

55. *See generally* DWORKIN, *supra* note 30 (this idea is grounded in the neutrality principle of liberal philosophy. The State should act in a religion-blind way. This positions considers religion a non-sectarian concept that could help people to organize their lives independently, and thus without State interference, except for cases of harm or damages).

56. *Cf.* BRIAN LEITER, WHY TOLERATE RELIGION? 9 (2014).

57. *Cf.* Sohail Wahedi, *Female circumcision as an African problem: double standards or harsh reality?*, *in* CHRISTIAN GREEN, JEREMY GUNN & MARK HILL (EDS.), RELIGION, LAW AND SECURITY IN AFRICA 400 (2018).

58. EUROPEAN PARLIAMENT, *supra* note 12, 17.

59. *Id*. at 14.

60. *Id*. at 17.

manifestations of a "contentious minority" in Europe. However, it is not something completely unique. On a different level and in a case by case assessment, judges across liberal democracies have ruled in a large number of cases on the legality of religious manifestations that are considered contrary to legal and social norms of society.[61]

The legal outcomes of some of these cases are as controversial as the proposed plans of the special committee. The controversy lies in two specific grounds that shape the contours of the reconciliation strategy. First, some court judgments and the special committee report seek to adjust beliefs, expressions, and manifestations that violate general expectations about how one should live a life conforming to the dominant standards of the society. Second, the court judgments and the recommendations of the European Parliament seem to single out one "contentious" minority for special bans and restrictions. At this point, the majoritarian attitude is that some beliefs, expressions, and manifestations of this minority are unwelcome, anomalous, or simply problematic,[62] as they do not show enough respect for the societal achievements of Western societies, such as the equality between men and women.[63]

Taking both developments together unveils that very little of the propagated egalitarian and non-sectarian conception of religious

61. Shelby L. Wade, *Living Together or Living Apart from Religious Freedoms: The European Court of Human Right's Concept of Living Together and Its Impact on Religious Freedom*, 50 CASE W. RES. J. INT'L L. 411 (2018); Sarah Trotter, *Living Together, Learning Together, and Swimming Together: Osmanoglu and Kocabas v Switzerland (2017) and the Construction of Collective Life*, 18 HUM. RTS. L. REV. 157, 169 (2018) (discussing the emergence of the "living together" doctrine in the case law of the ECtHR and how this shift move toward constructing a "common identity" has affected free exercise of religious freedom); *Cf.* Stephanie A. Ferraiolo, *Justice for Injured Children: A Look into Possible Criminal Liability of Parents Whose Unvaccinated Children Infect Others*, 19 QUINNIPIAC HEALTH L. J. 29 (2016); Geurt Henk Spruyt, *Politicians and Epidemics in the Bible Belt*, 12 UTRECHT L. REV. 114, 124 (2016) (refraining from child vaccination on religious grounds provides another appropriate example of a contentious religious manifestation). *Cf.* John Alan Cohan, *Honor Killings and the Cultural Defense*, 40 CAL. W. INT'L L.J. 177 (2010).

62. Triandafyllidou, Modood & Zapata-Barrero, *supra* note 27, at 3.

63. *Cf.* Staatkundig Gereformeerde Partij v. the Netherands (SGP), App. No. 58369/10, Eur. Ct. H. R. (2012) (critically scrutinizing the practice of a "native" religious minority).

freedom has been adopted by decision makers in law and politics across liberal democracies.[64]

Instead, the protection of the rights and freedoms of others has been prioritized to cut off non-mainstream ways of life.[65] This approach is clearly present in the ECtHR's case law concerning the legality of Islamic dress codes,[66] such as headscarves and face-covering veils.[67] The European Parliament's recent draft report highly relies on the same ECtHR formula. The rule of thumb is that protecting the rights and freedoms of "others" justifies state practices that violate a minority's rights.[68] Hence, the special committee's recommendations might sound radical or even contradictory to the concept of "living together" in peace and diversity, but it attempts to codify the line that was developed by the ECtHR. In other words, the recommendations of the special committee and the ECtHR's case law share exactly the same narrative

64. *Cf. Id*. The SGP case is controversial for several reasons. Mainly, the idea that the State should not interfere in the way people want to give content to their lives, simply because the authorities do not appreciate that way of life, not because that way of life is causing harm or puts the safety of others under serious health risks. *See generally* DWORKIN, *supra* note 30, and Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. 993 (2010) (arguing that the state should not prescribe how people should live their lives).

65. *Cf.* interview with the former acting mayor of Amsterdam Jozias van Aartsen: Niels Klaassen, *'VVD moet moslims juist beschermen' ['VVD must protect Muslims']*, AD (July 20, 2018) (on file with author) (Van Aartsen claims that much of the current policy is based on gut feelings and suspicion toward Muslims, while religious freedom is meant to stop the government from prescribing how one should exercise his religion).

66. The ECtHR judgment in the SGP case forms an exception to this view. Another exception to this rule is the court judgment in Refah Partisi and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, Eur. Ct. H. R. (2003) (in both judgments the major concern was the rights and freedoms of others).

67. Dahlab v. Switzerland, App. No. 42393/98, Eur. Ct. H. R. (2001) [hereinafter, *Dahlab v. Switzerland*]; Leyla Şahin v. Turkey, App. No. 44774/98, Eur. Ct. H. R. (2005) [hereinafter *Leyla Şahin v. Turkey*]. *See also* Timothy J. Murphy, *Comparative Secularism: Leaving Room for the Holy Spirit and Headscarves in Turkish and American Public Schools*, 45 CAL. W. INT'L L.J. 297 (2015) (providing a comparative critical analysis of the protection regime for religion in the United States and Turkey).

68. EUROPEAN PARLIAMENT, *supra* note 12; *see also* Trotter *supra* note 61, at 163 (analyzes and discusses the way the ECtHR has embraced through case law the doctrine of "living together" as part of the limitation ground "protecting the rights and freedoms of others" to justify restrictions upon religious freedom).

that, in turn, reconciles diversity with majoritarian sensitivities about the way people should live their lives. What does this narrative exactly entail and how does it help us to theorize the reconciliation strategy? To answer this question, we can make use of the court's ruling in *S.A.S.* and compare this decision to the special committee's recommendations.

A. S.A.S. v. France

In *S.A.S.*, the ECtHR used, for the first time, the predominantly French concept of "living together" to rule on the legality of the French ban on publicly wearing face-covering veils.[69] The background of this judgment lies in the adoption of a highly controversial bill that aimed to ban face-covering dresses and veils, such as the *burqa* and *niqab*.[70] In July 2010, the French *Assemblée Nationale* passed the bill that was meant to prohibit concealing one's face in the public space. An absolute majority of the then present Assembly members voted in favor of this bill. Only one member voted against it while three members abstained.[71] In September 2010, the French *Sénat* adopted by an absolute majority the bill that criminalized wearing face-covering dresses in public ("prohibition law").[72]

69. Hakeem Yusuf, *S.A.S. v. France: Supporting Living Together or Forced Assimilation*, 3 INT'L HUM. RTS. L. REV. 277, 281 (2014) (criticizing the embracement of the French "living together" doctrine in *S.A.S.*).

70. *LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public* (*LOI n° 2010-1192*) [Law no. 2010-1192 of October 11, 2010 prohibiting the concealment of the face in the public space] (Fran.).

71. *See generally Assemblée nationale*, *Année 2010. – No 72 [2] A.N. (C.R.), – 2e SÉANCE DU 13 JUILLET 2010*, 5550 (Fran.) (on file with author) (335 out of 339 present Assembly members voted in favor of the bill).

72. *Sénat*, *Année 2010. – No 82 S. (C.R.)*, *SÉANCE DU 14 SEPTEMBRE 2010*, 6763 (Fran.) (246 out of 247 present Senate members voted in favor of the bill. One member voted against).

1. The French Prohibition Law

The French prohibition law, which has been active since April 2011,[73] prohibits anyone from covering his or her face in public,[74] unless this face concealment is required: (1) to fulfil a legal duty, (2) for a festivity, traditional, or artistic event, or (3) for the exercise of a particular sport.[75] An individual who violates this prohibition is fined or obligated to take a course on citizenship, or a combination of both.[76] The parliamentary proceedings on this bill reveal that the main rationale behind this piece of legislation has been the complete withdrawal of the Islamic face-covering dresses, such as the *burqa* and *niqab* from the public space in France.[77] The main justification for this intervention has been enshrined in the French idea of "living together" that has allegedly been threatened and frustrated by face-covering dresses.[78]

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73. *See generally* S.A.S. v. France, ¶¶ 14; 24-27 (providing a chronological overview of the legislative steps set to criminalize the concealment of the face in public).

74. *LOI n° 2010-1192*, (Article 1: No one may, within the public space, wear clothing that conceals the face.) *See also* S.A.S. v. France, ¶ 28 (provides a translation of the French Law on face-covering veils).

75. *LOI n° 2010-1192*, Article 2, section II.

76. *LOI n° 2010-1192*, Article 3 (the amount of this fine is connected with the infringements of second class).

77. *See Expose des Motifs*, Explanatory Memorandum of *LOI n° 2010-1192*, https://www.legifrance.gouv.fr/affichLoiPubliee.do;jsessionid=A3D47BAB744505C3074B405E1EA232DA.tplgfr25s_3?idDocument=JORFDOLE000022234691&type=expose&typeLoi=&legislature= (last visited Feb. 27, 2019) (according to this document that explains the rationale behind the bill, the French values of liberty, equality and fraternity, which "underpin the principle of respect for . . . equality between men and women" are threatened "by the wearing of full veil"). The quotations are based on the translation of the *Expose des Motifs* in S.A.S. v. France, ¶ 25. Also, the debates in the French Parliament reveals that the main aim of this prohibition has been the Islamic face-covering veils, like *burqa* and *niqab*. As such, only during the three debate at the *Assemblée nationale*, these contentious pieces of clothes are mentioned 92 times.

78. *Expose des Motifs*, Explanatory Memorandum of *LOI n° 2010-1192*, *supra* note 77 (the main argument behind this bill has always been that face-covering dresses are incompatible with the idea of "living together." The Memorandum does not explicate what this concept entails. However, it says that the French Republic is based on certain values, such as liberty, equality and fraternity and also some principles, like gender equality, which are threatened by a "sectarian manifestation" that rejects the values of the French Republic. Hence, the Memorandum suggests that "the

The bill's historical background is essential to better understand the rationale behind the bill.[79] The bill's historical background unveils that the concept of "living together" is basically defined by an exclusive French Republican ideal about how citizens should live and behave within the Republic,[80] providing little room for groups or people who reject this view.[81] Furthermore, this domestic background helps us evaluate the implications of adopting the ECtHR's "living together" doctrine and its impact on the free exercise of religion and matters of diversity that are so closely related to this right.[82]

2. The French Prohibition Law Before the European Court of Human Rights

In *S.A.S.*, a French citizen who was born in Pakistan but living in France, challenged the prohibition law.[83] She described herself as a "devout Muslim."[84] In her public and private life, she occasionally

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Republican social covenant" that forms the basis of the French society needs to be protected through outlawing practices that are contrary to this). *See also* S.A.S. v. France, ¶¶ 25, 140-41. This call can also be found back in the Parliamentary debate concerning the bill. *Cf.* the position of André Gerin who has defended the prohibition, since "the burqa, is the refusal of the Republic": *Assemblée nationale*, *Année 2010. – No 70 [1] A.N. (C.R.), – 1re SÉANCE DU 7 JUILLET 2010*, 5394 (Fran.) (on file with author).

79. Daly, *supra* note 27, at 141 (arguing that "living together," which has played such an important role in the justification of the prohibition, is a French concept about the manners of behavior in public life, in other words, it concerns "the duty of fraternity").

80. This line of reasoning is echoed very well by the contribution of Jean-Claude Guibal, who was a member of the *Union pour un mouvement populaire [Union for a Popular Movement]* that was led by Nicolas Sarkozy. During his address of the bill at the *Assemblée nationale*, Guibal defended the proposed prohibition and argued that although France is a tolerant society, it does not accept that some groups refuse to live in France as French people. Guibal said that such groups threatened "our" way of "living together" by their provocative behavior.

81. Daly, *supra* note 27, at 146-47 (criticizing the Court judgment in *S.A.S.*). This point of criticism was also mentioned by the applicant who challenged the French prohibition law before the ECtHR. *See* S.A.S. v. France ¶ 77.

82. *See* Trotter, *supra* note 61.

83. S.A.S. v. France ¶ 76.

84. *Id.* ¶ 11.

covered her face for religious, cultural, and personal purposes.[85] In doing so, she did not experience any forces or threats from her family or her husband to cover her face.[86] If needed, she refrained from using her face-covering *niqab* or *burqa*.[87] However, she insisted on having the option to cover her face when she was in a particular spiritual mood, such as during the Islamic fasting period.[88]

Although she was not prosecuted for a breach of the new prohibition law nor did she experience any negative consequence immediately after the enactment of the prohibition law,[89] she aimed to challenge the legality of this law for different reasons.[90] However, for the purpose of theorizing the reconciliation strategy, we will only focus on the alleged violation of religious freedom and the way the ECtHR has dealt with this particular concern.[91] The complaint about the violation of religious freedom rested strictly on two arguments.[92] The first argument suggested that although the ban on wearing face-covering dresses was prescribed by law,[93] it generally lacked resemblance to any of the legitimate limitation grounds against the free exercise of religion.[94] Moreover, the criticism put the defense of the French style of "living together" in the public area under critical

85. *Id.* ¶ 12.

86. *Id.* ¶ 11.

87. *Id.*

88. *Id.* ¶ 12.

89. *Id.* ¶ 57.

90. *Id.* ¶¶ 69-73 (she argued before the Court that the French prohibition law put her at risk of harassment. Furthermore, she claimed that the ban discriminated against her and violated her freedoms of expression, association, and respect for the private life).

91. *See id.* ¶¶ 76-80 (arguing why the ban violated her right to religious freedom and respect for the private life). *See id.* ¶¶ 110-158 (the Court's assessment of the complaint regarding the alleged violation of religious freedom and the right to respect the private life).

92. Article 9 of the European Convention on Human Rights [hereinafter, ECHR].

93. S.A.S. v. France ¶ 76.

94. *Id.* ¶ 77 (the applicant argues why the prohibition law cannot pursue the legitimate limitation ground of "public safety," since the ban was not designed for security reasons).

scrutiny.[95] The argument was that this French justification for the prohibition law completely neglected the minority's perspective. This particular viewpoint rested on the idea that it is possible for minorities to peacefully live together with the majority, while keeping their own habits and traditions.[96] In other words, living peacefully does not require the minority group to strictly follow the French style of "living together."[97] In the same way, presenting the law as a tool to pursue gender equality was considered a "simplistic" presentation of the reality in which there are groups of women who themselves choose to cover their faces.[98]

The second argument that questioned the legality of the prohibition law challenged the "necessity" of this ban in light of the prohibition law's justification.[99] The criticism, at this point, contended that it is not

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95. *See Assemblée nationale*, *supra* note 71, at 5548 (on file with author). The original text of this address reads as follows:

> "[L]e port du voile intégral constitue bien une pratique aux antipodes des valeurs qui fondent et structurent l'idée que tous ici nous nous faisons de la République. C'est un déni de liberté lorsqu'il a lieu sous l'effet de la contrainte, que celle-ci soit patente ou diluée dans un environnement social ; c'est une négation de l'égalité entre citoyens qui dépouille la femme de son identité, quand ce n'est pas de son humanité ; c'est un refus affiché de l'idéal de fraternité, une volonté de se soustraire au vivre ensemble républicain."

96. *See* S.A.S. v. France ¶ 77.

97. *Id.* ¶ 77 in conjunction with ¶ 114.

98. *Id.*

99. *Id.* ¶ 111. The ECtHR follows four specific steps to decide upon an alleged violation of the right to respect: private and family life; the freedom of thought, conscience, and religion; and freedom of expression, assembly, and association. First, it decides upon the presence of an *interference*. Second, it rules on the question as to whether this interference was *prescribed by law*. Third, it answers the question whether this interference was meant to pursue one or more of *legitimate limitation grounds upon fundamental freedoms*. Finally, it considers whether such a legitimate interference is *necessary in a democratic society*. The necessity question is a proportionality test. In fact, it helps judges determine whether a particular limitation upon a fundamental right "is necessary in a democratic society" to meet one or more of the legitimate limitation grounds, such as public safety, health, or morals, and the protection of public order as well as the rights and freedoms of others. Although the Court does not want to frustrate the democratic decisions of national states that in some cases limit the exercise of fundamental freedoms, giving states a certain "margin of appreciation" to take decisions, it aims to consider whether there is a "pressing social need" for a specific limitation. That pressing social need is meant to determine

to the authorities to favor or disfavor a particular lifestyle. Thus, the critique was about state's interferences in how people want to live their individual lives.[100] More generally, the argument suggested that a free society should accommodate a wide range of people, both believers and non-believers.[101] Hence, the authorities should not single out a particular lifestyle for disfavored treatment, even if there might be political support for that purpose. In other words, political support for a limitation does not automatically say that the measure is "necessary in a democratic society."[102] The argument relied on the idea that French authorities have failed to study less restrictive measures that could have reached the same goals as the ones behind the prohibition law.[103]

3. The Court's Assessment of the Legality of the French Prohibition Law

In the Court's assessment of the alleged violation of the right to religious freedom, it first rules that the French prohibition law interferes with the right to free exercise of religion.[104] Subsequently, the Court considers this "continuing interference" as sufficiently prescribed by

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the limitation's necessity. *See generally* Steven Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation*, 3 UCL HUM. RTS. REV. 1, 9 (2010); Gerorge Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 710-11 (2006) (analyzing how the ECtHR assesses complaints about alleged violation of fundamental rights). *See also* Christopher Belelieu, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam through a European Legal Prism in Light of the Sahin Judgment*, 12 COLUM. J. EUR. L. 573, 590 (2006); Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law,* 11 COLUM. J. EUR. L. 113, 128 (2005) (providing a historical overview of the way the margin of appreciation doctrine has been developed in the case law of the ECtHR and discussing the way the Court has dealt with the "necessity test").

100. S.A.S. v. France ¶ 78.

101. *Id*.

102. *Id*.; *see also* DWORKIN, *supra* note 30, at 130 (arguing that a liberal state should not favor or disfavor a particular lifestyle because another lifestyle is "intrinsically better." It should be left to citizens to decide which way of life better suits them).

103. S.A.S. v. France ¶ 78.

104. *Id*. ¶¶ 110-112.

law.[105] The Court elaborates quite extensively on the question of whether the French prohibition law pursues a legitimate aim.[106] The same is true for the legal assessment of the necessity test, which asks: is the prohibition law necessary in a democratic society to pursue one or more of the legitimate limitation grounds?[107]

What does the Court say about the legitimacy of the aim behind the prohibition law? The Court starts by noting that the list of grounds on which states could rely on to justify interferences with fundamental rights is "exhaustive" and their definition is "restrictive."[108] Meaning, the Court refrains from applying an extensive interpretation method to interpret the limitation grounds in light of an alleged violation of fundamental rights.[109]

In order to rule on whether there is a legitimate ground for the prohibition law, the Court draws on the justification provided by the French authorities in favor of the law.[110] The authorities have argued the ban pursues two goals. First, it aims to protect public safety.[111] Second, it aims to enforce respect for the minimum set of values of an open and democratic society.[112] The Court concludes that the latter aim does not "expressly" correspond with any of the legitimate limitations grounds that are mentioned in the Convention.[113] Absent a Convention limitation ground, the Court specifies with reference to the explanation provided by the French authorities that the second aim behind the prohibition law is meant to serve three values.[114] The three values are: (1) pursing respect for gender equality, (2) pursuing respect for human dignity, and (3) pursing respect for the minimum requirements of life in society.[115]

105. *Id*.
106. *Id*. ¶¶ 113-122.
107. *Id*. ¶¶ 123-159.
108. *Id*. ¶ 113.
109. *Id*.
110. *Id*. ¶ 110-11
111. *Id*. ¶ 114-115.
112. *Id*. ¶ 114.
113. *Id*.
114. *Id*. ¶ 116.
115. *Id*.

At first sight, the Court says that pursuing these three values cannot be related to one of the legitimate limitations grounds that are enlisted in the ECHR.[116]

Nevertheless, the Court relies on the French government's argument, which suggests ensuring respect for the minimum set of values of an open and democratic society as part of the legitimate limitation ground of protecting the rights and freedoms of others.[117] In doing so, the Court first examines and rejects the gender-equality argument.

According to the Court, this gender argument is ill-founded to pursue protection of the rights and freedoms of others as ultimate justification for the prohibition law.[118] In this context, the Court refers to women who insist to wear this type of clothing in public for religious purpose and as a matter of personal choice.[119] In other words, the treaty does not allow the limiting of people's basic liberties by an appeal to protecting these people from the free exercise of fundamental rights.[120]

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116. *Id*. ¶ 117.

117. *Id*.; *Id.* ¶¶ 81-82.

118. *Id*. ¶ 119. The court's rejection of the gender argument is a shift away from its own jurisprudence in which the Court repeatedly showed leniency toward the gender argument, allowing far reaching restrictions upon free exercise of religion and targeting particularly women. *See* Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1094 (2009); Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality under International Law*, 45 COLUM. J. TRANSNAT'L L. 367, 382 (2007); Benjamin Bleiberg, Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey, 91 CORNELL L. REV. 129 (2005). Interestingly enough, the Government's gender argument in favor of the ban was later debunked by empirical findings. *See* Eva Brems, *Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings*, 22 J.L. & POL'Y 517, 551 (2014) (purporting that some of women who cover their faces "express assertive emancipated views against traditional role patterns and against unequal gender practices in the Muslim community," concluding that "the face veil is not an indicator of its wearer's approval of male dominance, let alone of its promotion.").

119. *Id*. ¶ 125.

120. *Id*. ¶ 119 (the Court held: "a State Party cannot invoke gender equality in order to ban a practice that is defended by women . . . in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.").

With regard to the argument that the prohibition law aims to pursue respect for human dignity, this noble ground does not justify "a blanket ban" on face-covering dresses in public, despite the fact that this piece of clothing is considered "strange" by many people in the society.[121] The argument is that this "expression of a cultural identity" is crucial for the maintenance of pluralism,[122] which is according to the Court in favor of the whole democracy.[123]

When it comes to the assessment of the third value, respect for the minimum requirements of life in society (that is synonymous to "living together"), the Court very briefly says that pursuing this value might fall under the scope of the legitimate limitation ground of protecting the rights and freedoms of others.[124] In this regard, the Court engages with the French position—that considers an unveiled face in public as an indispensable tool for social interaction.[125] The Court reaches the following conclusion:

It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of "living together" and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.[126]

After having concluded that the French prohibition law constitutes an interference, which is prescribed by law and also pursues a legitimate aim, the Court starts examining the necessity of the legitimate limitation

121. *Id*. ¶ 120.
122. *Id*.
123. *Id*.
124. *Id*. ¶ 122.
125. *Id*.
126. *Id*.

in a democratic society.[127] In this regard, the Court first reiterates its standard interpretation of religious freedom, noting that:

> [F]reedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.[128]

However, the Court has also ruled that limitations upon free exercise of religious freedom are at some points justified as a tool "to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[129] This asks judges to "balance between the fundamental rights of each individual which constitutes the foundation of a 'democratic society.'"[130] This judicial balance should not frustrate the decision making process that has democratic legitimacy. The Court admits at this point that it has a "subsidiary role" in assessing whether particular restrictions upon fundamental rights in democratic societies are necessary.[131] This is because the Court views the sovereign states are "in principle better placed than an international court to evaluate local needs and conditions."[132]

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127. *Id*. ¶ 124.
128. *Id*.
129. *Id*. ¶ 126.
130. *Id*. ¶ 128.
131. *Id*. ¶ 129.
132. *Id*.; *see* Brauch, *supra* note 99 (for more information on "the better placed argument"). *See also* Patricia Popelier & Catherine van de Heyning, *Subsidiarity Post-Brighton: Procedural Rationality as Answer*, 30 LJIL 5 (2017) (analyzing how the ECtHR has dealt with the principle of subsidiarity, comparing the period before and after the so-called "Brighton" declaration that aimed to reinforce the idea that national States are in a better position to deal with the proper protection of fundamental rights); Alastair Mowbray, *Subsidiarity and the European Convention on Human Rights*, 15 HUM. RTS. L. REV. 313 (2015) (using a quantitative research method to analyze the subsidiarity principle); Matthew Saul, *The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments*,

This is especially the case, the Court found, when it faces questions of law and religion.[133] Hence, the Court ruled that in such cases, "the role of the domestic policy-maker should be given special weight."[134] In such cases, the Court grants states a wider "margin of appreciation,"[135] in assessing whether the legitimate limitation upon a particular freedom can undergo the necessity test.[136] To examine this properly, the Court must determine whether there is "consensus" amongst the member states of the ECHR concerning the need to impose certain limitations upon the exercise of a freedom.[137] This margin of appreciation does not provide states a *carte blanche*, rather it "goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the

15 HUM. RTS. L. REV. 745, 751 (2015) (providing an explanation for the subsidiarity principle, referring to the democratic legitimacy of nation Sates, the state of art with regard to a particular limitation amongst the States and the domestic expertise that an international Court generally lacks).

133. S.A.S. v. France ¶ 129.

134. *Id.* ¶ 129. *See also* Robert F. Cochran, Jr. & Michael A. Helfand, *The Competing Claims of Law and Religion: Who Should Influence Whom?*, 39 PEPP. L. REV. 1051, 1052 (2013) (on the continuous and "endless jousting" between law and religion).

135. In short, this doctrine entails that the Court grants the State certain room to develop its own policies. That room—the margin of appreciation—might be wider (i.e., the Court is less restrictive) in cases concerning subjects that state parties are "better placed" to deal with or issues where state parties respond differently to, the so-called "no-consensus" argument.

136. S.A.S. v. France ¶ 129; *see also* Aaron R. Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 GEO. WASH. INT'L L. REV. 807, 824 (2016).

137. *Id.*; *see* Brauch, *supra* note 99, at 126-27 (identifying two key-factors that help to define the scope of the margin of appreciation: "[first,] a balancing of the importance of the right with the importance of the restriction, [second] the existence of a European consensus on the matter before the Court."); Peter Cumper & Tom Lewis, *Empathy and Human Rights: The Case of Religious Dress*, 18 HUM. RTS. L. REV. 61, 69 (2018) (arguing that consensus amongst the member States generally leads to a narrower margin of appreciation). *Cf.* Ryan Thoreson, *The Limits of Moral Limitations: Reconceptualizing Morals in Human Rights Law*, 59 HARV. INT'L L.J. 197, 217 (2018) (giving the example of restrictions and limitations upon adult same-sex activities and illustrating how growing consensus amongst member States led to a narrower margin of appreciation in finding justification for such limitations).

measures taken at national level were justified in principle and proportionate."[138]

In addition to the analysis above, the Court also examined the necessity of the ban in light of the public safety argument.[139] In a more general note, the Court found that restrictions upon religious freedom for security reasons are, under some circumstances, necessary in a democratic society.[140] However, the Court did not see any reason to consider the prohibition law as a legitimate limitation that aims to deal with an immediate security threat.[141] For instance, the Court considered that the authorities could have chosen a less restrictive measure, such as requiring women to take off their veils at places that are constantly under high pressure of security threats.[142] Hence, the Court ruled that the interference caused by the prohibition law cannot be justified in a democratic society on the ground of pursuing public safety.[143]

The Court then assessed the necessity of the French prohibition law in light of the second justification provided by the authorities: considering the ban as ensuring the "living together" ideal.[144] Against the backdrop of the weight French authorities have given to ensure a particular way of "living together," the Court was sensitive to the argument that states should be given room "to secure the conditions whereby individuals can live together in their diversity."[145] Hence, the

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138. S.A.S. v. France ¶ 131. *See* Letsas, *supra* note 99, at 711 (claiming that the proportionality question "is by far the most important and most demanding criterion for whether the limitation of a right was permissible under the Convention."). *Cf.* Rosamund Scott, *Reproductive Health: Morals, Margins and Rights*, 81 MOD. L. REV. 422, 425 (2018) (arguing that the proportionality test "underlies the assessment of necessity and the Convention as a whole," which in turn requires a proper assessment "between the interests and rights of the individual and those of the community, including the public interest.").

139. S.A.S. v. France ¶ 137 (rejecting first the claim that the prohibition law was meant "to protect women against a practice which was imposed on them or would be detrimental to them.").

140. *Id*.

141. *Id*.

142. *Id*.

143. *Id*.

144. *Id*. ¶ 140 (the value of respect for the minimum requirements of life in society is amongst the three values of the broader goal pursuing respect for the minimum set of values of an open and democratic society).

145. *Id*. ¶ 141.

Court found the interference upon religious freedom "justified in its principle solely" because it aims to shape the contours of "living together" in the French society.[146]

With regard to the democratic necessity of imposing a ban on wearing face-covering veils in public that aims to ensure "living together," the Court admitted that this ban might "seem excessive," because it is designed to target a very small group who wants to cover their face in public.[147] Furthermore, the Court emphasized that it is aware of the fact that:

> [T]he ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil for reasons related to their beliefs. As stated previously, they are thus confronted with a complex dilemma, and the ban may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life. It is also understandable that the women concerned may perceive the ban as a threat to their identity.[148]

Although the Court acknowledged that many human rights groups have objected to the French prohibition law as "disproportionate,"[149] and that some voices consider this law "islamaphobic,"[150] the Judges ruled they are not in the position to intervene in domestic political debates that result in limitations of fundamental rights.[151] Nevertheless, the Court reiterated that:

> [A] State which enters into a [sensitive] legislative process . . . takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the

146. *Id*. ¶ 142.
147. *Id*.
148. *Id*. ¶ 146.
149. *Id*. ¶ 147.
150. *Id*. ¶ 149.
151. *Id*. (ruling that "[it] is admittedly not for the Court to rule on whether legislation is desirable in such matters.")

> expression of intolerance, when it has a duty, on the contrary, to promote tolerance.[152]

The Court also noted that the prohibition law was not designed to protest against the "religious connotation" of face-covering veils.[153] Rather, the ban is "solely" meant to combat the concealment of the face.[154] At the same time, the Court admitted that the ban leads to a decrease of pluralism in the French society.[155] By situating itself as such, the Court is not refrained from being genuinely sympathetic about the French struggle in this case, which seeks to protect and ensure:

> [A] principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic

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152. *Id*. (the Court also says "that remarks which constitute a general, vehement attack on a religious or ethnic group are incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention and do not fall within the right to freedom of expression that it protects.").

153. *Id*. ¶ 151.

154. *Id*. However, neutralizing the ban as merely a legal project that is not singling out religious face-covering dresses in public *qua* religious is a gross denial of the parliamentary history behind this ban. The history attests to the fact the ban was certainly designed to stop Muslim women from wearing face-covering dresses. The arguments used by the French Minister of Justice defending this ban in the *Assemblée nationale*, leave no ambiguity about this. She argues the French style of Islam respects French laws and she refers to the role Imams will play in explaining the prohibition law to their worshippers and community. In addition, the many exceptions the law makes for other groups to cover their faces, either for religious or non-religious purposes, clearly reveals that the prohibition not only aimed to single out the *burqa* and *niqab* for a special ban, but also introduces a French Islam that is compatible with the ideal of "living together." *See Assemblée nationale*, *supra* note 78, at 5417; *see also* Sofie G. Syed, *Liberte, Egalite, Vie Privee: The Implications of France's Anti-Veil Laws for Privacy and Autonomy*, 40 HARV. WOMEN'S L.J. 301, 306 (2017); W. Cole Jr. Durham & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 BYU L. REV. 421, 450 (1993) (discussing how seemingly neutral laws affect religious minorities: "The major problem is that any neutral, generally applicable law, however insignificant and ill-conceived, can trump religious liberty. This places smaller religious groups that lack significant political influence at constant risk of having their religious freedom rights violated by an intolerant or inadvertently insensitive majority."). *Cf.* R. J. Delahunty, *Does Animal Welfare Trump Religious Liberty? The Danish Ban on Kosher and Halal Butchering*, 16 SAN DIEGO INT'L L.J. 341 (2015).

155. S.A.S. v. France ¶ 149.

> society . . . It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.[156]

Against this backdrop, the Court refrained from making a value judgment about how the French decided to establish and maintain their society. The criticism entailed that "such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question."[157] Thus, in cases characterized by a high amount of sensitivity and polarization, the primacy lies with the national legislator. This means France has a broad margin of appreciation to decide upon the admissibility of face-covering dresses in public, in light of the "living together" ideal that it aims to ensure. To justify this wide margin, the Court referred to the lack of consensus amongst its member states with regard to the legality of face-covering veils.[158]

The Court reasoned that given the broad margin of appreciation France has in this case, the interference on religious freedom caused by the prohibition law, pursues a legitimate aim.[159] This legitimate aim ensures "living together" as part of protecting the rights and freedoms of others. This legitimate limitation is, according to the Court, necessary in a democratic society.[160] Therefore, there was no violation of religious freedom or any other right.[161] This way of reasoning revealed that the margin of appreciation doctrine is very sensitive toward reinforcing majoritarianism that effectively advances a particular political agenda.[162]

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156. *Id*. ¶ 154.
157. *Id*.
158. *Id*. ¶ 156.
159. *Id*. ¶ 157.
160. *Id*. ¶ 158.
161. *Id*. ¶¶ 156-159.
162. For example, the Court held that it needs to be restrained in opining about the lawfulness of "matters of general policy, on which opinions within a democratic society may reasonably differ widely." In such cases, the Court says, "the role of the domestic policy-maker should be given special weight." *See id*. ¶ 154. This facially neutral consideration is problematic for many reasons. But most importantly, it is problematic because the Court neglects its main task: giving protection to subordinated and marginalized people who seek protection under the law. Drawing on technical reasoning that gives majorities a wide margin of discretion effectively

B. "Majoritarian-proof" Making of Diversity

How can we understand the "abrupt" endorsement of "living together" in *S.A.S.*? [163] The adoption of this novel legitimate limitation ground on religious freedom reveals the use of a majoritarian lens and language to eventually decide the admissibility of contentious and norm deviant practices of minorities.[164] This approach immediately implicates that majoritarian ideas about the acceptability of contentious religious manifestations, such as wearing face-covering veils in public, matter very much in the justification of imposed restrictions upon "unwelcome" practices of religious groups. This reinforces and legitimizes the search, construction and maintenance of a collective cultural identity.[165] In other words, pursing and developing a shared narrative about the roots and character of the society, either secular or Judeo-Christian, results in "majoritarianism."[166] This majoritarian narrative aims to protect the native "national" identity that tells us more about "who we are." The construction of this "common background"

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advances their political agenda. *See also* Trump v. Hawaii 138 S. Ct. 2448 (2018) (Sotomayor, J., dissenting) (rightly pointing out that the judiciary must correct political branches of power when they obviously neglect constitutional rights).

163. *Cf.* Kristin Henrard, *Exploring the Potential (Contribution) of Multi-Disciplinary Legal Research for the Analysis of Minorities' Rights*, 8 ERASMUS L. REV. 111, 120 (2015) (criticizing the way the Court has assessed the different interests in *S.A.S.*, speaking of a poorly motivated decision).

164. LABORDE, *supra* note 39, at 33 (speaks about the decisiveness of majorities sensitivities for the acceptability of minorities' practices); Joppke, *supra* note 23, at 95-99 (discussing the preference for the preserve of the majoritarian practices in the case law of the ECtHR); Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide?*, *in* TALAL ASAD ET AL. (EDS.), IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH 79 (2009) (discussing how "majoritarian cultural sensibilities" challenge the beliefs and practices of Muslim minorities across Europe).

165. Trotter, *supra* note 61, at 169.

166. *Cf.* Ratna Kapur, *The Ayodhya Case: Hindu Majoritarianism and the Right to Religious Liberty*, 29 MD. J. INT'L L. 305, 307 (2014) (discussing how a local Indian court's judgment has contributed to the establishment of "Hindu Majoritarianism," affecting the rights of the Muslim minority). *Cf. also* Loren E. Mulraine, *Religious Freedom: The Original Civil Liberty*, 61 HOWARD L.J. 147, 149 (2017) (defending religious liberty and warning against the rise of nationalism that threatens this fundamental liberty). *See also* Bridgette Dunlap, *Protecting the Space to Be Unveiled: Why France's Full Veil Ban Does Not Violate the European Convention on Human Rights*, 35 FORDHAM INT'L L.J. 968 (2012).

leads to the immediate accusation of "disloyalty" for those who do not share the majoritarian narrative, or who cannot comply with majoritarian expectations about how one should live a life.[167] Hence, reinforcing majoritarianism advances ethnocentrism. This shift reduces the free exercise of fundamental rights for minorities who do not fit the perfect majoritarian picture.[168]

A timely example of the endorsement and reinforcement of majoritarianism is the Court's ruling in *S.A.S.*, which uniquely justifies its legitimate limitation ground against religious freedom in the pursuit of "living together."[169] This expansion of the limitation grounds is

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167. Indeed, the dominant idea suggests: who can be against the dominant narrative that tells us more about "who we are"? *Cf.* Beydoun, *supra* note 10, at 1764 (discussing how some have labeled U.S. Muslims as disloyal in the post-9/11 terrorist attacks era); Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1, 39 (2014) (elaborating on how Muslim women in the U.S. have been accused of "disloyalty" because of their extant Islamic appearance, such as wearing headscarves); David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 UCLA J. ISLAMIC & NEAR E. L. 85, 120 (2012) (describing the logic used by authorities that result in considering Muslims as "disloyal"); Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E. L. 121, 142 (2008) (arguing how the "racialization" of Muslims as disloyal citizens have created "a new zone of lawlessness where they are neither citizen nor alien, but rather belong to [the] inherently evil world called "Islam."'"). *See also* Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 S. ATLANTIC Q. 9, 25 (2014) (discussing ECtHR case law, framing Islamic headscarves as incompatible with democratic values).

168. *See generally* Wahedi, *supra* note 45; LABORDE, *supra* note 39; Joppke, *supra* note 23; Kapur, *supra* note 166; Mahmood, *supra* note 164 (sharing the point of view that using majoritarian standards in the legal assessment of minority practices results in an asymmetrical toleration regime: merciful for the majority and stingy in granting exemptions to religious minorities).

169. However, the outcome of the case is *not* surprising nor unique. It was even predictable as it fits a notorious line of jurisprudence that has been set out by the ECtHR, which is not merciful but stingy toward the habits and beliefs of the Muslim minority in Europe. *See* LABORDE, *supra* note 39, at 33 ("The European Court of Human Rights freedom of religion jurisprudence has notoriously been lenient toward practices of Christian establishment and overtly intolerant toward the presence of Islam in the public sphere."); *see generally* Keturah A. Dunner, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms*, 30 CAL. W. INT'L L.J. 117 (1999). In other words, *S.A.S.* fits the overall Islamophobic case law of the ECtHR, which is part of an Islamophobic atmosphere that is currently dominating debates on

thought-provoking and prone to criticism.[170] What does the normative attitude of the Court in *S.A.S.* tell us about the role of religion in liberal political philosophy?[171]

1. The Prohibition Law and Majoritarianism

Does the judgment reflect support for the French struggle of ensuring and reinforcing the minimum requirements of life in society thereby backing "living together" in a French style?[172] In addition, does

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migration and the place of Islam in Western democracies. *See* Wahedi, *supra* note 22 (describing Islamophobia merely as the fear for the Islam and Muslims and providing some recent examples of this tendency); *see generally* MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE (2012) (discussing the contemporary fear toward religious minorities, particularly the Muslim minority, in the Western world); Martha C. Nussbaum, *In Defense of Universal Values*, 36 IDAHO L. REV. 379 (2000).

170. The Court's expansion of the legitimate limitation grounds is one of the most prominent points of criticisms toward the judgment in *S.A.S*. *Cf.* Brett G. Scharffs, *Islam and Religious Freedom: The Experience of Religious Majorities and Minorities*, 93 NOTRE DAME L. REV. ONLINE 78, 96 (2018) (saying that the justification of the ban on grounds of "living together" has been criticized as expansion of the legitimate limitation grounds).

171. The central question of this liberal paradigm is: what role does religion play for the purposes of religious accommodation and justification of public policies? *See* Wahedi, *supra* note 45 (claiming that religion is not a unique protection-worthy category *qua* religion within the paradigm of liberal political philosophy); LABORDE, *supra* note 39 (discussing the emphasis on egalitarianism in contemporary liberal theories of religious freedom and calling upon legal philosophers to think about religion as an interpretive concept); LABORDE & BARDON, *supra* note 39, at 1-5 (identifying four types of debates concerning the question of religion in liberal political philosophy. First, the debate concerning the specialness of religion for legal purposes. Second, the religion neutrality debate. Third, the question of religious accommodation. Fourth, the debate on the relationship between religion and comparable, though non-sectarian categories, such as conscience and identity); Carlo Invernizzi Accetti, *Religious Truth and Democratic Freedom*, *in* RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 293-94 (Jean Louise Cohen & Cécile Laborde eds., 2016) (criticizing and providing an explanation for why within the paradigm of liberal political philosophy religious arguments are systematically labelled as inadmissible or reformulated in neutral terms).

172. Thus, does the *S.A.S.* judgment strengthen "forced assimilation" of French citizens who do not have a "native" French background, through allowing mechanisms that encourage minorities to adopt the majoritarian French lifestyle? *See* Syed, *supra* note 154, at 303 (qualifying the prohibition law as "assimilationist"); *see*

this jurisprudential expansion force minorities to follow the majoritarian choice of society,[173] providing little room for the habits, traditions, and ideas that diverge from this majoritarian norm?[174] In sum, how does the Court's judgment in *S.A.S.* fit the tendency of reinforcing majoritarianism and what does this mean for diversity and free exercise of religion?[175] To answer this question, we need to clarify which majoritarian ideas the Court has embraced and reinforced. The search for this answer helps us in two ways. First, it enables us to develop a theoretical framework we can use to embed the Court's approach. Second, it helps us to map the implications of the endorsement of majoritarianism for diversity and the free exercise of religion.[176] To conceptualize the Court's decision in *S.A.S.* we need to focus on the arguments used by the judges to justify the expansion of the limitation grounds with "living together," resulting in the justification of the imposed ban on wearing face-covering dresses in public.

