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"Balancing" Free Expression and Religious Feelings in E.S. v. Austria: Blasphemy by Any Other Name?

John G. Wrench

"BALANCING" FREE EXPRESSION AND RELIGIOUS FEELINGS IN *E.S. V. AUSTRIA*: BLASPHEMY BY ANY OTHER NAME?

John G. Wrench[1]

ABSTRACT

The European Court of Human Rights' 2018 decision in E.S. v. Austria *upheld an Austrian court's conviction based on "disparaging religious doctrine." The Court took this opportunity to reaffirm problematic, decades-old precedent, while creating new contradictions in its analysis of free expression claims. Despite the EU's modern opposition to the criminalization of blasphemy,* E.S. v. Austria *in effect sends a contradictory message. This Comment explores the roots of the Court's struggle to find an appropriate balance between the values of religious tolerance and freedom of expression, analyzes the Court's recent decision, and suggests future paths to recalibrate the Court's approach to these two fundamental rights.*

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1. J.D., Case Western Reserve University School of Law, Cleveland, Ohio, May 2019; B.A., Philosophy & Religious Studies, Pace University, Pleasantville, New York, December 2015.

INTRODUCTION

In 2018, the European Court of Human Rights ("ECtHR") upheld an Austrian court's conviction of a woman after she made several statements about Muhammad at a seminar on the "Basics of Islam."[2] A member of the right-wing Freedom Party Education Institute, "Ms. E.S." hosted two public seminars in 2014, where she criticized Muhammad's relationship with his wife, Aisha.[3] Ms. E.S. was subsequently convicted for "disparaging religious doctrines," a criminal violation in Austria.[4]

The ECtHR noted that although Article 10 of the Convention on Human Rights (the "Convention") establishes a right to free expression, that right must be balanced against the right to religious freedom established by Article 9.[5] Under the Court's precedent, the right to free expression may be validly proscribed when it is incompatible with respect for the religion of others.[6] Furthermore, as a departure from its typical free expression analysis, the ECtHR scrutinized the speaker's objectivity, weighed the value judgment's factual basis, and granted remarkable deference to Austria's courts and legislative goals.[7] The ECtHR held that both the statement's weak factual basis and Ms. E.S.'s subjectivity militated against protecting her expression.[8] Furthermore, the Court concluded that states are obligated to restrict expression capable of inciting Muslims to "justified indignation."[9]

The ECtHR's decision has been criticized by observers both within and outside the EU.[10] Some commentators from nations with more absolutist free expression regimes, particularly the United States, were

2. E.S. v. Austria, App. No. 38450/12, Eur. Ct. H.R., ¶¶ 6-8, 58 (Oct. 25, 2018), *available at* http://hudoc.echr.coe.int/eng?i=001-187188 [https://perma.cc/RRX8-NTVB].

3. *Id.* ¶ 13.

4. *Id.* ¶¶ 10-12.

5. *Id.* ¶ 43.

6. *Id.* ¶ 45.

7. *Id.* ¶¶ 47, 48.

8. E.S. v. Austria, App. No. 38450/12, ¶¶ 54–55.

9. *Id.* ¶ 57.

10. *See* Stijn Smet, *E.S. v. Austria: Freedom of Expression versus Religious Feelings, the Sequel*, STRASBOURG OBSERVERS (Nov. 7, 2018), https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/ [https://perma.cc/74NV-WJDH].

shocked at what appeared to be a draconian prosecution.[11] Similarly, some within the EU viewed the case as a sign of the times—an indication that the EU is slipping deeper into an intolerant climate of speech-suppression.[12]

This Comment explores the ECtHR's problematic application of its free expression precedent, placing particular emphasis on the Court's novel and contradictory analysis. Part I relates the facts of the case and the Court's reasoning, while describing the doctrinal relationship between Article 9's right to religious freedom and Article 10's right to free expression. Part II analyzes the Court's holding with the following questions in mind: First, is the holding in *E.S. v. Austria* an accurate application of the Court's free expression and religious freedom precedents? Second, in a prescriptive spirit, what are the strengths and weaknesses of the Court's approach in light of the rights protected by the Convention on Human Rights? The Comment concludes with suggestions for how the ECtHR should recalibrate its approach to the interaction of free expression and religious freedom, to better protect both fundamental rights in the future.

I. THE OFFENDING STATEMENTS, APPEALS, AND THE ECTHR'S RULING

A. Ms. E.S.'s Statements and Conviction in the Regional Court

In 2008, Ms. E.S. began holding seminars on the "Basics of Islam" at the Freedom Party Education Institute ("Freedom Party") in Vienna.[13] Those interested in attending could learn about upcoming seminars as Freedom Party members, as invitees, or by viewing the publicly accessible Freedom Party website.[14] The Freedom Party also advertised the lectures through leaflets "specifically aimed at young voters," inviting attendees to take part in a "free education package."[15] The two seminars at which Ms. E.S. made the statements in question

11. *See, e.g.*, Simon Cottee, *A Flawed European Ruling on Free Speech*, THE ATLANTIC (Oct. 31, 2018) (suggesting that "it is hard not to read the . . . ruling as a concession to those who wouldn't hesitate to interpret E.S.'s comments not just as offensive, but as deserving of a murderous retaliation."); *see also* Brendan O'Neill, *In Europe and in Pakistan, Two Women Are Condemned for Insulting Muhammad*, REASON (Nov. 1, 2018) ("Pluralism cannot survive without free expression, and free expression requires tolerance of criticism . . . [the ECtHR] has failed not only to defend the liberty of E.S., but of all Europeans—Christian, Muslim, and atheists alike.").

