The legal conception of "religion"

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RELIGION, CONSCIENCE, AND BELIEF IN THE EUROPEAN COURT OF HUMAN RIGHTS

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Religions are not treated equally by the law; religion is not absent from the substance of the law.†

Europe is suffused with Christianity, or at least memories of its past influence. ‡

I. INTRODUCTION

Historically, Europeans have not always been especially kind to each other, especially when there are religious differences between them. Religion has been the cause of controversy and war in Europe for centuries.[1] The last hundred years alone has seen attempts at exterminating substantial parts of populations identified by their religious difference: Armenian Christians, Ashkenazi Jews, and Bosnian Muslims have all faced systemic state-sponsored violence. Indeed, some European states exist as the result of "violent conflicts that once had their origins in religious enmity."[2] But the history of religion in Europe is not wholly dark. Partly in response to this history of bloodshed, the modern notion of human rights developed in Europe as well. "[T]he charter myth of modern law . . . describes a progressive growth of freedom, above all freedom of and from religion, following the European wars of religion that took place in

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† Anthony Bradney, *Faced by Faith*, *in* FAITH IN LAW: ESSAYS IN LEGAL THEORY 89-105, 89 (Peter Oliver, et al. eds., 2000).

‡ Andrew Higgins, *A More Secular Europe, Divided by the Cross*, N.Y. TIMES, June 18, 2013, at A1.

[1] Gordon A. Christenson, *"Liberty of the Exercise of Religion" in the Peace of Westphalia*, 21 TRANS. L. & CONTEMP. PROBS. 721, 722 (2013) ("Violence and the wars of religion before and after the Protestant Reformation and Catholic Counter-Reformation, in particular, exhausted Europe. . . . [and afterward] sectarian violence actually increased inside states from 1550 to 1750."). *See also* Mark Weston Janis, *The Shadow of Westphalia: Majoritarian Religions and Strasbourg Law*, 4 OX. J.L. REL. 75, 75 (2015) ("From the Roman Empire to our times, the Continent has witnessed one after another fierce religious struggle."); BENJAMIN J. KAPLAN, DIVIDED BY FAITH: RELIGIOUS CONFLICT AND THE PRACTICE OF TOLERATION IN EARLY MODERN EUROPE 2-7 (2007).

[2] Peter Cumper & Tom Lewis, *Introduction: Freedom of Religion and Belief—The Contemporary Context*, *in* RELIGION, RIGHTS AND SECULAR SOCIETY: EUROPEAN PERSPECTIVES 1-16, 5-6 (Peter Cumper & Tom Lewis, eds., 2012).

the sixteenth and seventeenth centuries."[3] But while religion was the cause of conflict, the idea of human rights as a means to control and prevent conflict drew heavily upon religious ideas as well.

Today, Europe's relationship with religion remains "a complicated matter."[4] Within many states, "religion itself has been a formative element in the creation of the national identities."[5] At the same time, however, "Europe has long been religiously and culturally diverse,"[6] and this diversity prompts continuing debate over the proper role of religion in European integration.[7] "Especially since the terrorist outrages of 9/11—and in Europe itself, 11 March 2004 in Madrid and 7 July 2005 in London—there has been something of a moral panic not just about jihadist Islam but more generally about the role of religion in public life."[8]

The Maastricht Treaty calls for European nations to "'contribute to the flowering of the cultures of the member states . . . and at the same time bring[] the common cultural heritage to the fore.'"[9] Is that common heritage "rooted in religion as claimed by some?"[10]

[3] Robert Yelle, *Moses' Veil: Secularization as Christian Myth*, *in* AFTER SECULAR LAW, 23-42, 23 (Winnifred Fallers Sullivan, et al. eds., 2011).

[4] Cumper & Lewis, *supra* note 2 at 1 (internal quotation omitted).

[5] *Id*. at 6. *See also id*. ("there seems little doubt that Christianity has had a considerable impact on European public life, as illustrated by the fact that Europe's working week and public holidays tend to be reflective of the Christian calendar.").

[6] Lourdes Peroni, *On Religious and Cultural Equality in European Human Rights Convention Law*, 32 NETH. Q. HUMAN RTS. 231, 231 (2014); *see also* Silvio Ferrari, *Law and Religion in Europe*, *in* RELIGION IN THE 21ST CENTURY: CHALLENGES AND TRANSFORMATIONS 149-59, 149 (Lisbet Christoffersen, et al. eds., 2010) ("Religious plurality is a well-known fact in Europe.").

[7] Cumper & Lewis, *supra* note 2 at 6 ("there exists a kaleidoscope of diversity on the status of religion in European societies"); Lucian N. Leustean & John T.S. Madeley, *Introduction*, *in* RELIGION, POLITICS AND LAW IN THE EUROPEAN UNION 1-16, 1 (Lucian N. Leustean & John T.S. Madeley, eds., 2010) ("[A] number of the most controversial issues associated with the ongoing project of European integration have indeed involved deep disagreement about the role of religion in politics and public life.").

[8] Leustean & Madeley, *supra* note 7 at 6. Jihadist Islam, however, remains at the forefront of the public discussion. *See* Paul Cliteur, et al., *The New Censorship: A Case Study of Extrajudicial Restraints on Free Speech*, *in* FREEDOM OF SPEECH UNDER ATTACK 291-315 (Afshin Ellian & Gelijn Molier, eds. 2015). And given the *Charlie Hebdo* shooting in January 2015 and the attempted train shooting in August 2015, this appears unlikely to change in the near-term. *See also* Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L L. 663, 744 (2011) ("Since 2001, the Article 9 jurisprudence of the European Court of Human Rights has raised anew the question of the relationship between religion and the public order.").

[9] Lucia Faltin, *Introduction: The Religious Roots of Contemporary European Identity*, *in* THE RELIGIOUS ROOTS OF CONTEMPORARY EUROPEAN IDENTITY, 1-13, 6 n.14 (Lucia Faltin & Melanie J. Wright, eds., 2007).

[10] Leustean & Madeley, *supra* note 7 at 1.

Many would see Europe's Christian roots as an obvious necessary element of European identity, shaping even secular or "post-Christian" society.[11] The question, then, is how to resolve the tension between Europe's Christian roots, its current diversity, and the ambition of liberal states to avoid discriminating in matters of religion. More than half a century ago, the ratification of the European Convention on Human Rights (ECHR or Convention) was a notable, but incomplete, step toward resolution. To move forward we must now ask whether Europe "can attend to human rights claims arising from this cultural and religious diversity in more inclusive and egalitarian ways."[12]

Here, I suggest that a more critical view toward the notion of "religion" under Article 9 by the European Court of Human Rights (ECtHR or Court) would take an important step toward a more inclusive and egalitarian human rights jurisprudence. In other work, I have shown that "religion" as a legal term of art is generally understood by judges to refer primarily to belief, and that this understanding privileges Christianity (specifically Protestant Christianity, and to a lesser extent other confessional religions such as Islam) at the expense of others, such as Judaism and Hinduism,[13]

[11] Grace Davie, *Understanding Religion in Europe: A Continually Evolving Mosaic*, *in* RELIGION, RIGHTS AND SECULAR SOCIETY: EUROPEAN PERSPECTIVES 251-270, 253 (Peter Cumper & Tom Lewis, eds., 2012) ("The role of Christianity in shaping European culture is undisputed."); Camil Ungureanu, *Europe and Religion: An Ambivalent Nexus*, *in* LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS 307-333, 309 (Lorenzo Zucca & Camil Ungureanu eds., 2012) ("The history of Europe and Christianity are inextricably intertwined."); Danchin, *supra* note 8 at 689 (quoting Charles Hirschkind, *Religious Difference and Democratic Pluralism: Some Recent Debates and Frameworks*, 44 TEMENOS 123, 126 (2008)) ("'Christian heritage is essential to the civilizational identity of Europe.'")).

Additionally, this dissonance can be seen in "[t]he quarrel over the exclusion of Christianity's contribution to Europe's heritage in the proposed European constitutional treaty[, which] sparked much debate and commentary. A reference to Christianity was absent from the initial draft of the preamble, which claimed that modern European civilization's values of freedom, equality of persons, reason, and the rule of law were derived from Europe's classical heritage and the Enlightenment. European governments and the late Pope John Paul II raised voices of dissent and argued that this represented an attempt by European intellectuals and European political leaders to airbrush fifteen hundred years of Christian history from Europe's political memory and was tantamount to 'an exercise in self-afflicted amnesia.'" *See* Paul E. Kerry, *The Quarrel over the Religious Roots of European Identity in the European Constitution and the Nature of Historical Explanation: A Catholic Coign of Vantage*, *in* THE RELIGIOUS ROOTS OF CONTEMPORARY EUROPEAN IDENTITY, 168-178, 168 (Lucia Faltin & Melanie J. Wright, eds., 2007).

[12] Peroni, *supra* note 6 at 231. If nothing else, familiarity with the foundations of religious identity in Europe is required for informed discourse in confronting ideological extremism. Faltin, *supra* note 9 at 2.

[13] I recognize the terms are anachronistic, but for present purposes they are sufficient to convey the meaning I intend.

that place greater emphasis on community, practice, ethics, or ritual.[14]

In this paper, I suggest that the notion of "religion" as the term is used in Article 9, and as applied by the Court (and previously by the European Commission of Human Rights) is biased in favor of Christianity. As Timothy Macklem observes, "[w]e are concerned here, not to know how the term religion *is* used, whether in the world at large or in the legal community, but to know how the term religion *should* be used, in the interpretation, the application, and the justification of a fundamental freedom."[15]

In Part II, I begin by reviewing the position of religion in Europe and the special role of religion in the origin of the Westphalian system, the emergence of liberalism and, ultimately, modern human rights. In Part III, I turn to the specific right at issue, that of religion or belief under the ECHR. I discuss the origin of the Convention, review the structure of the Court and Commission it created, and take account of the analytical approach applied in addressing claims arising under Article 9.

Part IV suggests that Christian bias may be observed both in the terms of the Convention itself, and in its application by the Court. I begin in Part IV.A with text of the Convention and its *traveaux préparatoires*. I suggest that in addition to the overt religious statements of some of the participants in the drafting process, the final language used in the text of the Convention introduces inequality between religions based on the relative centrality of belief by tacitly equating religion with "belief" and with a similarly vague and belief-based notion of "conscience."

Part IV.B discusses how the Court has exacerbated the problems inherent in the convention through Court-made doctrines. Part IV.B.1 addresses the *forum internum* and *forum externum*, a historical theological dialectic the Commission repurposed as a legal doctrine. Here, I suggest that the broad notion of "religion" evidenced by some of the Commission's decisions is seriously undermined by the Court's focus on the *forum internum*, although this could be improved with more nuanced understanding. Part IV.B.2 suggests that other general doctrines the Court follows, including the margin of appreciation, consensus, and subsidiarity combine to make both a pan-European understanding of religion, and judicial remedies for wronged individuals difficult to obtain.

[14] Aaron R. Petty, *Accommodating "Religion"*, 83 TENN. L. REV. ___, 1-2 & 5-8 (forthcoming 2016); Aaron R. Petty, *The Concept of "Religion" in the Supreme Court of Israel*, 26 YALE J.L. & HUMAN. 211, 254-59 (2014); Aaron R. Petty, *"Faith, However Defined": Reassessing* JFS *and the Judicial Conception of "Religion"*, 6 ELON L. REV. 117, 135-42 (2014).

[15] Timothy Macklem, *Reason and Religion*, *in* FAITH IN LAW: ESSAYS IN LEGAL THEORY 69-87, 70 (Peter Oliver, et al. eds., 2000).

Part IV.B.3 discusses difficulties in defining religion under Article 9.

Part V steps outside of the European perspective to reflect on how the current ECHR system reflects a Western and ultimately Christian understanding of religion, and suggests that this understanding is inherently in tension with the liberal human-rights objective of protecting freedom of religion. Both the modern Westphalian state and modern international law—including principles of religious freedom—were founded on the understanding that religion was primarily a private, internal matter of belief. The protection of freedom of religion by the state is therefore subject to, if not contingent on, the degree to which the religion in question resembles Protestant Christianity. Part VI offers a brief conclusion.

II. EUROPE, THE WESTPHALIAN STATE, AND THE ORIGIN OF HUMAN RIGHTS

A. Religion in Europe

The significance of Christianity in modern Europe is both formative and unifying and, simultaneously, marginalized in a continuing march toward secularization. From an American perspective, "[i]n a continent divided by many languages, vast differences of culture and economic gaps . . . centuries of Christianity provide a rare element shared by all of the . . . members of the fractious union."[16] American journalists are hardly alone in this view. To the contrary, Western Christianity as a *sine qua non* of European identity is long standing:

> The first time medieval chroniclers described an event as 'European' was the victory of Christian Frankish forces over a Muslim army at Poitiers in 732 . . . with the crusades of the eleventh century, Western Christianity became synonymous with a European identity which defined itself against the Islamic and Byzantine Orthodox Christian civilizations to its south and east.[17]

Europe "split up into Catholic, Protestant and Orthodox communities, with dividing lines that frequently crossed the same town or the same region. But this plurality was contained within a

[16] Higgins, *supra* note ‡ at A1.