Although, the Court's reasoning is meandering in this respect and often very contradictory, the overall outcome of this case affirms the large body of criticism that accuses the Court of being "overtly intolerant toward the presence of Islam in the public sphere."[177] This

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also Yusuf, *supra* note 69, at 284 (claiming that *S.A.S.* reinforces policies that are meant to assimilate minorities).

173. S.A.S. v. France ¶¶ 153-154 (the question of having or not a ban on wearing face-covering dresses in public concerns a "choice of society." The Court says in this respect that it "has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question.")

174. *See* LARBODE, *supra* note 39, at 33; Daly, *supra* note 27, at 165 (criticizing the use of majoritarian standards as yardstick in assessing the admissibility of minority practices).

175. *Cf.* Trotter, *supra* note 61, at 169 (warning for the shift toward a collective culture that is little merciful toward the religious demands of minorities, analyzing the post-"living together" judgments).

176. *See* Kapur, *supra* note 166, at 307.

177. LABORDE, *supra* note 39, at 33; Bhuta, *supra* note 167, at 26 (arguing that the ECtHR provides more room for majoritarian practices, while it adopts a militant secularist approach in assessing the legality of minority practices—in particular with regard to headscarves—resulting in the "equation of Islamic religious practices with intolerance, discrimination, and inequality," which obviously do not deserve protection under the Convention). *See generally* Wahedi, *supra* note 45; Joppke, *supra* note 23.

theoretical critique provides a fruitful insight in the general attitude of the Court toward contentious religious practices of a non-native minority. Therefore, this critique also helps to conceptualize the Court's decision in *S.A.S*—paving the way toward conceptualizing the Court's approach toward diversity.

This part argues that justifying far-reaching restrictions upon religious freedom with an appeal on "living together" aims to make diversity, as a concept, majoritarian-proof. That is to say: what is considered protection-worthy under "diversity" depends on majoritarian sensitivities, standards, and ideas about how people in a society should behave and live.[178]

Making diversity majoritarian-proof is meant to pass hard cases regarding the legality of contentious practices through the skeptical and critical lens of the majority, which aims to promote its own narrative. This results in an asymmetrical toleration regime: protective toward the rights, habits, and beliefs of the "native" majority, but intolerant, reactionary, and aggressive toward the exemption claims of "non-native" minorities, such as Muslims.[179] What evidence do we have to

178. *See* Mahmood, *supra* note 164, at 68.

179. *See generally* Wahedi, *supra* note 22. *See* Mahmood, *supra* note 164 at 86 (referring to Peter G. Danchin and discussing the criticism that qualifies the ECtHR attitude as "hypocritical," allegedly protecting the Christian majority, and being intolerant toward the Muslim minority); 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, at 275 (2008) (referring to critics of the ECtHR case law and concluding that "there appears to be a bias in the jurisprudence of the Court under article 9 toward protecting traditional and established religions and a corresponding insensitivity toward the rights of minority, nontraditional, or unpopular religious groups."); *see also* Samuel Moyn, *Religious Freedom and the Fate of Secularism*, *in* RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 27 (Jean Louise Cohen & Cécile Laborde eds., 2016) (asking rhetorically with respect to the systematically different legal treatment of Islamic cases before the ECtHR: "Do the cases . . . reflect a Christian Islamophobia in the principled garb of secularism?"); Bhuta, *supra* note 167, at 26 (criticizing the double standard that is seemingly used by the ECtHR to assess the admissibility of the manifestations of Muslims and Christians. "When it comes to Christian religious values, their potential inconsistency with democracy, equality, and tolerance is never in doubt, revealing sharply the degree to which this line of cases rests not on a thoroughgoing rationalist secularism but on a political theology of Christian democracy in which the identity of democratic values with an imagined Christian civilizational tradition is unquestioned."). For a similar argument raised in the United States, *see* Robert L. McFarland, *Are Religious Arbitration Panels Incompatible with Law: Examining Overlapping Jurisdictions in Private Law*, 4

claim that the Court has interpreted the limitation grounds upon religious freedom in a way that makes diversity ultimately "majoritarian proof?"

For the answer to this question we need to briefly recall the objectives of the French prohibition law. This discursive approach helps us see how the Court's endorsement of "living together" through an extensive interpretation of the legitimate limitation ground that attempts to protect the rights and freedoms of others has actually resulted in the reinforcement of majoritarianism.[180] In other words, attempting to protect the rights and freedoms of others is making diversity majoritarian-proof. The historical background of the prohibition law reveals that the ban has been considered necessary to: protect French secularism, rescue women who are victims of gender-inequality, and reaffirm fraternalism; as the full-face veil constitutes a breach of the French style of "living together" in public.[181] In short, the veil has been considered a sectarian "rejection of the values of the Republic," which makes social interaction impossible.[182]

The French authorities defended the limitation this law posed upon religious freedom as necessary for national security, and defending the rights and freedoms of others, which should guarantee a minimum amount of respect for the values of an open and democratic society.[183] The majoritarian argument suggests that face-covering veils do not belong to the "real" France, as these pieces of clothing make open communication impossible. The "true" Frenchman respects equality, human dignity, and is willing to interact socially in public.[184] The veil allegedly contradicts this majoritarian tradition.

However, the Court convincingly debunked the national security arguments,[185] and most of the arguments relating to the protection of the rights and freedoms of others, such as the gender-equality

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FAULKNER L. REV. 367, 371 (2013) (criticizing the stinginess of those who defend religious arbitration, but do not want to extend that right to Muslims).

180. For a comparable method applied to reach the same conclusion, compare Kapur, *supra* note 166, at 307.

181. S.A.S. v. France ¶¶ 17; 24-25.

182. *Id*. ¶ 25.

183. *Id*. ¶ 82.

184. *Cf. id*. ¶ 25.

185. *Id*. ¶ 139.

argument[186] and the human dignity argument.[187] Nevertheless, the Court interpreted the protection argument to justify the imposition of far reaching restrictions upon the free exercise of religious freedom with an appeal on ensuring the French style of "living together."[188] At first sight, this extensive interpretation of the Court is not only very remarkable but also very problematic because it reinforces majoritarianism and establishes ethnocentrism.

The Court's endorsement of "living together" is *only* remarkable in light of the Court's arguments discussing the legitimacy of the ban's aims and its necessity in a democratic society. As such, the Court has countlessly reaffirmed the importance and the value of pluralism and tolerance in democratic societies that are seemingly endangered by the prohibition law.[189] The Court also shared its concerns of animosity toward religious minorities at different points and called upon all parties involved to look for the dialogue instead of clashes and confrontation.[190] Thus, it is hard to believe the same Court has developed an argumentation pattern that contradicts the emphasis on tolerance, pluralism, and diversity. In fact, the Court's reasoning itself is intolerant and disrespectful toward "the other."

2. The Reconciliation of Diversity with Majoritarian Sensitivities

The Court's argument, as a whole, is contradictory. On the one hand, it emphasizes pluralism, broadmindedness, and the ability to develop unique identities. On the other hand, it shows understanding for "an established consensus" about public performance.[191] This contradictory way of reasoning can only be understood against the backdrop of a decisive and proven formula insinuated between the Court's reasoning in *S.A.S*. The judges reiterate that: "[in] democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to

186. *Id*. ¶ 118.
187. *Id*. ¶ 120.
188. *Id*. ¶¶ 142.
189. *Id*. ¶ 128.
190. *Id*. ¶¶ 128; 149; 152.
191. *Id*. ¶ 122.

manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[192]

This reconciliation strategy that aims to protect the rights and freedoms of others, generally the majority, has proven to be a very effective formula in finding justifications for far-reaching restrictions upon free exercise of religion. As such, in *Dahlab v. Switzerland* ("*Dahlab*"), although the Court declared the applicant's complaints about violating her right to manifest her religion inadmissible, it accepted the idea that wearing headscarves is problematic because this practice:

> [A]ppears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[193]

With reference to this *Dahlab* reconciliation formula, the Court in *Leyla Şahin v. Turkey* ("*Şahin*") again draws on prejudiced and hostile arguments to justify the Turkish ban on wearing religious symbols at the university.[194] While this ban was still enforced, the Court argued that in such places:

> [W]here the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.[195]

The Court used a very similar argument in its merciless judgments in *Dahlab* and *Şahin* to help reconstruct the Court's logic in *S.A.S.*,

192. *Id.* ¶ 126.

193. Dahlab v. Switzerland, ECthr at 13 (2001).

194. Leyla Şahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. ¶¶ 116; 111 (2005) (addressing the reconciliation formula of *Dahlab*).

195. *Id.*

resulting in the endorsement of "living together" as a legitimate limitation ground against the free exercise of religion. The Court stated that

> [it] can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.[196]

Reconciling diversity questions—dealing with inclusiveness—with majoritarian sensitivities relating to integration and assimilation of minority groups is not helpful "to hold the coordinate branches to account when they defy our most sacred legal commitments."[197] Furthermore, as these cases have revealed, reconciling diversity with majoritarian sensitives equates to "blindly accepting the Government's misguided invitation to sanction [discriminatory policies] motivated by animosity toward a disfavored group, all in the name of a superficial claim of [for example] national security, gender-equality or living together."[198]

3. The Reinforcement of Majoritarianism

The Court in *S.A.S.* v. *France* accepted that wearing full face-covering veils is a breach of the right to live together with others, which "under certain conditions," can be related to the limitation ground that aims to protect the rights and freedoms of others.[199] Thus, the Court found that in this case the veil is the trouble maker, as it does not fit a protection-worthy "established consensus" about how one should dress in public. The Court reaffirmed the reconciliation formula of *Dahlab* through *Sahin*,[200] and ruled that because the French aim is to ensure "living together" through defending and protecting "a principle of interaction," it is not for an international Court to give a value judgment

196. S.A.S. v. France ¶ 122.
197. Trump v. Hawaii, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).
198. *Id*.
199. S.A.S. v. France ¶ 122.
200. *Id*. ¶ 126.

about the "choice of society," which is the exclusive right of French citizens.[201] The Court uses this reasoning along with the fact that European states are very much divided on the legality of wearing face-covering veils in public to provide France with a wide margin of appreciation.[202] However, relating the French wide margin of appreciation to the legality of face-covering dresses in other European states, does little to hide the reconciliation strategy that is clearly present in this case. The application of this strategy results in a majoritarian-proof version of diversity.[203]

In *S.A.S.,* the majoritarian concern was the incompatibility of the *burqa* and *niqab* in public with the French lifestyle, or the French way of "living together," which allegedly prescribes an "open visor."[204] The Court's decision in *S.A.S.* reaffirms and declares the French "open visor" theory, a majoritarian narrative about "living together," as a protection worthy category in law. This "living together" narrative could be invoked against the manners of minorities that counter and harm the majoritarian narrative about how people should behave in public.[205]

S.A.S. reinforces majoritarianism in a further way. The endorsement of "living together" promotes the majoritarian narrative, which prescribes the conditions under which one can be considered a

201. *Id*. ¶¶ 153-154.

202. *Id*. ¶ 155.

203. *Id*. ¶ 128. It is very confusing to read what the Court says in *S.A.S.* about majoritarian desires in a democratic society: "democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position." However, it seems that the Court has operated in another way.

204. The concern regarding "the public manners" is illustrated by the fact that an overwhelming majority of both chambers previously voted in favor of the prohibition law. *See Assemblée nationale*, *supra* note 78; *Sénat*, *supra* note 72; *see also* Ralf Michaels, *Banning Burqas: The Perspective of Postsecular Comparative Law*, 28 DUKE J. COMP. & INT'L L. 213, 238 (2018) (providing insights into the impossibility to reconcile the desire to wear face-covering veils in public with the French conception of "living together").

205. Eva Brems, *S.A.S. v. France: A Reality Check*, 25 NOTTINGHAM L.J. 58, 70 (2016) (arguing that the Court's reasoning in *S.A.S.* "legitimizes a majority banning minority expressions from the entire public sphere on the sole basis of an ideological position that is the expression of the majority's culture."). *Cf.* Daly, *supra* note 27, at 161 (arguing that the "living together" ideology burdens religious and ethnic minorities more than the established majority).

real French citizen. *S.A.S.* clearly shows that one of the crucial elements in this respect is *not only* the ability to socialize in public, but also showing the *willingness* to do that through an "open visor," leaving little room for those who do not want to socialize publicly.[206]

C. The "Sacrifice" of a Fundamental Right

S.A.S. reinforced majoritarianism through an extensive interpretation of the limitation grounds of religious freedom by prioritizing the "living together" narrative. Subsequently, the Court has moved away from its traditionally used "religious freedom" rationale,[207] by reconciling diversity questions with majoritarian sensitivities about the acceptability of non-majoritarian practices, such as wearing face-covering dresses in public. This approach ultimately favors "the cultural and religious beliefs of the majority population."[208]

The downside of a majoritarian-proof-made-diversity is that non-native religions are "treated as a second-class religion not entitled to the same sort of consideration as the Christian faith."[209] Within this framework, the crucifix is allowed for reasons of diversity, as it does not counter majoritarian concerns about tolerance or human dignity. The Islamic *hijab*, however, both headscarves and face-covering dresses, is not considered a primary matter of diversity—but rather a practice that threatens the majoritarian culture about gender equality,

206. *Cf.* Jill Marshall, *S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities*, 15 HUM. RTS. L. REV. 377, 385 (2015) (criticizing the Court's willingness to accept the French perception of "living together" that necessitates a ban on face-covering veils in public, and "effectively bulldozes a right to personal identity unless that identity is acceptable and permissible in the eyes of the majority.").

207. The religious freedom rationale considers religious freedom a right that promotes pluralism, while enabling human beings to develop unique identities and live in accordance with their own conception of life. *See* Trispiotis, *supra* note 37, at 581 (referring to critics of *S.A.S.* accusing the Court of having favored majoritarian ideas at the expense of religious freedom).

208. Mahmood, *supra* note 164, at 86. *See generally* Samuel P. Kovach-Orr, *Banning the Burka: Indicative of a Legitimate Aim or a Thinly-Veiled Attempt to Legislate Religious and Cultural Intolerance*, 18 RUTGERS J. L. & RELIGION 89 (2016).

209. Moyn, *supra* note 179, at 29 (based on an analysis of the ECtHR case law).

human dignity, ethical integrity, and tolerance in general.[210] This reconciliation strategy does not rely "on a thoroughgoing rationalist secularism but on a political theology of Christian democracy, in which the identity of democratic values with an imagined Christian civilizational tradition is unquestioned."[211] This has far-reaching consequences for religious liberty, however, as free exercise becomes dependent upon the sensitivities of the majority.

Therefore, does the reinforcement of majoritarianism result in the subordination of religious freedom to principles that are designed to promote the majoritarian narrative?[212] It does.[213] The reinforcement of the French style of "living together" grossly limits the way people develop their personal and unique identities. It also limits the opportunity to pursue a life in accordance with their own beliefs on how to present themselves in public.[214] In a sense, the Court's judgment in *S.A.S.* has not only "sacrificed" the free exercise of a very important liberty,[215] but it has also provided lip service to a majoritarian political

210. *See* Syed, *supra* note 154, at 308 (describing the French perception of the Islamic hijab as a symbol of "Muslim oppression from which Muslim women need deliverance at the hands of secular actors"); *see also* Bhuta, *supra* note 167, at 29 ("One of the fears concerning Dahlab's headscarf was that it might invite curious questions from pupils leading to a discussion of her religious beliefs and, thereby, a risk of offense or coercion of children and their parents. The crucifix poses no such threat, and the possibility that it could stimulate a dialogue about religious beliefs is welcomed as conducive to tolerance.")

211. Bhuta, *supra* note 167, at 26. *See generally* Joseph H. H. Weiler, *Freedom of Religion and Freedom from Religion: The European Model*, 65 ME. L. REV. 759 (2013).

212. Joint partly dissenting opinion of Judges Nussberger and Jäderblom in S.A.S. v. France ¶ 2 (arguing that "the opinion of the majority . . . sacrifices concrete individual rights guaranteed by the Convention to abstract principles.").

213. Syed, *supra* note 154, at 314 (arguing that the French arguments in favor of the prohibition law have supported Islamophobia).

214. *Cf.* S.A.S. v. France ¶ 124 (the "freedom of thought, conscience and religion is . . . in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life . . . .").

215. Joint partly dissenting opinion of Judges Nussberger and Jäderblom in S.A.S. v. France ¶ 2.

agenda.[216] This agenda has set out its minimum expectations of citizenship for its minorities in the receiving society.[217]

Through its interpretation of "living together," the Court has advanced a political agenda regarding the role and the place of the Islam in liberal democracies.[218] This agenda reaffirms the majoritarian narrative that tells us who we are and what our binding characteristics are, not only historically, but also in terms of building a common future. In other words, this agenda reinforces a national and collective identity agenda.[219] Formulated in this way, the Court's jurisprudence on the

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216. *Id*.

217. *Cf*. Kapur, *supra* note 166, at 311 (illustrating how the legal discourse in India reinforced a majoritarian political agenda). *See also* Michaels, *supra* note 204, at 238 (arguing that within the French context, the prohibition law should be understood as a matter of "a civil duty . . . . By requiring the Muslim woman to take off her face veil, the state creates a positive duty for her to express her belonging to the state."); Stephane Mechoulan, *France Bans the Veil: What French Republicanism Has to Say about It*, 35 B.U. INT'L L.J. 223, 273 (2017); Daly, *supra* note 27, at 164 (arguing that the prohibition law can be considered a tool for the purpose of protecting a "republican *habitus*"); Trispiotis, *supra* note 37, at 591 (quoting Stephanie Berry who has argued that the "living together" argument is in favor of a "distinctly assimilationist agenda."); Susan S. M. Edwards, *No Burqas We're French: The Wide Margin of Appreciation and the ECtHR Burqa Ruling*, 26 DENNING L.J. 246, 258 (2014) (claiming that *S.A.S.* reinforces the French assimilation agenda).

218. Trispiotis, *supra* note 37, at 591 (quoting Eva Brems, who has suggested that the argument of "living together" in the context of face covering veils reflects "the fundamental unease of a large majority of people with the idea of an Islamic face veil, and the widespread feeling that this garment is undesirable in 'our society'."); Myriam Hunter-Henin, *Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom*, 61 INT'L & COMP. L.Q. 613, 615 (2012) (arguing that the French ban on both wearing headscarves at school and face-covering veils in public are "legal expression of the French sensitivity to the presence of Islam in the public sphere.").

219. Michaels, *supra* note 204, at 215; Trotter, *supra* note 61, at 169; Syed, *supra* note 154, at 322. A very recent example of adjusting to the dominant norms is present in *Osmanoğlu & Kocabaş v. Switzerland*. In this case, the ECtHR held that the Swiss authorities' denial to exempt Muslim girls from taking part in mixed-school swimming does not violate the right to religious freedom. Here, the judges unanimously held that although denial of the exemption request interfered with religious freedom, this interference was justified in light of the promotion of pupils' integration into Swiss society. *See* Osmanoğlu & Kocabaş v. Switzerland, App. No. 29086/12, Eur. Ct. H.R. (2017). In a similar case, a Muslim pupil had asked the Federal Constitutional Court of Germany, the Bundesverfassungsgericht (BVerfG), to review a decision of the Federal Administrative Court, the

lawfulness of laws that burden Muslim citizens, is difficult to reconcile with the notions of tolerance, equality, and respect.

The same is true for the European Parliament's recent recommendations that singled out Islamic institutions for a disfavored treatment *qua* Islam. With its proposal to shut down mosques that violate the EU's values and its call to develop education programs that can spread a "moderate" version of Islam, the Parliament reinforces majoritarianism and advances political Islamophobia that institutionalizes Islam and Muslim fear.[220] Like the ECtHR, the European Parliament has aimed to reconcile "Islam" with majoritarian sensitivities about terrorism, radicalization, and security matters in general. This resulted in the European Parliament drafting far-reaching proposals that ultimately treat the Islamic faith as a second-class religion—instead of a particular conception of life that helps human beings to flourish.

In sum, *S.A.S.* illustrates how the use of the "living together" argument has resulted in limiting the free exercise of religion *and* the reinforcement of a majoritarian political agenda suggesting how people should act in public. Additionally, EU Parliament's recommendations (relying on reconciliation strategy) will have serious consequences for

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Bundesverwaltungsgericht (BVerwG). The BVerwG had ruled that the school authorities' refusal to exempt applicant from joint swimming lessons did not violate the right to religious freedom. The BVerfG did not accept the complaint for adjudication, as the petitioner failed to explain convincingly why the *burkini* could not qualify as a religious alternative for other swimming clothes. *See* Bundesverfassungsgericht, BvR 3237/13, ¶ III.3.aa, Nov. 7, 2016 (Germ.); Sohail Wahedi, *BVerfG 3237/13*, 6 OXFORD J. L. & RELIGION 426 (2017) (on file with author). The problem with this way of reasoning is that the judge sits on the clergy. On this specific criticism, *see* Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, 2017 BYU L. REV. 915, 953 (2017) (on file with author) (critical of the way the Indian Supreme Court has introduced an "essentiality" test that aims to examine which practices do belong to a faith, "[elevating] the judiciary to the status of clergy.").

220. EUROPEAN PARLIAMENT, *supra* note 12, recommendation 15 ("Urges the Member States to encourage and tolerate only 'practices of Islam' that are in full accordance with EU values."); recommendation 17 ("invites the Commission and the Member States to develop and fund a network of European religious scholars that can spread - and testify to - practices of Islam that are compliant with EU values."); recommendation 20 ("Urges the Member States to close without delay mosques and places of worship and ban associations that do not adhere to EU values and incite to terrorist offences, hatred, discrimination or violence.").

equal treatment of the adherents of different religious groups. Therefore, the reconciliation strategy has given diversity a majoritarian content, fitting the sensitivities of the established majority and leaving little room for unpopular faiths, such as the Islam, and non-majoritarian religious manifestations, such as the full-face veil in public. Thus, such religious manifestations fail to satisfy the protection-worthy version of diversity that encompasses important liberal democratic values, like human dignity and gender equality.[221]

II. ABSTRACTION FROM THE RELIGIOUS DIMENSION

The question is whether this majoritarian-proof-making approach to "diversity" is compatible with the egalitarian and non-sectarian understanding of religion and religious freedom. To answer this question, this part first outlines the broader context of *S.A.S.* and the EU Parliament's recommendations, which concerns the question of religion in liberal political philosophy. Second, it develops a theoretical framework for religion and religious freedom within the paradigm of liberal political philosophy. Third, this theoretical framework will be used to reflect on the reconciliation of "diversity" with the dominant view regarding the desirability and legality of "contentious religious manifestations." The next question asks: is the "reconciliation strategy" a paradigmatic expression of recent developments in legal theory and liberal political philosophy about the role of "religion" for the justification of religious accommodation and public decisions taken in law and politics?

221. Michaels, *supra* note 204, at 227 (arguing that "regardless of whether the face veil is cultural or political or both, classifying it as nonreligious has an advantage: if the face veil is not religious, then the woman who wears it cannot invoke freedom of religion to do so. If she has been forced to wear it by family members, then the ban provides her with protection. If she has freely chosen to wear it . . . then this choice is inherently suspicious, because it shows that the woman is either against gender equality, or in favor of a politically suspicious movement."). *See also* Siobhán O'Grady, *After refusing a handshake, a Muslim couple was denied Swiss citizenship*, WASH. POST (Aug. 18, 2018), https://www.washingtonpost.com/world/2018/08/18/after-refusing-handshake-muslim-couple-was-denied-swiss-citizenship/?noredirect=on&utm_term=.74b13ae51014 (reporting about the Swiss denial to grant a Muslim couple citizenship after they insisted in their rejection to shake hands with the opposite gender).

A. Religion in the Paradigm of Liberal Political Philosophy

The recurring conflict in liberal democracies between competing religious demands and established legal norms has resulted in a principled debate in legal theory and liberal political philosophy regarding the role of religion in law and politics.[222] Religious manifestations that compete with legal and majoritarian norms of liberal democracies have accelerated the need for clarification of the question: does religion *qua* religion deserve any special protection?[223] More specifically, should liberal democracies care about religion *qua* religion for the public justification of decisions taken in law and

222. *Cf.* debates on the legality of Islamic veils in public, ritual circumcisions of children, ministerial exceptions, mixed school swimming cases and the religious slaughter cases. *See* Mechoulan, *supra* note 217 (contextualizing the French prohibition law); Trotter, *supra* note 61 (analyzing how the "living together" argument has played a role in a couple of recent judgments); Wahedi, *supra* note 54 (discussing the "double standards" argument in the debate on the legality of ritual circumcisions); Yasmine Ergas, *Regulating Religion Beyond Borders*, *in* RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 66 (Jean Louise Cohen & Cécile Laborde eds., 2016) (discussing the legality of female circumcision from a law and religion perspective); *see generally* Jeremy A. Rovinsky, *The Cutting Edge: The Debate over Regulation of Ritual Slaughter in the Western World*, 45 CAL. W. INT'L L.J. 79 (2014) (discussing the legality of ritual slaughter in Western democracies).

223. *See generally* Kenneth Einar Himma, *An Unjust Dogma: Why a Special Right to Religion Wrongly Discriminates against Non-Religious Worldviews*, 54 SAN DIEGO L. REV. 217 (2017); Arif A. Jamal, *Considering Freedom of Religion in a Post-Secular Context: Hapless or Hopeful?* 6 OXFORD J. L. & RELIGION 433 (2017); Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481 (2017); Brett G. Scharffs, *Why Religious Freedom - Why the Religiously Committed, the Religiously Indifferent, and Those Hostile to Religion Should Care*, 2017 BYU L. REV. 957 (2017); NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017); Tara Smith, *Religious Liberty or Religious License: Legal Schizophrenia and the Case against Examptions*, 32 J.L. & POL. 43 (2016); LABORDE, *supra* note 39; SMITH, *supra* note 48; LEITER, *supra* note 56; DWORKIN, *supra* note 30; ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013); MICAH SCHWARTZMAN, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE (2008); Chad Flanders, *The Possibility of a Secular First Amendment*, 26 QLR 257 (2008); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); James Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941 (2005); WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005). *Cf.* Steven P. Aggergaard, *The Question Speech on Private Campuses and the Answer Nobody Wants to Hear*, 44 MITCHELL HAMLINE L. REV. 629 (2018).

politics?[224] Hence, what do current debates in legal theory and liberal political philosophy tell us about the way modern liberal democracies interpret, value, protect, and deal with religious freedom? Is the outcome of *S.A.S.* compatible with the existing line of research within the liberal paradigm of law and religious scholarship? To answer all these questions, we need to develop a theoretical framework to help us conceptualize the possible liberal responses to the question whether religion *qua* religion deserves special protection.[225]

1. Liberal Theories of Religious Freedom

The main distinction in law and religious scholarship on the role of religion for granting exemptions and justifying decisions in law lies between *liberal* and *sectarian* theories of religious freedom. As such, sectarian theories justify the special legal solicitude toward religion with an appeal to some values that are considered distinctly religious.[226]

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224. Schwartzman, *supra* note 38, at 15 (arguing the current debate in liberal political philosophy regarding the role of religion in law and politics consists of two more specific debates: (1) the role of religion for the purpose of state actions (public justification debate); and (2) its relevance for granting exemptions (the religious accommodation debate) to certain groups in society).

225. The main research method of this Part is a conceptual meta-analysis of positions defended in the "specialness-debate" of religion, with a particular focus on the liberal theories of religious freedom. To identify the binding characteristic of the normative positions, this article has developed a matrix of positions. This matrix focuses on the arguments developed to deal with the question whether religion *qua* religion needs special legal protection. An advantage of this method is that it helps to see what the advantages and disadvantages of a particular concept are. It is also helpful to see what the alternatives are. *See generally* Schwartzman, *supra* note 38, at 28 (explaining how building up a theory in a systematic way sharpens our mind to see the inconsistencies in the existing body of knowledge); W. COLE DURHAM, JR. & BRETT G. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES 45 (2010) (on file with author) (providing a taxonomy of the various definitions of religion, as used in the case law or defended in the law and religion scholarship).

226. *See generally* Lund, *supra* note 223, at 490 (providing an overview of and discussing some of the religious arguments in favor of religious freedom); Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 LAW & PHIL. 581, 582 (2015) (explaining the distinction between liberal and sectarian theories of religious freedom and arguing that the transcendental value of religion does not justify religious freedom). For a sectarian justification of religious freedom *qua* religious, compare RAFAEL DOMINGO, GOD AND THE SECULAR LEGAL SYSTEM 79, 80-82

The paradigmatic distinction between sectarian and liberal theories of religious freedom is present within the paradigm of religion in liberal political philosophy.[227] There are also hybrid theories of religious freedom, using a mixture of liberal and sectarian arguments to justify religious freedom and the legality of certain religious manifestations.[228] This section focuses on the liberal theories of religious freedom that have put the question of religious accommodation under critical scrutiny, either by challenging or defending the special legal solicitude

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(2016) (considering the "protection of suprarationality" as the "ultimate justification" for protecting religion *qua* religion); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1183 (2013); DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 116, 117 (2009) (using a transcendental argument to justify the special legal protection of religion); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 57 (1996) (on file with author) (claiming that within the context of U.S. constitutional law, the "split-level character" could only be clarified in light of an exclusive "religious justification" of religious freedom); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15 (1985) (arguing the liberal state is not able to ultimately exclude the possibility that religious claims might be true, which means that the transcendental authority of such claims has more value than the claims of the state). McConnell continued to defend this line in recent publications. *See* Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 786-89 (2013).

227. C*f.* Paul B. Anderson, *Religious Liberty under Communism*, 6 J. CHURCH & ST. 169 (1964) (showing non-liberal, non-sectarian theories of religious freedom).

228. *Cf.* Donna E. Arzt, *Religious Freedom in a Religious State: The Case of Israel in Comparative Constitutional Perspective*, 9 WIS. INT'L L.J. 1 (1990) (comparing the Israeli approach to religious freedom). The hybrid approach to the justification of religious freedom should not be confused with quasi-liberal approaches to religious liberty, which favor the majoritarian religion or the religions of "recognized" minorities. Compare with the Constitution of the Islamic Republic of Iran that contains a sectarian explanation of "religious freedom." Articles 12 and 13 of Iran's Constitution exhaustively enumerate religions that are allowed to practice their faiths within the legal framework of the Islamic Republic. The "recognized" religions include Zoroastrianism, Judaism and Christianity. The Shia Jafari school of beliefs is the "eternally immutable" state's religion. *See* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] (1980) (Iran), http://www.divan-edalat.ir/show.php?page=base, (translation) (last visited Feb. 27, 2019). For a quasi-liberal approach to religious freedom, see the recent proposal of the Dutch SGP. This party has argued that the state should make a distinction between religions that have shaped the Dutch tradition (including Christianity and Judaism but excluding Islam), to protect the Judeo-Christian character of the Dutch culture and society. *See* SGP, *supra* note 30, at 3-4.

for religion.[229] Essential to the religious accommodation debate is for whom accommodations should be made for and for what kind of reasons?[230] These questions are used by legal theorists and liberal political philosophers to determine the normative tolerance and protection of religious beliefs and practices in liberal democracies.

In order to identify how the liberal paradigm of the law and religious scholarship has evolved, we need to categorize the type of arguments used within this paradigm. Categorizing this paradigm looks beyond the empirical argument that suggests religion *is special* because of religious freedom, accommodation through case law, and people's relationship with religion as a special experience that deserves special protection in law. Rather, this categorization draws on the body of normative arguments that posit how the law in liberal democracies *should* deal with the category of religion.[231] Generally, liberal theories of religious freedom contain "strong rejectionist" and "soft rejectionist" responses to the question of whether religion *should* be treated special in law. The strong rejectionist responses claim that there is nothing special about religion that makes it a protection worthy category in law. Therefore, religion does not deserve any special protection *qua*

229. *See generally* LABORDE & BARDON, *supra* note 39.

230. These two questions are helpful to deal in a more systematic way with the controversies that arise out of free exercise. *Cf.* LEITER, *supra* note 56, at 3 (Brian Leiter compares an orthodox Sikh boy to a non-Sikh boy from a traditional family. Both boys want to wear a dagger—the orthodox Sikh boy for religious purposes (he wants to wear a *kirpan*, a religious object made of metal that resembles a dagger) and the other for reasons of tradition. This case questions what the justification would be to treat the two differently. That is to say, Leiter asks, "[w]hy the state should have to tolerate exemptions from generally applicable laws when they conflict with religious obligations but not with any other equally serious obligations of conscience.").

231. Basically, the conceptual question of these liberal theories of religious freedom is: *should* the law grant religion *qua* religion special protection, or rather, *should* the law treat religion special because of the protection-worthy liberal substitutes of religion. For the development of this particular argument, I have benefited tremendously from the feedback of professor Benjamin Berger on the theory of abstraction during my stay as visiting researcher at Osgoode Hall Law School in Toronto (Apr. 2017). For a similar method that aims to challenge the empirical argument, *see generally* LEITER, *supra* note 56; DWORKIN, *supra* note 30; Schwartzman, *supra* note 223; Perry, *supra* note 64; Eisgruber & Sager, *supra* note 20 (questioning why the law protects religion specially).

religion.[232] The softer responses cover the body of arguments positing that the category of religion is not special *as such* but the liberal substitutes of religion are special. Therefore, religion is *only* special by virtue of abstraction from the religious dimension.

2. A Taxonomy of the Liberal Theories of Religious Freedom

This section develops a conceptual framework of normative approaches to religion in law. This framework classifies the liberal positions into five categories. First, principled *rejection* of arguments that justify the special legal protection of religion with an appeal to values that are presented as distinctly religious. Rejectionist arguments reject qualifying specific beliefs or manifestations as religious. Second, *substitution* consists of arguments explaining why religion is a subset of a broader human faculty, namely conscience. Substitution also covers arguments that say religious freedom has no distinct constitutional value, like other liberties, such as the freedom of expression and association. These in combination with the right to non-discrimination, *in practice* could guarantee free exercise of religion. Third, *generalization* opposes a sectarian interpretation of religion and religious freedom, arguing that religion stands for deep ethical commitments of human beings and that religious freedom is the general right that gives human beings access to ethical independence and moral freedom. Fourth, *equation*, which says that equality of treatment should be the norm when authorities are dealing with deep commitments of human beings who ask for exemptions from the application of general laws. Fifth, *representation*, which justifies the special legal protection of religion in light of values that are not necessarily religious in nature. Religion represents in this position certain values that let human beings flourish—this particular argument justifies the special legal protection of religion.[233]

232. Basically, the position of Brian Leiter and Kenneth Einar Himma. *See generally* LEITER, *supra* note 56; Himma, *supra* note 223.

233. The focus is on the appropriate interpretation of "the notion of religion in law (regardless of whether the category of freedom of religion is upheld or not)." Laborde, *supra* note 226, at 594.

a. Rejection

The rejectionist position discards arguments that justify religious freedom with an appeal to values that are considered distinctly religious. This position consists of two broader categories: *principled* rejection and *non-principled* rejection. Non-principled rejection claims that the concept of religion does not apply to certain beliefs, traditions or manifestations.[234] Yet, non-principled rejection does not exclude the option to use the term "religion" to consider other manifestations as religious for reasons of consensus and tradition. Thus, it promotes the term "religion" for particular religions and excludes other religions as not falling under the specific definition of "religion." The appropriate example is the rhetorical approach currently present in the political discourse, which views Islam not as a religion but as a totalitarian ideology with a closed internal system of rules that prescribe in detail how one should live his or her life. Against this backdrop, it has been argued practices and beliefs that are based on Islam should not have access to the privileges of religious freedom.[235] Principled rejection draws primarily on the idea that there are no principled reasons to tolerate religion *qua* religion within liberal democracies.[236]

i. Principled Rejection

The principled rejectionist rejects tolerating religion *qua* religion for principled reasons (i.e., reasons that find their origins in morality or epistemology). This position starts from the question of what toleration on principled grounds says about the justification of the special legal protection of religion *qua* religion. Thus, it questions whether the concept of toleration provides any room for arguments that justify religious toleration because of any specialness of religion (i.e., distinctly religious values). This sub-position defines pure toleration as

234. *See generally* AMOS N. GUIORA, FREEDOM FROM RELIGION 19 (2009).

235. *See generally* Wahedi, *supra* note 45.

236. LEITER, *supra* note 56, at 7, 55, 67; *see also* Schwartzman, *supra* note 38, at 22; Cécile Laborde, *Conclusion: Is Religion Special?*, *in* RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 423 (Jean Louise Cohen & Cécile Laborde eds., 2016); DWORKIN, *supra* note 30, at 111, 144; NUSSBAUM, *supra* note 223, at 164; Nickel, *supra* note 223, at 943; Eisgruber & Sager, *supra* note 20, at 1248; *see generally* SULLIVAN, *supra* note 223; Himma, *supra* note 223.

the situation in which the dominant group sees on moral, or epistemic grounds a reason to allow, or tolerate on such principled grounds, another group of citizens to continue with acts or manifestations that are considered objectionable by the dominant group. Principled rejection draws on this particular definition of toleration and concludes that the principle of toleration does not require special legal protection for religion *qua* religion.[237]

The principled rejectionist questions whether one can identify one or more principled reasons that could justify a toleration regime for religion *qua* religion. To answer this question, a distinction is made between two potentially distinctive characteristics of religion: "the categoricity of religious commands" and "insulation [of religious beliefs] from evidence" and reason.[238] This particular feature is closely related to the argument that religious beliefs might be distinctive due to their involvement in a "metaphysics of ultimate reality."[239] According to this position, the moral reasons for toleration only justify the special legal protection of human conscience. This moral justification of liberty of conscience does not simultaneously single out religion and its categoricity of commands for special legal protection. Thus, no evidence could support the argument that people in the Rawlsian "original position" will opt for religious freedom next to equal liberty of conscience.[240] Hence, the emphasis on the need for liberty of conscience does not make a distinction between the backgrounds of conscientious commands—it does not single out religion for a special favored treatment.[241] Leiter explains this argument as follows:

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237. Toleration is usually justified on different types of moral and epistemic grounds. Brian Leiter concludes there is nothing special, in terms of morality or epistemology, to warrant toleration of religion *qua* religion. LEITER, *supra* note 56, at 7-13; *see* LORENZO ZUCCA, A SECULAR EUROPE. LAW AND RELIGION IN THE EUROPEAN CONSTITUTIONAL LANDSCAPE 8, n.17 (2012) (providing a broader definition of toleration).

238. LEITER, *supra* note 56, at 33-34.

239. *Id*. at 47. *See also* NUSSBAUM, *supra* note 223, at 168.

240. Rawlsian morality argues in favor of toleration stating that people in the original position, when they perform behind the "veil of ignorance," will definitely accept some categorical demands, though these are not of a religious nature per se. In other words, this ground of toleration does not provide a principled argument to tolerate "religion *qua* religion." *See generally* LEITER, *supra* note 56, at 55.

241. *See* Simon Căbulea May, *Exemptions for Conscience*, *in* RELIGION IN LIBERAL POLITICAL PHILOSOPHY 191 (Cécile Laborde & Aurélia Bardon eds., 2017)

> Rawls repeatedly lumps religious and moral categoricity together, so that it is fair to say that the only thing individuals behind the veil of ignorance know is that they will accept some categorical demands, not they will accept distinctively religious ones, that is, ones whose grounding is a matter of faith.[242]

Similarly, the utilitarian moral arguments for toleration (which focus on the maximization of human well-being that, among others, depends on the ability of people to live by their conscience) do not prescribe special protection of religion. Therefore, toleration on moral grounds does not support the arguments that aim to single out religion as a matter of principled toleration.[243]

The other principled ground for toleration found in the epistemic arguments draws on an accepted toleration for knowledge expansion. Interestingly, knowledge expansion conflicts with religion's second potentially distinctive feature: insulation of religious beliefs from evidence and reason.[244] As Leiter argues, it is far from obvious "to think, after all, that tolerating the expression of beliefs that are insulated from evidence and reasons—that is, insulated from epistemically relevant considerations—will promote knowledge of the truth."[245] Although this argument does not address religious manifestations' effect on knowledge expansion, it is conceivable to say that principled rejection equally rejects arguments that aim to justify toleration of religious conduct, solely because of religion. Arguably, there is no reason to deny that both religious practices and beliefs are equally insulated from evidence.

(arguing that accommodation of sincere conscientious objections to generally applicable laws face the same criticism of unfair treatment as religious accommodation does).

242. LEITER, *supra* note 56, at 55; *see* Andrew Koppelman, *A Rawlsian Defence of Special Treatment for Religion*, *in* RELIGION IN LIBERAL POLITICAL PHILOSOPHY 31 (Cécile Laborde & Aurélia Bardon eds., 2017) (presenting some Rawlsian arguments in defense of religious freedom).

243. LEITER, *supra* note 56, at 55, 61.

244. Leiter argues reliance on Mill's perspective on what is "true for the right reasons" will not make a strong case to tolerate religion *qua* religion for epistemic reasons; religious faith excludes the idea that there might be some uncovered truth. *Id*. at 58.

