

LEGAL REGULATION OF NON-MAINSTREAM RELIGIOUS GROUPS: PERSPECTIVES FROM ECONOMICS AND SOCIAL PSYCHOLOGY

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/s/ Asim Jusić

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ABSTRACT:

In this paper, preliminary theory of the behavior of religious groups is advanced, arguing that basically religious groups fulfill three basic aims: First, the provision of group identity ‚bundled‘ with shared emotions, beliefs and behavioral patterns; second, activities that are meant to sustain mutual cooperation and advance the internal and external credibility of group held religious beliefs, identity and behavioral patterns; and finally, „boundary keeping activities,“ meaning activities related to the preservation of intra-group solidarity and group existence in the face of external or internal pressures.

Relying on a tradition which claims that law is a tool of social control and regulation I describe the rise of legal institutions as mechanisms to solve the problems of uncertainty. Institutions, built as they are against particular social background of values, customs, religion and informal rules, are charged with making binary decisions on what is legal or illegal. In so doing, legal institutions are influenced by social norms which have a psychological impact on legal decision makers (legislators, jurors and judges). In turn, institutions and legal decisions influence social norms themselves.

The work takes as its starting point a sociological claim that legal systems for regulating religious groups judge all non-mainstream religious groups by assessing them according to their relative status, in a Weberian sense of the word, in the social strata of a given society. I extend this thesis by claiming that the status of a given religious group depends on its social distance from what is socially constructed as the mainstream and a potential for disloyalty to the state-backed mainstream norms expressed through law.

The main claim of this work is that legal judgment of non-mainstream religious groups is based on judgment of the three major functions of religious groups posited in the theory of religious groups developed. It is assumed, hence, that the legal judgment of “disloyalty” potential and social distance (that is, ‘status judgment’) is the perception of boundary sustaining, group cooperation and credibility-enhancing mechanisms, which serve as proxies for assessing the (un)acceptability of emotions, beliefs and identities that precede them, when compared against the reference point of law backed mainstream norms.

Analytically, judgments of social distance and disloyalty are in practice intertwined, but can be distinguished, since the judgment of ‘disloyalty’ is normatively stronger, and usually has more immediate practical implications depending on whether the disloyalty is considered to be of such level that it creates (or is perceived as creating) present or future social harm and danger. It is expected that the judgment of disloyalty of a non-mainstream religious group is directly proportional to its non-recognition and a punitive treatment within the legal and social system.

Social distance, on the other hand, is relatively frequent in cases involving new or non-mainstream religious groups, given their ‘deviance from normalcy’. The judgment of ‘social distance’ itself, however, need not imply denials of legal status and rights, especially in cases of small, socially secluded religious groups given they are able to fully internalize the costs of their functions, without imposing any costs on the rest of the society; or in cases of non-mainstream religious groups who have moved, on some scale, closer to mainstream. In other words, the further a group is from what is legally perceived as mainstream on the scale of social distance and the more secluded it is *without* creating perceived social harm and being judged as disloyal,

the more likely it is to succeed with its legal claim. Non-mainstream religious groups that move into the mid-range of social distance receive mixed treatment, depending on whether the legal claims they make encroach on 'mainstream values' (in which case they fail); or whether their claim is 'internalized', that is it concern predominantly the group itself (in which case they are more likely to succeed.)

The theory developed is then applied to three cases, the US, Germany and France. In these three chapters, a historical – institutional analysis of the development of the legal treatment of non-mainstream religions is undertaken in order to explain historical developments using concepts developed in chapter One. In Chapter Two, which deals with the case of non-mainstream religions in the US, the argument I advance is that the American society and law have gone through a slow process of an increase of social and legal toleration of non-mainstream religious groups – from fighting Mormons in 19th century towards legal and to a certain extent also social approval of a religiously inspired behavior of socially distant smaller and secluded religious communities (the toleration of petty claims). Chapter Three is devoted to the analysis of the German “cooperationist” system of regulating religious groups, and the argument advanced there is that the demand for non-mainstream group loyalty is one of the cornerstones behind legal regulatory system. The mainstream norms behind the legal system have not yet produced any strongly felt need to develop mechanisms for strategic change. There were no reasons yet, external or internal, to engage in games of strategic shifts and “acceptance” in a way I elaborated in the chapter on US. In fact, things are likely opposite and can be well combined with the loyalty-Christian culture-protectionism demands posed by the German mainstream. To the extent that homogeneity is or will be reduced in future, it should be rather clear that temptations to play strategic shifts and “acceptance” game will be stronger, while the loyalist-Christian culture-protectionism arguments will gain even more stronghold in order to set boundaries firmly.

The analysis of French laicite and treatment of non-mainstream religions in France is undertaken in Chapter Four. The analysis shows that one of the potent forces behind the treatment of non-mainstream religious groups in France is an attempt to forge social unity and resolve the problem of 'groups within groups' or 'nations within nation,' an idea which has been ingrained in the project of the French Republicanism, secularism and anticlericalism from the beginning.

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Introduction

This thesis, as the title already states, is devoted to the analysis of the legal regulation of what I have called non-mainstream religious groups, using methodology and perspectives of economics and social psychology. It started as a project which attempted to apply economic methodology to issues of regulation of religion and has grown over time beyond its primary ideas¹.

The main reason why this particular subject has been taken was a relative lack of the application of social science insights to the question of the legal regulation of religion, specifically the issue of the regulation of religious groups². Though everyone intuitively understands that religion has many collective aspects, for various historical and methodological reasons the focus of the literature on law and religion was predominantly on the ways in which law affects religious individuals and their rights in a given legal system. The passing of time has – mostly unfortunately – shown that this focus is unsatisfactory and recent research is moving in a direction of paying more and more attention to collective aspects of religious life. On the other hand, recent advances in economics and social psychology helps not only with describing the ways religious groups function, but also with explaining the influence legal and political institutions - alongside the people who run such institutions - have on the decision making process and the relationship between legal institutions and religious groups.

¹ Asim Jusic, “Economic Analysis of the Legal Regulation of Religion in the US and Germany,” LLM thesis, Central European University, 2007 (unpublished, on file with author). Hereafter Jusic (2007).

² See excellent overview of the lack of social science treatment of collective aspects of religion in Slavica Jakelić, *Collective Aspects of Religion : Religion, Choice and Identity in Late Modernity*, (Ashgate, 2010), p. 1-14. Hereafter Jakelic.

The reasons why I have chosen to focus on what I have called non-mainstream religious groups deserve explanation too, alongside the explanation of the use of the term “non-mainstream group.” The term usually used to denote not-so-prevalent religions in a given society is minority religions. But I have chosen not to use it, given its relative inaccuracy. The inaccuracy of this term stems from two reasons, one having to do with the definition of what the majority and the mainstream norms are; the other having to do with the use of the term minority.

The relationship between majority and mainstream norms is not necessarily straightforward. Even assuming democratic political system, social and legal norms governing a particular society do not necessarily reflect the will of the demographic majority. Take, i.e., example of women – although they are demographic majority in many societies, hardly anyone would claim that mainstream norms and laws reflect desires and norms of many women. In other words, those who are in position to set the mainstream norms are not necessarily representing the most. Conversely, to say that a certain religious group is a minority begs a question of border drawing, that is to say, a group is minority but where? Church of Jesus Christ of Latter Day Saints might be a numerical minority in the whole of the US, but it is a clear majority in the state of Utah, where it is certainly influencing mainstream norms. Further, numbers do not necessarily reflect the influence – those mathematically less numerous can also have significant influence on the mainstream norms. Finally, I should add that one of the reasons why I have chosen to focus on non-mainstream religions is that studying the treatment of such groups tells us a lot about those groups themselves, but it also says a lot about the legal system and the society in which these groups live and operate.

Problem of dealing with and analyzing the relationship between law and religious groups are many fold, and the first one is obvious: a definition of what constitutes a religious group. In

chapter One I have developed a particular working definition of religious groups in order to make the analysis tractable, to the extent possible. I have situated the existence and functioning of religious groups around two particularly important issues (while paying attention to others factors) which appear to be common to all of them: identity and uncertainty. Uncertainty here is taken to mean the inability to validate ones claims and the sets of emotions, group identities, rituals and boundaries organized around the life of religious groups is a way of dealing with the phenomena; while identity is simply taken to mean a sense of belonging to a particular group that shares common existential and/or moral beliefs or practices relative to other groups with different beliefs.

Consequently, I have tentatively defined religious groups as groups of people who *a) share, with a varying degree of intensity and emotional commitment, existential and moral beliefs and/or practices that have non-empirical basis and are not prone to challenge from outside the said system of belief and/or practice; b) organize their activity and identity around rituals, rules and symbolic behaviors using particular group cooperative mechanisms in order to produce collective goods and advance their credibility; and c) have, in a varying degree, defined in-group/out of group boundaries in order to sustain intra-group solidarity and the existence and the identity of a group.*

Following this definition and after describing institutional mechanisms that influence life of religious groups in a given legal system, I develop the major thesis of this work. Drawing on Weberian sociological concepts, I argue that the contemporary systems for regulating religious groups judge all non-mainstream religious groups by assessing them according to their *status* in a given social stratification. Going further, I claim that the judgment of the status of a given religious group is based on a perceived group potential for „disloyalty“ to the state; and the

perceived and socially constructed social distance of a given group from what is legally constructed as the „mainstream.”

After explaining the rise of institutions as another mechanism for dealing with uncertainty and the function and effect of institutional decision making on behavior of individuals and groups, I assume that law functions as a tool of social control³ and furthermore claim that the legal judgment of non-mainstream religious groups is based on judgment of the three major functions of religious groups as I have described them above. In short, the legal judgment of group “status”, a “disloyalty potential” and social distance is a judgment based on the perception of group cooperation and credibility-enhancing mechanisms, as well as boundary sustaining mechanisms, which serve as proxies for a decision on the (un)acceptability of emotions, beliefs and identities that precede them, resulting in a positive or more likely negative legal decision.