12. *See* Smet, *supra* note 10 (describing the Court's reasoning as a "contrived" and "nonsensical" extension of the Court's existing precedent).

13. E.S. v. Austria, App. No. 38450/12, ¶¶ 6-7.

14. *Id.* ¶ 7.

15. *Id.*

were held in October and November of the following year, with approximately thirty participants attending each seminar.[16] One attendee—an undercover journalist—reported Ms. E.S.'s statements to their employer, who contacted the local authorities.[17]

Following an investigation, the prosecutor initially brought charges against Ms. E.S. for "inciting hatred," but Vienna's Regional Criminal Court acquitted her for two reasons.[18] First, the prosecutor willingly withdrew the indictment as applied to particular statements; and second, the prosecutor failed to establish that Ms. E.S. made some of the statements as written in the indictment.[19] Her victory was short-lived, as the Regional Court nevertheless convicted Ms. E.S. of "disparaging religious doctrines."[20]

The Regional Court identified three specific statements on which the conviction was based.[21] First, Ms. E.S. argued that Muslims, specifically male Muslims, are called to imitate Muhammad because he is seen as the ideal man.[22] She then criticized that expectation, on the grounds that Muhammad was a "warlord," had "many women," and "liked to do it with children."[23] Second, Ms. E.S. stated that the Sahih Al-Bukhari is the most important of the Hadith collections, where "the thing with Aisha and child sex is written."[24] Third, Ms. E.S. repeated a conversation she had with her sister, in which she stated, "A 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?"[25]

Some background on what Ms. E.S. was referring to is important for understanding the context of the court's analysis. Aisha was the third wife of Muhammad and daughter of the first caliph, Abu Bakr.[26] In one of the "most authentic collections" of the Sahih al-Bukhari hadith, Aisha stated that "[t]he Messenger of God married me when I

16. *Id.* ¶ 8.

17. *Id.* ¶¶ 8-9.

18. *Id.* ¶¶ 10, 12.

19. E.S. v. Austria, App. No. 38450/12, ¶ 12.

20. *Id.*

21. *Id.* ¶ 13.

22. *Id.*

23. *Id.*

24. *Id.*

25. E.S. v. Austria, App. No. 38450/12, ¶ 13.

26. *A'ishah*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Aishah[https://perma.cc/A6Q5-ZURT].

was six, and consummated the marriage with me when I was nine."[27] In response to both external criticism and inter-Islamic debate, some scholars justify the marriage in historical context,[28] while others challenge the accuracy of Aisha's statement.[29]

The Regional Court found that Ms. E.S.'s statements "essentially conveyed" that Muhammad had "paedophilic tendencies" and suggested that he was not a "worthy subject of worship."[30] The court stated that the term "paedophile" implied a "primary sexual interest" in pre-pubescent children, which disregarded the fact that Aisha remained with Muhammad until his death—when she was eighteen years old and clearly past the age of puberty.[31] The court concluded that the statements were "capable of causing indignation," and that it was possible for at least a portion of the audience to be disturbed by the statements.[32]

The Regional Court rejected that Ms. E.S.'s statements were protected by Article 10's right to free expression, relying on two separate but related points. First, while Section 1 of Article 10 establishes that individuals have the right to free expression, the court noted that the right is subject to "duties and responsibilities" under Section 2.[33] Such duties include refraining from making statements which "hurt others without reason and therefore did not contribute to a debate of public interest."[34] The court found that Ms. E.S. had not made statements of fact, but value judgments aimed at "degrad[ing] Muhammad," outside of Article 10's protection.[35] Second, Article 9's protection of the freedom to religion can require States to ensure that religious views are not attacked in a "provocative way capable of

27. *Muhammad's Marriage to Ayesha*, ISLAMFYI, Princeton University (Sep. 19, 2017), https://islamfyi.princeton.edu/is-it-true-that-muhammad-married-a-child-bride-by-the-name-of-ayesha-when-he-was-53-and-she-was-9-years-old-if-so-how-do-muslims-justify-this-from-their-exemplary-prophet/ [https://perma.cc/6GAY-SNF9].

28. *See, e.g.*, COLIN TURNER, ISLAM: THE BASICS 34 (2d ed. 2011) (stating that "[a] marriage between an older man and a young girl was customary among the Bedouins," particularly if the marriage had "direct political significance" to the families).

29. *See, e.g.*, MAULANA MUHAMMAD ALI & JOHN HAYTON, MUHAMMAD THE PROPHET (2011) (stating that Aisha "could not have been less than ten" at the time of her marriage).

30. E.S. v. Austria, App. No. 38450/12, ¶ 14.

31. *Id.*

32. *Id.*

33. *Id.* ¶ 15.

34. *Id.*

35. *Id.*

hurting the feelings" of religious individuals.[36] Thus, after balancing the rights at stake, the court held that Ms. E.S.'s conviction was justified and necessary to "protect religious peace" in Austria.[37]

B. Appeals in Austrian Courts

Ms. E.S. appealed the Regional Court's judgment on several grounds. First, that her statements were not value judgments, but statements of fact based on the documents submitted for evidence;[38] second, that she had merely questioned whether an adult having sexual intercourse with a nine-year-old "amounted to paedophilia";[39] and, third, that she had used the term "paedophile" in the way it was commonly used—referring to "men who have sex with minors"—not in a strict scientific sense.[40] Lastly, Ms. E.S. reiterated that her statements were protected by Article 10's establishment of the right to "impart opinions and ideas that offend, shock, or disturb."[41]

The Vienna Court of Appeals (the "Court of Appeals") dismissed Ms. E.S.'s claim, affirming the lower court's factual findings and noting that her statements were "wrong and offensive" even if the factual claim was accurate.[42] Furthermore, the Court of Appeals stated that "paedophilia" denotes a *primary* sexual interest in children, and therefore no "reliable sources" supported Ms. E.S.'s statements.[43] The Court of Appeals concluded that Article 10 permits individuals to express "harsh criticism of churches or religious societies," this protection ends at "insults and mockery of a religious belief or person of worship."[44]

Ms. E.S. next lodged an appeal with the Austrian Supreme Court, which dismissed her application and upheld the lower court's reasoning.[45] Interferences with Article 10's protections could be justified by the need to protect religious peace and religious feelings under Article 9,[46] and courts must balance these rights to determine whether

36. E.S. v. Austria, App. No. 38450/12, ¶ 15.

37. *Id.*

38. *Id.* ¶ 16.

39. *Id.*

40. *Id.*

41. *Id.*

42. E.S. v. Austria, App. No. 38450/12, ¶ 17.

43. *Id.* ¶ 18.

44. *Id.*

45. *Id.* ¶¶ 20-22.

46. *Id.* ¶ 21.

a statement is capable of "arousing justified indignation."[47] The court held that, as a consequences of balancing Articles 9 and 10, Ms. E.S. had aimed to defame Muhammad in order to show that he was not worthy of worship—not to "contribute to a serious debate about Islam or the phenomenon of child marriage."[48]

C. The ECtHR Ruling

Ms. E.S. appealed to the ECtHR, which issued its ruling on October 25, 2018.[49] The ECtHR pointed out that both parties agreed that there had been an interference with Ms. E.S.'s right to free expression.[50] That interference, however, could be justified if it was "prescribed by law," pursued a "legitimate aim" under Section 2 of Article 10 and was "necessary in a democratic society" in order to achieve that aim.[51] The Court moved quickly through the first two questions—the Austrian law prescribed convictions for disparaging religious doctrines, for the legitimate aims of safeguarding religious peace and protecting religious feelings.[52] These aims constituted "protecting the rights of others" under Section 2 of Article 10 and could therefore justify an interference with the right to free expression.[53] The issue was thus whether or not Ms. E.S.'s conviction was "necessary in a democratic society" to achieve those aims.[54]

The ECtHR began its analysis by examining Article 10's two sections.[55] Section 1 establishes the right to free expression, while Section 2 states there are duties and responsibilities for those exercising the right.[56] Under *Otto-Preminger-Institute*,[57] the Court continued, Article 9 justifies the restriction of "gratuitously offensive" and "profane" expressions:

> Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a State may

47. *Id.*

48. E.S. v. Austria, App. No. 38450/12, ¶ 22.

49. *Id.* ¶ 58.

50. *Id.* ¶ 39.

51. *Id.*

52. *Id.* ¶¶ 40, 41.

53. *Id.* ¶ 41.

54. E.S. v. Austria, App. No. 38450/12, ¶ 42.

55. *Id.*

56. *Id.*

57. *See* Smet, *supra* note 8.