245. *Id*. at 55-56.

ii. Non-Principled Rejection

Non-principled rejection rejects the qualification of certain beliefs, speeches, or conducts as religious, and is mainly present in political and legal discourse. As such, one can refer to the political approach of the Dutch right-wing party, *Partij voor de Vrijheid* (the Party for Freedom), toward Islam. This political party has repeatedly argued that Islam is not a religion, but rather a totalitarian ideology that should not enjoy the privileges of religious freedom. Consequently, it has proposed an immigration ban from Islamic countries, legal prohibition of the Koran, and closure of all mosques and Islamic schools in the Netherlands.[246] Non-principled rejection in legal discourse occurs when one asks for permission to perform a practice that is portrayed as religious but apparently prohibited by authorities. In some of the cases dealing with the legal admissibility of norm-deviant practices, the court or other parties involved refuse to admit that the practice at stake has a potentially religious dimension.[247]

Similarly, in the legal debate related to the Travel Ban of President Trump, some scholars have explicitly argued that this ban has nothing to do with religion, purporting that it is related to security concerns.[248] Most notably, one of the legal advisors to President Trump revealed the President-elect asked him about how he could realize his promised

246. *Tweede Kamer der Staten-Generaal* [*The House of Representatives*], *Aanhangsel Handelingen II* [*Parliamentary Proceedings II*], 2016/2017, at 2-6-61 and 2-6-62 (Neth.) (on file with author).

247. Compare with tax exemption litigations of the Scientology Church and the Church of Satan case: Hof. Den Haag 21 October 2015, ECLI:NL:GHDHA:2015:2875, ¶ 8.16 (Neth.) (holding that the activities of the Scientology Church—in particular, Auditing and Training—are commercial in nature and not religious, serving primarily private interests. Thus, the Church is ineligible for tax exemptions). The case of Saint-Walburga, which focused on sisters forming the Church of Satan, turned on the question whether a brothel could be considered a religious institution. HR 31 October 1986, ECLI:NL:HR:1986:AC9553 (Neth.); *Cf. Religion Based on Sex Gets a Judicial Review*, N.Y. TIMES, http://www.nytimes.com/1990/05/02/us/religion-based-on-sex-gets-a-judicial-review.html (discussing a case in which a couple charged for pimping and prostitution claimed that the activities that took place in the Church were part of their sacred religion).

248. *See generally* Michael B. Mukasey, *Judicial Independence: The Fortress Threatened from Within*, 47 U. MEM. L. REV. 1223 (2017) (defending the ban as a matter of national security) (on file with author).

Muslim travel ban in a legal way.[249] The advisory team found "danger" was an appropriate substitute for those coming from Muslim majority countries—the category of people, the President promised he would single out for special travel restrictions.[250] The shift from focusing on security matters and rejecting the religious dimension in this context was "perfectly sensible, perfectly legal."[251]

b. Substitution

The substitution position claims both religion and religious freedom have adequate substitutes.[252] Like the rejectionist position, substitution consists of both principled substitution and non-principled substitution.[253] Principled substitution draws on arguments that view religion as a subset of a particular faculty that is worthy of special legal protection. This protection-worthy faculty concerns human conscience.[254] The argument is that free exercise of religion and the admissibility of religious claims for exemptions could be adequately ensured through freedom of conscience.[255] Non-principled substitution

249. Jim Dwyer, *First Came Giuliani's Input on the Immigration Order. Now There's the Court Test*, N.Y. TIMES (Feb. 9, 2017), https://www.nytimes.com/2017/02/09/nyregion/rudolph-giuliani-donald-trump-travel-ban.html.

250. *See id.*

251. *Id.*

252. *See generally* LABORDE, *supra* note 39; Michah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1099 (2014) (discussing the "substitution" position).

253. *See generally* NUSSBAUM, *supra* note 223 (providing a deeper philosophical account for the argument that religion has a substitute, like conscience); Nickel, *supra* note 223 (purporting that religious freedom can be replaced by other freedoms).

254. This article will not engage in the discussion about the different conceptions of conscience. Neither will it discuss the argument that there is a difference between human conscience and religious conscience. *See* Lund, *supra* note 223, at 503-04. For the argument that this article aims to develop, it is sufficient to indicate that some liberal theorists of religious freedom argue that religion and religious freedom have certain substitutes.

255. *See* JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 89 (2011) (arguing that given "the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status but rather, all core beliefs that allow individuals to

views basic liberties as being in practice enough to guarantee the free exercise of religion. Thus, as Nickel has rightly asked: "who needs freedom of religion," when this right turns out to be superfluous?[256]

i. Principled Substitution

Principled substitution says that religion is a subset of a broader protection-worthy category: the conscience.[257] With reference to the work of Roger Williams, Nussbaum argues:

> The faculty with which each person searches for the ultimate meaning of life is of intrinsic worth and value, and is worthy of respect whether the person is using it well or badly. The faculty is identified in part by what it does—it reasons, searches, and experiences emotions of longing connected to that search—and in part by its subject matter—it deals with ultimate questions, questions of ultimate meaning. It is the faculty, not its goal, that is the basis of political respect, and thus we can agree to respect the faculty without prejudicing the question whether there is a meaning to be found, or what it might be like. From the respect we have for the person's conscience, that faculty of inquiring and searching, it follows that we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the right of others or comes up against some compelling state interest.[258]

According to Nussbaum, this way of reasoning helps us "make sense of our feeling that there really is something about religion or quasi-religion that calls for special protection and delicacy."[259]

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structure their moral identity."). *See also* LABORDE, *supra* note 39, at 66-67 (critical of the position defended by Jocelyn Maclure and Charles Taylor).

256. Nickel, *supra* note 223, at 943.

257. *See also* Koppelman, *supra* note 242, at 38 (rejecting the claim that religion is a subset of human conscience and arguing that the latter is at best a complement, not a substitute, for teleologically loaded terms such as religion).

258. NUSSBAUM, *supra* note 223, at 168-69.

259. *Id*. at 169 (arguing the search for meaningful answers to ultimate questions of life helps us to keep our special solicitude for religion, as a matter of respect for a broader human faculty, separated from "silly" faculties. That is to say, "faculties used by my car lover, who isn't engaged in a search for meaning, or the person who feels

Specifically, this protection-worthy "something" is the human conscience, which is an inalienable dignity people possess, regardless of educational or socioeconomic background, health, religious belief, and more.[260] Thus, there is no principled reason to single out religion because it is religion. Rather, there is a principled argument to justify the special protection of a broad liberty of conscience that encompasses and protects the religious conscience as a matter of respect for human dignity.[261] Accordingly, religious claims for exemptions are sometimes granted "because they involve matters of conscience, not matters of religion."[262]

ii. Non-Principled Substitution

Non-principled substitution seeks to invalidate the necessity of a separate right to religious freedom.[263] Specifically, existing freedoms of speech and association, and bans on discrimination and violence, render a separate right unnecessary.[264] In other words: freedom of religion has at least some very "adequate substitute[s]."[265] Arguments that support the replacement of religious freedom consider this right "dispensable,"[266] as other basic liberties ensure the free exercise of religion. The argument suggests religious manifestations are related to a broad range of areas, such as business, politics and association. Non-

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called to dress like a chicken when going to work, which is (probably) just too silly to count as a genuine search for meaning.").

260. *Id*.

261. *Id*. at 164-74; *see also* NUSSBAUM, *supra* note 169, at 61-66; *see generally* LEITER, *supra* note 56 (discussing the line that liberty of conscience is an appropriate substitute for religious freedom). In the theoretical framework that Leiter uses to develop his argument, principled substitution arises out of what the liberal concept of toleration considers protection-worthy for principled reasons: equal liberty of conscience.

262. LEITER, *supra* note 56, at 64.

263. *See generally* Nickel, *supra* note 223.

264. *See generally* Nickel, *supra* note 223, for a further discussion of this position; *see also* Mark Tushnet, *Redundant of Free Exercise Clause?*, 33 LOY. U. CHI. L. J. 71, 73, 94 (2001). *See generally* Scott M. Noveck, *The Promise and Problems of Treating Religious Freedom as Freedom of Association*, 45 GONZ. L. REV. 745 (2009).

265. Tushnet, *supra* note 264, at 94.

266. Nickel, *supra* note 223, at 941.

principled substitution understands religious freedom in light of the argument "that the sorts of activities it involves are covered by the most important general liberties."[267]

Furthermore, non-principled substitution expects religious freedom shares the same basis as other basic liberties. Thus, there is no reason to think religion is something unique that could justify the special legal solicitude toward religion *qua* religion. The expectation is that understanding the need for the free exercise of religion in light of existing basic liberties may eliminate the idea that religious beliefs are privileged in society. Therefore, the granted exemptions are the outcome of a proper application of basic liberties and not derived from the presumed distinct value of religious beliefs. Lastly, the emphasis on the protection of religious beliefs through the application of basic liberties ensures people have a real choice to engage in or disapprove certain convictions.[268]

c. Generalization

Generalization advocates a broader, ecumenical and non-sectarian definition of religion and religious freedom. Against this normative backdrop, generalization defends the position that religious freedom should not be considered a special right, which protects only a selected group of people—the believers.[269] Rather, religious freedom should be a general right to ethical and moral independence.[270] This position is ecumenical because it looks beyond the sectarian theistic accounts of religion. It is also non-sectarian because it does not bifurcate theistic and non-theistic convictions about the good.[271] Generalization looks beyond the narrow, theistic conception of "religion" and argues that both God-believers and non-believers may be considered "religious," as both could have the same convictions about fundamental questions.[272] In examining the deep commitment that religious and

267. *Id*. at 950.

268. *Id*. at 943-50.

269. DWORKIN, *supra* note 30, at 132 (discussing religious freedom as a general right to ethical independence); *see also* Perry, *supra* note 64, at 996 (stating how broadening religious freedom will encompass moral freedom).

270. *Id*.

271. *Id*.

272. DWORKIN, *supra* note 30, at 5.

non-religious people share, the generalist position sees an "intrinsic and inescapable ethical responsibility" to succeed in life.[273] Accordingly, this position says religious freedom should be the general right to ethical independence that opens the doors to moral freedom.[274]

Under the generalist framework, religious freedom is the right that gives humans full access to ethical independence.[275] Thus, the generalist account of religious freedom emphasizes the opportunities for individuals to make independent life decisions based on their deeply held ethical commitments. This approach apparently extends the definition of religion.[276] The main justification for this extension is rooted in the idea that we need a deeper, non-sectarian understanding of religious freedom because the free exercise of religion cannot be protected on sectarian grounds for distinctly religious reasons.[277] The leading normative argument behind generalization's core tenets—religious beliefs as deep ethical commitments and religious freedom as a general right to moral and ethical independence—is the assumption that public authorities are not apt to judge what should count as moral or religious truth.[278]

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273. *Id*. at 114. *See also* James McBride, *Paul Tillich and the Supreme Court: Tillich's Ultimate Concern as a Standard in Judicial Interpretation*, 30 J. CHURCH & ST. 245, 260 (1988) (discussing Paul Tillich's idea of "ultimate concerns" that scholars have used to interpret religion beyond its theistic definition). Many thanks to Christy Green for the suggestion to have a look at Paul Tillich's discussion of "ultimate concerns."

274. DWORKIN, *supra* note 30, at 129-30.

275. *Id*. at 132.

276. *See* Schwartzman, *supra* note 38, at 22. A serious concern of this "symmetrical theory" of religious freedom—on both sides (public justification and religious accommodation) religion is not something special—is the huge risk of anarchy. *See generally* DWORKIN, *supra* note 30, at 117; LEITER, *supra* note 56, at 95; NUSSBAUM, *supra* note 223, at 173 (drawing attention to the side-constraints of an all-inclusive term religion).

277. DWORKIN, *supra* note 30, at 17, 129. *See generally* Matthew Clayton, *Is Ethical Independence Enough?*, *in* RELIGION IN LIBERAL POLITICAL PHILOSOPHY 132 (Cécile Laborde & Aurélia Bardon Eds.) (2017) (a recent defense of Dworkin's approach to religious freedom).

278. Perry, *supra* note 64, at 1012. This concerns a Lockean criticism on governmental interference in matters of morality and religion. Locke states that the main purpose of the law "is not to provide for the truth of opinions, but for the safety and security of the commonwealth and of every particular man's goods and person." *Id*. at 1003.

Understanding religion in terms of access to ethical independence pursues an ideal of liberal neutrality,[279] toward what Nussbaum has called, the "ultimate questions" of life.[280] The call for liberal neutrality toward deep human commitments is bolstered by the crux of ethical independence, which "requires that government not restrict citizens' freedom when its justification assumes that one concept of how to live, or what makes a successful life, is superior to others. It is often an interpretive question, and sometimes a difficult one, whether a policy does reflect that assumption."[281] To clarify why we should endorse liberal neutrality as a matter of principle, the generalist position divides basic liberties into special and general rights. The difference between these two variants is rooted in what the threshold authorities must cross when they aim to restrict a right. Special rights focus on a particular "subject matter" and it is complicated to limit these rights legitimately, except in cases of emergency. General rights, on the other hand, focus on the relation between authorities and people. General rights restrict the scope of arguments authorities can provide to legitimately limit the exercise of a general right.[282]

The specific distinction between general (restrict arguments to limit free exercise) and special (focus is on a protection-worthy subject) rights gives generalists a reason to argue that religious freedom should be a general right, as the category of "religion" remains a complicated subject to interpret. Thus, the definition problem of religion, which the generalists posit is intertwined with freedom of religion, is an important argument to oppose granting religious freedom a special status. That is to say, considering religious freedom a special right. The semantic criticism at this point conveys that a special right would explicitly focus

279. Cécile Laborde, *Dworkin's Freedom of Religion Without God*, 94 B.U. L. REV. 125, 125 (2014).

280. NUSSBAUM, *supra* note 223, at 168.

281. DWORKIN, *supra* note 30, at 141-42.

282. DWORKIN, *supra* note 30, at 132-33 (stating that "a special right of religion declares that government must not constrain religious exercise in any way, absent an extraordinary emergency. The general right to ethical independence, on the contrary . . . limits the reasons government may offer for any constraint on a citizen's freedom at all.").

on the definition of religion and it would not be able to solve the definition problem of this right.[283]

Furthermore, a special right requires high demands on restrictions that aim to limit the exercise of such a right. Instead, the generalist position argues that approaching religious freedom as a general right to ethical independence will provide protection to the free exercise of religion. The generalist position explains that the right to ethical independence "condemns any explicit discrimination . . . that assumes . . . that one variety of religious faith is superior to others in truth or virtue or that a political majority is entitled to favor one faith over others or that atheism is father to immorality."[284] Moreover, it "protects religious conviction in a more subtle way as well: by outlawing any constraint neutral on its face but whose design covertly assumes some direct or indirect subordination."[285] However, understanding religious freedom as a general right to ethical independence might force people to adjust their religious conduct in a way that conforms to laws that are not *per se* catered to them.[286] Therefore, the generalist position argues that authorities should take into account whether restrictions on a particular practice they propose are in fact targeting what one group might consider "a sacred duty."[287] If so, "then the legislature must consider whether equal concern . . . requires an exemption or other amelioration. If an exception can be managed with no significant damage to the policy in play, then it might be unreasonable not to grant that exception."[288]

283. *Id.*; *see generally* LABORDE, *supra* note 39, at 30-33; SULLIVAN, *supra* note 223, at 1-4 (discussing the problem of defining religion).

284. DWORKIN, *supra* note 30, at 133-34.

285. *Id*. at 134.

286. Ronald Dworkin stated, "[i]f we deny a special right to free exercise of religious practice, and rely only on the general right to ethical independence, then religions may be forced to restrict their practices so as to obey rational, non-discriminatory laws that do not display less than equal concern for them." *Id*. at 135-36.

287. *Id*. at 136.

288. *Id*.

d. Equation

Equation requires equal respect for all deep concerns of people. In effect, religious beliefs and practices of one group of citizens, as they relate to deep human concerns, should not be favored over similar deep concerns of others. Religious freedom should ensure this equal treatment of people.[289] Against this backdrop, equation opposes arguments that justify religious freedom in light of any "distinct value" of religious manifestations. Rather, it argues that believers' vulnerability to discrimination should be considered the main justification for religious freedom. In addition, equation opposes a "religious" understanding of religious freedom. In this sense, equation is very close to generalization. However, there are two main differences. First, it is not indifference or neutrality as such that requires principled equation.[290] Rather, it is the ideal of equality of treatment of all acts and thoughts that have an intrinsic value.[291] Second, equation does not generalize religious freedom to something like the general right to ethical independence and moral freedom.[292] Instead, equation approaches religious freedom from the principle of equality of treatment, which is considered the main constitutional value of a liberal democracy.[293] Therefore, the equation approach is part of

289. Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?* 84 NOTRE DAME L. REV. 807, 834-35 (2009) (stating that "the point of the Religion Clauses is not to affirm (or deny) the value of religious practices, any more than the point of the Free Speech Clause is to affirm (or deny) the value of flag burning.").

290. *See* Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 496-97, 520 (2009).

291. *See* Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, at 352 (2010) (arguing that some liberal theorists of religious freedom have "[attacked] religious exemptions on the general premise that they are fundamentally unfair to nonreligious people.").

292. *See* EISGRUBER & SAGER, *supra* note 223, 51-77 (2007); *see generally* LABORDE, *supra* note 39, at 55-57; Lund, *supra* note 291, at 360 (critical of the theory developed by Eisgruber and Sager). *See also* Boyce, *supra* note 290, at 496-97 (differentiating between equality in treatment and equality in effect).

293. *See* LABORDE, *supra* note 39, at 19.

what has been called the egalitarian theories of religious freedom.[294] The question is, however, equation of *what*?[295] At the outset, this position is anti-favoritism,[296] as it advocates equal treatment of all conscientious manifestations and beliefs that contain an intrinsic value.[297]

Equation "requires simply that government treat[s] the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."[298] Thus, there are no principled reasons to differentiate between deep human commitments. The norm should be an equal approach to non-religious and religious perspectives on the ultimate questions of life. The equation approach rethinks religious freedom as "the right of the individual . . . to life outside the state—the right to live as a self on which many given, as well as chosen, demands are made. Such a right may not be best realized through laws guaranteeing religious freedom but by laws guaranteeing equality."[299] Thus, the regime of religious toleration should be understood against the backdrop of human vulnerability to discrimination. Eisgruber and Sager states:

> [what] properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns. When we have replaced value with vulnerability, and the paradigm of privilege with that of protection, then it will be possible both to make sense of our constitutional past in this area and to chart an appealing constitutional future.[300]

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294. *See* Cécile Laborde, *Liberal Neutrality, Religion and the Good?*, *in* RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 249 (Jean Louise Cohen & Cécile Laborde Eds., 2016) (discussing egalitarian theories of religious freedom).

295. *See* LABORDE, *supra* note 39, at 89.

296. SULLIVAN, *supra* note 223, at 149; *see also* LABORDE, *supra* note 39, at 42.

297. EISGRUBER & SAGER, *supra* note 223, at 51-77; LABORDE, *supra* note 39, at 51.

298. Eisgruber & Sager, *supra* note 20, at 1283.

299. SULLIVAN, *supra* note 223, at 159.

300. Eisgruber & Sager, *supra* note 20, at 1248.

This position allows us to accept two main differences between generalization and equation. In short, generalization focuses on how we should understand religious freedom as a liberty and equation approaches religious freedom from the ideal of equality.

e. Representation

Representation's main claim is that a single group should not have exclusive protections that are not afforded to other groups. Hence, it is not a sectarian theory of religious freedom. Representation is rooted, as Laborde says, "in the ecumenical value of ethical integrity, and in the normative justifications for generic liberal rights such as speech and association."[301] Representation views religion as a concept that stands for a set of protection-worthy values that are not necessarily "religious" at the core.[302] These values justify the codification of a special right to religious freedom.[303] As such, religion, like respect, stands for a "hypergood"—a particular category of higher goods.[304] Koppelman argues that:

> [religion] . . . has a value that can override many other goods and preferences. But religion is one among many hypergoods. It should not be privileged over the rest of them. This fundamental problem of modernity should not be adjudicated by the state. The problem of determining the appropriate hypergood, if any, and its reconciliation with the broad range of ordinary goods, is a question that occupies the same existential territory as religion. If the state is incompetent

301. The position this article qualifies as "representation" elaborates on the "proxy" and "disaggregation" approaches. *See* LABORDE & BARDON, *supra* note 39, at 599-600.

302. *See generally* Ronan McCrea, *The Consequences of Disaggregation and the Impossibility of a Third Way*, *in* RELIGION IN LIBERAL POLITICAL PHILOSOPHY 69 (Cécile Laborde & Aurélia Bardon eds., 2017) (criticizing Laborde's disaggregation approach).

303. Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 332 (2001).

304. Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 594 (2006).

> to resolve religious questions, it is likewise incompetent to resolve this one.[305]

To identify the relevant legal values of religion, the representation position reflects on the potential matches between the "different parts of the law" and "different dimensions of religion for the protection of different normative values."[306] Examples of such matches are: the presentation of religion as a conception of the good life; a conscientious moral obligation; the key feature of identity; mode of human association; a vulnerability class; a totalizing institution; and an inaccessible doctrine.[307] Specifically, matches such as the presentation of religion as a conception of the good life, a matter of conscience, identity and association, are more "relevant to the notion of freedom of religion" than other overlapping areas.[308] Hence, representation could be defined as "religion-blind without being religion-insensitive, because it sees religion, not as a specialised and self-contained area of human belief and activity, but as a richly diverse expression of life itself."[309]

B. Religious Freedom: Abstraction from the Religious Dimension

Does religion *qua* religion deserve special legal protection? At the outset, there is no right or wrong answer to this question. At most, classifying different positions is instructive for mapping the main arguments to explore alternative methods. Also, classifying normative approaches is helpful when examining the theoretical differences of the

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305. *Id*. In his later publications, Andrew Koppelman has elaborated on considering religion a legal proxy. *See, e.g.*, Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 981 (2010) (stating "it is not possible to offer a unitary account of what religion is good for. Like a knife or a rock, it is something that people find already existing in the world, which they then put to a huge variety of uses. Religion denotes a cluster of goods."). This position has been defended more recently in KOPPELMAN, *supra* note 223, at 124. *See also* Koppelman, *supra* note 242, at 36-37 (repeating the view that religion encompasses many goods that people aim to purse and religious freedom enables them to do that).

306. Laborde, *supra* note 226, at 594.

307. *Id*. at 594-95.

308. *Id*. at 595-97.

309. *Id*. at 600.

liberal theories of religious freedom. Moreover, mapping out differences streamlines the process of finding an element of commonality between the theories. The similarities between the responses reveal two potential categories. First, a "strong rejectionist response." Second, a "soft rejectionist response." The strong rejectionist response posits that religion should not be considered a special protection-worthy category in law. This position corresponds with the rejectionist position. The softer response also rejects the position that religion is special *qua* religion in law—entailing that the liberal substitutes of religion make this category possibly protection worthy. Therefore, religion is only special through substitution, generalization, equation, and representation. Does this twofold response about religion's specialness provide us with a binding commonality between all liberal theories of religious freedom? It does.

The underlying message supporting both categories of responses is that distinctly religious values are not enough to justify the special legal solicitude toward religion. Thus, both responses reject the specialness of the metaphysics of religion for the special legal solitude toward religion. The synthesis of the twofold response is the dismissal of the special legal protection of religion *qua* religion. Moreover, this synthesis renounces arguments that justify religious freedom with an appeal to any distinct value of religion. What clarifies and justifies the special legal attention for religion is a broader and apparently religion-empty (i.e., free from distinctly religious values) framework of faculties, liberties, and vulnerabilities.[310]

The question is, what does this predominantly negative answer to the question of whether religion *qua* religion requires special legal protection suggest about the binding feature of the liberal theories of religious freedom? Can we claim that the twofold response that we have given is an illustration of "decoupling religion from a god?"[311] Alternatively, does the synthesis of our twofold response fit the

310. LABORDE, *supra* note 39, at 42 (criticizing the "vague" broader framework that is adopted by egalitarian theorists of religious freedom to justify the special legal solicitude toward religion).

311. DWORKIN, *supra* note 30 at 132 (stating that "the problems we encountered in defining freedom of religion flow from trying to retain that right as a special right while also decoupling religion from a god.").

"tendency, among legal practitioners, to re-describe" religious matters in non-religious terms?[312]

The synthesis of our negative response encompasses both hypothetical questions when it reacts to the justification grounds of the special legal solicitude toward religion. It decouples religion from any God. Essentially, it presents religion as one subcategory in the more general and apparently non-religious categories of human conscience and the conceptions of the good life. It decouples religion from any God in a further sense. The twofold response conceptualizes religion in a God-empty way, free from distinctly religious values. For example, the definition of religion states that it is the combination of categorical demands that are insulated from evidence and reason.[313] Other God-empty conceptions of religion are concerned with the identification of general and apparently non-religious values that are worthy of legal protection. Examples of such intrinsic and valuable aspects of religion include: the values behind human conscience,[314] ethical integrity,[315]

312. Laborde, *supra* note 226, at 590 (arguing that "there has been a tendency, among legal practitioners, to re-describe [particular religious] practices in the language of conscientious obligation, so as to accommodate them under the label of freedom of religion.").

313. LEITER, *supra* note 56, at 33-34. Koppelman is critical of Brian Leiter's conception of religion, referring to it as "a radically impoverished conception." Koppelman, *supra* note 305, at 962; *see also* McConnell, *supra* note 226, at 784 (suggesting, "it is futile to draw up a list of features descriptive of religion and only of religion. What makes religion distinctive is its unique combination of features, as well as the place it holds in real human lives and human history.") *See also* François Boucher & Cécile Laborde, *Why Tolerate Conscience?*, 10 CRIM. L. & PHIL. 493, 496 (2016) (stating that "Leiter fails to establish insulation from reasons and evidence as the demarcating feature of religion. This is because he draws on incompatible interpretations of 'insulation from reasons and evidence' to reply to different challenges regarding either the under-inclusiveness or the over-inclusiveness of his definition of religion.").

314. NUSSBAUM, *supra* note 223, at 168-69. *But see* KOPPELMAN, *supra* note 223, at 153 (arguing that "[it] is not clear how Nussbaum can maintain the distinction between her position and a libertarian view in which any regulation of anyone's conduct is presumptively invalid . . . . [As such], [t]he boundaries of protection in Nussbaum are thus uncertain."). *See also* Laborde, *supra* note 226, at 589 (arguing that the substitution position is not able to provide equal protection to all religious practices that are valuable, though not always on conscientious grounds).

315. Laborde, *supra* note 226, at 589.

deep ethical commitments,[316] hope and vulnerability to injustice.[317] These valuable—though not specifically or distinctly religious—aspects of religion justify the special legal protection of religious beliefs and manifestations.

The synthesis of our twofold response fits the tendency of re-description, which suggests that in analyzing the legal aspects of a religious manifestation case, it is neither necessary nor useful to define or understand that case in distinct religious terms. The tendency of re-description arises from projects that aim to rethink religious freedom in a religion-empty way, protecting both theistic and non-theistic beliefs and manifestations. The normative argument is that both theistic and non-theistic beliefs and manifestations with an intrinsic value, which attaches to valuable aspects of a human life, should be treated with the same amount of respect and concern. As such, religious freedom has been rethought, approached and defended as: the liberty of conscience,[318] the right to moral freedom,[319] the right to ethical independence, and the citizens' equal right to live outside the state.[320]

Thus far, we have argued that the synthesis of our twofold response decouples religion from any God and relies mainly on non-religious language to re-describe religious matters.[321] The question is whether we could provide a more coherent description of our synthesis, encompassing both the decoupling and re-description aspect of the debate in jurisprudence about law and religion. In other words, is it possible to systematically identify and subsequently define the feature that serves as the binding characteristic of the liberal theories of religious freedom? This feature looks beyond the varieties of normative

316. DWORKIN, *supra* note 30, at 5.

317. KOPPELMAN, *supra* note 223, at 122 (discussing hope); Eisgruber & Sager, *supra* note 20, at 1248 (discussing the vulnerability to injustice).

318. MACLURE & TAYLOR, *supra* note 255, at 89; NUSSBAUM, *supra* note 223, at 169.

319. Perry, *supra* note 64, at 996.

320. DWORKIN, *supra* note 30, at 130 (on the right to ethical independence); SULLIVAN, *supra* note 223, at 159 (on the right to live outside the state).

321. *Cf.* Peter Jones, *Religious Exemptions and Distributive Justice*, *in* RELIGION IN LIBERAL POLITICAL PHILOSOPHY 163 (Cécile Laborde & Aurélia Bardon eds., 2017) (explaining that the non-religious description of religious exemptions, such as the use of a cultural frame, fits the egalitarian strategy to defend religious exemptions on non-sectarian grounds).

positions and connects these perspectives through a common focus—the justification grounds for the special legal protection of religion.

With this presumption in mind, the starting point in identifying the potential binding element of the liberal theories of religious freedom is the interpretative concern about the proper legal definition of religion and religious freedom and the definition's fair application in practice. This interpretative concern guides us to define the binding characteristic of the liberal theories of religious freedom. First, we have seen that these theories aim to provide the most appropriate definition of religion in law. Second, they have one important concern: the egalitarian attention to fair treatment of deep human commitments and beliefs.

Hence, the binding characteristic is a normative response to the question: how should liberal democracies understand and accordingly deal with the concept of religion in law? This binding element encompasses the entire body of arguments that paves the way for balancing religion's role in law as it relates to the paradigm of liberal political philosophy. The binding characteristic takes the form of an *interpretative shield*. It is embedded in philosophical arguments that can resist the justification of religious freedom with an appeal to distinctly religious values. In addition, it draws on a non-sectarian language to conceptualize religion and religious manifestations.

What does this *interpretative shield* suggest about the binding feature of the liberal theories of religious freedom? Does it help provide a more coherent definition of our synthesis that covers the decoupling and the re-description aspects of the law and religion debate in jurisprudence? Yes, it does. The negative answer to the question as to whether religion *qua* religion requires special legal protection stands for abstraction from the religious dimension. The abstraction theory entails that religion does not deserve special protection in law *qua* religion. Religion receives *only* a special treatment through abstraction, meaning through the non-sectarian, protection-worthy categories that serve as proper liberal substitutes for the category of religion. This is due to the egalitarian approach of religious freedom's liberal theories

to theistic and non-theistic beliefs and the emphasis of these theories on neutrality toward any particular worldview.[322]

Abstraction manifests itself by refusing to justify religious freedom through appeals to religious values, thus rejecting the toleration of religion *qua* religion. Moreover, it also refuses to justify free exercise by appealing to a more general framework of values that are not theistic *per se*. Even more, abstraction insists that justifications for religious exceptions, like for any other type of legal exception, need to be ecumenical.[323]

As with ritual dietary restrictions, the liberal argument suggests exemptions are granted *not* because of *any* religious narrative, but because of the commitment to respect the human conscience equally.[324] The abstraction theory unveils that within the liberal paradigm of political philosophy, religious freedom is in fact a euphemism for abstraction from the religious dimension. As such, abstraction is not about the empirical argument concerning the specialness of religion. Rather, abstraction covers the complete body of conceptual and normative arguments that either strongly (rejection) or less strongly (substitution, generalization, equation and representation) oppose to the empirical reality in liberal democracies that treats religion as special *qua* religion.

However, the abstraction theory provides two ways to understand the law and religious scholarship within the paradigm of liberal political philosophy. First, the metaphysics of religion are not considered special—this has a legal explanation. The abstraction argument suggests that law always abstracts from a particular perspective toward a more general perspective. Second, religion is not a special protection-worthy category in law *qua* religion. Liberal theories of religious freedom strongly oppose favoritism of religious beliefs and practices, and abstraction is an ideological tool to equalize beliefs and experiences.

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322. Laborde, *supra* note 294, at 249 (for a discussion of the egalitarian theories of religious freedom). There is also a legal explanation for the phenomenon of abstraction, however that is beyond the scope of this article.

323. Ecumenical, here, is not in the religious meaning of the word, but rather in the sense of being widely accessible to a broad public, and not because of the quality of people's beliefs but simply because they are human beings who share certain important features, such as the conscience.

324. *Cf.* MACLURE & TAYLOR, *supra* note 255, at 77.

C. Abstraction and "Living Together"

Abstraction and "Living Together" directs our attention back to *S.A.S.*, the recommendations of the EU Parliament, the "reconciliation strategy" and the reinforcement of majoritarianism. Is the "reconciliation strategy" a paradigmatic expression of recent developments in legal theory and liberal political philosophy about religion's role in justifying accommodation and decisions in law and politics? In other words, does the abstraction theory help us to reconcile diversity with majoritarian sensitivities under critical scrutiny? It does. The abstraction theory, with its emphasis on the use of religiously neutral or religion-empty language in discussions concerning the lawfulness of contentious religious manifestations helps us discuss the outcome of *S.A.S.* in light of the most recent theoretical developments in the field of liberal political philosophy. On the one hand, presenting an extant religious manifestation (such as face-covering veils) as a matter of gender-equality, human dignity, and "living together" fits the non-sectarian approach of abstraction. Indeed, the abstraction theory does not support any legal discussion of religious practices from a sectarian perspective, meaning an exclusively religious view. In other words, the use of that language fits the tendency of "re-describing" extant religious manifestation in non-religious terms. That is not problematic *per se*. But the Travel Ban case has shown that such a facially neutral language does not help to vanish its history of animus toward Muslims.[325]

Furthermore, reinforcing the argument that particular lifestyles are not welcome might pose a serious danger to the egalitarian defense of religious freedoms. The abstraction theory has unveiled the notion that liberal theories of religious freedom strongly oppose favoring or disfavoring a particular lifestyle because of the specific narratives behind that lifestyle.[326] Nevertheless, the empirical argument suggests something else.

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325. Matthew J. Lindsay, *The Perpetual Invasion: Past as Prologue in Constitutional Immigration Law*, 23 ROGER WILLIAMS U. L. REV. 369, 389 (2018) (on file with author) (rightly pointing out that Trump's anti-Muslim rhetoric during the Presidential campaign, was more than a slip of the tongue).

326. *Cf.* DWORKIN, *supra* note 30 at 130; Perry, *supra* note 64 (both arguing that the state should not prescribe how people should live their lives).

Over the past few years, particularly over the last decade and in the aftermath of terrorist attacks that are linked to radicalized Islamic groups, a growing number of liberal democracies have developed monitoring policies that single out Muslims and Muslim organizations for *special* bans.[327] The arguments used to defend these types of prohibitions are similar: defending the neutrality of the state, avoiding radicalization, and combatting life styles that are contrary to Western norms. The latter objective challenges us to think about the compatibility of these *special* bans with the standards of liberal political philosophy that has shaped the contours of modern liberal democracies. Within this liberal paradigm of political thought, the state should refrain from favoring or disfavoring particular lifestyles. As a result, the recent prohibitions targeting Muslims across liberal democracies for their norm deviant behavior violates the favored egalitarian understanding of religious freedom. Hence, the endorsement of living together and the reinforcement of majoritarianism are both paradigmatic expressions of the shifts toward ethnocentrism that is little tolerant of non-mainstream ideas and practices.

III. THE PRAGMATIC DEFENSE

The reinforcement of majoritarianism results in the creation of the "good religion," which is adopted by the vast majority. Subsequently, "bad religions" are outlawed by making diversity and religious plurality majoritarian-proof. The outcome is the establishment of a "State's Religion," which clearly admires the category of good religions of the dominant majority. These are basically religious practices and beliefs that fit the state's agenda of how citizens should live their lives. Hence, practices and beliefs that do not fall within the category of good

327. *See generally* Khaled A. Beydoun, *9/11 and 11/9: The Law, Lives and Lies That Bind*, 20 CUNY L. REV. 455 (2017) (on the anti-Muslim agenda of President Trump); Mark C. Rahdert, *Exceptionalism Unbound: Appraising American Resistance to Foreign Law*, 65 CATH. U. L. REV. 537, 558 (2016) (critical of singling out Sharia law *qua* Sharia for a special ban); Yaser Ali, *Shariah and Citizenship—How Islamophobia is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027 (2012) (on how anti-Muslim initiatives reinforce disparities); Jennifer Heider, *Unveiling the Truth behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights*, 22 IND. INT'L & COMP. L. REV. 93 (2012) (on file with author) (on the rise of Islamophobia and how this affects the fundamental rights of Muslims).

religions are banned, restricted, or labeled as "unwelcome." The question is: are we able to develop argumentation patterns that help us refrain from this dangerous path, while remaining aware of the security threats some beliefs pose to the core ideals of a liberal democracy? Is it possible to rethink religious freedom in a way that is more "diversity-friendly" and compatible with the egalitarian understating of this right that rejects religious toleration *qua* religious? How can we develop argumentation patterns that would fit a broad sense of justice when we talk about religious freedom? Reflecting on the implications potential bans would have on extant religious practices, internally and externally, is a helpful first exercise to develop the sort arguments needed to defend religious freedom beyond the sectarian justification of this right.

A. The Anti-Alienation Argument

To explain this argument we need to think about a real threat to a particular religious manifestation. The potential ban on ritual infant male circumcision ("MC") is an appropriate example. Although, this practice has not been outlawed yet, a few "exceptional judgments" mirror the growing public outcry across Western countries to stop MC. These decisions consider the current legal approach to MC as contrary to the child's best interests. The argument is that given the high health risks of MC, such as the risk of developing sexual and mental health problems, the non-therapeutic ritual circumcision of boys should be postponed until the child is of an age that he can competently consent to the procedure.[328] The most outspoken court ruling embracing this line of reasoning is the 2012 German Cologne *Landgericht* ruling.[329] A similar decision was reached a few years earlier in Finland,[330] and in

328. Peter W. Adler, *Is Circumcision Legal?*, 16 RICH. J. L. & PUB. INT. 439, 440-41 (2013).

329. The court ruled that parents' right to religious freedom—in general—does not justify MC, if the intervention is not medically required. The child should have the opportunity to decide himself about the status of his foreskin. *See also* Bijan Fateh-Moghadam, *Criminalizing Male Circumcision*, 13 GERMAN L.J. 1131 (2012).

330. The Tampere District Court held that religious freedom does not justify the violation of bodily integrity. The court referred to the ban on female circumcision and argued that toleration of male circumcision would result in discrimination. *See generally* Heli Askola, *Cut-Off Point? Regulating Male Circumcision in Finland*, 25 INT'L J.L. POL'Y & FAM. 100 (2011).

Iceland a bill to completely ban ritual male circumcision was designed.[331]

Reflecting on the implications of a potential ban on ritual male circumcision would have internally, we can argue that such a total ban would give Jews and Muslims the impression that they do not enjoy equal respect from authorities. This argument finds support in scholarly works that have found how anti-Sharia legal initiatives in the United States, such as the "Save our State" Amendment, have put Muslim communities at risk of isolation and alienation.[332] Therefore, liberal democracies need to encourage mutual understanding between different groups of citizens. This "anti-alienation" argument helps maintain the legal status quo of ritual male circumcision, not because of its sectarian nature, but rather because a total ban on this practice could further alienate marginalized groups that attach great importance to ritual male circumcision.[333]

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331. Harriet Sherwood, *Iceland law to outlaw male circumcision sparks row over religious freedom*, GUARDIAN (Feb. 18, 2018), https://www.theguardian.com/society/2018/feb/18/iceland-ban-male-circumcision-first-european-country.

332. Ali, *supra* note 327, at 1031. *See also* Ross Johnson, *A Monolithic Threat: The anti-Sharia Movement and America's Counter-Subversive Tradition*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 183, 218 (2012).

333. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, REPORT OF THE SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION AND BELIEF ON HIS MISSION TO DENMARK (2016). Interestingly enough, the enormous and global sensitivity about a potential ban regarding male circumcision is completely absent in the area of female circumcision. On the contrary, many countries around the globe have decided to eliminate this practice by either using standard laws banning assault and other types of physical harm or developing special bans on female circumcision. *See* Renée Kool & Sohail Wahedi, *European Models of Citizenship and the Fight against Female Genital Mutilation*, *in* DEVELOPMENT AND THE POLITICS OF HUMAN RIGHTS 205-221 (Scott Nicholas Romaniuk & Marguerite Marlin Eds., 2015) (on file with author). *See also* Saul Levmore, *Can Wrinkles be Glamorous? in* SAUL LEVMORE & MARTHA C. NUSSBAUM, AGING THOUGHTFULLY: CONVERSATIONS ABOUT RETIREMENT, ROMANCE, WRINKLES, AND REGRET 104-05 (2017) (saying "the fact that so many thoughtful people find female but not male circumcision abhorrent, suggests that a critical difference is that one is practiced on a group that is, at least to Western eyes, seriously constrained and subjugated by a variety of practices."); *see generally* Hope Lewis & Isabelle R. Gunning, *Essay: Cleaning Our Own House: Exotic and Familial Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123 (1998). On the presence of double standards in this context, *see* Obiajulu Nnamuchi, *Hands off My Pudendum: A Critique of the Human Rights*

B. The Wrong-Signal Argument

Next to the anti-alienation argument, we can also reflect on the external effects of a ban on ritual male circumcision. The question is: what implications would a ban on ritual male circumcision have for the foreign policies of liberal democracies? Such policies are, among other matters, concerned with the protection of the rights of non-believers, atheists, proselytes, and critics of religion in countries that lack fundamental rights, such as the freedoms of speech, conscience, and association.[334] Notably, religious freedom is within the human rights discourse understood as the right to believe, to not believe, to change religion, and to be able to criticize religion. Therefore, a complete ban on ritual male circumcision, which has also been practiced in countries that do not have a strong human rights record, would further complicate and narrow our possibilities when asking to direct attention to the rights of vulnerable groups around the globe. In other words, such a policy would send the wrong signal about religion and related freedoms.[335]

This "wrong signal" argument accepts that within liberal democracies, religious freedom has no intrinsic liberal value. It understands this freedom as a religion-empty liberty that provides protection to a wide range of beliefs and practices, without making a distinction between the theistic and non-theistic beliefs people may have. However, in line with the political commitment to draw attention to the human rights situation of vulnerable groups,[336] in countries that lack religious freedom, we would benefit from this freedom to raise awareness about the deplorable human rights situation of vulnerable groups. We need to draw attention to the insecurity threatening these

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Approach to Female Genital Ritual, 15 QUINNIPIAC HEALTH L. J. 243, 253 (2011) (pointing out that a traditional practice like female circumcision is generally associated with harm and mutilation, while similar harsh language is absent from the discussion on cosmetic interventions upon female bodies).

334. The European Union has even a Special Envoy, Ján Figel, former Slovak diplomat, who promotes religious freedom as part of the European Union's foreign policy. *See also* Ján Figel, *The European Union and Freedom of Religion or Belief: A New Momentum*, 2017 BYU L. REV. 895 (2017). *Cf.* Jeremy Patrick, *Religion and New Constitutions: Recent Trends of Harmony and Divergence*, 44 MCGEORGE L. REV. 903 (2013).

335. *Cf.* Yusuf, *supra* note 69, at 293.

336. Vulnerable groups, in this context, include: atheists, adherents of new religions, and critics of religion.

vulnerable groups in countries that do not recognize the right to religious freedom. Therefore, any serious restriction—such as a total ban on important religious practices like ritual male circumcision (relevant for many Muslims and Jews)—creates a complex situation for liberal democracies.[337]

C. The Non-Sectarian Liberal Defense of Religious Liberty

Although the pragmatic arguments help us to oppose a complete ban on MC and a toleration regime for FC, they are not the similar to *principled* arguments that criticize the ban on face-covering dresses and the proposed closure of mosques by the EU Parliament. Opposing restrictions on the latter category of religious manifestations draws on matters related to liberties of conscience, expression, and association. The theory of abstraction from the religious dimension, with its emphasis on the egalitarian and non-sectarian understanding of religious freedom, provides *principled* arguments to oppose measures that unfairly restrict ways of life that are not favored by the majority. Meaning, that the pragmatic defense of religious freedom based on the "anti-alienation" and "wrong signal" arguments is not *principled* in nature. This defense does not convincingly debunk the liberal rejection (the "strong rejectionist response") and substitution (the "soft rejectionist response") criticism. However, for the time being, it provides arguments that explain why we should be aware of imposing restrictions upon certain extant religious manifestations. The case of ritual circumcision reveals that any total ban on ritual male circumcision would call for both internal and external resistance. Hence, the pragmatic arguments warn us for the implications of a ban internally and externally. This reflection is a helpful exercise for developing a theory of religious freedom that endorses diversity for pragmatic reasons.

337. We may also find support for this argument in Justice Kennedy's concurring opinion in Trump v. Hawaii 138 S. Ct. at 2424, "The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains *committed* always *to the liberties* the Constitution seeks to preserve and protect, so that *freedom extends outward*, and lasts." (emphasis added).

However, there is something very crucial about the relationship between abstraction and the non-sectarian liberal defense of religious liberty. What we should clearly dispatch, is the idea that the theory of abstraction—with its talent to undo religious practices from a religious angle, is effectively an open invitation to disregard fundamental rights of people. Denying them the right to manifest or even have their own beliefs, and declaring them and religious accommodation at war.

Liberal political philosophy has a dichotomous relationship with religion. On the one hand it contends that religion *qua* religion should not be singled out for a special, or favored, treatment in law. Hence, no religious freedom simply because religion is special. On the other hand, liberal political philosophy includes many arguments we could rely on to say that religion *qua* religion should not be singled out for a special disfavored treatment in law.[338] This is because of the reasons liberal political philosophy generally gives to object a legal protection regime for religion *qua* religion.

This rejection is laid down in an egalitarian approach to questions of accommodation. However, egalitarianism in this context does not imply that religious people should be deprived from the right to manifest their beliefs. Egalitarianism, in relation to religious accommodation, challenges the legal protection regime, asking if there is anything special about religion that warrants a special and favored treatment of religion *qua* religion. Admittedly, it answers this question negatively. But it provides via abstraction a wide range of grounds and substitutes on which the toleration regime for religious accommodation can continue. It continues, not because it involves religion, but, for example, because of conscience and the high importance it attaches to the protection hereof.[339]

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338. *Cf.* the "inclusive non-accommodation" theory of religious freedom, as discussed by Micah Schwartzman. The *inclusiveness* of this theory is related to the public justification debate (on the "specialness" of religion for the purpose of justifying public decisions), implying that religion is not something special for the justification of legal and political decisions. Thus, no limitation on adding religion to the body of categories that can be used by legal and political authorities to justify their decisions. Similarly, religion is not special for the accommodation question: religions and non-religions should be treated equally by granting exemptions. *See* Schwartzman, *supra* note 38, at 22.

339. Wahedi, *supra* note 54.

This egalitarian challenge to religious accommodation does not only help us critically revisit the protection regime for a wide range of religious practices. It also helps us to dismantle and uncover double standards behind plans that target religion, either in an implicit way or a clear showing of animus toward religion. Hence, the egalitarian perspective—with its focus on the non-sectarian substitutes of religion—helps us to challenge facially neutral grounds that effectively challenge the lawfulness of religious manifestations or target the adherents of a particular religion.[340]

Since singling out religion *qua* religion for special legal protection is problematic, it is equally troublesome to single out religion *qua* religion for special prohibitions. To put it differently, neither sectarian grounds nor grounds evincing animosity toward religion should be considered decisive for granting exemptions or issuing bans. Both are equally objectionable. This point can be illustrated in light of the problematic cases we have discussed in this article and by asking ourselves the following two questions. First, does the action attest to singling out religion *qua* religion for a disfavored treatment? Second, would we have been able to scrutinize this action in absence of religious freedom?

Let's begin with The Austrian "Islam bill." Does the ban for Islamic organizations and houses of worship on receiving foreign founding attest to singling out religion *qua* religion for a disfavored treatment? It does. Other religious groups do not face similar restrictions. Hence, this may point to the presence of double standards in dealing with religious radicalization, the facially neutral ground the restriction rests on. But, would we have been able to scrutinize this action in absence of religious freedom? Yes. The limitations it poses on the freedom of association and the opportunities to have equal access to, for example, crowdfunding actions, would help us argue that the Austrian bill is wrong, apart from the fact that it implies a double standard. Both the *substitution* and the *equation* approach would help us at this point to challenge the legality of the Austrian "Islam bill."

Next, let's review the French ban on face-covering dresses. Does the French Prohibition Law attest to singling out religion *qua* religion for a disfavored treatment? It does. The notorious history of this ban

340. *See generally* Sohail Wahedi, *Muslims and the Myths in the Immigration Politics of the United States*, CAL. W. L. REV. (forthcoming).

contains many indications revealing this ban was initiated as a response to Islamic manifestations in public.[341] The exceptions it contains, for example, for those who cover their faces to participate in traditional and artistic events, reinforce the suspicion that the ban effectively singled out an Islamic practice *qua* Islamic. Would we in any way have been able to scrutinize this action in absence of religious freedom? Yes. We would have approached this ban, for example, as contradictory to freedom of conscience, as the women who cover their faces are deprived from the right to live in accordance with their deepest convictions, without posing serious harm to other people or the society as a whole. Hence, the *substitution* approach to religion and the *generalization* approach to religious freedom, rethink this right as the right to ethical independence and helps us to put the ban under critical scrutiny.

Our next illustration is the Travel Ban of President Trump. Does the enactment of travel restrictions for people coming from Muslim majority countries attest to singling out religion *qua* religion for a disfavored treatment? It does. The issuance of the Travel Ban incarnated the promise of Republican Party's Candidate Trump to close all the U.S. borders to Muslims.[342] But, would we have been able to scrutinize this action in absence of religious freedom? Yes. The Travel Ban—lacking a profound justification for the choice of targeted nations—is an obvious example of discrimination based on nationality. Furthermore, the fact that the Ban mainly targets Muslims—or people coming from Muslim majority countries—makes it possible to posit that it is clearly against the freedom of expression, as it hinders people to pursue their path of beliefs. The *equation* and the *substitution* approaches would help us to further challenge the Travel Ban in absence of religious freedom.

We can add the Save our State debacle in the state of Oklahoma, singling out the Sharia law for a special ban to the list of examples discussed. And we can even revisit the legality of ritual male

341. Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 746 (2006) (saying that the bans in this area were meant to target the Islamic appearance in public *qua* Islamic for a disfavored treatment).

342. *Cf.* Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1501 (2018) (arguing that the issued travel bans effectively incarnate Donald Trump's promise of issuing a Muslim ban).

circumcision—although this illustration would ask a much deeper discussion. On the one hand, we may rely on the non-sectarian argument that parents should have the autonomy to raise their child in accordance with their convictions. But does this mean that we should similarly create exemptions for those types of female circumcision that are comparable to male circumcision? And does autonomy allow to irreversibly alter the body of your own child, even if there is no medical support for that alteration? That is very questionable—but our brief analysis is large enough to conclude that facially neutral arguments do not cleanse legislative steps from obvious animus towards religion.

Furthermore, our brief analysis has shown us what we could have done in all these cases in absence of religious freedom. In other words, do we lose anything if we would delete religious freedom from the constitution? Apart from the pragmatic arguments we have provided at the beginning of this section, we contend that we do not lose anything. The paradigm of liberal political philosophy contains enough arguments to oppose any mistreatment of religious people *qua* religious. Hence, the abstraction knife cuts on two sides: it is a helpful strategy to repackage and undo religious practices from their religious dimension, but it is never *as such* a justificatory strategy for obvious discrimination, religious intolerance, and spread of hatred toward unpopular religious groups or religions.

CONCLUSION

This article has reflected on the reconciliation of diversity with majoritarian sensitivities as present in the Travel Ban of President Trump, the Save our State initiative from Oklahoma, and the religious freedom jurisprudence of the European Court of Human Rights. The European Court of Human Rights has "notoriously been lenient toward practices of Christian establishment and overtly intolerant toward the presence of Islam in the public sphere."[343] Reconciliation of diversity questions with majoritarian sensitives effectively reinforces majoritarianism and advances a political agenda that is not tolerant of the practices of religious minorities. This development violates the advocated egalitarian understanding of religious freedom. To face the challenge at this point, this article has developed two novel pragmatic

343. LABORDE, *supra* note 39, at 33.

arguments in favor of religious freedom. These arguments are not principled in nature. However, for the time being, they provide very strong arguments to reflect critically upon the internal and external implications of a potential ban on extant religious manifestations of religious minorities. This is a temporary defense of religious freedom rooted in grounds that are non-sectarian, non-majoritarian, and non-violent to the advocated egalitarian conception of religious freedom. In addition to the development of this pragmatic framework this article has set out why even in absence of the right to religious freedom, religious people and their practices warrant protection, that is because these cases involve matters of conscience, association, and expression.[344]

The dichotomous relationship of liberal political philosophy with religion does not support a disfavored treatment of either singling people or their religion out for special prohibitions and restrictions. Ultimately, this helps us "hold the coordinate branches to account when they defy our most sacred legal commitments."[345]

344. *Cf*. LEITER, *supra* note 56, at 64.

345. Trump v. Hawaii, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

MUSLIMS AND THE MYTHS IN THE IMMIGRATION POLITICS OF THE UNITED STATES

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Today, the explicit use of anti-immigration rhetoric has become common among a significant portion of the American political establishment. With the 2016 election of President Trump came a tougher attitude toward immigration and immigrants. Subsequently, the 2018 midterm elections revealed an increase in "Islamophobic" rhetoric among political campaigners. This article focuses on the challenges faced by one group—the Muslim community. Specifically, this article aims to shed light on the ways in which the contemporary anti-immigration atmosphere has targeted American Muslims. In doing so, this article analyzes recent public decisions that have both burdened Muslims and negatively affected their civil liberties. Drawing on these recent decisions, this article proposes a strategy to overcome the contemporary era of fear, anxiety, and intolerance toward newcomers—specifically those with an Islamic background.

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INTRODUCTION

The American Dream of "a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement,"[1] is a fruitful source of inspiration for many American societal groups in the fight for equality.[2] The American Dream of a better life for everyone, everywhere in the United States, is endorsed by the Declaration of Independence, which states clearly that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit

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1. JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA 404 (1931). *See also* Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN ST. L. REV. 417, 427 (2008) (quoting Adams and arguing that the classic work-hard-play-hard conception of the American Dream with the aim of achieving a higher level of welfare has made room for a thicker conception. The modern version of the American Dream includes other themes that are relevant to human flourishing. Korff mentions in this respect education, employment opportunities, healthcare, a reliable retirement system and "a general sense of social mobility.").

2. Although a shift has taken place in the way people have defined the American Dream concept through the history, today, the bottom line is an egalitarian approach: equal opportunities for all citizens, regardless their racial or economic background. *Cf.* Andrea J. Boyack, *A New American Dream for Detroit*, 93 U. DET. MERCY L. REV. 573, 574 (2016); Katherine M. Vail, *Saving the American Dream: The Legalization of the Tiny House Movement*, 54 U. LOUISVILLE L. REV. 357, 379 (2016) (arguing that the American Dream rests on an idea of creating equal opportunities for all); Paul D. Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227 (1973) (claiming that "the right to equal educational opportunity is the American Dream incarnate as constitutional law."). *See* for an official endorsement of this egalitarian conception of the American Dream: George Bush, *Exporting the American Dream*, 17 HUM. RTS. 18 (1990) (defending the export of the "American Dream" to new democracies and arguing that equality is the most important principle in law that should be guaranteed and protected strongly. That is a democracy "that supports a strict equality of rights: one that guarantees all men and women-whatever their race or ancestry-stand equal before the law.").

of Happiness."[3] This powerful and timeless promise of equality and welfare inspired great advocates of civil rights and civil liberties, such as Dr. Martin Luther King, Jr. In what he revealed as "a dream deeply rooted in the American dream," Dr. King scrutinized the presence of obvious inequalities in the American society and urged the nation to stop racial discrimination.[4] He dreamed of a land where people would "not be judged by the color of their skin but by the content of their character."[5] He dreamed of true fulfillment of the promise "that all men are created equal."[6] With his renowned "I Have a Dream" speech, Dr. King created awareness of parallel societies in the United States where people did not live together, but rather were separated from one another. He warned against the devastating effects of segregation, discrimination, and hatred.[7] Dr. King described a nightmare in which many people lived at that time, and declared his unambiguous ambition to end this nightmare for those who faced hatred and discrimination instead of opportunities and freedoms.[8]

The resounding message behind Dr. King's speech was that the American Dream was a far destination for many American citizens to reach.[9] His concerns about the inaccessibility of the American Dream have urged politicians and legal scholars to consider concrete steps to preserve this ideal.[10]

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *See also* JIM CULLEN, THE AMERICAN DREAM 38 (2003) (arguing that the second paragraph of the Declaration of Independence is the "key" to this important document as it "underwrites" the American Dream). *See also* Darrell A.H. Miller, *Continuity and the Declaration of Independence*, 89 S. CAL. L. REV. 601, 605 (2016) (critically analyzing the language used in the Declaration and explaining why so many judges, politicians and civil rights activists have drawn on this document to develop their arguments).

4. Martin Luther King, Jr., "I have a Dream …" Speech at the "March on Washington" (Aug. 28, 1963), transcript, *available at* https://www.archives.gov/files/press/exhibits/dream-speech.pdf (last visited Feb. 15, 2019) (referring to the equality promise of the Declaration of Independence and criticizing the lack of opportunities for non-white people to flourish in life due to the obvious presence of racial discrimination).

5. *Id*.

6. *Id*.

7. *See also* Katharine Klebes, *The Limited Provision of Mental Health Services at Community Colleges: Obstacles, Initiatives, and Opportunities for Change*, 19 QUINNIPIAC HEALTH L. J. 315, 322 (2017) (referring to a recent study that shows how racism hinders the true social integration of students with an immigrant background at university campuses).

8. *Cf*. Kevin Brown, *Hopwood: Was this the African-American Nightmare or the African-American Dream*, 2 TEX. F. ON C.L. & C.R. 97, 102 (1996) (providing an overview of cases that have challenged the legality of segregation and defending a skeptical approach about the elimination of racial discrimination in the future). *See also* Kevin Brown, *End of the Racial Age: Reflections on the Changing Racial and Ethnic Ancestry of Blacks on Affirmative Action*, 22 TEX. J. ON C. L. & C. R. 139 (2017).

9. *Cf*. Monroe H. Little, Jr., *More than a Dreamer: Remembering Dr. Martin Luther King, Jr.*, 41 IND. L. REV. 523, 529 (2008) (paying attention to the achievements of Martin Luther King, Jr., arguing that King was more than the main voice of civil rights protests).

10. David B. Oppenheimer, *Dr. King's Dream of Affirmative Action*, 21 HARV. LATINX L. REV. 55 (2018) (arguing that the work of Dr. King is still valuable to fight inequalities

Recent history reminds us that institutional support of inequality reinforces the emergence of parallel societies. Within these divisions, only a few people can benefit from opportunities to flourish, while others suffer from stagnation and deprivation of basic liberties.[11] Therefore, the idea that all people should have equal opportunities to realize the American Dream is often echoed in initiatives propagated by legal scholars, or enacted by law after extensive political debates.[12] However, despite the many initiatives geared toward creating equal opportunities, the American Dream is still difficult to realize for many groups in American society.[13] Even the historic victory of Barack Obama in the 2008 and 2012 presidential elections, and the recent elections of two Muslim women with immigrant backgrounds to Congress, do not erase the palpable presence of racial discrimination in the United States.[14]

Studies have reaffirmed the presence of ethnic and racial discrimination in aspects of life considered crucial for the realization of the American Dream.[15] Such discrimination exists in the job market,[16] access to financial instruments,[17] housing,[18] education, and many other

related to race and class). *See also* Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., the American Dream, and the Challenge of Socio-Economic Inequality*, 57 VILL. L. REV. 339, 342 (2012).

11. *Cf.* Khaled A. Beydoun, *Why Ferguson Is Our Issue: A Letter to Muslim America*, 31 HARV. J.RACIAL & ETHNIC JUST. 1 (2015).

12. These steps are mainly set in the field of housing, health care, education, job market and political freedoms and are meant to provide all people—regardless of their race, color, class, religion, origin or sexual orientation—access to the basic needs that enable them to flourish in the American society. However, the changes in these areas should not be overstated. *See* Damon J. Keith, *What Happens to a Dream Deferred: An Assessment of Civil Rights Law Twenty Years after the 1963 March on Washington*, 19 HARV. C. R.-C. L. L. REV. 469 (1984) (quite rightly expressing the expectation that the struggle for equality is not over, rather "the gains made in the legal arena over the past . . . decades form only a skeletal foundation for the monumental changes that must take place").

13. *See generally* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016) (criticizing the lack of equal protection in the case law of the Supreme Court).

14. Alex M. Johnson, Jr., *What the Tea Party Movement Means for Contemporary Race Relations: A Historical and Contextual Analysis*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 201, 202 (2015) (pointing out that racism "remains endemic in American society," and saying that the fact that some members of minority groups have been successful does not say much about equal opportunities for all). *See also* Reginald Oh, *Regulating White Desire*, 2007 WIS. L. REV. 463 (2007).

15. Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 7-8 (2007) (arguing that the struggle for more equality will continue because "the economic and psychological wounds of slavery and segregation persist in the form of well-documented discrimination").

16. *Cf.* Kevin Woodson, *Derivative Racial Discrimination*, 12 STAN. J. C.R. & C.L. 335, 386 (2016) (introducing "derivative racial discrimination" as a form of "institutional discrimination that disadvantages black workers derivatively" due to socio-cultural differences).

17. *See* Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071 (2017) (reporting about the prevalence of racism and discrimination in the financial world).

18. *See generally* Alexander Polikoff, *Racial Inequality and the Black Ghetto*, 1 NW. J. L. & SOC. POL'Y 1 (2006); David R. James, *The Racial Ghetto as a Race-making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 LAW & SOC.

areas.[19] In light of these findings, some scholars have suggested the era of civil liberties is waning.[20] This sad and alarming conclusion is not a new revelation.[21] Rather, it is a renewed reminder of the complexity involved in shaping the right conditions to provide all people equal opportunities to flourish in life.[22]

This lasting reminder illustrates the fragility and vulnerability of the victories achieved in the field of civil liberties.[23] However, it does not

INQUIRY 407 (1994); Karl Taeuber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL'Y REV. 339 (1988) (on the presence of racial discrimination in the context of housing and real estate).

19. *Cf.* Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765 (2017) (finding that schools with an overrepresentation of racially-diverse students tend to be stricter on developing safety measures, while there is no empirical evidence in favor of this approach). *See also* Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH. U. L. REV. 763 (2010) (identifying a "unique" form of racial discrimination in the hiring system of universities).

20. This position has been defended explicitly in the aftermath of the 2013 Supreme Court's decision in Shelby v. Holder, 570 U.S. 529 (2013) (outlawing the "coverage-formula" of the Voting Rights Act of 1965, which was designed to guarantee equal voting rights). *See generally* REBEKAH HERRICK, MINORITIES AND REPRESENTATION IN AMERICAN POLITICS (2017). *See also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatue*, 100 IOWA L. REV. 1389, 1391 (2015) (arguing that the unambiguous message behind *Shelby* is that the era of civil rights is over); Seth Davis, *Equal Sovereignty as a Right against a Remedy*, 76 La. L. Rev. 83, 118 (2015) (calling the decision in *Shelby* "not nuanced"); Ilya Shapiro, *Shelby County and the Vindication of Martin Luther King's Dream*, 8 N.Y.U. J.L. & LIBERTY 182 (2013) (criticizing the critics of *Shelby* and arguing that this judgment reaffirms that "widespread, official racial discrimination in voting has disappeared.").

21. *Cf.* Mario L. Barnes, *The More Things Change: New Moves for Legitimizing Racial Discrimination in a Post-Race World*, 100 MINN. L. REV. 2043, 2096 (2016) (providing an in-depth analysis of decisions reached by the Supreme Court in employment, education and voting rights cases that touch upon the theme of racial discrimination and claiming that the Court's rejectionist approach toward the "realness of race" has obviously resulted in the current situation, in which "the Court avoids interrogating larger concerns such as structural racism and white supremacy."). *See also* the dissenting opinion of Justice Sotomayor in Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014) (Sotomayor believes that race still matters "because of persistent racial inequality in society").

22. Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 906 (2016) (pointing to a serious challenge caused by affirmative actions: "these policies express that blacks are inferior to whites. Why is that problematic? It is problematic because one way to fail to treat people as equals is to express that they are not, in fact, equals."). *See also* Anita Christina Butera, *Assimilation, Pluralism and Multiculturalism: The Policy of Racial/Ethnic Identity in America*, 7 BUFF. HUM. RTS. L. REV. 1, 8 (2001) (highlighting the main constraints of various models of citizenship in dealing properly with racism and discrimination).

23. *Cf.* Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 LA. L. REV. 181, 185 (2015) (arguing that although the Voting Rights Acts of 1965 has improved political participation of black population, "there are still large disparities between the actual population of African Americans in the South and the actual representation in southern legislatures and in Congress. In part, this is a result of residual white hostility to black political participation"). *See also* Anthony J. Gaughan, *Has the South Changed? Shelby County and*

herald the end of the civil rights era.[24] Rather, this illustration prompts us to be cautious.[25] The key questions are: how can we pursue the courageous path set out in *Brown v. Board of Education*,[26] and how can we avoid a revitalization of *Plessy v. Ferguson* in the future?[27] Put differently, how can we halt the "insidious and pervasive evil" that is racial discrimination?[28] These are fundamental questions in an era where, unfortunately, race is a decisive factor in the continuation of obvious disparities between groups of people.[29] We must keep our eyes open and remain alert to developments that jeopardize the equality many have fought for over recent decades.[30]

Admittedly, we have few reasons to be pessimistic about the scholarly efforts that have highlighted "the stark reality that race matters" in relation to opportunities that help people improve their lives.[31] Yet, we do have reason to be worried, in general, about the rise of intolerance toward newcomers and citizens with immigrant backgrounds or ethnic appearances. In particular, there is cause for concern regarding

the Expansion of the Voter ID Battlefield, 19 TEX. J. ON C. L. & C. R. 109, 112 (2013) (expecting that *Shelby* will "retreat" historical achievements).

24. *See* Kevin R. Johnson, *The End of Civil Rights as We Know It: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1484 (2002) (arguing that immigration will introduce all kinds of new civil rights disputes).

25. Michael Selmi, *Understanding Discrimination in a Post-Racial World*, 32 CARDOZO L. REV. 833, 855 (2011) (providing a clear analysis of the steps that are necessary for the purpose of reaching an era in which racial discrimination is practically vanished from all important aspects of life).

26. 347 U.S. 483 (1954) (ruling that the Fourteenth Amendment prohibits racial discrimination at public schools). *See also* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (arguing that the outcome in *Brown* was probably the home version of the freedom and equality message spread by the United States during the second world war).

27. 163 U.S. 537 (1896) (ruling that separate but equal public education for different racial groups was not at odds with the Fourteenth Amendment and allowing effectively the continuation of racial segregation at public school).

28. South Carolina v. Katzenbach, 383 U.S. 301 (1966) (ruling on the constitutionality of the Voting Rights Act of 1965 and terming racial discrimination in the exercise of voting rights an "evil").

29. Gratz v. Bollinger, 539 U.S. 244 (2003) (Ginsburg, J., dissenting) (noting that "the effects of centuries of law-sanctioned inequality remain painfully evident in our" society and referring to the presence of racial discrimination in the job market, education and the health sector).

30. Richard R. W. Brooks, *The Banality of Racial Inequality*, 124 YALE L. J. 2626, 2662 (2015) (quoting Justice Sotomayor who wrote in her dissenting opinion in *Schuette* that race is still relevant because many people suffer from racial discrimination in their daily life. To stop this unfortunate situation—Brook quotes again Justice Sotomayor at this point—we need to apply the Constitution in a way that shows awareness of the long history of racial discrimination).

31. 572 U.S. 291 (2014) (Sotomayor, J., dissenting). *See also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (providing an in-depth analysis of the shift in the equal protection jurisprudence, saying that the "end of traditional equality jurisprudence . . . should not be conflated with the end of protection for subordinated groups.").

the emergence and political advancement of Islamophobia.[32] Nearly sixty years after Dr. King delivered his famous speech, we must again be concerned with the inaccessibility of the American Dream and the tragic re-emergence of a "system of racial caste."[33] Our main concern should be halting the reinforcement of segregation that will inevitably increase fundamental disparities between groups of people. The best solution to this problem lies within the law and politics relating to immigration.[34]

A brief analysis of modern immigration law reveals that many stereotypes have been used to justify restrictions with far-reaching consequences upon civil rights. The travel bans instituted by President Trump, popularly known as the Muslim travel bans,[35] are timely examples of regulations that rest strongly on anti-Muslim stereotypes and anti-immigration rhetoric.[36] Similarly, Oklahoma's Save Our State Amendment prohibited courts from using Islamic Sharia law or international law, and therefore targeted immigrants with Islamic backgrounds in particular.[37] This initiative rested on the same anti-Muslim narratives and stereotypes as the recent travel bans.

32. *Cf.* David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 210 (2018) (critically discussing some of President Trump's major anti-immigration projects).

33. Adarand Constructors v. Peña, 515 U.S. 200 (1995) (Ginsburg, J., dissenting). *See also* Frank S. Ravitch, *Creating Chaos in the Name of Consistency: Affirmative Action and the Odd Legacy of* Adarand Constructors, Inc. v. Pena, 101 DICK. L. REV. 281 (1997).

34. *Cf.* Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 662 (2011); Saby Ghoshray, *Is There a Human-Rights Dimension to Immigration? Seeking Clarity through the Prism of Morality and Human Survival*, 84 DENV. U. L. REV. 1151, 1168 (2007) (both analyzing the law, politics and jurisprudence of immigration).

35. Exec. Order No. 13,769, 82 FR 8977 (Jan. 27, 2017) (Exec. Order 13,769); Exec. Order No. 13,780, 82 FR 13209 (Mar. 6, 2017) (Exec. Order 13,780), both titled *Protecting the Nation from Foreign Terrorist Entry into the United States*; Proclamation No. 9645 82 Fed. Reg. 45,161 (Sept. 24, 2017), titled *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats* (Proclamation 9723).

36. Khaled A. Beydoun, *Muslim Bans and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1735 (2017) (arguing that the Muslim ban fits a long tradition of Islamophobia that has always been present in the American law and politics of immigration); Ved P. Nanda, *Migrants and Refugees Are Routinely Denied the Protection of International Human Rights: What Does the Future Hold?*, 45 DENV. J. INT'L L. & POL'Y 303, 315 (2017) (arguing that the travel ban incarnates anti-immigration rhetoric of President Trump). *See also* Adrienne Rodriguez, *A Cry for Change: The Fallacy of the American Dream for K-4 Children*, 16 SEATTLE J. SOC. JUST. 399, 422 (2017) (relating the tougher attitude toward immigration to the election of President Trump).

37. Yaser Ali, *Shariah and Citizenship—How Islamophobia is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027 (2012) (exploring on the roots of the Save Our State Amendment and arguing that this legal initiative fits the tendency of Islamophobia, which reinforces racism toward Arab Americans). *See generally* on the uselessness of anti-Sharia legislation: Lee Ann Bambach, *Save us from Save Our State: Anti-Sharia Legislative Efforts across the United States and Their Impact*, 13 J. ISLAMIC L. & CULTURE 72 (2011) (warning against the negative effects of anti-Sharia legislation upon businesses, arguing that State and Federal law provide enough remedies against alleged human rights violations under Sharia law).

What can we say about the contemporary tenor of politics surrounding immigration, immigrants, and non-white citizens generally? How shall we appraise, for example, an incident that took place not so long ago in Washington D.C.? A group of teenagers, equipped with "Make America Great Again" apparel, were caught in an altercation with Nathan Phillips, a Native American activist and Omaha tribe elder. The teenagers allegedly chanted "build the wall!"[38]—a reference to President Trump's plan to build a wall physically separating the United States from Mexico.[39]

How can we rationalize accusations of disloyalty against politicians with immigrant backgrounds?[40] Take, for example, Rashida Tlaib, who is among the first ever Muslims in Congress and one of only two Muslim women ever elected to the House of Representatives. She has been considered, by some, to be a potential danger because of her Islamic and Palestinian background. One Florida city commissioner went so far as to accuse Representative Tlaib "of being a 'danger' who might 'blow up' the U.S. Capitol."[41] Similar accusations have been raised against Republican

38. This is a contentious example since there is no video-recorded evidence of pupils shouting "build the wall!" *See* David Williams & Emanuella Grinberg, *Teen in confrontation with Native American elder says he was trying to defuse the situation*, CNN (Jan. 23, 2019), https://edition.cnn.com/2019/01/19/us/teens-mock-native-elder-trnd/index.html (last visited Feb. 15, 2019). The reference might also be contentious as "Make America Again" hats are a hype among teens "to signify you're on a "winning" team." *See* Rebecca Jennings, *It isn't just the Covington Catholic students—MAGA hats are a teen trend*, VOX (Jan. 22, 2019), https://www.vox.com/the-goods/2019/1/22/18192933/covington-catholic-maga-teen-nick-sandmann-hat (last visited Feb. 15, 2019) (noting that although the hats might be a teen hype, there are reports revealing how students wearing such hats have harassed their fellow students with an immigrant or non-white background).

39. Referring to the Washington D.C. incident might be contentious, however it is valuable for the argument this article will develop about the rise of using hostile rhetoric in the politics to talk about immigration and people with an immigrant background. In this respect, "Make America Great Again" is a clear sign of support for President Trump who was elected after running a campaign full of rhetoric against immigration and people with an immigrant background. *See* Lindsay Pérez Huber, *Make America Great again: Donald Trump, Racist Nativism and the Virulent Adherence to White Supremecy Amid U.S. Demographic Change*, 10 CHARLESTON L. REV. 215, 224 (2016).

40. Most notably against former President Obama who has been "accused" of being secretly a Muslim ruling the United States. *See* Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 848 (2011) (saying that Obama was accused of being born outside the United States, and having a hidden faith: the Islam).

41. *See* Holly Rosenkrantz, *Florida official says U.S. Rep. Rashida Tlaib may "blow up" Capitol*, CBS NEWS (Jan. 24, 2019), https://www.cbsnews.com/news/florida-official-says-rep-rashida-tlaib-may-blow-up-the-capitol/ (last visited Feb. 15, 2019) (quoting Anabelle Lima-Taub, a Florida official, who has called Rashida Tlaib a "Hamas-loving anti-Semite . . . [who] would not put it past her to become a martyr and blow up Capitol Hill."). Similar accusations have been raised against the other Muslim representative Ilhan Omar. *See* Katie Mettler, *'Just deal,' Muslim lawmaker Ilhan Omar says to Pastor who complained about hijabs on House floor*, WASH. POST (Dec. 7, 2018), https://www.washingtonpost.com/religion/2018/12/07/just-deal-muslim-lawmaker-ilhan-omar-says-pastor-who-complained-about-hijabs-house-floor/?utm_term=.cf94512b35c8 (last visited Feb. 15, 2019) (quoting the critics to the allowance of headscarves in the House of Representatives).

Shahid Shafi, elected Southlake City Council member and vice chairman of the Tarrant County Republican Party in Texas. His Muslim background has been used to portray him as an unreliable person. In a special rally, the Tarrant Republicans asked the party, in vain, to remove Sahid Shafi from his political post. As a practicing Muslim, the Tarrant Republicans reasoned Shafi would not be able to represent the Party, since "not [all] Republicans . . . think Islam is safe or acceptable in the U.S., in Tarrant County, and in the [Republican Party]."[42]

Does the language used today to talk about immigration and those with immigrant backgrounds or non-white appearances indicate that we have entered an entirely new era? No. Immigration has always been a subject of political debate in the United States.[43] Are the measures that target some religious groups for special bans and restrictions unique in their sort? Not really. In the past, some immigrants were expelled from the colonies by powerful settlers because of their "heretic" views. More generally, some colonies were "not open" to Baptists, Jews, and Quakers. And, until very recently, Catholics in the United States suffered from widespread feelings of animosity and prejudice dating back from the Irish migration wave during the nineteenth century.[44]

Can we say that actual or propagated bans that single out the Islamic faith *qua* Islamic faith for special prohibitions and restrictions—such as those targeting Muslims *qua* Muslims—add an entirely new perspective to the debate about the law and politics of immigration in the United States? Even this is not the case. For decades, immigrants from predominantly Muslim nations, including non-Muslim immigrants such as Christians, were deprived the right to become full citizens of the United States.[45] In the years following the 2001 terrorist attacks, racial

42. Adeel Hassan, *Texas Republicans Rally Behind Muslim Official as Some Try to Oust Him Over Religion*, N.Y. TIMES (Jan. 10, 0219), https://www.nytimes.com/2019/01/10/us/muslim-republican-shahid-shafi-texas.html (last visited Feb. 15, 2019) (quoting Dorrie O'Brien).

43. *Cf.* Pooja R. Dadhania, *Deporting Undesirable Women*, 9 UC IRVINE L. REV. 53 (2018). *See also* Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611 (2017) (arguing that history contains many examples of anti-immigration policies); Amanda Frost, *Independence and Immigration*, 89 S. CAL. L. REV. 485 (2016) (analyzing immigration law from a historical perspective); David B. Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 6 (2016) (providing a historical overview of immigration policies); Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 395 (2017) (discussing the future of deportation law and paying attention to the history of this debate, revealing that immigration has always been part of the political debate). *See also* Martha C. Nussbaum, *Lockean Neutrality versus Religious Accommodation*, 11 DARTMOUTH L.J. 1 (2013) (pointing to the accommodation challenge faced by colonists and caused by migrants).

44. MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE 7 (2012).

45. Beydoun, *supra* note 36, at 1735. *See* for a thorough analysis of this form of racial discrimination: Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of*

profiling, discrimination, and hatred have been major issues for those with immigrant backgrounds in the United States.[46] This group includes not only Muslims, but others whose appearances are similar to adherents of the Islamic faith,[47] including those with headscarves or turbans, beards, non-Hispanic brown complexions, and Middle-Eastern postures.[48]

Our brief analysis of the law and politics surrounding immigration reveals that neither the strong language used in connection with immigrants, nor the policies related to immigration, indicate that we have entered a new anti-immigration era. In both cases, stereotypes appear to be persistently present, governing the tone of the debate as well as the seriousness of the interventions designed to regulate immigration.[49] These persistent stereotypes have generated serious concern regarding undocumented immigrants, illegal border crossings, and national security threats. The latter concern is often used to justify

Arab American Identity, 69 N.Y.U. ANN. SURV. AM. L. 29 (2013) (exploring on the roots and meaning of "whiteness," which was for a long period a requirement for a successful citizenship application, pointing to the lack of scholarly attention to cases that have challenged this racial discrimination). *See also* Jonathan Weinberg, *Proving Identity*, 44 PEPP. L. REV. 731, 742 (2017) (arguing that the Naturalization Act of 1790 made it practically impossible for the group of Chinese immigrants to become citizens of the United States); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1744 (1993) (arguing that whiteness was important because of the associated privileges).

46. Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215 (2005). Makau Mutua, *Terrorism and Human Rights: Power, Culture, and Subordination*, 8 BUFF. HUM. RTS. L. REV. 1 (2002) (exploring on the roots of the "War on Terror," which has drawn a line between us—the civilized world—and them.). *See also* Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law*, 66 EMORY L.J. 669 (2017) (discussing how the national security agenda has shaped contemporary immigration policies); Sara Mahdavi, *Held Hostage: Identity Citizenship of Iranian Americans*, 11 TEX. J. ON C.L. & C.R. 211 (2006); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2001) (critical of the security measures post 9/11).

47. Romtin Parvaresh, *Prayer for Relief: Anti-Muslim Discrimination as Racial Discrimination*, 87 S. CAL. L. REV. 1287, 1313 (2014); Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years after 9/11*, 13 N.Y. CITY L. REV. 33, 43 (2009); Vijay Sekhon, *The Civil Rights of Others: Antiterrorism, the Patriot Act, and Arab and South Asian American Rights in Post-9/11 American Society*, 8 TEX. F. ON C.L. & C.R. 117 (2003) (discussing how non-Muslims have suffered from racial profiling and hatred after the 9/11 terrorist attacks).

48. Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1 (2018) (exploring on the consequences of purposefully manifesting or hiding the Islamic faith in public).

49. Today, the explicit use of anti-immigration rhetoric has become very common among a major part of the political establishment. Furthermore, it has provoked the immigration debate and shaped the contours of the contemporary political discourse concerning this subject. As such, the 2018 midterms showed a clear uprise of Islamophobic rhetoric in the political campaigns. More generally, the 2016 election of President Trump resulted in a tougher attitude toward immigration and immigrants. This attitude has manifested its face in two ways. First, the language that has been used to discuss immigration has generally an aggressive tone. Second, there is a proliferation of actual or propagated restrictions that aim to reduce the immigration numbers. What is striking about both political developments, is the use of many stereotypes. *See* Nanda, *supra* note 36.

the special need for radical measures in the fight against immigration—measures that range from building a separation wall between the United States and Mexico,[50] to issuing travel bans that deny citizens of some countries access to the United States.[51]

People with immigrant backgrounds often suffer harassment, hatred, and racial profiling as a consequence of this harsh political reality.[52] Remaining silent in the face of this discrimination only advances the process of creating parallel societies with second-class citizens.[53] This interim conclusion exhorts us to be cautious. While the inaccessibility of the American Dream remains a larger issue, the re-emergence of Islamophobia is especially concerning. This article thus focuses on the challenges faced by the Muslim community today. Specifically, this article explores how the contemporary anti-immigration climate—particularly the increased focus on border protection—has impacted the Muslim community.

Part I of this article focuses on recent public decisions burdening Muslims, such as the travel bans implemented by President Trump, and analyzes the legality of those policies. Part II looks critically at how particular steps taken in the public and private fields have contributed to the racialization of Muslims.[54] This Part explores the stereotypes and conspiracy theories developed to gain political support for far reaching anti-immigration policies. Not only do these policies aim to limit opportunities for legal immigration to the United States, they specifically target people with immigrant backgrounds, such as the Muslim community.[55] In Part III, the article draws upon this theoretical framework to introduce a strategy to overcome this era of fear, anxiety,

50. Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1 (2016) (providing a thought-provoking explanation for the rise of physical walls separating states).

51. Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 257 (2017) (describing how the Trump administration framed the travel ban for different purposes. Toward its supporters of a more strict immigration policy, it was presented as the promised Muslim ban. In courts, it was defended as a necessary security measure). *See also* Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253 (2018) (arguing that much of the immigration policies today, continue the line that was set out by preceding administrations).

52. *Cf.* Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 564 (2019) (giving some examples of racism and discrimination in which the Trump administration was involved).

53. Ali, *supra* note 37, at 1031 (arguing that "growing anxiety and antagonism toward Islam and Muslims—Islamophobia—as exhibited by the Oklahoma law is creating a distinct second-class citizenry."). *See also* Mohammad-Mahmoud Ould Mohamedou, *Responsibility, Injustice and the American Dilemma*, 11 BUFF. HUM. RTS. L. REV. 3 (2005).

54. Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E. L. 121, 142 (2008) (positing that racialization of Muslims has resulted in "a new zone of lawlessness where [Muslims] are neither citizen nor alien, but rather [adherents of the] inherently evil world called "Islam."").

55. MUSLIM ADVOCATES, RUNNING ON HATE (2019).

and intolerance toward newcomers and those with immigrant backgrounds. This article concludes that the racialization of people with immigrant backgrounds contributes to the creation of parallel societies. This development, in turn, negatively affects equal access to fundamental liberties. Consequently, not everyone has an equal ability to flourish in life and to achieve the promises of the Declaration of Independence that made the American Dream possible. A final reflection about the tendency of singling out certain groups for special prohibitions follows in the epilogue of this article.