Of course, judgments of (dis)loyalty and/or social distance are in practice intertwined, but analytically they can be distinguished since the judgment of disloyalty is a normatively stronger one and usually has more immediate practical implications depending on whether the disloyalty is considered to be of such level that it creates (or is perceived as creating) present or future social harm and danger. It is expected that the judgment of disloyalty of a non-mainstream religious group is directly proportional to its non-recognition and a penal treatment within the legal and social system.

Social distance, on the other hand, is present relatively frequently in cases of non-mainstream religious groups given their “deviance from normalcy.” But the judgment of “social

³ On law as a tool of social control, see Donald Black, *The Behavior of Law*, (New York: Academic Press, 1976), p. 2. On relationship between law as a tool of social control and minority religions see James T. Richardson, “Law, Social Control, and Minority Religions,” in Pauline Cote (ed.), *Chercheurs de Dieux Dans L'espace Public* (trans. Frontier Religions in Public Space) (Ottawa: University of Ottawa Press, 2001), p. 139-168.

distance” itself need not imply denials of legal status and rights available to other religious groups, especially in cases of small socially secluded religious groups who are able and willing to fully internalize costs of their functioning without imposing any costs on the rest of the society; and in cases of non-mainstream religious groups who have moved, on some scale, closer to mainstream. In other words, further the group is on a scale of social distance (i.e. the more secluded it is without creating perceived social harm and avoiding being judged as disloyal) from what is legally perceived as mainstream, the more likely it is to succeed with its legal claim. Non-mainstream religious groups that move within the mid-level range of social distance receive mixed treatment depending on whether the legal claim they are making encroaches on mainstream “values” (in which case they fail); or whether their claim is “internalized”, that is it concerns predominantly the group itself, in which case they are more likely to succeed. In that sense, judgments on the status and the unacceptability or legal claims of non-mainstream religious groups is curvilinear.

Finally, building on a simple description that laws generally reflect majority preferences or the will of the group claiming the will of majority, I continue by holding that of necessity the law benefits, in theory or in practice, one group over another. Hence, the final assumption of this work is that law – representing a mainstream values and passions – in order to reduce conflict potential of various religious groups will seek ways to minimize their “identity” differences and will therefore act with the assimilationist bias⁴ in order to allow for *exit* or *covering* or *passing* of the members of socially distant non-mainstream religions. That is to say, the law seeks to “push” members of non-mainstream religions towards either forsaking their group identity and accepting mainstream norms (“exit”); or “toning down” their religious

⁴ Kenji Yoshino, “Assimilationist Bias in Equal Protection: the Visibility Presumption and the Case of “Don’t Ask Don’t Tell” 108 *Yale Law Journal* 487 (1998).

identity (“covering”) for the sake of “normal” communication with mainstream; or behaving like the member of mainstream while sustaining its religious group identity (“passing”).

Moreover, I argue that law seek to discourage *voice* (fight) option of non-mainstream religious groups in an attempt to reduce conflict potential among religious groups and preserve the social stability defined by the mainstream norms. In the process, the law aims at “de-polarizing” groups given that behavior to contrary can further entrench in-group identity, promote “undesirable” behavior and increase the likelihood and severity of conflict. On the other hand, religious groups whose beliefs and practices are in opposition to prevalent ones will show *the resistance bias* seeking either to bent prevalent norms their own way; or, in last instance, to attain the less costly covering or passing strategy, which is to say to try to adjust their practices so that the out-of-group cooperation is more likely and less burdensome relative to their identity which they seek to preserve.

In the rest of the thesis, theoretical assumptions and claims developed in chapter One are applied to three case studies – the US, Germany and France. In these three chapters, a historical – institutional analysis of the development of the legal treatment of non-mainstream religions is undertaken in order to explain historical developments using concepts developed in chapter One.

In Chapter Two, which deals with the case of non-mainstream religions in the US, the argument I advance is that the American society and law have gone through a slow process of an increase of social and legal toleration of non-mainstream religious groups – from fighting Mormons in 19th century towards legal and to a certain extent also social approval of a religiously inspired behavior of socially distant smaller and secluded religious communities. On record, this process was by no means very nice or painless for non-mainstream religious groups. Yet the improvements are obvious alongside changes in institutional and regulatory mechanisms

which the legal system uses to treat communities – there is a clear moving away from direct social and legal prevalence of the Protestant Christianity towards pronouncements of vaguely more inclusive Judeo-Christian culture or a pluralist culture. But the toleration of course remains limited with the mainstream norms – today commonly labeled with a vague term “culture”; as well as the majority preferences, whose religious or religiously rooted secularized practices, alongside governmental interests, define such limits.

In the US case, I claim, the influence of social factors described in chapter One is at their fullest. In a first scenario (assimilationist bias coupled with provision of exit options), when the group itself defies the invitation for exit and remains stubbornly attached to its own ways – as it was the case with Mormons – the mainstream moves towards attacking the main group cooperation mechanisms (i.e. polygamy, economic cooperation, social bonds) which are considered by the mainstream to be a hot bed of group “claim to exceptionalism” and the “Berlin Wall” of boundary that the group has erected between itself and the mainstream. Such moves are meant to break the hope for resistance within the group, provide for exit options and motivate the groups to move towards the assimilation process – these mainstream moves I refer to collectively as assimilationist bias.

In a second social factor scenario, the acceptance of smaller secluded non-mainstream groups follows once the mainstream norms change for *strategic reasons that benefit the mainstream without costs to it*. The example of *Gobitis* and *Barnette* cases involving Jehovah’s Witnesses is the clearest example of what is meant in this context by strategic reasons of the mainstream. The popular opinion pressure and the FDR policy during the WWII were clearly main reasons why unpopular group previously considered suspicious and disloyal and susceptible to persecution both in and outside of the country has ironically enough become a

beneficiary of its own persecution in a sense that the approval of their legal claims was found to be in congruence with (part) of the mainstream interests in proving its own moral superiority over adversaries during both WWII and later on Cold War. *Yoder* case involving Old Order Amish children education further testifies to a fact that there is an increased toleration in American constitutional law (and likely a society) of small, socially distant and secluded non-mainstream religious groups that *place no cost at mainstream*.

Chapter Three is devoted to the analysis of the German “cooperationist” system of regulating religious groups. I argue that marked differences separate German case from the US one, and show deviations from the general model of regulation of non-mainstream groups developed in chapter One. In the German case, moves towards more acceptance and toleration of non-traditional faiths are clearly a result of WWII experiences combined, in a curious manner and with almost paradoxical results, with historical path dependencies, motivated and limited by two social factors and three institutional factors elaborated in chapter One, all to a certain degree intertwined and affecting each other.

On a social side, two important social factors— assimilationist bias and acceptance of non-mainstream group norms for strategic reasons - are less developed in German case than in the US one. First, the mainstream inclination in Germany – in the words of judges and legislators, not necessarily ‘the people’ itself - is not so much to act with assimilationist bias and to provide for exit options for members of unpopular non-mainstream groups, using various methods of pressure if necessary to achieve its aims. Rather, the aim is, first, securing or assuring oneself that a non-mainstream group is *formally loyal or that it formally pledges its loyalty* to the equilibrium and cooperation between the state and religious communities established as a result of history, especially the experience of the WWII. *Loyalty* here basically means that non-

mainstream group, as the Jehovah's Witnesses cases shows, will be asked to prove fidelity to democracy and constitutional rights as defined by the GG and the German elite after the WWII, sometimes even to an absurd degree.

Second, the non-mainstream group norms (and group members) are requested to, in the words of German Constitutional Court, 'confront' (whatever this means) the affirmative influence of Western Christianity expressed through culture and in the daily setting (including public setting). In that sense, one could say that mainstream norms in German case are not fully assimilationist but rather "protectionist" ones, playing a role of a first guardian at the fence.

The second claim about the influence of social factor elaborated in chapter One, holding that the acceptance of some non-mainstream groups follows once the mainstream norms change for strategic reasons that benefit the mainstream and on condition that such change imposes no costs on mainstream and is internalized by the group under scrutiny, is very poorly developed in the German case, at least in the material I have reviewed. Presumably, the reason might be stable homogenous division of religious roles that has governed Germany throughout most of its history once. In other words, the social norms that have become mainstream norms as a result of the German religious and secular history have not yet produced any strongly felt need to develop mechanisms for strategic change of mainstream norms and shifting costs of change to non-mainstream groups. There were no reasons yet, external or internal, to engage in games of strategic shifts and "acceptance" in a way I elaborated in the chapter on US. In fact, things are likely opposite and can be well combined with the loyalty-Christian culture-protectionism demands posed by the German mainstream. To the extent that homogeneity is or will be reduced in future, it should be rather clear that temptations to play strategic shifts and "acceptance" game will be stronger, while the loyalist-Christian culture-protectionism arguments will gain even

more stronghold in order to set boundaries firmly.

The analysis of French laicite and treatment of non-mainstream religions in France is undertaken in Chapter Four. The analysis shows that one of the potent forces behind the treatment of non-mainstream religious groups in France is an attempt to forge social unity and resolve the problem of „groups within groups“ or nations within nation, an idea which has been ingrained in the project of the French Republicanism, secularism and anticlericalism from the beginning. Looking at a side of social factor elaborated in part one – assimilationist bias and acceptance of non-mainstream group norms for strategic reasons – I argue that in the French case the former is fully underdeveloped, while the later is fully developed, both mutually supporting each other in an interesting way. That is to say, the assumption that one is to assimilate in order reach status of “inclusion” in the body of the Republic – irrespective of race and ethnic issues standing in the way - is absolute, demanding full scale assimilation, and not just milder versions of toning down one’s inclinations, rhetoric’s of privatization notwithstanding. In the words of legislators, the aim of assimilation is to achieve social unity and prevent rise of groups within a group and from that assumption “measuring” social distance and anticipating the treatment non-mainstream religious groups can expect to receive is not terribly difficult. The relation is directly proportional, without unnecessary complications.