[17] RONAN MCCREA, RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION 18 (2010). This continues today, as "some prominent Christian Democrats . . . have objected [that] Turkey's strong Islamic heritage prevents it from sharing core Christian values which they insist underlie the whole EU construct." Leustean & Madeley, *supra* note 7 at 9.

shared horizon, defined by reference to the same sacred books."[18] In more recent years, "[t]his common horizon has become progressively weaker" due to "immigration, which brought into Europe an increasing number of people who do not know and do not share some central features of the European cultural heritage" and "individualism, which questions assumptions that used to be taken for granted."[19]

On the side of individualism, or liberalism more generally, one can see that "[f]rom 1973, when the Copenhagen Declaration on European Identity was promulgated, the fundamental elements which were identified as corresponding to the 'deepest aspirations' of Europe's people were presented in political, legal and philosophical terms without prejudice to cultural specificities," which is to say, without express reference to a shared Christian heritage.[20] Some have claimed that this "failure to acknowledge the historic debt can be traced directly to a 'Christophobic' mind-set which is all of a piece with the progressive marginalisation of religious influences in Europe's public life."[21]

But neither religion generally nor Christianity in particular have disappeared even as recognition for its role in European identity and culture has been withdrawn. "Religious institutions retain important roles in areas such as healthcare and education in almost all [EU] Member States, while many states retain official links to particular Christian denominations which remain an important element of national identities."[22] Moreover, the incorporation of states formerly members of the Warsaw Pact has changed the landscape as well, and not necessarily in ways that mesh seamlessly with the more secular states of Western Europe.[23] In short, "at a time when

[18] Ferrari, *supra* note 6 at 149. "Of course, Jewish and Muslim communities have been living in Europe for a long time. The Jews, however, were faced early on with the alternative between assimilation or persecution (and they chose the first, without avoiding the second), and the Muslims were confined to a peripheral region of Europe after the Catholic 'reconquista' of Spain in the fifteenth century. As a consequence, religious plurality in Europe has been predominantly intra-Christian." *Id.* at 149.

[19] *Id.* In addition, "[t]here is a widespread intolerance of Islam, a re-emergence of anti-semitism, and heavily majoritarian cultures, often hostile to minority faiths, all over." Janis, *supra* note 1 at 76.

[20] Leustean & Madeley, *supra* note 7 at 6.

[21] *Id.* at 2.

[22] MCCREA, *supra* note 17 at 17. At least a dozen European states formally establish a religion. Janis, *supra* note 1 at 80.

[23] "The increase in the significance of religious factors for the explanation and interpretation of social, political, and international conflicts and changes also applies to Europe, which has changed greatly as a result of the collapse of state socialism and the re-entry of Eastern and Central European countries into European history. In particular, the increased status in Eastern Europe of national churches, religious movements, and ethnic conflicts within the religious sphere is obvious." Detlaf Pollack et al., *Church and Religion in the Enlarged Europe:*

Europe needs solidarity and a unified sense of purpose to grapple with its seemingly endless economic crisis, religion has instead become yet another source of discord."[24]

B. The State

Modern Western notions of religious liberty begin with the separation of political and religious authority. Some have claimed that "[t]he Western tradition of church-state separation and religious freedom is often, and properly, traced back to the dualistic teaching of the New Testament, succinctly expressed in Jesus' admonition to '[r]ender . . . unto Caesar the things which be Caesar's, and unto God the things which be God's.'"[25] More immediately, though, the role of religion as separate from and generally subordinate to the state stems from the Investiture Controversies of the eleventh and twelfth centuries and the Peace of Westphalia at the conclusion of the thirty years' war in 1648. "[S]ystematic theorizing about the relation between church and state began in earnest with the so-called Investiture Controversy of the eleventh and twelfth centuries."[26] The result was that the largely exclusive jurisdictional spheres for temporal and spiritual rulers that emerged from the controversy "distinguished European civilisation from the Caesaro-Papism of the Eastern Orthodox Church and Islamic approaches which did not differentiate between the religious and political domains."[27]

Once separated from the authority of temporal rulers, dissident religious views could be tolerated without threatening the political order. The Peace of Westphalia "tolled the bell both on the Catholic Church's pretension to be the common faith of Western Europe."[28] The Treaty of Münster (one of the constituent treaties of the Peace of Westphalia) guaranteed individuals "the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God."[29] "[T]he non-established religious

Analyses of the Social Significance of Religion in East and West, *in* THE SOCIAL SIGNIFICANCE OF RELIGION IN THE ENLARGED EUROPE: SECULARIZATION, INDIVIDUALIZATION, AND PLURALIZATION 1-26, 1 (Detlaf Pollack, et al. eds., 2012).

[24] Higgins, *supra* note ‡ at A1.

[25] Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1873 (2009) (quoting Luke 20:25).

[26] *Id.* at 1873.

[27] MCCREA, *supra* note 17 at 18.

[28] Janis, *supra* note 1 at 76.

[29] Christenson, *supra* note 1 at 741 (quoting PEACE TREATY BETWEEN THE HOLY ROMAN EMPEROR AND THE KING OF FRANCE AND THEIR RESPECTIVE ALLIES (Treaty of Münster) Oct. 24, 1648, 1 CTS 271, Art. XXVIII).

confessions, whether Protestant or Roman Catholic, were given the right to assemble and worship as well as the right to educate their children in their own faith. Thus a principle of religious toleration was established between Lutherans, Calvinists, and Roman Catholics."[30]

Toleration of minority religions was a major turning point because "until the last few centuries, there was a general assumption that minority faiths and religious dissenters posed a threat to the very existence of the state."[31] The shift of religion from public to private life, as in Grotius's phrase *etsi Deus non daretur*, was meant to "make possible the coexistence in the same country of subjects with a different religious faith" and put an end to the wars of religion that engulfed Europe in the sixteenth and seventeenth centuries.[32]

But toleration is a far cry from substantive neutrality. Under this conception of religious toleration, "[t]he state is far from neutral about religious doctrine and practice in general, but the strategy of toleration in which certain doctrines previously vilified as heretical are treated instead as not threatening to public order provided they remain in their proper place."[33] But the "proper place" was in private, in the spiritual life, in the minds of individual believers. It was not public, did not claim temporal power, and certainly did not endanger the religious justifications underpinning the legitimacy of temporal rulers. Thus, "[t]he constitution of the modern state required the forcible redefinition of religion as belief, and of religious belief, sentiment, and identity as personal matters that belong to the newly emerging space of private (as opposed to public) life."[34] But while the banishment of religion to the life of

[30] HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 101 (2003).

[31] Peter Cumper, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT'L L. REV. 13, 14 (2007).

[32] Ferrari, *supra* note 6 at 151.

[33] Janis, *supra* note 1 at 78 (internal quotation omitted). *See also* Ungureanu, *supra* note 11 at 308 ("within this constitutional framework, the state is not 'purely' neutral, but has a positive obligation to protect pluralism and enhance a culture of mutual tolerance, respect and dialogue amongst citizens.").

[34] TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 205 (1993); *see also* Suzanne Last Stone, *Conflicting Visions of Political Space*, *in* MAPPING THE BOUNDARIES OF LEGAL RELIGION: RELIGION AND MULTICULTURALISM FROM ISRAEL TO CANADA 41-55, 41 (René Provost, ed., 2014) ("Keeping religion and politics apart is an idea with a history, and that history is primarily a Christian one, rooted in the experience of European Christendom and made possible because Christians, virtually from the beginning, viewed church and state as conceptually separate entities, with different jurisdictions and powers, and even a different logic."); Richard Moon, *Christianity, Multiculturalism, and National Identity: A Canadian Comment on* Lautsi and Others v. Italy, *in* THE LAUTSI PAPERS: MULTIDISCIPLINARY

the mind made room for the modern state to claim a monopoly on temporal power, it did not entirely resolve the problem that "religious beliefs sometimes have public implications."[35]

C. Liberalism

Given that official pronouncements of religious toleration came into being in conjunction with the emergence of the modern liberal state from under the authority of the church, "Religious Freedom may be the oldest as well as the most problematic human right."[36] The loss of political authority for the church led to "the gradual spiritualization of religion."[37] At the same time, official state toleration of dissenting beliefs required "the public sphere [be] reconceived in terms of a moral theory of justice and religious liberty grounded in a complex (and unstable) notion of freedom of conscience."[38] This new religious freedom was "premised on distinctive (Protestant) conceptions of the individual, freedom, and religion."[39] As a result, the privatization of religion became (and remains) a feature of the liberal state.[40] Accordingly, "the neutrality of the public sphere (whether national or supranational) and the scope of the right to religious freedom should be understood as culturally and historically contingent and neutral toward neither religion in general nor distinct religious traditions in particular."[41] But religious liberty is not, in practice, understood this way. Instead, "[t]he 'secular' nature of the modern European state and the 'secular' character of European democracy serve as one of the foundational myths of the contemporary European identity."[42] Prima facie official neutrality among religions is assumed, but religious liberty assumes a particular type of religion.

REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 251 (Jeroen Temperman, ed., 2012) ("State neutrality in matters of religion is possible only if religion can be treated simply as a private matter—as separable from the public concerns addressed by the state.").

[35] Moon, *supra* note 34 at 243

[36] Janis, *supra* note 1 at 75

[37] Danchin, *supra* note 8 at 670

[38] *Id.*

[39] *Id.*

[40] Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT'L L.J. 249, 252 (2008).

[41] Danchin, *supra* note 8 at 670 ("historically, secularism has entailed the regulation and reformation of religious beliefs, doctrines, and practices to yield a particular normative conception of religion (that is largely Protestant Christian in its contours)"). *See also* Lourdes Peroni, *Deconstructing "Legal" Religion in Strasbourg*, 3 OX. J.L. REL. 235, 246 (2014) (internal quotation omitted).

[42] José Casanova, *Religion Challenging the Myth of Secular Democracy*, *in* RELIGION IN THE 21ST CENTURY: CHALLENGES AND TRANSFORMATIONS 19-36, 21 (Lisbet Christoffersen, et al. eds., 2010).

D. The Rise of International Law and Human Rights

Human rights, another foundational element of contemporary European identity, has a clear religious heritage and sometimes even speaks in what could be heard as religious language. As Zachary Calo observes, "[t]he idea of human rights, particularly the underlying idea of human dignity, is replete with echoes of the sacred."[43] And like some religious doctrines, "[h]uman rights are traditionally understood as . . . universal [and] . . . inalienable. . . . Almost by definition, they are supposed to be applicable everywhere and anytime, not to depend on a specific political system or culture."[44] Yet, again, much like the idea of religion,[45] "the notion of religious freedom as an 'international right' has a particular history—a time and place of origin."[46] Human rights "have been slowly established and defined in a precise historical and cultural context, mainly in England and the United States, in the wake of the Enlightenment."[47]

Oliver Roy & Pasquale Annicchino suggest that the Christian origin of the idea of human rights is obvious:

> we can characterize this Christian anthropology through the following criteria: a human being is defined by an autonomous individual soul that is not under the control of the state or society, both entitled only to control the body; a '*for interieur*' (inner core, heart of hearts) that can deliberate for itself, the sacred nature of the body as a template of the divine creation; the equal dignity (in God, not in society) of all human beings; and free will.[48]

Archbishop Rowan Williams adds that any inherent legal rights belonging to all people would "require[] both a certain valuation of the human as such and a conviction that the human subject is always

[43] Zachary R. Calo, *Religion, Human Rights and Post-Secular Legal Theory*, 85 ST. JOHN'S L. REV. 495, 495 (2011).

[44] Oliver Roy & Pasquale Annicchino, *Human Rights Between Religions, Cultures, and Universality*, *in* THE CULTURAL DIMENSION OF HUMAN RIGHTS 13-25, 13 (Ana Filipa Vrdoljak, ed., 2013).

[45] Petty, *Faith*, *supra* note 14 at 254-57; Petty, *Israel*, *supra* note 14 at 135-42.

[46] Peter G. Danchin, *The Emergence and Structure of Religious Freedom in International Law Reconsidered*, 23 J.L. & RELIGION 455, 456 (2007-08).

[47] Roy & Annicchino, *supra* note 44 at 13.

[48] *Id.* at 15. *See also* Calo, *supra* note 43 at 496 ("There were many intellectual sources that shaped the idea of human rights, but none were more foundational than Christianity."); Danchin, *supra* note 40 at 262 ("International human rights law imagines an internal or personal sphere of 'belief' that is in some sense pre- or extra-social, political, and legal and hence absolutely 'inviolable' or 'sovereign.'").

endowed with some degree of freedom over against any and every actual system of human social life. Both of these things are historically rooted in Christian theology."[49]

But from the eighteenth century, European legal systems began to see themselves as "potentially universal," pursuing the law of reason of the Enlightenment, unmoored from their Christian origins.[50] The Christian foundations of the legal systems remained, of course, albeit silently. Even into the twentieth century, "religion—the history of Christianity, in particular—has been the dominant force in the formation and shaping of the international legal system."[51] As a result, "mainstream accounts of human rights in international law are insensitive, and in some cases even blind, to the communal dimensions of goods such as religion."[52] One place in which the silent influence Christianity is manifested is in Article 9 of the European Convention on Human Rights.

III. THE TREATY FRAMEWORK

A. The Council of Europe

The Council of Europe, founded in 1949, promotes cooperation among European countries in the areas of legal standards, human rights, democratic development, the rule of law, and advancement of culture. The Preamble to the Statute of the Council of Europe affirmed "the need for greater unity between like-minded European countries for the sake of economic and social progress."[53] It exists entirely outside the European Union treaty framework (though all EU member states are also members of the CoE[54]) and the EU has recognized the CoE's role in enforcing human rights throughout Europe.[55]

[49] Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 ECC. L.J. 262, 272 (2008).

[50] Faltin, *supra* note 9 at 8 n.18 (citing JOSEPH RATZINGER, CHURCH, ECUMENISM AND POLITICS 224 (1987)).

[51] *Id.* at 501

[52] Danchin, *supra* note 46 at 460.

[53] Danny Nicol, *Original Intent and the ECHR*, [2005] PUBLIC LAW 152 at 155.