I. PROTECT OUR NATION FROM MUSLIMS

In what has been considered Donald Trump's "most infamous anti-Muslim screed," he called for "a total and complete shutdown of Muslims entering the United States."[56] This dramatic call came just days after the 2015 terrorist attack in San Bernardino. At the time, Donald Trump was a frontrunner in the Republican Party's primaries for the 2016 presidential elections. In a sense, his call for singling out Muslims for a special entry ban did not came as a surprise.[57] This was not Donald Trump's first anti-Muslim plan. Prior to these statements, Donald Trump had shown a strong aversion to granting asylum to refugees coming from Syria, comparing them to the "Trojan horse."[58] He also suggested closing mosques, colorfully describing them as places where "some of the hatred—the absolute hatred—is coming from."[59] Thus, the call to introduce an entry ban singling out Muslims *qua* Muslims fit a longer tradition of proposals targeting both Muslims and their religion for special restrictions and prohibitions.[60] However, this call to stop Muslims coming to the United States was something more than putting out an anti-immigration feeler—it set the tone for a new, anti-Muslim

56. Gregory Krieg, *Trump's history of anti-Muslim rhetoric hits dangerous new low*, CNN (Nov. 30, 2017), https://edition.cnn.com/2017/11/29/politics/donald-trump-muslim-attacks/index.html (last visited Feb. 15, 2019) (quoting Donald Trump who advocated for a Muslim ban until the authorities have "[figured] out what the hell is going on.").
57. *Cf.* Vienna Flores, *Competing Paradigms of Immigrant Human Rights in America*, 21 LAW & BUS. REV. AM. 459, 466 (2015); Tyler Lloyd, *Closing the Golden Door: The Potential Legality of Donald Trump's Ban on Muslim Immigration*, 30 GEO. IMMIGR. L.J. 399 (2016) (critical of a Muslim ban).
58. Jenna Johnson & Abigail Hauslohner, '*I think Islam hates us': A timeline of Trump's comments about Islam and Muslims*, WASH. POST (May 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?noredirect=on&utm_term=.418b059fabaa (last visited Feb. 15, 2019) (providing an overview of anti-Muslim statements made by Donald Trump).
59. *Id.*
60. *Cf.* Pérez Huber, *supra* note 39, at 225 (on Trump's attitude toward the Latino community).

rhetoric.[61]

The call to stop Muslims from entering the United States soon proved to be more than political rhetoric. In 2016, newly-elected President Trump suited the action to the word, and the word to the action. Upon taking office, he issued two Executive Orders and one Proclamation, predominantly targeting travelers from Muslim-majority countries.[62] The "Muslim Ban" became a reality,[63] throwing the United States back to a dark era of racial discrimination.[64] This Part analyzes the history of the travel bans and the various case law addressing the lawfulness of these restrictions.

A. Executive Order 13,769

Despite harsh criticism from lawyers, political leaders, and commentators, the newly elected President introduced Executive Order 13,769, popularly known as the "Muslim Ban," just days after the presidential election.[65] By signing this order, titled *Protecting the Nation from Foreign Terrorist Entry into the United States*, the President paved the way for the realization of one of his major election pledges: enacting a travel ban for Muslims.[66] After all, Donald Trump's election campaign was highly dedicated to border protection and national security issues,

61. Johnson & Hauslohner, *supra* note 58 (quoting Trump saying: "I think Islam hates us."). *See also* Khaled A. Beydoun, *9/11 and 11/9: The Law, Lives and Lies that Bind*, 20 CUNY L. REV. 455 (2017) (discussing the anti-Muslim agenda of President Trump).

62. Matthew J. Lindsay, *The Perpetual Invasion: Past as Prologue in Constitutional Immigration Law*, 23 ROGER WILLIAMS U. L. REV. 369, 389 (2018) (rightly pointing out that Trump's anti-Muslim rhetoric during the presidential campaign, was something more than a slip of the tongue).

63. *See* for an overview of travel restrictions that targeted Muslims: Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1502 (2018).

64. Julia G. Young, *Making America 1920 again? Nativism and US Immigration, Past and Present*, 5 J. ON MIGRATION & HUM. SEC. 217 (2017) (comparing the anti-immigration era of 1920 to the present day, concluding that there are many similarities between the two eras of nativism).

65. Jennifer Lee Barrow, *Trump's Travel Ban: Lawful but Ill-Advised*, 41 HARV. J. L. & PUB. POL'Y 691 (2018) (defending the line that border and admission questions fall under the authority of the president, making the Executive Order 13,769 lawful); Michael B. Mukasey, *Judicial Independence: The Fortress Threatened from within*, 47 U. MEM. L. REV. 1223 (2017) (defending the ban as a matter of national security); Virgil Wiebe, *The Immigration Hotel*, 68 RUTGERS U.L. REV. 1673, 1684 (2016) (arguing that challenging restrictive immigration laws before the court would be difficult, because of the "plenary power doctrine."). *See also* Charles Gordon, *The Alien and the Constitution*, 9 CAL. W. L. REV. 1 (1972) (paying attention to the limited role judges play in assessing the legality of immigration laws because of the "plenary power doctrine").

66. Exec. Order 13,769, at 8977. *See also* Harold A. Lloyd, *Speaker Meaning and the Interpretation and Construction of Executive Orders*, 8 WAKE FOREST J. L. & POL'Y 319, 332 (2018) (analyzing Trump's anti-Muslim rhetoric and its contribution to the enacted travel restrictions).

focusing specifically on who enters the country and how to stop those invaders.[67]

Executive Order 13,769 aimed to protect the United States against foreign terrorism, drawing on experiences from the 9/11 attacks. The main purposes of this order were to fill an important security gap and eliminate opportunities for foreign nationals to commit acts of terrorism within the United States.[68] The Order urged authorities to approach foreign nationals' travel requests with stricter scrutiny.[69] The main argument behind this tougher attitude toward immigration and border protection was that:

> [the] United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.[70]

Upon first read, Executive Order 13,769 singled out troublemakers for special travel restrictions. But more specifically, this order suspended—categorically—the issuance of travel visas and other "immigration benefits" to nationals of "countries of particular concern."[71] Although not all explicitly mentioned in the text, these countries of particular concern included Syria, Iraq, Iran, Libya, Somalia, Sudan, and Yemen. This was evident from the decision to revoke all issued and valid visas—except diplomatic visas—to nationals from these seven

67. *Cf.* Stuart Chinn, *Threats to Democratic Stability: Comparing the Elections of 2016 and 1860*, 77 MD. L. REV. 291 (2017); A. Reid Monroe-Sheridan, *Frankly Unthinkable: The Constitutional Failings of President Trump's Proposed Muslim Registry*, 70 ME. L. REV. 1 (2017) (both arguing that immigration and Islam were amongst the hot topics of Trump's election campaign).

68. Exec. Order 13,769, at 8977 (in Section 1, the Order explains that "while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.").

69. *Id.*

70. *Id.*

71. *Id.* The only country mentioned by name was Syria for the purposes of halting the entry of refugees coming from this country. The list of particular concern countries that faced travel restrictions was developed by the Obama administration, following the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015. However, the latter did not categorically suspended the entry of *any* national from the countries on the list, it only posed certain restrictions upon those nationals to whom the Visa Waiver Program applied.

countries.[72]

The issued travel restrictions targeted people from Muslim-majority countries in particular. Put differently, Executive Order 13,769 *predominantly* singled out Muslims for a special prohibition: travel to the United States.[73] The restrictions consisted of a general ban on travelling to the United States for a period of 90 days. Additionally, the order urged the Secretary of State to halt the admission of refugees—regardless of their origin—for a period of 120 days, and to suspend the entry of Syrian refugees indefinitely, claiming the presence of pressing security needs.[74]

However, Executive Order 13,769 did allow the Secretaries of State and Homeland Security "to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest."[75] In this respect, the ban urged authorities to expedite refugee applications from persecuted members of religious minority groups who would not pose security or welfare risks upon their arrival into the United States.[76] Despite the presence of this tiny exit door, scholars still criticized the ban for its vagueness, arbitrariness, and willingness to stigmatize, drawing on strong anti-Muslim stereotypes, such as honor killings and other forms of gender-related violence.[77]

Executive Order 13,769 caused a wave of public indignation and worldwide condemnation after media reports leaked footage of dozens of

72. United States Department of State, No. 1:17-cv-10154-NMG (Jan. 27, 2017).

73. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2192 (2018); Josh Blackman, *The Legal Resistance*, 9 FAULKNER L. REV. 45, 56 (2017); Latoya Tyson, *A Wolf in Sheep's Clothing: Executive Order No. 13, 780 as a Disguise for a Muslim Ban: The Implications of* International Refugee Assistance Project v. Trump, 40 N.C. CENT. L. REV. 140, 141 (2017) (all saying that Executive Order 13,769 was designed to stop Muslims from visiting the United States).

74. Exec. Order 13,769, at 8979 (arguing that the entry of Syrian refugees could harm national interests).

75. *Id.*

76. *Id.* (also people in transfer could be exempted). Critical of the choice to favor religious minority groups: Barrow, *supra* note 65, at 715 (speaking of a "poor policy choice" in this respect).

77. Kate Aschenbrenner Rodriguez, *Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court's Immigration Jurisprudence*, 86 U. CIN. L. REV. 215, 218 (2018) (criticizing Executive Order 13,769 because of the "vague" language used); Kaila C. Randolph, *Executive Order 13,769 and America's Longstanding Practice of Institutionalized Racial Discrimination towards Refugees and Asylum Seekers*, 47 STETSON L. REV. 1, 35 (2017); Melissa Brooke Winkler, *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States: Violating First Amendment Rights or Altering Constitutional Provisions Granting Foreign Policy Powers to the President*, 34 T. M. COOLEY L. REV. 79, 83 (2017) (referring to the critics asking why countries that have supported terrorism, such as, Saudi Arabia, were not put on the list of countries affected by the Executive Order 13,769); Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment*, 2017 BYU L. REV. 779, 825 (2017); Eunice Lee, *Non-Discrimination in Refugee and Asylum Law (against Travel Ban 1.0 and 2.0)*, 31 GEO. IMMIGR. L.J. 459, 464 (2017) (both positing that the aim to keep honor killers outside the United States is an obvious reference to Muslims).

stuck and detained travelers.[78] The enacted travel restriction further provoked heated debate among legal scholars and immigration attorneys. This debate was specifically geared toward claims of First Amendment violations,[79] given the specific political context in which the travel restrictions were realized,[80] and the clear presence of favoritism toward religious minority groups.[81]

It did not take long before this travel restriction was challenged in court. In fact, the litigation journey started just hours after the announcement of the restrictions. On January 28, 2017, in *Darweesh v. Trump*, District Judge Ann Donnelly ordered a temporary injunction halting the removal of passengers with valid travel documents who were affected by the imposed travel restriction.[82]

On the same day, in *Aziz v. Trump*, District Judge Leonie Brinkema from Virginia granted a Temporary Restraining Order ("TRO"), ordering authorities to provide lawyers access to affected travelers at Dulles International Airport who were in possession of valid entry documents, such as green cards. Judge Brinkema further enjoined authorities from

78. Enid Trucios-Hyanes & Marianna Michael, *Mobilizing a Community: The Effect of President Trump's Executive Orders on the Country's Interior*, 22 LEWIS & CLARK L. REV. 577, 590 (2018) (both paying attention to the role media and attorneys played in challenging the lawfulness of Executive Order 13,769, specifically drawing attention on the allegedly unlawful detention of travelers coming from the banned countries). *See also* Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 203 (2018). *See* on the importance of using the media in another context: Mimi A. Akel, *The Good, the Bad, and the Evils of the #MeToo Movement's Sexual Harassment Allegations in Today's Society: a Cautionary Tale Regarding the Cost of These Claims to the Victims, the Accused, and Beyond*, 49 CAL. W. INT'L L.J. 103, 106 (2018).

79. Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391 (2018) (critically discussing the First Amendment argument, positing however that admission policy concerns—falling under the authority of the legislative and executive branches of power—are rather political of nature); Gary Feinerman, *Civility, Dignity, Respect, and Virtue*, 71 STAN. L. REV. ONLINE 140, 144 (2018) (briefly highlighting the Establishment Clause argument).

80. *See* on the importance of the broader political context for determining the lawfulness of the imposed travel restrictions: John G. Roberts, Jr. et al. *In Tribute: Justice Anthony M. Kennedy*, 132 HARV. L. REV. 1, 20 (2018) (referring to the travel ban controversy and rhetorically asking "what if (some) words are part of the problem?"); Anton Sorkin, *Make Law, Not War: Solving the Faith/Equality Crisis*, 12 LIBERTY U. L. REV. 663, 723 (2018) (briefly discussing the concept of "extrinsic" evidence that helps to prove the main objective behind certain actions).

81. Keith A. Petty, *Duty and Disobedience: The Conflict of Conscience and Compliance in the Trump Era*, 45 PEPP. L. REV. 55, 79 (2018).

82. Darweesh v. Trump, No. 17 Civ. 480 (AMD) (E.D. N.Y. Jan. 28, 2017) (two Iraqi men, Mr. Darweesh and Mr. Alshawi, were on their way to the United States with valid travel visas. However, because of the travel restrictions, both were banned from entering the country and put in detention) (case information, *available at* https://www.aclu.org/cases/darweesh-v-trump) (last visited Feb. 15, 2019). *See also* Matthew R. Segal, *Civil Rights and State Courts in the Trump Era*, 12 HARV. L. & POL'Y REV. 49 (2018) Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Carson Holloway, *Judicial Review and Subjective Intentions*, 9 FAULKNER L. REV. 1 (2017) (all paying attention to *Darweesh* and similar cases).

removing those passengers.[83]

In another TRO granted one day after *Darweesh* and *Aziz*, District Judge Allison Burroughs of Massachusetts also enjoined authorities from removing affected passengers in possession of lawful travel documents and who, "absent the Executive Order, would be legally authorized to enter the United States."[84] This TRO also ordered authorities "to notify airlines that have flights arriving at Logan Airport of this Order and the fact that individuals on these flights [cannot] be detained or returned based solely on the basis of the Executive Order."[85]

Although none of these temporary orders explicitly required authorities to provide entry to affected travelers,[86] the Trump administration sharply criticized these legal decisions,[87] and reiterated that it would continue enforcing the travel restrictions "humanely and with professionalism . . . to protect the homeland."[88] The criticism, however, did not come only from the Trump administration. Legal scholars also expressed criticism of the way the judges blocked enforcement of the executive order.[89] Specifically, the critics were concerned about the issuance of nationwide injunctions enjoining authorities from enforcing the travel restrictions.[90] Critics questioned the constitutionality of issuing geographically unlimited restraining orders, or nationwide injunctions.[91] This criticism arose specifically in the aftermath of the court's decision—first granting a nationwide TRO and

83. Aziz v. Trump, No. 1:17-cv-116 (E.D. Va. Jan. 28, 2017).
84. Tootkaboni v. Trump, Civil Action No. 17-CV-10154 (D. Mass. Jan. 29, 2017), motion for extension of TRO declined in Louhghalam v. Trump, 230 F. Supp. 3d 26 (D. Mass. 2017).
85. *Id. See also* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1099 (2018) (pointing to the geographical limitedness of the TRO in *Tootkaboni*, and the confusion it has caused regarding the question who is allowed to enter the country).
86. An exception to this: Mohammed v. Trump, No. CV 17-00786 AB (C.D. Cal. Jan. 31, 2017) (enjoining the authorities from "blocking the entry" for anyone traveling on a valid visa, though affected by the travel restrictions).
87. Rebecca Buckwalter-Poza, *New Sheriff, Old Problems: Advancing Access to Justice under the Trump Administration*, 127 YALE L.J. F. 254, 267 (2017).
88. DHS Statement On Compliance With Court Orders And The President's Executive Order, transcript, *available at* https://www.dhs.gov/news/2017/01/29/dhs-statement-compliance-Court-orders-and-presidents-executive-order (last visited Feb. 15, 2019).
89. Frost, *supra* note 85, at 1068 (referring to legal critics of the legal steps set to freeze the travel restrictions). In this regard, Frost refers, among others, to Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); and, Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017) (both critical of nationwide injunctions).
90. Frost, *supra* note 85, at 1068, 1090 (providing three counter-arguments in favor of nationwide injunctions: (i) if that is the only way for complete relief; (ii) in case it avoids irreparable injuries; (iii) when geographically curtailed injunctions would end up in chaos).
91. Josh Blackman, *The 9th Circuit's Contrived Comedy of Errors in* Washington v. Trump, 95 TEX. L. REV. SEE ALSO 221, 225 (2016). *See also* Matthew Erickson, *Who, What, and Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 352 (2018) (developing a balancing test to assess the necessity of nationwide injunctions).

later denying the stay thereof, pending an emergency appeal—in *Washington v. Trump*, where the state of Washington, later joined by Minnesota, challenged the lawfulness of the enacted travel restrictions.[92]

While both the district court and the court of appeals appeared to sympathize with the states' view that the travel restrictions had negatively affected them, neither court thoroughly engaged with allegations that the travel restrictions were designed to ban Muslims from entering the United States. This was likely due to the highly "sensitive interests" involved in the litigation and the relatively limited task of the court.[93] Particularly relevant here is the courts' discussion of separation of powers and the judiciary's role to review immigration policies. District Judge James Robart admitted he lacked authority

> to create policy or judge the wisdom of any particular policy promoted by the other two branches. That is the work of the legislative and executive branches and of the citizens of this country who ultimately exercise democratic control over those branches. The role of the Judiciary and this Court, is limited to ensuring that the actions taken by the other two branches comport with our country's laws, and more importantly, our Constitution.[94]

On appeal, the Ninth Circuit continued this discussion on separation of powers. While assessing the emergency motion of the Federal Government to stay the TRO, pending an emergency appeal, the court reasoned that

> [although] our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our Court has ever held that Courts lack the authority to review executive action in those arenas for compliance with the Constitution. To the contrary, the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution when policymaking in that context.[95]

92. No. C17-0141JLR (W.D. Wash. Feb. 3, 2017) (granting a nationwide TRO), *aff'd*, 847 F.3d 1151 (9th Cir. 2017) (denying a stay of the granted TRO).
93. *Cf.* Washington v. Trump, No. C17-0141JLR (W.D. Wash. Feb. 3, 2017); 847 F.3d 1151 (9th Cir. 2017).
94. Washington v. Trump, No. C17-0141JLR (W.D. Wash. Feb. 3, 2017).
95. Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (also refusing—with reference to Texas v. United States, 809 F.3d 134 (5th Cir. 2015) *aff'd sub nom* United States v. Texas, 136 S. Ct. 2271—any geographical limit of the TRO, because "such a fragmented

This precedential backdrop led the Ninth Circuit to the conclusion that it had the authority to review the lawfulness of executive actions.[96] In ruling on the emergency motion to stay the TRO, the court employed a four-part test:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[97]

The Ninth Circuit concluded—preliminarily—that the Government failed to meet its burden regarding the first two elements.[98] The court further noted that the last two elements of the test also did not weigh in favor of the Government.[99] Ultimately, the Ninth Circuit denied the

immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy.").

96. *Id*. (positing that "although Courts owe considerable deference to the President's policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action."). *See also* Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 572 (2018) (arguing that compared to the district court's discussion of the separation of powers argument, the Ninth Circuit's discussion of this argument was less political of nature, rather it was based "(facially) on more technical statutory interpretation.").

97. *Id*. (quoting Lair v. Bullock, 697 F.3d 1200, 1203 (9th Cir. 2012), which quotes Nken v. Holder, 556 U.S. 418, 433 (2009), and saying that the first two questions are in fact leading, while the last two steps matter, only after the first two question have been answered).

98. *Id*. (concluding with reference to the Fifth Amendment of the Constitution that authorities have failed to prove that the enacted regime of travel restrictions "provides what due process requires, such as notice and a hearing prior to restricting an individual's ability to travel. . . . Rather, . . . the Government argues that most or all of the individuals affected have no rights under the Due Process Clause." Also concluding that the authorities have failed to prove that the absence of a stay would cause irreparable injury. Firstly, because the Government failed to prove the presence of an injury absent a stay. Secondly, because the injury that is allegedly caused due to "erosion of the separation of powers, . . . is not "irreparable."").

99. *Id*. (saying that "the States [of Washington and Minnesota] have offered ample evidence that if the Executive Order were reinstated even temporarily, it would substantially injure [them]." Also concluding that both parties can draw on public interests argument. "On the one hand, the public has a powerful interest in national security and in the ability of an elected president to enact policies. And on the other, the public also has an interest in free flow of travel, in avoiding separation of families, and in freedom from discrimination . . .; when considered alongside the hardships discussed above, these competing public interests do not justify a stay.").

stay.[100]

In response to this decision, President Trump quickly took to Twitter, writing: "SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!"[101] The President's challenge to go to court soon became a reality. Although the nationwide injunction had survived the first round of litigation, opponents of the travel restrictions continued to challenge the Executive order. The growing body of court rulings against the newly-enacted travel restrictions gave rise to a new category of arguments, challenging the legality of the restrictions based on religious discrimination, and specifically anti-Muslim discrimination.[102] But courts showed reservation about accepting such claims.[103]

However, in granting the preliminary injunction in *Aziz v. Trump* and enjoining authorities from enforcing a key section of Executive Order 13,769, the court noted the ambiguity of the Trump administration's reasoning for the travel restriction.[104] Inside the courtroom, the administration defended the restriction on neutral grounds, presenting it as a necessary security measure. But outside the court, the restriction was defended as a necessary means to address the "Muslim problem."[105] In discussing this ambiguity, the district court stated:

> [the] Establishment Clause concerns (…) do not involve an assessment of the merits of the president's national security judgment. Instead, the question is whether the EO was animated by national security concerns at all, as

100. *See also* S. Cagle Juhan & Greg Rustico, *Jurisdiction and Judicial Self-Defense*, 165 U. PA. L. REV. ONLINE 123, 135 (2017) (defending the anonymously written decision of the Ninth Circuit, as "anonymity frames the debate in institutional terms.").

101. Donald J. Trump (@realdDonaldTrump), TWITTER (Feb. 9, 2017, 3:35 PM), https://twitter.com/realdonaldtrump/status/829836231802515457 (last visited Feb. 15, 2019).

102. Admittedly, allegations, suggesting the enacted travel restrictions incarnate the promised Muslim ban were raised previously. *See, e.g.*, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (saying that the states have provided evidence related to the anti-Muslim character of the enacted travel restrictions).

103. *See* for a denial of the Establishment Clause arguments in relation to the imposed travel restrictions: Louhghalam v. Trump, 230 F. Supp. 3d 26, at 35 (D. Mass. 2017) ("[The argument] that [Executive Order 13,769] favors Muslims over Christians, in violation of the Establishment Clause [is wrong]. . . . Nothing [in the text of the Executive Order] compels a finding that Christians are preferred to any other group.")

104. 234 F. Supp. 3d 724 (E.D. Va. 2017) (enjoining the authorities from enforcing § 3(c) of the Executive Order 13,769, and specifying the targeted groups). *See also* Josh Blackman, *The Domestic Establishment Clause*, 23 ROGER WILLIAMS U. L. REV. 345, 346 (2018) (critical of accepting the Establishment Clause arguments in immigration law cases, positing that such arguments have "no place in the realm of foreign affairs and national security.").

105. 234 F. Supp. 3d 724, at 730 (E.D. Va. 2017)(discussing Trump's relationship with the travel restrictions enacted, before and after becoming President). *See generally* Chacón, *supra* note 51, at 257 (arguing that the enacted travel restrictions regime was defended differently for various uses, saying that "to supporters, it was the promised Muslim ban, but to Courts, it was not.").

> opposed to the impermissible motive of, in the context of entry, disfavoring one religious group and, in the area of refugees, favoring another religious group.[106]

The court further noted a "conceptual link between [the promised] Muslim ban and the [imposed travel restrictions]."[107] Referencing Rudy Giuliani's comments about the rationale behind the travel restriction,[108] the court concluded that the imposed restriction was not designed to meet a pressing security need.[109] More importantly, the court enervated the argument that authorities would become powerless if the imposed travel restriction was to be interpreted as a Muslim ban. The court qualified this fear as "exaggerated" and found the "the dearth of evidence indicating a national security purpose" persuasive.[110] The serious engagement of the court with this argument against the travel restriction makes *Aziz* an exceptional case.[111] Perhaps even more importantly, *Aziz* is the first ruling in which the court explicitly hinted to the unconstitutional nature of the travel restriction, concluding "enjoining unconstitutional action by the Executive Branch is always in the public's interest."[112]

While litigation continued in the aftermath of *Aziz* and *Washington v. Trump*,[113] the Trump administration announced it would issue a new

106. 234 F. Supp. 3d 724, at 735-36 (E.D. Va. 2017).
107. *Id*. at 737 (saying that what matters is the "discriminatory purpose" of the action).
108. *Id*. at 736 (Giuliani had linked the imposed restrictions to the promised Muslim ban).
109. *Id*. (saying that the context in which the travel restrictions were designed "bolsters the . . . argument that the [choice to enact those travel restrictions] was not motivated by rational national security concerns.").
110. *Id*. at 736 (also explaining why it does not take into account *post hoc* clarifications denying that the travel restrictions incarnate the promised Muslim ban).
111. Admittedly, arguments touching upon the legality of the enacted travel restriction from the angle of non-Establishment were discussed previously in Louhghalam v. Trump, 230 F. Supp. 3d 26, at 35 (D. Mass. 2017) (rejecting the argument that the imposed travel restrictions cause a violation of the guarantees under the Establishment Clause, saying that the language used in the Executive Order 13,769 is neutral and does not point at any stage to favoring one religious group over others).
112. Aziz v. Trump, 234 F. Supp. 3d 724, at 739 (E.D. Va. 2017). *Cf.* on the jurisprudential support in favor of this position of the court: Beatrice Catherine Franklin, *Irreparability, I Presume: On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions*, 45 COLUM. HUM. RTS. L. REV. 623, 665 (2014).
113. Not all litigation concerned cases about the constitutionality of the imposed travel restrictions, seeking for injunctions that should enjoin authorities from the enforcement of the newly enacted restrictions. However, the cases were *in some way* related to the broader legal debate about the travel restrictions. *Cf.* for example: Decker v. Washington, No. 3:17-CV-00254, 2017 WL 891318 (M.D. Pa. Feb. 14, 2017) (asking the court to overturn the denial of stay decision of the Ninth Circuit); McDonnell v. City and Cty. of Denver, 238 F. Supp. 3d 1279 (D. Colo. 2017) (on the lawfulness of the authorities' decision to prevent an anti-travel ban demonstration); Taiebat v. Scialabba, No. 17-cv-0805-PJH, 2017 WL 839807 (N.D. Cal. Mar. 3, 2017) (aimed at changing his legal status as non-immigrant working and living in the United States, as he was afraid of not being allowed to re-enter the country as an Iranian citizen). *Cf.* for a ruling brought before the court by the challengers of the travel

round of travel restrictions more "tailored to [the] very bad decision" of the Ninth Circuit.[114] On March 6, 2017, almost six weeks after the announcement of the first Executive order, the administration revoked Executive Order 13,769 and issued Executive Order 13,780, also titled *Protecting the Nation from Foreign Terrorist Entry into the United States*. The pending appeal in the Ninth Circuit was voluntarily dismissed.[115]

B. Executive Order 13,780

In many ways, the new version of *Protecting the Nation from Foreign Terrorist Entry into the United States* was similar to its predecessor, Executive Order 13,769.[116] Executive Order 13,780 retained the fixed period entry ban for nationals of six predominantly Muslim countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen, claiming their admission "would be detrimental to the interests of the United States."[117] Additionally, the fixed period suspension of admitting refugees under the U.S. Refugee Admissions Program remained unhurt.[118] The same is true for the reference to potential foreign troublemakers, such as honor killers.[119]

However, this new travel restriction also contained important differences from the previous order.[120] Iraq was removed from the list of countries affected by the travel restrictions,[121] and the choice to keep the other countries on the list was explicitly justified.[122] Additionally, the

restriction: International Refugee Assistance Project v. Trump, No. TDC-17-0361, 2017 WL 818255 (D. Md. Mar. 1, 2017) (granting the motion to proceed under pseudonyms).

114. Laura Jarrett et al., *Trump promises new immigration order as DOJ holds off appeals Court*, CNN (Feb. 17, 2017), https://edition.cnn.com/2017/02/16/politics/donald-trump-travel-ban-executive-order/ (last visited Feb. 15, 2019).

115. Nanda, *supra* note 36, at 318. *See also* Washington v. Trump, 853 F.3d 933 (9th Cir. 2017) (Bybee, J., dissenting from the majority's opinion not to rehear the case en banc and saying that "[even] if we have questions about the basis for the President's ultimate findings—whether it was a "Muslim ban" or something else—we do not get to peek behind the curtain. So long as there is one "facially legitimate and bona fide" reason for the President's actions, our inquiry is at an end.")

116. Barrow, *supra* note 65, at 693 (comparing the two versions of the Executive Orders and pointing to the similarities and differences between them).

117. Exec. Order 13,780, at 13213.

118. *Id*. at 13215 (also the case-by-case decision to admit some refugees in spite of enacted travel restrictions remained intact).

119. *Id*. at 13217 (urging the authorities to inform the President about "the number and types of acts of gender-based violence against women, including so-called "honor killings," in the United States by foreign nationals.").

120. Barrow, *supra* note 65, at 693.

121. Exec. Order 13,780, at 13212 (saying that "the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq.").

122. *Id*. at 13210-11.

new order provided guidance for dealing with those nationals who had been affected by the travel restrictions but possessed valid travel documents.[123]

More importantly, Executive Order 13,780 was Trump's response to the litigation surrounding revoked Executive Order 13,769 in general,[124] and in particular to the panel's opinion denying the government's motion to stay the TRO.[125] Consequently, the new order gave the President room to waive aside allegations of a discriminatory rationale behind the former version. President Trump defended the revoked version, saying:

> Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities.[126]

The President also showed serious disagreement with the Ninth Circuit's denial of the motion to stay. While the court agreed the executive branch is in a better position to make decisions concerning the admission policy, it—in spite of this important acknowledgement—"declined to stay or narrow [the granted TRO] pending the outcome of further judicial proceedings."[127] However, the "better position" argument led the President to design a new travel ban,[128] which "expressly exclude[d] from the suspensions categories of aliens that have prompted judicial concerns and which clarifie[d] or refine[d] the approach to certain other issues or categories of affected aliens."[129]

123. *Id.* at 13213-14 (for example, excepting green card holders, people with a valid travel visa, affected nationals with a dual citizenship, as long as the travel documents are not issued by one of the affected countries).
124. *Id.* at 13210 (speaking of a "delay" in the enforcement of the travel restrictions, due to litigations).
125. *Id.* (referring to the panel's opinion).
126. *Id.*
127. *Id.* Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (admitting the lack of authority "to . . . rewrite the Executive Order." Since the executive branch is "far better equipped to make appropriate distinctions").
128. Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1189 (2018) (saying that racial discrimination jurisprudence is "the strongest precedential authority for President Trump's executive actions" to enact travel restrictions against Muslims).
129. Exec. Order 13,780, at 13212.

These new justifications, explanations, and exemptions did not guarantee the full enforcement of the new travel restrictions. Rather, a new series of litigation began.[130] And again, the challengers to President Trump booked important victories in the courtroom.[131] The first nationwide TRO blocking implementation of the new travel restrictions was issued on March 15, 2017. In an opinion similar to *Aziz*, the district court of Hawaii enjoined authorities from enforcing Sections 2,[132] and 6 of the new Executive Order,[133] one day before the new restrictions came into effect.[134]

In issuing the injunction, the court discussed the allegations of Muslim discrimination behind the travel restrictions. Unlike the decision in *Louhghalam*, which found the language in the Executive Order neutral to religion,[135] the district court of Hawaii concluded that "statements by President and other government officials, in months leading up to and contemporaneous with signing of executive order, demonstrated that order was issued with purpose to temporarily suspend entry of Muslims, despite its stated religiously-neutral purpose of protecting United States from terrorist attacks."[136] This conclusion informed how the court dealt with the Government's claim that the enacted travel ban was designed to meet neutral security purposes.

The Government argued that the ban did not target the Islamic faith or all Muslims around the globe, emphasizing the fact that the restriction was limited to a specified number of countries. Addressing this argument, the court said:

> [this] illogic of the Government's contentions is palpable. The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed. The Court declines to relegate its Establishment Clause analysis to a purely mathematical exercise. (…) Equally flawed is the [argument] that the Executive Order cannot be found to have targeted Islam because it applies to all individuals in the six referenced countries. It is undisputed, using the primary source

130. *Cf.* Doe v. Trump, No. 17-cv-112-wmc, 2017 WL 975996 (W.D. Wis. Mar. 10, 2017) (granting a TRO in part and enjoining the authorities from the enforcement of Exec. Order 13,780 in relation to the plaintiff).
131. Nanda, *supra* note 36, at 318 (providing an overview of cases against the new Order).
132. With few exceptions, generally banning the nationals of six predominately Muslim majority countries from entering the United States
133. Hawaii v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017) (§ 6 of the new Executive Order concerned the temporary suspension of admitting refugees to the United States).
134. Exec. Order 13,780, at 13218.
135. Louhghalam v. Trump, 230 F. Supp. 3d 26, at 35 (D. Mass. 2017).
136. Hawaii v. Trump, 241 F. Supp. 3d 1119, at 1121 (D. Haw. 2017) (granting nationwide TRO).

> upon which the Government itself relies, that these six countries have overwhelmingly Muslim populations (…). It would therefore be no paradigmatic leap to conclude that targeting these countries likewise targets Islam. Certainly, it would be inappropriate to conclude, as the Government does, that it does not.[137]

The court concluded that, by subjecting travelers from predominately Muslim nations to prohibitions, the new travel ban again singled out one specific religion for disfavored treatment. This conclusion formed the legal underpinning of the court's discussion of the alleged violation of the Establishment Clause.[138] With reference to the political context in which the travel bans were issued, the court found that challengers had rightly stated a violation of non-Establishment. According to the court, the political context surrounding the travel restrictions clearly illustrated the true motivation behind the bans: "religious animus."[139] The "unrebutted evidence" of this animus explained why the authorities had urged the court to focus on the plain text of the order, rather than the broader political context.[140] In the days after *Hawaii*, courts across the country granted temporary injunctions on similar grounds,[141] blocking and freezing enforcement of the enacted

137. *Id.* at 1135.

138. *Id.* at 1134 (arguing that "[because] a reasonable, objective observer—enlightened by the specific historical context, contemporaneous public statements, and specific sequence of events leading to its issuance—would conclude that the Executive Order was issued with a purpose to disfavor a particular religion, in spite of its stated, religiously neutral purpose, the Court finds that [challengers] are likely to succeed on the merits of their Establishment Clause claim."). The Court developed a similar argumentation pattern to say that the main purpose of the enacted travel restriction was to single out Muslims for a special prohibition: *see id.* at 1137 (arguing that any "objective observer would conclude . . . that the stated secular purpose of the Executive Order is, at the very least, "secondary to a religious objective" of temporarily suspending the entry of Muslims." Quoting McCreary Cty. v. Am. Civil Liberties Union, 545 U.S. 844). Critical of this way of reasoning by the court: Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics*, 52 U. RICH. L. REV. 633, 644 (2018).

139. Hawaii v. Trump, 241 F. Supp. 3d 1119, at 1136 (D. Haw. 2017)

140. *Id.* (arguing that "the historical background [of the travel restrictions] makes plain why the Government wishes to focus on the Executive Order's text, rather than its context. The record before this Court is unique. It includes significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor.").

141. *See*, e.g., Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md.) (granting nationwide preliminary injunction, blocking enforcement of § 2(c) Exec. Order 13,780, restricting the entry opportunities of the nationals of six predominantly Muslim majority countries), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017), *and vacated and remanded sub nom.* Trump v. Int'l Refugee Assistance, 138 S. Ct. 353, 199 L. Ed. 2d 203 (2017); Hawaii v. Trump, 245 F. Supp. 3d 1227 (D. Haw. 2017) (granting nationwide preliminary injunction), *hearing in banc denied sub nom.* Hawaii v. Trump, 864 F.3d 994 (9th Cir. 2017), *and aff'd in part, vacated in part, remanded sub nom.* Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017), *cert.*

travel restrictions.[142] The administration's response to these judicial developments was twofold. Put differently, the administration played—like chess masters—on two boards at the same time. First, the President used public debate to lash out at judges who had voted against his travel restrictions, accusing them of endangering the country and writing political judgments to aggrandize their own power and influence.[143] Simultaneously, his team of lawyers and legal advisors worked on a strategy to convince judges that the President had the sole legal authority to make decisions regarding the admission of aliens.[144] This double-faceted strategy is characteristic of the Trump administration's dealings with political disappointments, at least in the area of regulating immigration.[145]

However, these strategies did not immediately turn out to be the legal game-changer the President had hoped they would be. Instead, history repeated itself. The nationwide injunctions—blocking enforcement of key parts of the new travel suspension and restriction regime—were largely upheld by the Fourth and Ninth Circuits.[146] Both

granted sub nom. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017), *and vacated and remanded*, 138 S. Ct. 377, 199 L. Ed. 2d 275 (2017), *and appeal dismissed as moot sub nom.* Hawaii v. Trump, 874 F.3d 1112 (9th Cir. 2017); Hamama v. Adducci, No. 17-CV-11910, 2017 WL 2684477 (E.D. Mich. June 22, 2017) (granting TRO to stay the execution of removal); State v. Trump, 263 F. Supp. 3d 1049 (D. Haw.), *aff'd*, 871 F.3d 646 (9th Cir. 2017) (grating nationwide injunction against enforcement of travel restrictions—§§ 2(c), 6(a), and § 6(b) Exec. Order 13,780—affecting close relatives, like grandparents, of people living in the U.S.)

142. An exception to this was Sarsour v. Trump, 245 F. Supp. 3d 719 (E.D. Va. 2017) (denying TRO that should enjoin authorities from the enforcement of the new travel restrictions, holding that the executive order is unreviewable under the Administrative Procedure Act, furthermore holding that the challengers were not to succeed under the guarantees of the Establishment Clause: "the substantive revisions reflected in [the new executive order] have reduced the probative value of the President's statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominate purpose of [the new executive order] is to discriminate against Muslims based on their religion and that [the new executive order] is a pretext or a sham for that purpose.").

143. Elizabeth Thornburg, *Twitter and the #So-CalledJudge*, 71 S.M.U. L. REV. 249, 265 (2018) (discussing how Trump has repeatedly attacked the judiciary after a disappointing judgment and arguing that judges should use social media to reach a broader audience). *See also* Alison Higgins Merrill, Nicholas D. Conway & Joseph Daniel Ura, *Confidence and Constraint: Public Opinion, Judicial Independence, and the Robert Court*, 54 WASH. U. J. L. & POL'Y 209, 223 (2017) (pointing out that judges have little means to save their institution from political attacks).

144. Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 501 (2018) (providing an overview of statements made by President Trump to show his disagreement with the legal decisions issued against his travel restrictions, also pointing to willingness of the Administration to respect the legal decisions and follow the procedures to proceed further in court).

145. *Cf.* Chacón, *supra* note 51, at 257.

146. International Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017) (holding, among others, that challengers were "likely to succeed on merits of religious purpose element of Establishment Clause claim."); Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017) (holding, *per curiam*, among others, that challengers were "likely to succeed on merits

courts shared an important concern: the waning influence of the rule of law, which shaped a dangerous precedent for fact-free engagement in politics.[147]

Nevertheless, in *Trump v. International Refugee Assistance Project*, President Trump gained an important victory on his way to establish his desired travel regime.[148] Equipped with this safeguard, the President issued a new travel ban: Proclamation 9645, titled *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*.[149] The President announced this new ban in September 2017, just ninety days after receiving a partial stay of the issued injunctions.

C. Proclamation 9645

Like its predecessors, the new travel ban singled out nationals of certain states for special travel restrictions. However, this ban was also unique in some respects. Remarkably, the Proclamation did not contain the stereotypes explicitly mentioned by its predecessors, namely, honor killers and women abusers. Instead, the general focus was on protecting the country from terrorism.[150]

Another important distinction between this Proclamation and its predecessors concerns the durability of the latter. While the previous versions were designed to temporarily suspend the entry of certain nationals, the Proclamation had an indefinite character "to advance the

of claim that temporary suspension of entry of nationals from six majority-Muslim countries violated INA's prohibition of nationality-based discrimination.").

147. Renan, *supra* note 73, at 2259-60. *See also* Matthew R. Segal, *America's Conscience: The Rise of Civil Society Groups under President Trump*, 65 UCLA L. REV. 1574, 1579 (2018) (expecting that the authorities will lose credibility under people because of President's animus toward everything he dislikes and positing that when "the federal government is . . . going to behave just like a landlord who won't rent to Black people, then it will command precisely the same level of respect.").

148. *Cf.* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2090 198 L. Ed. 2d 643 (2017) (Thomas, J., with whom Alito, J., and Gorsuch J., join concurring in part and dissenting in part). What Justice Thomas said in his opinion was very promising for the President and his advisory team: "I agree with the Court's implicit conclusion that the Government has made a strong showing that it is likely to succeed on the merits—that is, that the judgments below will be reversed. The Government has also established that failure to stay the injunctions will cause irreparable harm.").

149. Proclamation 9645.

150. *Id.* (the President explains the need for this Proclamation as follows: "As President, I must act to protect the security and interests of the United States and its people. I am committed to our ongoing efforts to engage those countries willing to cooperate, improve information-sharing and identity-management protocols and procedures, and address both terrorism-related and public-safety risks. . . . I have determined, on the basis of recommendations from the Secretary of Homeland Security and other members of my Cabinet, to impose certain conditional restrictions and limitations . . . on entry into the United States of nationals of the countries identified in section 2 of this proclamation.").

national security, foreign policy, and counterterrorism interests of the United States."[151] The only escape was through a recommendation to the President to change the policies, following the outcomes of a review every 180 days.[152] But more importantly, for the first time in the history of President Trump's travel restrictions, the Proclamation included "non-Muslim" countries. This new ban added North Korea,[153] and Venezuela to the list of countries affected by the travel restrictions.[154] Other states on this list included Iran,[155] Libya,[156] Somalia,[157] Syria,[158] Yemen,[159] and Chad, which was removed from this list in April 2018.[160] Despite this most recent version of the travel ban including some "non-Muslim" states and removing one Muslim majority country, Sudan, the vast majority of the targeted states still consisted of places with predominantly Muslim populations.[161] Furthermore, the addition of Venezuela had primarily a symbolic significance, since most of its nationals were not affected by the suspension.[162] Therefore, North Korea was the only "non-Muslim" state that faced the same travel restrictions as other predominantly-Muslim countries on the list.[163]

151. *Id.* § 8 (also urging to enforce the restrictions "to the maximum extent possible.").
152. *Id.* § 4 (urging the authorities to report "within 180 days, . . . and every 180 days thereafter" about the need to uphold the restrictions and if necessary to modify them).
153. *Id.* § 2(d)(ii) (suspending all nonimmigrant and immigrant visas).
154. *Id.* § 2(f)(ii) (suspending [notwithstanding] section 3(b)(v) of this proclamation [that excepts those "traveling on a diplomatic or diplomatic-type visa . . ."], the entry into the United States of officials of government agencies of Venezuela involved in screening and vetting procedures . . . and their immediate family members, as nonimmigrants on business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas").
155. *Id.* § 2(b) (ii) (suspending all nonimmigrant visas, except F, M and J visas, and suspending all immigrant visas, subjecting visa holders to screening procedures).
156. *Id.* § 2(c)(ii) (suspending nonimmigrant B-1, B-2 and B-1/B-2 visas, and suspending all immigrant visas).
157. *Id.* § 2(h)(ii) (suspending all immigrant visas, and putting nonimmigrant visa applicants under "additional scrutiny to determine if [they] are connected to terrorist organizations or otherwise pose a threat to the national security or public safety.").
158. *Id.* § 2(e)(ii) (suspending all nonimmigrant and immigrant visas).
159. *Id.* § 2(g)(ii) (suspending nonimmigrant B-1, B-2 and B-1/B-2 visas, and suspending all immigrant visas).
160. Proclamation No. 9723, 83 Fed. Reg. 15,937 (Apr. 13, 2018), titled *Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats* (Proclamation 9723) (finding "that the entry into the United States of the nationals of Chad [would no longer] be detrimental to the interests of the United States, and therefore [proclaiming the removal of restrictions and limitations on Chad]").
161. Proclamation 9645, § 3 (listing exceptions and waivers to decide case-by-case).
162. Proclamation 9645, § 2(f)(ii).
163. Critical of this inclusion: Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 623 (D. Md. 2017) (holding that "the inclusion of two non-majority Muslim nations, North Korea and Venezuela, does not persuasively show a lack of religious purpose behind the Proclamation. The Venezuela ban is qualitatively different from the others because it extends only to government officials, and the ban on North Korea [affects] fewer than 100 people. . . . In short, the inclusion of Venezuela and North Korea in the Proclamation has little practical consequence.").

The issuance of this new and indefinite travel ban has had two important short-term effects. First, because Executive Order 13,780 expired on the date President Trump issued Proclamation 9645, the Supreme Court vacated and remanded the cases it had previously granted certiorari to hear. The Court instructed the Fourth and Ninth Circuits to dismiss as moot those cases challenging the legality of the travel restrictions.[164] Second, a new wave of legal challenges blocked enforcement of the travel restrictions. Again, the likelihood of success in challenging the travel restrictions regime on grounds that it discriminates and violates the Establishment Clause played an important role in courts granting nationwide injunctions.[165]

After thoroughly analyzing the history and political context of the imposed travel restrictions, the method adopted to select the countries to be put under security scrutiny, and the language used to define the restrictions, Judge Theodore Chuang stated:

> there are substantial reasons to question whether the asserted national security purpose has now indeed become the primary purpose. First, the underlying architecture of the prior Executive Orders and the Proclamation is fundamentally the same. Each of these executive actions bans the issuance of immigrant and nonimmigrant visas on the basis of nationality to multiple majority-Muslim countries on the basis of concerns about terrorism. The Proclamation does not abandon this fundamental approach, but rather doubles down on it.[166] [Hence,] the Court concludes that where

164. Respectively Trump v. Int'l Refugee Assistance, 138 S. Ct. 353 (2017) (mem.); Trump v. Hawaii, 138 S. Ct. 377 (2017) (mem.). *See also* W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J. F. 825, 831 (2018); Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 50-51 (2018) (both providing a brief timeline of the legal developments related to the travel restriction regimes of President Trump).

165. Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017), *aff'd*, 883 F.3d 233 (4th Cir. 2018), *as amended*, (Feb. 28, 2018), *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018), and *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018); State v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *cert. granted* 138 S. Ct. 923 (2018), *and rev'd and remanded*, 138 S. Ct. 2392 (2018).

166. Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 624 (D. Md. 2017). *Cf. also* State v. Trump, 265 F. Supp. 3d 1140, 1157 (D. Haw. 2017) (critical of the methodological justification behind the selection of the targeted countries, concluding that "[the Proclamation's] individualized country findings make no effort to explain why some *types* of visitors from a particular country are banned, while others are not. (…) [Furthermore, the Proclamation's] scope and provisions also contradict its stated rationale. As noted above, many of [the Proclamation's] structural provisions are unsupported by

> the Proclamation itself is not sufficiently independent of [its predecessors] to signal a purposeful, persuasive change in the primary purpose of the travel ban, and there were no other public signs that "as persuasively" as the original violation established a different primary purpose for the travel ban, it cannot find that a "reasonable observer" would understand that the primary purpose of the Proclamation's travel ban is no longer the desire to impose a Muslim ban.[167]

The sharpest judicial condemnation of Trump's travel ban as a sign of animosity toward Muslims and Islam followed a few months later. In *International Refugee Assistance Project v. Trump*, the Fourth Circuit held that the nationwide injunction was warranted only in relation to "foreign nationals with a bona fide relationship with an individual or entity in United States."[168] However, after a thorough examination of "official statements from President Trump and other executive branch officials, along with the Proclamation itself," the court concluded that the ban was "unconstitutionally tainted with animus toward Islam."[169]

This sharp conclusion about religious animosity—"evidenced by official statements of the President . . . that graphically disparage the Islamic faith and its practitioners"[170]—came at a time when President Trump was celebrating his most significant progress in dealing with the legal challenges that had continuously delayed what he had promised to his voters: enacting a travel ban. In December 2017, the Supreme Court ordered to stay the granted preliminary injunctions pending "disposition of the Government's appeal . . . and disposition of the Government's petition for a writ of certiorari."[171] Furthermore, the Supreme Court urged the courts of appeal to reach their decisions "with appropriate dispatch."[172] In light of this order, the circuit courts decided to stay their decisions pending the Supreme Court's future decisions.[173]

verifiable evidence, undermining any claim that its findings "support the conclusion" to categorically ban the entry of millions.")

167. *Id*. at 628 (referring to McCreary C. v. Am. Civil Liberties Union 545 U.S. 844 (2005)).

168. Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 271 (4th Cir. 2018).

169. *Id*. at 257.

170. *Id*. at 353 (Harris, Cir. J., with whom Gribbon Motz, Cir. J., and King, Cir. J., join, concurring).

171. Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 542 (2017) (mem.); Trump v. Hawaii, 138 S. Ct. 542 (2017) (mem.).

172. *Id*.

173. Hawaii v. Trump 878 F.3d 662, 702 (9th Cir. 2017); Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 274 (4th Cir. 2018). *See also* Lauri Kai, *Embracing the Chinese Exclusion Case: An International Law Approach to Racial Exclusions*, 59 WM. & MARY L. REV. 2617, 2621-22 (2018) (expecting that contemporary travel restrictions survive Supreme Court review because the "plenary power doctrine" has made policies related to immigration and admission "nonjusticiable.").

This order did not issue any limitations on the scope of the travel restrictions,[174] and the Trump administration approached it as a "substantial victory for the safety and security of the American people."[175] This timely victory advanced the President's immigration agenda,[176] and the administration began to enforce the travel restrictions soon after the issuance of the stays.[177] Moreover, the authorities continued to uphold the travel restrictions after the Supreme Court granted certiorari in January 2018.[178] Consequently, the stay order remained in power pending the Supreme Court's final decision.[179] This decision came in June 2018, when the Supreme Court upheld Proclamation 9645 in *Trump v. Hawaii*.[180]

The Court's opinion in this case was extraordinary.[181] Not merely because of the animus toward one particular religion that surrounded the case,[182] prompting today's travel ban controversy to be mentioned in the same breath as cases of racial exclusion from the dark decades behind us.[183] No, *Trump v. Hawaii* is special because the Supreme Court missed an opportunity to explain to its critics why the travel ban case was so

174. The previous stay order, granting certioraris limited the scope of the enforcement to those who failed to prove their bona fide relationship: Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017). Critical of this formula: Jeremy Martin, Trump v. International Refugee Assistance Program 137 S. Ct. 2080 (2017), 44 OHIO N.U. L. REV. 131, 142 (2018).

175. Adam Liptak, *Supreme Court Allows Trump Travel Ban to Take Effect*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-Court.html (last visited Feb. 15, 2019) (quoting Attorney General Jeff Sessions).

176. Josh Blackman, *The Travel Bans*, 2017 CATO SUP. CT. REV. 29, 30 (2017-2018) (arguing that the stay order "was a conclusive indication that the lower Courts had gone astray."). *See also* Ratna Kapur, *The Ayodhya Case: Hindu Majoritarianism and the Right to Religious Liberty*, 29 MD. J. INT'L L. 305, 311 (2014) (pointing out how landmark decisions can advance a political agenda).

177. U.S. Department of State, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/2017-12-04-Presidential-Proclamation.html (last visited Feb. 15, 2019) (responding to the stay order and saying that the authorities have started to implement the restriction as of Dec. 8, 2017).

178. Trump v. Hawaii, 138 S. Ct. 923 (2018) (mem.). In June 2018, in Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 2710 (2018) (mem.) the Supreme Court granted certiorari and vacated the decision of the Fourth Circuit below this case.

179. Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 542 (2017) (mem.); Trump v. Hawaii, 138 S. Ct. 542 (2017) (mem.).

180. 138 S. Ct. 2392 (2018).

181. *Cf.* Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1453 (2018) (saying that the negative assessment the travel ban has received fits a broader tendency, in which other branches of power show their serious disagreement with the President Trump's violation of important (unwritten) norms).

182. Emily C. Callan, *A Funny Thing Happened on My Way to the Border. How the Recent Immigration Executive Orders and Subsequent Lawsuits Demonstrate the Immediate Need for Comprehensive Immigration Reform*, 47 U. BALT. L. REV. 1, 11 (2017) (saying that the travel ban jurisprudence is interesting because it juxtaposes the restriction regimes to the statements of the President).

183. *Cf.* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 594-95 (2017); Shawn E. Fields, *The Unreviewable Executive: National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 753 (2017).

different from other recent controversies concerning religious discrimination and religious neutrality, such as the *Masterpiece Cakeshop* case.[184]

Before discussing this point of criticism further, we must first explore the arguments set forth in *Trump v. Hawaii* denying the unconstitutionality of the most recent travel ban. We will then turn to a criticism of double standards, analyzing how the Court has responded differently to those officials' statements showing hostility toward religion. Finally, we will briefly highlight the argument that authorities should always be mindful of the constitutional tradition, the freedoms guaranteed, and the impact their actions might have on society, as powerfully advocated by concurring Justice Kennedy.[185]

1. Trump v. Hawaii

On June 26, 2018, Chief Justice Roberts delivered the majority opinion ruling on the lawfulness of President Trump's latest travel ban.[186] Although the Court dispatched this case barely two months after hearing oral arguments, the 5-4 vote was a clear indication of the Court's contrasting views. The highly divided Supreme Court upheld Proclamation 9645 on the grounds that: (1) the Immigration and Nationality Act ("INA") allows the President to deny entry to aliens when their admission would harm the interests of the United States;[187] (2) the non-discrimination provision of the INA relating to the issuance of visas does not alter the right of the President to deny aliens entry to the United States;[188] (3) the travel ban might be rationally related to the goal it preservers, namely national security;[189] and (4) the ban did not violate the Establishment Clause.[190] For purposes of this article, we will limit our analysis to the Court's discussion of the travel ban's constitutionality

184. 138 S. Ct. 1719 (2018). *See* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 135 (2018) (blaming the Supreme Court for not providing the standards for how to deal in cases about religious discrimination and claims for equal protection, also criticizing the Court for delivering contradictory opinions in Masterpiece and Trump v. Hawaii, both touching upon animosity toward religion and discrimination); Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1516 (2018) (saying that dissenting Justice Sotomayor is probably right that the majority has used a double standard through finding authorities' hostility toward religion relevant in Masterpiece, while that point is barely considered in Trump. v Hawaii).
185. Trump v. Hawaii, 138 S. Ct. 2392 (2018) (Kennedy, J., concurring).
186. Trump v. Hawaii, 138 S. Ct. 2392 (2018) (Kennedy, J., and Thomas, J., concurring) (Breyer, J., with whom Kagan, J., join dissenting) (Sotomayor, J., with whom Ginsburg, J., join dissenting).
187. *Id.* at 2408-10 (with reference to Immigration and Nationality Act § 1182(f)).
188. *Id.* at 2414.
189. *Id.* at 2415.
190. *Id.* at 2423.

in light of the First Amendment's Establishment Clause.

The Supreme Court began this discussion by outlining the factors it would consider in assessing the lawfulness of the travel ban. First, the Court clarified that its task was not to denounce what the President had said, but rather to protect the authority of the Presidency and the legitimacy of the executive power. Thus, what the President has said needs to be assessed in light of what exercising his executive power entails. That was the main focus of the Court, since the travel restrictions addressed "a matter [that fell] within the core of executive responsibility."[191] The Court further stated that this case is fundamentally different than other non-Establishment guarantee litigation because the issued Proclamation touched upon issues of national security, drawing on entirely religion-neutral language. "Conventional" Establishment Clause cases, however, typically discuss the lawfulness of authorities' endorsing religion in public.[192]

With this background in mind, the Court reiterated that matters of admission and removal of aliens fall under the authority of the executive and legislative branches, insulating this specific issue from judicial scrutiny. The Court explained that those branches are better informed to make such decisions because "decisions in these matters may implicate 'relations with foreign powers,' or involve 'classifications defined in the light of changing political and economic circumstances.'"[193] However, when admission questions implicate the constitutional rights of United States citizens, it may provide reason for the Court to put such cases under scrutiny.[194] Yet this does not alter the legal authority given to the executive and legislative branches to make decisions concerning the admission of aliens. In other words, those branches retain the final say. That is also the case "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the Courts will neither look behind the exercise of that discretion, nor test it by balancing its justification," in light of the Constitutional rights of United States citizens.[195]

Further, the Court approaches cases of national security with the highest possible cautiousness, given the authority and information the President has regarding such cases. The majority noted that applying the conventional inquiry—that is, asking whether the adopted policy was

191. *Id.* at 2418.
192. *Id.*
193. *Id.* at 2418-19 (the Court is quoting from Mathews v. Diaz, 426 U.S. 67 (1976)).
194. *Id.* at 2419 (quoting from Kleindienst v. Mandel, 408 U.S. 753 (1972), arguing that "although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.").
195. *Id.* at 2419.

facially legitimate and bona fide—"would put an end to our review."[196] However, following the suggestion of the Government, the Court delved beyond the ban's facially neutral appearance.[197] In this respect, the Court drew upon its rational basis doctrine to assess the lawfulness of the travel ban in light of the Establishment Clause. The Court "may consider . . . extrinsic evidence [as submitted by the challengers to the travel restrictions], but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."[198]

In other words, the rational basis doctrine does not help opponents of the travel restrictions to halt a policy that pursues a legitimate government interest. To illustrate this point, the majority referred to "a few occasions" where the Court has invalidated policies that were clearly harmful.[199] In *Romer v. Evans*, for instance, the Supreme Court struck down a state amendment that clearly discriminated against non-heterosexuals, depriving them of the right to access anti-discrimination laws.[200] The Court's limited precedent in striking down laws and policies that do not pursue a legitimate governmental interest provided little guidance here. However, the Court concluded that the travel ban regime did not share such characteristics with cases like *Romer* to warrant invalidating the Proclamation.[201] Chief Justice Roberts stated:

> [the] Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. [Challengers to the Proclamation] nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.[202]

The Supreme Court also saw no reason to invalidate the

196. *Id.* at 2420.
197. *Id.*
198. *Id. See also* Sorkin, *supra* note 80 (briefly discussing the "extrinsic evidence").
199. Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).
200. *Id.* 517 U.S. 620 (1996) (Scalia, J., with whom Rehnquist, C.J., and Thomas, J., join dissenting).
201. Trump v. Hawaii, 138 S. Ct. 2392, 2420-21 (2018).
202. *Id.* at 2421.

Proclamation on the ground that it lacked effectiveness, as posited by the challengers. The Court could not properly evaluate the content of that argument, since the effectiveness question involved complicated matters that were better suited for the executive branch. Put differently, the Court was not in a position to "substitute [its] own assessment for the Executive's predictive judgments on [security] matters."[203] The fact that the Government had removed three predominantly-Muslim countries from the list of affected countries further reaffirmed the view that the Proclamation pursued a legitimate security interest.[204] Furthermore, the Court reasoned, the Proclamation included "significant exceptions" and waiver programs for those nationals affected by the restrictions.[205]

Despite the majority noting the Court would not denounce any political statements made by the President in the context of the travel bans, it nevertheless bitterly denounced any comparison between the contemporary travel bans and the Supreme Court's decision in *Korematsu v. United States* concerning the lawfulness of forced relocations based on race. Opponents of the travel bans had suggested that the restrictions rested on the same narrative present in *Korematsu*—namely, anxiety toward a specific group of people that ultimately resulted in singling them out for a problematic relocation policy.[206] The majority vigorously denounced this comparison, saying:

> *Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. (…) The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.[207]

The majority went a step further in conveying its disdain toward *Korematsu*, stating the decision "was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[208]

203. *Id*.
204. *Id*. at 2422.
205. *Id*. at 2422.
206. *Id*. at 2423. *See also* 323 U.S. 214 (1944).
207. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).
208. *Id*. (quoting dissenting Justice Jackson in Korematsu).

The Court concluded that the Government had met its burden to demonstrate the Proclamation pursued a legitimate government interest—security protection—which is itself a rational and justificatory ground to limit the entry of certain nationals. Finding that the Proclamation survived rational basis review, the Supreme Court reversed the lower court's judgment granting the preliminary injunction.[209]

2. The Façade of Security Concerns and Double Standards

While *Trump v. Hawaii* reaffirmed the Government's argument that the Proclamation pursued a legitimate aim, one major criticism of the travel ban is that it is politically motivated and fulfills President Trump's promise to implement a Muslim ban, instead of actually dealing with national security concerns.[210] Critics maintain the travel ban lacks a bona fide justification, arguing that it instead rests primarily on stereotypes about immigrants.[211] However, stereotyping immigrants—varying from job-hunters to terrorists—has proven to be a successful method for justifying exclusionary politics today and in the past.[212]

Another criticism of the travel ban case is that the Supreme Court's majority opinion applied double standards. It was uncritical toward the President's remarks about Muslims both during the election and after he took office, but critical toward officials' statements discrediting majoritarian religious sensitivities. For example, the Court considered the President's statements toward Muslims irrelevant for purposes of assessing the travel ban, but the "hostile religious statements" of a local civil rights commissioner were found decisive for the Court's assessment

209. *Id*.

210. *See* without being exhaustive in the references, for example: Wadhia, *supra* note 63, at 1502. The "disconnect" between a neutral defense of the ban (security concerns) and its political presentation (a Muslim ban) puzzled courts in how to approach the travel bans: Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 124 (2017).

211. *Cf.* Leti Volpp, *Protecting the Nation from Honor Killings: The Construction of a Problem*, 34 CONST. COMMENT. 133, 169 (2019) (arguing that "[the] specter of violence against women has played an important role in the Trump administration's executive orders seeking to bar Muslims from entry, and continues to rationalize the notion that the nation must be protected through their exclusion. Yet this submerged story has been largely overlooked.").

212. Critics have placed contemporary travel bans in the category of exclusion policies that have through the history singled out specific groups of immigrants for special bans. *See* for example: Chang, *supra* note 128; Kai, *supra* note 173; Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find out)*, 1 NEV. L.J. F. 80 (2017).

of a First Amendment claim in *Masterpiece Cakeshop*.[213]

These two major points of criticism—the façade of security concerns behind the travel ban and the presence of double standards—are further discussed in light of Justice Sotomayor's dissenting opinion in *Trump v. Hawaii*, which dispatches each of these concerns thoroughly. Justice Sotomayor stated that "repackaging" the promise of enacting a "total and complete shutdown of Muslims entering the United States" as a matter of national security "does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created." [214]

Justice Sotomayor further suggested that "behind [the] facade of national security concerns" existed fear of the stranger *in general* and of the Muslim migrant *in particular*.[215] This is reflected in the obvious presence of animus toward Muslims that drove the President to issue travel bans singling out Muslims in the first place. This hostile language toward Muslims has always surrounded the travel bans and plainly contradicts the guarantee of neutrality toward religion enshrined in the Establishment Clause of the First Amendment. Furthermore, a historical review of the emergence of travel bans in the Trump era complicates the argument that the travel bans were not issued to target Muslims. It was therefore regrettable, according to Justice Sotomayor, that the majority limited its review to the plain text of the Proclamation.[216]

To properly evaluate the challengers' Establishment Clause claim, it is necessary, according to Justice Sotomayor, to review the statements of the President as a whole. It is this "full record [of statements that] paints a far more harrowing picture [than the one we may discern on the basis of the majority judgment], from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith"[217] instead of pressing security needs.[218] This is exacerbated, according to Justice Sotomayor, by the fact that President Trump has never rectified his bold statements, despite his

213. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018). Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 515-16 (2018) (criticizing the Court for being overtly protective toward majoritarian beliefs and sensitives, while indifferent toward similar claims for protection, though coming from minority groups). *See also* Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors*, 2017 CATO SUP. CT. REV. 139, 168 (2017-2018) (saying that in general "majoritarian branches are insensitive to particular free-exercise claims," and urging the Court to mind this unfortunate circumstance in its decisions). *See generally* Frank S. Ravitch, *The Supreme Court's Rhetorical Hostility: What is Hostile to Religion under the Establishment Clause*, 2004 BYU L. REV. 1031 (2004).
214. 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., with whom Ginsburg, J., join dissenting).
215. *Id*.
216. *Id*. at 2435.
217. *Id*.
218. *Id*. at 2438.

many opportunities to do so.[219] Instead of offering a different justification for the relationship between the travel restrictions and the Muslim faith, to make the national security claim more plausible to the objective observer, the President has continued his infamous attacks on the Muslim community.[220]

Referencing the majority decision in *Masterpiece Cakeshop*—decided just weeks before *Trump v. Hawaii*—Justice Sotomayor called it striking that the Court found "less pervasive official expressions of hostility and the failure to disavow them to be Constitutionally significant."[221] Why the Court chose not to draw the same line in the travel ban case was "perplexing."[222] This difference in treatment leaves an unsatisfactory feeling. While local officials were held "accountable" for the impact of their statements about religion in *Masterpiece Cakeshop*, the majority declined to apply the same standard in this case.[223] But, as Justice Sotomayor indicated, both cases questioned "whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom."[224]

The majority's choice to exclude the President's statements from its legal assessment—while operating opposite to *Masterpiece Cakeshop*, a case concerning majoritarian sensitives[225]—is a disservice to adherents of minority religions. Justice Sotomayor concluded that applying double standards in apparently similar cases "erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country" that they are not equally entitled to the same rights and privileges as those who belong to the majority.[226]

219. *Id.* at 2439.
220. *Id.*
221. *Id.*
222. *Id.* at 2441 (however, Justice Sotomayor uses the term "perplexing" to criticize the choice of the majority to draw on the rational basis doctrine in assessing the lawfulness of the Proclamation. This is in her eyes a "perplexing" choice because the Court has decided to apply "a more stringent" test in Establishment Clause cases, especially the ones about animosity toward religion. This major difference in deciding cases that share similarities justifies our choice to quote "perplexing.").
223. *Id.* at 2447.
224. *Id.*
225. *Cf.* Nora Olabi, *"We Told You So": Conservatives Use Masterpiece Decision to Energize Base*, WESTWORD (Jun. 5, 2018), https://www.westword.com/news/colorado-republicans-use-masterpiece-cakeshop-Court-decision-to-rally-support-for-november-elections-10377635 (last visited Feb. 15, 2019).
226. Trump v. Hawaii, 138 S. Ct. 2392, 2433, 2447 (2018) (Sotomayor, J., with whom Ginsburg, J., join dissenting).

3. The Freedom to Disregard the Constitutional Tradition

Justice Sotomayor's criticism of the Court's decision in *Trump v. Hawaii* primarily concerned President Trump's remarks, his decision not to rectify those remarks, and his continued hostility toward members of the Islamic minority in the United States. While the majority excluded President Trump's remarks from their analysis, concurring Justice Kennedy noted that public statements made by the executive branch may have significant societal consequences.[227] Justice Kennedy cautioned that although such statements are often "not subject to judicial scrutiny or intervention," this does not allow government officials "to disregard the Constitution and the rights it proclaims and protects."[228] Officials have broad discretion free from judicial scrutiny, but it is this freedom that "makes it all the more imperative for [government officials] to adhere to the Constitution and to its meaning and its promise."[229]

Justice Kennedy applied this concept of public manners to First Amendment controversies. Because the Constitution guarantees the freedoms of religion and expression and simultaneously prohibits the Government from establishing any religion,

> [it is] an urgent necessity that officials adhere to these Constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts. [230]

In a forceful plea, Justice Kennedy urged authorities to be mindful of the constitutional tradition, the freedoms and constraints guaranteed, and the impact their actions might have, both internally and externally. The public appearance of authorities should attest to the rich constitutional tradition of freedom and neutrality.[231]

While Justice Kennedy did not apply his framework of public manners explicitly to the travel ban case, and specifically to President

227. *Id.* at 2424 (Kennedy, J., concurring)
228. *Id.*
229. *Id.* (also positing that the shared point of view in Trump v. Hawaii is that officials' statements can be subjected to judicial scrutiny when such statements spread hostility toward, for example, religion. This means that the scope of putting authorities' statements under judicial scrutiny is quite limited and reserved to extraordinary circumstances.).
230. *Id.*
231. *Id.*

Trump's remarks about Muslims, his unambiguous message of minding the Constitution while exercising power raises the following questions: how should we appraise President Trump's travel ban project? What does President Trump's rhetorical attack on Muslims tell us? Does the President's disregard for the Constitution, in terms of explicitly questioning the reliability of one group of people, namely Muslims,[232] indicate that the United States has entered into a completely new era of hatred and racial discrimination?[233]

The President has almost unlimited discretionary authority, and thus power, to deny aliens entry into the United States.[234] This is what *Trump v. Hawaii* tells us. And although it might be empirically right for the President to possess unlimited power to decide questions of admission, we must ask whether it is justified for the President to exclude *categories* of people. We must ask whether the President should be allowed to continue—unrestrained—to insult adherents of one religion, portraying them, for example, as a dangerous group,[235] who are unreliable, ill-mannered, uncivilized, honor killers, rapists, ticking time bombs, and harmful to American society.[236] It is the desire to exclude this group of individuals that has ultimately driven the President to enact a series of travel bans.[237]

II. SAVE OUR STATE FROM ISLAM

A historical analysis of President Trump's travel ban project suggests his focus on border protection was mainly concerned with who is *entering* the country—drawing on stereotypes and ultimately ordering a series of facially neutral travel restrictions targeting one specific group of people. However, concerns about who is *living in* the United States have similarly disfavored the American Muslim community. For example, headscarves and beards kept for religious purposes have, for

232. *Id.* at 2437 (Sotomayor, J., with whom Ginsburg, J., join dissenting) (*cf.* for example the record of anti-Muslim statements made by President Trump, as discussed by Justice Sotomayor in her dissenting opinion).
233. *Cf.* Eric K. Yamamoto, Maria Amparo Vanaclocha Berti & Jaime Tokioka, *Loaded Weapon Revisited: The Trump Era Import of Justice Jackson's Warning in Korematsu*, 24 ASIAN AM. L.J. 5 (2017) (pointing to the rise of hatred against Muslims in the Trump era).
234. *See generally* Barrow, *supra* note 65.
235. 138 S. Ct. 2392, 2433, 2447 (2018) (Sotomayor, J., with whom Ginsburg, J., join dissenting) (dissenting Justice Sotomayor provides an overview of the statements made against Muslims by President Trump).
236. *See* Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108, 111 (2016) (saying that stereotypes are a driving factor behind policies that target specifically Muslims).
237. Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 481 (2017).

some, caused trouble in the workplace.[238] Similar troubles arise in relation to plans to build mosques or Islamic centers. One particularly controversial example of this is the plan to build a multi-faith center close to Ground Zero in New York, popularly known as the "Ground Zero Mosque" by opponents of the project.[239] Another consequence of the stereotypes surrounding the Muslim immigrant population appears in the form of legal initiatives prohibiting the use of Sharia law in the United States.[240]

How can we rationalize policies that target a very specific group of people? Particularly, how can we rationalize those policies that target adherents of an unpopular religion, or those who come from regions associated with such religions? How can we understand the Supreme Court's majority decision to uphold a policy obviously condoning hatred and animus toward one group of people? Oklahoma's urgent plea to save their State from Islamic law,[241] suggests President Trump's exclusionary politics are not accidental. Rather, these policies share the same historical background of exclusion and are rooted in a narrative of fear—fear of the non-white stranger in general and fear of the Muslim in particular. Fear has proven to be a useful breeding ground for policies of exclusion and reprisal in the United States.[242] Part II of this article discusses Oklahoma's Save Our State Amendment and determines that, like the President's travel ban project, Oklahoma's amendment emanates from feelings of fear and animus toward the stranger.[243] This analysis will be used in Part III to uncover some of the possible myths driving

238. *Cf.* Kelly A. Harrison, *Hiding under the Veil of Dress Policy: Muslim Women, Hijab, and Employment Discrimination in the United States*, 17 GEO. J. GENDER & L. 831 (2016); Cheryl A. Sharp, *Sweet Land of Liberty: Islamophobia and the Treatment of Muslims in the State of Connecticut*, 11 CONN. PUB. INT. L.J. 221 (2012); Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033 (2009) (all referring to controversies at work because of a religious appearance).

239. *Cf.* Nicholas A. Primrose, *Has Society Become Tolerant of Further Infringement on First Amendment Rights*, 19 BARRY L. REV. 313 (2013); Heather Greenfield, *International Law, Religious Limitations, and Cultural Sensitivity: The Park51 Mosque at Ground Zero*, 25 EMORY INT'L L. REV. 1317 (2011); Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 HARV. L. & POL'Y REV. 347 (2011).

240. Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363 (2012).

241. *Cf.* Ross Johnson, *A Monolithic Threat: The anti-Sharia Movement and America's Counter-Subversive Tradition*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 183, 191 (2012) (on how the American anti-Sharia movement present the fight against Sharia law in the United Sates as an "existential conflict").

242. *See generally* NUSSBAUM, *supra* note 44; Beydoun, *supra* note 236.

243. John M. Bickers, *False Facts and Holy War: How the Supreme Court's Establishment Clause Cases Fuel Religious Conflict*, 51 IND. L. REV. 305, 332 (2018); Hilal Elver, *Racializing Islamn before and After 9/11: From Melting Pot to Islamophobia*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 119, 162 (2012); Robert E. Michael, *The Anti-Shari'a Movement and Oklahoma's Save Our State Amendment—Unconstitutional Discrimination or Homeland Security*, 18 ILSA J. INT'L & COMP. L. 347 (2012) (all pointing to the role fear plays in pushing anti-Sharia initiatives forward).

policymakers to design such exclusionary politics.

A. State Question 755

In November 2010, Oklahoma residents participated in a ballot initiative aimed to single out Sharia law *qua* Sharia for a special ban.[244] This proposal, colloquially titled the Save our State Amendment, asked Oklahomans via State Question 755 whether they agreed with a ban on the use of international law and Sharia law in Oklahoma courts.[245] The proposal defined Sharia law as "Islamic law . . . based on two principal sources, the Koran and the teaching of Mohammed."[246] More than 70% of the voters agreed with the ban.[247]

Rex Duncan, a primary proponent of this initiative, defended this amendment as an absolute necessity in the "war for the survival of America."[248] Duncan stated that, contrary to Muslims:

> Oklahomans recognize that America was founded on Judeo-Christian principles … [a]nd State Question 755, the Save Our State Amendment, is just a simple effort to ensure that our Courts are not used to undermine those founding principles and turn Oklahoma into something that our founding fathers and our great-grandparents wouldn't recognize.[249]

This fallaciously gallant rhetoric unveiled the true motivation behind State Question 755: fear of the stranger, this is, Muslims. But this animus toward Muslims and their customs had deeper roots, grounded in majoritarian sensitivities about who Oklahomans were and where

244. Sarah Topy, *Sharia Law in the Sooner State and beyond: How the First Amendment Impacts the Future of Anti-Sharia Law Statutes*, 80 U. CIN. L. REV. 617, 641 (2011).
245. House Joint Resolution, No. 1056, Sec. 1(b), transcript, *available at* https://www.sos.ok.gov/documents/questions/755.pdf (last visited Feb. 15, 2019).
246. *Id.*
247. Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions like it that Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189, 190 (2011) (the proposal aimed to amend the Oklahoman Constitution in a way that prohibited courts from making use of international law, Sharia law or "the precepts of other nations or cultures.").
248. NUSSBAUM, *supra* note 44, at 11; Uddin & Pantzer, *supra* note 240, at 368. *See also* Justin R. Long, *State Constitutions as Interactive Expressions of Fundamental Values*, 74 ALB. L. REV. 1739, 1745 (2010) (discussing how the ban was defended by its proponents in the public discourse).
249. Lee Tankle, *The Only Thing We Have to Fear Is Fear Itself: Islamophobia and the Recently Proposed Unconstitutional and Unnecessary anti-Religion Laws*, 21 WM. & MARY BILL RTS. J. 273 (2012) (quoting Rex Duncan in defense of his Sharia ban). *See also* Amara S. Chaudhry-Kravitz, *The New Facially Neutral Anti-Shariah Bills: A Constitutional Analysis*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 25, 31 (2013).

their sentiments were coming from. Specifically, this animus stemmed from the idea that the Judeo-Christian character of Oklahoma needed protection from a serious threat coming from outside the state and even outside the country—those individuals who did not share the majoritarian narrative about who Oklahomans are. In other words, Oklahoma was clearly being threatened by Muslims and their customs,[250] and something had to be done.[251]

Apparently, for individuals like Rex Duncan:

> [when] it comes to Christian religious values, their potential inconsistency with democracy, equality, and tolerance is never in doubt, revealing sharply the degree to which [their] line of [reasoning] rests not on a thoroughgoing rationalist secularism but on a political theology of Christian democracy in which the identity of democratic values with an imagined Christian civilizational tradition is unquestioned.[252]

B. Disfavoring Muslims

The approval of State Question 755 by Oklahoma voters was immediately challenged by Muneer Awad, the executive director of Oklahoma's chapter of the Council on Islamic-American Relations.[253] On November 29, 2010, the district court granted Awad a preliminary injunction, enjoining the Oklahoma State Board of Elections from

250. Carlo A. Pedrioli, *Constructing the Other: U.S. Muslims, anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric*, 22 S. CAL. INTERDISC. L.J. 65, 71 (2012) (analyzing why those who are outside the immigrant group fear this group and their rituals).

251. Ali, *supra* note 37.

252. Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 S. ATLANTIC Q. 9, 26 (2014) (admittedly, the quote is a critique on the jurisprudence of the European Court of Human Rights related to the assessment of laws targeting Muslims. However, this quote covers precisely what is so problematic about the Oklahoma case and its many lookalikes). *Cf.* for questions and criticism in the context of the United States that fit the critical analysis of Nehal Bhuta: Mark C. Rahdert, *Exceptionalism Unbound: Appraising American Resistance to Foreign Law*, 65 CATH. U. L. REV. 537, 558 (2016) (arguing singling out the Sharia law *qua* Sharia for a special ban, at least implies that the Judeo-Christian legal tradition is not entitled to the same amount of disfavor); Robert L. McFarland, *Are Religious Arbitration Panels Incompatible with Law: Examining Overlapping Jurisdictions in Private Law*, 4 FAULKNER L. REV. 367, 371 (2013) (criticizing the stinginess on the side of those who defend religious arbitration, but withdraw Muslims from the same privilege). *See also* Najmeh Mahmoudjafari, *Religion and Family Law: The Possibility of Pluralistic Cooperation*, 82 UMKC L. REV. 1077, 1085 (2014) (wondering whether similar exceptions that are made for the Jewish community related to religious arbitration, could also be made for the Muslims).

253. John T. Parry, *Oklahoma's Save Our State Amendment: Two Issues for the Appeal*, 64 OKLA. L. REV. 161 (2012).

certifying the election outcomes.[254] The court found Awad had successfully demonstrated the criteria needed to grant the preliminary injunction. Specifically, Awad had demonstrated a substantial likelihood of success on the merits of his First Amendment claims and that he would suffer from irreparable harm if his request for an injunction was denied.[255] Furthermore, the balance of hardship and public interests advocated for the issuance of an injunction in this case.[256]

The district court was especially concerned about the consequences of the special disfavor to Sharia law. The court found:

> [Awad] has sufficiently set forth a personal stake in this action by alleging that he lives in Oklahoma, is a Muslim, that the amendment conveys an official government message of disapproval and hostility toward his religious beliefs, that sends a clear message he is an outsider, not a full member of the political community, thereby chilling his access to the government and forcing him to curtail his political and religious activities.[257]

Similarly, the district court disavowed the argument that Oklahoma's amendment concerned a permissible choice of law.[258] In finding the amendment explicitly singled out Sharia Law for disfavor, the court said:

> [the] amendment creates two independent restrictions on use/consideration of Sharia Law: (1) the amendment requires that Oklahoma courts "shall not consider … Sharia Law", and (2) the amendment allows Oklahoma courts to use/consider the law of another state of the United States but only if "the other state does not include Sharia Law". No other "legal precepts of other nations or cultures" is similarly restricted with respect to the law of

254. *Cf.* Venetis, *supra* note 247, at 198 (providing an overview and timeline of the proceedings).
255. Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012).
256. *Id.* at 1308 (holding that "[while the public has an interest in the will of the voters being carried out, for the reasons set forth above, the Court finds that the public has a more profound and long-term interest in upholding an individual's constitutional rights.").
257. *Id.* at 1303.
258. *Cf.* Kimberly Karseboom, *Sharia Law and America: The Constitutionality of Prohibiting the Consideration of Sharia Law in American Courts*, 10 GEO. J.L. & PUB. POL'Y 663, 675 (2012) (defending the line that "[if] Sharia is a legal system, then the Oklahoma voters had every right to ban its consideration in state courts. It is conceivable that the legislators included the portion about Sharia Law in the Save Our State Amendment because, as a legal system, it is not covered under the doctrine of the Establishment Clause and its subsequent cases. In any event, Oklahoma voters had the right to decide which types of law could be considered in their state courts.").

another state.[259]

More fundamentally, the court agreed with Awad's argument that Sharia is not only a legal system, but a way of life "that [provides] guidance to [Awad] and other Muslims regarding the exercise of their faith."[260]

The Attorney General of Oklahoma appealed the preliminary injunction,[261] but the Court of Appeals for the Tenth Circuit affirmed the district court's decision in January 2012.[262] On appeal, members of the Oklahoma State Board of Elections argued that Awad had not suffered actual harm because the adopted amendment was not yet in effect when he initiated his lawsuit. Neither had the rule limiting the use of Sharia law been implemented in any Oklahoma court. Therefore, appellants contended, Awad's action rested merely on hypothetical risks.[263] The appellate court rejected this line of reasoning, finding the fear of exclusion and "disfavored treatment" that had driven Awad to file the suit was not based on speculation.[264] The ban would have been enacted a week after the voters' approval. The court concluded the injunction was warranted, finding the four prongs of the injunction test—a successful claim, the balance of harms, irreparable injury, and public interests—weighed in Awad's favor.[265]

In discussing the alleged violation of the Establishment Clause, the appellate court drew on the *Larson* test,[266] due to the obviously discriminatory nature of the Save our State Amendment. In this respect, the court noted:

> [the] amendment bans only one form of religious law—Sharia law. Even if we accept Appellants' argument that we should interpret "cultures" to include "religions," the text does not ban all religious laws. The word "other" in the amendment modifies both "nations" and "cultures." Therefore, if we substituted the word "religions" for "cultures," the amendment would prohibit Oklahoma courts from "look[ing] to the legal precepts of other … religions." The word "other" implies that whatever religions the legislature considered to be part of domestic or Oklahoma culture would not have their legal precepts

259. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010).
260. *Id*.
261. Venetis, *supra* note 247, at 199.
262. Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).
263. *Id*. at 1120.
264. *Id*. at 1123.
265. *Id*. at 1126.
266. 456 U.S. 228 (1982).