Given such strong assumptions and assimilationist aim, it is but expected that in the French public and legal space strategic reasons for accommodation cannot be easily supported or argued for, nor they are likely to gain wider acceptance, even if in someone’s opinion they do exist. In other words, the second claim about the influence of social factor I have elaborated in chapter One, holding that the acceptance of some non-mainstream groups follows once the mainstream norms change for strategic reasons that benefit the mainstream and on condition that

such change imposes no costs on mainstream and is internalized by the group under scrutiny, is lacking to a great extent in French case.

As far as the relationship between French state and the non-mainstream groups, things are rather clear. The legal and social heroic push towards turning members of those socially distant groups that have been suspect of creating “groups within groups” or “nation within nation” – i.e. Jews back in 19th century, Muslims today – was or is marked with clearly stated legal and social control efforts aimed at assimilation and a provision of exit options for group members in return for, to be sure, upstream movement in the social ranking, at least in the case of Jews, given that the case of Muslims is more complicated having in mind the history of colonization and the process of what was supposed to be a short-term immigration. In the Muslim case, the last two social processes have probably prevented the assimilation process from functioning properly, though it must be stated that the mainstream was also not interested in it from the beginning, expecting guests to leave. What course events will take in the case of Muslims in France – whether there will be further entrenchment of social distance and indeed conflict with the mainstream or the assimilation will eventually work or whether there some interlocutory governing elite will developing amongst Muslims in France under influence of French state - only time will tell. Much will hinge on a strategic calculation the mainstream makes and the assessment of costs and benefits of each of these measures.

Finally, in the case of “sects” and New Religious Movements, clearly the measures undertaken by the French government were rather harsh ones, exemplifying clear social control and a wholesale fight for preservation of a public order with legal system initiating, from a highest level, protective measures against the “intruders.” The harshness of these measures is indeed difficult if not impossible to understand using some of the concepts I have tried to

develop in chapter One – i.e. group size or the costs that a given non-mainstream group imposes on a mainstream – considering that the size and number of New Religious Movements in France is negligible, alongside the amount of “extraordinary problems” they create for public order. This fact implies that peculiar emotional and motivational forces, which require further research, are at work in the case of French law and society dealing with the New Religious Movements and I suspect laïcité is only one part of the story.

Chapter I Theory of Religious Groups and Institutional Decision Making

Providing a general definition of religion as a concept, a mode of belief, behavior, worldview or a general way of life is likely to be an ungrateful task for number of reasons that immediately suggest themselves if one starts thinking about the whole issue of religion and the influence it might or might not have on life of individuals, groups and whole societies. External diversity of existing “old” religions and the “new” modes of life sometimes referred to (somewhat pejoratively) as “new religious movements,” ; the internal variety of individual and group practices and beliefs professed within “defined” boundaries of religious groups that claim adherence to the same “family of beliefs”; and the almost next to impossible (and therefore tempting and amusing) task of understanding contradictions between what people profess to believe versus what they in fact do and the explanations they give for motivations and underlying emotional urge for doing so. In short, the whole endeavor of even providing generally accepted definition of religion, let alone understanding the whole phenomena, remains elusive and open to criticism from all sides, as it is likely that the definition will either be one sided and under inclusive, because it is, i.e. built on an implicit understanding of religion as monotheistic religion; or because its over inclusive as in cases when religion is defined as a relentless activity and devotion to habits of the heart in which case variety of activities like passion for postal marks or gambling would also count as religion. To illustrate, Merriam-Webster Online Dictionary of English, provides different definitions of religion ranging from: the state of a religious; the service and worship of God or the supernatural; commitment or devotion to religious faith or observance; a personal set

or institutionalized system of religious attitudes, beliefs, and practice; scrupulous conformity; a cause, principle, or system of beliefs held to with ardor and faith⁵.

In spite of elusiveness, given historical pervasiveness and influence of religious beliefs and behavior motivated by it on individual and social life to a various extent in different parts of the world, anthropological, sociological, psychological, political, economic and legal definitions of what religion is are abundant and, implicitly, so are different theories of what religion is and what is its function in a life of individual and society. Each of these approaches focuses on a particular trait of religion and builds however imperfect theoretical framework around it and, to a varying degree, raises its theoretical insights to different levels of generalization with some theories ambitiously trying to explain place of religion in all societies and at all times, while others remain more modest in their claims. Hence, anthropological studies of E.E. Ewans-Pritchard and Mary Douglas generally construct religion as social structure aimed at preservation of groups and societies⁶; while sociological theories, of which Emil Durkheim is probably the best known, emphasize social role of religion as a visible collective solidarity mechanism that defines a particular group by promoting a conception of the sacred⁷.

Psychological theories of Freud, Abraham Maslow and Gordon Allport place emphasis on conscious and sublime processes trough which religion influence behavior, and define religion as a form of personal neurosis and pathology (Freud), while Maslow and

⁵ <http://www.merriam-webster.com/dictionary/religion> (accessed 08.09.2009, 12:40).

⁶ On Ewans Pritchard view of religion see Daniel Pals, "Society's 'Construct of the Heart'" in *Eight theories of Religion*, (Oxford University Press, 2006), p. 229-259; Mary Douglas, *Purity and Danger*, (London: Routledge and Kegan Paul, 1966).

⁷ Daniel Pals, "Society as Sacred" in *Eight theories of Religion*, (Oxford University Press, 2006), p. 85-117. Hereafter Pals.

Allport emphasize the role and position of emotional religious experiences as a fulfillment of psychological needs⁸. Renowned politico-economical and legal theories place religion in a larger context of the system of governance and power relations, especially (but by no means exclusively) in the capitalist society. Max Weber advanced influential “Protestant Ethic and the Spirit of Capitalism” thesis, while Karl Marx, in a well known phrase, defined religions as “opium for masses” and a system of beliefs alienating human beings from their true self and calculated towards the suppression of the dissent of the oppressed classes and the preservation of the uneven distribution of wealth⁹.

The list keeps growing in the second half and especiall towards the end of the 20th century to include feminists like Gayatri Spivak who, inspired by Foucault, place religion in a Western power structure designed to sustain control and discipline bodies, particularly female ones¹⁰; and postcolonial historians of ideas and anthropologists such is Talal Asad, who question the very concept of religion (as well as secularizations) as a social construct of 19th century European science that justified and accompanied, as an ideological fellow traveler, the imperial conquests and process of colonization of the “Third World.”¹¹

Of later, three other theories of religion have also gained a prominent status, a secularization thesis and a religious market thesis. Firstly, a secularizations thesis, relying mostly on examples from European countries, defines religions as a left over from non-

⁸ On Freud’s theory of religion as a neurosis see Pals, “Religion and Personality,” p. 53-84; on Abraham Maslow see *Religions, Values and Peak-Experiences*, (Penguin Books, 1964); Gordon Allport, *Individual and his Religion* (New York: Macmillan Co. 1951).

⁹ Weber’s and Marx’s views of religion see Pals, “A Source of Social Action,” p. 149-192 (Weber) and “Religion as Alienation,” p. 118-148 (Marx).

¹⁰ Gayatri Spivak, *In Other Worlds: Essays in Cultural Politics*, (London: Routledge, 1988).

¹¹ Talal Asad, *Genealogies of Religion: Discipline and Reason of Power in Christianity and Islam*, (Baltimore, Maryland: Johns Hopkins University Press, 1993).

scientific pre-Enlightenment age and holds that as a result of the advent of sciences and the rapid urbanization religion will necessarily fade as a social force and a significant factor in lives of individuals¹². Second important theory is the religious market hypothesis which posits that religious choices are a matter of individual cost-benefit analysis and argue that stifling of the “supply side of religion” – meaning establishment of a privileged religion(s) and legal and economic obstacles for entrance of other religions in the same area – explain lower level of religious vitality in European countries relative to thriving “religious market” in the US¹³. Thirdly, stronger claims of relationship between religion and brain activity, as well as a religion as an evolutionary adaptive complex have recently gained a high momentum¹⁴.

None of the said theories, particularly the secularization thesis and the religious market place theory, have gone without strong criticism. The religious market hypothesis based on rational choice and supply-side theories is criticized for its relative “America-centeredness;” empirical findings that refute its prediction; and its simplistic if reductionist emphasis on a utilitarian, solitary individual analyzed in almost absolute separation from the

¹² Bruce Steve, *God is Dead: Secularisation in the West*, (Blackwell Publishers, 2002). For a more balanced view see Peter Berger, *Sacred Canopy*, infra and Thomas Luckman, *Invisible Religion: The Problem of Religion in Modern Society*, (New York: Macmillan Publishing Company, 1967).

¹³ Rodney Stark and Phillip Bainbridge, *The Future of Religion: Secularization, Revival, and Cult Formation*, (Berkeley: University of California Press, 1985).

¹⁴ For a cognitive science approach to religion see Ilkka Pysaïnen, *On How Religion Works: Towards a New Cognitive Science: Cognition and Culture*, (The Netherlands: Brill Academic Publishes, 2001); on evolutionary approach to religion see Scot Atran, In *Gods We Trust: Evolutionary Landscape of Religion*, (Oxford University Press, 2002) and a discussion infra.

social context and history¹⁵. The “secularization thesis,” on the other hand, was almost proclaimed to be “clinically dead” as theoretically “Eurocentric¹⁶” and empirically refuted on account of globally observable steadiness and indeed the relative growth of religious observance around the globe¹⁷.

Analyzing some of the above given descriptions of religion, one can come out with at least two traits of religious belief system these definitions appear to share. Firstly, religion has emotional and motivational impact on individuals and groups, irrespective of whether one explains this impact in more functional or substantive terms; and secondly, religion has functions in a wider social system, irrespective of how that function is explained. And as cross-cultural anthropological studies show, this is mostly the case. In order to build on these two traits, I take up as a working definition Clifford Geertz’s view of religion as a:

*... (1) a system of symbols which acts to (2) establish powerful, pervasive, and lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.*¹⁸”

¹⁵ For a critique of rational choice approach to religion as a-historical, theoretically impoverished and “America centered” see Roland Robertson, “Global Millennialism: A Postmortem on Secularization,” in Peter Beyer and Lori G. Beaman, ed., *Religion, Globalization and Culture* (Martinus Nijhof Publishers, 2009), p. 25-27. For a methodological critique of rational choice approach to religion from within the economic discourse, see James D. Montgomery, “Contemplations on the Economic Approach to Religious Behavior,” (1996) *American Economic Review, Papers and Proceedings* (on file with author). For a revealing critique of how rational choice theorists when trying to prove the “religious vitality and variety” in the US (and Canada) tend to mischaracterize as “other non-mainstream groups” groups that are de facto misclassified Christians and hence not really “diverse” relative to the mainstream, consequently producing a misguided image of “the great diversity”, see Lori G. Beaman, “The Myth of Pluralism, Diversity and Vigor: the Constitutional Privilege of Protestantism in the US and Canada,” *Journal for the Scientific Study of Religion* 42:3, (2003), p. 311–325, at 313.

¹⁶ For empirical evidence and theoretical explanation claiming that Europe as an “exceptional case” when it comes to high levels of social secularization relative to all other parts of the world see Grace Davie, *Europe: The Exceptional Case* (Darton, Longman and Todd, 2002), p. 2-27.

¹⁷ On the general criticism of the secularization thesis see Roland Robertson, “Global Millennialism: A Postmortem on Secularization,” in Peter Beyer and Lori G. Beaman, ed., *Religion, Globalization and Culture* (Martinus Nijhof Publishers, 2009), p. 27 and infra. On empirical evidence documenting strength and growth of religion worldwide see Grace Davie, *Europe: The Exceptional Case* (Darton, Longman and Todd, 2002), p. 27-53 (on the strength of religion in the US), p. 54-83 (religious changes in Latin America, especially the growth of Pentecostalism) and p. 84-111 on the influence of religion in Africa.

¹⁸ Clifford Geertz, *The Interpretation of Cultures*, (Basic Books, 1973), p.90.

Moreover, Geertz went to on to explain the influence of religion as a cultural system, that is engaged in an interpretative study of the role of religion in a cultural-societal sphere, providing much ethnographic evidence for a claim that religious moods and norms are basically socially constructed and changing over time, and the exact definition of “costs and benefits” of engaging in religious behavior makes sense only against the background of particular norms and institutions of a given society¹⁹.

However, it would be difficult if not impossible to engage in a more comprehensive social, legal and institutional analysis of interplay between law and religion only following Geertz’s definition for basically two reasons. First reason has to do with ‘narrowness’ of Geertz’s definition of religion, however important and influential, as it basically leaves the social influence of religion somewhat under explained and out of the big picture. The reason for this is, as Talal Asad explains, is Geertz’s bias towards conceptualizing religion, in a tradition that draws on Immanuel Kant, as purely belief system which concerns itself with meaning and is able to withstand rational and naturalistic criticism. As Asad argues, in the tradition within which Geertz operates religion is divorced from the social reality and seizes to be a set of practical rules intermingled with process of defining power and knowledge and becomes an abstract (and by definition vague) set of thought and beliefs divorced from the societal processes from which it emerges and which, in turn, influences²⁰. As Tayob argues, in Geertz’s approach defining religion as social action could not be regarded as one of the core characteristics of religion, which is peculiarly modern attitude that is successful in

¹⁹ Geertz, “Religion as a Cultural System,” in *The Interpretation of Cultures*, supra.

²⁰ Talal Asad, *Genealogies of Religion: Discipline and Reason of Power in Christianity and Islam*, (Baltimore, Maryland: Johns Hopkins University Press, 1993).

explaining only some variations of Christianity in particular places and times, but likely unsatisfactory explanation of religion in most of the world most of the time²¹. From this deficiency of Geertz's definition it follows that its acceptance as a guiding light for analyzing relationship between religion, society and institutions would create insurmountable analytical problems and renders most of the behavior of various religious groups and individuals inexplicable on a societal level and therefore prone to quick mystification and/or reductionist oversimplifications.

Hence, a particular working definition of religious groups is required in order to make the analysis tractable and in this work the definition of religious groups is situated around two particularly important issues (while paying attention to others factors) which appears to be common to all such groups: identity and uncertainty. Uncertainty here is taken to mean the inability to validate ones claims and the sets of emotions, group identities, rituals and boundaries organized around the life of religious groups is a way of dealing with the phenomena; while identity is simply taken to mean a sense of belonging to a particular group that shares common existential and/or moral beliefs or practices relative to other groups with different beliefs.

Consequently, one can tentatively define religious groups as groups of people who *a) share, with a varying degree of intensity and emotional commitment, existential and moral beliefs that have non-falsifiable or otherworldly basis and are not prone to challenge from outside the shared system; b) organize their activity and identity around rituals, rules and symbolic behaviors using particular group cooperative mechanisms in order to produce*

²¹ Abdulkader Tayob, *Islam in South Africa: Mosques, Imams, and Sermons*, (Gainesville: University Press of Florida, 1999) p. 10 quoted in Edward E. Curtis *Islam in Black America: Identity, Liberation, and Difference in African-American Islamic Thought*, (SUNY Press, 2002), p. 3, n. 5.

*collective goods and „shared“ goods; and c) have, in a varying degree, defined in-group/out of group boundaries in order to sustain intra-group solidarity and the existence and the identity of a group*²².

The rest of this chapter is organized as follows. Firstly, I explain three major phenomena motivating activities of religious groups, namely the management of emotions, beliefs and a provision of group identity; activities that are mean to advance the credibility of group held religious beliefs; and the „boundary keeping,“ by which I mean the activities meant to preserve intra-group solidarity in face of external pressures or competition. Throughout, these functions are illustrated by means of examples in order to stress differences in ways in which these functions play out in the social life of “traditional” and “new” religious groups.

Secondly, the analysis of institutional decision making process is undertaken. First, I explain the rise of institutions as uncertainty problem-solving mechanisms built against a particular social background of values, customs, religion and alike informal rules and analyzes some major function of institutions. Finally, I critically analyze some historical foundations and more importantly theoretical views that have informed contemporary legal secularism and church –state separation, with a particular attention to works of Thomas

²² Somewhat similar definition is offered in Eric Posner, “Legal Regulation of Religious Groups”, *Legal Theory* 2 (1996), p. 35, “Religious groups are a group of people who (1) share certain important beliefs about morality which have a nonhuman, otherworldly basis; (2) benefit from „collective goods“ provided by the religious groups, both spiritual and communal, but also material goods; (3) enter (or decline to leave) the group in order to attain these benefits; and (4) coordinate behavior through the use of non-legal sanctions such as exhortation, criticism, ostracism and so on.” Posner defines group membership in more individualistic terms of opportunity of exit and entry, while the definition I use is more a „group oriented“ one, since most members of religious groups usually do not either „choose“ to enter nor they defect according to cost-benefit analysis; membership in religious groups is more frequently a matter of happenstance (family, country and so on) than a conscious choice, though it could be that too; moreover, the stance of out-of-group members towards religious „in-groups“ is also more complicated than Posner allows for. Also, Posner does not discuss in detail the role of emotions in the life of religious groups.

Hobbes and John Locke. T Adam Smith and David Hume, James Madison and Thomas Jefferson.

Final part draws all of the above material together in order to construct the major hypothesis of this work: the contemporary systems for regulating religious groups judge all non-mainstream religious groups²³ by assessing them according to their *status* in a given social stratification. The judgment on the status of a given religious group is based on a perceived group potential for „disloyalty“ to the state; and the perceived and socially constructed social distance of a given group from what is legally constructed as the „mainstream.“. Further, building on the previous work of James T. Richardson and others, argue that three legal and institutional mechanism have a strong effect on institutions-religious group’s relations, and these three institutional mechanisms for the purposes of this work are taken as *given*²⁴. *First institutional mechanism* is the level and the nature of the “legalization” of works of religious groups and the (de)centralization of the level of regulatory decision making. *Second institutional mechanism* is the level of judicial influence on decisions regarding status of religious groups, as well as the level of judicial autonomy and discretion in the process. *Third institutional mechanism* is the nature and the socially

²³ Throughout the work, the term “non-mainstream religious groups” refers to all groups, irrespective of the historical longevity of their presence in a given country jurisdiction, whose belief, practices and identity defer significantly from what is considered to be a “mainstream.” What is a “mainstream” is simply taken to be a legal construct and an expression of the will of those who are currently deciding the issue which is why the very judgment of what is legally “right or wrong” is taken to be socially constructed, see, for example, Donald Black, *Social Structure of Right and Wrong* (New York: Academic Press, 1997). Hence, i.e., despite their long standing presence in the US, Mormons, Jehovah’s Witnesses, Native American religions etc. are, for my purposes, considered “non-mainstream” given – however weak or weakening in the process of assimilation - social perception of the divergence of their identity, practices and beliefs from the mainstream; so are Muslims, Jews and other “cults” in France; Jehovah’s Witnesses, Muslims, and the “sects” in Germany. For a comprehensive treatment of “new religious movements” see James R. Lewis, ed., *The Oxford Handbook of New Religious Movements* (Oxford University Press, 2003).

²⁴ The three factors are drawn from James T. Richardson, “Religion, Law and Human Rights“ in Peter Beyer, ed., *Religion, Globalization and Culture* (Martinus Nijhof Publishers, 2009), p. 407-423.

constructed structure of judicial argumentation and evidence in cases dealing with the non-mainstream religious groups.

Finally, building on a simple description that laws generally reflect majority preferences or the will of the group claiming the will of majority, and of necessity the law benefits, in theory or in practice, one group over another, last assumption of this work is that the law – representing a mainstream values and passions - will seek ways to minimize “identity“ differences and will therefore act with the assimilationist bias²⁵ in order to allow for *exit* or *covering* or *passing* ; and will further seek to discourage *voice* (fight) option of non-mainstream religious groups. In the process, the law will seek to “de-polarize” groups given that behavior to contrary can further entrench in-group identity, promote “undesirable” behavior and increase the likelihood and severity of conflict. On the other hand, religious groups whose beliefs and practices are in opposition to prevalent ones will show *the resistance bias* seeking either to bent prevalent norms their own way; or, in last instance, to attain the less costly covering or passing strategy, which is to say to try to adjust their practices so that the out-of-group cooperation is more likely and less burdensome relative to their identity which they seek to preserve.

1.1 Emotions, beliefs and religious identity

It appears obvious and redundant to try and prove that religiously-inspired behavior relies, to a varying degree, on underlying beliefs that act as motivational factors and instill (as Geertz’s definition of religion goes) moods and motivations that appear „uniquely

²⁵ Kenji Yoshino, “Assimilationist Bias in Equal Protection: the Visibility Presumption and the Case of “Don’t Ask Don’t Tell” 108 *Yale Law Journal* 487 (1998).

realistic.“ Explaining the whole background of religious beliefs, the way they function within groups, emotions they inspire and actions they generate is a topic well beyond the present work and a subject of many contradicting and competing theoretical explanations. For purposes of this study, in addition to prior sociological work on this topic, I build mostly on two largely complementary theories, evolutionary theory of religion²⁶ and a recent research on the effects of quests for meanings, emotions and values on decision-making²⁷ developed in behavioral economics in order to show the connection between beliefs, emotions and group identities as a function of individual and group psychological forces and the decision making process.

Evolutionary theory of religious beliefs and the quest for meaning

Evolutionary approach to religious beliefs and emotions

Evolutionary theory of religion, following a long standing tradition stretching all the way back to Durkheim, Malinowski and Darwin, among others²⁸, posit religion as an adaptive strategy developed in the course of evolution as basically a survival-enhancing mechanism providing the explanation for „inexplicable events“ and magical beliefs in ability

²⁶ On evolutionary approach to religion see Scot Atran, In *Gods We Trust: Evolutionary Landscape of Religion*, (Oxford University Press, 2002). For further theoretical inquiries and anthropological studies drawing on evolutionary and neuropsychological research in an attempt to explain intra group cooperation and the behavior of religious groups towards nonmembers see Richard Sosis, and Candace Alcorta “Signaling, Solidarity, and the Sacred: The Evolution of Religious Behavior,” *Evolutionary Anthropology* 12, p. 264-274 (2003); Richard Sosis, “Religious Behaviors, Badges, and Bans: Signaling Theory and the Evolution of Religion” in: *Where God and Science Meet: How Brain and Evolutionary Studies Alter Our Understanding of Religion*, Volume 1: Evolution, Genes, and the Religious Brain, ed. Patrick McNamara, p. 61-86, Westport, CT: Praeger Publishers (2006); Candace Alcorta and Richard Sosis “Ritual, Emotion, and Sacred Symbols: The Evolution of Religion as an Adaptive Complex” *Human Nature* 16, p/ 323-359 (2005). On evolutionary economics approach to religion see Joseph Heinrich “The evolution of costly displays, cooperation and religion. Inferentially potent displays and their implications for cultural evolution,” Max Planck Institute for Economics Papers on Economics and Evolution, available at <https://papers.econ.mpg.de/evo/discussionpapers/2007-21.pdf> (downloaded Sept. 18, 2008, 12:40).

²⁷ George Lowenstein, *Exotic Preferences: Behavioral Economics and Human Motivation*, (Oxford University Press, 2007).

²⁸ See Candace Alcorta and Richard Sosis “Ritual, Emotion, and Sacred Symbols: The Evolution of Religion as an Adaptive Complex” *Human Nature* 16, p. 323-325 (2005) for an overview of previous work.

to control natural force; and a system of providing cooperative mechanism for human groups (i.e. tribes, clans and so on) under conditions of struggle for resources against nature and the competing groups through means of „costly signals.“ Such costly signals included face-scarves, particularly painful initiation rituals like mutilation, wearing of self-created masks as a sign of belonging to group and so on. Costly signals, in short, become norms in order to serve as means of preserving group cohesion and enhancing mutual cooperation for the sake of group survival, providing resources for mutual altruism and cohesiveness. Nevertheless, theory of religion as *just* costly signals would not fully explain survival of religion (and groups adhering to religious precepts) across time, since the change in circumstances (i.e. abundance instead of scarcity of resources, no competitive external pressure etc.) would make any religious belief unnecessary - which is presently not the case.

Cross-cultural studies show that the four general traits shared by systems that can be (with some degree of approximation) termed „religious“ are non-variable beliefs and counter-intuitive concepts; communal participation in the costly rituals as a way of assuring group continuity; separation of the sacred and profane and the differential attitudes towards the former and latter; and a tendency towards transmission of these beliefs to younger generations, usually during the period of adolescence. The defining difference between religion and other non-religious beliefs is the appeal of religious beliefs not to the rational side of human beings, but to the emotional side²⁹. The emotional appeal is present in all of the above activities defined as four general traits, in a degree that varies both individually and across groups. Emotions aroused can be both positive (joy, happiness, etc.) and negative

²⁹ Candace Alcorta and Richard Sosis “Ritual, Emotion, and Sacred Symbols: The Evolution of Religion as an Adaptive Complex,” *Human Nature* 16, p. 325, 333-340 (2005).

(anger, disgust, fear etc.) and are connected with evaluation and judgment of both one's own behavior ("self-focused evaluations") and the behavior of others ("other-focused evaluations") with regards to some commonly observed group norm or the norm which the evaluator believes it should be observed by everyone in a particular circumstances³⁰.

Experimental evidence confirms this intuitive claim. In a repeated Ultimatum Game, for example, individuals with stronger preference for "fairness norms" increase their offers after finding out that their low offer in a first round was rejected as "unfair" – in other words irrespective of material gains and without the possibility of incurring sanctions, their preference for fairness triggers "self-evaluating" emotion of guilt given that the norm has not been observed according to information from the other side³¹.

The relationship between emotions as evaluations and the observance of norms is even stronger when it comes to emotions evaluating behavior of others with respect to some norm ("other-focused evaluations"). In spite of rational choice predictions, experiments with public good games show that a significant number of individuals are willing to inflict punishments on others in response to violations of group norms, with high costs and almost no benefit to the "punishers" themselves (so called "altruistic punishment."³²) The most significant "other evaluating" emotions connected with the punishment for group norm violation were anger, contempt and disgust with subtle difference. Anger was found to be an emotion primarily connected with violations of one's personal rights, while contempt and disgust are predominantly connected with the violation of community standards and customs

³⁰ Timothy Katelaar, "The Role of Moral Sentiments in Economic Decision Making" in *Social Psychology and Economics*, David De Cremer, Marcel Zeelenberg and J. Keith Murnighan, eds., (Lawrence Erlbaum Associates, 2006), p. 97-116.

³¹ Id., p.103-104.

³² Ernst Fehr and Simon Gächter, "Altruistic Punishments in Humans," *Nature*, vol. 10 (2002), p. 137-140.

(contempt) and normative standards (disgust), particularly those standards connected with religious traditions³³.

Moreover, among other things, emotions serves to mobilize and allocate resources (strong emotions mobilize or inhibit action) and functions as a communication system (expressing, in word or deed, one's feelings). Emotions precipitate and guide decision making process³⁴. While the discussion on the role of influence of emotions on decision making and their general relationship with the idea of rationality is far from closed, it seems that strong case can be built for an argument that without a prior emotional attachment there is no rationality to step in order to "make the decision." Same can be said about the effect of normative values (hardly a stranger to religion) on decision making – normative values tend to have same impact on decision making (rationality) as affects and, as cognitive scientists argue, values and emotions seem to be inextricable from another.³⁵ They are "packaged together" in human brains and hence cold rational Dr. Strangelove is unlikely to appear in reality.

With regards to specifically religious experience and the emotions and values that are compounded with this experience, the neurobiological and neuroeconomic evidence shows that for a religious person observing, for example, a cross increases arousal in the limbic system of, a part of the brain in which emotions are generated, which in turn adds to the

³³ P. Rozin, L. Lowery, S. Imada and J. Haidt, "The CAD triad hypothesis: A mapping between three moral emotions (contempt, anger and disgust) and three moral codes (community, autonomy, divinity)," *Journal of Personality and Social Psychology*, 76 (1999), p. 574-586.

³⁴ For an overview of the influence of affect on decision making process see Rik Pieters, G.M. and W. Fred van Raaij, "The Role of Affect in Economic Behavior," in W. Fred van Raaij, Gery M. van Veldhove, Theo M.M. Verhalen, and Karl – Erik Warneryd, eds., *Handbook of Economic Psychology* (Amsterdam, North Holland, 1987). For a further discussion on the role of normative and affective factors in decision making process and a rejection of the hypothesis that affects and normative values undermine rationality see Amitai Etzioni, *The Moral Dimension: Toward a New Economics*, (Free Press, 1988), p. 93-113.

³⁵ Amitai Etzioni, *The Moral Dimension: Toward a New Economics*, (Free Press, 1988), p. 105.

“truth quality” or the “truth impact” of a symbol onto the individual – the experience appears to be uniquely “real” with a tendency to remain “ingrained” in personal memory³⁶. Since limbic cortices that generate emotions are uninfluenced by conscious, they are more difficult to control, memorable and more easily observable for outsiders’ though, i.e., changes in facial expressions communicating the underlying change in emotions³⁷.

The intimate connection between religion and emotions is hardly a news, so much so that theorists like William James or Friedrich Schleiermacher, among others discussed above, have devoted most of their attention to emotional experiences aroused by religiously inspired “oceanic feelings,” while contemporary theories inspect in historical and anthropological fashion varieties of emotional experiences found across many religions, Buddhism, Hinduism, Christianity, Islam, etc.³⁸. Furthermore, several experiments confirm that experiences connected with religious symbols and rituals are responsible for triggering a dopaminergic reward system in the brain, which causes production of dopamine, a natural neuromodulator responsible for feelings of satisfaction and happiness and a motivator of locomotive activity. At a same time and depending on context, same symbols and rituals arouse amygdala, part of the brain responsible for quick responses to threats and dangers, which triggers whole series of neuroendocrine events. However, the prefrontal cortex still plays the primary role in the decision making process regarding responsibility, impulse

³⁶ Richard Rappaport, “The Sacred in Human Evolution,” *Annual Review of Ecology and Systematics*, 2, (1971), p. 23-24.

³⁷ Richard Sosis, “Religious Behaviors, Badges, and Bans: Signaling Theory and the Evolution of Religion” in: *Where God and Science Meet: How Brain and Evolutionary Studies Alter Our Understanding of Religion*, Volume 1: *Evolution, Genes, and the Religious Brain*, ed. Patrick McNamara (Westport, CT: Praeger Publishers, 2006), p. 76.

³⁸ For an overview see John Corrigan, “Introduction: the Study of Religion and Emotion” in John Corrigan, ed., *Oxford Handbook of Religion and Emotions*, (Oxford University Press, 2008), p. 3-14.

control and moral beliefs. Hence, emotions precede the decision making and turn it into an almost “automatic process,” yet the availability of control still lies with the upper rational functions³⁹. The emotions lurking behind a religiously motivated behavior resolve to a certain extent the “commitment problem⁴⁰” – sustainment of behavior in absence of both evidence and observable costs and benefits connected with the behavior; and tend to be strengthened when shared with the group, consequently providing for the construction and solidification of group identities.

As Berger notes, religious worldviews and communities, especially the theistic one, through shared beliefs instill in members emotions of belonging and self-esteem and provide psychological resources for self-actualization and self-transcendence. Membership in a number of other non-religious groups may inspire the development of the „public self“ – that is a self loosely defined as a set of beliefs and behaviors based on more instrumental cost benefit grounds. Religious groups appear extraordinarily successful in developing a „private self“ that functions according to self-affirming beliefs sustainable even in cases when groups fall apart. Private self in this context means that the private devotion remains stable absent encouragement of the group and sometimes in the presence of a wholesale disparagement in hands of others⁴¹. This „privatized self“ aspect of the religious identity seems to partially explain why religion inspires „greater loyalty“ relative to other worldviews and ideologies⁴². It might also explain the prevalence of religious conflicts and their apparent intractability

³⁹ Candace Alcorta and Richard Sosis “Ritual, Emotion, and Sacred Symbols: The Evolution of Religion as an Adaptive Complex,” *Human Nature* 16, (2005), p. 323-325.

⁴⁰ Robert Frank, *Passions within Reason: The Strategic Role of Emotions*, (New York, W.W. Norton, 1988).

⁴¹ Peter Berger, *The Sacred Canopy*, (New York: Anchor, 1967), p. 37-38.

⁴² Further see Mark Jurgensmeyer, *The New Religious War: Religious Nationalism Confronts the Secular State*, (University of California Berkeley Press, 1993).

once they occur – if the whole conflict would involve “solely” identifiable material interests or some other type of scarce resources amenable to some sort of resolution than the conflict resolution would appear much easier than in the case when the resolution requires affecting privatized and strongly held beliefs.

Quest for Meaning

What I have argued so far is that emotions aroused as a result of the joining communal rituals or symbolic religious behavior have developed, to a certain extent, as a result of the evolutionary developments meant to enhance group survival function through its “stickiness.” There is, however, a rather large part of the human activity that goes beyond somewhat functionalistic explanations of religion as just “survival enhancing mechanism”: the quest for meaning. The quest for meaning appears to be a uniquely human activity as we are not presently able to tell whether plants or animals are concerned with philosophical questions such as “what is the value of life given that the death is inevitable”; the “true self question” (who am I?); or the questions of the nature of justice, ethics, truth and alike. Having however unpersuasive answers to these dilemmas - assuming one cares about them as dilemmas since it is not obvious that anyone should - can also be a “survival enhancing mechanisms” in a sense of, i.e., improving the quality of life and so on; but then again they need not be. In a contemporary satiated society, well taken care of individuals need not worry about the survival as many previous generations had to; but the questions of meaning is still being raised over and over again (and that almost across all societies irrespective of their level of economic development with different answers). To understand how religion fits and

deals with the question of meaning, tentative interpretations of the sorts of behavior the “quest for meaning” inspires are in place.

Generally speaking, having a response to admittedly infinitely variable questions of the individual meaning in life resolves several types of uncertainties inherent in human existence, two of which are relevant here given their social impact: question of the uncertainty of preferences; and the question of the social and temporal self-extension⁴³.

Uncertainty over preferences

Question of uncertainty over preferences is basically a question of what is it that the one wants or should want given circumstances. Beyond the necessary non-negotiable biological needs, many if not most people know what they want and remain relatively certain that what they want is a right (or good) thing for them, throughout the life many tend to change their opinions either as a result of experiences, positive or negative; or as a result of change resulting from introspection and self-reflective process particularly in situations of existential stress and change (adolescence, aging, death of loved ones, sickness, addictions etc.) Various systems of behavior and belief – including religious systems– suggest themselves as a resolution to a question about what to do or (in moralistic terms) what should be done in a given situation and are, more often than not, received from external sources such as family, peers, larger environment, and tend, over time, to become embedded or internalized and a “part of self.”

Religious systems, in other words, act as preference-organizing mechanisms and

⁴³ George Lowenstein, “Economics of Meaning“ in *Exotic Preferences: Behavioral Economics and Human Motivation*, (Oxford University Press, 2007), p. 36-54. Two other types of uncertainties Lowenstein cites are sense-making and the assertions of individual self-actualization and freely willed acts. While they are certainly important, they bear much more influence on an individual level while my focus is on a group level.

therefore information processing mechanisms, since the organization of preferences logically leads to different evaluations of various incoming information. By the same token, they operate as constraints since pattern of behavior in one direction resulting from a specific process of information evaluation by definition excludes (or at least tends to exclude) other patterns⁴⁴. When aggregated on a collective level (a sum of individuals) the decision making process influenced by religious emotions, beliefs, values and stabilizes behavioral expectations and patterns on a part of self and others which creates a collective identity of “we” (or “our” behavior) whose distinct qualities can be different from qualities of the individuals of which it consists.

Psychological and sociological studies point to much evidence for this claim. For Hans Mol, stabilization of the group and individual identity is *the* psychological function of religion⁴⁵, while Niklas Luhmann, in a more sociological fashion, posits religion as one of social sub-systems operating within the larger social environment as an uncertainty resolving and complexity decreasing mechanism which codes “outside” information according to its own binary process of separating information into “sacred/profane” boxes⁴⁶. Despite their different approaches, the process they describe looks remarkably similar. All group psychological processes are fundamentally understood as dialectical processes of differentiation v. integration. Integration is a process by which current information is integrated into a coherent worldview – i.e. the existence of the world is explained by referring to God’s will, immovable first mover, dualistic interplay of Jin and Jang, etc.; and

⁴⁴ On the role of affect and normative values as information selecting mechanisms see Amitai Etzioni, *The Moral Dimension: Toward a New Economics*, (Free Press, 1988), p. 102-108.

⁴⁵ Hans Mol, *Identity and the Sacred: A Sketch for a New Social-Scientific Theory of Religion*, (Oxford University Press, 1976).

⁴⁶ Niklas Luhmann, *Religious Dogmatics and the Evolution of Societies*, (New York: Edwin Mellen Press, 1984).

from their own all the new information and changes (behavior, beliefs, etc.) across the time are judged on the scale of whether they adhere to already integrated view (or whether there is a potential for integrating „new“ in to old identity content after some censorship or reinterpretation). Integration process satisfies group and individuals need for stability and safeguards against new and unknown.

When the new information or behavior cannot (or will not be) integrated, the information will be rejected - the process of differentiation. In short, apart from acting as preference – organizing mechanisms, religious group identities, by the same token, organize and „process“ the incoming information through means of differentiation, rejection or integration with the previously existing beliefs – but within this process there need not be anything “instrumentally rational.” Much depends on convictions and practices, strength with which they are held, and the context in which information processing takes place, and it is now almost common thing among psychologists to argue that the processing of information is reference-dependant⁴⁷.

Given that group identities resolve the problem of preference uncertainty and provide a means for judging new information by so stabilizing the identity, that leaves a final

⁴⁷ On reference-dependency of preferences, see Daniel Kahneman and Amos Tversky, A. (1979), ‘Prospect theory: An analysis of decision under risk’, *Econometrica* 47(2), (1979), p. 263–291. Model of reference dependant preferences can be found in B. Koszegi, B. and Matthey Rabin, M. , “A model of reference-dependent preferences”, *Quarterly Journal of Economics* 121(4), (2006), p. 1133–1165. On an extremely interesting behaviorally informed theory of Islamic revival see Jean-Paul Carvalho, “A Theory of Islamic Revival,” Oxford University Department of Economics Discussion Paper, (March 2009) paper n. 424, on file with author (arguing that, among Arab-Muslims, the emotions of envy towards the economic and military success of the West as well as the perception of a lower status and a continuous deprivation combined with the failure of various more secularly oriented political ideologies such as socialism and pan-Arabism have contributed to the resurgence of Islam quickly undoing the vast secularization of Arab societies during most of the XXth century. Moreover, according to the formal behavioral model Carvalho develops, in terms of future cultural and economic competition of the Muslim world relative to other civilizations, only two types of “cultures” survive: one morally and culturally permissive, the other (Muslim one) less permissive and “group oriented”).

question: where does this knowledge come from? There are many interesting intricacies in the philosophy and the sociology of knowledge generally, the most famous being Wittgenstein's claim on cultural dependency and the lack of any foundations of knowledge at all, which is to say that no knowledge can be held with certainty; ironically this is a brute fact and a starting point of religious belief⁴⁸. Notwithstanding the religious beliefs claim of deeper roots (revelation, holy book, institutional authority, sacred or revered person, set of traditional rituals, etc) it suffices for my purposes to suppose that most knowledge is socially generated or culturally constructed⁴⁹ and transferred through sources like family, relevant religious groups, wider culture, society, peers etc⁵⁰.

With that in mind, one has to distinguish the most important trait of (some) religious beliefs that separate it from almost all other sorts of knowledge⁵¹: infallibilism⁵². Infallible belief basically implies invulnerability to challenge from the sources outside of the system belief and for the religious belief specifically implies that within itself belief has to be based

⁴⁸ Ludwig Wittgenstein, *On Certainty*, (New York, Harper 1969), ed. by G.E.M Anscombe and G.H. Wright. This leads to a further irony discussed by commentators of relationship between Wittgenstein's philosophy and religious beliefs: if knowledge generally is groundless and the value of evidence marshaled to support knowledge is consequently dubious and assumptions-dependant, then basically religious beliefs stands equal and somewhat hostile to other types of belief system, religious and a-religious alike, see Yong Huang, "Foundations of Religious Beliefs after Foundationalism : Wittgenstein between Nielsen and Philips," *Religious Studies*, 31 (1995), p. 251-267; for criticism of this view see "Huang on Wittgenstein on Religious Epistemology", *Religious Studies*, 34 (1998), p. 81-89. For a further overview of economic, sociological and philosophical theories of knowledge see Russell Hardin, "Ordinary Knowledge," in *How do You Know*, (Princeton University Press, 2009), p. 1-25 (here after Hardin, 2009).

⁴⁹ Hardin (2009), "Ordinary Knowledge," supra. In terms of social constructivism, the process of learning from social sources is referred to as a primary and secondary socialization, depending on whether one talks of family (primary level) or other levels. Primary and secondary socialization are embedded with different degrees of emotional charge connected with the experience, primary level being emotionally much stronger and less prone to changes, see Peter Berger and Thomas Luckmann, *Social Construction of Reality: A Treatise in the Sociology of Knowledge*, (New York: Anchor Books, 1966), p. 129-147.

⁵⁰ See Darren Sherkat, "Religious Socialization: Sources of Influence and Influences of Agency," in Michelle Dillon, *Handbook of the Sociology of Religion*, (Cambridge University Press, 2003), p. 151-163.

⁵¹ As history shows, systems of beliefs coming from purely non-religious sources can assert themselves with equal strength and claim invulnerability to challenge, various types of nationalisms and political ideologies are best proof of that.

⁵² Russell (2009), p. 135-160.

on an act (socially transmitted, but also a result of a pure individual choice) that proceeds with believing not because of evidence but because of the lack of evidence and in spite of it – hence in principle excluding the possibility of exchange of “opinions” (roots of Richard Rorty’s conversation stopper metaphor). Infallibilism suffers problems such are the sustainment of the credibility of communal sources of belief lacking evidence, dealing with inconsistencies within the belief system itself and ensuring sincerity within the group⁵³; as well as a problem of engaging with fallibilistic belief (i.e. science) and other infallibilistic belief system (other religious beliefs).

A cautionary word is in place here. By using the term “infallibilism” I do not mean to enter a realm of a debate between science, presented as an endeavor based on the premises of falsification and testing of claims, and religion, which is often portrayed as extremism-prone nonnegotiable system of convictions. As history shows, systems of thought and behavior coming from purely non-religious sources can assert themselves with equal strength and claim invulnerability to challenge. Twentieth century with its various types of nationalisms and political ideologies is the best proof of this. Contemporary problems stem more from the (over)production of the unprecedented number of the disparate social sources of knowledge in an increasingly diverse and almost “fractured” societies. In such a world, sustainment of

⁵³ Hardin (2009), p. 148-150 (on communal sources of belief); on sincerity of belief problem see p. 150-153; on fundamentalist or infallible belief see p. 153-158. Hardin claims adjective “fundamentalist” for what is more properly called extremist belief, given that almost by definition any belief held without evidence and with some degree of certainty and emotional color is infallible *ex ante*. The fact that *ex post* such beliefs are revised is not necessarily a proof of their “fallibility” but more often than not failed expectations; emotional bonds like love and sexual passion are best examples. Moreover, Hardin does not sufficiently distinguish between a pure belief and belief generating action.

the credibility of communal sources of belief lacking evidence, dealing with inconsistencies within the belief system itself and ensuring sincerity within the group⁵⁴, as well as a problem of engaging with the “fallibilistic” systems (i.e. science) and other “infallibilistic” system (other religions and moral systems) can be a major issue.

Social self-extension

The quest for meaning provides for a sense of extension of self, socially or temporally. Relevant issues are the identification of oneself with the “cared for” others; and the resolution of the question of value of time-restricted existence. The former question (“identification”) is basically a “feeling of loneliness or unworthiness.” One’s own ego might be completely irrelevant given number of persons around the world, but the ego worthlessness problem can be overcome by the (over)identification with one’s race, nation, ethnic group, and many other groups including religious ones – or by considering wholesale rejection of the idea of false ego, as in Buddhism. The identification logic is that you yourself might be unimportant, but given that you are, say, American, German, Chinese or a member of a Catholic Church or a Hindu the very fact of belonging to a group you (typically) consider important can resolve the uncertainty over question of your own unimportant existence. Over-identification with one’s own group may end in complete “forgetfulness” of

⁵⁴ Id., p. 148-150 (on communal sources of belief); on sincerity of belief problem see p. 150-153; on fundamentalist or infallible belief see p. 153-158. Hardin claims adjective “fundamentalist” for what is more properly called extremist belief, given that almost by definition any belief held without evidence with some degree of certainty and emotional color is infallible *ex ante*. The fact that *ex post* such beliefs are revised is not necessarily a proof of their “fallibility” but more often than not failed expectations; emotional bonds like love, sexual passion and parental devotion are best examples. Moreover, Hardin does not sufficiently distinguish between a pure belief and belief generating action. That is expected, however, since Hardin is writing against a set of liberal premises. For a very powerful and convincing critique of these premises see Akeel Bilgrami, “Secular Liberalism and Relativism,” available at <http://www.columbia.edu/cu/philosophy/word-files/secular.doc> (accessed February 8th, 2010, 14:30).

self, result in very charitable behavior and selfless helping to those you deem close to you; but it may also to lead forms of “moral insanity” where group norms overwhelm any sort of boundaries between self and others - the regular story and experience of any nationalism, religious extremism and other “isms.”

As the social identity theory argues, the group belonging is both the extension of the individual self and the way to advance the positive view of oneself⁵⁵. Individuals “strive to achieve or maintain a positive *social* identity” as a way to preserve their own sense of self – sustainment and their own positive image⁵⁶. Formed or “thrown into” group identities are not only pure sums of individual identities, but also have distinct qualities of their own and the internal and external rules that sustain the group.

Group identities are filled with mutually shared conceptions and values, institution, traditions, shared narratives of history, relationship with the present and future plans and expectations. It is embedded and sustained across time with different means, i.e., writing materials such are sacred books like the Bible or Quran, meant to advance the shared message; institutions of “common” belonging like the Catholic Church or more local ethnic churches and synagogues; all in the name of distinguishing the short-lived existence of the particular individual group member relative to the long-lasting existence of the group⁵⁷.

Across time, group identity is also fluid and dynamic and represents a mix of the historical

⁵⁵ Jeffrey R. Seul, “Ours is the Way of God: Religion, Identity and Intergroup Conflict,” *Journal of Peace Research* vol. 1, 36, (1999), p. 553.

⁵⁶ Henry Tajfel and John C. Turner, “The Social Identity Theory of Intergroup Behavior,” in Stephen Worchel and William G. Austin, ed., *Psychology of Intergroup Relations*, (Monterey, CA: Brooks Cole, 1986), p. 7-24.

⁵⁷ Herbert C. Kelman, “The Place of Ethnic Identity in the Formation of Personal Identity: a Challenge for the Jewish Family,” in Peter Y. Medding, ed., *Coping with Life and Death: Jewish Families in the Twentieth Century*, (Oxford University Press, 1998), p. 3-26, quoted in Jeffrey R. Seul, “Ours is the Way of God: Religion, Identity and Intergroup Conflict,” *Journal of Peace Research* 1, vol. 36, (1999), p. 556.

realities and the deliberative strategies mobilizing group in one or the other direction. Level of commitments and attachment of individual group members to the group identity also varies across time⁵⁸.

Group or social identity consists of three major components, categorization, identification and comparison⁵⁹. Categorization implies that an individual “brackets” itself and others into different categories and attaches specific attributes to all of these categories. These “modes of thought” assume that if one labels another person a football player, a Christian, Muslim, Jew or a Buddhist, one attaches certain attributes to any of these categories. Categorization is self-referencing; just as it is categorizing others, the individual attaches herself to a particular group identity and such an identity becomes her own. Note, however, that it is not assumed that individuals act of “unified self” – same person can be a football player, a Buddhist and a German.

Contemporary political theory, induced by political development at the end of 20th century, placed much emphasis on emotions, common identity and a sense of self in relation to ‘relevant others’⁶⁰, confirming much of the psychological insights elaborated above. Consider for example a statement of Dominique Moisi⁶¹, predicting the influence of emotions on geopolitics and international affairs in decades to follow:

⁵⁸ Herbert C. Kelman, “The Place of Ethnic Identity in the Formation of Personal Identity: a Challenge for the Jewish Family,” in Peter Y. Medding, ed., *Coping with Life and Death: Jewish Families in the Twentieth Century*, (Oxford University Press, 1998), p. 3-26, quoted in Jeffrey R. Seul, “Ours is the Way of God: Religion, Identity and Intergroup Conflict,” *Journal of Peace Research* 1, vol. 36, (1999), p. 556.

⁵⁹ Henri Tajfel and John Turner, “An Integrative Theory of Intergroup Conflict,” in Stephen Worchel and William Austin, eds., *The Social Psychology of Intergroup Relations*, (Monterey, CA: Brooks/Cole, 1979).

⁶⁰ See, i.e., Avigail Eisenberg, *Reasons of Identity*, (Oxford University Press, 2009), p. 18 and infra for various definitions of what is identity, its structure, how internally and externally contradictory seemingly unified identity can be, and what importance it has for decision making.

⁶¹ Dominique Moisi, *The Geopolitics of Emotion*, (Doubleday, 2009), p. 14.

“If the twentieth century was both “the American century” and the “the century of ideology,” I think there is a strong evidence that the twenty-first century will be the “the Asian century” and “the century of identity.” The parallel shifts from ideology to identity and from the West to the East means that emotions become more important than ever in the way we see the world. In the ideological atmosphere of the twentieth century, the world was defined by conflicting political models: socialism, fascism, and capitalism. In today’s world, ideology has been replaced by the struggle for identity. In the age of globalization, when everything and everybody is connected, it is important to assert ones own individuality: ‘I am unique, I am different, and, if necessary, I am wiling to fight until you recognize my existence.’”

Anything involving vague term “identity” is, of course, far from simple, and Anthony Kwame Appiah⁶², one of the most important political theorists today, notes that people do not necessarily follow what the ‘scripts’ of collective identities which structure narratives of individual self. That is to say, human beings assert their own agency even in the process of assigning themselves voluntarily onto a identity – they ascend to some parts of collective identity and not to others. The process of ‘cherry picking parts of identity’ shows certain level of instrumental reasoning even when it comes to emotionally and socially embedded identity structures. Appiah defines identity as ways in which social properties (social embedednes) becomes a part of the personal self-conception⁶³.

Such definitions of identity have been known to social theorists and sociologists of the past. and have recently made a come back due to a hype over “multiculturalism.” As Claude Levy Strauss stated quote some time ago, the identity is “a sort of virtual center to which we must refer to explain certain things, but without it ever having a real existence.”⁶⁴,

Charleas Taylor, a renowned historian of religion and a theorist of multiculturalism, provides

⁶² Anthony K. Appiah, *The Ethics of Identity*, (Princeton University Press, 2005), p. 23.

⁶³ Id., p. 265.

⁶⁴ Claude Levy Strauss, *L’Identite*, quoted in Avigail Eisenberg, *Reasons of Identity*, (Oxford University Press, 2009), p. 19.

the most succinct definition which is to a certain extent closest to theoretical discussion on the influence of emotions and identity to decision making. For Taylor, identity is the answer to question who you, me or we are, and the ultimate “background against which our tastes and desires and opinions and aspirations make sense.”⁶⁵ This might be somewhat overbroad definition, but it confirms major points I have elaborated above – making sense of one-self decisions (even wholly instrumental ones) and particularly other people’s decisions is a task that requires however incomplete some grip or intuition of who ‘I’ or ‘you’ are. To understand you, I need to have some image of you or the image of your identity in order to make sense of what is being done and what is going on.

In philosophical (and economic) terms, the description of identity closest to the perspective I am taking here is the complex structure of identity elaborated in Amartya Sen’s work on identity and violence⁶⁶. There, Sen argues that identities are not *prior* to capacity to reason, but in fact define the field of choices and constraints within which people will be reasoning, once the process starts. In other words, however imperfectly, the emotions and values that are part of the identity of others is getting to know (again imperfectly, given however minimal freedom of will) the way other people and groups will deliberate, reason and decide.

Most likely the contemporary, distinctly (post)modern “compartmentalization” of the individual self, including the growth of overlapping individual and group identities as a result of almost “subjugation” to various sources of information competing for individual and group loyalties that more often than not pull in completely opposite directions, is what makes

⁶⁵ Charles Taylor, *Multiculturalism and the ‘Politics of Recognition’* (Princeton University Press, 1994), p. 33-34.

⁶⁶ Amartya Sen, *Identity and Violence: The Illusion of Destiny*, (New York: WW Norton and Co., 2006).

current group and individual behavior, including religious ones, so difficult to grasp in its entirety. There are persuasive arguments pointing to a conclusion that the “care for group identity” is a very contemporary “syndrome” peculiar to modern conditions of life of constant geographical and social mobility and rapid changes in social structures, so much so that some theorists proclaim it to be a “time of tribes⁶⁷” which will inevitably, if only by implication, create communal tensions in new form. In this religion already plays its role, for better or for worse – usually the latter.

Temporal Self-extension

Apart from self-extension, the second question with which individuals deal is one of meaning of life given that the death is inevitable. The attachment to forms of group identity that provide narratives for dealing with these issues can be one way of finding an answer. The prospect of death inevitably makes all efforts ultimately futile and is an everlasting philosophical issue. And if you are not existentialist, some variances of religious beliefs, particularly monotheistic ones, can offer an answer and consonance in face of such worries by supplying narratives of life after death, heaven and hell, reincarnation, resurrection, etc., – the major playfield of many religions. As the “terror management experiments” show, there is a direct causality between confronting experiences of mortality and the reaction of seeking identification with the relevant group particularly a religious one, and this sometimes with a “benefit of hindsight” as in many stories of “deathbed” conversions and “repentance for sins

⁶⁷ See Michel Maffesoli, *The Time of Tribes*, (Beverly Hills: Sage Press, 1995). For a further critical discussion and overview of various theories of religious identity in a postmodern era see Nancy T. Ammerman, “Religious Identities and Religious Institutions,” in Michelle Dillon, ed., *Handbook of Sociology of Religion*, (Cambridge University Press, 2003), p. 207-224.

in the face of death.” Simply exposing people to their own mortality increases individual attachment to group beliefs and values⁶⁸. Having this in mind no wonder that many funerals are charged with religious symbols and rituals, as well as long emotional speeches in an atmosphere of organized communal events.

Implications of religious group identity for law (and economics) regulation

I have argued so far that the religious group identity developed as a result of a combination of several factors, evolutionary ones and a quest for meaning, that is, the resolution for a problem of the uncertainty of preferences as well as a social and temporal self-extension. Throughout, I have emphasized the role of emotions on the norm formation and sustainment. In this part, I will briefly explore the role of identity in law and economics literature.

Within the law and economics literature that relied on neoclassical microeconomics assumptions, issues of identity and the effect of law on it was not a very popular one till recently. However, in a last decade economists have focused almost exclusively on incorporating issues of identity and emotions into their research in order to provide for a richer account of human behavior, starting with the seminal work of Nobel Prize winner George Akkerlof and Rachel Kranton⁶⁹. Akkerlof and Kranton borrow insights from the sociology and psychology, specifically social identity theory discussed above, in order to

⁶⁸ J. Greenberg, S Solomon and T. Pyszczynski, “Terror management theory of self-esteem and social behavior: empirical assessment and conceptual refinements,” in M.P.Zanna (ed.) *Advances in Experimental and Social Psychology*, Vol. 29, (New York:Academic Press, 1997) p. 61-139.

⁶⁹ George A. Akerlof and Rachel E. Kranton “Economics and Identity”, *The Quarterly Journal of Economics*, Vol. 115, No. 3 (Aug., 2000), p. 715-753 (hereafter Akerlof and Kranton, “Economics and Identity”); George A. Akerlof and Rachel E. Kranton, “Identity and the Economics of Organizations,” 19 *Journal of Economic Perspectives* 9 (2005) (hereafter Akkerlof and Kranton, “Identity and the Economics of Organization”); on effect of identity on conflict see Edward L. Glaeser (2005) “The Political Economy of Hatred” *Quarterly Journal of Economics* 120:1, (2005), p. 45-86.

include utility in the behavioral calculus. Identity is defined not solely (as in neoclassical microeconomics) as “tastes”, but as norms - “how people think that they and others *should* behave.”⁷⁰ Wider societal norms are defined as social regularities and activities that are widely practiced in a society with all the accompanying differences across cultures and time⁷¹. Through repetition of certain activities that become widely accepted, society “tells” (signals) to its members what they should do in a particular situation, and the whole set of external costs and benefits (i.e. the loss or gain of social status) and internal costs and benefits (feeling of guilt, isolation or pride, etc.) is organized around these norms. Depending on a level of social and/or organizational diversity across society, social norms may “suffer” from ubiquity and uncertainty, they are “frown on a racist’s joke: they tell the stranger to tip a waiter at a highway dinner; they are unsure whether a man should hold a door open for woman.”⁷²

In the same model, Akkerlof and Kranton claim that the identity is the most important “economic” decision people make since individual utility function is dependant once belonging to predefined “social categories” – concept introduced above. The interaction between different persons entails that each member knows its own category as well as that of persons or impersonal organizations on the other side. Identity in interaction also implies avoidance of personal cognitive dissonance, which is a mismatch between the expectation behind the assigned social category and the actual characteristics and behavior of the person.

⁷⁰ Akkerlof and Kranton, “Identity in Organizations,” *supra*, p. 19.

⁷¹ Further on social norms and variance across space and time even within the basically same culture and country, see C.A. