Freedom and equality as necessary constituents of a liberal democratic state

Doomen, J.

Chapter 10. Harm and ignore

10.1 The protection the state offers to citizens, or, more precisely put, those deemed basically equal, against each other (and foreign elements) is vital; it has to be there for the freedoms to be exercised at all, in a sense.[326] Without such protection, such freedoms may still be said to exist[327] (and even unboundedly[328]), but more important rights would not be protected. If one can be killed at random, one has other things to be concerned about than the right to free expression. That does not necessarily mean that a totalitarian state should be established, though, and reaching such a conclusion at this point of the inquiry would testify to a false dilemma. It is one option among many (but not the most desirable, as will be argued below). For now, the outcome is open-ended. It was argued in chapter 8 that freedom is important, but that merely means that freedom must be taken seriously, not that it cannot be limited if it is weighed against something more important.

10.2 What has become known as the 'harm principle' is a useful starting point. Mill's formulation of it is the following: "[…] the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[329] It is difficult what 'harm' is supposed to mean. There are passages in Mill's work where a broader notion than physical harm seems intended,[330] but clarity on the subject matter is wanting. Be that as it may, this is not an exercise in exegesis, and the issue at hand is whether this principle is tenable.

One could limit the domain of disallowed harm to physical harm, but this would constitute an arbitrary demarcation line between permissible and prohibited actions: while it is certainly defensible that an action which would (or even might) result in the physical harm of another person than the agent[331] should be disallowed, it is not clear why it would at the same time be the *only* sort of action to be considered thus. The only reason I can think of to

---

326 Cf. section 7.2 and Th. Hobbes, *Leviathan*, Ch. 21 (pp. 147, 148).

327 Even this may be called into question, but in this case on the basis of a more fundamental analysis than I would here provide. I remark here only, in line with what was said above (note 46, *supra*), that it is not *a priori* correct that people may be considered complete units prior to their functioning in a society; perhaps they can, conversely, only be considered to function as they do *within* a society, in which case such freedoms can *a fortiori* only exist there. This is an issue that is perhaps not answerable by science or philosophy.

328 Indeed, if there were no difference between freedom of expression with and without the interference of the state, a large part of the present work would lose its import.

329 J. S. Mill, *On Liberty*, Ch. 1 (p. 223).

330 J. S. Mill, *On Liberty*, Ch. 1 (p. 224), Ch. 3 (p. 260).

331 That the agent's *own* harm is not covered by this principle is an important caveat for Mill (*On Liberty*, Ch. 1 (pp. 223, 224)).

uphold such a demarcation line would be that physical harm is relatively easily observable,[332] which is a criterion that can be of no concern (except if the issue were whether someone is sincere in his claim that he is harmed). Libelous acts, for example, are not physical in nature but could easily be argued to be harmful.[333]

In any event, the importance to avoid other sorts of harm than physical harm cannot be dismissed by simply qualifying them as such (i.e., as non-physical harm). Even if their avoidance is less pressing than that of physical harm, this still does not exclude the possibility that they, too, are to be prohibited. I am not saying that this is necessarily my position; at this stage, I merely seek to elucidate the issue, so that it becomes apparent what is at stake.

I must first support why physical harm itself is a sufficient reason to limit freedom. This is perhaps considered a trivial matter by some (or many),[334] but in order to present a complete account – and take into account what I observed above regarding the importance of freedom – it is necessary to justify even this intrusion on one's freedom; that my justification of such an intrusion will be brief is not spurred by the former consideration – since *argumenta ad populum* are to be avoided at *each* stage – but rather by the fact that the argumentation is relatively straightforward. In the case of having to balance freedom against one of the reasons for a state to exist at all, *viz.*, to protect one's life (and possessions) and avoid being hurt at random, the hierarchy involved here dictates what the answer should be.[335]

10.3 On the basis of the foregoing I would argue that the forbearance of physical harm is the *minimum* that must be observed and because of which freedom may be limited, but that does not mean that the limit cannot be drawn at a less intrusive stage, using a broader definition

---

[332] If one considers all the acts that potentially cause harm to others, the extent of the actions that can be allowed is easily shown to be very small (D. Dripps, "The Liberal Critique of the Harm Principle", pp. 9, 10), which would show the need to demarcate a sub-domain of – merely – potentially harmful actions that *would* supposedly be allowed. This would complicate the matter, as the distinction between 'harmful' and 'potentially harmful' is in practice often difficult to make.

[333] I merely provide this example to illustrate my point. The next chapter will concretize what is said in the present chapter by means of some elaborate examples.

[334] But not by everyone. For example, according to Smith's interpretation of the harm principle ("Is the Harm Principle Illiberal?", p. 4), the incidence of (physical) harm is a necessary condition to limit freedom but not a sufficient one.

[335] This reasoning warrants some caution. Apart from the fact that it does not apply to all cases, notably martyrs willing to suffer or die for their beliefs, a false dilemma (constituting at the same time a slippery slope) – which would ensue if one should argue, as Hobbes does (*vide* note 283, *supra*), that a totalitarian state, while undesirable, is still preferable to a state of *total* freedom, in which one may randomly be killed or hurt – is to be avoided if a middle ground is possible and superior. Presenting such a middle ground is the purpose of this part of the present study.

of 'harm'.[336] For example, someone may argue that he is harmed by the fact that cartoons are made that insult a person or deity[337] he considers to be of great value, or even sacred. His conception of 'harm' would obviously have a wider scope than physical harm, in a case such as this one consisting in being annoyed, or perhaps in being (non-physically) hurt because something or someone is not treated with the reverence he considers it, him or her to merit. From such a perspective, harm need not be physical in nature to warrant limiting freedom.

Feinberg distinguishes between harmful, hurtful and offensive experiences,[338] arguing that "Not everything valuable is such that its absence is harmful; nor is everything that is undesirable such that its presence is harmful. An undesirable thing is harmful only when its presence is sufficient to impede an interest."[339] Indeed, an interest being thwarted, set back or defeated is the defining characteristic of being harmed, according to Feinberg;[340] he elaborates on this by saying that: "One's interests […] consist of all those things in which one has a stake […]."[341] I see no reason to disagree with such a way of qualifying the issue. This does mean, however, that it must be clear what an 'interest' is, or what having a stake in something is. For a believer, for example, not having one's religion (or a deity) insulted may be considered such an interest.

Feinberg may distinguish, as he does, between offense and harm, stating that "[…] the offended mental state in itself is not a condition of harm.",[342] limiting what was just said about interests to the latter, but the question arises to what such a distinction amounts. After all, the crucial issue is not whether an act is harmful (in Feinberg's sense) or offensive but whether the reasons to prohibit it outweigh those to allow it, and this applies to both offensive and harmful (again, in Feinberg's sense) acts. The believer just mentioned may agree with the statement that "It is unlikely […] that being in an intensely offended state could *ipso facto* amount to being in a harmed state.",[343] but for him, the issue will be an

[336] It is unwarranted to define a matter in some way and then draw one's own conclusions from the result (cf. my remark in section 2.5 with regard to defining 'rationality' and note 316, *supra*). 'Harm' is no clearly delineated concept and the difficulties that follow from this given must be taken into account.

[337] In the latter case, the insult would presumably be vicarious.

[338] J. Feinberg, *Harm to Others*, pp. 46-49.

[339] J. Feinberg, *Harm to Others*, p. 47.

[340] J. Feinberg, *Harm to Others*, pp. 33, 34.

[341] J. Feinberg, *Harm to Others*, p. 34.

[342] J. Feinberg, *Offense to Others*, p. 3.

[343] J. Feinberg, *Harm to Others*, p. 49.

academic one, his interest[344] not consisting in the way in which his negative experience is semantically qualified[345] but in the means to eliminate it.

Feinberg seems to have taken such an objection into account, saying that "It is the person of normal vulnerability whose interests are to be protected by coercive power […]. He can demand protection only against conduct that would harm the normal person in his position. The further protection he needs he must provide himself by non-coercive methods."[346] It must be admitted that the demarcation point between what should be allowed and what not is difficult to find and perhaps impossible to locate from a single perspective.[347] Yet 'normal' is, in my view, an insufficient term: it makes the outcome a virtually arbitrary one.[348]

In any event, a distinction such as the one made by Feinberg may have its value, but not for the purposes of the present discussion. One might still introduce specific terms to cover non-physical harm, such as 'secondary harm' for someone who would indeed be shocked because something very important to him is concerned, and 'tertiary harm' for someone who is merely annoyed, but a distinction between physical harm and other sorts of harm may not even be necessary: as long as harm is acknowledged to be the decisive element, a further division would only be relevant at a next stage, namely, to indicate the degree to which harm is inflicted. Since the first stage has not been completed, it would be premature to discuss this matter here; the following analysis will, moreover, show that such a division is irrelevant. I will, then, continue to use the single, uncomplicated notion of harm with which I started; whether something is harmful can only be decided by those experiencing it as such.

10.4 Presuming that those claiming to be harmed in a non-physical sense are sincere, the problem that ensues is that someone may claim to be harmed (in this broad sense) on the basis of virtually any expression that is critical of his viewpoint. For instance, a Christian may claim to be harmed (and not just purport to be, but actually experience harm[349]) on the basis

---

[344] In order to evade a rhetorical way of responding to Feinberg's line of reasoning, I acknowledge that I use the word 'interest' here, which both he and I consider a vital element. However, as I mentioned above, for the person under discussion there may be an interest (something may be at stake) a nonbeliever is unable to grasp, in contradistinction to harm (in Feinberg's sense), the presence of which can (presumably) be grasped by both religious *and* nonreligious people when they see someone being physically harmed.

[345] This does not mean that one cannot debate the qualification. For example, Smith convincingly argues that emotional or psychic distress constitutes harm and opposes, along this line or reasoning, the attempt to differentiate between harm and offense (S. Smith, "Is the Harm Principle Illiberal?", p. 16).

[346] J. Feinberg, *Harm to Others*, p. 50.

[347] To anticipate matters somewhat, this issue will prove to be a difficulty in my own alternative as well.

[348] Feinberg uses 'harm' here in the way he has defined it, but, again, one's own definition may not be used as a directive. Applied to this case, if he wants to define 'harm' as he does, Feinberg must still make it clear why a 'normal' person should allow himself to be offended.

[349] Whether or not someone else would deem it harm, offense or nonsense, the Christian himself may experience it as something harmful, if 'harm' is understood to encompass more than physical harm.

of a scientific exposition in the field of biology, or a joke in which his convictions are mocked. If such expressions should be considered undesirable and prohibited for that reason, little scientific progress would remain possible, few debates, scientific or otherwise, would continue to take place, and freedom of expression would easily be seen to be hollowed out.[350]

One might distinguish between those expressions which (presumably) provide a contribution to a public debate, and those which (presumably) do not, and in which one has no other objective but to offend (or harm) groups of people or individuals. Such a stance is taken by the European Court of Human in Rights in the case of Otto-Preminger-Institut v. Austria: "[…] as is borne out by the wording itself of Article 10 para. 2 (art. 10-2) [of the ECHR], whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (art. 10-1) undertakes "duties and responsibilities". Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."[351]

What is problematic here is that it is difficult, if not impossible, to delineate the category of 'gratuitously offensive' expressions, and to steer clear from the lurking concomitant political abuse of this obscurity.[352] I concur, then, with Leigh's evaluation of this judgment: "Gratuitously offensive speech is a vague category that is unpredictable in its application: it may extend not only to mere abuse but also to expression with a violent or hateful message."[353] In the case of Otto-Preminger-Institut v. Austria, the Court referred to the case of Handyside v. United Kingdom,[354] acknowledging that its ruling constituted an exception to the general rule, expressed there, that "[…] freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" […]."[355] To

[350] Cf. S. Smith, "Is the Harm Principle Illiberal?", pp. 20, 25, 38.

[351] Otto-Preminger-Institut v. Austria (ECtHR, Application no. 13470/87, 1994).

[352] In addition, it may be argued that acts considered by many to be gratuitous are actually a manifestation of an expression (cf. G. Letsas, "Is there a Right not to be Offended in One's Religious Beliefs?", p. 256, who refers in this regard to insulting religious doctrines by burning crosses, writing heretical books and publishing cartoons).

[353] I. Leigh, "Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack", p. 71; cf. I. Cram, "The Danish Cartoons, Offensive Expression and Democratic Legitimacy", p. 327.

[354] Handyside v. United Kingdom (ECtHR, Application no. 5493/72, 1976).

[355] Otto-Preminger-Institut v. Austria (ECtHR, Application no. 13470/87, 1994).

add that offensive expressions are allowed as long as they are not *gratuitously* offensive puts pressure on freedom of expression.

The line of reasoning presented above, according to which freedom of expression will cease to exist, may seem to constitute a slippery slope but it is, as long as a consistent line of reasoning is followed, simply the consequence of taking harm as seriously as I have. This consequence need not, admittedly, often occur *in practice*, for there are a number of ways to accommodate the various interests at stake, the usual – i.e., politically most digestible – one in a liberal democratic state being that an imaginary line is drawn between those statements that are acceptable and those that are not. I say 'imaginary' since it is of course impossible to enumerate all statements beforehand and classify them one way or the other, so that, when an actual case presents itself, the discretion of the court ruling over the matter will – at least to some degree – be decisive, but, more importantly, no criteria to decide what should be tolerated are provided by the legislator (unless one should want to resort to the situation I qualified above, namely, the one in which expressions may be warded off on the basis of someone's claim that he is harmed).

So while such a pragmatic, political solution may suffice in many cases, that does not mean that it is also satisfactory (*too* pragmatic a stance must be avoided here). First, it suffers from inconsistency and randomness. For instance, making derogatory remarks about Jews is at present, against the background of the manifestations of anti-Semitism that culminated in the Holocaust, generally less acceptable in Western Europe than it was in the 19th and beginning of the 20th century, when discussing the 'Jewish question' was in vogue,[356] while, conversely, the possibilities to critically discuss religions have steadily increased over time,[357] which, to anticipate the discussion in the next chapter, makes it clear that the context needs to be considered in approaching such issues. Second, not unrelated to the first matter, it leads to uncertainty with regard to the extent to which one is at liberty to express oneself.

10.5 The problem seems to result from starting with the criterion: harm. I will propose an alternative, more productive criterion here. In a liberal democratic state, one may be expected to be able to deal with expressions from viewpoints that diverge from one's own. This may even be argued on the basis of a *quid pro quo* argument: in this sort of state, no view is so prevailing that its adherents can be assured that they can impose theirs upon others

[356] Important exponents include W. Marr (*Der Sieg des Judenthums über das Germanenthum*) and E. Dühring (*Die Judenfrage als Frage des Racencharakters und seiner Schädlichkeiten für Völkerexistenz, Sitte und Cultur*).

[357] To avoid any confusion: no evaluative statements are made here about persecutions of groups of people. It may seem strange that I discuss Jews at all, as it follows from the first part of this study that they should, being *ceteris paribus* basically rational, be treated equally with other people (and thus not be singled out as a segment). However, if this is taken – in line with what was observed above, and not limiting oneself to religion – to be so broad that nothing may be said that may be taken to be harmful, no room seems left where freedom may be manifested. Neither of these two extremes – unequal treatment and the absence of freedom – seems desirable; I will present an alternative to accommodate both basic equality and freedom below.

(provided they should want to), and, in line with was said in part 1 of this study, even if it were, there is no guarantee that this state of affairs will continue indefinitely. The price they pay for having the opportunity to live according to their beliefs and express their views is that they should allow others to do the same.

There are, however, clear limits to this price. No one should have to be confronted with manifestations he cannot reasonably ignore. So there should, e.g., be freedom to publish works in which views and persons are criticized and mocked, but no one should be forced to read them – one should have the opportunity to ignore such publications.

The danger that a majority will use the contents of a view as a criterion to decide for minorities whether they should be allowed to express them is mitigated by the fact that no majority can be guaranteed its persistence in a liberal democratic state (cf. section 6.7). Since anyone may belong to a minority in the future, an outlook that optimally accommodates any view is preferable to anyone analyzing the matter rationally.

It is not clear whether 'harm' in 'harm principle' refers to the noun or the verb, which could be left open, whereas no such lemma form exists in this case, 'ignore' and 'ignorance' being the alternatives. I opt for the phrase 'ignore principle' rather than 'ignorance principle' for two reasons. First, 'ignorance' implies that one is ignorant and thus has no knowledge of the manifestation, which is not the case (for otherwise the issue would not arise in the first place), and, second, 'ignorance' implies passivity while 'ignore' indicates that the person in question needs to do something, namely, ignore that which might harm him.

10.6 An apparent problem in this theory is that one should be able to 'reasonably' ignore manifestations, while I have not specified what this means. Indeed, this vagueness is admittedly a weakness, but the limitations of what one can resolve at the *a priori* stage must be acknowledged rather than hidden through obscure phrases or lines of reasoning.[358] (In order not to let my own solution be rubricated as such, I will, in chapter 11, deal with this matter in detail.)

I would rather present a credible while limited theory than one whose comprehensiveness and elegance is made possible only by its procrustean (and thus flawed) nature. I have merely wanted to point out that it is impossible (at least for me) to foresee every (sort of) confrontation that might take place and to indicate in advance the limitations necessary to distinguish between what may and may not be demanded of citizens to ignore.

[358] Feinberg suggests, following an approach similar to mine, "[…] the *standard of reasonable avoidability*. The easier it is to avoid a particular offense, or to terminate it once it occurs, without inconvenience to oneself, the less serious the offense is." *Offense to Others*, p. 32. This seems to provide a viable starting point.

Some room must be left in which the specifics of the cases can be dealt with in sufficient detail;[359] as I said, this will be brought to the fore in chapter 11.

10.7 I have not yet indicated whether religious outlooks should be treated in the same way as nonreligious ones. The issue of whether religious outlooks should receive a special treatment has stirred much debate and merits an investigation. An obvious reason to treat such outlooks in a special way in the present respect, offering religious people special protection against being harmed, would be that for religious people, much is at stake, namely, the very reason why they live. Criticizing their beliefs, let alone mocking them, one may contend, means disturbing something very important to them, in which respect their situation differs from that of nonreligious people, whose opinions can be said to be relatively trifling.[360]

This argument is not compelling. Apart from the ontological claims (the presence of one or more deities and – at least in the three monotheistic religions – an afterlife), there are no relevant differences. A communist, for example, may cling to his convictions with just as much vigor and consider his goals just as important as a believer does. The factors that drive persons to their opinions are more important in this regard than the *contents* of those opinions: various degrees of ardor are evidenced in both religious and nonreligious convictions.

The ontological claims might yet be put forward as a decisive reason to differentiate, but, absent the inclination to become dogmatic,[361] this would still necessitate making theologians of legislators. Even if one should opine – which I do not – that they must be concerned with 'truth', a realization along the lines just mentioned would be difficult to reconcile with the precepts determinative for liberal democracy. I must grant that this outcome is not *necessarily* irreconcilable with such precepts: one can imagine legislators acting upon religious convictions while taking into consideration the interests of nonbelievers. Still, the more they do so – and the more room they accordingly leave for the latter to express themselves, even when this should conflict with their own beliefs –, the less the issue is relevant. If such legislators should indeed operate *ceteris paribus* in the same way as legislators who don't act upon religious convictions, the issue will be limited to the legislators' *fora interna*[362] and thus be moot.

---

[359] The specifics attest to what is characteristic of a particular liberal democratic state, which may, so long as the general restrictions are taken to heart, differ from one case to the next (cf. the example (note 190, *supra*) of the election of mayors in some but not all liberal democratic states).

[360] Laycock avers, in a similar vein, that "People with a deeply held conscientious objection to a law are not similarly situated to people without such an objection." D. Laycock, "Formal, Substantive, and Disaggregated Neutrality toward Religion", p. 1016.

[361] That this is to be avoided follows – if not already from a general disposition – from the considerations in section 8.3.

[362] Meaning here that if they are religious, that fact won't affect the decisions they make as legislators regarding the freedom religious and nonreligious people should have.

10.8 Another reason why religious positions or their adherents should not merit special privileges in this respect follows in general from what was said about basic equality and prescriptive equality in chapter 6. Similarly, it can be argued that a special treatment for religious actors conflicts with the conditions of fairness and reciprocity.[363] Besides, should one want to depart from that stance only in this instance (and, in other words, privilege a religious position), there would be no *legal* considerations to do so, so that legislators would here, too, be forced into the role of theologians, since religious reasons would have to be decisive in order (to try) to support such an exception.

10.9 A final reason that may be adduced is that 'religion' is no principally delimited term, no criteria to determine when something is a religion being available; besides, the quest for such criteria could only be undertaken by theologians, this being the third instance that an appeal to them would be necessary. Should one nonetheless treat religious organizations differently from nonreligious ones (specifically, treat the first more favorably than the latter), it is not surprising that organizations should claim to be religious. To illustrate this point I refer to the presence of "Det Missionerande Kopimistsamfundet" ("The Missionary Church of Kopimism"), a Swedish association which considers, *inter alia*, the search for knowledge and the act of copying sacred and which has been acknowledged to be religious by the Swedish authorities (thus gaining strength in combating copyright restrictions, which is its goal[364]). This issue becomes all the more problematic in light of actions to disadvantage some groups of people under the guise of a religious practice.[365]

One may shift the focus from the content of 'religion' to the defense of "[…] conscientious belief and practice […]", which "[…] are beliefs and practices, which are not merely important to people, but important because, in light of their content, they are regarded as somehow demanded of them. This would extend to moral, political and, perhaps, some aesthetic beliefs as well as religious ones.",[366] and subsequently maintain that "[…] they are special preferences because of the sort of constraint they place on those who have them. It is not simply difficult for such people to abandon them, as it may be difficult for a pigeon-fancier to give up his hobby. The sacrifice involved is of a quite different sort, a sort that it is reasonable to wish to be immune from the normal process of weighing interests. That wish is realized in constitutional protection, which gives precisely that immunity." [367] This, however, immediately prompts the question of whether and, if so, how the sincerity of one's convictions should be measured. If no such inquiry is made, the issue is moot as people will

[363] J. Garvey, "An Anti-Liberal Argument for Religious Freedom", pp. 290, 291.

[364] It is not relevant for the present discussion whether this is merely a means for the – in that case *actual* – goal to have unlimited access to knowledge.

[365] Cf. A. McColgan, "Religion and (in)equality in the European Framework", p. 233.

[366] A. Ellis, "What is Special about Religion?", p. 239.

[367] A. Ellis, "What is Special about Religion?", p. 240.

continue to be able to claim that they have an interest in their beliefs being treated in a special way, but if, conversely, it is made, it would be hard to deny that an unwarranted state intervention will take place.

10.10 The line of reasoning presented above started from the premise that religious positions should not be *favored* over nonreligious ones. Yet one may also argue that unequal treatment is justified in a way that *disadvantages* religious positions. Acts of aggression motivated by a religious outlook must of course be penalized or, preferably, prevented, but does that require taking a special stance with respect to religious positions? One must be nuanced here. So if it is stated that "[…] religion is indistinguishable from any other threat facing the state.",[368] it would not be warranted to consider (any) religion a threat if not in the very general sense that *any* view, religious or nonreligious, may constitute a threat (taken broadly).

The fact that the adherents of some views are more likely than those of others to indeed manifest undesirable actions does not necessarily mean that (all) religions should belong to the first category. Perhaps it is correct to say that "A religious authority figure is viewed as a representative of God on earth. A follower is far more likely to act on the words of a religious authority figure than other speakers.",[369] but whether a believer will indeed go so far as to *defy* secular authorities on this basis is not a given and cannot be determined *a priori*[370] (which Guiora seems to acknowledge by using the phrase 'far more likely'); such a statement needs empirical support.

Furthermore, to say that "Extreme religious speech *does* present a threat, or at least has the potential to present a threat in a manner that secular speech today does not.",[371] seems to be an overgeneralization: secular speech can be constituted by various views and can be manifested in many ways, some of which may *ceteris paribus*[372] constitute a greater threat than some religious sources. In any event, from the perspective of basic equality and prescriptive equality, no special treatment for religions would be justified. I would accordingly agree with the recommendation that "[…] religious speech be subject to the same careful scrutiny as secular speech."[373] The same applies to actions that lead to physical harm.[374]

---

368 A. Guiora, *Freedom from Religion*, p. 23.

369 A. Guiora, *Freedom from Religion*, p. 30.

370 Religious sources, whether they be texts or persons, may of course instigate civil disobedience, but it is difficult to see how the various ways in which those that belong to the pertinent religious denomination can interpret them and act upon their directives may be captured in a single encompassing model.

371 A. Guiora, *Freedom from Religion*, p. 48.

372 This caveat must be added since, again, it is not decisive what the views are but rather how those that adhere to them interpret them and act upon them.

373 A. Guiora, *Freedom from Religion*, p. 120.

374 A. Guiora, *Freedom from Religion*, p. 108.

10.11 The differences between religious and nonreligious positions were relativized in the foregoing. This merely indicates that such positions should be treated equally; restricting their adherents' freedom to the same degree would not conflict with this conclusion. If it is supplemented by the arguments for allowing freedom of expression from chapter 8, the standpoint that anyone in a liberal democratic state must stand what he can reasonably ignore seems to me to be justified. There is no reason, then, why those being able to reasonably ignore expressions irreconcilable with their religious outlooks should have a claim to suppress them. (The same applies to the reverse situation, of course, religious people having the freedom to express themselves with respect to nonreligious people and views.)

The possibly radical outcome of clinging to a special position for adherents of a religious denomination is neatly illustrated by Cram, referring to the case Wingrove v. United Kingdom, where it was ruled that "In the difficult balancing exercise that has to be carried out in these situations where religious and philosophical sensibilities are confronted by freedom of expression, it is important that the inspiration provided by the European Convention and its interpretation should be based both on pluralism and a sense of values."[375] As he says, "'Balancing' sits oddly alongside established frames of Article 10 [of the ECHR] Jurisprudence that require any interference with expression to be both (i) 'convincingly established' and (ii) based on 'relevant and sufficient' grounds. This is commonly thought to give a presumptive priority to the principle of freedom of expression and a correspondingly narrowed scope for national interference with expressive activity. 'Balance' seems to undercut much of this presumptive priority as virtually all criticism of a religion or the religious practices of its adherents is likely to cause offence and, as such, become eligible to be put onto the scales by national authorities who are best placed to judge the need for restriction."[376] In the most extreme case this might lead to the disappearance of freedom of expression.[377] Indeed, "At bottom, the claim that an individual's freedom of religion is somehow dependant upon (and may be improperly curtailed by) what others say about that individual's religious beliefs effectively allows religious beliefs to dictate what may

[375] Wingrove v. United Kingdom (ECtHR, Application no. 17419/90, 1996).

[376] I. Cram, "The Danish Cartoons, Offensive Expression and Democratic Legitimacy", p. 316. The Court argues both in this case and elsewhere (e.g., Handyside v. United Kingdom (ECtHR, Application no. 5493/72, 1976); Otto-Preminger-Institut v. Austria (ECtHR, Application no. 13470/87, 1994)) that state authorities are in a better position than the Court to assess whether rights should be restricted in light of possible offense.

[377] In the case of Wingrove v. United Kingdom, Judge Pettiti argued, in a separate Concurring Opinion, that both adherents of religious beliefs *and* of philosophical convictions should be protected against offences, but, while all persuasions would thus be treated equally, this would constitute a graver problem: this approach "[…] goes in precisely the wrong direction by broadening and applying to secular ideas the notion of religious offence. Even if it is correct in fact that the misappropriation of secular cultural icons causes equivalent offence to their followers to that caused by blasphemy to religious adherents, the standard at which state intervention is proposed – 'seriously offends the deeply held feelings of those who respect their works' – is even vaguer than blasphemy." I. Leigh, "Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack", p. 60.

be said in the public sphere. This position is extremely difficult to reconcile with modern understandings of liberalism."[378]

10.12 It may be objected to the foregoing that in the case of religion, something people may consider important is at stake, or even something so vital that they would be willing to (violently) oppose laws that would restrict their right to practice it. I have already pointed out why a distinction between religious and nonreligious standpoints is not warranted, but would add here that this problem cannot principally be resolved, neither through my account nor through any other;[379] this issue is not limited to situations in which people appeal to their religious convictions, but applies to any situation where the law conflicts with people's convictions and where they are unwilling to obey the law.

The question then presents itself to what extent states (and, specifically, governments) should be allowed to intervene in practices, whether they be religious or not. This may be answered in the abstract by pointing to the ignore principle, but when this principle is applied, the consequences may vary significantly. Someone who raises his children liberally may not even notice that this principle is used as the standard, while an individual who incorporates religious elements in his children's upbringing may – depending, of course, on the precise nature of this upbringing – be confronted with limitations he may challenge. For example, male circumcision is considered a solemn duty in the Jewish faith (Gen. 17:10-14), and a religious zealot may even go so far as to sacrifice his child, from the conviction that God has ordered him to do so (cf. Gen. 22:1-13). It is clear[380] that both of the practices just mentioned contravene the ignore principle,[381] but – on the basis of traditions that have gradually come to be accepted and the vested interests of advocacy groups – it may in

---

[378] I. Cram, "The Danish Cartoons, Offensive Expression and Democratic Legitimacy", p. 320. I do not, incidentally, agree with the author's way to resolve the difficulties by appealing to values such as tolerance, mutual respect and dignity (*ibid.*), for this is no convincing way to confront them, as will be shown in chapter 13.

[379] Excepting here something I have excluded from the outset, *viz.*, a totalitarian state. In such a state, not only violent opposition to laws but *any* opposition to those in power may be oppressed.

[380] I must anticipate the treatment of the ignore principle in chapter 11 here, but these examples are, I think, extreme enough to be understood without yet having considered the detailed account.

[381] In the case of male circumcision described above, the choice is made by the parent(s). This is significantly different from a situation in which someone decides for himself to be circumcised. This is also the line of reasoning of the Landgericht (district court) of Cologne (Az. 151 Ns 169/11, 2012), condemning male circumcision in the first instance: "Die in der Beschneidung zur religiösen Erziehung liegende Verletzung der körperlichen Unversehrtheit ist, wenn sie denn erforderlich sein sollte, jedenfalls unangemessen. […] Zudem wird der Körper des Kindes durch die Beschneidung dauerhaft und irreparabel verändert. Diese Veränderung läuft dem Interesse des Kindes später selbst über seine Religionszugehörigkeit entscheiden zu können zuwider." ("The violation of the corporal integrity that consists in the circumcision, being part of the religious upbringing, is, even if it should be required, in any event inapposite. […] Moreover, the child's body is changed lastingly and irreparably by the circumcision. This change runs counter to the child's interest to be able to decide for itself, later on, regarding its affinity to a religion.")

practice prove difficult to alter all legislation in order to accommodate the ignore principle. This is yet another example of the confrontation of an *a priori* approach with an *a posteriori* state of affairs.

This *status quo* does not alter the fact that a consistent approach would, in light of the observations made above, entail that the child involved should be protected against harm it cannot reasonably ignore, whether the actions be motivated from religious considerations or not. An exception may be made in cases in which the actions can be justified on the basis of conflicting interests (of the child) that supersede the harm, *viz.*, if the child's health profits from implementing the procedure. In such cases, of course, freedom of religion is no consideration.[382]

10.13 Should one maintain that "[…] religion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. Government should not interfere with our beliefs about religion either by coercion or by persuasion.",[383] I can, in light of what has been said, only concur. The crux of the matter lies, however, in the phrase 'as unaffected by government as possible'; as long as it is not clear what this means, no limits to government interference have been drawn. Laycock himself seems in any event not to want to limit religious freedom to the freedom to *believe* what one wants, as it should also cover religious *practice*: "Government must be neutral so that religious belief and practice can be free."[384] This cannot justifiably be concluded from the former observation, precisely because 'as unaffected by government as possible' has not been qualified, and the step from 'beliefs about religion' to 'religious belief and practice' is obviously not a minor one.

Incidentally, the matter may be considered moot because of the way Laycock defines 'religion': "My conception of religious neutrality includes a neutral conception of religion. That is, any belief about God, the supernatural, or the transcendent, is a religious belief. For constitutional purposes, the belief that there is no God, or no afterlife, is as much a religious belief as the belief that there is a God or an afterlife."[385] It would be hard to see, then, why from such a perspective the ignore principle should not be applicable: citizens are free to believe what they want, but should not induce harm that cannot reasonably be ignored.

It must be granted that here, too, an *a priori* stance to decide matters in every detail would be an illusion, or at least an oversimplification.[386] It is difficult to assess whether proposals such as mine do not suffer, at least in part, from their being embedded within a

---

[382] Incidentally, the practice of male circumcision itself may originally stem from precisely such considerations, but this is no argument for a believer to perform it, as he would appeal to a *nonreligious* reason and defeat the very basis of his (special) appeal.

[383] D. Laycock, "Formal, Substantive, and Disaggregated Neutrality toward Religion", p. 1002.

[384] D. Laycock, "Formal, Substantive, and Disaggregated Neutrality toward Religion", p. 1002.

[385] D. Laycock, "Formal, Substantive, and Disaggregated Neutrality toward Religion", p. 1002.

[386] As Aristotle rightly observes, the same degree of precision is not to be expected in each subject matter (*Ethica Nicomachea*, 1094b).

certain tradition, on the basis of which they may *seem* universally acceptable while their acceptability would in fact be confined to the very domain from which they have arisen. Robert makes an important observation in this regard: "[…] it must not be forgotten that Judeo-Christian thought has forged the Western mentality and that we are more familiar with certain denominations than with others that may shock us by their exterior aspect, their esotericism, or their ostensible attachment to beliefs and rituals that are foreign to our culture."[387] Indeed, "[…] a danger exists that discrimination will arise between old and new religions since all do not exercise the same influence on the national culture and all do not have the same place in our common heritage."[388]

At this point it must be reminded that the starting point, the ignore principle,[389] cannot be forgone, unless, contrary to what I argue here, one should maintain that no necessary (and thus universal) characteristics of liberal democracy are discernible at all. That given does not detract from the fact that the ignore principle is no completely *a priori* principle, meaning that only its basis is indeed universal, a matter that will be taken up in the next chapter.

10.14 A final consideration with regard to religious positions is pertinent. I have only dealt with the behavior of citizens amongst themselves, but the role of the state vis-à-vis individuals or groups of people cannot remain unaddressed in a discussion such as the present one. One may wonder, for example, how one should deal with matters such as the following: should a Muslim woman who is a public servant, or, specifically, a judge, be allowed to wear a headscarf while in function, should a Christian in that capacity be allowed to wear a Christian cross (visibly), and should a Sikh in that capacity be allowed to wear a kirpan[390] (a dagger (baptized) Sikhs are obligated to wear in accordance with their religious tenets)? The perspective from which this question is presented differs from the first, but the way it is answered is the same. Here, too, basic and prescriptive equality, in conjunction with the ignore principle, lead to equal treatment for religious and nonreligious denominations (if the value of this distinction has not already dissipated in light of what was observed above).

---

[387] J. Robert, "Religious Liberty and French Secularism", p. 651. Cf. A. Galeotti, "Citizenship and Equality: The Place for Toleration", p. 588: "The liberal democratic state, as a rule, interferes only when there is evidence of harm done to the person or to society in general. It is far from evident that chador-wearing would be harmful, whereas, say, Catholic symbols (e.g., necklace with the cross) are not so."; p. 593: "[…] it is the fact that the French are accustomed to the cross but not to Islamic headscarves that makes the first quasi-invisible and the second highlighted to them."

[388] J. Robert, "Religious Liberty and French Secularism", pp. 651, 652; cf. S. Bedi, "What is so Special about Religion? The Dilemma of the Religious Exemption", pp. 242, 243, and M. Nussbaum, *The New Religious Intolerance*, pp. 119 and 124-126, where she demonstrates a discrepancy between the treatment of Muslims on the one hand and ultra-orthodox Jews, Jehovah's Witnesses and Christians on the other.

[389] Or, if the ignore principle should not be acceptable, a similar principle.

[390] In addition, Sikhs wear specific attire tailored to their religious duties.

It would be unfair to conclude the chapter thus, for one controversial matter remains: should a liberal democratic state not display an appearance of neutrality, which seems difficult to reconcile with someone's having the right to display a religious symbol? I would respond to this by saying that the ignore principle is no less a criterion here than it is in other matters. Should one really be convinced that a female Muslim judge will reach different decisions if she removes her headscarf in that capacity, that would be a reason to forbid judges to wear them, as the interests of one or more parties involved in lawsuits may then be concerned, but I find it hard to imagine that a causal link would exist between the manifestation and the process leading to the ruling. After all, even if she removes the headscarf, the judge is still a Muslim; should one be worried that her religious convictions are in any sense decisive, adjusting or removing her apparel will do nothing to alleviate this and should one have no such worries, the issue is moot to begin with.

The same line of reasoning can be used in the case of the display of the Christian cross. Only with an appeal to tradition may one fruitfully object to this, and maintain that judges should all have the same appearance, as far as possible, and the wearing of wigs may similarly be pleaded. (I do not mean to say by using 'fruitfully' that I would be convinced by this argument, but see no reason to try to dissuade those who persist in incorporating ceremonial elements into the process, as I consider this a relatively minor matter.) The case of the kirpan differs somewhat from the other two; in this case, the law may forbid carrying certain weapons and if the kirpan meets the requirements to be qualified as such, the Sikh should not be allowed to wear it, as he must be treated equally with those who adhere to another religion and nonbelievers.

The argument that civil servants represent the state as a whole and should *in this role* not express their own views[391] appears to me a valid one, but while it seems to me correct that civil servants are mere executers of state policy,[392] it may, at least in some cases, be questioned whether a display of one's religious view conflicts with the view of the state, for it may be questioned whether such a view exists at all.[393] (This issue will be revisited in section 12.2.) Focusing on such displays is possible, but only from an aesthetic standpoint, meaning that one would argue that it is necessary that the state be represented in a uniform manner. Since civil servants' opinions would, presumably, not be affected by such policies, still being able to cling to any (religious) view, not much would seem to be gained.

I have of course not fully responded to the objection, for the issue of neutrality has not been addressed. However, since chapter 12 is entirely devoted to this topic, I will forestall discussing it until its detailed treatment will be undertaken there.

---

391 P. Cliteur, "State and Religion Against the Backdrop of Religious Radicalism", pp. 146-149.

392 In the case of civil servants operating close to a minister, substantial contributions can be made, but their position is formally still a subordinate one.

393 Governments have views, of course, but identifying such views with the view of the state would, in a liberal democratic state, mean that the state 'changes its mind' periodically, and that (some) religious manifestations may be allowed, but only at times.

10.15 Summary and relation to chapter 11

This chapter was focused on clarifying the meaning of 'harm' and to find the means to balance the interests of those who want to express themselves against the interests of those that may be harmed as a consequence. This has resulted in the ignore principle. Because of the specifics and intricacies of individual cases, it would be an illusion to maintain that a simple principle should suffice. The next chapter is devoted to this issue. Apart from the general theme of harm, I have paid special attention to religious outlooks, maintaining that they merit no special treatment, which I base on three considerations. First, to judge the contents of such tenets requires special expertise legislators may not be expected to have; second, equal treatment of all views means that religious views should be treated equally with all other views; third, 'religion' is not clearly defined, so that any position may be considered religious, rendering the issue of whether religious positions merit a special treatment moot. The position of religious denominations will receive further attention in the next chapters.