> prohibited from consideration, while all others would. Thus, the second portion of the amendment that mentions Sharia law also discriminates among religions.[267]

The Tenth Circuit's discussion of the existence of any concrete justification for the ban on Sharia law is meaningful not only for the greater legal debate concerning the presence or absence of a compelling state interest to pursue the ban, but also for its analysis of the real reasons behind the ban.[268] This analysis again revealed strong feelings of animus toward Muslims and their customs. Consequently, the appellate court refrained from a thorough discussion of the existence of "a close fit with a compelling state interest."[269] The court's discussion of irreparable harm in the absence of the injunction was also remarkably brief, merely approving the district court's holding.[270]

In relation to the balance of harms prong, the court first disavowed the argument that Oklahomans should have the right to see authorities take their vote seriously. The court explicitly rejected this idea, reasoning that the balance of harms test prevents authorities from enacting laws that seriously infringe upon the constitutional rights of part of the population. Similarly, the court found that avoiding violation of citizens' fundamental rights is always in the public interest, and therefore affirmed the district court's application of this prong of the injunction test.[271]

Finally, in the summer of 2013, the District Court for the Western District of Oklahoma granted summary judgment in favor of the plaintiff, permanently enjoining the authorities from implementing State Question 755.[272] Although *Awad v. Ziriax* halted Oklahoma's Save Our State Amendment, such initiatives, largely defended as necessary to

267. *Id.* at 1129.
268. *Id.* at 1130 (with reference to the case before the district court, the Appeal Judges say that authorities have "admitted . . . that they did not know of even a single instance where an Oklahoma court had applied Sharia law or used the legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems in Oklahoma.").
269. *Id.* (the court says that a further inquiry is useless because the strict scrutiny test requires the presence of both: a particular compelling interest and a close fit).
270. *Id.* at 1131.
271. *Id.* at 1131 (holding that "when the law that voters wish to enact is likely unconstitutional, their interests do not outweigh Mr. Awad's in having his constitutional rights protected.").
272. Chaudhry-Kravitz, *supra* note 249, at 32 (providing a brief timeline of the legal proceedings in Awad v. Ziriax).

combat a "barbaric" culture,[273] continue to appear.[274] However, as was the case with President Trump's travel bans, the presentation of these initiatives has changed: from explicitly anti-Sharia to "facially neutral."[275]

C. Facially Neutral, But Obviously Sectarian

Recall the history of President Trump's travel bans: the President-elect asked his advisory team how he could realize his promised Muslim travel ban in a legally-sound way.[276] The advisory team concluded the threat of "danger" was an appropriate justification for banning individuals from Muslim majority countries: the same category of people the President had promised to single out for special travel restrictions.[277] This shift to focusing on national security instead of religion was "perfectly sensible, perfectly legal."[278] But, as Justice Sotomayor noted in *Trump v. Hawaii*, this use of neutral language does little "to cleanse" such initiatives from their discriminatory purpose and obvious animus toward specific groups.[279] Contrary to Justice Sotomayor, the majority appeared to show sensitivity toward this shift, concluding that "because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification."[280]

Apart from this adoption of more facially neutral language, there is something else of theoretical relevance about the rise of these legal

273. *Cf.* Jeremy Grunert, *How Do You Solve a Problem Like Sharia:* Award v. Ziriax *and the Question of Sharia Law in America*, 40 PEPP. L. REV. 695 (2013).
274. Holly Tao, *Congress, Courts, and Control over Persuasive Sources of Law*, 51 GONZ. L. REV. 235 (2015) (on the rise of anti-Sharia legal initiatives in the United States).
275. Chaudhry-Kravitz, *supra* note 249, at 26-27 (saying that after the failure to realize an anti-Sharia bill in Oklahoma, the anti-Sharia movement has decided to rethink its strategy and moved toward facially neutral measures that could have the same effect as the Save our State Amendment).
276. W. Bradley Wendel, *Sally Yates, Ronald Dworkin, and the Best View of the Law*, 115 MICH. L. REV. FIRST IMPRESSIONS 78, 82 (2016) (using this as an example to answer the question "what happens when there are competing accounts of what the law permits or requires?").
277. Bennett L. Gershman, *Rudolph Giuliani and the Ethics of Bullshit*, 57 DUQ. L. REV. 293, 303 (2019) (quoting Rudy Giuliani).
278. Jim Dwyer, *First Came Giuliani's Input on the Immigration Order. Now There's the Court Test*, N.Y. TIMES (Feb. 9, 2017), https://www.nytimes.com/2017/02/09/nyregion/rudolph-giuliani-donald-trump-travel-ban.html (last visited Feb. 15, 2019). *See also* Ana Pottratz Acosta, *Sunlight Is the Best Disinfectant: The Role of the Media in Shaping Immigration Policy*, 44 MITCHELL HAMLINE L. REV. 803, 841-42 (2018) (on how this specific statement has played a major role in the litigations against the travel ban, saying that challengers have utilized statements made in the media to find support for their Establishment Clause claim).
279. 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., with whom Ginsburg, J., join dissenting).
280. *Id.* at 2421.

initiatives that may explain the prevalence of animosity toward the other. This may also help us conceptualize policies, like the travel bans, that show obvious disdain and disinvitation for individuals from Muslim majority countries. Put differently, there exists a much deeper ideological root behind the contemporary animosity toward the non-white other: misgivings about multiculturalism make a rejection of the Islamic culture possible, specifically in the area of alternative dispute resolution dealing with disputes that have a religious dimension.[281]

Although criticism on religious arbitration as a form of alternative dispute resolution might sound fair because of favoritism toward religious people, singling them out for special favor,[282] it does not however justify singling out Muslims for special *dis*favor, either in the form of travel bans or in the enactment of rules depriving them from living in accordance with their faith.[283] This criticism touches upon the presence of double standards that explicitly disfavor some groups. For example, in the case of Oklahoma, the Save Our State Amendment singled out explicitly Sharia law *qua* Sharia for special disfavor but remained silent as to other religious legal systems.[284] The courts in *Awad* easily parried the concerns and shattered the illusion—created out of myths and persisting conspiracy theories about Muslims—that Oklahoma was facing a huge Sharia problem. The Supreme Court in

281. The lack of appreciation of multiculturalism frustrates the possibility of having "competing and independent legal orders," enabling people to find appropriate solutions for their civil law disputes in accordance with their religious convictions. *Cf.* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1239 (2011) (purporting that anti-Sharia legal initiatives mainly "seek to undermine the ability of groups to serve as competing and independent legal orders, thereby striking at the very heart of the new multiculturalism."). *See also* Sukhsimranjit Singh, *Religious Arbitration and Its Struggles with American Law & Judicial Review*, 16 PEPP. DISP. RESOL. L.J. 360 (2016) (arguing that the debate about multiculturalism is at the heart of the debate concerning the permissibility of religious arbitration within secular systems); Joel A. Nichols, *Religion, Marriage, and Pluralism*, 25 EMORY INT'L L. REV. 967, 976 (2011) (saying that the "disconnect between religious law and civil law, when combined with premises of multiculturalism and the deep commitments of religious believers, has led to calls for greater legal recognition of the decisions of religious tribunals.").

282. Importantly, this concern can be seen as the other side of our critique so far on measures that have singled out groups for a special *disfavor qua* religion. Singling groups out for a special *favor qua* religion is on similar grounds very objectionable. *See generally* Sohail Wahedi, *Abstraction from the Religious Dimension*, 24 BUFF. HUM. RTS. L. REV. 1 (2017-2018) (discussing the liberal critique on singling out religion *qua* religion for a special favor). *See* however on the critique of favoritism in relation to religious arbitration: Brian Hutler, *Religious Arbitration and the Establishment Clause*, 33 OHIO ST. J. ON DISP. RESOL. 337, 358 (2018). *Cf.* generally on the problem with favoritism: Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C. L. REV. 781, 788 (2007) (claiming that favoritism toward groups undermines the authority of rules).

283. James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717, 728 (2015) (saying that a disfavored treatment of Sharia law *qua* Sharia in courts is not justified).

284. *Cf.* Rahdert, *supra* note 252.

Trump v. Hawaii, however, showed sensitivity to the seemingly neutral re-description of the travel ban, despite its undeniable and notorious history of hostility toward Muslims.

Comparing the travel ban cases to the Save our State Amendment debacle raises three delicate and challenging questions. First, how do we rationalize the return of exclusionary politics that single out people with immigrant backgrounds for disfavored treatment? Second, how can we understand the return of exclusionary politics *as such*? And third, how can we spread awareness of the devastating effects of such discriminatory policies?

The first question is contextual in nature. Fear has played a significant role in both the enactment of the travel bans and in the rise of anti-Sharia initiatives.[285] The fear of uncertainty as to who is entering the country, namely potential terrorists, led to the issuance of the travel ban. And it was the fear of who is already living here, namely people who follow the rules of an evil tradition, that caused the wave of anti-Sharia initiatives. This focus on border protection and preservation of the majoritarian narrative led to the rise of fear-based politics not grounded in a thorough and rationalist approach to the problems they claim to solve.[286]

The second question about how we should understand the return of these exclusionary politics is a conceptual one. How did it come to be that in both cases, the religious dimension was pushed to the margins? The travel bans were presented—ultimately with great success—as solutions to growing national security concerns. The Save our State Amendment, finding significantly less success, was presented merely as a choice-of-law or choice-of-forum issue. This sharp abstraction from the religious dimension,[287] particularly to the field of national security, has made it possible to marginalize serious criticism of the travel restrictions. After

285. Fear will play a major role in cases that in whatever way would pose threats to majoritarian sensitivities. *Cf.* for example the upcoming and first ever criminal trial in the United States regarding the permissibility of the lightest version of female circumcision, separation of the mucous membrane from the girls' genitalia, was rhetorically presented as a horrifying case of brutality. While this case concerned *religious* female circumcision that in all respects was less invasive than religious male circumcision, the mass media attention for "genital mutilation" made it impossible to say something meaningful about the lawfulness of this variant of female circumcision. *See* Sohail Wahedi, *The Health Law Implications of Ritual Circumcisions*, 22 QUINNIPIAC HEALTH L. J. 209 (2019). *Cf.* also Saul Levmore, *Can Wrinkles be Glamorous? in* SAUL LEVMORE & MARTHA C. NUSSBAUM, AGING THOUGHTFULLY: CONVERSATIONS ABOUT RETIREMENT, ROMANCE, WRINKLES, AND REGRET 104 (2017) (saying "the fact that so many thoughtful people find female but not male circumcision abhorrent, suggests that a critical difference is that one is practiced on a group that is, at least to Western eyes, seriously constrained and subjugated by a variety of practices.").

286. *Cf.* Bhuta, *supra* note 252. *See also* Jamie R. Abrams, *Enforcing Masculinities at the Borders*, 13 NEV. L.J. 564, 572 (2013).

287. *Cf.* Wahedi, *supra* note 282.

all, who could be against national security measures?[288]

The third question is about recommendations, focusing primarily on how to overcome the era of fear and spread awareness of the devastating effects of policies that single out minority groups for disfavored treatment. But before we can address solutions to the challenges posed by these fear-based politics, we must first identify and define what is at risk.

III. FREE OUR POLITICS FROM ANIMUS

Following our analysis of fear-driven politics, we are left with two fundamental questions. First, how can we conceptualize such politics? More specifically: against which theoretical backdrop can we conceptualize politics that single out specific groups—in our case, American Muslims—for special disfavored treatment? And second, how can we save our politics from fear and animus in an era of terror, anxiety, and social unrest?

What is interesting about the travel ban project and the Save our State debacle is that we can identify some facially neutral justification in both cases. While both situations could easily be characterized as concerning animus toward Muslims, there is another approach: abstraction from the religious dimension. This is reflected in the Trump administration's decision to translate the President's promise to shut down the borders to Muslims. The administration found a suitable and legally acceptable way to keep that promise, shifting the attention from religion and instead focusing on national security. This strategy corresponded with concerns intelligence services generally have about people coming from conflict areas, such as the Middle East and other Muslim-majority countries. A similar strategy was adopted in the Sharia ban cases: shifting the attention from religion to choice-of-law and choice-of-forum issues.

Both security concerns and choice-of-law issues were facially neutral and, therefore, suitable substitutes for the categories they effectively targeted. But what does abstraction from the religious dimension entail and how does it work in relation to the fear-driven politics discussed in this article? To answer this question, we must first acknowledge that the idea of abstraction, as discussed here, derives from the scholarly debate about the relationship between law and religion within the paradigm of

288. *Cf.* for example Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 838 (2017) (discussing President Trump's style of leadership and saying that "today's conditions of partisanship and polarization significantly reduce the possibility of meaningful oversight.").

liberal political philosophy.[289] Basically, liberal theories of religious freedom dealing with the specialness of religion for either religious accommodation or justification of public decisions,[290] have one major commonality: abstraction from the religious dimension.[291]

Liberal theories of religious freedom are skeptical about the specialness of religion *qua* religion, rejecting the special legal solicitude toward religion *qua* religion.[292] In other words, there should be no room for sectarian justifications of the special legal solicitude toward religion.[293] Within this approach, religion can only be considered special and, thus, a protection-worthy category via abstraction. That is to say, via the identification of its liberal and neutral substitutes.[294] The question becomes whether politics of fear, as described in this article, are paradigmatic expressions of abstraction. Intuitively, the answer is yes. Because of the strong rejectionist nature of the abstraction thesis that aims to find liberal substitutes for religion, explaining based hereon, why it is for example worthy to protect some religious practices, such as wearing headscarves or consuming Halal and Kosher food. Ultimately, not because these cases concern matters of religion, but because they concern matters of conscience.[295]

This rejection of the religious dimension that defines the abstraction strategy makes sense when analyzing the Government's decision to present the travel ban as purely a security matter. This also helps explain why authorities in Oklahoma strongly emphasized approaching State Question 755 solely as a choice-of-law matter. In both cases, abstraction was a useful strategy to shift the conversation away from religion and its serious constitutional concerns.

Although it may be true that abstraction from the religious dimension, as presented here, could be used to declare every unpopular

289. *Cf.* on the debate about the place of religion in liberal political philosophy: CÉCILE LABORDE & AURÉLIA BARDON, RELIGION IN LIBERAL POLITICAL PHILOSOPHY (2017).
290. *Cf.* Micah Schwartzman, *What if Religion is Not Special?* 79 U. CHI. L. REV. 1351 (2012).
291. Wahedi, *supra* note 282.
292. *Cf.* Kenneth Einar Himma, *An Unjust Dogma: Why a Special Right to Religion Wrongly Discriminates against Non-Religious Worldviews*, 54 SAN DIEGO L. REV. 217 (2017); BRIAN LEITER, WHY TOLERATE RELIGION? (2014); RONALD DWORKIN, RELIGION WITHOUT GOD (2013); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE (2008); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007) (all having in common that sectarian arguments in favor of religious freedom are not enough to justify singling out religion for special legal solicitude).
293. *Cf.* for a sectarian defense of religious freedom: Michael W. McConnell, *Why Protect Religious Freedom?* 123 YALE L.J. 770, 786-89 (2013); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1183 (2013).
294. For example conscience is considered an appropriate substitute for religion: JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE (2011).
295. *Cf.* LEITER, *supra* note 292, at 64. *See also* MACLURE & TAYLOR, *supra* note 294, at 77.

religious act out of order,[296] abstraction also emphasizes the importance of egalitarianism. In this context, that means authorities should enable all citizens to make use of their basic liberties to the same extent. Conversely, authorities should not favor one group at the expense of another. Thus, because of its emphasis on egalitarianism, abstraction disapproves a favored treatment of religion *qua* religion. But it also disapproves—for reasons of neutrality—a *dis*favored treatment of religion *qua* religion.[297]

Neither the travel ban, nor the Save our State Amendment can pass the second prong of abstraction: the ban on singling out groups of people or beliefs for special restrictions. Animosity toward Muslims was obviously present in both cases. The travel ban claims to deal with security measures, keeping potential terrorists, rapists, honor killers, and other troublemakers outside the United States. The Save our State Amendment similarly hid the religious concerns of its Muslim victims by positing that it aims solely to see that Oklahoma courts utilize only American laws, rather than any foreign laws.

The question now becomes how to overcome this era of anxiety toward the other. Anti-Sharia legal initiatives did not stop after *Awad*. In fact, there has been an increase in the amount of such initiatives proposed throughout the country. Additionally, the Islamic faith has been singled out for special restrictions in the areas of labor and land allocation for religious institutes.

Obviously, politics of fear are contrary to the promise of the American Dream. The only legacies these fear-driven politics will leave, will be the creation of disparities between groups of people, downgrading them to secondary citizens;[298] the reinforcement of majoritarianism and the political advancement of a clearly xenophobic immigration agenda;[299] and, above all, the institutionalization of Islamophobia.[300]

But, we should not give up quickly. We may still have some hope to overcome this era of anxiety, animus, and disregard of the constitutional traditions of freedom and neutrality. Justice Kennedy's concurring opinion regarding public manners in *Trump v. Hawaii* provides some guidance here. A broad interpretation of Justice Kennedy's forceful plea reminds the authorities to be mindful of what the constitutional tradition tells them; to bear in mind the freedoms guaranteed in the Constitution;

296. Sohail Wahedi, *Freedom of Religion and Living Together*, 49 CAL. W. INT'L L.J. 213 (2018-2019) (explaining European cases of singling out Muslims for specials restrictions in light of abstraction from the religious dimension).
297. *Cf.* DWORKIN, *supra* note 292, at 130 (defending the line that liberal democracies should not abandon a particular lifestyle because another lifestyle is "intrinsically better." It should be left to citizens to decide which way of life better suits them).
298. Ali, *supra* note 37.
299. Kapur, *supra* note 176.
300. *See generally* Beydoun, *supra* note 36.

and to be aware of legal constraints, such as the Establishment Clause.[301]

Indeed, we should not forget this country is "built upon the promise of religious liberty. [The Founding Fathers] honored that core promise by embedding the principle of religious neutrality in the First Amendment."[302] Similarly, we should keep in mind what Dr. King fought to achieve: more equality and less disparity. Pursuing the ideal of equal liberty and equal respect for human beings in a highly divided world is the least we can do to honor Dr. King's powerful and timeless dream.

Just as important as the plea for equal liberty, public manners, and respect for the constitutional tradition, is the need for having and maintaining "a Judiciary willing to hold the [political] branches [accountable] when they defy our most sacred legal commitments," such as religious freedom.[303]

CONCLUSION

Immigration has always been subject to great political debate in the United States. Today, however, the explicit use of anti-immigration rhetoric has become common among a significant portion of the political establishment. This rhetoric has provoked the immigration debate and shaped the contours of the contemporary political discourse concerning immigration. With the 2016 election of President Trump came a tougher attitude toward immigration and immigrants. Subsequently, the 2018 midterm elections revealed an increase in "Islamophobic" rhetoric among political campaigners. This stricter attitude toward immigration has manifested itself in two ways. First, through the aggressive language used to discuss immigration. And second, through the proliferation of restrictions aiming to inhibit immigrants from entering the United States.

What is striking about both political developments is the undue use of stereotypes. These stereotypes have intensified concerns about undocumented immigrants, illegal border crossings, and national security threats. Specifically, this latter concern has been used to justify the special need for radical measures in the fight against immigration—measures ranging from building a separation wall between the United States and Mexico to denying citizens of some countries access into the United States. As a consequence of this harsh political reality, people with immigrant backgrounds suffer from harassment, hatred, and racial profiling.

This article has focused on the challenges faced by one group in

301. 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).
302. *Id.* at 2433 (Sotomayor, J., with whom Ginsburg, J., join dissenting).
303. *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., with whom Ginsburg, J., join dissenting).

particular: the Muslim community. The contemporary anti-immigration atmosphere draws upon fears of uncertainty about who is crossing the borders and who is living here. To deal with these concerns, authorities have singled out Muslims and their faith for special restrictions. This is obviously discriminatory and contrary to the rich constitutional tradition of freedom and neutrality.

To halt a further racialization of Muslims and to overcome the contemporary era of fear, anxiety, and distrust, we must act in accordance with and uphold the constitutional tradition of freedom and neutrality. We must foster a strong judiciary that can halt the executive and legislative branches if necessary. We must keep in mind: no more racial discrimination, but equal liberty and equal respect toward the other, even if the other does not share our beliefs or our way of life.

EPILOGUE

The travel ban project and the Save our State debacle fit a broader tendency of disregarding constitutional traditions of religious liberty and state neutrality toward religion, applying double standards and framing the "other" as dangerous, unwelcome, and unfit. Unfortunately, this tendency is present across many liberal democracies: from the Far East, to the Middle East, Europe, and North America. Of these places, the situation in Europe is comparable to, and in some instances even worse, than what we see happening in the United States. The rise in measures targeting people with Islamic background is perplexing. And the restraint of the judiciary to defend "our most sacred legal commitments" is regrettable.[304]

As such, the religious freedom jurisprudence of the European Court of Human Rights is notoriously Islamophobic in nature, likely resting on myths about Muslims,[305] rather than drawing on an approach attesting to equal respect and equal liberty.[306] It has proven to be very "lenient

304. *Id.*

305. 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, at 275 (2008) (saying with reference to critics of the case law of this Court that "there appears to be a bias in the jurisprudence of the [European Court of Human Rights] under article 9 toward protecting traditional and established religions and a corresponding insensitivity toward the rights of minority, nontraditional, or unpopular religious groups."). *See also* Samuel Moyn, *Religious Freedom and the Fate of Secularism*, *in* JEAN LOUISE COHEN & CÉCILE LABORDE (EDS.), RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 27 (2016) (asking rhetorically with respect to the systematically different legal treatment of Islamic cases before the ECtHR: "Do the cases . . . reflect a Christian Islamophobia in the principled garb of secularism?").

306. Christian Joppke, *Pluralism vs. Pluralism: Islam and Christianity in the European Court of Human Rights*, *in* JEAN LOUISE COHEN & CÉCILE LABORDE (EDS.), RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 88 (2016) (analyzing the case law of the European Court of Human Rights in religious freedom cases and claiming that the Court

toward practices of Christian establishment and overtly intolerant toward the presence of Islam."[307] But more alarming is the rise of concrete measures across European states singling out the Islamic faith for special bans *qua* Islam. For example, in 2015, Austria adopted the "Islam-bill," singling out Islamic organizations and banning them from receiving foreign funding. More recently, the European Parliament has proposed to close all Islamic centers, including mosques and other institutes that operate contrary to values of the European Union, while again leaving other religions unmentioned.[308]

Abstraction may be a helpful strategy to separate practices from their religious dimension, but it is never a justificatory strategy for discrimination, religious intolerance, or the spread of hatred toward unpopular religious groups.

interprets pluralism as a value that is threatened by the Islamic faith and needs therefore be protected).

307. CECILE LABORDE, LIBERALISM'S RELIGION 33 (2017).

308. Wahedi, *supra* note 296.

CONCLUSION

This project has focused on the "specialness" of religion in law either for the purposes of a favored treatment or a disfavored treatment. Based hereon, it has raised the question as to whether religion qua *religion deserves special protection in law and if not what consequences does such a negative response have for disfavoring religion in law. This Conclusion will answer the main research question in two steps and in line with the twofold design of the main research question. Also, it remarks on four recurring issues that have played a major role in this project. These issues that will be reconsidered in light of the reasoned conclusions that we have reached at different points include (i) the phenomenon of abstraction; (ii) religious freedom; (iii) the (un)lawfulness of ritual circumcisions; and (iv) the reinforcement of majoritarianism.*

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FAVORING AND DISFAVORING RELIGION IN LAW

This project has raised the following main research question:

"Should the law in liberal democracies single out religion *qua* religion for favored treatment? If not, what consequences does the answer to this question have for singling out religion *qua* religion in law for disfavored treatment?"

This Conclusion answers the main research question in line with its twofold shape: (i) should the law in liberal democracies single out religion *qua* religion for favored treatment? (ii) If not, what consequences does the answer to this question have for singling out religion *qua* religion in law for disfavored treatment?

This response helps us to reconsider recurring themes and cases that have played an important role in the development of this project. Hence, after answering the two questions that have been raised by our research question, we reconsider the phenomenon of abstraction from the

religious dimension (Part I); freedom of religion (Part II); the legal admissibility of ritual circumcision (Part III) and the reinforcement of majoritarianism (Part IV). The final Part of this Conclusion contains a brief response to the main research-question of this study.

Back to the first part of our main question: should the law in liberal democracies single out religion *qua* religion for favored treatment? The first four Chapters of this study say: no. Religion should not be singled out in law for favored treatment *qua* religion. However, and as Chapters Three and Four have concluded religion deserves special protection in law via abstraction from the religious dimension. That is to say: the liberal and non-sectarian substitutes of religion need to be singled out in law for special protection. This means that there is no room for a sectarian justification of religious freedom. Because within the paradigm of liberal political philosophy, religion cannot be considered a protection-worthy category in law *qua* religion.

Thus, for example conscience needs protection *qua* conscience in law and since it can cover both the religious and non-religious conscience, our negative conclusion that says religion should not be singled out in law for a favored treatment *qua* religion, does not affect the toleration regime for manifestations of religion that concern matters of conscience.

Chapters Three and Four refer in this context to dietary restrictions and objections to military service. Both examples can have a religious or a non-religious basis. The same is true for the choice to wear clothes that have a religious background. Therefore, the law should not allow for the possibility of wearing headscarves in public because of the specialness of religion—or the specialness of the metaphysics of religion, the law should allow for this practice, because covering the head concerns an important matter of conscience. In other words, it is not because religion is special that we say the law should allow for the choice to wear headscarves, it is, we posit because human conscience needs protection in law.

Thus, there is no need to single out religion in law *qua* religion for a favored treatment. What consequences does this answer have for singling out religion *qua* religion in law for a disfavored treatment? Chapters Five and Six have revealed that drawing on a religiously neutral language in justifying measures that have effectively singled out religion in law for a disfavored treatment is very problematic and in no way compatible with how liberal political philosophy aims to deal with religion in law. Nor are such measures comprehensible from that perspective.

At best, making use of facially neutral grounds and a religion-empty language in defense of measures that have disfavored religion in law *qua* religion can be conceptualized and understood in terms of abstraction from the religious dimension. But the use of abstraction for the purposes of disfavoring religion—simply because the regulatory authorities dislike a particular lifestyle—cannot justify to downgrade fundamental rights of some religious minorities.

The reason as to why liberal political philosophy does not provide a justification ground to single out religion for disfavored treatment in law—of course in those cases that manifestation of religion is not harming the society as a whole, thus we are not discussing the admissibility of for example "theoterrorism"—is because it emphasizes two matters that complicate the liberal justification of disfavoring religion in law *qua* religion. First, because of neutrality toward how people want to live their lives—and again we are not talking about terrorism or other harmful ways of life.

Second, because of equal respect toward religious and non-religious concerns, commitments, deep feelings, worldviews and ways of life. This means that the authorities have a positive obligation to create equal opportunities for all citizens so they could make equally use of their basic rights. It is against this backdrop very problematic for example to deprive Muslims from the right to freedom of religion, as some politicians in for example—but not limited to—the Netherlands have suggested.

We will now draw on these general notes to discuss more in-depth what our research outcomes tell us about some concepts and cases that have played a significant role in carrying out this research. We start with abstraction from the religious dimension. We then move toward religious freedom. After this, we clarify our position regarding ritual circumcisions and the reinforcement of majoritarianism.

I. ABSTRACTION FROM THE RELIGIOUS DIMENSION RECONSIDERED

In different Chapters of this PhD project, but also in the preparatory phase, the idea that there is something like abstraction from the religious dimension in public discussions concerning religious accommodation and scholarly debates about the special legal solicitude toward religion has played a significant role. Now taking the six articles together, we may ask the question again: what is abstraction from the religious dimension about? How can we define this concept? Is it indeed a concept? Or is abstraction from the religious dimension rather a theory? If so, what is this theory about? What may help in answering these questions is that we have thought about abstraction at two different points in this study.

In Chapter Three, we have concluded that legal and liberal political philosophers abstract from the religious dimension in their theories of religious freedom, when they think about the need for protecting religion in law *qua* religion. They draw on a religion-empty language to reflect on the protection worthiness of religion, religious accommodation and free exercise of religion. In Chapter Four, we have said that religion should only receive a special treatment in law via abstraction from the religious dimension.

Thus, we have concluded that religion should only be singled out in

law for special protection if its liberal substitutes are protection-worthy as such. We have conceptualized this way of approaching religion in law as abstraction from the religious dimension. This is a description of what we have discerned in liberal political philosophy. But now we can take an important step and conclude that within the paradigm of liberal political philosophy abstraction is a concept that tells us what the liberal positions have in common in terms of their specific normative understanding of the specialness of religion in law. The commonality between these positions is that they all reject—though in different degrees—the idea that the law should tolerate religion *qua* religion.

The normative justification for this position is that liberal theories of religious freedom draw on egalitarianism and strongly advocate for an egalitarian approach to the choices people make to live their lives in line with their own insights, beliefs, deep commitments and so on. Therefore, authorities should refrain from upgrading religion and downgrading non-religion. Instead, authorities should approach religion and non-religion equally and assess requests for exemptions from laws that are generally applicable equally. Thus, authorities should not distinguish between for example a Jehovah's Witness who refuses service in the army on religious grounds, and a pacifist who refuses military service because of objections that are deeply rooted in his worldviews.

The second reason why liberal theories of religious freedom argue in favor of a God-empty and religion-empty approach to religious freedom is their emphasis on neutrality that says authorities should find a more *ecumenical* justification for any favored treatment in law. Thus, equality and neutrality are the grounds that have paved the way to abstract from the religious dimension.

Describing abstraction as a concept that tells us how liberal theories of religious freedom are connected to each other from a normative point of view, is a helpful step to understand the phenomenon of abstraction in the law and religion scholarship. But there is something more about this phenomenon. In the last two Chapters we have used abstraction for the purposes of conceptualizing a new and barely scrutinized development in law: disfavoring religion *qua* religion by using facially neutral grounds to repackage and redescribe a wide range of religious manifestations.

Chapter Five has revealed that the use of a religion-empty language has helped to shift the attention from religion to non-religious categories that warrant restrictive measures. This Chapter has referred to debates including, but definitely not limited to the legal admissibility of laws that have singled out face-covering veils for special bans and plans that single out Mosques and Islamic institutes for special restrictions and bans.

Chapter Six has revealed that adopting a religion-empty language helps to find neutral grounds that could justify certain interventions. As such, the travel bans of President Trump have been defended as security measures that are necessary to protect people against violence. The anti-

Sharia law initiatives were presented as means to secure the use of state law in courts.

What both Chapters have illustrated is that from a rhetorical point of view, abstraction from the religious dimension is a useful instrument and a powerful political tool to shift the attention *from* religion toward a more neutral framework in order to justify restrictions upon free exercise of religion. But what both Chapters have also revealed is that the use of a religion-empty language, drawing hereby on facially neutral grounds, does not cleanse such measures from discrimination and animus toward religion.

To put it differently, abstraction from the religious dimension for the purposes of justifying restrictive measures, does not help—at the end of the day—to hide what is really behind the façade of neutral grounds. Nor is abstraction helpful in whitewashing the pretexts that have been used to disfavor religion or some religious minorities.

As such, Chapter Five has showed that the use of a religion-empty language in discussions about the legal admissibility of face coverings veils and closure of places of worship does not change the history of religious animus behind such concrete steps.

The same is true for the travel ban projects of President Trump and the anti-Sharia law initiatives that have been taken in different states. Abstraction from the religious dimension in relation to these two cases does not change the history of religious animus behind these cases.

What does abstraction from the religious dimension—as discussed in Chapters Six and Five—entail? Here, abstraction has been used for political purposes. But within the paradigm of liberal political philosophy abstraction has another meaning. We have concluded that abstraction in that part of the research stands for a descriptive concept about normative argumentation patterns concerning the specialness of religion in law.

However, our findings in the final phase of this research reveal that the phenomenon of abstraction from the religious dimension is broader than our initial conclusion about abstraction as a descriptive concept that tells us how liberal political philosophy thinks about the role of religion for the purposes of granting exemptions and justifying public decisions.

So we need to broaden our understanding of abstraction in law and religion. What we posit in this respect is that within the public, political and legal discourse on matters of law and religion, abstraction from the religious dimension has been used rhetorically to find very questionable justifications for restrictive measures that are not grounded in thorough reflections about the problems they aim to solve. Rather the façades and pretexts that have been used to justify disfavoring measures advance a political agenda that is very skeptical about diversity and pluralism in a world that is rapidly changing.

Thus, we can conclude that abstraction from the religious dimension is a broad phenomenon in the debate on law and religion. There is on the

one hand abstraction within the paradigm of liberal political philosophy. On the other hand, there is abstraction in the legal, political and public debates about religion, religious accommodation and free exercise. These two forms of abstraction differ from each other in the sense that political philosophers abstract for different reasons and purposes than those who abstract from the religious dimension to achieve certain political goals.

This dichotomous understanding of abstraction from the religious dimension—based on the specific discussion we have analyzed—as either a concept with normative positions on the specialness of religion in law or as a political instrument, at least suggests that the theory building about abstraction cannot be easily caught by one specific definition. What this research has done is outlining the contours of a theory that informs us about the presence of something that we could call abstraction from the religious dimension in the law and religion scholarship and public debates about religion, religious accommodation and free exercise. But at different points in this debate, abstraction takes a different meaning.

This may also suggest that this project has not been involved with a semantic debate about the most appropriate definition of abstraction. This is even more conceivable because providing such a comprehensive definition would be impossible. The two parts of this study have showed how we could understand abstraction from the religious dimension in law and religion debates.

Hence, for the purpose of this research abstraction has helped us in two ways. First, we have seen how liberal political philosophers think about the justification for the special legal solicitude toward religion. Second, we have been able to scrutinize the pretexts that have been used to develop restrictive measures.

Furthermore, thinking in terms of abstraction has helped us to contextualize why liberal political philosophers and authorities abstract when they are dealing with religion in law. Whereas the latter group abstract from the religious dimension because it has been driven by feelings of fear toward the stranger in general and Muslims in particular, theorists abstract to preserve the principles of equality and neutrality.

II. FREEDOM OF RELIGION

The theoretical axis of this PhD project has been the specialness of religion, either for a favored treatment or a disfavored treatment in law. Obviously, freedom of religion plays a major role in this respect. As a matter of fact, it comes back in each one of the articles. So, the question is: what do our outcomes suggest about the need for a special right to religious freedom?

For the answer to this question we need to combine the outcomes of our analyses in Chapters Three to Six. These Chapters have showed that

from a theoretical perspective—more specifically from the perspective of liberal political philosophy—there is no reason to single out religion for favored treatment in law *qua* religion. Religion may only be singled out for special protection via abstraction. In other words, it is not religion as such that warrants special legal solicitude, but its liberal substitutes.

Does the conclusion that free exercise of religion can be guaranteed by combining non-discrimination with basic liberties, such as freedom of expression, conscience and association, imply that we do not need a special right to religious freedom? It does. This project has defended the argument that there is nothing special about religion that would urge us on *principled grounds* to single religion out *qua* religion for special legal protection. The principles of equality and neutrality do not provide any room for a sectarian justification of the need for a special right to religious freedom.

Thus, does religion *qua* religion deserve special protection in law? No, it does not. What does this conclusion actually mean for regional and international treaty provisions and other constitutional rights that single out religion for special protection? Should religious freedom be removed from constitutions and treaties that guarantee free exercise of religion?

Before answering this question, we will look at what our conclusion means for rights that guarantee a special right to religious freedom. Take for example the First Amendment to the U.S. Constitution.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

International and regional human rights documents contain similar provisions. For example, the Universal Declaration of Human Rights,[1] the International Covenant on Civil and Political Rights,[2] the European Convention on Human Rights,[3] and the Charter of Fundamental Rights of the European Union protect free exercise of thought, conscience and religion.[4]

So what does our conclusion about the lack of support for the special legal protection of religion *qua* religion mean for legal provisions that provide special protection to religion? Admittedly, the international and regional provisions concerning the right to free exercise also guarantee freedom of conscience and thought. But our national example shows some interesting differences. It singles out religion for two different purposes.

First, for the purposes of free exercise. Second, for a special ban on

1. Article 18 (1), UNIVERSAL DECLARATION OF HUMAN RIGHTS.
2. Article 18 (1), INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.
3. Article 9 (1), EUROPEAN CONVENTION ON HUMAN RIGHTS.
4. Article 10 (1), CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION.

authorities' side to establish a religion. The assessment of this national provision in light of our normative framework of abstraction reveals that the First Amendment is *underinclusive*. There is no reference to what really needs specific legal protection: human conscience.

The fact that Courts today—and specifically during the Vietnam War era—have proliferated the legal definition of religious beliefs, as for example has happened in *United States v. Seeger*,[5] does not change our critique that no explicit protection of conscience is unsatisfactory in light of what liberal political philosophy considers protection-worthy in law: that is not religion, but for example conscience or ethical independence, just to mention a few of the liberal alternatives.[6]

What about the international and regional human rights treaties that have singled out religion, conscience and thought for special protection? In a sense, these provisions are *overinclusive*. That is even more the case since those documents also guarantee non-discrimination and protect freedom of association and expression.

Hence, there is no need to protect free exercise of religion *next to* what these treaties protect (basic liberties) and prohibit (discrimination). The combination of non-discrimination with guarantees provided under freedoms of conscience, thought, association and expression are enough to have something like "religious liberty." Hence, under those regimes there is no need to mention religion explicitly in the list of categories singled out for special legal protection.

What does our conclusion about the *underinclusiveness* and the *overinclusiveness* of national, international and regional rights related to free exercise of religion concretely suggest about the need for a special right to religious freedom?

We have strong normative arguments to posit that "religion" in the First Amendment should be replaced by "conscience." For the regional and international instruments, we may suggest to remove the reference to religion.

Thus, our conclusion suggests that we do not need any reference to religion in relation to a freedom to have the legal opportunity and access to free exercise of religion. Paradoxically, we say: you do not need to have a special right to religious freedom to have religious liberty. This conclusion is grounded in the findings of Chapter Three. The five alternative liberal positions we have discussed in that Chapter all show how we could give protection to free exercise without reliance on religious

5. 380 U.S. 163 (1965) (the Supreme Court held that conscientious objections to military service may be based on both: religious and non-religious grounds).
6. *Cf.* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 167 (2008) (on the problem of *underinclusiveness* and *overinclusiveness* in relation to the right to free exercise of religion).

values or reference to religion.[7]

But does this negative recommendation to remove—under certain circumstances—an explicit reference to religion in the Constitution and human rights treaties herald the end of religious freedom? No, it does not for two reasons. First, our conclusion has a limited geographical scope. It is only defensible within those traditions and regimes that prohibit any form of discrimination and guarantee freedom of association, freedom of expression and freedom of conscience. Not only theoretically, but also in practice.

Therefore, we do not recommend to remove religious freedom from Constitutions that do not guarantee non-discrimination and other necessary freedoms that together make religious liberty—and thus free exercise—possible. Thus, we acknowledge the limited applicability of our conclusion in this respect. In line with this, Chapters Four and Five have mentioned two practical arguments that explain why the "removal" of religious freedom from the Constitution would create an undesirable precedent in today's anxious world.

This conclusion has also been reaffirmed in Chapter Six that calls for "public manners," i.e. authorities should not "disregard" what the tradition of freedom and neutrality tells them about respect for basic liberties and fundamental rights of all human beings.[8]

Simply said, we posit that there are no principled reasons to single out religion in law for special protection *qua* religion. The combination of other freedoms guarantee free exercise. However, this conclusion has a limited geographical application. Moreover, practical concerns make us to be cautious in our concrete actions in relation to religious freedom.

Admittedly, we do not expect that political leaders will change the current legal regime of guarantees for free exercise as codified in various national Constitutions, regional and international treaties. Moreover, as discussed in Chapters Four and Five, we do not want them to change at this time the current state of art. But with an eye to the future, we have set out an argumentation framework that could help the founding fathers of new countries what they should include in the Constitution. Also new organizations that work on the promotion of human rights could draw on our normative framework to think about the question what needs special

7. The positions discussed in Chapter Three are just alternative approaches to the same question: does religion *qua* religion deserve special protection in law? Chapter Three does not aim to be exhaustive in its analysis of the liberal positions concerning the "specialness" of religion. It illustrates what alternative responses are possible without saying which one is the best alternative justification for the special legal solicitude toward religion. But that is not necessary, since all the positions discussed have something of abstraction in common when they talk about the specialness of religion. This commonality between liberal theories of religious freedom reveals that religion is only special in law via the route of abstraction from the religious dimension.

8. *Cf.* Trump v. Hawaii 138 S. Ct. at 2424 (Kennedy, J., concurring).

protection, further advocacy and emphasis.

That is working toward non-discrimination and creating awareness about the importance of having equal access to basic liberties, such as the freedoms of conscience, thought and association. This should guarantee free exercise of religion without any explicit reference to religion.

A timely example of what our conclusion posits at this point is the project of "Human Dignity for Everyone and Everywhere" that draws on a language of human dignity to promote justice without singling out one specific category of beliefs or worldviews for special protection *qua* that category.[9]

III. RITUAL CIRCUMCISIONS

This project has drawn inspiration from the debate concerning the (un)lawfulness of ritual circumcisions at different points. As such, this study starts with an analysis of the debate concerning the (un)lawfulness of ritual circumcisions. Furthermore, it confronts the outcomes of these analyses with the normative framework of abstraction. And it relies on this confrontation to develop a framework of arguments that defends religious freedom in a way that looks beyond the sectarian justification provided for this right.

Hence, the question is: what do our research outcomes suggest about the (un)lawfulness of ritual circumcisions? The answer to this question can be found in Chapter Four.

However, given the theoretical and methodological importance of the debate on the (un)lawfulness of ritual circumcisions, we will briefly summarize our conclusions on the legal admissibility of circumcisions.

In line with the conclusions reached in Chapter Three, we have said in Chapter Four that religious practices should not be singled out in law *qua* religious for favored treatment. So drawing on this conclusion, we have said that any favored treatment of ritual circumcisions in law *qua* religious would be indefensible. Hence, only a more *ecumenical* language would justify any exemptions made in law for ritual circumcisions.

Analyzing the (un)lawfulness of ritual circumcisions from this angle resulted in the conclusion that male circumcision could only be justified in law as a medical treatment. This approach trumps convincingly bodily integrity concerns. But moving from religion toward a medical treatment argument in the debate on the (un)lawfulness of ritual circumcisions has also helped us to provide a normative justification for the argument that religion as such should not be used as a justification ground to favor the category of interventions upon children's bodies that are irreversible, and

9. *See* PUNTA DEL ESTE DECLARATION ON HUMAN DIGNITY FOR EVERYONE EVERYWHERE, https://www.dignityforeveryone.org/wp-content/uploads/sites/5/2019/02/Punta-del-Este-Declaration.pdf (last visited Jun. 27, 2019).

which lack proper medical need and consent. Hence, laws that single out male circumcision for a favored treatment in law *qua* religious are quite problematic. The same is true for laws that allow for cosmetic surgeries on female genitals for esthetic reasons, but which criminalize similar interventions upon female genitals for traditional reasons.

