Faith in Strasbourg? Religious Freedom in the European Court of Human Rights

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FAITH IN STRASBOURG? RELIGIOUS FREEDOM IN THE EUROPEAN COURT OF HUMAN RIGHTS

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Distinguished Israeli law professor Natan Lerner was a leading scholar of religious freedom for both individuals and groups. He pressed for the integration of national, regional, and international protections of religious freedom, and the harmonization of religious freedom with other fundamental rights claims. This Article, dedicated to the memory of Professor Lerner, analyzes the rapidly growing body of religious freedom and related case law issued by the European Court of Human Rights in Strasbourg. And in keeping with Professor Lerner's comparative law methodology, the Article compares the Strasbourg Court's jurisprudence on religious freedom with that of the United States Supreme Court, finding substantial and surprising confluence of opinions, but also some creative tensions.

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A. NATAN LERNER'S RELIGIOUS FREEDOM JURISPRUDENCE

For the past three decades, I have had the privilege of leading several international projects on fundamental questions of religion, human rights, and religious freedom. One of the earliest and most faithful collaborators in this work was my dear and distinguished friend, Professor Natan Lerner, alas now of blessed memory. Six times over the past three decades, Professor Lerner traveled to our Center for the Study of Law and Religion at Emory University in Atlanta to participate in private roundtables and public conferences on Jewish, Christian, and Islamic contributions to human rights and religious freedom--both positive and negative contributions. While visiting us, he also delivered sterling public lectures on hard questions of genocide, racism, religious discrimination, proselytism, legal pluralism, and religious group rights, several of which yielded brilliant new articles and book chapters that we were privileged to publish.[1] Three times more, he hosted me in Israel to take up these and

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1 *See, e.g.* Natan Lerner, *Religion and Freedom of Association*, *in* RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 218 (John Witte, Jr. & M. Christian Green eds., 2012); Natan Lerner, *Religious Human Rights Under the United Nations*, *in* RELIGIOUS HUMAN RIGHTS

other themes with his colleagues and students at IDC Herzliya and Tel Aviv University. Included in those visits were deep and interesting private and public discussions of the law of religious freedom in Israel and the United States.

As other chapters in this Symposium Issue in his memory amply attest, this is just one of many contributions that Professor Lerner made to the world of religion, human rights, and religious freedom. Here was a man of enormous integrity, humanity, and wisdom, who revealed in his very person the true meaning of excellence, tolerance, and respect for the Golden Rule.[2] And here was a man, scarred by the savagery of the Holocaust and World War II, and forced into exile in Argentina before returning to Israel, who took up these themes in his work as a scholar, counselor, and advocate. From his early pioneering work on the World Jewish Congress,[3] to his many courses and seminars at IDC and Tel Aviv, to his scores of public lectures, scholarly articles, and pithy newspaper articles in the Israeli and Spanish press, he earned his reputation as a sage master of the field. And he distilled his work in several landmark monographs, including *Religion, Secular Beliefs, and Human Rights* (2006, 2d ed. 2012),[4] *Religion, Beliefs, and International Human Rights* (2000),[5] *Group Rights and*

IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 79 (Johan D. van der Vyver & John Witte, Jr. eds., 1996); Natan Lerner, *Proselytism, Change of Religion, and International Human Rights,* 12 EMORY INT'L L. REV. 477 (1998) [hereinafter Lerner, *Proselytism*].

2 *See* b. Šabb. 31a, *Quotes on Judaism & Israel: Rabbi Hillel,* JEWISH VIRTUAL LIBRARY, www.jewishvirtuallibrary.org/rabbi-hillel-quotes-on-judaism-and-israel: "Once there was a gentile who came before Shammai, and said to him: 'Convert me on the condition that you teach me the whole Torah while I stand on one foot'. Shammai pushed him aside with the measuring stick he was holding. The same fellow came before Hillel, and Hillel converted him, saying: 'That which is despicable to you, do not do to your fellow, this is the whole Torah, and the rest is commentary, go and learn it.'" See also Matthew 7:12 ("So whatever you wish that men would do to you, do so to them; for this is the law and the prophets.") (Revised Standard Version).

3 *See* Natan Lerner, *The World Jewish Congress and the State of Israel: A Personal Reminiscence, in* THE WORLD JEWISH CONGRESS, 1936-2016 88 (Menachem Z. Rosensaft ed., 2017).

4 NATAN LERNER, RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS: 25 YEARS AFTER THE 1981 DECLARATION (Stud. Religion Secular Beliefs & Hum. Rts. Ser., 2d rev. ed. 2006) [hereinafter LERNER, RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS].

5 NATAN LERNER, RELIGION, BELIEFS, AND INTERNATIONAL HUMAN RIGHTS (Religion & Hum. Rts. Ser., 2000).

Discrimination in International Law (1991, 2d ed. 2003),[6] and *The UN Convention on the Elimination of All Forms of Racial Discrimination* (1965, 2d ed. 1980).[7]

I learned from Professor Lerner the idea that religious freedom is perforce both an individual and a group right. It involves the rights of individuals to thought, conscience, and belief and the corresponding rights to assemble, speak, worship, proselytize, educate, parent, travel, or to abstain from the same on the basis of their beliefs. And it involves the rights of religious groups to attain legal status or legal personality in a community as well as corresponding rights to corporate property, collective worship, organized charity, parochial education, freedom of press, autonomy of governance, and more. Individual and corporate religious freedom go hand in hand, Professor Lerner insisted, and their separation – or the reduction of religious freedom to either one – can be deeply destructive.

I also learned from him that religious freedom embraces multiple legal principles at once. These include the freedom of conscience to choose, change, or reject religion; freedom to manifest one's religious beliefs in actions, speech, writings, and refusals to act; freedom to form religious organizations and associations for worship, charity, education, and more; freedom to nurture a family in accordance with one's religious beliefs and traditions; freedom from unjust discrimination and persecution based on one's religious beliefs, practices, or identity; and more. Some manifestations of religion must, of necessity, be limited by public safety, health, and welfare concerns and by the fundamental rights of others. But such limits must be applied transparently and under tight constitutional constraints of necessity and proportionality.

Finally, I learned from Professor Lerner the deep value of understanding religious freedom and human rights in comparative legal perspective. For him, this started with the international human rights instruments that protect religion, thought, conscience, and belief. Professor Lerner's *Religion, Secular Beliefs, and Human Rights* provides an especially cogent analysis of all the relevant international legal instruments. These include especially Articles 18 and 26 in the Universal Declaration of Human Rights (1948) and in the International Covenant on Civil and Political Rights (1966), as well as the lengthier provisions in the 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.[8] Professor

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6 NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW (2d ed. 2003) [hereinafter LERNER, GROUP RIGHTS].

7 NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1980).

8 G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966)

Lerner properly lamented, however, the many shortcomings and compromises that weaken these international instruments – particularly the 1981 UN Declaration which remains a mere "declaration" rather than a binding covenant. While some of these limitations have been offset by subsequent instruments like the 1989 Vienna Concluding Document and the 1992 UN Declaration on Minorities,[9] international religious freedom norms remain underdeveloped, and they are now brazenly violated in too many parts of the world.

Indeed, a comprehensive 2009 study, updated in 2016, documented that more than a third of the world's 198 countries and self-administering territories had "high" or "very high" levels of religious oppression, sometimes exacerbated by civil wars, natural disasters, and foreign invasions that have caused massive humanitarian crises. The countries on this dishonor roll include Iran, Iraq, India, Pakistan, Bangladesh, Sri Lanka, Indonesia, Saudi Arabia, Somalia, Yemen, Sudan, South Sudan, Egypt, Burma, Rwanda, Burundi, Congo, Chechnya, and Uzbekistan, among others.[10] A recent annual report of the U.S. Commission on International Religious Freedom confirms the precarious status of religious minorities in many parts of the world, now exacerbated by the rise of ISIS and other jihadist groups in the Middle East and the escalating oppression of Jewish, Muslim, and Christian minorities in various parts of the world.[11] A 2014 study, and another in 2017, found that Christians were more widely harassed than any other religious group, experiencing social and political

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[hereinafter International Covenant on Civil and Political Rights] (entered into force Mar. 23, 1976); G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981).

9 Organization for Security and Co-operation in Europe (OSCE), *Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-Operation in Europe* (Jan. 19, 1989); G.A. Res. 47/135, annex, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Dec. 18, 1992).

10 2 CHRISTIANITY AND FREEDOM: CONTEMPORARY PERSPECTIVES (Allen D. Hertzke & Timothy Samuel Shah eds., 2016); *Global Restrictions on Religion*, PEW FORUM ON RELIGION & PUBLIC LIFE (Dec. 2009), www.pewresearch.org/wp-content/uploads/sites/7/2009/12/restrictions-fullreport1.pdf; *but also see Trends in Global Restrictions on Religion*, PEW RESEARCH CTR. (June 23, 2016), www.pewforum.org/wp-content/uploads/sites/7/2016/06/Restrictions2016-Full-Report-FINAL.pdf (showing an overall decline in religious restrictions and hostilities).

11 *Annual Report of the U.S. Commission on International Religious Freedom: 15th Anniversary Retrospective: Renewing the Commitment*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (2014), www.uscirf.gov/sites/default/files/USCIRF%202014%20Annual%20Report%20PDF.pdf.

hostility in at least 110 countries.[12] And several recent reports show an alarming rise of anti-Semitism in many parts of the world, including in Western Europe and the United States.[13] These hostilities against religious believers and groups are carried out by a wide range of private groups and governmental entities. They include arrests and detentions; desecration of holy sites, books, and objects; denial of visas, corporate charters, and entity status; discrimination in employment, education, and housing; closures of worship centers, schools, charities, cemeteries, and religious services; and worse: rape, torture, kidnappings, beheadings, and the genocidal slaughter of religious believers in alarming numbers in war-torn areas of the Middle East and Africa.[14]

In light of these tragic developments, Professor Lerner repeatedly called for the United Nations to move from a mere declaration on religious tolerance to a binding covenant or convention on religious rights and freedoms that will help build a better human rights culture dedicated to the full protection of religion and belief.[15] As an interim and complementary step, he also called for the more robust implementation of regional instruments to protect religious freedom. Not all such regional instruments have proved effective, he showed. The 1960 American Convention on Human Rights, for example, has sweeping religious freedom protections,[16] but it has had no influence on American laws of religious freedom, and has done far too little to blunt the growing clashes among Catholic, Protestant, Pentecostal, and traditional or indigenous religious groups in various Latin American countries. Some of the regional human rights instruments of Africa, notably the 1990 Cairo Declaration on Human Rights, give undue preferences to Islam, and these documents have been

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12 *Religious Hostilities Reach Six-Year High*, PEW RESEARCH CTR. (Jan. 14, 2014), www.pewresearch.org/wp-content/uploads/sites/7/2014/01/RestrictionsV-full-report.pdf. By comparison, Muslims were harassed in 109 countries; Jews in 71 countries; "others" (e.g., Sikhs, Zoroastrians, Baha'i, etc.) in 40 countries; "folk religionists" in 26 countries; Hindus in 16 countries; and Buddhists in 13 countries. See updates on Christian persecution in UNDER CAESAR'S SWORD: HOW CHRISTIANS RESPOND TO PERSECUTION (Daniel Philpott & Timothy Samuel Shah eds., 2018).

13 See, e.g., JONATHAN FOX, THE UNFREE EXERCISE OF RELIGION: A WORLD SURVEY OF DISCRIMINATION AGAINST RELIGIOUS MINORITIES (2016).

14 *See* W. Cole Durham, Jr. et al., *The Status of and Threats to International Law on Freedom of Religion or Belief*, *in* THE FUTURE OF RELIGIOUS FREEDOM: GLOBAL CHALLENGES 31 (Allen D. Hertzke ed., 2013).

15 *See, e.g.* LERNER, RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS, *supra* note 4, at 37–53; Natan Lerner, *The Nature and Minimum Standards of Freedom of Religion or Belief*, 2000 B.Y.U. L. REV. 905, 932 (2000).

16 Lerner, *Proselytism*, *supra* note 1, at 542.

exploited both by Islamicist nation-states and transnational jihadist groups to visit their prejudices on religious minorities at home and abroad.

But other regional instruments on human rights hold greater promise that is beginning to be realized. For example, the recent concordats between the Papal See and two dozen nation-states, including Israel, Professor Lerner showed, are signature examples of forceful and foresightful protections for religious rights and freedoms–not just for Catholics, but for all peaceable religious groups. The 1950 European Convention on Human Rights, too, while initially ineffective, has yielded a number of important cases in the European Court of Human Rights in Strasbourg offering protection for individual and group religious rights,[17] which have influenced the constitutional laws of individual European nations.[18] (This is a different tribunal from the Court of Justice of the European Union, charged with implementing the religious freedom provisions of the 2009 European Charter of Human Rights; so far, only a few cases have emerged from this Court, but this jurisprudence bears watching.)[19]

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17 Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention], *available at* treaties.un.org/doc/Publication/UNTS/Volume%20213/volume-213-I-2889-English.pdf. The Charter of Fundamental Rights of the European Union has added further protections for religious freedom, now enforced by the Court of Justice of the European Union (CJEU). *See* Charter of Fundamental Rights of the European Union, arts. 10, 14, 21, 2007 O.J. (C 326) [hereinafter Charter of Fundamental Rights]. The European Union parliament enacted the Charter of Fundamental Rights "to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter". (*Id.* at 395.) The Charter reaffirms existing international legal obligations of members of the European Union, including the provisions in Article 10, which provides that, "(1) Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. (2) The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right".

18 See, e.g., IMPLEMENTATION OF THE ECHR ON HUMAN RIGHTS AND OF THE JUDGMENTS OF THE ECTHR IN NATIONAL CASE-LAW: A COMPARATIVE ANALYSIS (Janneke H. Gerards & Joseph W. Fleuren eds., 2014).

19 See recent cases on religious freedom: Case C-372/16, *Sahyouni v. Mamisch*, 2016 EUR-Lex CELEX 62016CJ0372 (Dec. 20, 2017); Case C-188/15, *Bougnaoui v. Micropole* SA, 2015 EUR-Lex CELEX 62015CJ0188 (Mar. 14, 2017); Case C-157/15, *Achbita v. G4S Secure Solutions* NV, 2017 EUR-Lex CELEX 62017CJ0157 (Mar. 14, 2017); Case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen v. Gewest*,

It is the recent European Court of Human Rights jurisprudence of religious freedom that is the principal subject of this brief article. When Professor Lerner and I began our work on comparative religious freedom questions three decades ago, there was rather little to say about the European Convention's jurisprudence on religious freedom.[20] The Convention's formal guarantees of religious freedom had ample potential, but they had generated rather little sturdy case law before 1993.[21] But since then, the European Court of Human Rights has issued judgments on the merits in some 150 cases involving religious freedom, including almost a score of them in the form of Grand Chamber judgments that carry ample authority.[22]

2016 EUR-Lex CELEX 62016CJ0426 (May 29, 2018); Case C-414/16, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, 2016 EUR-Lex CELEX 62016CJ0414 (Apr. 17, 2018); Case C-68/17, *IR v. JQ*, 2017 EUR-Lex CELEX 62017CJ0068 (Sept. 11, 2018); Case C-74/16, *Congregación de Escuelas Pías Provincia Betania v. De Getafe,* 2016 EUR-Lex 62016CJ0074 (June 27, 2017); Case C-25/17, *Tietosuojavaltuutettu v. Jehovah's Witnesses*, 2017 E-Lex CELEX 62017CJ0025 (July 10, 2018); Case C-139/17, *Gresco Investigation GmbH v. Achatzi*, 2017 EUR-Lex CELEX 62017CJ0017 (July 10, 2018). I am grateful to Professor Andrea Pin of the University of Padua for instructing me on this CJEU jurisprudence, which we will be developing into separate set of studies. See analysis of these cases in Pin and Witte, *supra* note *.

20 *See* European Convention, *supra* note 17, art. 9 at 230: "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

21 On the early case law, *see* CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2001); Carolyn Evans, *Religion and Freedom of Expression, in* RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 188 (John Witte, Jr. & M. Christian Green eds., 2012); THE CHANGING NATURE OF RELIGIOUS RIGHTS UNDER INTERNATIONAL LAW (Malcolm Evans et al. eds., 2015); T. Jeremy Gunn, *Adjudicating Rights of Conscience under the European Convention on Human Rights*, *in* 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 305 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

22 For a complete list of cases through 2015, *see Guide on Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience, and Religion*, EURO. CT. OF HUM. RTS., 71–79 (2015), www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf. Note that since 2012, the European Court of Justice has also ruled in at least four additional cases, including: *Bougnaoui*, 2015 EUR-Lex CELEX 62015CJ0188 ; Case C-74/16,

This Article, dedicated to Professor Lerner's memory and to his family, takes up these cases briefly. I have organized them under different principles of religious freedom that Professor Lerner lifted up in his scholarship, and I then compare them briefly to the United States Supreme Court's jurisprudence on religious freedom.

B. RELIGIOUS FREEDOM IN THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights (1950) applies to all forty-seven of the current member states of the Council of Europe. The European Court of Human Rights, re-formed in 1998, is the principal interpreter of the Convention, and it hears cases from all member states of Europe. Any party under the jurisdiction of a member state has standing to claim a violation of rights under the Convention and file a claim directly with the Court.[23]

1. Article 9 and Related Protections

The most important religious freedom guarantee is Article 9 of the Convention:

> "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of

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Congregación de Escuelas Pías Provincia Betania v. De Getafe, 2016 EUR-Lex CELEX 62016CC0074 (Feb. 16, 2017); *Achbita*, 2017 EUR-Lex CELEX 62017CJ0157; Case C-71/11, *Bundesrepublik Deutschland v. Y,* 2011 EUR-Lex CELEX 62011CJ0071 (Sept. 5, 2012).

23 See NINA-LOUISA AROLD, THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS 1–2 (2007); John Witte, Jr. & Nina-Louisa Arold, *Lift High the Cross?: Contrasting the New European and American Cases on Religious Symbols on Government Property,* 25 EMORY INT'L L. REV. 5, 13 (2011).

public order, health or morals, or for the protection of the rights and freedoms of others."[24]

An important Protocol on Article 9 adds that "the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".[25] Complementing these protections, Article 8 of the Convention protects the right to privacy, including one's own private religious practices. Article 10 protects freedom of expression, including religious and antireligious expression. Article 11 protects freedom of assembly and association, including religious association. And Article 14 prohibits discrimination on the basis of religion, among others. As with other international human rights instruments, the European Convention has no formal prohibition on the establishment of religion that is equivalent to the First Amendment's "establishment clause" in the United States Constitution.[26] The European Convention also lacks a separate, explicit provision governing the relations of religious communities and the state.[27]

Though its case law on this subject is sparse and more recent than on many other subjects covered by the Convention,[28] the European Court now stresses the importance of religious freedom for Europeans. As the Court explained in 2010, religion is "one of the most vital elements that go to make up the identity of believers and their conception of life". Moreover, "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. The State's duty of neutrality and impartiality, as defined in the Court's case-law, is

24 European Convention, *supra* note 17, art. 9 at 232.

25 Protocol to the European Convention, *supra* note 17, art. 2 at 264.

26 *See generally* RCE, *supra* note *; NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY (T. Jeremy Gunn & John Witte, Jr. eds., 2012). *But see* JEROEN TEMPERMAN, STATE—RELIGION RELATIONSHIPS AND HUMAN RIGHTS LAW: TOWARDS A RIGHT TO RELIGIOUSLY NEUTRAL GOVERNANCE (2010) (arguing that contemporary human rights norms imply limits on state-religion identification).

27 The same is true of the Charter of Fundamental Rights, *supra* note 17, art. 14 at 398.

28 The European Court of Human Rights (and its predecessors) has found at least fifty-nine violations of Article 9—the first in 1993 and most of them in the past decade. *See Overview: 1959-2014*, EUROPEAN COURT OF HUMAN RIGHTS (2015), www.echr.coe.int/Documents/Overview_19592014_ENG.pdf (compiling court statistics).

incompatible with any power on the State's part to assess the legitimacy of religious beliefs".[29]

Article 9 of the European Convention extends protection to theists and nontheists, atheists and agnostics, free thinkers and sceptics, new religions and ancient traditions alike.[30] The European Court has placed a high premium on the "pluralism" of thoughts and beliefs as a fundamental good for democratic societies, and insisted that conflicts between religions, or between religion and nonreligion, be resolved in a way that tolerates all peaceable forms of religion in the community. As the Court put it in 2007: "...[T]he role of the authorities in such circumstances was not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other. That role of the State was conducive to public order, religious harmony and tolerance in a democratic society".[31] In a 2013 case, the Court stressed further "the positive obligation on the State authorities to secure the rights under Article 9", even when they are being violated by another private party, not the state.[32]

2. Rights of Thought, Conscience, and Belief

Article 9 protects a person's right to hold religious beliefs and to manifest those beliefs peacefully in public. The European Court has treated the "internal right to believe" much like European and North American national courts have treated the liberty of conscience. This includes each person's right to accept, reject, or change his or her thoughts, beliefs, or religious affiliation without involvement, inducement, or

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29 *Jehovah's Witnesses of Moscow v. Russia*, *App. No. 302/02*, EUR. CT. HUM. RTS. ¶ 99 (June 10, 2010), www.refworld.org/cases,ECHR,4c2090002.html [hereinafter *Jehovah's Witnesses of Moscow*].

30 *Also see* International Covenant on Civil and Political Rights, *supra* note 8, art. 18 (prividing similar protections).

31 *97 Members of the Gldani Congregation of Jehovah's Witnesses v. Georgia*, App. No. 71156/01, 46 Eur. H.R. Rep. 613, ¶¶ 132–133, at 619 (2007) (citing *Serif v. Greece*, App. No. 38178/97, 1999-IX Eur. Ct. H.R. 73); *Refah Partisi (the Welfare Party) v. Turkey,* App. Nos. 41340/98, 41342/98–41344/98, 37 Eur. H.R. Rep. 1 (2003). *See also Kuznetsov v. Russia, App. No. 184/02*, EURO. CT. HUM. RTS. (Jan. 11, 2007) www.ceceurope.org/wp-content/uploads/2015/08/CASE_OF_KUZNETSOV_AND_OTHERS_v._RUSSIA.pdf [hereinafter Kuznetsov v. Russia] (finding an Article 9 violation for a state's failure to prosecute officials who had illegally broken up a Jehovah's Witness Sunday worship service).

32 *Eweida v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, 36516/10, 2013-I Eur. Ct. H.R. 215, 254, ¶ 84.

impediment of the state.[33] Article 9 further protects a person from pressure to reveal his or her religious identity or beliefs to the state.[34] It protects military personnel from being forced to discuss religion with their superior officers.[35] It protects persons from being forced to swear a religious oath to take political office, to testify in court, or to receive a professional license.[36] As the European Court put it in 2010: "...State authorities are not entitled to intervene in the sphere of an individual's freedom of conscience and to seek to discover his or her religious beliefs or oblige him or her to disclose such beliefs."[37]

a) Prisoners

The Court has further made clear that a prisoner has a right to religious worship and access to a religious leader of their faith community.[38] The Court reiterated this in *Mozer v. Republic of Moldova and Russia* (2016),[39] holding that prison authorities who had refused to allow a pastor to visit a prisoner violated the Article 9 rights of the prisoner. However, in *Süveges v. Hungary* (2017),[40] the Court held that the refusal by the authorities to allow a person under house arrest to attend a weekly worship service outside his home was not a violation Article 9. In this case, the restriction was prescribed by law, pursued a stated legitimate purpose of safety and security, was proportionate to that purpose, and necessary in a democratic society, the Court concluded.[41]

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33 *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397 (ser. A) (1993).