[54] EU Relations with the Council of Europe, http://eeas.europa.eu/organisations/coe/index_en.htm.

[55] Memorandum of Understanding Between the Council of Europe and the European Union, para. 10 (May 23, 2007) ("The Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe."), http://ec.europa.eu/justice/international-relations/files/mou_2007_en.pdf

"[T]he first and principal achievement of the Council of Europe" was the European Convention on Human Rights.[56] The Convention "was signed in 1950 and has been successively amended by several protocols."[57] It "was intended to build upon the work undertaken in the United Nations and aims at 'securing the universal and effective recognition and observance of the rights' contained in the Universal Declaration of Human Rights."[58]

B. The Origin of Article 9

As the ECHR aimed to implement the rights identified in the Universal Declaration, [59] it is appropriate to begin examination of Article 9 of the ECHR by reviewing its predecessor in the Universal Declaration, Article 18. "Article 18 of the Universal Declaration is the primary article dealing with freedom of religion."[60] Article 18 reads:

> 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 teaching, practice, worship and observance.

Article 18 is limited by Article 29(2), which provides that:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations are as determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 18 of the Universal Declaration reflects "the basic approach that has been followed in most other international, and

[56] Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587, 587 (2005).

[57] *Id.*

[58] CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 8 & 34 (2001) ("One of the purposes of the Convention, as set out in the Preamble, was to 'take the first step for the collective enforcement of certain Rights stated in the Universal Declaration."); *see also* PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 7 (2005).

[59] TAYLOR, *supra* note 58 at 7 (citing the Preamble to the European Convention).

[60] EVANS, *supra* note 58 at 35

many other regional, human rights instruments. That approach is based on the idea that religion or belief is essentially a matter of individual choice and that everyone should have the freedom to hold whatever form of belief (religious or otherwise) that they wish."[61]

Following this approach, the text of Article 9 of the ECHR "was drawn almost verbatim from Article 18 of the Universal Declaration of Human Rights."[62] And like Article 18, "Article 9 recognizes the freedom of thought, conscience and religion, and enumerates the limitations that may be imposed on the manifestations of this freedom."[63]

Article 9 provides:

> 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.[64]

Several observations may be made from the text of Article 9 alone. First, Article 9 contains "several overlapping terms" with "subtle distinctions." "Freedom to *change* one's 'religion or belief' is singled out from the right of 'freedom of thought, conscience and religion' in Article 9(1). The right under Article 9(2) to *manifest* one's religion does not extend to manifesting one's freedom of thought or conscience."[65] Second, "Article 9 protects religious

[61] Malcolm Evans, *Advancing Freedom of Religion or Belief: Agendas for Change*, 1 OX. J.L. REL. 5, 8 (2012).

[62] T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, PART 2, 305-330, 308 (John Witte, Jr. & Johan D. van der Vyver, eds., 1996); *see also* TAYLOR, *supra* note 58 at 7.

[63] Martínez-Torrón, *supra* note 56 at 588. Although "[t]hree provisions of the ECHR deal with religion," *id.* at 587, I will address only Article 9.

[64] "[T]he limitations applicable to the freedom of thought, conscience and religion, as described in Article 9, are largely coincident with the limitations applicable to the freedoms protected by other Articles of the Convention, namely Articles 8, 10 and 11." *Id.* at 589.

[65] REX ADHAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 140 (2d ed. 2013).

freedom as an individual right, but also as a group right; enjoyment of religious freedom comprises a right to manifest and practice the religion, alone or with others."[66] Third, "[i]n all cases, limitations on freedoms must be: 1) prescribed by law; 2) necessary in a democratic society; 3) proportionate to reach some of the aims itemized in par[agraph] 2 of the corresponding Article, which are the only legitimate aims within the ECHR framework."[67] How these overlapping concepts are given concrete meaning in individual cases is a task assigned to the Court.

C. The European Court and Commission of Human Rights

The interpretation and application of the Convention "corresponds, specifically and exclusively, to the European Court of Human Rights. . . located in Strasbourg, France, which has jurisdiction over every state that has signed the Convention,"[68] and has been in operation since February 1959.[69] "The ECHR system has been described, with justice, as the most effective human rights regime in the world."[70]

One reason for this level of prestige and success is that the judges of the Court are "recruited in a way which provides only a

[66] Mark Freedland & Lucy Vickers, *Religious Expression in the Workplace in the United Kingdom*, 30 COMP. LAB. L. & POL'Y J. 597, 602 (2009).

[67] Martínez-Torrón, *supra* note 56 at 589-90. "With regard to freedom of religion or belief, the list of permissible aims is even narrower than with regard to other freedoms. *Id.* at 590.

[68] *Id.* at 587.

[69] Brett G. Scharffs, *Symposium Introduction: The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal Moral, Political and Religious Perspectives*, 26 J.L. & RELIGION 249, 253 (2010-11).

[70] Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, 9 HUM. RTS. L. REV. 397, 403 (2009) (internal quotation omitted). "Generally speaking, the Court enjoys a high degree of prestige and support from national judicial institutions, the political branches of the CoE, as well as legal academia." *Id*. "The European Court of Human Rights in Strasbourg . . . is probably the court that enjoys the most authority and prestige around the globe in the realm of human rights. It is a well-deserved prestige. By and large, the Court has done a great job in the defence of human rights in Europe, both in general and in the particular case of freedom of religion and belief." Javier Martínez-Torrón, *The (Un)protection of Individaul Religious Identity in the Strasbourg Case Law*, 1 OX. J.L. REL. 363, 363 (2012). In the 65 years since it was signed, the ECHR "has evolved into 'the most effective transnational human rights institution on earth.'" Effie Fokas, *Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of the European Court of Human Rights Religious Freedom Jurisprudence*, 4 OX. J. L. REL. 54, 55 (2015) (quoting W. Cole Durham and David Kirkham, *Introduction*, in ISLAM, EUROPE, AND EMERGING LEGAL ISSUES 1, 2 (W. Cole Durham, et al. eds., 2012)).

partial control of Contracting States over the selection outcomes:"[71] judges are elected by the Parliamentary Assembly of the Council of Europe from a list of candidates presented by each member state.[72] And "while on the bench, the judges benefit from guarantees providing a real independence from pressure from their (or other) governments."[73] As a result, the Court "displays features of a genuinely independent supranational tribunal."[74]

Because of its independence and prestige, "[i]t has become fashionable to press the claim that the Court has become (or is becoming) a sort of 'constitutional court' for Europe."[75] "Its decisions are binding on Contracting States deemed to have violated the Convention,[76] and are enjoying, through a growingly accepted custom, an authority of *erga omnes* nature, at least as far as the interpretive value of its judgments is concerned."[77] "Judgments of the European Court of Human Rights . . . . ha[ve] become an indelible source of inspiration for judges in national courts around the globe."[78] It's "jurisprudence enlightens not only national judges but also judges and committee members of the other international human rights organs."[79] Wojciech Sadurski goes as far as suggesting that "the Court has successfully staked its claim as the final and authoritative interpreter of the Convention."[80] More remarkably still, this reputation has developed over a relatively short time.

Until very recently another body, "[t]he European Commission of Human Rights[,] served a screening function for the Court and was authorized to resolve many of its cases."[81] But in Article 9 cases, the Commission resembled an impenetrable wall more than a screen. Indeed, "[u]ntil 1989, the Commission concluded in almost all cases brought under Article 9 that the facts did not disclose any violation; applications were therefore deemed inadmissible and

[71] Sadurski, *supra* note 70 at 403.

[72] Silvio Ferrari, *The Strasbourg Court and Article 9 of the European Convention on Human Rights: A Quantitative Analysis of the Case Law*, *in* THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 13 & n.2 (Jeroen Temperman, ed., 2012).

[73] Sadurski, *supra* note 70 at 403.

[74] *Id.*

[75] *Id.* at 398.

[76] George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OX. J. LEGAL STUD. 705, 707-08 (2006) (citations omitted) ("a Contracting State that breaches the ECHR has a duty under international law to abide by the final judgment of the Court and to award just compensation to the victim.").

[77] Sadurski, *supra* note 70 at 403-04.

[78] Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U J. INT'L L. & POL. 843 (1999).

[79] *Id*. "It has set standards of protection that have had an impact far beyond European borders." Martínez-Torrón, *supra* note 70 at 363.

[80] Sadurski, *supra* note 70 at 403.

[81] Scharffs, *supra* note 69 at 253.

never reached the Court."[82] Protocol 11 to the Convention, adopted in 1998, abolished the Commission and "[f]rom that time, all cases have gone directly to the European Court for consideration."[83]

"The role of the Court [with respect to Article 9] is to define common standards on religious freedom in a religiously diverse Europe."[84] And it is "distinctive, if not quite unique, as an international law body in that it provides a mechanism for individuals—citizens, nationals, and even visitors—to bring a claim in a transnational court that the host country has violated their basic human rights."[85] However, "[t]here is no review of national law and the determinations of courts under national law, and the asserted violation must be caused by a responsible state party: applicants cannot bring a complaint against another private or corporate party."[86] Furthermore, "the applicant must exhaust local remedies

[82] Julie Ringelheim, *Rights, Religion, and the Public Sphere: The European Court of Human Rights in Seach of a Theory?*, *in* LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS 283-306, 284-85 (Lorenzo Zucca & Camil Ungureanu, eds., 2012).

[83] Scharffs, *supra* note 69 at 253. *See also* Fokas, *supra* note 70 at 60 & n.30 ("Until 1989, almost all cases brought under art 9 were deemed inadmissible."). One reason for the delay may be that the aim of the ECHR signatories was "solely to prevent the descent into dictatorship threated by fascist revival or pro-Soviet coup." Nicol, *supra* note 53 at 152. As Yannis Ktiskakis has argued, "the founders of the Strasbourg system were more concerned with constituting a political weapon of juxtaposition to the atheistic proposal of Communists than in moderating 'the peaceful coexistence of Christian states.'" Janis, *supra* note 1 at 92 (quoting Yannis Ktiskakis, *The Protection of the Forum Internum Under Article 9 of the ECHR*, *in* THE EUROPEAN CONVENTION OF HUMAN RIGHTS AS A LIVING INSTRUMENT: ESSAYS IN HONOUR OF CHRISTOF L. ROZAKIS 285, 286 (Dean Speilmann et al. eds., 2011)).

[84] Françoise Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism*, 30 CARDOZO L. REV. 2575, 2576-77 (2009) (internal quotation omitted).

[85] Scharffs, *supra* note 69 at 250-51 ("Applications against Contracting Parties for human rights violations can be brought before the Court by other states, other parties, or individuals."). "[I]ndividual access to the Court was rendered mandatory for all Contracting Parties only in 1998." Sadurski, *supra* note 70 at 407. "The main concern of citizens who chose to 'go to Strasbourg' to bring up issues for which they could not find a proper remedy in their home countries were no longer at the fringes of the rights enshrined in the Convention but right at its very core." *Id.* at 408.

[86] Scharffs, *supra* note 69 at 252. "A traditional perception of the status and reach of the ECtHR's judgments was that the carried a purely individualised, specific implication. The Court was perceived as a kind of tribunal of last resort, whose role was limited to specific cases of rights violations after the exhaustion of all domestic remedies. According to this view, it did not fall on the Court to assess the validity of domestic *laws* themselves. Its policing role was strictly restricted to the consideration of acts and decisions rather than to the laws allegedly underlying the latter. . . . However, this traditional perception was never completely accurate. Indeed drawing a sharp distinction between bad decisions and bad laws . . . is not very credible." Sadurski, *supra* note 70 at 412. In any event, to the extent that the Court ever was merely a "'fine tuner' of national legal

through the national court level, and must file a claim within six months of the final disposition of the claim at the national level."[87]

Many commentators have claimed "the right to freedom of thought, conscience and religion, enshrined in Article 9 of the European Convention on Human Rights (ECHR), is insufficiently and erratically protected in the courts."[88] Even a summary history of the adjudication of claims under Article 9 reflects significant trepidation on the part of the Court in deciding issues of religious freedom. For decades, they were invariably decided under other provisions of the Convention. "Prior to 1993, there were mainly two relevant cases, both decided in light of Article 2 of the ECHR's First Protocol—*Kjeldsen* (1976), related to conscientious objection to sex education in school, and *Campbell and Cosans* (1983), related to the opposition to having children physically punished at school."[89] In fact, "[i]n its first 34 years of operation as a Court, from 1959 to 1993, the ECtHR did not issue a single conviction against a state on the basis of the main religious freedom provision of the ECtHR, Article 9 on the freedom of thought, conscience, and religion."[90] It "looked for many decades as though it was going to be effectively a dead letter."[91]

The last two decades have seen a small and generally cautious, but nonetheless active, growth in the Court's Article 9 jurisprudence. "Since 1993, with the *Kokkinakis* case, which involved the right to engage in proselytism, the Court began an itinerary of decisions adopted in light of Article 9 or in the light of other articles, but with a clear reference to religion."[92] And "[w]hile in its first judgments the Court demonstrates great caution in approaching religious issues, it has progressively become more

systems," the accession of formerly Communist Eastern European states to the Council of Europe "radically transformed this situation." *Id.* at 401. The Court "was compelled instead to adopt a role of policing the national systems in which serious violations of rights occurred or suffering from important systemic deficiencies as far as the [Council of Europe] standards of rights are concerned." *Id.*

[87] Scharffs, *supra* note 69 at 252.

[88] Alice Donald, *Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism?*, 2 OX. J.L. REL. 50, 51 (2013). "For the two decades after *Kokkinakis*, the Strasbourg Court has had very little success in charting a steady course for the interpretation and application of Article 9. It is a commonplace to remark that the court's case law on religious freedom is inconsistent." Janis, *supra* note 1 at 76.

[89] Martínez-Torrón, *supra* note 70 at 364.

[90] Fokas, *supra* note 70 at 60.

[91] Carolyn Evans, *Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Architecture*, 26 J.L. & RELIGION 321, 321 (2010-11).

[92] Martínez-Torrón, *supra* note 70 at 364.

assertive in its defence of religious freedom."[93] Carolyn Evans suggests that "in a relatively short period, the Court has been pushed to develop a jurisprudence of religious freedom to deal with increasingly complex and controversial cases."[94] The Court has dealt with this complexity and controversy, in part, by relying on a standardized analytical process.

"The analytical approach to Article 9 cases can seem quite formulaic, which is helpful to students becoming familiar with the Court, but is unsatisfying to more serious scholars because the Court's reasoning comes to seem somewhat mechanical."[95] First the Court asks "whether there has been an interference with religion, thought or conscience by the state. If the Court holds in the affirmative, the second question is whether the interference was prescribed by law (essentially an enquiry into whether the state has followed the 'rule of law.')."[96] If so, then the Court will inquire "whether the limitation adopted by the state was enacted to pursue and protect a legitimate aim under Article 9."[97] "The final step of the analysis asks whether the limitation is 'necessary in a democratic society.'

"In analyzing necessity, the Court typically—though not always—asks two questions: first, is the limitation justified in principle, i.e., does it correspond to a pressing social need? Second, is it proportionate to the legitimate aim pursued? Perhaps as many as seventy-five percent of Article 9 cases turn on this question of proportionality."[98] "This multi-part enquiry represents the gravamen of most Article 9 jurisprudence."[99]

Lourdes Peroni suggests that "the Court's track record is at best mixed" when it comes to applying the framework to actual controversies.[100] The limitations of the formulaic approach have crystallized "[a]s the case law has multiplied and the issues have diversified . . . it has become clear that the Court has not yet

[93] Ringelheim, *supra* note 82 at 283-84. Mark Weston Janis has observed that "[a]rticle 9 cases after *Kokkinakis* continue to play a relatively minor role in the jurisprudence of the court." This overstates the matter. Article 9 cases occupy less than one percent of the court's docket. In 2011, only five out of 1,157 total judgments rendered concerned Article 9. In 2013, only six out of 919. Janis, *supra* note 1 at 90. *See also* Ferrari, *supra* note 72 at 19 ("the case law concerning Article 9 is relatively small: about 100 decisions, spread over fifty years, is not a high number, especially when compared with the case law that regards other articles of the Convention.").

[94] Evans, *supra* note 91 at 321-22.

[95] Scharffs, *supra* note 69 at 258.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 259.

[99] *Id.*

[100] Lourdes Peroni, *The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review*, 89 CHI.-KENT L. REV. 663, 664 (2014).

developed a sufficiently coherent and principled approach to this area."[101] Carolyn Evans further notes that "the conceptual foundations on which Article 9 case law is built are weak; and difficult cases are beginning to expose the cracks in the intellectual architecture of the Court's religious freedom jurisprudence."[102] This is seen in two general trends. First, the Court "has shifted its focus away from the right of the individual and towards the role of the state in matters of religion."[103] Second, it has "taken such a cautious approach to protecting the manifestation of religion or belief that the law has come to protect 'only a very restrictive and conservative form of religious life,' that is lived behind closed doors rather than in public."[104]

It is this understanding of religion as essentially a private matter that is of primary concern. "'[T]he Commission and the Court have, at times, been accused of being unsympathetic to the claims of those from non-Christian traditions, or religions without a long history in Europe.'"[105] These accusations may flow from "assumptions about religion underlying the Court's understanding of the scope and content of freedom of religion."[106] Specifically, there have been instances where "implicit assumptions about religion as a set of 'theological propositions' to which people adhere . . . surface in the Court's freedom of religion reasoning."[107] Or, put differently, "the Court has some problems in understanding the conceptions of religion which stress the elements of identity and practice over those of freely chosen belief."[108]

[101] Evans, *supra* note 91 at 321-22. In particular, "the intellectual framework that the Court has built around religious freedom cases is sufficient to deal with the relatively simple cases of refusal to treat like with like, but is insufficient to tackle the more complex cases where rights come into conflict and the religious claim is a right to be treated differently rather than identically." *Id.* at 339-40. Part of the difficulty may be the lack of a coherent vision of church-state relations across the continent, with different nations employing different models to varying degrees. *See generally* Paul Cliteur, *State and Religion Against the Backdrop of Religious Radicalism*, 10 INT'L J. CONST. L. 127-52 (2012).

[102] *Id.* at 322

[103] Malcolm D. Evans, *Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions*, *in* LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 291-315, 291 (Peter Cane, et al. eds., 2008).

[104] Donald, *supra* note 88 at 51 (quoting RUSSELL SANDBERG, LAW AND RELIGION 98 (2011)).

[105] MCCREA, *supra* note 17 at 126-27 (quoting Peter Cumper, *The Rights of Religious Minorities: The Legal Regulation of New Religious Movements*, *in* MINORITY RIGHTS IN THE "NEW" EUROPE 165, 174 (Peter Cumper & Steven Wheatley, eds., 1999)).

[106] Peroni, *supra* note 100 at 665.

[107] *Id.*

[108] Ferrari, *supra* note 72 at 33.

In some respects, this is not surprising. The text of the Convention itself favors such an interpretation, which is exacerbated by several of the Court's judge-made doctrines. But this outcome is not inevitable. The case law of the Strasbourg court "both rejects the strictures of the ECHR text in favour of a teleological emphasis on effectiveness, and also treats the ECHR as a living instrument, the interpretation of which it can update in response to changing social conditions."[109] The question is effectiveness in what respect, and for whom? The Court *can* revisit its jurisprudence, but will it?

IV. THE INHERENT BIAS OF ARTICLE 9

A. Difficulties Internal to the Convention

1. The Process of Adoption

"The Court has accepted that Articles 31-34 of the Vienna Convention on the Law of Treaties represent customary international law and that they are thus applicable to interpreting the Convention."[110] It is therefore permissible to review the *travaux préparatoires* in determining the meaning of the Convention text. Furthermore, because Article 9 was based in large part upon Article 18 of the Universal Declaration of Human Rights, (and because Article 9 was agreed to essentially without debate) "it is necessary to look first at the Universal Declaration's drafting history for any light that it can shed on the appropriate interpretation of the Convention."[111] Unfortunately, as a general matter, the *travaux préparatoires* are "neither complete nor particularly revealing."[112] However, they do reflect that many delegates expressly linked Christianity and human rights, and understood the protection of human rights as a Christian duty.[113]

With respect to the Convention itself, not all of the bodies that had input into the drafting kept minutes and, of those that did, not all of the minutes have been published.[114] But the available evidence

[109] Nicol, *supra* note 53 at 152.

[110] EVANS, *supra* note 58 at 51 (citing Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 14 (1975)).

[111] EVANS, *supra* note 58 at 34. *See also* Janis, *supra* note 1 at 78 ("The wording of Article 9 in the 1950 ECHR was immediately drawn from Article 18 of the United Nations' 1949 Universal Declaration of Human Rights."). "The United Nations continued to develop the right to freedom of religion and belief in a number of other international instruments, most notably Article 18 of the International Covenant on Civil and Political Rights and the more detailed Declaration on Religious Intolerance and Discrimination." EVANS, *supra* note 58 at 36-37.

[112] EVANS, *supra* note 58 at 34

[113] *Id.* at 39.

[114] *Id.* at 38.

reveals that the drafters rejected a proposal that would have expressly protected "freedom of religious practice" in favor of a more limited protection "of thought, conscience and religion."[115] This was "presumably aimed at recognizing the importance of religious belief (as compared to practice)."[116]

2. The Convention Text

Apart from the intent of the drafters in rejecting express protection for religious practice, or any religious motivations the framers of the Declaration may have had, the text of Article 9 presents difficulties on its own terms. Article 31(2) of the Vienna Convention on the Law of Treaties provides that treaties should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context."[117] This is not much of a guide, but it does seem clear that "'thought and conscience' must be distinct in some way from 'religion or belief', as there is a non-derogable obligation to protect the right to freedom of thought and conscience, but there is no right to manifest them."[118] "'[B]elief' could include relatively individualistic beliefs that are not part of a structured religion or organization of believers. . . . the Court has explicitly recognized that the protection of the Convention extends to 'free-thinkers' and 'the unconcerned.'"[119] Alternatively, "belief" may be a subset of "thought" or "conscience" or both, the manifestation of which is protected,[120] although it is far from clear

[115] COLLECTED EDITION OF THE "TRAVAUX PREPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1975-85), vol. 1, First Session of the Consultative Assembly 168 & 174, (A.H. Robertson, ed., 1985).

[116] EVANS, *supra* note 58 at 40. *But see* BM at 388 ("Perhaps the most that can be said in regards to its drafting is that delegates considered the issue of freedom of religion to be of great importance and that they accepted that the Universal Declaration provided an appropriate model for the protection of freedom of religion.").

[117] Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/Conf.39/27, 8 I.L.M. 679, Art 21(2).

[118] EVANS, *supra* note 58 at 52

[119] *Id.* at 58

[120] *See id.* at 63 ("Another, more minor, difficulty in the wording of Article 9 is the introduction of the world 'belief' in the second part of Article 9(1). It seems to cover conveniently groups such as atheists and agnostics . . . Yet, if this is correct, the exclusion of belief from the first part of Article 9 seems to suggest the strange outcome that an atheist has the right to manifest his or her belief . . . but his or her right to hold this belief is not protected. Probably the best way around this apparent anomaly would be to assume that beliefs are a subset of the broader category of thought and conscience.").

how protected "belief" could be distinguished from a more general, unprotected "thought."[121]

Rather than the differences between these terms, however, the more subtle problem lies in their similarity. Here the difficulty stems from the phrase "religion or belief." Although this phrase in particular appears to have gained currency in international law,[122] and despite its initial appearance of extending the protection offered "religion" to include views such as atheism and agnosticism,[123] the phrase "religion or belief" implicitly limits "religion" to mean something akin to "belief." The maxim *noscitur a sociis*—which holds that a legal term of art may be understood reference to the surrounding terms, so that it is understood to be *of the same kind* as its companions—is à propos.[124] Put differently, "[w]ords . . . are liable to be affected by other words with which they are associated."[125] Essentially, the drafters set up "religion" and "belief" as two of a kind.

This also is not entirely surprising. "[T]he drafters of the Convention . . . tended to assume that the content of religious freedom was not controversial, at least in Europe."[126] And religion in Europe was obviously centered around Christianity, which was (and is) premised on belief. Even today, the U.N. Special Rapporteur on Religious Freedom apparently understands religion in this limited sense,[127] and international instruments continue to focus on "belief," employing it as an umbrella term for both (theistic)

[121] *Id.* at 64 ("the term belief has increased the conceptual confusion in this area and the approach that the Commission has taken to the cases has only magnified this confusion.").

[122] GUIDELINES FOR REVIEW OF LEGISLATION PERTAINING TO RELIGION OR BELIEF, 8 ("International standards do not speak of religion in an isolated sense, but of 'religion or belief.' The 'belief' aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus, atheism and agnosticism, for example, are generally held to be entitled to the same protection as religious beliefs.") http://www.osce.org/odihr/13993?download=true

[123] Carolyn Evans, *Religious Freedom in European Human Rights Law: The Search for a Guiding Conception*, *in* RELIGION AND INTERNATIONAL LAW 385-400, 385 (Mark W. Janis & Carolyn Evans, eds., 1999) ("If the term 'or belief' is added, perhaps we think of atheism or agnosticism. Yet the question about what links these diverse beliefs and ways of life together, so that we recognise them as 'religions', is far less clear."); *see also* EVANS, *supra* note 58 at 64 ("The addition of the term 'or belief' to religion in Article 9 of the Convention may clarify some issues (particularly whether atheists are entitled to the protection of religious freedom)).

[124] *See*, *e.g.,* Yates v. United States, 135 S. Ct. 1074, 1085 (2014).

[125] BLACK'S LAW DICTIONARY (9th ed. 2009), *noscistur a sociis*.

[126] Evans, *supra* note 123 at 388.

[127] Heiner Bielefeldt, *Freedom of Religion or Belief—A Human Right Under Pressure*, 1 OX. J.L. REL. 15, 17 (2012) ("respect is due for the *underlying ability of human beings to have and develop deep convictions in the first place.*") (emphasis in original).

religion and other beliefs unconcerned with the existence (or nonexistence) of supernatural entities.[128]

Beyond this, the primacy of belief over practice in Strasbourg "is not just presupposed; it is represented overtly in language that orders the belief/practice dualism hierarchically."[129] The limitations in Article 9(2) apply only to the manifestation; the right to believe is absolute.[130] And the Court has explained that Article 9 exists primarily to protect religion and belief, and that protection of manifestation of religion and belief is secondary. But it is "hard to imagine how exactly a state may interfere with people's religious beliefs if not by forcing some form of action upon them."[131]

3. The Challenge of "Conscience"

The word "conscience," which the Convention groups with both "religion" and "belief," presents additional difficulties. "Notwithstanding the notorious difficulty of defining religion and the consequent effort on the part of jurists and academics to avoid embracing any particular definition, one model of religion has dominated modern discourse: religion as conscience."[132] But "[w]hen we reverently invoke 'conscience,' 'freedom of conscience' or the 'sanctity of conscience' . . . do we have any idea what we are talking about? Or are we just exploiting a venerable theme for rhetorical purposes without any clear sense of what 'conscience' is or why it matters?"[133] "More generally, what do we understand 'conscience' to be, exactly?"[134]

"Historically, 'conscience' has been a protean notion with different meanings for different people," and these different meanings have evolved over time.[135] "Since the time of Thomas Aquinas, when *conscience* referred to moral judgments about action, and [the American] founding era, when 'freedom of conscience' dominantly referred to individual religious liberty, our understanding has evolved."[136] Even today, "there are various ways

[128] *See, e.g.*, Leustean & Madeley, *supra* note 7 at 5 (discussing "Non-Confessional Organizations" in Declaration 11 to the Treaty of Amsterdam as parallel to churches).