Laws that favor male circumcision *qua* religious are problematic as they do not single out religious variants of female circumcision that are not irreversible like ritual male circumcision. Laws that effectively single out one group of women for access to the cosmetic surgery industry, while criminalizing other women who would like to make use of the services of this industry for traditional purposes are problematic because such laws attest to "double standards" in how authorities appraise the lawfulness of practices that have more in common than we may want to believe.

However, as Chapters Four and Five have showed neither male nor female circumcisions should be singled out in law for favored treatment *qua* religious. Hence, as long as there is medical support for the practice of male circumcision, it should be allowed under that umbrella. Female circumcision does not have any health benefits. For this reason, it should not be accepted as an exemption in law. Moreover, practical concerns as discussed in Chapters Four and Five oppose any further restriction of ritual male circumcision and ease of the legal regime related to female circumcision.

Nevertheless, it remains very difficult to allow for ear piercings for young children, and approach the lightest version of female circumcision, as discussed in Chapter Four with reference to the *Nagarwala* case, as a serious violation of human rights. After all, we have concluded and later defended the normative argument that equal protection concerns should prevent authorities from explicitly favoring or disfavoring a particular lifestyle.

Allowing for ear piercings because it concerns a practice of the dominant culture, while outlawing the lightest variant of ritual female circumcision because it does not fit majoritarian sensitivities, attest to a state practice that is clearly not neutral in the way it appraises similar practices. This conclusion does not call for allowing infibulation, excision, or clitoridectomy. It creates serious awareness about the presence of an asymmetrical toleration regime that is morally indefensible, but which is at least for the time being justifiable on pragmatic grounds.

VI. REINFORCEMENT OF MAJORITARIANISM

The combination of the first four Chapters of this PhD project has showed that it is problematic to single out religion *qua* religion for a favored treatment in law. Similarly, the remaining last two Chapters of this project have illustrated—with references to experiences from Europe

and the United States—that it is equally troublesome to single out religion *qua* religion for disfavored treatment in law. The normative framework of abstraction, as developed in Chapter Three, with its emphasis on egalitarianism and neutrality, provides the arguments for opposing singling out religion *qua* religion for disfavored treatment in law. As a matter of fact, and as Chapters Five and Six have pointed out, this unfortunate development has targeted specifically members of the Islamic minority living in Europe and the United States.

Today, the rise of measures across such liberal democracies that have singled out the Islamic faith *qua* Islam for disfavored treatment is perplexing. And the restraint of the judiciary to intervene and make a clear statement against this tendency is regrettable. As the alarming analyses of Chapters Five and Six show, this tendency reinforces majoritarianism in an unprecedented way.

The reinforcement of majoritarianism takes place because of two mutually confirming developments. On the one hand, there is a rise of actual or propagated bans singling out the Islamic faith *qua* Islam for disfavored treatment in law, downgrading Muslims to secondary class citizens for whom other criteria apply when it comes to free exercise of basic liberties. On the other hand, the religious freedom jurisprudence of Courts across liberal democracies is overtly tolerant toward majoritarian sensitivities and intolerant toward requests for exemptions coming from people who do not fit within the majoritarian and dominant culture. This latter development does not only affect Muslims, but simultaneously other minority groups who—like Muslims—do not share the majoritarian cultural and religious narrative.

Hence, the risk of applying double standards in religious freedom cases is not something hypothetical. Chapters Five and Six have given concrete examples of cases in which Courts have used double standards in dealing with very similar cases of free exercise. Whereas for example in the *Masterpiece Cakeshop* judgment, the Supreme Court of the United States ruled that religious intolerant statements were problematic, in *Trump v. Hawaii*, the Court ruled—just a couple of days after its decision in *Masterpiece*—that the use of facially neutral language in the most recent version of the travel ban of President Trump was sufficient to reaffirm that the executive power is in charge of taking decisions upon entrance admission into the United States. This approach of the Supreme Court that could be understood in terms of abstraction from the religious dimension made it possible to ignore completely the history of animosity toward Muslims that resulted in the enactment of a series of travel bans.

The presence of "double standards" in combination with drawing on a language of abstraction—not in a normative way, but using abstraction as a rhetorical instrument—makes it possible to say that the Court shows leniency toward majoritarian sensitivities areas related to immigration politics and border security concerns.

But more problematic is the religious freedom jurisprudence of the European Court of Human Rights (ECtHR), which effectively reinforces majoritarianism in an unprecedented way. This jurisprudence is for two reasons very problematic.

First, because the ECtHR gives its member states a wider margin of appreciation in those cases where its member states are "better placed" to take a decision, or in cases in which there is "no consensus" among its member states as to how the law should react to a certain matter that is subject of discussion.

As Chapter Five has concluded, this margin of appreciation doctrine reinforces majoritarianism. The ECtHR is there to protect and promote human rights, even if the outcome in a particular case is contrary to what majoritarian sensitivities suggest.

Second, because the ECtHR seems to be insensitive toward the large body of criticism upon its notorious religious freedom jurisprudence. As such, and as discussed in Chapter Five, its *S.A.S.* decision was criticized mainly because of the "abrupt" introduction of "living together" as ground for justifying restrictions upon free exercise of religion.

But instead of rethinking the problematic introduction of a limitation ground that is not mentioned in the Convention, the ECtHR has recently reaffirmed its *S.A.S.* judgment. In *Dakir*, the Court continues with using the *S.A.S.* living together limitation formula.[10]

This post-*S.A.S.* decision on the lawfulness of the ban on face-covering veils in Belgium is thought provoking for two reasons.

On the one hand, the Court provides lip service to Muslims through saying that it is aware of the fact that banning face-covering veils affects this religious minority in particular.[11] On the other hand, however, it has provided France and Belgium a wide margin of appreciation to form an opinion about the (un)lawfulness of wearing face-covering veils in public, since it assumes that there is no consensus upon this matter within its member states.[12] But this is simply not true. Many European Countries are moving toward the enactment of laws banning face-covering veils in public. Hence, there is consensus upon a growing number of European countries to ban face-covering veils in the public space.[13] This fact should have moved the ECtHR to reflect critically on bans that are born out of the "living together" formula.

10. Dakir v. Belgium, App. No 4619/12, Eur. Ct. H. R. ¶ 56 (2017).
11. *Id.* ¶ 55.
12. *Id.* ¶ 59.
13. *The Islamic veil across Europe*, BBC (May 31, 2018), https://www.bbc.com/news/world-europe-13038095 (Jun. 27, 2019).

CONCLUSION

This PhD project has raised a twofold research question: (i) should the law in liberal democracies single out religion *qua* religion for favored treatment? (ii) If not, what consequences does the answer to this question have for singling out religion *qua* religion in law for disfavored treatment?

This research has showed in its first four Chapters that religion should not be singled out in law for favored treatment *qua* religion. The combination of the ban on discrimination with other basic liberties, such as freedom of conscience, expression and association guarantees the free exercise of religion. This response has a limited geographical scope. It is only applicable in places where the law does prohibit discrimination and guarantee freedoms of conscience, expression and association. Moreover, practical concerns complicate the move toward withdrawal of religious freedom from the Constitution and other documents, even if other laws guarantee freedom of conscience, expression and association.

This research has showed in its last two Chapters that disfavoring religion *qua* religion is also problematic. It reinforces majoritarianism and downgrades minority groups to secondary class citizens.

The conclusion that religion *as such* does not deserve special legal solicitude does not herald the end of religious accommodation. Religious toleration and true religious pluralism could only be guaranteed under a legal regime that guarantees non-discrimination and basic liberties, such as the freedoms of conscience, expression and association.

Hence, we can summarize the threefold conclusion of this research as follows. No, religion does not deserve special legal protection because it is religion. And no, religion should not be disfavored in law because it concerns religion. Free exercise of religion finds proper protection under the guarantees of basic liberties, like freedoms of conscience, expression and association, as well as the legal promises of non-discrimination and neutrality.

SUMMARY

The main research question of this study aims to solve two matters: (i) should the law in liberal democracies single out religion *qua* religion for favored treatment? (ii) If not, what consequences does the answer to this question have for singling out religion *qua* religion in law for disfavored treatment?

This research has given an answer to this question via combining the outcomes of six articles, each representing one Chapter. The first four Chapters deal with the question whether religion should be singled out in law *qua* religion. The final two Chapters scrutinizes the tendency of disfavoring religion in law. Although each Chapter has its own method, the overarching research methodology is one of searching for a reflective equilibrium. The Introduction has accounted for the way this study has started, what role our intuitions have played in the preparatory phase, how we have reached conclusions and revised our preliminary considered convictions.

We began this project as a response to developments in the legal and political discourse dealing with the question how the law should deal with religion and claims for exemptions based thereon. Although our first working hypothesis suggested that abstraction from a normative point of view is a problematic development, the confrontation of this hypothesis with legal philosophy on the "specialness" of religion in law urged us to reconsider our first ideas about this phenomenon. The conclusion we reached after reviewing the paradigmatic debate in liberal political philosophy on the justification grounds for a favored treatment of religion in law, was that abstraction is not something problematic per se. But the rise of measures attesting to a disfavored treatment of religion in law urged us to reconsider our conclusions about the phenomenon of abstraction.

This moving back and forth between our first intuitions, considered conclusions, concrete debates, legal theory and legal philosophy helped us in the search for a reflective equilibrium.

The overarching research strategy was one of testing our first ideas, revise our conclusions and expand our network of professionals who could help us to improve our argumentation pattern.

The Assessment Framework of Ritual Male Circumcision (Chapter One) has analyzed the legal-political debate in the Netherlands and the Council of Europe on the legal admissibility of male circumcision. The method used was a combination of doctrinal and normative research. As such, this Chapter has scrutinized the Dutch case law, positive law and literature on the (un)lawfulness of ritual male circumcision. Next, it has focused on the political debates inside the Council of Europe.

Chapter One has revealed that the national (Dutch) and regional

approaches (Council of Europe) to ritual male circumcision are quite similar. Both consider this intervention as a medical practice that can be accepted in law if certain criteria are met.

Parental consent for circumcision is the most important criterion in this regard. But the law also prescribes that circumcisions should take place under appropriate conditions and carried out by professionals. This condition was reaffirmed by the Council of Europe.

Chapter One has posited that religious male circumcision should not be accepted in law *qua* religious. It has justified this normative argument on the basis of what liberal political philosophy tells us about the special legal solicitude toward religion. That is no favoritism toward religion *qua* religion.

The Criminal Law Approach toward Female Circumcision: A Comparative Law Perspective (Chapter Two) has elaborated on the legal and political debates concerning the unlawfulness of female circumcision. This Chapter has analyzed the narratives behind this practice focusing on the question why people continue with practicing female circumcision. In addition, it has analyzed the legal approaches to this practice, focusing on the question as to why France is the only country that has succeeded in bringing cases of female circumcision before the criminal court.

To scrutinize why many countries fail to combat female circumcision despite the fact that this practice is considered a crime and a violation of fundamental rights, Chapter Two has compared the legal approaches to this practice in France, the Netherlands and the United Kingdom. In this respect, it has drawn on qualitative literature research to explore the relationship between models of citizenship that prevail in France, the Netherlands and the United Kingdom, and the criminal law approach to female circumcision. This analysis has resulted in the conclusion that we could conceptualize the French success in enforcing criminal law against female circumcision in light of the French republican model of citizenship that works toward assimilation of people with an immigrant background in the French society. The lack of results in the criminal law enforcement toward female circumcision in the Netherland and the United Kingdom is related to the multicultural model of citizenship that for a long time prevailed in both countries.

Abstraction from the Religious Dimension (Chapter Three) has focused on the liberal theories of religious freedom and introduced a conceptual framework of normative positions about the role of religion in law. This framework involves argumentation patterns that are helpful to answer the question whether liberal democracies should single out religion for special legal protection.

To answer this question, Chapter Three has categorized the liberal approaches to religion as follows. Rejection: no toleration for religion in law *qua* religion. Substitution: no need to single out religion in law *qua*

religion for a favored treatment, free exercise could be guaranteed under other basic freedoms. Generalization: advocating for a broader definition of religion in law that looks beyond theism. Equation: no reason to favor religion *qua* religion, the law should guarantee equal protection of deep commitments of all human beings, and it should guarantee that all have equal access to basic liberties. Representation: justifying the special legal solicitude toward religion in light of non-theistic values.

This classification of liberal positions, based on a normative method that has analyzed the debate in liberal political philosophy on the role of religion in law, is the first step to answer the question whether religion *qua* religion deserves special legal protection in liberal democracies. The answer to this question is threefold, and its synthesis is characterized by abstraction from the religious dimension, which renounces arguments justifying religious freedom with an appeal to distinctly religious values.

The Health Law Implications of Ritual Circumcisions (Chapter Four) has scrutinized the different legal approaches to practices and traditions that are comparable, such as male circumcision, the least invasive version of female circumcision and female genital cosmetic surgeries. This Chapter has referred in this respect to the fact that many countries, including but not limited to Western countries have forbidden female circumcision, better known as female genital mutilation in all its variants, while ritual male circumcision and esthetic genital surgeries are allowed.

This attests to the presence of "double standards" favoring religion and the cosmetic surgery industry. To address properly this criticism of "double standards", Chapter Four has focused on the legal admissibility of ritual circumcisions.

It has combined doctrinal and normative research, and adopted a health law perspective to put the legality of ritual circumcisions under critical scrutiny. This approach has helped to explain why circumcision of boys is generally allowed in law. This practice has been considered a medical intervention that seems to be in the best interest of the child. Therefore, Chapter Four has posited that the law should not single out male circumcision for a favored treatment in law *qua* religious. Chapter Four has given a normative justification for this position, that is that any exemption granted in law should be *ecumenical* of nature, meaning that the law should not favor religion *qua* religion.

The health law perspective has also helped to explain why ritual female circumcision should remain illegal: it has no health benefits and it harms female bodies significantly. But this no-health-benefits-argument could also have consequences for the legal admissibility of male circumcision if the medical benefits are at a future time determined to be non-existent. This gives an unsatisfactory feeling, as the ban on ritual circumcision of boys hangs like a Damocles sword above this

practice.

To address this critique, this Chapter has developed argumentation patterns that are closer to reality, meaning arguments that look beyond the sectarian and liberal justifications of ritual circumcisions, explaining why we should refrain from the acceptance of female circumcision in law and why we should restrain from the creation of further restrictions upon male circumcision at this moment.

Chapter Four has found such grounds in foreign relation interests of liberal democracies and their commitment to create a space of mutual understanding between different groups of people.

Freedom of Religion and Living Together (Chapter Five) has argued that despite the recognition of religious freedom as a fundamental human right, recent developments inside the United States and Europe reveal that the Islamic faith has been singled out *qua* Islam for special disfavored treatment. Chapter Five has raised the question whether this approach is compatible with the normative understanding of religion and religious freedom. The answer to this question is: no and it is based on a combination of doctrinal and normative research.

After all, liberal political philosophy emphasizes egalitarianism and neutrality in relation to religion. And although religion does not warrant special legal solicitude *qua* religion, Chapter Five has concluded that it is equally problematic to single out religion for disfavored treatment in law *qua* religion, even if the justification is facially neutral. Chapter Five has drawn on facially neutral examples, such as: the French ban on face-covering veils, the travel ban project of President Trump, and the anti-Sharia debacle in the state of Oklahoma. But the use of a prima facie neutral language does not cleanse such measures from animosity toward religion and discrimination of minority groups.

Chapter Five has revealed that abstraction in the broader debate on law and religion has been used in two ways. One, within the paradigm of liberal political philosophy on the role of religion in law. Two, within legal and political debates about religion in the public space, free exercise and religious accommodation.

Muslims and the Myths in the Immigration Politics of the United States (Chapter Six) has identified the myths behind measures that have singled out Muslims *qua* Islam for special restrictions and bans in the United States. This Chapter has analyzed the travel ban project of President Trump and the "Save our State Amendment" that aimed to outlaw the use of Sharia law in the state of Oklahoma. Chapter Six has revealed that behind the façades of security and neutrality there is fear of the stranger and in particular, fear of the Muslim migrant. Fear has played a major role in justifying measures and plans like the travel ban of President Trump and the anti-Sharia legal initiatives.

Historically, such "politics of fear" have affected migrant groups who

did not share the dominant religious and political perspective. As such, Baptists, Catholics, Jews, Mormons and Quakers were targeted in the past. Today, politics of fear have affected specifically Muslim migrants. In this respect, Chapter Six has revealed that over the past few years, particularly in the aftermath of Muslim terrorist attacks, the outward appearance of Muslims–such as wearing headscarves, having beards, non-Hispanic brown, and Middle-Eastern posture–has played a major role in the racial profiling of Muslim migrants in the United States. Furthermore, such physical characteristics and stereotypes have formed the basis to treat the stranger as suspicious.

Chapter Six has also revealed that today racial and ethnic profiling of Muslims or travelers with a "Muslim name" or an "Islamic appearance" at airports has become a notorious phenomenon. Moreover, while racial profiling of Muslims at airports and other security-sensitive places has been considered necessary for security needs, Chapter Six has unveiled how in other areas, the Islamic background of people has been considered a serious threat to societal harmony and peaceful coexistence in diversity.

Chapter Six has concluded that racialization of Muslims and other people with an immigrant background in the United States contributes to the creation of parallel societies affecting equal access to basic liberties in society.

The Conclusion of this research is that religion should not be singled out in law *qua* religion for a favored treatment. Neither should religion *qua* religion be singled out in law for a disfavored treatment.

Favoring religion in law is problematic because the combination of other basic liberties, such as the freedoms of conscience, association and expression, guarantees free exercise of religion.

Disfavoring religion in law is problematic because liberal political philosophy does not provide a normative basis to justify measures attesting to religious animus and religious discrimination.

The Conclusion has drawn on these two general notes to reconsider the phenomenon of abstraction in the debate on law and religion, freedom of religion, the (un)lawfulness of ritual circumcisions and reinforcement of majoritarianism.

With regard to the phenomenon of abstraction, the Conclusion has posited that we can describe abstraction as a concept that tells us what liberal political philosophers say about the specialness of religion in law. This description of abstraction as a concept that contains normative ideas about the special legal solicitude toward religion, unveils that religion in liberal political philosophy is only considered protection-worthy in law, if its liberal substitutes are protection-worthy categories as such.

Thus, religion should only receive special protection via abstraction from the religious dimension.

But the Conclusion has showed that we can discern abstraction in

legal and political debates on for example religion, free exercise, religious accommodation, immigration and integration of minorities. At this point, abstraction has been used rhetorically to justify restrictive measures.

With regard to the need for a special right to freedom of religion, the Conclusion has defended the argument that we do not need religious freedom to have the ability to manifest our religious beliefs in freedom. The guarantees under other basic liberties, like freedoms of conscience, thought and expression provide enough protection to free exercise, i.e. the freedom to manifest religious beliefs. However, political concerns at this time urge us to be cautious. Hence, the Conclusion does not advocate for the removal of religious freedom in today's anxious world, it only says that we do not have a normative liberal justification for favoring religion in law.

With regard to the admissibility of ritual circumcisions in law, the Conclusion has reaffirmed that the law should not single out for favored treatment religious practices *qua* religious. Thus, no toleration in law for female circumcision, although some of its variants show similarities with practices that are allowed, such as genital cosmetic surgeries and male circumcision. Furthermore, male circumcision should only be accepted as an exemption in law if certain criteria are met. This means that the law should not favor religious male circumcision *qua* religious, but allow for this practice if parental consent is present and the circumcision is carried out by skilled professionals and under appropriate conditions.

With regard to reinforcement of majoritarianism, we have said that two developments have contributed to this. On the one hand, the rise of measures that have singled out the Islamic faith *qua* Islam for disfavored treatment. This has downgraded Muslims to secondary class citizens for whom other criteria apply when it comes to free exercise of basic liberties. On the other hand, the religious freedom jurisprudence of Courts across liberal democracies is overtly tolerant toward majoritarian sensitivities and intolerant toward requests for exemptions coming from people who do not fit within the majoritarian and dominant culture.

SAMENVATTING

De hoofdvraag van dit onderzoek, onderzoekt twee kwesties: (i) zou godsdienst binnen liberale democratieën uitgezonderd moeten worden voor speciale bescherming *qua* godsdienst? (ii) Zo niet, heeft het antwoord op de eerste vraag consequenties voor het uitzonderen van godsdienst voor nadelige behandeling *qua* godsdienst?

Dit onderzoek heeft antwoord gegeven op deze hoofdvraag door de uitkomsten van zes artikelen, ieder artikel staat voor een hoofdstuk, te combineren. De eerste vier hoofdstukken hebben betrekking op de vraag of godsdienst uitgezonderd dient te worden voor bijzondere bescherming. De laatste twee hoofdstukken hebben betrekking op de ontwikkeling die godsdienst uitzondert voor nadelige behandeling.

Hoewel ieder hoofdstuk een eigen onderzoeksmethode heeft, wordt de overkoepelende methode gekenmerkt door het reflectief evenwicht.

In de Introductie is verantwoording afgelegd over de aanleiding van dit onderzoek, welke rol onze inzichten hebben gespeeld bij aanvang van dit onderzoek en hoe wij tot onze conclusies zijn gekomen.

Dit project is begonnen als een reactie op ontwikkelingen binnen het juridische en politieke discours over godsdienst en claims voor excepties daarop gebaseerd. Hoewel de werkhypothese aanvankelijk suggereerde dat abstractie—normatief gezien—een problematische ontwikkeling is, leidde de confrontatie van deze werkhypothese met het debat binnen de liberale politieke filosofie over de beschermwaardigheid van godsdienst binnen het recht ertoe dat wij onze eerste ideeën over abstractie hebben herzien.

Wij concludeerden dat abstractie niet per definitie problematisch is. Wat wel problematisch bleek te zijn, was het gebruik van abstractie voor een nadelige behandeling van godsdienst *qua* godsdienst. De opkomst en toename van voorstellen en maatregelen die een ongunstige behandeling van godsdienst in de wet bevestigen, leidde ertoe dat wij onze eerdere conclusie over het fenomeen abstractie hebben heroverwogen.

Dit heen en weer gaan tussen onze eerste ideeën over abstractie, weloverwogen conclusies, concrete debatten, rechtsfilosofie en politieke filosofie heeft ons geholpen bij onze zoektocht naar reflectief evenwicht.

De overkoepelende onderzoeksstrategie bestond uit het testen van onze eerste ideeën, het herzien van onze conclusies en het uitbreiden van ons netwerk van professionals om de inhoud van ons werk te verbeteren.

Het Beoordelingskader van Rituele Jongensbesnijdenis (hoofdstuk één) heeft het juridisch-politieke debat binnen Nederland en de Raad van Europa over de toelaatbaarheid van jongensbesnijdenis geanalyseerd. De gebruikte methode was zowel doctrinair als normatief. Als zodanig heeft dit hoofdstuk de Nederlandse jurisprudentie, het positieve recht en de

juridische literatuur over de (on)toelaatbaarheid van jongensbesnijdenis geanalyseerd. Ook heeft dit hoofdstuk politieke debatten binnen de Raad van Europa over de toelaatbaarheid van jongensbesnijdenis onderzocht.

Hoofdstuk één heeft laten zien dat de Nederlandse (nationaal) en de regionale benadering (de Raad van Europa) van jongensbesnijdenis veel overeenkomsten vertonen. Beide beschouwen jongensbesnijdenis als een medische praktijk die onder bepaalde voorwaarden toelaatbaar is.

De toestemming van de ouders voor de besnijdenis is in dit opzicht het belangrijkste criterium. Maar de besnijdenis moet ook plaatsvinden onder medisch verantwoorde omstandigheden en zij dient uitgevoerd te worden door professionals.

Dit hoofdstuk heeft betoogd dat jongensbesnijdenis niet zou moeten worden toegelaten in het recht, omdat het een religieuze praktijk betreft. Deze normatieve stellingname is verankerd en verantwoord binnen het kader van de liberale politieke filosofie over de rechtvaardiging voor de bijzondere bescherming van godsdienst. Binnen dit kader is geen ruimte voor de bescherming van godsdienst *qua* godsdienst in het recht.

De Strafrechtelijke Aanpak van Meisjesbesnijdenis in een Rechtsvergelijkende Context (hoofdstuk twee) heeft juridische en politieke debatten over de strafwaardigheid van meisjesbesnijdenis nader onderzocht. Dit hoofdstuk heeft de grondslagen van deze praktijk geanalyseerd met nadruk op de vraag waarom jonge meisjes en vrouwen nog altijd onderworpen worden aan besnijdenis. Ook heeft dit hoofdstuk de juridische benadering van deze praktijk geanalyseerd met nadruk op de vraag waarom Frankrijk het enige land is dat succesvol zaken over meisjesbesnijdenis onder de aandacht van de strafrechter heeft gebracht.

Om te onderzoeken waarom veel landen falen in het bestrijden van meisjesbesnijdenis ondanks het feit dat deze praktijk als een misdaad en schending van de grondrechten wordt beschouwd, heeft hoofdstuk twee de aanpak van dit verschijnsel in Frankrijk, Nederland en het Verenigd Koninkrijk vergeleken.

In dit verband is gebruikgemaakt van literatuuronderzoek om te kijken of er een verband bestaat tussen burgerschapsmodellen die gelden in respectievelijk Frankrijk, Nederland en het Verenigd Koninkrijk en de strafrechtelijke benadering van meisjesbesnijdenis in die landen.

Deze analyse heeft geleid tot de conclusie dat wij het Franse succes in de strafrechtelijke aanpak van meisjesbesnijdenis kunnen koppelen aan het republikeinse model van burgerschap dat hamert op assimilatie van mensen met een niet-Franse achtergrond in de Franse samenleving. Het gebrek aan resultaten bij de strafrechtelijke handhaving ten aanzien van meisjesbesnijdenis in Nederland en het Verenigd Koninkrijk houdt verband met het multiculturele model van burgerschap dat in die landen lange tijd gold.

Abstractie van de Religieuze Dimensie (hoofdstuk drie) heeft nader

onderzoek gedaan naar de liberale theorieën van godsdienstvrijheid. Ook heeft dit hoofdstuk een conceptueel kader ontwikkeld over de bijzondere bescherming van de categorie godsdienst in het recht.

Dit raamwerk omvat argumentatiepatronen die nuttig zijn om de vraag te beantwoorden of liberale democratieën godsdienst behoren uit te zonderen voor bijzondere bescherming *qua* godsdienst.

Hoofdstuk drie heeft de liberale benadering van godsdienst als volgt gecategoriseerd. Verwerping: geen tolerantie voor godsdienst in het recht *qua* godsdienst. Vervanging: het is niet nodig godsdienst *qua* godsdienst speciaal te beschermen, want godsdienstvrijheid kan worden vervangen door andere rechten. Generalisatie: pleiten voor een andere interpretatie van godsdienst die verder reikt dan het theïsme. Vergelijking: geen reden om alleen godsdienst uit te zonderen voor bijzondere bescherming, want het recht zou diepe overtuigingen op dezelfde manier moeten beschermen en het recht moet ook de gelijke toegang tot grondrechten garanderen. Vertegenwoordiging: niet-godsdienstige waarden vormen de basis om de bijzondere bescherming van godsdienst te rechtvaardigen in het recht.

Deze classificatie van liberale posities, gebaseerd op een normatieve methode die het rechtsfilosofische debat over de rol van godsdienst in het recht heeft geanalyseerd, is de eerste stap om de vraag te beantwoorden of godsdienst *qua* godsdienst bijzondere bescherming nodig heeft binnen liberale democratieën.

Het antwoord op deze vraag is drieledig en de synthese ervan wordt gekenmerkt door abstractie van de religieuze dimensie, die geen ruimte biedt voor argumenten die godsdienstvrijheid willen rechtvaardigen met een appel op religieuze waarden.

De Gezondheidsrechtelijke Implicaties van Rituele Besnijdenissen (hoofdstuk vier) heeft de juridische verschillen in de toelaatbaarheid van relatief vergelijkbare praktijken, zoals jongensbesnijdenis, de lichtste variant van meisjesbesnijdenis en cosmetische ingrepen aan vrouwelijke genitaliën kritisch geanalyseerd. Dit hoofdstuk heeft verwezen naar het feit dat in veel landen meisjesbesnijdenis, beter bekend als vrouwelijke genitale verminking, in al zijn varianten verboden is, terwijl bijvoorbeeld jongensbesnijdenis en cosmetische ingrepen toegestaan zijn.

Dit getuigt van "dubbele standaarden" ten gunste van godsdienst en de cosmetische chirurgie-industrie. Om dit punt nader te onderzoeken, heeft dit hoofdstuk gekeken naar verschillen in de wijze waarop het recht omgaat met mannen- en vrouwenbesnijdenis.

Om de toelaatbaarheid van rituele besnijdenissen te onderzoeken, heeft hoofdstuk vier doctrinair en normatief onderzoek gecombineerd en tevens gebruik gemaakt van een gezondheidsrechtelijk kader.

Deze combinatie van verschillende benaderingen heeft ons in staat gesteld om te verklaren waarom het recht een uitzondering maakt voor jongensbesnijdenis. Niet omdat het een religieuze praktijk betreft. Maar

omdat jongensbesnijdenis een medische ingreep betreft.

Hoofdstuk vier heeft geconcludeerd dat religieuze praktijken niet zouden moeten worden toegelaten binnen het recht louter op basis van hun religieuze grondslagen.

De normatieve rechtvaardiging voor deze conclusie is dat excepties altijd op basis van algemeen aanvaarde waarden zouden moeten worden gerechtvaardigd. Dus: geen speciale bescherming voor godsdienst in het recht *qua* godsdienst.

Het gezondheidsrechtelijk kader heeft ons tevens geholpen om te verklaren waarom meisjesbesnijdenis strafbaar moet blijven: zij schaadt vrouwelijke lichamen aanzienlijk en zij heeft geen gezondheidsvoordelen.

Maar het "gezondheidsargument" zou ook gevolgen kunnen hebben voor de juridische toelaatbaarheid van jongensbesnijdenis, indien blijkt dat deze praktijk geen enkel medisch voordeel meer heeft. Dit geeft een onbevredigend gevoel, omdat het verbod op rituele besnijdenis geen denkbeeldige scenario is. Het verbod hangt als een zwaard van Damocles boven jongensbesnijdenis.

Om een oplossing te bieden voor deze uitdaging, heeft hoofdstuk vier argumentatiepatronen ontwikkeld die dichter bij de werkelijkheid staan: dus tegen het toelaten van vrouwenbesnijdenis en tegen een verbod op de rituele jongensbesnijdenis.

Dit kader stoelt op belangen van liberale democratieën in verband met internationale betrekkingen en de wijze waarop zij om horen te gaan met minderheden.

Godsdienstvrijheid en Samen Leven (hoofdstuk vijf) heeft betoogd dat ondanks het feit dat godsdienstvrijheid algemeen is erkend als een fundamenteel recht, ontwikkelingen binnen Verenigde Staten en Europa laten zien dat de islam wordt uitgezonderd voor nadelige behandeling. Dit hoofdstuk heeft de vraag opgeworpen of deze benadeling verenigbaar is met de wijze waarop binnen liberale politieke filosofie wordt gesproken over godsdienst. Het antwoord hierop is: nee. Dit antwoord is gebaseerd op een combinatie van doctrinair en normatief onderzoek.

Liberale politieke filosofie benadrukt gelijkheid en neutraliteit in de wijze waarop zij omgaat met godsdienst en hoewel dit kader geen ruimte biedt om godsdienst *qua* godsdienst bijzonder te beschermen, biedt het evenmin ruimte om godsdienst *qua* godsdienst bijzonder te benadelen.

Daarom zijn maatregelen en wetten die *prima facie* neutraal zijn, zoals het Franse boerkaverbod, de inreisverboden van President Trump en het anti-Sharia initiatief in de staat Oklahoma, maar die godsdienst in de kern raken, problematisch en als zodanig ontoelaatbaar.

Hoofdstuk vijf heeft laten zien hoe abstractie op twee manieren is gebruikt binnen het bredere debat over recht en religie. Abstractie heeft een eigen betekenis binnen het paradigma van liberale politieke filosofie over godsdienst. Binnen juridische en politieke debatten over godsdienst

in de openbare ruimte, het uitoefenen van godsdienst en het creëren van excepties voor gelovigen binnen liberale democratieën wordt zij retorisch toegepast.

Moslims en Mythes in het Immigratiebeleid van de Verenigde Staten (hoofdstuk zes) heeft een aantal mythes geïdentificeerd die de boventoon voeren in het immigratiedebat in de Verenigde Staten. Zij vormen tevens de basis voor maatregelen die moslims nadelig treffen op basis van hun godsdienst. Dit hoofdstuk heeft de inreisverboden van president Trump geanalyseerd, alsook het anti-Sharia initiatief in de staat Oklahoma.

Hoofdstuk zes heeft onthuld dat achter de façades van veiligheid en neutraliteit in het algemeen een vrees bestaat voor de vreemdeling en in het bijzonder de angst heerst over moslims. Angst heeft een belangrijke rol gespeeld bij het vinden van rechtvaardigingen voor maatregelen en voorstellen die moslims in het bijzonder nadelig treffen.

Maatregelen die gebaseerd zijn op gevoelens van angst hebben altijd mensen geraakt die niet passen binnen de heersende dominante cultuur. Als zodanig zijn baptisten, katholieken, joden, mormonen en quakers in het verleden een doelwit geweest van soortgelijke maatregelen.

Tegenwoordig heeft de politiek van angst vooral moslimmigranten nadelig getroffen. In dit verband heeft hoofdstuk zes verwezen naar het "moslimuiterlijk", zoals het dragen van hoofddoeken, baarden, gekleurd zijn of Midden-Oosters eruit zien, dat in de afgelopen jaren, en met name in de nasleep van terroristische aanslagen, een cruciale rol heeft gespeeld in het raciaal profileren van moslimmigranten in de Verenigde Staten.

Hoofdstuk zes heeft tevens verwezen naar het feit dat tegenwoordig het raciaal en etnisch profileren van moslims of mensen die islamitische namen hebben een veel toegepaste methode is op vliegvelden. Maar de "islamitische achtergrond" wordt tegenwoordig ook gebruikt om allerlei restrictieve maatregelen en wetten te rechtvaardigen om de dominante cultuur aldus te beschermen.

De conclusie van dit hoofdstuk was dat racialisering van moslims en anderen met een achtergrond die afwijkt van de dominante cultuur in de Verenigde Staten bijdraagt aan het creëren van parallelle samenlevingen dat gelijke toegang tot fundamentele rechten bemoeilijkt.

De Conclusie is dat godsdienst geen speciale bescherming toe mag komen omdat het godsdienst betreft. Evenmin zou godsdienst een bron moeten zijn voor bijzonder nadelige aanpak.

Het uitzonderen van godsdienst voor bijzondere bescherming geeft vanuit een normatief oogpunt problemen omdat godsdienst vervangbaar is door andere categorieën die als zodanig beschermwaardig zijn, zoals het geweten.

Het uitzonderen van godsdienst voor nadelige behandeling is vanuit een normatief oogpunt bezien niet wenselijk, omdat het indruist tegen de basisprincipes van de liberale politieke filosofie: verbod op discriminatie

en neutraliteit van staatswege tegenover godsdienst.

In de Conclusie wordt ook nog teruggeblikt op vier onderwerpen die een belangrijke rol hebben gespeeld in dit onderzoek: het fenomeen van abstractie, het debat over de vrijheid van godsdienst, de toelaatbaarheid van rituele besnijdenissen en de versterking van het majoritarisme.

Met betrekking tot abstractie menen wij dat dit fenomeen als een concept met normatieve posities kan worden beschreven. Daarnaast is er sprake van abstractie binnen juridische en politieke debatten.

Ten aanzien van abstractie als een descriptief concept dat ons nader informeert over de bijzondere bescherming van godsdienst in het recht, laat ons onderzoek zien dat godsdienst alleen beschermwaardig is door abstractie van de religieuze dimensie.

Dus, godsdienst kan alleen als bijzonder worden beschouwd omdat zijn liberale substituten beschermwaardig zijn in het recht.

Ten aanzien van abstractie als een middel dat wordt toegepast om vergaande restricties op fundamentele rechten te rechtvaardigen, laten wij aan de hand van concrete politieke debatten zien hoe abstractie als een retorisch middel wordt gebruikt.

Met betrekking tot de noodzaak voor een bijzonder recht op vrijheid van godsdienst zegt dit onderzoek in de Conclusie dat voor de uitoefening van godsdienst een speciaal recht op godsdienstvrijheid geen must is. De garanties onder gewetensvrijheid, de vrijheid van meningsuiting en de vrijheid van vereniging bieden genoeg bescherming om in vrijheid uiting te geven aan religieuze overtuigen. Maar politieke ontwikkelingen op dit moment nopen tot voorzichtigheid.

Daarom pleiten wij niet voor afschaffing van godsdienstvrijheid, wij stellen uitsluitend vast dat er normatief gezien geen redenen bestaan om godsdienst uit te zonderen voor bijzondere bescherming in het recht *qua* godsdienst.

Met betrekking tot de toelaatbaarheid van rituele besnijdenissen, zijn wij tot de conclusie gekomen dat religieuze praktijken niet mogen worden bevoorrecht *qua* het religieuze. Dus geen bescherming voor een praktijk als meisjesbesnijdenis, hoewel sommige varianten hiervan veel overeenkomsten vertonen met jongensbesnijdenis.

Jongensbesnijdenis zou alleen mogen worden toegestaan onder een aantal voorwaarden, zoals ouderlijke toestemming, vakbekwaamheid en professionaliteit.

Met betrekking tot versterking van het majoritarisme hebben wij verwezen naar maatregelen die moslims in het bijzonder nadelig hebben getroffen. Wij hebben gewezen op het risico van parallelle samenlevingen die kunnen ontstaan als gevolg van zulke maatregelen. In dit verband hebben wij ook gekeken naar Amerikaanse en Europese rechtspraak die zeer gevoelig blijkt te zijn voor meerderheidszorgen.

Deze twee ontwikkelingen versterken het majoritarisme.

CURRICULUM VITAE

Short academic biography:

Sohail Wahedi has a bachelor degree in law (2012) and a master degree in "Legal Research" (cum laude) from Utrecht University (2015). In 2015, his PhD research proposal on the relationship between law and religion was accepted by the Erasmus School of Law. His academic work has appeared in *Buffalo Human Rights Law Review*; *California Western International Law Journal*; *Quinnipiac Health Law Journal* and *Oxford Journal of Law and Religion*.

In 2018, Sohail was a visiting fellow at Osgoode Hall Law School, Toronto, and a writing fellow in the International Center for Law and Religion Studies' inaugural Oxford Program, "Religion and the Rule of Law." This program was organized by Brigham Young University and held at Christ Church, University of Oxford.

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Prior to his appointment as a PhD Candidate, Sohail was intern at the embassy of the Kingdom of the Netherlands in Tel Aviv, Israel and working student at De Brauw Blackstone Westbroek.

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- *Exporting the Revolution to Africa: the Nigerian Experience*, *in* CHRISTIAN GREEN (ED.), LAW, RELIGION AND HUMAN FLOURISHING 147 (2019).
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– *Federal Constitutional Court of Germany Case no 1 BvR 3237/13 – Case Note*, 6 OXFORD J. L. & RELIGION 426 (2017).
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Paper presentations at Conferences and Special Workshops:

- *Disfavoring Muslims in the West: Religious Bigotry or Religious Persecution?*, Religious Persecution in the World Today: Diagnoses, Prognoses, Treatments, Cures Conference, Christ Church, University of Oxford, United Kingdom (UK), Aug. 2-3, 2019.
- *Worship pollution. On Noisy Churches, Yelling Muazzins and Whatever May Follow*, Law, Religion, and the Environment, The Seventh Conference of the African Consortium for Law and Religion Studies (ACLARS), Gaborone, Botswana, May 19-22, 2019.
- *Freedom of Religion and Living Together*, Public lecture at the Desmond Tutu Centre for Religion and Social Justice, Desmond & Leah Tutu Legacy Foundation, Cape Town, South Africa, May18, 2019.
- *Religious Freedom in an Era of Egalitarianism*, Religion and Law Conference, University of Alberta, Camrose, Canada, Apr. 12, 2019.
- *Disfavoring Religion* Qua *Religion*, Law and Religion Workshop, J. Reuben Clark Law School, Brigham Young University, Provo, United States of America (USA), Mar. 12, 2019.
- *Beauty and the Beast. Muslims and the Myths*, Border Myths Symposium, California Western School of Law, San Diego, USA, Mar. 12, 2019.
- *Religious Freedom: An Oxymoron for Abstraction from the Religious Dimension*, European Academy of Religion Annual Conference, Bologna, Italy, Mar. 5, 2019.
- *The Good Religion, the Bad Religion and the State's Religion*, State Responses to Security Threats and Religious Diversity Conference, Prague, Czech Republic, Nov. 27, 2018.
- *Religious Freedom and Living Together in Diversity: A Peaceful Combination?*, Living Together in Diversity: Strategies from Law and Religion, The Fifth Conference of the International Consortium for Law and Religion Studies (ICLARS), Pontifícia Universidade Católica, Rio de Janeiro, Brazil, Sep. 12-14, 2018.
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- *Abstraction from the Religious Dimension*, Religious Critiques of Law Conference, Nootbar Institute, Pepperdine University School of Law, Malibu, USA, Mar. 8-9, 2017.
- *Ritual Male Circumcision in Dutch Case Law: A Rejectionist Approach?*, Empirical Legal Studies: Fad, Feud or Fellowship? The Annual Conference of the Dutch Legal Sociology Association, Erasmus University Rotterdam, Rotterdam, the Netherlands, Jan. 19, 2017.

Conferences attended (without paper presentation):

- Tolerance in Mediterranean Societies: History, Ideas and Institutions, Casablanca Seminars, King Abdul-Aziz Al-Saud Foundation for Islamic Studies and Human Sciences, Casablanca, Morocco, Jul. 11-13, 2019.
- Freedom of/for/from/in Religions: Differing Dimensions of a Common Right?, The Fourth Conference of the ICLARS, St. Hugh's College, University of Oxford, UK, Sep. 8-11, 2018.