34 *Işik v. Turkey*, App. No. 21924/05, 2010-I Eur. Ct. H.R. 341, ¶ 41, at 356. *But compare Wasmuth v. Germany, App. No. 12884/03, App. No. 58271/15*, EUR. CT. HUM. RTS. (Feb. 17, 2011), www.legislationline.org/documents/id/17859 (press release No. 141).

35 *Larissis v. Greece*, App. Nos. 23372/94, 26377–78/94, 27 Eur. H.R. Rep. 329 (1998).

36 *Buscarini v. San Marino*, App. No. 24645/94, 1999-I Eur. Ct. H.R. 605, ¶¶ 36, 39–40, at 616–618; *Alexandridis v. Greece, App. No. 19516/06*, EUR. CT. HUM. RTS. (Feb. 21, 2008), www.legislationline.org/documents/id/17855 (press release No. 126).

37 *Işik*, 2010-I Eur. Ct. H.R. ¶ 41, at 356. *See also, Dimitras v. Greece, App. Nos. 42837/06, 3269/07, 35793/07, 6099/08*, EUR. CT. HUM. RTS. (June 3, 2010), hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-3151460-3507511&filename=003-3151460-3507511.pdf (press release No. 449).

38 *Poltoratskiy v. Ukraine*, App. No. 38812/97, 2003-V Eur. Ct. H.R. 89, ¶¶ 166–167, at 129.

39 *Mozer v. Republic of Moldova and Russia, App. No. 11138/10*, EUR. CT. HUM. RTS. ¶¶ 197–99 (Feb. 23, 2016), www.legislationline.org/documents/id/20213.

40 *Süveges v. Hungary, App. No. 50255/12*, EUR. CT. HUM. RTS. (May 2, 2015), www.legislationline.org/documents/id/20208.

41 *Id*. ¶¶ 151–55, 26–27.

b) Conscientious Objectors

The European Court has interpreted Article 9 to include the fundamental right to conscientious objection to military service. In *Bayatyan v. Armenia* (2009), the Court granted relief to a Jehovah's Witness who was imprisoned for failing to serve in the military upon his conscription; noncombat options were unavailable at the time. "...Article 9 did not explicitly refer to a right to conscientious objection", the Court noted. But "a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constituted a conviction or belief of sufficient cogency, seriousness, cohesion, and importance to attract the guarantees of Article 9".[42] It helped the *Bayatyan* Court that "the overwhelming majority" of European state legislatures had already granted conscientious objection status to pacifists. It also helped that the United Nations Human Rights Committee had opined similarly that conscientious objection was a right, not just a legislative privilege.[43] In the absence of a legislative accommodation of conscientious objectors, Article 9 protects the rights of pacifism, the Court ruled.[44]

In more recent cases, the Court has made clear that Article 9 protects conscientious objections only if they are rooted in religious beliefs that are in serious and insurmountable conflict with one's obligation to perform military service. In *Aydemir v. Turkey* (2016),[45] a man declared himself a conscientious objector and refused to perform his military service for the Turkish secularist government, though he said he would be willing to serve in the military if the Turkish government was Islamic. The Court rejected his Article 9 claims, holding the man's objection to military service was political, not religious. By contrast, in *Papavasilakis v. Greece* (2016),[46] a man who was raised by a Jehovah Witness mother (though he did not identify as a Jehovah Witness) invoked his upbringing for his conscientious objection to military service. The court held that since Greece had not properly conducted his conscientious objection determination, it had violated Article 9.

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42 *Bayatyan v. Armenia*, App. No. 23459/03, 2011-IV Eur. Ct. H.R. 1, ⁋ 110 at 37.

43 *See* U.N. Human Rights Committee, General Comment No. 22: Article 18 (Forty-eight Session 1993), ¶ 11, U.N. Doc. HRI/GEN/1/Rev.1 35–38 (July 29, 1994).

44 *See Bayatyan* 2011-IV Eur. Ct. H.R.

45 *Aydemir v. Turkey, App. No. 26012/11*, EUR. CT. HUM. RTS. (June 7, 2016), hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5398050-6750692&filename=Judgments%20of%2007.06.16.pdf (press release No. 190).

46 *Papavasilakis v. Greece, App. No. 66899/14*, EUR. CT. HUM. RTS. (Sept. 15, 2016), hudoc.echr.coe.int/eng?i=001-166850.

c) Students and Parents

The Court has also repeatedly addressed claims by students and parents seeking freedom from religious coercion in schools. These cases have decidedly mixed results. In an early case of *Valsamis v. Greece* (1996), the Court provided no relief to a Jehovah's Witness student who was punished for not participating in a school parade celebrating a national holiday in commemoration of the Greek's war with Italy. The student had claimed conscientious objection to participation in this celebration of warfare. The school had already accommodated his conscientious objections to religious-education classes and the Orthodox mass, but the school did not think he warranted an exemption from the parade. The Court agreed: Participation in a one-time parade, far removed from the field of military battle, did not "offend the applicants' pacifist convictions" enough to warrant an exemption.[47]

In *Konrad v. Germany* (2006), the Court rejected the right of parents to home-school their primary-school-aged children. The Romeikes were conservative Christians who opposed the German public school's liberal sex education courses, its use of fairy tales with magic and witchcraft, and its tolerance of physical and psychological violence among students. In the absence of available private schools, they wanted to teach their young children at home using the same curriculum as state-approved private schools, but with supplemental religious instruction. Germany denied their request, citing its constitutionally based system of mandatory school attendance. The parents appealed, on behalf of themselves and their children. They claimed violations of their rights to privacy, equality, and religious freedom under the Convention. They also pointed to the Protocol to Article 9 that explicitly identifies "the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".[48]

The European Court ruled for Germany. The Protocol to Article 9, the Court pointed out, begins by saying that "[n]o person shall be denied the right to education". "It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions." The child's right to education comes first, and the Romeike children are too young to waive that right or to understand the implications of that waiver for their later democratic capacities. Germany's interest and duty lay in protecting each child's right to education and "safeguarding pluralism in education, which is essential for the preservation of the 'democratic society'... In view of the power of the modern State, it is above all through State teaching that this

47 *Valsamis v. Greece*, App. No. 21787/93, 24 Eur. H.R. Rep. 294 72, ¶¶ 31,37 at 296–97 (1996).

48 *Id*. at 363–64.

aim must be realized".[49] Germany has determined that in a democratic society "not only the acquisition of knowledge but also integration into and first experiences of society are important goals in primary-school education... those objectives could not be met to the same extent by home education, even if it allowed children to acquire the same standard of knowledge".[50] Moreover, the parents could provide their children with the religious instruction they desire outside of school time. With no European consensus on homeschooling options, the Court concluded, Germany must enjoy a "margin of appreciation" in how best to educate its citizens.[51]

The German police thereafter forcibly transported the Romeike children to the public school, and their parents faced fines and potential loss of custody. In response, they moved to the United States, which has long allowed homeschooling in many of its states. The U.S. immigration court granted them asylum, holding that the German policy against homeschooling was "utterly repellant to everything we believe in as Americans".[52] The Court of Appeals, however, reversed, and the United States Supreme Court rejected the Romeike's appeal.[53] The family thus faced deportation, but the Department of Homeland Security decided to give their case "indefinite deferred action status".[54] Congress now has under consideration the "Asylum Reform and Border Protection Act" to provide relief in such cases.[55]

The European Court was more sympathetic to the claims of atheist and agnostic students and their parents who claimed religious coercion in the cases *of Folgerø v. Norway* (2007) and *Grzelak v. Poland* (2010). *Folgerø* addressed a new Norwegian law requiring all public grade school and middle school students to take a course in "Christianity, Religion and Philosophy" ("KRL"). The law made no exceptions for non-Christian students. Four students, whose families were professed humanists, objected that this policy forced them into religious instruction they could not abide. The Court agreed. It found that the state had not tailored its new law carefully enough to deal with students with different religious and nonreligious backgrounds. "[N]otwithstanding the many laudable legislative purposes" in introducing this course,

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49 *Id*. at 364.

50 *Id*. at 365.

51 *Konrad v. Germany*, App. No. 35504/03, 2006-XIII Eur. Ct. H.R. 355, ¶¶ 1, 3, at 365, 367.

52 *In Re* Romeike, Oral Decision of the Immigration Judge, 16 (Jan. 26, 2010), www.becketfund.org/wp-content/uploads/2013/06/Oral-Decision-of-Immigration-Judge-in-Romeike-case.pdf (File Nos. A087368/600–606).

53 *Romeike v. Holder*, 718 F.3d 528 (6th Cir. 2013) (cert. denied), 571 U.S. 1244 (2014).

54 *German Home-school Family will not be Deported from US*, BBC (Mar. 5, 2014), www.bbc.com/news/world-us-canada-26454988.

55 Asylum Reform and Border Protection Act, H.R. 1153, 114th Cong. § 21(a) (2015).

the Court held, the material was not "conveyed in an objective, critical and pluralistic manner". Moreover, the school's "refusal to grant the applicant parents full exemption from the KRL subject for their children gave rise to a violation" of the parents' rights to raise their child in their own faith, in this case atheism.[56]

Three years later, in *Grzelak*, a public grade school student in Poland, with agnostic parents, was properly exempted from mandatory religion classes in public school, as the Folgerø ruling had demanded. But his only alternative to attending the religion classes was to spend unsupervised time in the school hallway, library, or club. His parents wanted him enrolled in an alternative course in secular ethics. The school refused to offer such a special course for lack of sufficient teachers, students, and funds. The school further marked his report card with a blank for "religion/ethics," and calculated his cumulative grade point average based on fewer credit hours. The Court found that these state actions violated both Articles 9 and 14 (prohibiting religious discrimination) of the Convention, for it "brings about a situation in which individuals are obliged—directly or indirectly—to reveal that they are non-believers".[57]

In the closely watched case of *Lautsi v. Italy* (2011), however, the European Court upheld Italy's longstanding policy of displaying crucifixes in its public school classrooms despite religious freedom objections. In this case, an atheistic mother of two public school children challenged Italy's policy as a form of coercion of Christian beliefs. She argued that the presence of these crucifixes in public schools violated her and her children's rights to religious freedom and to a secular education guaranteed by Article 9 and its Protocol, and other provisions. The Court's Grand Chamber held in favor of Italy. It recognized that the crucifix is a religious symbol, that atheism is a protected religious belief, and that public schools must be religiously neutral and free from religious coercion. But the Court held that the "passive display" of a crucifix in a public school classroom by itself was not a form of religious coercion—particularly when students of all faiths were welcome in public schools and were free to wear their own religious symbols. The Court held further that Italy's policy of displaying only the crucifix and no other religious symbol was not a violation of its obligation of religious neutrality, but an acceptable reflection of its majoritarian Catholic culture and history. As Judge Bonello put it in his concurrence: "A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard

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56 *Folgerø v. Norway*, App. No. 15472/02, 2007-III Eur. Ct. H.R. 51, ¶ 102, at 100–101.

57 *Grzelak v. Poland, App. No. 7710/02*, EUR. CT. HUM .RTS. ¶ 87 at 22–23 (Nov. 11, 2010) hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-99384&filename=001-99384.pdf.

the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mold and define the profile of a people".[58] With European nations widely divided on whether and where to display various religious symbols, the Court concluded, Italy must be granted a "margin of appreciation" to decide for itself how and where to maintain its traditions in school.[59]

3. Regulation of Public Manifestations of Religion

Article 9 protects not only the internal right to believe, but also the external right to manifest one's beliefs in public through "worship, teaching, practice and observance". The freedoms of expression (Article 10) and association (Article 11) offer complementary protections.

The European Court has made clear that the right to "manifest one's religion in public" is subject to regulation "in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".[60] When a party claims interference with, violation of, or a burden on Article 9 rights, the Court will assess (1) whether there is, in fact, interference with that right; (2) whether this interference was based on law, rather than an arbitrary judgment; and (3) whether it was necessary in a democratic society. This last point is judged by whether the law (a) corresponds to a pressing social need; (b) is proportionate to the aim pursued; and (c) is justified by relevant, sufficient, or pressing reasons.[61]

a) Proselytism

In its earliest Article 9 case on point, *Kokkinakis v. Greece* (1993), the Court upheld a person's right to evangelize, despite a Greek criminal law that prohibited it. A Jehovah's Witness, peaceably discussing his faith with a local Orthodox woman, was arrested and convicted under this statute. He appealed, and the Court found in his favor. Article 9, the Court reasoned, explicitly protects "freedom to manifest one's religion... in community with others" through "words and deeds" that express one's "religious convictions". It protects "the right to try to convince one's neighbour, for

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58 *Lautsi v. Italy*, App. No. 30814/06, 2011-III Eur. Ct. H.R. 61, ¶ 1.1 at 103.

59 *Id.* at 109.

60 European Convention, *supra* note 17, art. 9(2) at 230.

61 This standard of judicial review is comparable to "heightened" or "strict" scrutiny standards in U.S. constitutional law, *see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 858 (2006). ("[C]hallenged laws be narrowly tailored means of furthering compelling governmental interests.")

example through 'teaching'". If that were not the case, Article 9's "'freedom to change [one's] religion or belief'... would be likely to remain a dead letter". The State may regulate this missionary activity for the sake of security and protection of the rights of others. It may also outlaw "activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need... [or] the use of violence or brainwashing".[62] These factors, however, were not present in *Kokkinakis*, and so he prevailed. In a case five years later, however, the Court found no violation of Article 9 rights for military officers who were convicted for proselytizing their military subordinates. That conduct constituted religious coercion of those subordinate soldiers, and could be properly prohibited and punished, the Court concluded.[63]

b) Holy Days

The European Court generally has held against religious minorities who seek Article 9 accommodations to observe their holy days. In *Kosteski v. Former Yugoslav Republic of Macedonia* (2006), a Muslim employee was fined for taking a day off to celebrate a Muslim religious holiday/festival without giving notice to his employer. He alleged violations of his Article 9 rights to engage in religious worship. The Court rejected these claims, arguing that his attendance at the religious festival was not a clear act of religious worship; moreover, the ostensibly religious nature of the festival did not justify Koteski's failure to notify his employer that he planned to miss work.[64] Six years later, in *Sessa v. Italy* (2012), a Jewish lawyer objected to a court order that scheduled a hearing date on his religious holiday (Yom Kippur) without granting a continuance in a case where he served as counsel. The Court found no Article 9 violation, arguing that the judge was acting reasonably to vindicate the public's right to the proper administration of justice, and the lawyer could have arranged for substitute counsel at that hearing.[65]

c) Religious Dress

The European Court has also allowed states to impose rules limiting religious dress and ornamentation in public life. Several cases have dealt with Article 9 claims by

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62 *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, ¶¶ 31,48 at 418,422 (1993).

63 *Larissis v. Greece*, App. Nos. 23372/94, 26377–78/94, 27 Eur. H.R. Rep. 329 (1998).

64 *Kosteski v. Former Yugoslav Republic of Macedonia, App. No. 55170/00*, EUR. CT. HUM. RTS. (Apr. 13, 2006), www.legislationline.org/documents/id/20195.

65 *Sessa v. Italy*, App. No. 28790/08, 2012-III Eur. Ct. H.R. 165.

Muslim women who wore headscarves in manifestation of their religion, but contrary to public school dress codes.[66] In each case, the Court sided with the state against the Muslim petitioner.

In *Dahlab v Switzerland* (2001), a state elementary schoolteacher, newly converted to Islam from Catholicism, was banned from wearing a headscarf when she taught her classes. The government highlighted the value of maintaining secularism in a public school that was open to young students from various traditions. Invoking the margin of appreciation doctrine, the Court determined that this school dress code and its application to Ms. Dahlab were necessary and proportionate, and dismissed her claim that the state had violated Article 9.

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears 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.

Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.[67]

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66 Cases involving religious clothing have also been argued in the Court of Justice of the European Union. *See, e.g.*, Case C-157/15, *Achbita v. G4S Secure Solutions NV*, 2017 EUR-Lex CELEX 62017CJ0157 (Mar. 14, 2017); Case C-188/15, *Bougnaoui v. Micropole SA*, 2015 EUR-Lex CELEX 62015CJ0188 (Mar. 14, 2017).

67 *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 447, at 463. *See also Kurtulumus v. Turkey,* App. No. 65500/01, 2006-II Eur. Ct. H.R. 297 (declaring inadmissible an Article 9 objection by a Muslim university professor who was prohibited from wearing her Islamic headscarf in the exercise of her functions).

The court extended this reasoning in *Şahin v. Turkey* (2005).[68] There, an Islamic medical student at Istanbul University was forbidden to take certain courses and exams because she was wearing a headscarf, contrary to state rules governing dress. When the university brought disciplinary actions against her, she filed an Article 9 claim. The Court sided with Turkey, and again granted a "margin of appreciation" to the Turkish constitutional and cultural ideals of gender equality and state secularism. "The principle of secularism", the Court noted, created "a modern public society in which equality was guaranteed to all citizens without distinction on grounds of religion, denomination or sex". It made possible "significant advances in women's rights", including "equality of treatment in education, the introduction of a ban on polygamy" and "the presence of women in public life and their active participation in society. Consequently, the ideas that women should be freed from religious constraints and that society should be modernised had a common origin".[69] Since "secularism" is "one of the fundamental principles of the Turkish State", and since this principle is "in harmony with the rule of law and respect for human rights", religious "attitudes" and actions to the contrary "will not enjoy the protection of Article 9".[70]

The European Court continued on this path in *Dogru v. France* (2008). There, a Muslim girl refused to follow her public school's dress code that required her to take off her headscarf during physical education classes and sports events. Dismayed by the breach of its rules and the tensions it caused among the other students, the school initiated disciplinary action against her. When she persisted in her claim to wear her headscarf in all public settings, the school offered to teach her through a correspondence program. She and her parents rejected this, so she was expelled from the school. She claimed violations of her Article 9 rights. The Court again held for the state, and again accorded France an ample "margin of appreciation" for its state policy of secularism.[71]

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68 *Şahin v. Turkey*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. 173, ¶¶ 31–32, at 185–186.

69 *Id.* ¶¶ 23–25, at 182–86.

70 *Id.* ¶ 114, at 205–06.

71 *Dogru v. France, App. No. 27058/05*, EUR. CT. HUM. RTS. ¶ 63 (Dec. 4, 2008). *See also Köse v. Turkey*, App. No. 26625/02, 2006-II Eur. Ct. H.R. 339 (declaring inadmissible claims under Article 9 and its Protocol against Turkey's general prohibition against wearing the Islamic headscarf in school).

In its most recent case on point, *Osmanoğlu v. Switzerland* (2017),[72] the Court also ruled against two Muslim girls whose parents challenged a Swiss public school's compulsory swimming lessons program that had boys and girls swimming together in the same pool. The parents claimed that mixed-gender swimming violated their and their daughters' Article 9 rights, and they refused to send their 9- and 11-year-old daughters to swimming lessons. Although school authorities offered to let the girls wear "burkinis" and change clothes in a private dressing room, the parents insisted that mixed-gender swimming – even before puberty – contradicted their religious belief and practice, since their daughters were preparing to observe Muslim customs of female modesty as adults. Moreover, the girls were already taking private swimming lessons. Thus, the parents sought a full exemption from the program. The Court, however, determined that, although the swimming program interfered to some degree with the applicants' ability to manifest their religious beliefs, it also advanced legitimate public goals beyond teaching children to swim, including, most notably, fostering socio-economic inclusiveness and integration among a diverse student body. Insofar as Swiss authorities had also offered reasonable accommodations, the program did not violate applicants' Article 9 rights but fell within the margin of appreciation for state decision-making about the best forms and forums of education.

The Court has also accepted alternative logics to support other state restrictions on public displays of religious apparel. Twice the Court rejected Article 9 complaints by airline passengers who were forced to remove religious apparel during airport security checks. Safety concerns clearly outweighed Article 9 rights, the Court stated.[73] In *Mann Singh v. France* (2008), the Court upheld France's decision to withhold a driver's license from a Sikh who refused to remove his turban for his picture on the license. France's public safety concerns again outweighed the applicant's genuine religious interest in wearing his turban at all times, the Court concluded.[74] Similarly, in *S.A.S. v. France* (2014), the Court upheld France's controversial ban on full-face coverings in public against a claim by a devout Muslim who wore the *niqab* and *burqa* as expressions of her "religious, personal, and cultural faith". The Court recognized that the ban interfered with her religion. It rejected France's arguments that

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72 *Osmanoğlu v. Switzerland, App. No. 29086/12*, EUR. CT. HUM. RTS. (Jan. 10, 2017), hudoc.echr.coe.int/eng?i=001-170436.

73 *Phull v. France*, App. No. 35753/03, 2005-I EUR. CT. H.R. 409 (Sikh with turban); *El Morsli v. France, App. No. 15585/06*, 2008 EUR CT. HUM. RTS. (Mar. 4, 2008), hudoc.echr.coe.int/eng?i=001-117860 (Muslim with headscarf).

74 *Mann Singh v. France, App. No. 24479/07*, 2008 EUR. CT. HUM. RTS. (Nov. 27, 2008), hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-2558814-2783003&filename=003-2558814-2783003.pdf (press release No. 845).

the ban was justified because it promoted the rights of women, protected safety and security, and respected the dignity and equality of men and women alike. Instead, the Court embraced France's tertiary argument that the ban promoted "respect for the minimum requirements of life in society" – namely, face-to-face communication. "[T]he face plays an important role in social interaction", the Court reasoned, and "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".[75] The Court further expanded its margin of appreciation doctrine in *Ebrahimian v. France* (2015).[76] Here, the Court held that the French authorities' decision not to renew the contract of a Muslim social worker who worked at a public hospital, and refused to take off her headscarf, did not violate her Article 9 and 14 rights.

In *Belcacemi v. Belgium* (2017),[77] the Court upheld a similar Belgian ban on clothing that covers the face in whole or in part. Borrowing heavily from S.A.S. *v. France,* the Court argued that the restriction sought to guarantee the conditions of social coexistence and to protect the rights and freedoms of others in a democratic society. The applicants in this case were two Muslim women who were born and lived in Belgium. They chose to wear the *hijab* in expression of their religious convictions. One of the applicants had stopped wearing her *hijab* in public after the ban was enacted, while the other chose to keep her *hijab* but remain at home to avoid violating the law and risking a fine or even imprisonment. The Court affirmed that such laws would violate Article 9 if they lacked objective and reasonable justifications or failed to advance a legitimate purpose or aim; states must also demonstrate a reasonable relationship of proportionality between the goals and means of such laws. However, while the headscarf ban had far-reaching effects on the applicants and members of their religious community, the Court held that Belgian authorities were best situated to determine what was necessary in their society and should be granted an ample

75 *S.A.S. v. France, App. No. 43835/11*, EUR. CT. HUM. RTS. ¶¶ 77,122, at 35,49 (July 1, 2014), hudoc.echr.coe.int/eng?i=001-145466.

76 *Ebrahimian v. France, App. No. 64846/11*, EUR. CT. HUM. RTS. (Nov. 26, 2015), hudoc.echr.coe.int/eng?i=001-159070.

77 *Belcacemi v. Belgium, App. No. 37798/13*, EUR. CT. HUM. RTS. (July 11, 2017), hudoc. echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5788361-7361157&filename= Judgment%20Belcacemi%20and%20Oussar%20v.%20Belgium%20-%20ban%20on%20 wearing%20face%20covering%20in%20public%20areas%20%28Law%20of%201%20 June%202011%29.pdf (press release No. 241).

margin of appreciation. In *Dakir v. Belgium* (2017),[78] the Court similarly ruled that headscarf bans in various Belgian municipalities did not violate the Article 9 rights of Muslim women.

Only in two cases to date has the European Court upheld Article 9 claims involving religious clothing.[79] In *Ahmet Arslan v. Turkey* (2010), the Court found that Turkey had violated Article 9 rights by arresting a group of Muslims for wearing, on a public street, traditional religious garb including a turban, baggy trousers, a tunic, and a stick. Local antiterrorism laws prohibited such dress, except during religious ceremonies and on public holy days. The Court stated that restrictions on religious dress are permissible if they are explicitly designed to protect the state principle of secularism in a democratic society, or to prevent disorder or violation of the rights of others. But without such rationales, this antiterrorism law was neither a necessary nor a proportionate limitation on religious dress in public.[80] Likewise in *Eweida v. United Kingdom* (2013), the Court upheld a flight attendant's right to wear her cross necklace on the job in manifestation of her Christian beliefs. U.K. law was silent on the right to wear religious clothing or symbols in the workplace, and it was her private employer, British Airways, that had imposed the restriction on this religious symbol. Nonetheless, the Court chose to "consider the issues in terms of the positive obligation on the State authorities to secure the rights under Article 9". The Court balanced the concerns for danger, security, safety, or the rights of others against her right to wear a small cross, and ruled in favor of the flight attendant.[81]

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78 *Dakir v. Belgium*, *App. No. 4619/12*, EUR. CT. HUM .RTS. (July 11, 2017), hudoc.echr.coe.int/eng/?i=001-175660.

79 A third relevant case (*Edidi v. Spain, App. No. 21780/13*, EUR. CT. HUM. RTS (may 19, 2016), hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5378856-6721575&filename=Decision%20Barik%20Edidi%20v.%20Spain%20-%20appeal%20lodged%20out%20of%20time%20prevented%20courts%20from%20ruling%20on%20merits%20of%20case.pdf (press release No. 164)) was dismissed for the failure to exhaust domestic remedies after the applicant failed to lodge her appeal before the domestic court in time. The court could not therefore examine her other grounds of appeal including the alleged violation of Article 9. This case concerned the Article 9 rights of a lawyer to wear her *hijab* in a Spanish courtroom while representing her clients.

80 *Arslan v. Turkey*, *App. No. 41135/98*, EUR. CT. HUM. RTS. (Feb. 2010), hudoc.echr.coe.int/eng/?i=002-1131 (Information note on the Court's case-law No. 127).

81 *Eweida*, 2013-I Eur. Ct. H.R ¶ 84, at 254. During the pendency of the case, the employer British Airways changed its policies to allow for the wearing of crosses and other religious symbols. The case then shifted to a suit for lost pay when the employee was forced to be on leave. In a companion case, the Court upheld a hospital decision to prohibit a geriatric nurse from wearing her cross on duty in order to protect health and safety on the ward.

4. Religious Group Protection

Article 9, along with Article 11 (on freedom of assembly and association), protects religious groups from undue state intrusion, interference, or discriminatory regulation. These Articles protect religious groups *per se*, recognizing their rights to legal personality and religious autonomy. These religious groups have rights to maintain their own standards of teaching, practice, membership, and discipline; to devise their own forms of polity and organization; to hold property; to lease facilities; to make contracts; to open bank accounts; to hire and pay employees, suppliers, and service providers; to maintain relations with coreligionists at home and abroad; to publish their literature; and to operate worship centers, clerical housing, seminaries, schools, charities, mission groups, hospitals, and cemeteries.[82]

The European Court has repeatedly held that states may not arbitrarily or discriminatorily withhold, withdraw, or condition a religious group's right to acquire legal personality;[83] to procure the necessary state licenses for religious marriages, nursery schools, or educational programs for their members;[84] or to receive state funding or other state benefits available to other properly registered religious groups.[85] Nor may the state impose an exorbitant or discriminatory tax on a religious organization that jeopardizes the organization's ability to operate.[86] Moreover, even if a religious group will not or cannot register as a separate legal entity, the state may not prohibit, intervene, or interfere with their collective worship or assembly in private homes or settings.[87] All these state actions, the Court has held, violate Article

82 *Jehovah's Witnesses of Moscow*, *supra* note 29; Metro. Church of Bessarabia v. Moldova, App. No. 45701/99, 2001-XII Eur. Ct. H.R. 81.

83 *Id.*; *Dimitrova v. Bulgaria, App. No. 15452/07*, EUR. CT. HUM. RTS. (Feb. 10, 2015), www.adfmedia.org/files/DimitrovaJudgment.pdf.

84 *Savez Crkava "Riječ Života" v. Croatia, App. No. 7798/08*, EUR. CT. HUM. RTS. (Dec. 9, 2010), adsdatabase.ohchr.org/IssueLibrary/ECtHR_Case%20of%20Savez%20crkava%20%E2%80%98Rije%C4%8D%20%C5%BEivota%E2%80%99%20and%20Others%20v.%20Croatia.pdf.

85 *Magyar Keresztény Mennonita Egyház v. Hungary*, *App. Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12, and 56581/12*, EUR. CT. HUM. RTS. (Apr. 8, 2014), hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-9372&filename=002-9372.pdf&TID=ihgdqbxnfi.

86 *Ass'n Les Témoins de Jéhovah v. France, App. No. 8916/05*, EUR. CT. HUM. RTS. (Aug.–Sept. 2010), jwleaks.files.wordpress.com/2012/07/association-les-tmoins-de-jhov-1.pdf (Information Note on the Court's case-law No. 133).

87 *Masaev v. Moldova, App. No. 6303/05*, EUR. CT. HUM. RTS. (May 12, 2009), hudoc.echr.coe.int/eng/?i=001-92584.

9 rights of religion, and sometimes violate Article 11 and Article 14 rights of association and non-discrimination, as well. As the Court stated in 2000:

> "...[R]eligious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9..."[88]

a) Religious Autonomy

The Court has placed special emphasis on the autonomy of religious bodies. In a 2013 case, for example, the Court opined: "The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all the active members."[89] In implementing this religious autonomy principle, the Court has held that a state may not force a religious group to admit new members,[90] to exclude a member whom the State disfavors, or to retain a member who has departed or dissented from the group's teachings or practices. So long as the group respects the individual's right to leave without impediment or interference, the group's internal authority trumps the individual's right to participate as a member of that group.[91] Furthermore, the state may not force a church to accept the unionization of its clerical and lay employees, since that "[W]ould... be likely to undermine the Church's traditional hierarchical structure... [and] create a real risk to the autonomy of the religious community".[92] And a state

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88 *Hasan v. Bulgaria*, App. No. 30985/96, 2000-XI Eur. Ct. H.R. 117, ⁋ 62, at 137–38.

89 *Sindicatul "Păstorul cel Bun" v. Romania*, App. No 2330/09, 2013-V Eur. Ct. H.R. 41, ¶ 136, at 62–63 (quoting, in part, Hasan, *Id.*).

90 *Svyato-Mykhaylivska Parafiya v. Ukraine, App. No. 77703/01*, EUR. CT. HUM. RTS. (June 14, 2007), hudoc.echr.coe.int/eng/?i=001-81067.

91 *Holy Synod of the Bulgarian Orthodox Church (Metro. Inokentiy) v. Bulgaria*, *App. Nos. 412/03 and 35677/04*, EUR. CT. HUM. RTS. (Jan. 22, 2009), hudoc.echr.coe.int/eng/?i=001-90788 [hereinafter *Holy Synod of the Bulgarian Orthodox Church*]; *Svyato-Mykhaylivska Parafiya*, *Id*.

92 *Sindicatul "Păstorul cel Bun"*, 2000-XI Eur. Ct. H.R. 44, 68.

may
not force a church to retain the services of a religious education teacher who publicly opposed its religious doctrines,[93] or a public relations director who committed adultery in violation of church teaching and in breach of his employment contract.[94]

The European Court has also held that states may not interfere in the resolution of internal disputes over church leadership, force denominations to unite or divide, compel them to accept one religious official over another, or prevent them from amending their internal legal structures or canons.[95] Even in those countries that have established churches or favored traditional religions, Article 9 "excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion".[96] In a later case, the Court stated further: "While it may be necessary for the State to... reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the various religions, denominations and groups within them."[97]

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93 *Martínez v. Spain, App. No. 56030/07*, EUR. CT. HUM. RTS. (June 12, 2014), http://hudoc.echr.coe.int/eng/?i=001-145068.

94 *Obst v. Germany*, App. No. 425/03, 2010 Eur. Ct. H.R. (unreported). *But compare Schüth v. Germany*, App. No. 1620/03, 2010-V Eur. Ct. H.R. 397 (a case involving an organist in a Catholic Church who was fired for his adultery). Here, the Court said that the pro forma approval of this discharge by the employment tribunal in Germany did not go far enough to protect the organist's right to privacy under Article 8 of the Convention.

95 *Holy Synod of the Bulgarian Orthodox Church*, *supra* note 91; *Svyato-Mykhaylivska Parafiya* , *supra* note 90; *Hasan v. Bulgaria*, App. No. 30985/96, 2000-XI Eur. Ct. H.R. 117; *Serif v. Greece*, App. No. 38178/97, 1999-IX Eur. Ct. H.R. 73.

96 *Metro. Church of Bessarabia v. Moldova*, App. No. 45701/99, 2001-XII Eur. Ct. H.R. 81, ¶ 116.

97 *Holy Synod of the Bulgarian Orthodox Church*, *supra* note 91, ¶ 119, at 22. See also *Magyar Keresztény Mennonita Egyház v. Hungary*, *App. Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12, and 56581/12*, EUR. CT. HUM. RTS., ⁋ 76, at 28 (Apr. 8, 2014), www.adfmedia.org/files/EgyhazDecision.pdf; *Tsartsidze v. Georgia, App. No. 18766/04*, EUR. CT. HUM. RTS. (Jan. 17, 2017), hudoc. echr.coe.int/eng/?i=001-170349.

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b) Limits on Religious Groups

Despite this insistence on state deference to religious autonomy, the Court has allowed governments to regulate and restrict the activities of registered religious organizations in order "to protect its institutions and citizens". These limitations, the Court has said, "must be used sparingly, as exceptions to the rule" and allowed only for "convincing and compelling reasons" and in cases of "pressing social need".[98] But some limitations pass muster under Article 9 review. In *Yiğit v. Turkey* (2010), for example, the Court upheld Turkey's law that required couples to marry monogamously in a civil ceremony before a state official. Turkish law does not recognize a religious marriage ceremony as sufficient to create a valid marriage, and the state threatened to imprison any religious official or group who presided over a marriage without a prior civil registration of the marriage. The stated purpose of the Turkish law, as the Court saw it, "was to protect women against polygamy. If religious marriages were to be considered lawful, all the attendant religious consequences would have to be recognised, for instance the fact that a [Muslim] man could marry four women".[99] Further, in the case of *Ouardiri v. Switzerland* (2011), the Court upheld Switzerland's new constitutional amendment prohibiting the building of minarets against the claim that this violated the rights of Muslims to have suitable mosques for public worship. The Court dismissed the claim, arguing that there was no real victim in the case.

But the Court has stepped in with Article 9 protection when local religious communities were victimized by their neighbors and did not receive help from the police or other state authorities. The case of *97 Members of the Gldani Congregation of Jehovah's Witnesses v. Georgia* (2007) provides a good illustration. There, local Orthodox Christians repeatedly attacked and intimidated a local group of Jehovah's Witnesses in an effort to drive them out of the community or force them to convert to Orthodoxy. The Witnesses were repeatedly assaulted and beaten with crosses, whips, and sticks – sometimes resulting in serious injuries. Their literature was burned; their worship services were interrupted. One man was shaved bald and forced to listen to Orthodox prayers designed to convert him. And all these actions were filmed and aired on national television. Local authorities did nothing, despite hearing 784 formal complaints, because they perceived the Witnesses "as a threat to Christian orthodoxy". The Court held that this state indifference was a clear violation of the Witnesses' Article 9 rights. Freedom of religion means that one group may not "apply

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98 *Magyar Keresztény Mennonita Egyház*, *Id.* ¶ 79, at 40.

99 *Yiğit v. Turkey, App. No. 3976/05*, EUR. CT. HUM. RTS. (Nov. 2, 2010) ¶ 62, hudoc.echr.coe.int/eng/?i=001-101579.

improper pressure on others from a wish to promote one's religious convictions",[100] the Court said.

> "...[T]he role of the authorities in such circumstances was not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other. That role of the State was conducive to public order, religious harmony and tolerance in a democratic society and could not be conceived as being likely to diminish the role of a faith or of a Church with which the population of a specific country was historically and culturally associated."[101]

Similarly, in *Dimitrova v. Bulgaria* (2015), the Court condemned Bulgarian actions against a local chapter of an international Evangelical group, The Word of Life. Authorities had first refused to permit the group to register as a religious body, then further restricted and intervened into the group's private home meetings, seizing their assets in a raid. The government alleged that this group was a dangerous sect that isolated members from their families, and prohibited them from getting medical care, going to school, watching television, or reading any literature besides the Bible. The group charged the government with religious discrimination. The Court held for the Evangelical group under Article 9. The state's actions were not prescribed by law, not neutral and impartial, and "failed to respect the need for true religious pluralism".[102]

Similarly, in *Ass'n for Solidarity with Jehovah Witnesses v. Turkey* (2016),[103] the Court stepped in to stop government's interference with the right of a peaceable

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100 *97 Members of the Gldani Congregation of Jehovah's Witnesses v. Georgia*, 46 Eur. H.R. Rep. 613, 646 (2007).

101 *Id.* ⁋⁋ 132–133, at 619 (citing *Larissis v. Greece*, App. Nos. 23372/94, 26377–78/94, 27 Eur. H.R. Rep. 329, ¶¶ 54, 59 at 332 (1998); *Serif v. Greece*, App. No. 38178/97, 1999-IX Eur. Ct. H.R. 73*; Refah Partisi (the Welfare Party) v. Turkey*, 37 Eur. H.R. Rep. 1 (2003)). *See also Kuznetsov v. Russia*, *supra* note 31, (finding an Article 9 violation for a state's failure to prosecute officials who had illegally broken up a Jehovah's Witness Sunday worship service).

102 *See Dimitrova v. Bulgaria, App. No. 15452/07*, EUR. CT. HUM. RTS. ¶ 25, at 6 (Feb. 10, 2015), www.adfmedia.org/files/DimitrovaJudgment.pdf.

103 *Ass'n for Solidarity with Jehovah Witnesses v. Turkey*, *App. Nos. 36915/10 and 8606/13,* EUR. CT. HUM. RTS. (May 24, 2016), hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5383018-6727996&filename=Judgment%20Association%20of%20solidarity%20with%20Jehovah%20Witnesses%20and%20Others%20v.%20Turkey%20-%20refu

religious group to worship privately. In this case, groups of Jehovah Witnesses alleged that the Turkish government violated their Article 9 rights by making it nearly impossible for them to conduct worship services. For many years, these groups could worship in private premises. However, a new Urban Planning Law limited religious gatherings to designated places of worship. The authorities ordered these private worship premises closed and prohibited worship services at any other private apartment in the district. They further denied the group's later application to build a place of worship and rejected their subsequent appeal to an administrative court. All this, the European Court held, violated the Witnesses' Article 9 rights; it was neither proportionate to a legitimate aim, nor necessary in a democratic society.

In *Metodiev v. Bulgaria* (2017),[104] the court also found a violation of Article 11 as well as Article 9. Here, Bulgarian authorities had refused to register an Ahmadi Muslim community as an official denomination, ostensibly because their community's constitution lacked a precise and clear indication of the beliefs and rites of the Ahmadi religion, as required by the Religions Act which sought to distinguish between the various religions and to avoid confrontation between religious communities. The court held that this refusal amounted to a violation of Article 9. The state was to remain neutral between religious beliefs and groups, and it did not have a valid interest in preventing religious sub-groups from forming their own separate organizations instead of integrating into larger religious communities.

C. COMPARING THE RELIGIOUS FREEDOM JURISPRUDENCE OF THE EUROPEAN COURT AND U.S. SUPREME COURT

As Professor Lerner taught us, it is eminently useful to study religious freedom in comparative perspectives. Comparative legal analysis allows scholars, legislators, and citizens to question, criticize, and confirm the value and validity of their own legal norms, procedures, and practices. It can also yield new ideas for reforming laws,

sal%20to%20provide%20Jehovah%E2%80%99s%20Witnesses%20with%20a%20place%20of%20worship%20.pdf (press release No. 168).

104 *Metodiev v. Bulgaria, App. No. 58088/08*, EUR. CT. HUM. RTS. (June 15, 2017), hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5746925-7304756&filename=Judgment%20Metodiev%20and%20Others%20v.%20Bulgaria%20-%20refusal%20by%20the%20authorities%20to%20register%20a%20new%20religious%20association.pdf (press release, 198).

addressing new cases, or adopting new statutes. The European Court of Human Rights cases that we have sampled often used comparative legal analysis to evaluate legal issues and trends in European member states as well as those of non-European nations.[105] This is vintage Lerner legal methodology, too. In his own scholarship, he has worked hard to compare the standards of religious freedom of many nations and regions of the world, not only with each other, but also with international human rights standards.

In that spirit, allow me briefly to compare the religious freedom case law of the European Court of Human Rights with that of the United States Supreme Court.[106] Both these distinguished courts are committed to the legal protection of religious freedom and other fundamental human rights. Both have developed comparable cultures of constitutional order, rule of law, democratic governance, and orderly pluralism. Europe has long been a trailblazer on many topics of law, politics, and society – often anticipating trends that gain influence in the United States a decade or two later. And the European Court of Human Rights uses the Article 9 religious freedom provisions to judge the disparate actions of forty-seven member states in Europe, not unlike the United States Supreme Court's use of the First Amendment guarantees of no establishment and free exercise of religion to judge the disparate policies of fifty state governments (along with federal actions). Here, in brief, are two sophisticated courts that are concurrently articulating and applying comparable religious liberty norms in discrete legal contexts. It is enlightening to compare their judgments.

1. Liberty of Conscience

Both the European Court of Human Rights and the United States Supreme Court give presumptive protection to liberty of conscience claims by pacifists conscientiously opposed to participation in war or violence. European Court cases have gone further

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105 *See, e.g.*, *Şahin v. Turkey*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. 173, as discussed in LERNER, RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS, *supra* note 4, at 187–188.

106 Also see the growing body of literature in this area, including, for example, *Which Model, Whose Liberty? Differences between US and European Approaches to Religious Freedom,* GEO. U. (Oct. 11, 2012), berkleycenter.georgetown.edu/publications/which-model-whose-liberty-differences-between-us-and-european-approaches-to-religious-freedom; Liviu Andreescu & Gabriel Andreescu, *Passive / Aggressive Symbols in the Public School: Religious Displays in the Council of Europe and the United States, with a Special Focus on Romania, in* THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC CLASSROOM 267 (Jeroen Temperman ed., 2012).

in declaring that pacifism is a fundamental right, rooted in Article 9, and they have insisted on its protection even for member states that have no law on point or limit it to certain religions. American cases say that pacifists have only statutory rights to conscientious objection, though they have interpreted these legislative accommodations very broadly in favor of pacifist claims.[107]

Both the European Court and Supreme Court have worked hard to protect vulnerable parties from coerced religious participation.[108] Several recent European Court cases, we saw, protected conscientious objectors from compulsory oath-swearing and protected minority religious students, including atheists and agnostics, from unwanted religious instruction and activities in public schools. The Supreme Court likewise has protected an atheist from swearing a compulsory oath contrary to his religious convictions,[109] Jehovah's Witness children from saluting the flag or reciting the pledge of allegiance,[110] or public-school students from recitations of prayers and Bible reading.[111]

While the United States Supreme Court does not allow parents to tailor the state's public-school curriculum to satisfy their religious scruples,[112] it has held in a long line of cases that the state has no monopoly on the education of children in a democratic system of government. Public and private (religious) schools, and even homeschooling, are all legal options—with subsequent cases even permitting limited forms of state aid to private school students through tax deductions, credits, and tuition vouchers.[113] Religious students may also be given release time from public school to attend religious services and ceremonies off the school premises.[114] This stands in some contrast to the *Konrad* case. The European Court's deference to "the power of the modern State" of Germany to monopolize the education of its citizens is, for Americans, a troubling development for pluralistic communities and religious minorities.

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107 See, e.g., United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970).

108 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Torcaso v. Watkins, 367 U.S. 488 (1961); Lee v. Wiesman, 505 U.S. 577 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

109 Torcaso, Id.

110 West Virginia State Bd. of Educ., *supra note* 108.

111 Lee, *supra note* 108; Santa Fe Indep. Sch. Dist., *supra note* 108.

112 See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

113 Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011); Wisconsin v. Yoder, 406 U.S. 205 (1972).

114 Zorach v. Clauson, 343 U.S. 306 (1952).

To be sure, the Supreme Court is in accord with the European Court in recognizing that parental rights to control their children's religious upbringing must be balanced against the state's duty to protect the best interests of that child. For example, *Prince v. Massachusetts* (1944) insisted that a minor child could not proselytize on the street corner at night in violation of child labor laws, even if the child's guardian regarded that activity as essential to the child's religious upbringing. *Jehovah's Witnesses v. King County Hospital* (1968) insisted that a minor child be given a necessary blood transfusion and other medical care, even though the parents wanted to treat the child by prayer alone as a test and testimony of faith.[115] Both in America and in Europe, parental acts or omissions that endanger a child's life or limb are automatic triggers for state intervention—notwithstanding religious interests to the contrary. These issues are resurfacing in America, Europe, and other nations today as some religious parents object to compulsory vaccinations for their young children, both because of the potential side effects of these drugs, and the purported interference in the divine protection and healing of these children. These issues have become more acute as some children have contracted preventable diseases that have spread to other vulnerable persons. More and more states and nations are putting pressure on these religious parents to get their children vaccinated, fining them, and revoking benefits (like public school education or social welfare aid) for those who refuse. It is unlikely that parental religious objections to compulsory vaccinations will be readily accommodated either in the European Court or in the Supreme Court.[116]

2. Free Exercise, Equality, and Pluralism

The European Court cases protecting the right to manifest one's religion, and allowing governments to impose regulations only if they are "necessary" and "proportionate" are roughly equivalent to the "heightened scrutiny" regime of American law. Like the European Court, the Supreme Court has applied this standard to uphold the rights of religious proselytism and other forms of public religious expression, but also to allow

115 Prince v. Massachusetts, 321 U.S. 158 (1944); Jehovah's Witnesses v. King Cty. Hosp., 390 U.S. 598 (1968).

116 *See the discussion and cases in* MARCI A. HAMILTON, JUSTICE DENIED: WHAT AMERICAN MUST DO TO PROTECT ITS CHILDREN (2012); ALAN ROGERS, THE CHILD CASES: HOW AMERICA'S RELIGIOUS EXEMPTION LAWS HARM CHILDREN (2014); Phil Willon & Melanie Mason, *California Gov. Jerry Brown Signs New Vaccination Law, One of Nation's Toughest,* L.A. TIMES (June 30, 2015), www.latimes.com/local/political/la-me-ln-governor-signs-tough-new-vaccination-law-20150630-story.html.

the state to impose general time, place, and manner regulations that are applied in a non-discriminatory manner.

In its recent cases, however, the Supreme Court has been much more solicitous than the European Court in protecting the religious exercise of religious minorities. Even Muslims, who have not fared well in American courts,[117] have recently won protections for their religious grooming and apparel in recent Supreme Court cases.[118] These cases stand in marked contrast to the European Court cases upholding state restrictions of headscarves, *burqas*, and turbans in public settings under its "margin of appreciation" doctrine. American courts would likely view such policies as obvious forms of viewpoint discrimination under both the First Amendment free exercise and free speech clauses, as well as under federal and state statutes. The Supreme Court has been deferential to local authorities in their regulation of religious dress in public schools, in prisons, or on military bases, where free speech and free exercise rights are of necessity "diminished".[119] And the Court's neo-federalism has allowed more local variations in the regulation of free exercise rights. But blanket statutory prohibitions on headscarves or *burqas*, like those upheld by the European Court would almost certainly be overturned by American courts under American free speech and free exercise jurisprudence, not to mention federal statutes.[120]

Similarly, an American law comparable to Switzerland's recent ban on the construction of minarets, which was upheld by the European Court in *Ouardiri v. Switzerland* (2011), would have little hope of survival in the United States if challenged under Religious Land Use and Institutional Persons Act or even under the free exercise clause directly. The United States Supreme Court case of *Church of Lukumi Babalu Aye v. Hialeah* (1993)[121] demonstrated that, even in the post-*Smith* era of American free exercise law, the targeting of one particular religious community

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117 *See, e.g.,* Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts,* 88 NOTRE DAME L. REV. 1371 (2013); Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts,* 98 IOWA L. REV. 231 (2012); ABDULLAHI AHMED AN-NA'IM, WHAT IS AN AMERICAN MUSLIM? (2014).

118 *Holt v. Hobbs*, 135 S.Ct. 853 (2015); *EEOC v. Abercrombie & Fitch Stores,* 575 U.S. __, 135 S.Ct. 2028 (2015).

119 *See Morse v. Frederick*, 551 U.S. 393 (2007); *Goldman v. Weinberger*, 475 U.S. 503 (1986).

120 *See, e.g.,* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488; Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

121 508 U.S. 520 (1993).

is not a valid neutral or generally applicable law, and will rarely, if ever, satisfy a compelling state interest or least restrictive alternative analysis, the rough American equivalents of the European Court's "necessity" and "proportionality" requirement. Not every application to build a mosque and minaret—or to build a church and steeple—is accommodated in the United States.[122] But a per se prohibition on all such construction would not pass constitutional or statutory muster.

That said, the Supreme Court has been notably harsh in its treatment of Native American Indian claims to religious freedom. The cases of *Bowen v. Roy* (1986), *Lyng v. Northwestern Indian Cemetery Protective Association* (1988), and *Employment Division v. Smith* (1990) all involved claims by Native Americans to special protection for their religious sites and rites in an era where the Supreme Court was using a strict scrutiny analysis in adjudicating free exercise cases.[123] Moreover, Congress had passed the American Indian Religious Freedom Act (1978) which called on the government "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions... including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites".[124] Neither this Act, nor the First Amendment free exercise clause, however, has provided Native American claimants with much protection against laws that impugned the spiritual development of an American Indian child, built a road right through a sacred burial site used for centuries by three tribes, and failed to accommodate a Native sacramental ritual involving the use of peyote. The Supreme Court's cavalier treatment of their religious liberty claims is a substantial blight on its record.

3. Corporate Free Exercise Rights

Both European and American cases and statutes go to great lengths to protect the autonomy and rights for religious worship centers, schools, and charities.[125] Similarly, the "deference test" used by the Supreme Court, from *Watson v. Jones*

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122 *Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act*, U.S. DEP'T OF JUSTICE (Sept. 22, 2010), www.justice.gov/crt/rluipa_report_092210.pdf.

123 *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

124 42 U.S.C. § 1996 (1978).

125 See, e.g., *Presiding Bishop v. Amos,* 483 U.S. 327 (1987), and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. 171 (2012).

(1872)[126] to *Serbian Orthodox Diocese v. Milivojevich* (1976),[127] to abstain from resolving intrachurch disputes over property has close parallels in European court jurisprudence. All of these cases, on both sides of the Atlantic, protect the right of religious groups to make their own decisions about polity, property, leadership, employment, and membership.

Several United States Supreme Court cases involving religious groups, however, have charted their own path. No recent European Court case or international instrument has imitated the Supreme Court case of *Jones v. Wolf* (1979),[128] which permitted government resolution of intrachurch disputes involving "neutral principles" of law. While "state neutrality" in religion is an important principle of religious freedom, church autonomy to adjudicate internal disputes has been the overriding principle in European Court jurisprudence, as it had been in American case law prior to 1979. The recent European Court jurisprudence on intrachurch disputes has been more insistent and consistent in protecting religious group rights. Moreover, no European Court cases has gone as far as the Supreme Court case of *Bob Jones University v. United States* (1983), which withheld tax-exempt status from a religious university that engaged in racial discrimination on the basis of its religious convictions.[129] The holding of the *Bob Jones* case is intuitively attractive, given the tragic history of slavery and persistent discrimination against African Americans and other minorities. But international norms of religious rights protect even unpopular and prejudicial policies of a religious body that are sincerely held—so long as such policies do not threaten or violate the life or limb of its members or impair any party's liberty of exit from the religious body.[130]

With the new Supreme Court cases of *Obergefell v. Hodges* (2015)[131] and *United States v. Windsor* (2013)[132] authorizing same-sex marriage and LGBTQ rights, similar issues are now being seriously debated. If a religious charity, school, club, or worship center fails to support same-sex marriages or relationships, might that trigger removal of its federal or state tax-exempt status, or even its ability to incorporate, hold property, or get licenses to operate? If a church, synagogue, or mosque refuses to solemnize a same-sex marriage, might that result in fines, new taxes, or revocation of

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126 80 U.S. 679 (1871).

127 426 U.S. 696 (1976).

128 433 U.S. 595 (1979).

129 *Bob Jones U. v. United States*, 461 U.S. 574 (1983).

130 *See* LERNER, GROUP RIGHTS, *supra* note 6.

131 576 U.S. 644 (2015).

132 570 U.S. 744 (2013).

its license to solemnize weddings "by the power of the state vested" in the religious official? Some of these questions are still academic hypotheticals. But these speculations have been fueled by Supreme Court cases like *Christian Legal Society v. Martinez* (2010), which denied a Christian organization licensed student status on a public university campus because of its aversion to same-sex relationships.[133] Given the strong principle of religious autonomy for religious groups, American states will likely not force churches, synagogues, or mosques to ordain gay and lesbian clergy or marry same-sex couples anytime soon. But many religious organizations will soon face increasing pressure to accommodate claims relating to sexual orientation and gender identity. It will be of keen interest to see how the European Court jurisprudence comes out on these questions as European nations struggle to balance religious freedom and sexual liberty claims.

4. Separation of Church and State and No Establishment of Religion

The founding American principles of separation of church and state and no establishment of religion go beyond the international human rights instruments and European Court case law, and they have resulted in some striking differences in American religious freedom law. For example, the European Convention and European Court case law permit state establishments of religion (whether Anglican, Lutheran, Presbyterian, or Orthodox) as well as special constitutional relations, such as concordats, between one religious organization and the state. But these bodies also insist that any such arrangements must result in no discrimination against other religions. This position is untenable in the United States. Many of the eighteenth-century American founders already taught that state establishments of, or preferences for one religion inevitably impede the religious freedom of all others; establishment and equality cannot coexist. Disestablishment of religion was thought to provide a better way to protect the liberty of conscience, free exercise rights, and religious equality of all faiths, whether majority or minority.[134] This has long been a commonplace of American case law, which requires government to treat all religions neutrally and nonpreferentially.[135]

As a further example, the European Court has repeatedly granted a large "margin of appreciation" to state policies of secularism and laïcité, even when those policies have resulted in blatantly discriminatory treatment of Muslims, small religious sects,

133 Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2011).
134 RCE, *supra* note *, at 57–62.
135 *Id.* at 154–171.

and other minorities who raised religious freedom objections. This position, too, is untenable in the United States given its constitutional commandment of no establishment of religion. The Supreme Court has said that the First Amendment establishment clause does not require the state to be hostile to religion,[136] or allow the state to establish a "religion of secularism".[137] "We are a religious people whose institutions presuppose a Supreme Being," the Supreme Court has said repeatedly. "Religion has been closely identified with our history and government."[138] While the Supreme Court's recent neo-federalism has resulted in more deference to the decision-making of the fifty individual states, it is unlikely that the Court would accept a state establishment of secularism or laïcité any more than a state establishment of Catholicism or Islam. I say "unlikely" rather than "never" only because Justice Clarence Thomas has repeatedly called on the Court to reject the incorporation of the First Amendment establishment clause from the Fourteenth Amendment due process clause.[139] This would leave the establishment clause binding on "Congress" alone and leave the states and local governments with more leeway to experiment with such religious establishments. The operation of the "margin of appreciation" doctrine in Europe, and disproportionate rulings against claims by religious minorities, are a fair warning about what such "de-incorporation" of the establishment clause might yield.

The principles of no establishment of religion and separation of church and state have informed America's distinct commitment to letting religion flourish on its own, so much as possible, without government coercion, control, subsidy, or sanction. In turn, these principles have led to the requirement that government develop its laws and policies without reliance on religious arguments or operations. When these disestablishment and separation principles were at their apex in the 1960s and 1970s, they yielded the *Lemon* test that requires laws to (1) have a secular purpose, (2) have a

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136 *See, e.g.*, *Everson v. Bd. of Educ*., 330 U.S. 1, 18 (1947); *Abington Sch. Dist. v. Schempp,* 374 U.S. 203, 225, 306 (1963); *Walz v. Tax Comm'n of N.Y.,* 397 U.S. 664, 672 (1970); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Zorach v. Clauson*, 343 U.S. 306, 314–315 (1952); *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C. J., dissenting).

137 Abington Sch. Dist., *id.* at 313 (Stewart, J., dissenting).

138 *See* Zorach, *supra* note 114 at 313; Abington Sch. Dist., *Id*. at 212; *Van Orden v. Perry*, 545 U.S. 677, 683–684 (2005).

139 *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (Thomas, J., concurring in the judgment ("I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation. Moreover, as I will explain, the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause, which would probably cover little more than the Free Exercise Clause)." (*Id*. at 45–46).

primary effect that neither inhibits nor prohibits religion, and (3) foster no excessive entanglement between religious and political officials. While the Supreme Court applied this *Lemon* test vigorously for a time, especially in its education cases, it has largely abandoned this test in recent cases. State "neutrality" toward religion and "equality" in treatment of religion, and not state secularity, have become the preferred American standard. This broadly comports with international human rights standards, although not always with particular cases in the European Court of Human Rights.[140]

While the European Court of Human Rights has addressed state regulation of private religious dress and ornamentation in public life, the United States Supreme Court has repeatedly addressed state support or accommodation of religious symbols in public life, creating a jumble of precedents under the establishment clause. In *Lautsi v. Italy* (2011), the European Court upheld Italy's longstanding policy of displaying crucifixes in public schools. In working through this case, the European Court sounded a number of themes that have come to prominence in the most recent Supreme Court establishment clause cases as well. First, tradition counts in these cases. In American courts, older religious displays tend to fare better than newer displays. The longstanding customary presence of a religious symbol in public life eventually renders it not only acceptable but also indispensable to defining a people or nation.

Second, religious symbols can communicate a range of cultural values and meanings. American courts have ruled that the Decalogue is not only religious commandments but also an historic moral and legal code; that a cross is not always a narrowly Christian symbol but also a poignant memorial to military sacrifice.[141] In some contexts, then, the meanings of controversial symbols can be left for the public to debate instead of being reflexively banished by the courts. The European Court of Human Rights echoed this logic in its *Lautsi* ruling. While recognizing the crucifix as religious in origin, the Court accepted Italy's argument that "the crucifix symbolised the principles and values" of liberty and equality which "formed the foundation of democracy" and human rights in Italy.[142]

Third, religious freedom does not give a minority a heckler's veto over majoritarian policies. Until recently, American courts allowed taxpayers to challenge any law touching religion even if it caused them no real personal injury. This

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140 *See* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality toward Religion,* 39 DEPAUL L. REV. 993 (1990).

141 RCE, *supra* note *, 209–221.

142 *Lautsi*, 2011-III Eur. Ct. H.R. 61 ¶¶ 16,67, at 72–74, 93–94.

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effectively gave individual litigants a "veto" over sundry laws and policies on religion—however old, common, or popular those laws might be. The Supreme Court has now tightened its standing rules considerably, forcing parties to make their cases for legal reform in the legislatures and to seek individual exemptions from policies that violate their beliefs. *Lautsi* holds similarly. It recognizes that while the crucifix may offend some, it represents the cherished cultural values of millions of others. Religious coercion is unlawful, but personal offense alone is not a sufficient ground for overruling every offensive cultural artifact or tradition.

SUMMARY AND CONCLUSIONS

This brief survey of religious freedom cases in the European Court of Human Rights and the United States Supreme Court highlights the importance – and complexity – of upholding religious freedom in pluralistic modern democracies. Indeed, both these distinguished courts have engaged some of this generation's most pressing religious freedom questions: How to protect religious and cultural minorities who face religious and cultural discrimination.[143] How to define limits on religious and anti-religious practices that cause offense or harm to others. How to adjudicate cases when a state's religious proscriptions or prescriptions conflict with individual conscience. How to balance private and public exercises of religion. How to respect the rights of parents to bring up children in their faith while fulfilling the duties of the state to protect the rights and interests of children. How to protect the distinct religious needs of prisoners, soldiers, refugees, and others who do not enjoy ready access to traditional forms and forums of religious worship and expression.

Many religion and human rights issues involve religious groups. For them, the right to organize as a legal entity with legal or juridical personality is itself a critical issue that raises more hard questions: How to negotiate the complex needs and norms of religious groups without granting them undue sovereignty over their members. How to provide legal relief and checks via secular courts in the event of fundamental rights violations by a religious community's institutions and governing bodies. How to balance the rights of religious groups to self-determination and self-governance against the guarantees of freedom from discrimination based on religion, gender, culture, and sexual orientation. How to balance competing religious groups who claim

143 *See, e.g.,* JEROEN TEMPERMAN, RELIGIOUS HATRED AND INTERNATIONAL LAW: THE PROHIBITION OF INCITEMENT TO VIOLENCE OR DISCRIMINATION (2015).

access to common holy sites, or to protect groups whose sacred sites are threatened with desecration or development. How to protect the relations between local religious communities and their foreign coreligionists. How to adjudicate intra- or interreligious disputes that come before secular tribunals for resolution. How to determine the proper levels of state cooperation with and support of religious officials and institutions in the delivery of vital social services—child care, education, charity, medical services, disaster relief, and others.

These questions are as pressing as they are perennial. Social and political changes continue to test and transform the world's legal systems. Multiple generations of jurists and litigants have now wrestled with the hard problems – legal, religious, and otherwise – presented by new patterns of globalization and pluralism. Western nations now have multiple legal instruments and institutions to address these problems. Documents like the Universal Declaration of Human Rights and the European Convention on Human Rights articulate international ideals and norms to protect religious freedom, while also recognizing the sovereignty of individual nation-states. Institutions like the European Court of Human Rights and European Court of Justice, in turn, apply these norms to individual cases and controversies. If the principles that guide these courts often seem inadequate, and if individual rulings in these courts often seem flawed or misguided, the increasing nuance and level of attention that courts are now paying to religious freedom are cause for real optimism.

Yet recent trends in world affairs are also cause for concern. Entire regions of the world – from Syria to Myanmar – remain mired in catastrophic conflicts that seem hopelessly indifferent to any and all demands to respect human rights, not least religious freedom. Corresponding waves of refugees seeking security in European nations and North America are met with a mixture of solidarity, ambivalence, and even hostility by native populations who fear for their own cultures and coffers. Many Western nations that have long mingled (and mettled) in the affairs of foreign countries now balk at the rights claims of groups fleeing to their borders.

If we have learned anything from the work of Natan Lerner, it is that the world cannot, in good conscience, turn a blind eye to the suffering of these individuals or groups. But can laws protecting "religious liberty" actually rise to the occasion? Can they compel – morally or legally – governments and peoples to accommodate and care for the "other," for the "sojourner" in their midst? Or, are they capable only of resolving relatively tame conflicts about school curricula, public holidays, religious headscarves, and the like? Should international courts and legislative bodies continue to invest time and energy in promoting religious liberty at a time when so many are suffering?

A host of contemporary critics now answer with a resounding "No!" Freedom of religion, they argue, is simply too Western, too parochial, and too hegemonic to enforce as part of an international human rights agenda – especially in places like Asia, the Middle East, and Africa, where indigenous cultures and ethnic conflicts do not fit neatly within the frameworks of "religion" or "religious liberty". Promoting religious freedom directly, via international human rights instruments, or obliquely, through things such as international trade agreements, intrudes on the self-determination of non-Western societies that have their own unique ways of knowing, living, and being. Such an agenda, other critics now argue, reeks of neo-colonialism, for modern human rights instruments are irredeemably tainted by the influence of Christian thinkers and statesmen who advocated for human rights after World War II.[144] Still other scholars argue that the framework of religious freedom blinds us to the complexity of diverse cultures and contexts. Organizers of the renowned "Politics of Religious Freedom" project, for example, insist that ongoing conflicts in places like Pakistan, India, and elsewhere in the Indian subcontinent, will only be solved by political and economic reforms, not through the application of religious liberty norms: "Foregrounding religious freedom as *the* key to understanding Pakistan's problems today blinds us to the political and economic pathologies" at the root of that country's problems, they say. Similarly, promoting religious freedom in places like Myanmar ignores the historical roles of Western colonialism in fostering "ethnic, racial, political, economic, and national" discrimination against the Rohingya minority there. "For the international community to single out religion as the operative marker of social difference in these circumstances is descriptively inaccurate and does more harm than good. It is time to step back from the seductively over-simplified diagnosis licensed by religious freedom advocacy."[145]

One hopes that these well-meaning critics will read Professor Lerner's scholarship before continuing on this critical path. A survivor of the *Shoah* – that destroyed almost everyone and every place in his Polish hometown – Lerner made the prevention of such atrocities his life's work. Not coincidentally, he became one of the world's most learned students and advocates of religious freedom, racial freedom, and genocide.

There are few scholars who knew so well the limitations of religious freedom – as a concept and as a set of legal instruments – for preventing the marginalization, persecution, and even annihilation of vulnerable populations in various parts of the world. Nor are there many jurists who knew so well the contours of international laws

144 *See, e.g.*, SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS (2015).

145 POLITICS OF RELIGIOUS FREEDOM 4–5 (Winnifred Fallers Sullivan et al. eds., 2015).

governing religious freedom – their nuances, reach, and final effectiveness. Rather than focusing on political rhetoric and headlines about religious freedom, Lerner paid close attention to the legal meanings and practical implications of religious freedom as it is actually applied in courts. Rather than disregarding religious freedom as such, because the term "religion" seems too blunt, Lerner instead offered observations like this: "Because religion, in general, has been too hard to define, the United Nations has adopted instead a catalog of rights in the sphere of religion, under the heading of freedom of thought, conscience, and religion. The same approach has been followed in regional human rights instruments. None of the international and regional instruments addressing the freedom of rights of religion has attempted to define religion."[146] Rather than presenting religion or religious freedom as *the* key to understanding complicated conflicts, Lerner carefully analyzed contemporary forms of social groups and discrimination,[147] and soberly observed that "religion plays a weighty role in xenophobia, racism, group hatred, and even territorial changes". Religion and religious freedom, therefore, are important factors, among many others, for understanding, adjudicating, and preventing unjust forms of discrimination and persecution; and for protecting an "essential manifestation of human liberty".[148]

The lesson here is not that the fashionable academic critics of religious freedom today are wrong to question the meanings, origins, or even utility of religious freedom; but rather that many critics are too hasty in their willingness to discard it. Religious freedom is complicated. It requires maintenance – both to sustain it, and to fix it. It requires updates – big and small, additions and subtractions – to account for the evolving societies and legislative bodies whose actions it governs, and whose rights and prerogatives it protects. It requires criticism – constructive and deconstructive both – for its continued vitality and relevance. Yet, despite all of its flaws and imperfections, its shortcomings and failures, and all of the work it still calls us to do, Natan Lerner reminded us that religious freedom is as important now as it ever was.

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146 LERNER, RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS, *supra* note 4, at 5.

147 *See* LERNER, GROUP RIGHTS, *supra* note 6; *also see* Natan Lerner, *Jewish Interests in International Fora*, 59 JUST. MAG. 26, 27 (2017).

148 LERNER, RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS, *Id.* at 2.

אמונה בשטרסבורג? חופש דת בבית הדין האירופי לזכויות אדם

ג׳ון ויטי הבן

פרופ׳ נתן לרנר היה חוקר מוערך בתחומים הנוגעים בחופש דת ליחידים ולקבוצות כאחד. הוא תמך בשילוב ההגנה הלאומית, ההגנה האזורית וההגנה הבין-לאומית על חופש הדת, וביצירת הרמוניזציה של חופש הדת עם סוגיות אחרות הנוגעות בזכויות יסוד. מאמר זה, המוקדש לזכרו של פרופ׳ לרנר, מנתח את גוף הפסיקות הגדל במהירות של בית הדין האירופי לזכויות אדם בשטרסבורג בנושא חופש הדת ובנושאים קשורים. בהתאם למתודולוגיית המשפט ההשוואתי של פרופ׳ לרנר, המאמר משווה בין הפסיקה של בית הדין בשטרסבורג בנושא חופש הדת לבין זו של בית המשפט העליון בארצות הברית, ומוצא תמימות דעים מהותית ומפתיעה אך גם מתחים יצירתיים מסוימים.

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כרך כה, תשפ״ב