> legitimately consider them to be incompatible with respect for the freedom of thought, consciences and religion and take proportionate restrictive measures . . .[58]

Furthermore, national authorities are due a "margin of appreciation" in determining whether a restriction is necessary in a democratic society, to account for the lack of a uniform conception of morality in the EU.[59]

The ECtHR proceeded to apply these principles, affirming the lower courts' holdings on several grounds.[60] First, the ECtHR stated that Ms. E.S.—as an "expert in the field of Islamic doctrine"—"must have been aware that her statements were partly based on untrue facts and apt to arouse (justified) indignation."[61] Therefore, not only did her statements fail to further the purposes of Article 10, but national authorities had a positive duty under Article 9 to restrict these statements to ensure an "atmosphere of mutual tolerance."[62] Second, although courts are incapable of judging the truth of a value judgment,[63] the ECtHR found that Ms. E.S.'s statements were not based on a "sufficient factual basis" to receive protection under Article 10.[64] Lastly, the Court held that the conviction and attendant fine were not disproportionate in light of how strict the punishment could have been.[65] The Court concluded that the Austrian courts had not overstepped their "wide" margin of appreciation in determining the balance between Ms. E.S.'s "right to free expression with the rights of others to have their religious feelings protected . . ."[66]

58. E.S. v. Austria, App. No. 38450/12, ¶ 40.

59. *Id.* ¶ 44 ("The absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States' margin of appreciation when regulating freedom of expression in relation to matters liable to offend personal convictions within the sphere of morals or religion.").

60. *Id.* ¶ 53.

61. *Id.*

62. *Id.*

63. *Id.* ¶ 54.

64. E.S. v. Austria, App. No. 38450/12, ¶ 54.

65. *See id.* ¶ 56 (stating that "the fine imposed was on the lower end" of the statutory range and that the "Criminal Code alternatively would have provided for up to six months' imprisonment.").

66. *Id.* ¶ 57.

II. *E.S. v. Austria* Reaffirmed *Otto-Preminger-Institut*; Future Cases Must Abandon Both

A. Organic Application of Precedent, or Strange Outgrowth?

A fundamental premise of the ECtHR's holding is that a national authority can justifiably restrict expressions capable of hurting religious feelings or religious peace.[67] Reading the text of Article 9, it is not obvious that the right to religious freedom could be violated by mocking, insulting, or harshly critical expressions. Indeed, the concept that gratuitously offensive expressions can interfere with the right to freedom of religion stems from the ECtHR's interpretation of Article 9 in *Otto-Preminger-Institut*.[68]

Otto-Preminger-Institut revolved around an organization that attempted to host six showings of a film, Das Liebeskonzil ("Council of Love"[69]), which caricatured several features of Christian belief.[70] Advertisements did not include information about the film's content, the showings were age-restricted, and attendees were required to pay a "fee" to enter.[71] The film was to be shown in a majority-Catholic area. The organization was convicted for disparaging religious doctrines after being reported by a Catholic organization.[72]

The ECtHR upheld the conviction in *Otto-Preminger-Institut*, finding that in "extreme cases," particular "methods of opposing or denying religious beliefs can . . . inhibit those who hold such beliefs from exercising their freedom to hold and express them."[73] Furthermore, the ECtHR noted that the goals of Article 10 are not achieved by protecting "gratuitously offensive" expressions, which are incapable of contributing to "any form of public debate."[74] The ECtHR concluded by noting that while national authorities are due a "certain margin of appreciation" in determining whether an interference was necessary in a democratic society, the margin of appreciation is not

67. *Id.*

68. Otto-Preminger-Institut v. Austria, 19 Eur. H.R. Rep. 34 (1994) [hereinafter *Otto-Preminger-Institut*].

69. The ECtHR translated the title as "Council in Heaven" in English, but "the French text of the decision, more accurately . . . translated [it] as 'Le Concile d'amour.'" Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587, n. 144 (2005).

70. *Otto-Preminger-Institut*, 19 Eur. H.R. Rep. at 34.

71. *Id.* at 44.

72. *Id.* at 37.

73. *Id.* at 43.

74. *Id.*

"unlimited."[75] Moreover, in cases where there has been an interference with the rights protected by Article 10, "supervision must be strict because of the importance of the freedoms in question."[76]

In some ways, the ECtHR's holding in *E.S. v. Austria* follows naturally from *Otto-Preminger-Institut*. First, and perhaps most important, is the principle that Article 9 obligates national authorities to restrict expressions capable of hurting religious feelings or disrupting religious peace.[77] The Court merely reapplies this doctrine in *E.S. v. Austria*.[78] Secondly, in *E.S. v. Austria*, the ECtHR simply cited *Otto-Preminger-Institut* for the idea that Article 10's goals are not achieved by protecting "gratuitously offensive" expressions, as they do not contribute to public dialogue.[79] A third application of *Otto-Preminger-Institut* is the Court's finding that convictions based on "disparaging religious doctrines" (the same conviction in both *Otto-Preminger-Institut* and *E.S. v. Austria*) for the purpose of protecting religious feelings and religious peace, is a legitimate goal and justifies an interference with Article 10.[80] Lastly, the ECtHR upheld the convictions in *Otto-Preminger-Institut* and *E.S. v. Austria* even though no individual's religious feelings were actually harmed—the expression's ability to create "justified indignation" was entirely hypothetical.[81]

By introducing other questions into its analysis, however, the ECtHR's holding represents a consequential shift in how the Court balances the relationship between Articles 9 and 10. Outside of Article 9's affirmative duty to protect religious freedom, the Court's holding relies on two separate lines of reasoning. We will describe one as "veracity-based" arguments—which weaken the applicability of Article 10's protection, and "deference-based" arguments—which justify the Court's deference to Austria's legislative goals and judicial findings.

The ECtHR's veracity-based focus is clear by its delving into semantic definitions, requiring that those seeking to exercise their right to free expression do so "objectively," and its weighing of the quantum of evidence requisite to render a value-judgment sufficiently "without factual basis" to strip it of Article 10 protection.[82] The ECtHR adopted the Regional Court's finding that "paedophilia" is defined as a *primary* sexual interest in prepubescent children, despite Ms. E.S.'s argument

75. *Id.* at 44.

76. *Otto-Preminger-Institut*, 19 Eur. H.R. Rep. at 44.

77. *See* E.S. v. Austria, App. No. 38450/12, ¶ 57.

78. *Id.*

79. *Id.* ¶ 43.

80. *Id.* ¶ 58.

81. *Id.* ¶ 57; *Otto-Preminger-Institut*, 19 Eur. H.R. Rep. at 60.

82. E.S. v. Austria, App. No. 38450/12, ¶ 57.

that the term is commonly used in a broader sense—to refer to men who have sex with children.[83] Endorsing the narrower definition led the Court to conclude that Ms. E.S. was essentially lying in the seminars.[84] Relatedly, the Court held that Ms. E.S.'s failure to present information in an "objective" way increased the probability that her statements could arouse justified indignation.[85] Thus, because her "subjective" statements did not contribute to Article 10's purpose of encouraging a debate of public interest, the Court more easily concluded that an interference was justified by other concerns.[86] Lastly, although the ECtHR noted that "the truth of value judgments [are] not susceptible of proof," it characterized Ms. E.S.'s statements as value-judgments "without sufficient factual basis."[87] Article 10, the Court concluded, does not protect statements which are "based on (manifestly) untrue" facts.[88] This focus on veracity or truthfulness is distinct from the concerns articulated in *Otto-Preminger-Institut*, namely, that a majority-Catholic population might be offended by a film depicting religious figures in insulting ways.[89]

Secondly, the Court repeatedly stated that national authorities are due a "wide" margin of appreciation in determining whether an interference with Article 10 is "necessary in a democratic society."[90] The ECtHR's framing of the margin of appreciation as "wide" or "broad" is not born out of the Court's earlier holding in *Otto-*

83. *Id.* ¶¶ 53, 54.

84. *See id.* ¶ 53 (agreeing that Ms. E.S.'s characterization was "partly based on untrue facts"; *see also id.* ¶ 54 (stating alternatively that Ms. E.S. had failed to adduce "any evidence" that her statements had a factual basis).

85. *Id.* ¶ 52 (accepting the domestic courts' analysis that the statements "had not been made in an objective manner aimed at contributing to a debate of public interest").

86. *Id.* ¶ 57.

87. *Id.* ¶¶ 48, 54.

88. E.S. v. Austria, App. No. 38450/12, ¶ 55.

89. *See Otto-Preminger-Institut*, at 59 (finding that the film's advertisements were sufficiently public to "cause offence"); *see also id.* (emphasizing that "the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans.").

90. *See* E.S. v. Austria, App. No. 38450/12, ¶ 15 (stating the "interference with applicant's freedom of expression...had been necessary in a democratic society."). *See also id.* ¶ 44 (stating that the lack of uniform requirements for protecting religious convictions "broadens the . . . margin of appreciation when regulating freedom of expression"; *id.* ¶ 50 ("domestic authorities had a *wide* margin of appreciation . . . as they were in a better position to evaluate which statements were likely to disturb the religious peace in their country.") (emphasis added); *id.* ¶ 58 ("[T]he domestic courts did not overstep their – wide – margin of appreciation in the instant case . . .").

Preminger-Institut.[91] To the contrary, in that case the ECtHR clearly stated that while a "certain" margin of appreciation is due to national authorities:

> "The authorities' margin of appreciation . . . is not unlimited. It goes hand in hand with Convention supervision, the scope of which will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the freedoms guaranteed in [Article 10], the *supervision must be strict* because of the importance of the freedoms in question. The necessity for any restriction *must be convincingly established*."[92]

Nowhere in *Otto-Preminger-Institut* does the ECtHR refer to the margin of appreciation as a concept broadened or expanded beyond the standard "regard" due to national authorities.[93] Indeed, Judges Palm, Pekkanen, and Makarczyk dissented to reiterate that permissible reasons for interfering with Article 10 "must be narrowly interpreted; the State's margin of appreciation in this field cannot be a wide one."[94]

Otto-Preminger-Institut ultimately provides the doctrinal cornerstone of the Court's decision in *E.S. v. Austria*, despite any innovations or novel analysis introduced by the latter case. Indeed, *Otto-Preminger-Institut* provides the logic for subordinating "gratuitously offensive" expressions to the need for religious peace.[95] Without a framework allowing national authorities to restrict hypothetically offensive statements in the name of protecting religious peace or religious feelings, the Court may have reached an alternate holding in *E.S. v. Austria*. The ECtHR's departures from *Otto-Preminger-Institut*, manifested in the veracity and deference-based analyses, will likely influence subsequent decisions. The two major shifts noted above—the Court's interrogation of the statement's factual basis or speaker's intentions, and increased deference to national

91. *See* Javier Martínez-Torrón, *supra* note 69, at 601 (noting that "the Council of Europe gathered a reduced number of States that shared a relatively uniform concept of democracy and civil liberties.").

92. *See Otto-Preminger-Institut*, 19 Eur. H.R. Rep. at 57–58 (emphasis added).

93. *See id.* at 59 (noting that "regard must be had to the margin of appreciation left to the national authorities"); *see also id.* (finding that the nation had not "overstepped their margin of appreciation" in "assess[ing] the need" for a particular restriction).

94. *Otto-Preminger-Institut*, 19 Eur. H.R. Rep. at 60–61 (Judges Palm, Pekkanen and Makarczyk, dissenting).

95. *See Religious Practice and Observance in EU Member States*, at 11 (Feb. 2013), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474399/IPOL-LIBE_ET(2013)474399_EN.pdf [https://perma.cc/93C6-HSVK].

authorities—will undoubtedly be cited in subsequent cases to justify the necessity of interferences with rights protected by Article 10.

B. Some Normative Problems with E.S. v. Austria, and Alternative Approaches

Skeptics offer a plethora of reasons to doubt that the ECtHR's current doctrine adequately protects free expression. Indeed, the reasoning employed in *E.S. v. Austria* has proven somewhat frustrating for those living within, or aspiring to adopt the principles of, nations with more absolutist free expression regimes. The following issues, however, stem from contradictions within the ECtHR's own approach to balancing rights established by Articles 9 and 10.

Austria's "disparaging religious doctrines" offense amounts to a blasphemy law and the ECtHR's arguments to the contrary are unpersuasive. The EU has recently acknowledged the inherent tension between the right to free expression and blasphemy laws, repeatedly disavowing such laws in recent history.[96] Calls to abolish blasphemy convictions simultaneously accept that nations must punish actual incitement, distinguishing between merely offensive expression and those with a causal connection to subsequent religious hatred.[97] Initially, Ms. E.S. was charged with (and acquitted of) "inciting hatred."[98] It is telling that, despite the EU's insistence on dismantling blasphemy laws and the ECtHR's insistence that it was not enforcing a blasphemy law, Ms. E.S. was acquitted of inciting hatred and ultimately convicted for making statements that could hurt religious feelings.[99]

The ECtHR's analysis went beyond *Otto-Preminger-Institut*, focusing on issues that have little material connection to Ms. E.S.'s claim under Article 10. The Court framed Ms. E.S.'s statements

96. *See, e.g.*, Council of Europe Parliamentary Assembly, *Recommendation 1805* (2007), ¶ 4 [hereinafter *Recommendation 1805*] ("[B]lasphemy, as an insult to a religion, should not be deemed a criminal offense . . . [e]ven though today prosecutions in this respect are rare in member states, they are legion in other countries of the world."). *See also* European Commission for Democracy through Law, *Report on the Relationship Between Freedom of Expression and Freedom of Religion*, CDL-AD (2008)026, § 92 [hereinafter *Democracy through Law Report*] (noting that "criminal sanctions are inappropriate in respect of insult to religious feelings and, even more so, in respect of blasphemy.").

97. *See Recommendation 1805*, *supra* note 96, ¶ 15 (suggesting that "national laws should only penalize expressions about religious matters which intentionally and severely disturb public order and call for public violence."); *see also Democracy through Law Report*, *supra* note 95, § 90 ([I]n [the Commission's] view, criminal sanctions are only appropriate in respect of incitement to hatred . . .").

98. *See* E.S. v. Austria, App. No. 38450/12, ¶¶ 10, 12.

99. *See id.* ¶ 12.

regarding paedophilia as a subjective judgment, primarily because it adopted the narrow definition proposed by the Regional Court.[100] By construing the statements as lacking factual basis and context, the Court was in a position to make its next two points: Article 10 does not protect value-judgments without sufficient factual basis; and, Article 10's goals are not achieved without objective consideration of public issues.[101] While both points (albeit unpersuasively) lessen the importance of protecting Ms. E.S.'s statements under Article 10, they have little connection to the issue of "religious peace."

The Court's analysis effectively invites courts to resolve free expression cases through semantics and historical exegesis.[102] It is doubtful, however, that objectiveness and factual sufficiency are truly determinative in the Court's analysis. Imagine, for example, that Ms. E.S.'s statements were made "objectively" and with "sufficient factual-basis" (placing them fully within the protection of Article 10)—are they therefore incapable of damaging religious peace? Probably not, and perhaps the ECtHR would hold in such a case that her statements could nevertheless be restricted solely based on fears of harming religious feelings. That holding would bring the following question to the forefront: does *Otto-Preminger-Institut* permit states to silence factually accurate, objective statements merely because a hypothetical third-party's religious feelings could be hurt? If so, one might wonder how such a rule is truly compatible with a right to free expression.

The ECtHR found a convenient way to avoid that question. Instead, the Court took a belt-and-suspenders approach by relying on *Otto-Preminger-Institut* for an affirmative duty to police religiously offensive expression, while collecting reasons for why the statements were not objective or factual enough to deserve full Article 10 protection.[103] If the ECtHR honestly believes that the rights protected by Articles 9 and 10 must be "balanced" when they conflict, then it should at least respect the right to free expression instead of narrowing

100. It appears, however, that the ECtHR doubted the Regional Court's logical conclusion that someone could not be a paedophile if they marry and remain married to the child past pubescence. *See id* ¶ 50 ("Accordingly, and notwithstanding some of the domestic courts' considerations such as the duration of the marriage in question . . .").

101. *Id.* ¶¶ 54, 57.

102. *See* Smet, *supra* note 12 ("By going down this road, the Court reduces the case to a single factual question: is having sex with one child 1,400 years ago enough to be labelled a paedophile today? That is an exceedingly narrow view of the case and entirely unhelpful for its resolution.").

103. *Otto-Preminger-Institut*, 19 Eur. H.R. Rep. at 59–60 (discussing why the statements made did not violate Article 10).

it beyond recognition.[104] Following *E.S. v. Austria*, one wonders whether the Court has created a doctrine in which even truthful statements necessarily acquiesce to others' religious feelings.

The ECtHR could resolve these tensions while still protecting both fundamental rights, but not without doctrinal changes. First, the ECtHR can both protect the right to religious freedom and overrule *Otto-Preminger-Institut* by judging expression under an incitement standard.[105] By using incitement, expressions that actually called for public violence or harassed religious individuals could be limited. In comparison—as *Otto-Preminger-Institut* is currently applied—emphasizing the feelings of a hypothetical third-party functionally makes "disparaging religious doctrine" a victimless crime. Importantly, The EU has already suggested this option[106] and the Court gave it lip-service in *E.S. v. Austria*.[107] Requiring incitement would put an end to blasphemy convictions, instead of allowing them under the guise of "disparaging religious doctrine."[108] Furthermore, incitement would take the emphasis off of the speaker's "objectiveness" and factual basis of their subjective opinion, instead focusing on the effects of their expression. An incitement standard would also allow courts to focus on more concrete factual questions, compared to whether or not some hypothetical third party's religious feelings have been hurt. Lastly, an incitement standard is the practical way to ensure that religious ideas are subject to the same criticism as any other idea, while allowing nations to protect the right to freedom of religion. The Court's current doctrine insulates religious individuals from potential insult, while hypothetically protecting the same statements about a non-religious

104. *See* Graeme Wood, *In Europe, Speech Is an Alienable Right*, THE ATLANTIC (Oct. 27, 2018), https://www.theatlantic.com/ideas/archive/2018/10/its-not-free-speech-criticize-muhammad-echr-ruled/574174/ [https://perma.cc/AWW8-3AKJ] ([I]f European courts assess freedom of speech at barely a feather's weight, as it appears in [*E.S. v. Austria*], they should spare us their sanctimony and admit that they do not value free expression at all.").

105. For example, whether a statement directed towards an individual has the tendency to incite an immediate breach of the peace. This language tracks a portion of the United States' free speech exception for "fighting words," articulated in Chaplinsky v. New Hampshire, 315. U.S. 568, 571–72 (1942).

106. *See Recommendation 1805*, *supra* note 97.

107. *See* E.S. v. Austria, App. No. 38450/12, ¶¶ 27-29.

108. *See* Smet, *supra* note 12; *see also* Simon Cottee, *A Flawed European Ruling on Free Speech*, THE ATLANTIC (Oct. 31, 2018), https://www.theatlantic.com/ideas/archive/2018/10/europe-rules-against-free-speech/574369/ [https://perma.cc/96PQ-73CW] ("[E.S. v. Austria] has given legitimacy to what is in all but name an Austrian blasphemy law …").

subject.[109] Drawing the line at actual incitement would do away with this double-standard.

Second, adopting an incitement standard would helpfully recalibrate how the ECtHR applies the margin of appreciation. Currently, national authorities partake in judicial augury when determining whether some hypothetical third party's religious feelings could have been harmed. By applying a "wide" margin of appreciation, reviewing courts like the ECtHR only add a wider margin of error in determining whether religious peace is actually protected. By placing only incitement to religious hatred outside of Article 10's protection, national authorities would make factual determinations as to whether or not an expression was capable of causing an immediate incitement of religious hatred. Reviewing courts, including the ECtHR, could thereby grant a margin of appreciation in their analysis while protecting the right to free expression.

One final note on the principle of judicial deference inherent in the margin of appreciation. Courts necessarily struggle with how to enforce enumerated rights while granting proper deference to local legislatures attempting to address social issues—difficulties in applying that balance abound outside the ECtHR and EU. It may be illustrative to recall a debate that occurred in the United States, between then-Judge Antonin Scalia and Professor Richard Epstein, on the proper amount of deference owed by courts to legislatures. In his article, Judge Scalia noted that "[m]any believe" that the American system has suffered from "judicializing . . . social judgments that ought better be left to the democratic process."[110] While criticizing "extravagant" versions of this view, Scalia nevertheless concluded that the courts acting as an "alternate legislature" is a "the distinctive threat of our times."[111]

Professor Epstein's response has rather obvious application to the ECtHR's current approach to individual rights:

> Judicial restraint is fine when it keeps courts from intervening in areas where they have no business intervening. But the world always has two kinds of errors: the error of commission (type I) and the error of omission (type II) . . . what Scalia has, in effect argued for is to minimize type I error. We run our system by

109. *See* Douglas Murray, *Should It Be Illegal to Call Mohammed a Paedophile*, THE SPECTATOR (Oct. 27, 2018), https://spectator.us/illegal-mohammed-pedophile/ [https://perma.cc/J5U3-HLSM] (suggesting that the ECtHR has created a "two-tier critical environment in Europe," in which some offensive statements are restricted merely because they are directed towards religious subjects).

110. Antonin Scalia, *Economic Affairs as Human Affairs*, *in* SCALIA V. EPSTEIN: TWO VIEWS ON JUDICIAL ACTIVISM 4 (Cato Inst. 1985).

111. *Id.*

> being most afraid of intervention where it is not appropriate. My view is that we should minimize both types of error.[112]

The ECtHR currently applies the margin of appreciation in a way that suggests a similar fear of intervening where inappropriate. Indeed, other academics have recognized that deference via the margin of appreciation doctrine often acts as an obstacle to the enforcement of human rights.[113] The ECtHR thus appears to be focusing almost entirely on avoiding "type I" errors at the cost of enforcing rights protected in the Convention. The amount of political theorizing required to address the cause (or causes) of the Court's pattern of deference is simply beyond the scope of this Comment. Suffice it to say, however, that without a drastic change in doctrine, one could predict the pattern to continue with all its attendant consequences for individual rights.

CONCLUSION

The ECtHR must adopt a different theory of causation to resolve the tensions in its contradictory treatment of Articles 9 and 10. At its core, the direction of the Court's doctrine on the relationship between Articles 9 and 10 displays a serious mistrust of citizens' resilience to bad ideas and expression in general.[114] *Otto-Preminger-Institut* is merely a manifestation of this theory of causality, in that it draws a

112. Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, *in* SCALIA V. EPSTEIN: TWO VIEWS ON JUDICIAL ACTIVISM 15 (Cato Inst. 1985).

113. *See, e.g.*, Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 844 (1999) ("Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights. If applied liberally, this doctrine can undermine seriously the promise of international enforcement of human rights that overcomes national policies."); *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, 138 (2004) (recounting Lord Lester's appraisal of the doctrine as "standardless . . . the concept of the margin of appreciation has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake.").

114. *See* Wood, *supra* note 102 (arguing that "virtually limitless debate has proven highly capable" of discrediting ideas like Holocaust denial); *see also* Marko Milanovic, *Legitimizing Blasphemy Laws Through the Backdoor: The European Court's Judgment in E.S. v. Austria*, EJIL: TALK! (Oct. 29, 2018), https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/ [https://perma.cc/SDV3-D99U] (suggesting that the Court enforced a "vigilant nanny state" variety of religious tolerance instead of encouraging public debate).

direct connection between "gratuitously offensive" statements and an interference with the right to practice one's religion.[115] The Court's theory of how expression causes subsequent harm is similarly reflected in *E.S. v. Austria*. Ms. E.S. was in no sense "objective" in her discussions,[116] but to imply that individuals cannot ferret out hyperbole or untruths without the state's help is a dangerous idea.

One can easily imagine why, in light of history, many nations in the EU would rather provide religious freedom with disproportionate protection under the Convention. Bad ideas can have consequences, but so do blasphemy laws. The ECtHR must acknowledge that the citizens under its jurisdiction are the intermediaries between bad ideas and bad acts. That being said, even the United States' rough-and-tumble free expression regime draws a line between merely offensive expression and expression directed towards and likely to produce imminent lawless action,[117] or constitutes a true threat.[118] Short of adopting the United States' free expression regime, the ECtHR could simply institute the EU's own suggestion that expression should only be restricted if it incites religious hatred. This standard would create a workable relationship between the need to protect free expression and the pluralistic call for religious freedom. In finding a proper balance between these two fundamental rights, that would be a start.

115. *Otto-Preminger-Institut*, 19 Eur. H.R. Rep. at 57.

116. *See* Cottee, *supra* note 108 (noting that while Ms. E.S. was not speaking in the "spirit of objectivity" . . . E.S.'s statements [about Muhammad] were not phrased in a neutral manner aimed at being an objective contribution.").

117. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

118. *See* Virginia v. Black, 538 U.S. 343, 359 (2003).