[129] Peroni, *supra* note 41 at 237.

[130] See Martínez-Torrón, *supra* note 56 at 590.

[131] Peroni, *supra* note 41 at 252.

[132] Nomi Maya Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041, 1041 (2010).

[133] Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 326 (2005).

[134] *Id.* at 327

[135] Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 225 (2009).

[136] Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 901 (2010).

of conceiving what 'conscience' is, for example, Thomist versus Protestant versus secular conceptions, and varying views about whether conscience is strictly a 'religious' faculty or whether it encompasses nonreligious beliefs as well."[137]

As a result of this lack of uniform meaning, "[l]egal theorists have been unclear about the relationship between religion and conscience and whether one or both should be eligible for legal exemptions."[138] Steven D. Smith argues that "the commitment to special legal treatment for religion derives from a two-realm world view in which religion—meaning the church, and later the conscience—was understood to inhabit a separate jurisdiction that was in some respects outside the governance of the state."[139] It "'began as an argument that government must ensure a free response by the individual called distinctively by the Divine within.'"[140] But although it was "recognized in medieval Catholic teaching and canon law, the Protestant Reformation altered the significance of conscience in a way that profoundly affected, and to some extent redirected, historical commitments to the separation of church and state."[141]

In the "centuries since Thomas More and Roger Williams solemnly invoked conscience," the objective metaethical basis for their invocation has been challenged and in some quarters replaced. At the same time, freedom of conscience has become "more widespread and commonplace—even platitudinous—in our public rhetoric."[142] And "if we look closely at the modern invocations of conscience we will find uncertainty, confusion, and perhaps even a kind of degradation."[143] Conscience now "'has come to mean very little beyond the notion of personal existential decision-making.'"[144]

But "what all conceptions that picture religion as conscience have in common is the fundamental assumption that religion is a species of belief."[145] Nathan Chapman explains, "[r]eligious tolerance and cries for liberty of conscience emerged from doctrinal differences within the Christian tradition."[146] "Locke thought that coercing people into religious beliefs was contrary to Christianity and ultimately ineffective because only freely held beliefs led to

[137] Stolzenberg, *supra* note 132 at 1043.

[138] Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1460.

[139] Smith, *supra* note 25 at 1883.

[140] Smith, *supra* note 133 at 326 (quoting Marie A. Failinger, *Wondering After Babel: Power, Freedom and Ideology in U.S. Supreme Court Interpretations of the Religion Clauses*, in LAW & RELIGION, 81, 93-94 (Rex J. Adhar, ed. 2000)).

[141] Smith, *supra* note 25 at 1876-77.

[142] Smith, *supra* note 133 at 358.

[143] *Id.*

[144] *Id.* at 326 (quoting Failinger, *supra* note 140 at 93-94).

[145] Stolzenberg, *supra* note 132 at 1043.

[146] Chapman, *supra* note 138 at 1480.

salvation. This liberty of conscience favored members of protestant groups that stressed individual responsibility and authority on spiritual matters."[147] Today, "[t]here is good reason to be concerned that the model of religion as conscience, which relies on the basic distinction between practice and belief, privileging the latter over the former, threatens to give short shrift to religious practices and institutions."[148]

That is not to say that protecting conscience is necessarily a bad idea:

> As a practical matter, liberty of conscience may advance democratic deliberation. It eliminates some disputes over moral differences that might otherwise monopolize the public life of a pluralistic society . . . . Protecting liberty of conscience also limits the government's pretensions to absolute moral authority. Liberty of conscience enables nonconformist moral thought that undermines moral tyranny.[149]

Additionally, "[c]onscientious exemptions for those who disagree with prevailing norms prolong internal and national dialogues over contested moral issues. This may lead to better public understandings and decisions on morally novel issues such as the best use of new technology or morally profound issues."[150]

But one difficulty is in the evaluation of claims to legal exemptions. "Even if claimants are sincere, other persons are hard put to assess what they mean if they say, 'This is a fundamental conviction of mine.'"[151] "Any such claim must rely on assumptions about political theory, about morality, and perhaps even about theology, but these are rarely stated. 'Conscience' has been something of a black box."[152] Additionally, "conscience can generate exorbitant demands: 'Both good and evil can emanate from conscience: the feeding of the poor, perhaps, but also the purification of the caucasian race.'"[153]

Another challenge is that it is far from clear that conscience fully protects religiously motivated conduct. "An increasingly prominent justification for the reliance on conscience is that conscience is entitled to deference because the person in its grip

[147] *Id.* at 1465.
[148] Stolzenberg, *supra* note 132 at 1065.
[149] Chapman, *supra* note 138 at 1499.
[150] *Id.* at 1500.
[151] Greenawalt, *supra* note 136 at 906.
[152] Koppelman, *supra* note 135 at 216.
[153] *Id.* at 221 (quoting Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1269 (1994)).

cannot obey the law without betraying his deepest, most identity-defining commitments."[154] But Koppelman notes that "[t]he emphasis on conscience focuses excessively on duty,"[155] while "most people engage in religious practice out of habit, adherence to custom, a need to cope with misfortune, injustice, temptation and guilt, curiosity about a religious truth, a desire to feel connected to God, or happy religious enthusiasm rather than a sense of obligation or fear of divine punishment."[156] In a collective setting, "'[c]onscience' is a poor characterization of the desire of a church to expand its building to be able to hold its growing congregation, as in *City of Boerne v. Flores*."[157] "So conscience . . . fails to fit the cases in which most people want to accommodate religion. It is both overinclusive and underinclusive."[158]

B. Problems of Application and Doctrine

In addition to the problems already inherent in Article 9, the Court has added to difficulties in its application through judicial doctrines. Parlaying sixteenth-cenutury theology into legal jargon, the *forum internum*/*forum externum* divide artificially splits religion into constituent components, privileging belief over other modes of religiousity. The margin of appreciation, a doctrine of deference to judgments of individual states, and the related doctrine of consensus, which is seen as a prerequisite to announcing Europe-wide legal rules, together diminish uniformity and render judgments concerning the ECHR in one state difficult to enforce in another. Finally, the Court's general avoidance of Article 9 altogether (and its rote analysis when it has addressed it) has impoverished what has the potential to be a substantially richer, more nuanced jurisprudence.

1. Judicial Focus on the Forum Internum

"It is almost inconceivable to consider freedom of religion or belief without coming across at least one reference to *forum internum* and *forum externum*."[159] "The case law of Strasbourg emphasizes that it is necessary to distinguish between the internal and external aspects of religious liberty. The former is the freedom

[154] *Id.* at 216.
[155] *Id.* at 222.
[156] *Id.* at 222-23.
[157] *Id.* at 223.
[158] *Id.* at 223-24.
[159] Peter Petkoff, *Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights*, 7 RELIGION AND HUMAN RIGHTS 183, 184 (2012).

to believe, which embraces the freedom to choose one's beliefs—religious or non-religious—and the freedom to change one's religion."[160] "This 'inner freedom' (*forum internum*) is complemented by the freedom to act in accordance with the beliefs that one holds, this being achieved by recognizing the additional right to 'manifest' one's religion or belief in a number of ways—through teaching, worship, observance and practice."[161] The *forum internum* "can be exteriorized through rites and acts of cults, but these are in principle accomplished within the family and 'the circle of those whose faith one shares.'"[162]

The dichotomy between the *forum internum* and *forum externum* was first introduced in the Councils of Trent (1545 and 1563),[163] and originally a part of Latin canon law.[164] In the last century, the two forums were implicitly included "in the 1948 Universal Declaration of Human Rights, emerge implicitly within the ECHR narrative and then are confidently rearticulated in the context of the ICCPR, in numerous reports of the UN Special Rapporteur for Freedom of Religion and Belief, and in Strasbourg and domestic Article 9 jurisprudence."[165]

As the Court has made clear, "[t]he internal dimension of religious freedom is absolute, which the external dimension is by its very nature relative. Indeed, Article 9(2) clearly states that the limitations specified therein may be applied only to the '[f]reedom to manifest one's religion or beliefs.'"[166] In short, "[t]he Court has construed freedom of religion in terms of a binary opposition

[160] Martínez-Torrón, *supra* note 56 at 590.

[161] Evans, *supra* note 61 at 8.

[162] Ringleheim, *supra* note 82 at 293 (citing Sahin v. Turkey [GC], App. No. 44774/98, [2005-XI] Eur. Ct. H.R. 173, para. 105).

[163] Petkoff, *supra* note 159 at 201.

[164] *Id.* at 183. "It is interesting to consider why a concept developed by medieval canon law has been adopted by one of the most powerful International Human Rights enforcement systems." *Id.* at 198.

[165] *Id.* at 184-85

[166] Martínez-Torrón, *supra* note 56 at 590. *See also* Ringleheim, *supra* note 82 at 285 (The Commission emphasized "the distinction drawn in Article 9 between two aspects of religious freedom: whereas its internal dimension, namely the right to have or change religion or belief, cannot be subject to any limitation whatsoever, its external aspect, that is, 'the 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' may be restricted in some circumstances, under the conditions set forth in the second paragraph of Article 9."). In addition, "the *forum internum* is a narrower concept than the commonly understood meaning of the term 'private sphere.' It encompasses the *internal* sphere of *personal* thought, conscience, or belief and not those *external* spheres, even if nonstate and therefore technically 'private,' such as places of worship, the school, or the family, where religious belief may be communicated or acted upon." Danchin, *supra* note 40 at 261.

between belief and practice,"[167] and "views individual religious freedom as a right that is principally private in nature and focuses on an individual right to develop and adhere to a religious identity."[168]

The difficulty is that dividing religiousity between the *forum internum* and *forum externum* presents the question in a biased, historically contingent way without justifying that choice. It "is not religiously neutral" but instead depends upon *a priori* assumptions about "the ordinary forms of religious practice and the proper scope of political action."[169] "The Court and Commission have chosen to emphasise the internal realm in their interpretation of Article 9."[170] This construct "implicitly creates an oppositional and hierarchical relationship between the two."[171] Peter Danchin explains:

> In the conditions of the modern state, religion is thus imagined as having two dimensions: insofar as religion involves actual manifestations of belief and actions in the world, it is subject to regulation and control by the public (political and legal) spheres; insofar as it involves matters of conscience, it is imagined as occupying—in a state of inviolable freedom—the private sphere of personal belief, sentiment, and identity.[172]

"Whether this is a conscious choice or merely an assumption about the 'real' nature of religion is not clear from the cases. What is clear is that the Court and Commission have never justified their approach or shown any awareness that this view is anything but self-evident."[173]

As Javier Martínez-Torrón sardonically notes, this binary and hierarchical understanding of religion "is not the most desirable."[174] It erects an artificial boundary "between two different ways of conceiving and experiencing religion" without a sufficient justification for the choice in privileging one over the other,

[167] Peroni, *supra* note 41 at 236.

[168] McCrea, *supra* note 17 at 103. *See also* Ringleheim, *supra* note 82 at 293 ("Underlying the Court's case law is the idea that religion is primarily an inward feeling; a matter of individual conscience.") (internal quotation omitted); Martínez-Torrón, *supra* note 70 at 365 ("Freedom of thought, conscience and religion, as all fundamental rights, is primarily an individual right but also has a very significant and visible collective dimension.").

[169] Moon, *supra* note 34 at 256.

[170] Evans, *supra* note 123 at 396.

[171] Peroni, *supra* note 6 at 233.

[172] Danchin, *supra* note 40 at 262.

[173] Evans, *supra* note 123 at 396. *But see* Petkoff, *supra* note 159 at 185-86 ("In *Kosteski* (2006) the Strasbourg Court explained that 'the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions.'").

[174] Martínez-Torrón, *supra* note 70 at 370.

recognizing that belief and practice are mutually dependent, or recognizing that they cannot be neatly separated from each other.[175]

In his analysis of law and literature, James Boyd White distinguished between characters—believable, full, and complex—and caricatures, which reduce subjects to exaggerations, labels, and single roles. The law, he writes, is a literature of caricature.[176] The dubious proposition that all of religion can be neatly packaged into the *forum internum* and *forum externum* may be a prime example.[177]

2. The Difficulties with Doctrine: Margin of Appreciation, Subsidiarity and Consensus

Although not tied directly to Article 9 in the same way as the *forum externum* and *forum internum*, the Court's general doctrines of margin of appreciation, subsidiarity, and consensus also play a significant role in how the Court is able to shape its Article 9 jurisprudence.

"The margin of appreciation has a complex role in European Convention case-law."[178] It "is in a way a logical result of the position of the Court being a supranational institution."[179] Generally speaking, it is "a rationale for deferring to State decision-making in areas of controversy or complexity,"[180] which "gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention."[181]

[175] Silvio Ferrari, *Law and Religion in a Secular World: A European Perspective*, 14 ECC. L.J. 355, 367 (2012).

[176] Lourdes Peroni, *Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising*, 10 INT'L J.L. CONTEXT 195, 195 (2014) (citing JAMES BOYD WHITE, THE LEGAL IMAGINATION 113-14 (1985)).

[177] Caylee Hong & René Provost, *Let Us Compare Mythologies*, *in* MAPPING THE BOUNDARIES OF LEGAL RELIGION: RELIGION AND MULTICULTURALISM FROM ISRAEL TO CANADA 1-21, 2 (René Provost, ed., 2014) ("Lawyers, for whom the erection of such intellectual scaffoldings presents a largely irresistible urge, may be more at risk than most of falling prey to this illusion of coherence in the process of creating and interpreting legal norms meant to regulate diversity in our societies.").

[178] Evans, *supra* note 91 at 332.

[179] Carla M. Zoethout, *Rethinking Adjudication Under the European Convention*, *in* THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 422 (Jeroen Temperman, ed., 2012).

[180] Evans, *supra* note 91 at 332.

[181] R. St. J. MacDonald, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 123 (R. St. J. MacDonald, et al. eds., 1993). *See also* Letsas, *supra* note 76 at 720 ("Many commentators view the margin of appreciation as a feature of a supranational judicial system, designed to

The margins doctrine "initially responded to concerns of national governments that international policies could jeopardize their national security."[182] The "rationale later was expanded to allow each country wide discretion to select policies that would regulate potentially harmful activities, such as incitement to violence or racist speech, by means benefitting each State's unique circumstances and societal constraints."[183] Today, however, the doctrine has expanded beyond the unique security concerns of individual states to areas "such as the allocation and management of its natural resources, length of national statutes of limitations, or restriction of speech due to public morals."[184] This "reflect[s] an altogether different philosophy, one which is based on notions of subsidiarity and democracy and which significantly defers to the wishes of each society to maintain its unique values and address its particular needs."[185]

Thus, today, one aspect of the doctrine is that "the European Court should often *defer* to the judgment of national authorities on the basis that the ECHR is an *international* convention, not a national bill of rights. The ideas of subsidiarity and state consensus are usually invoked to support the structural use of the margin of appreciation."[186] Thus, "the role of national decision-making bodies has to be given special consideration and domestic authorities should enjoy a large margin of appreciation."[187] At the same time, "certain standards must be universally observed by all contracting states."[188] "[T]he Court developed the doctrine of the 'margin of appreciation' to reconcile the potential tension between universality and subsidiarity."[189]

balance the sovereignty of the Contracting States with the need to secure protection of the rights embodied in the Convention.") & 721 ("It is the idea that the Court's power to review decisions taken by domestic authorities should be more limited than the powers of national constitutional court or other national bodies that monitor or review compliance with an entrenched bill of rights."); "[T]he dynamics of the European Court are very different from, and much more complex than, the dynamics of national constitutional courts." Martínez-Torrón, *supra* note 70 at 364.

[182] Benvenisti, *supra* note 78 at 845; *see also* Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. J. INT'L L. 1, 48 (1995) (noting the doctrine "is particularly generous with regard to actions which domestic authorities regard as critical to the prevention of disorder or crime.").

[183] Benvenisti, *supra* note 78 at 845-46.

[184] *Id.* at 846

[185] *Id.*

[186] Letsas, *supra* note 76 at 706.

[187] Tulkens, *supra* note 84 at 2577-78.

[188] Fokas, *supra* note 70 at 58.

[189] *Id.* Until quite recently, both the subsidiarity principle and the margin of appreciation were established only in the Court's case law. "But as of 2013 both formally entered the ECHR with the introduction of Protocol 15 that inserts a reference to the principle of subsidiarity and the doctrine of the margin of

Subsidiarity "'refers primarily to the subsidiary role of the Convention machinery and entails first of all what may be termed a 'procedural relationship' between the national authorities responsible for implementing the Convention and deciding human rights issues on the one hand and the Convention institutions on the other."[190] "This is the principle that it falls primarily upon the Contracting States to ensure that the rights embodied in the Convention are protected."[191] The Maastricht Treaty provides in Article 1 that decisions should be taken as closely as possible to the citizen, while "'Article 2 then asserts the principle by name: 'The objectives of the Union shall be achieved as provided in this Treaty . . . while respecting the principle of subsidiarity.'"[192]

In addition, the Court has concluded that it "must *defer* to the national authorities whenever they are '*better placed*' than an international judge to decide on human rights issues raised by the applicant's complaint."[193] In other words, "national authorities are not only the first ones to deal with complaints regarding the Convention rights and provide remedies, but also the ones who have . . . more legitimacy . . . to decide on human rights issues."[194] Paola Carozza explains:

> Even though the word 'subsidiarity' entered our political lexicon only in the twentieth century, the idea has an intellectual history as old as European political thought. Chantal Millon-Delsol, whose study of subsidiarity is one of the most comprehensive available and one of the first standard sources for any study of the concept, traces its origins as far back as classical Greece, and finds it later taken up by Thomas Aquinas and medieval scholasticism. . . . It was only in the latter part of the nineteenth century that Catholic social theorists became the principal proponents of the idea of subsidiarity, as they sought some sort of middle way between the perceived excesses of both

appreciation into the Convention's preamble pending ratification by contracting states." *Id.* at 60. However, subsidiarity was adopted as Community policy not long after "Pope John XXIII issued his 1961 encyclical *Mater et Magistra*." Leustean & Madeley, *supra* note 7 at 3.

[190] Letsas, *supra* note 76 at 722.

[191] *Id.* at 721; *see also* Fokas, *supra* note 70 at 58 ("each contracting state is, in the first place, responsible for securing the rights and freedoms protected by the Convention").

[192] Paola G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 50 (2003) (quoting Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253, Arts. 1 & 2)).

[193] Letsas, *supra* note 76 at 721.

[194] *Id.* at 722.

> laissez-faire liberal capitalist society and Marxian socialist alternatives.[195]

"Subsidiarity is therefore a somewhat paradoxical principle. It limits the state, yet empowers and justifies it. It limits intervention, yet requires it. It expresses both a positive and a negative vision of the role of the state with respect to society and the individual."[196]

"There are two broad categories of cases in which the Court has taken national authorities to be better placed and has deferred to their judgment. The first category includes cases where there is no *consensus* among Contracting States on what human rights individuals have."[197] Consensus is inversely related to the margin of appreciation. "[T]he less a court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins a court is prepared to grant to the national institutions. Minority values, hardly reflected in national politics, are the main losers in this approach."[198]

"The second category comprises cases where the Court defers to the decision of the national authorities because the latter are better placed to decide on politically sensitive issues within a particular Contracting State."[199] With respect to the extent of the margin of appreciation:

> some aims are more susceptible to an objective analysis than others; a bigger objectivity calls for a lesser discretion on the part of national authorities. Second, the nature of the activities subjected to limitation; when they concern strictly an individual's private life—and not so much the community—the State's margin of appreciation lessens while the ECtHR's power of control increases, and, at the same time, 'particularly serious reasons' are required to consider that a State interference has been legitimate.[200]

The margin of appreciation tends to be particularly wide in religious freedom cases.[201] This should not be surprising. "The

[195] Carozza, *supra* note 192 at 40-41.

[196] *Id.* at 44.

[197] Letsas, *supra* note 76 at 722.

[198] Benvenisti, *supra* note 78 at 851.

[199] Letsas, *supra* note 76 at 723; *see also id.* at 706 (noting the substantive element of the margin doctrine "is to address the relationship between individual freedoms and collective goals").

[200] Martínez-Torrón, *supra* note 56 at 601.

[201] Fokas, *supra* note 70 at 58; *see also* EVANS, *supra* note 58 at 143 ("While in theory there is no difference between the margin of appreciation in relation to particular Articles, State respondents in Article 9 cases tend to be given a wider margin of appreciation."). Specifically, "The 'margin of appreciation' has paradigmatically figured in judgments concerning the limitation clauses; the

discretion the Court grants to national authorities on religious issues is symptomatic of the difficulty in dealing with them."[202] And especially given that "the countermajoritarian role of the European Court of Human Rights . . . is not unconditionally accepted,"[203] it "enables the European Court to take account of local sensibilities when making rulings in particular cases"[204] and "provides an exit for the Court from certain culturally and politically sensitive issues."[205]

Although the doctrine "allows states a certain, variable, leeway to interpret religious rights and freedoms within the broader context of their national cultures and traditions"[206] its application is not without difficulty. To begin, some question whether the doctrine undercuts the universality of the rights protected by the Court to an unacceptable degree.[207] Additionally, many have charged that the Court relies on the doctrine inconsistently, and that the degree to which the Court will defer to national institutions is unpredictable.[208] Functionally, application of the doctrine "especially when coupled with the consensus rationale, essentially reverts difficult policy questions back to national institutions, in complete disregard of their weaknesses."[209]

More problematically, "the doctrine is inappropriate when conflicts between majorities and minorities are examined."[210] In addition to leaving unanswered "some of the more philosophically taxing questions about the accommodation of religious belief,"[211] the doctrine burdens minorities, including religious minorities, in important ways. Eyal Benvenisti explains:

doctrine is being used in particular where the Convention enables a balancing of interests by the Member state, notably under Articles 8-11 . . . which contain in the second paragraph the 'necessary in a democratic society' clause." Zoethout, *supra* note 179 at 418.

[202] Fokas, *supra* note 70 at 58.

[203] Zoethout, *supra* note 179 at 421.

[204] Cumper & Lewis, *supra* note 2 at 15.

[205] Fokas, *supra* note 70 at 58

[206] *Id.*

[207] Benvenisti, *supra* note 78 at 843 ("The ECHR's "universal aspirations are, to a large extent, compromised by the doctrine of margin of appreciation.") & 844 ("Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights.").

[208] Fokas, *supra* note 70 at 55 (noting the "variable 'margin of appreciation' it allows individual states on religious issues, particularly when concerning Islam."); Letsas, *supra* note 76 at 705 ("Most commentators complain about the lack of a uniform or coherent application of the margin of appreciation doctrine in the case law of the European Court of Human Rights."); Benvenisti, *supra* note 78 at 844 ("Inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards.").

[209] Benvenisti, *supra* note 78 at 853.

[210] *Id.* at 847

[211] Cumper & Lewis, *supra* note 2 at 15.

> a wide margin of appreciation is appropriate with respect to policies that affect the general population equally, such as restrictions on hate speech (which are aimed at protecting domestic minorities), or statutes of limitations for actions in tort. On the other hand, no margin is called for when the political rights of members of minority groups are curtailed through, for example, restrictions on speech or on association, when their educational opportunities are restricted by the State, or when the allocation of resources creates differential effects on the majority and the minority. Acquiescing to the margin of appreciation in the latter cases assists the majorities in burdening politically powerless minorities.[212]

He continues, noting that the consensus doctrine similarly:

> puts quite a heavy burden on the advocates of the promotion of individual and minority rights who must spread their resources among the diverse national institutions in their efforts to promote human rights. Only if they succeed in a sufficient number of jurisdictions will the court be convinced that the status quo has been changed and react accordingly. Such a policy cannot be said to promote human rights, especially not minority rights.[213]

In Carla Zoethout's view, "it is time for the Court to develop a new mode of adjudication—a form of review which makes it possible to act as a countermajoritarian institution and set a European standard, without infringing state sovereignty."[214]

3. Defining Religion (or Not)

a. The Problem of Definition

When the Court does address Article 9 head-on, it must face, as an initial matter, a question of definition or classification. And "[t]he definition of religion—how it is organized, the rituals it employs, the beliefs it transmits—is a central determinant of the degree to which religious liberty is protected."[215] "Although many international and regional human rights instruments guarantee rights

[212] Benvenisti, *supra* note 78 at 847.
[213] *Id.* at 853
[214] Zoethout, *supra* note 179 at 413.
[215] Lori G. Beaman, *The Courts and the Definition of Religion: Preserving the Status Quo Through Exclusion*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 203, 210 (Arthur L. Greil & David G. Bromley, eds., 2003).

related to freedom of religion or belief, none attempts to define the term 'religion,'" and it "remains undefined as a matter of international law."[216] There is no "commonly agreed definition of what 'religion' means in EU law and policy."[217] Whether and how religion ought to be defined for legal purposes are "increasingly contested and divisive questions."[218] Yet "because religion is much more complex than other guaranteed rights, the difficulty of understanding what is and is not protected is significantly greater."[219] And this difficulty is perhaps even more acute in the legal field that in others. "While academics have the luxury of debating whether the term 'religion' is hopelessly ambiguous, judges and lawyers often do not."[220]

"The word 'religion' has a fairly long pedigree in European languages. . . . its use dates back at least to Roman times" but its antiquity does not "mean that the word has always had the same meaning throughout history; rather the opposite is the case."[221] "Religio" in Roman times referred primarily to the monastic life (as "Religious" still does within the Roman Catholic Church, as seen in the division between the "religious" clergy who belong to orders, and "secular" diocesan clergy, who do not). Moreover, "to the degree that 'religio' designated a wider quality or domain, this sphere . . . denoted those matters having to do with God or gods" and human devotion to them generally; it was "singular and not plural."[222] Today, however, religion exists as a reified "thing" that exists in the world. "Religion in the West is understood both as a personal judgment about what is true and right . . . and a group

[216] T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189, 189-90 (2003). *See also* Danchin, *supra* note 8 at 675-76 ("none of the major international and regional human rights instruments define the term 'religion.'"); Arthur L. Greil & David G. Bromley, *Introduction*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 3 (Arthur L. Greil & David G. Bromley, eds., 2003) ("it is probably safe to venture the proposition that no consensus has yet been reached with regard to this subject."); EVANS, *supra* note 58 at 51 ("No human rights treaty, including the Convention, has ever defined religion or belief.").

[217] Sergio Carrera and Joanna Parkin, *The Place of Religion in European Union Law and Policy: Competing Approaches and Actors Inside the European Commission*, RELIGARE Working Document No. 1, September 2010, at 3.

[218] Danchin, *supra* note 46 at 456.

[219] Gunn, *supra* note 216 at 190.

[220] *Id.* at 191.

[221] Peter Beyer, *Defining Religion in Cross-National Perspective: Identity and Difference in Official Conceptions*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 163, 166 (Arthur L. Greil & David G. Bromley, eds., 2003).

[222] *Id.*

identity that is deeply rooted."[223] As such, there is a general assumption that religion is capable of definition.

But with respect to Article 9 in particular, "the issue has proved so controversial that it has been difficult to achieve any consensus as to the meaning of the term."[224] Defining religion, especially as a legal term of art, is no simple task. As Eisgruber and Sager explain:

> The problem goes something like this: in order to protect religious liberty we have to define what religion is, and once we are in the business of saying that some beliefs, commitments, and projects are entitled to special treatment as 'religious' while others are not, we are creating a sphere of orthodoxy of exactly the sort that any plausible understanding of religious liberty should deplore.[225]

Moreover, "any attempt to define the scope and content of the right to religious liberty will necessarily involve assumptions about the underlying nature of religion itself."[226] Legal definitions may incorporate attitudes and assumptions that reflect cultural attitudes about religion generally or toward individual religions specifically. For example, with respect to religion generally, "[t]he right to religious freedom is often referred to simply as 'freedom of conscience or belief.' This subtle shift in terminology is in fact the product of two deeply entangled historical and normative transformations that have occurred in modern secular discourse on religious freedom."[227]

Thus, rather than viewing religion as an entity, it is better to speak of it as "a 'category of discourse,' whose precise meaning and implications are continually being negotiated in the course of social interaction."[228] "The practical task of defining religion is one that involves a large number of social actors in a variety of social

[223] Moon, *supra* note 34 at 258.

[224] Evans, *supra* note 58 at 51.

[225] Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 807 (2009).

[226] Danchin, *supra* note 8 at 676 (quoting Gunn, *supra* note 216 at 195).

[227] *Id.* at 675

[228] Greil & Brombley, *supra* note 216 at 4; *see also* Meredith B. McGuire, *Contested Meanings and Definitional Boundaries: Historicizing the Sociology of Religion*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 127, 127 (Arthur L. Greil & David G. Bromley, eds., 2003) ("Definitional boundaries are the outcomes of *contested meanings*." (emphasis in original)). Even biases within "sociology of religion . . . ha[ve] underwritten conceptions of 'religion' as essentially fixed, rather than existentially variable." William H. Swatos, Jr., *Differentiating Experiences: The Virtue of Substantive Definitions*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 39, 43 (Arthur L. Greil & David G. Bromley, eds., 2003).

contexts and that has important social, political and cultural consequences. This is perhaps most obvious if we look at the courts."[229] The ECtHR in particular has addressed the definitional issue in a unique way, by beginning with a broad, inclusive definition, but then differentiating between religious beliefs *qua* beliefs, on the one hand, which are inviolable, and manifestations of belief on the other, which are entitled to far less protection. The underlying problem is that this approach is not neutral between religions.

First, the Court has responded to the problem of defining religion by adopting a "a broad, inclusive approach to the question of what 'counts' as a religion or belief for the purposes for the second sentence of Article 9(1)."[230] For example, "[t]he Church of Scientology was accepted as falling under the protection of Article 9 with no discussion of the issues that have concerned domestic courts."[231] And "[p]acifism has been accepted as a belief even when it is not linked to a particular religion."[232]

But the Court has been far less accommodating in its protection of religion as it is actually lived. It has "moved from a very liberal definition of 'religion or belief' to a very restrictive view of what freedom of religion and belief entail. . . . they have in fact developed a conservative conception of these notions that belies the expansive approach taken at the definitional stage."[233] And "the way in which the Court and Commission have dealt with the substance of the protection of freedom of religion or belief subtly prefers some conceptions of religion to others."[234]

[229] Greil & Bromley, *supra* note 216 at 3.

[230] Evans, *supra* note 103 at 295; *see also* Evans, *supra* note 123 at 389-90 ("The basic approach of the Commission has been to define religion or belief liberally and inclusively. It has rarely been determined that something that is alleged to be a religion or belief does not fall within the protection of the Convention.") & 392 ("the tendency of the Court and Commission at the definition stage of Article 9 cases has been to adopt a philosophy of inclusiveness."). However, "[a]lthough the Court has been relatively liberal in its definition of religion, its insistence that its views, rather than those of the applicants, should decide what is required by the relevant religion has meant that. . . . there is a risk that the Court 'will single out for protection religious rites and practices with which the members of the Court are familiar and feel comfortable.'" MCCREA, *supra* note 17 at 126 (quoting EVANS, *supra* note 58 at 125).

[231] EVANS, *supra* note 58 at 55 (citing X & Church of Scientology v. Sweden, App. No. 7805/77, 16 Eur. Comm'n H.R. Dec. & Rep. 68, 70 (1978)).

[232] EVANS, *supra* note 58 at 55 (citing Le Cour Grandmaison & Fritz v. France, App. Nos. 11567/85 & 11568/85, 53 Eur. Comm'n H.R. Dec. & Rep. 150 (1987) and Arrowsmith v. United Kingdom, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5, 19 (1978)). Both of these cases understand "belief" to mean "conviction."

[233] EVANS, *supra* note 58 at 66.

[234] Evans, *supra* note 123 at 392.

Specifically, "the emphasis in the interpretation of Article 9 is on the internal: the private thought, conscience, and religion of the individual."[235] Therefore, as William Arnal explains:

> [O]ur definitions of religion, especially insofar as they assume a privatized and cognitive character behind religion (as in religious *belief*), simply reflect (and assume as normative) the West's distinctive historical feature of the secularized state. Religion, precisely, is *not* social, *not* coercive, *is* individual, *is* belief-oriented, and so on, because in our day and age there are certain apparently free-standing cultural institutions, such as the Church, which are excluded from the political state.[236]

Additionally, the Court has held that "'religious freedom is primarily a matter of individual conscience' though one that implies a right to some manifestation."[237] The problem is that "[t]he primacy that the Court has given to the internal role of conscience and the notion that freedom of religion or belief is mainly about being able to hold a particular set of beliefs is relevant to the conception of who or was is entitled to freedom of religion or belief."[238] "The 'norm' in Strasbourg freedom of religion case law appears to be a Protestant, belief-centered conception of religion. This conception favours internal and disembodied forms of religion over external and embodied ones."[239] Although the Court has not attempted to define religion comprehensively, (assuming such a definition is possible),[240] "background assumptions about religion as primarily a matter of conscience or belief appear throughout its freedom of religion case law."[241]

Finally, there are lurking behind the legal issues, questions of diversity, toleration, and cultural identity. Apart from the difficulties in defining religion generally, and the special hardships in defining it for legal purposes, it may be that the Court's uneasiness with Article 9 as a whole "reflects a deep-seated European uneasiness about how far to tolerate religious diversity."[242] Veit Bader has found that among European states,

[235] EVANS, *supra* note 58 at 72.

[236] William E. Arnal, *Definition*, *in* GUIDE TO THE STUDY OF RELIGION 21, 31 (Willi Braun & Russell T. McCutcheon, eds., 2000).

[237] Evans, *supra* note 123 at 393 (quoting Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A), para 33 (1993)).

[238] *Id.* at 394.

[239] Peroni, *supra* note 6 at 233.

[240] Petty, *supra* note 14 at __ (Tenn. L. Rev.).

[241] Peroni, *supra* note 41 at 236.

[242] Janis, *supra* note 1 at 76. In addition, "There is always a danger in attempting to apply a concept as complex and controversial as religious freedom,

domestic courts in France, Belgium, Italy, and Portugal face challenges "in finding defensible definitions of 'religion' under conditions of greater and manifestly visible religious diversity."[243] The Strasbourg court has therefore avoided addressing Article 9 when it found such avoidance to be expedient.

b. Avoiding the Issue

"It is fairly common for legal analyses of freedom of religion or belief to avoid a serious discussion of the definitional problem, even among the most important works."[244] Because Article 9 was almost completely the domain of the Commission for many years, "[t]he task of defining religion or belief in the context of Article 9 has generally been performed by the Commission."[245] Both the Commission and, later, the Court "have taken a generous approach to defining religion or belief."[246] They "have refrained from defining, or even listing, the essential criteria of the word 'religion.'"[247] "And [t]he Commission has, by and large, not entered into that controversy as it has rarely determined that something that is alleged to be a religion or belief is not."[248]

"The reluctance of the European Commission or Court formally to define the word 'religion' is understandable."[249] A workable legal definition would have to be specific enough to provide practical guidance to courts on inclusion and exclusion criteria, while at the same time accounting for the wide diversity of religious belief and practice and distinguishing religious behaviors that could also be classified as cultural, philosophical, or otherwise non-religious. "Such a balance would be almost impossible to strike and explains why definitions of religion have also been avoided in the past by the Human Rights Committee of the International Covenant

that those charged with applying it will simply draw on their own experiences or notions of 'common sense' and thus give deference to systems of belief with which they are familiar or comfortable, but fail to adequately protect that which seems foreign or strange." EVANS, *supra* note 58 at 18.

[243] Veit Bader, *Religion and the Myths of Secularization and Separation*, RELIGARE Working Paper no. 8, March 2011, at 3 & n.1.

[244] Gunn, *supra* note 216 at 190-91.

[245] EVANS, *supra* note 58 at 53

[246] *Id.* at 55

[247] Adhar & Leigh, *supra* note 65 at 152 ("It is a frequent criticism of the jurisprudence on Article 9 of the European Convention that it has failed almost entirely to confront the issue of defining religion."); Cumper, *supra* note 105 at 173. *But see* Freedland & Vickers, *supra* note 66 at 601 (noting the "ECHR suggests that beliefs must have sufficient 'cogency, seriousness, cohesion and importance' to warrant protection.").

[248] EVANS, *supra* note 58 at 54. "Often the Commission tried to simply ignore the issue by dealing with controversial cases on different grounds." *Id.* at 56.

[249] Cumper, *supra* note 105 at 173.

on Civil and Political Rights 1966 (ICCPR) and the UN's Special Rapporteur on the Elimination of Religious Intolerance."[250]

In addition to simply avoiding the definitional question, the Court went to greater lengths in avoiding Article 9 entirely. The ECtHR developed its jurisprudence of the permissible limitations on rights in the context of Articles 8, 10 and 11, rather than Article 9 because, until 1993, Article 9 cases were almost entirely deemed inadmissible by the Commission. "By the time the Court began to judge on the merits of applications based on religious freedom, there was a well-established doctrine on the permissible limitations on the freedom of expression, the freedom of assembly and association, and the right to private and family life."[251]

In recent years, the Court has changed course. The Court "has been engaging seriously with the freedom of religion and belief under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms" for the last fifteen years.[252] "Article 9 of the Convention explicitly protects freedom of religion or belief. Yet there are a wide variety of conceptions as to what this freedom entails."[253] "[T]he Court may be considered to be in the process of developing a 'theory' on the proper place of religion in the public sphere."[254] But the Court still must overcome a variety of structural and doctrinal hurdles to do so, particularly in a way that is both coherent and equitable.

V. EUROPEAN POLITICAL THEOLOGY: RELIGIOUS LIBERTY AS A WESTPHALIAN PARADOX

European societies have assumed that being modern and secular requires the privatization of religion.[255] As Robert Yelle has said, "we inhabit a particular political theology."[256] "[W]hat we call 'secular law' has been shaped by Christian soteriology and supersessionism" involving "[t]he separation of a spiritual 'religion' from both civil law and ceremonial 'religion.'"[257] The result of this separation is that "[t]he practical application of human rights approaches to the freedom of religion is structurally biased towards those forms of religious belief which are essentially voluntarist,

[250] Cumper, *supra* note 105 at 173.
[251] Martínez-Torrón, *supra* note 56 at 594.
[252] Scharffs, *supra* note 69 at 249.
[253] EVANS, *supra* note 58 at 18.
[254] Fokas, *supra* note 70 at 55 (noting the jurisprudence of the ECHR reflects the "extreme state of flux currently characterizing the place of religion in the European sphere, both at the European and national level.").
[255] Casanova, *supra* note 42 at 26.
[256] Yelle, *supra* note 3 at 25.
[257] *Id.*

private and individualist—one might say pietistic—rather than communitarian in organisational orientation."[258]

Yelle continues:

> Indeed, Christianity arguably created a separation between the religion and political domains with its distinctions between the 'Two Kingdoms (Cities, Swords)' and, even earlier, between Christian 'grace' and Jewish 'law.' The original version of the Great Separation' was the founding narrative of Christianity, which, according to Saint Paul, effected a fundamental break with its own Jewish past. Following Christ's redemptive sacrifice on the Cross, the laws that prescribed sacrifice and other rituals were ineffective as a means of salvation and were abrogated. Religion was no longer a matter of law, but of grace; no longer of the flesh, but of spirit.[259]

This understanding of religion is privatized and ultimately Christian "'because . . . it emphasizes the priority of belief as a state of mind rather than as constituting activity in the world.'"[260] Religion thus became "an internal discipline superior because invisible, ubiquitous, and transcendent: in a word, *spiritual*."[261] And while ritual continued to play an important part in the early church, "the 'interiorization of religion' following the Reformation . . . made belief the measure of what religion is understood to be."[262] "Privileging belief over practice . . . rests on a conception of religion that has emerged out of a particular historical trajectory and that, as a result, is largely Protestant."[263]

But this is hardly the only way that one can understand religion. It need not be principally spiritual, and "there is nothing 'natural' or 'universal' in describing religion as fundamentally a matter of belief."[264] Indeed, this understanding of religion is not necessarily applicable outside of its own Western milieu. "Many non-Western traditions . . . cannot conceive of, nor accept, a system of rights that excludes religion. Religion is for these traditions inextricably

[258] Evans, *supra* note 103 at 313.

[259] Yelle, *supra* note 3 at 24 (internal quotation omitted)

[260] Danchin, *supra* note 8 at 676-77 (quoting TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 47 (1993)). *See also* Stone, *supra* note 34 at 42. ("Western liberalism's very definition of religion as being about belief and not custom or law has a distinctly Protestant cast that does not suit religions such as Judaism or Islam.").

[261] Yelle, *supra* note 3 at 26.

[262] Peroni, *supra* note 41 at 249 (internal quotations omitted).

[263] *Id.* at 248-49.

[264] *Id.* at 249.

integrated into every facet of life."[265] For those who see themselves as "'born into' some religious group rather than religiously 'born again'" religion is not a matter of voluntary assent.[266] These are "collectivistic religions that are 'public in character and defin[e] people's group identity.'"[267] But "more communitarian-oriented religious traditions tend to challenge the state's ordering of society in a manner which more individually focused religions do not."[268] Therefore, "the 'choice' of religion is also established as a legal principle: it serves to define what religion is."[269] It is a choice: voluntary assent to certain propositions.

Accordingly, "any non-Christian or non-Western religion such as Islam which deviates from this notion of religion as private belief and subjective experience thus faces a double charge: not only is it a threat to the secular political order but it is also not religion in its true, modern form."[270] So it should be no surprise "that Western Christianity has found it easier to cohabit plural liberal democracies than some other forms of religious traditions."[271] Christianity fits the *forum internum* left to it by the state, and the state defines religion as generalizations based on Christianity.[272] Western secularism:

> presupposes a Christian civilisation that is easily forgotten because, over time, it has silently slid into the background. Christianity allows this self-limitation, and much of the world innocently mistakes this rather cunning self-denial

[265] John Witte, Jr., *Law, Religion and Human Rights*, 28 COLUM. HUM. RTS. L. REV. 1, 12 (1996).

[266] Ferrari, *supra* note 175 at 368 (quoting SLAVA JAKELIC, COLLECTIVISTIC RELIGIONS: RELIGIONS, CHOICE, AND IDENTITY IN LATE MODERNITY 1-3 (2010)). *See also* Russell T. McCutcheon, *The Category "Religion" and the Politics of Tolerance*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 139, 144 (Arthur L. Greil & David G. Bromley, eds., 2003) (quoting MADAN SARUP, IDENTITY, CULTURE, AND THE POSTMODERN WORLD 3 (1996) ("'[F]or members of many ethnic-minority groups, their religion is an aspect of their culture, a valuable support in a hostile environment.'")); Evans, *supra* note 123 at 396 ("For some religious minority groups, their ability to retain a distinctive lifestyle may be essential to the survival of a community that is supportive of their beliefs.").

[267] Ferrari, *supra* note 175 at 368.

[268] Evans, *supra* note 103 at 314.

[269] Ferrari, *supra* note 175 at 368 (quoting JAKELIC, *supra* note 266).

[270] Danchin, *supra* note 8 at 689.

[271] Evans, *supra* note 103 at 314.

[272] Peroni, *supra* note 41 at 236 ("the Court has valorized disembodied, autonomous, and private forms of religiousity identified with mainstream Protestantism, while sidelining embodied, habitual, and public forms.") & 244 ("aspects of applicant's practices that the Court has tended to de-emphasize include those that cannot be neatly separated from daily actions or everyday life. . . . manifestations outside the domains of home, family and places of worship are of secondary importance.").

> for its disappearance. But if this is so, this 'inherently dogmatic' secularism cannot coexist innocently with other religions . . . it can live comfortably with liberal, Protestantized, individualized, and privatized religions but has no resources to cope with religions that mandate greater public or political presence or have a strong communal orientation. This group-insensitivity of secularism makes it virtually impossible for it to accommodate community-specific rights and therefore to protect the rights of religious minorities.[273]

But, like religion, neither secularism nor religion is a universal category: they need to be contextualized, as they are the product of different and particular histories and cultures. Once applied to Europe, this conclusion means that European secularism is the outcome of European history, in which Christianity has played a central role.[274] But "once European secularism is placed in its context, its Christian roots become evident and prevent the claim of the neutrality of the secular public sphere from being taken seriously: this sphere is an exclusionary space where some selected religions feel at home while others are left out in the cold."[275] Paradoxically, European secularism "remains intrinsically and inevitably Christian—to be fair to non-Christian religions."[276] José Casanova suggests:

> Rather than recognizing the "really existing" religious and secular pluralisms and the multiple European modernities, the dominant discourses in Europe prefer to hold on to the idea of a single secular modernity, emerging out of the Enlightenment. Only secular neutrality is supposed to guarantee liberal tolerance and pluralist multicultural recognition in an expanded European Union. Thus, the secularist paradox, that in the name of freedom, individual autonomy, tolerance, and cultural pluralism, religious people—Christian, Jewish, and Muslim—are being asked to keep their religious beliefs, identities, and norms

[273] Rajeev Bhargava, *Rehabilitating Secularism*, *in* RETHINKING SECULARISM 92-113, 101 (Craig Calhoun, et al. eds., 2011).

[274] Ferrari, *supra* note 175 at 360.

[275] *Id.* at 361-62

[276] *Id.* at 361. *See also id.* at 362 (internal quotation omitted) ("the liberal model of toleration results from an internal Christian dynamic of secularization, which reproduces theological principles in secular guise.")

> "private" so that they do not disturb the project of a modern, secular, enlightened Europe.[277]

But as *JFS* revealed, this is not really possible.[278] Secular modernity guarantees religious freedom only by the privatization of religion. The space that the modern state has left to religion is shaped like Christianity, and when other religions do not fit, they are not treated equally. "[T]he claim of religious neutrality, on the basis of which secularism asserted the authority to adjudicate the limits of the various religions, especially vis-à-vis the secular, stands revealed as myth."[279]

In a nominally post-Christian Europe, there is little to be gained by failing to "acknowledge these roots and to recognize that the art of separation—and, with it, the privatizing of religion—is nothing by an imposition of secular liberalism's Christian cultural heritage on non-Christian religions whose basic terms of reference are entirely different."[280] The "[l]ack of sensitivity and respect for the needs of others are becoming really dangerous for management processes of religious and cultural diversity in European states. We seem to be violating principles of equality in questionable efforts to force unequals to . . . become like us."[281]

This can be seen in the text of the Convention and in the Court's dichotomy between belief and practice. "The ECtHR has, despite Article 9's protection of the right to 'manifest' one's religion, seen protection of individual religious freedom as being largely confined to the private sphere."[282] And "[i]n the Strasbourg representational discourse, the relationship between the two terms appears unidirectional: belief is imagined as pre-existing and practice as its subsequent manifestation. . . . this suggests that there is an actual belief lying beneath practice that comes first."[283] But this need not be the case. "[N]either practice nor belief is foundational, as the two are mutually dependent."[284] "The difficulty with the interpretive methodology of the European Court of Human Rights . . . is that any

[277] José Casanova, *Religion, European Secular Identities, and European Integration*, *in* RELIGION IN AN EXPANDING EUROPE, 65-92, 66-67 (T.A. Byrnes & P.J. Katzenstein, eds., 2006).

[278] *See generally* Petty, *Faith*, *supra* note 14. *See also* Ferrari, *supra* note 175 at 359 (noting Western secularism "penalises non-Christian religions in particular.").

[279] Yelle, *supra* note 3 at 35.

[280] Stone, *supra* note 34 at 41-42.

[281] Werner Menski, *Fuzzy Law and the Boundaries of Secularism*, RELIGARE Lecture, June 2010, at 9.

[282] MCCREA, *supra* note 17 at 122.

[283] Peroni, *supra* note 41 at 255.

[284] *Id.* at 256; ADAM B. SELIGMAN, ET AL., RITUAL AND ITS CONSEQUENCES: AN ESSAY ON THE LIMITS OF SINCERITY 106-07 (2008) (discussing ritual and belief as mutually reinforcing).

assertion of universal authority in the form of 'free-standing' reason . . . tacitly subsumes majoritarian cultural norms . . . into the meaning and scope of Article 9."[285] In the end, "the ECHR has been interpreted so as to permit the use of coercive state power to promote the interests of certain religions."[286]

As Lourdes Peroni suggests:

> moving towards a more inclusive European Human Rights Convention Law may require reaching and challenging deep-rooted assumptions and conceptions underpinning the Court's legal reasoning. In particular, the move may involve rethinking those assumptions and conceptions, which all too often pass for natural and universal, but which in fact benefit some and disadvantage others.[287]

VI. CONCLUSION

"Religion and church continue to have a marked significance in European countries at the end of the twentieth and the beginning of the twenty-first century."[288] And while European states test "different models of democracy, law and religion,"[289] "states not only cannot avoid considering religion, but have an interest in doing so in an increasingly multicultural environment. Europe cannot just disregard religion in all its various manifestations in the 21st century."[290]

In particular, "Christianity continues to shape significant aspects of both the state and state law. This is an embarrassment for liberal theories of rights and their assumption of state neutrality."[291] It is also, to a significant extent, inevitable. The understanding of

[285] Danchin, *supra* note 8 at 745. "Of course, the collective culture within which individual religious freedom is asserted is inevitably influenced by cultural norms to which particular faiths have disproportionately contributed. Therefore, the protection of private religious freedom may allow adherents to culturally entrenched religious a greater degree of freedom to adhere to their faith in public situations, not because the Court accords them a more extensive right to religious freedom, but because there is no clash between the collective norms and structures of the society in which they live and the requirements of their faith." Peroni, *supra* note 41 at 104.

[286] Peroni, *supra* note 41 at 105.

[287] Peroni, *supra* note 6 at 234. *See also* Martínez-Torrón, *supra* note 70 at 365 ("Among the improvable aspects of its case law is the protection of individual religious or moral identity, especially when it is expressed in particular actions in ordinary life, beyond traditional expressions of religiousity such as rites or preaching.").

[288] Pollack, et al., *supra* note 23 at 1.

[289] Ungureanu, *supra* note 11 at 307.

[290] Menski, *supra* note 281 at 1.

[291] Danchin, *supra* note 8 at 670-71.

religion that underlies the state's claim to neutrality and perhaps even the Westphalian system itself is predicated on the privatization of religion and the transfer of jurisdiction over temporal matters to the state. Redefining religion as something broader than propositional belief calls into question the state's goal of neutrality and to a certain (now extremely limited) extent the *raison d'être* of the state itself.

But "unless it faces these issues explicitly, challenging its own assumptions and looking at the consequences of its approach, the European Court of Human Rights is unlikely to provide an example to the international community as it continues to struggle with the complex implications of religious freedom."[292] Focusing on belief in considering issues of religion is not "necessarily wrong or useless. It is merely culturally dependent on 1700 years of Christian history, so ingrained as to be invisible."[293] This is where the Court can do better. "Religious freedom is best measured on the margins: it is those groups who don't 'fit' into definitions of religious normalcy who are the best indicator of a society's commitment to religious expression in its widest possible form."[294]

It seems likely that "the tacit background assumptions shaping the public-private divide—religion as primarily a matter of belief or conscience whose proper place in the private sphere—become more visible when it is a Muslim who seeks to manifest a non-Christian belief or practice in the public sphere."[295] But "this is not only an issue about Islam but about other faith groups, including Orthodox Judaism; and indeed it spills over into some of the questions that

[292] Evans, *supra* note 123 at 396-97.

[293] James V. Spickard, *Cultural Context and the Definition of Religion: Seeing With Confucian Eyes*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 189, 191 (Arthur L. Greil & David G. Bromley, eds., 2003).

[294] Beaman, *supra* note 215 at 216.

[295] Danchin, *supra* note 8 at 672. For example, Joseph Dan suggests that "[t]he political consequences of the mis-use of the term 'religion' are most obvious today concerning the image of 'fundamentalist' Islam in the West. If Islam is a 'religion,' it should be confined to individual spiritual life, and not try to become the Law of the Land of modern countries and see everything outside of itself as evil, and to be fought against as a dangerous cultural and political enemy. Yet this is exactly the meaning of Islam since its beginnings; it never recognized a culture outside of itself (except as subordinated, tolerated minorities which are denied full political rights). Islam was always a political entity, and the expectation that it will conform to the Christian definition of 'religion' is the result of the process of the attempt to universalize the concept of religion in its particular meaning in Christianity." Joseph Dan, *Jewish Studies and European Terminology: Religion, Law and Ethics*, *in* JEWISH STUDIES IN A NEW EUROPE: PROCEEDINGS OF THE FIFTH CONGRESS OF JEWISH STUDIES IN COPENHAGEN 1994 UNDER THE AUSPICES OF THE EUROPEAN ASSOCIATION FOR JEWISH STUDIES xxiii-xxxvi, xxviii n.9. (Ulf Haxen, et al. eds., 1998).

have surfaced . . . about the right of religious believers in general to opt out of certain legal provisions."[296]

"[C]itizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land"[297] "[H]uman rights law regarding the freedom of religion in Europe today is developing in a fashion which is as likely to hinder as it is to assist the realisation of the goals of tolerance and religious pluralism which are said to be what it is seeking to achieve."[298] To do so, "[r]eligion . . . needs to be categorised within a wider frame than 'religion and belief.'"[299]

[296] Williams, *supra* note 49 at 263.

[297] *Id.* at 268.

[298] Evans, *supra* note 103 at 291.

[299] Maleiha Malik, *The "Other" Citizens: Religion in a Multicultural Europe*, *in* LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS 93-114, 95-96 (Lorenzo Zucca & Camil Ungureanu eds., 2012).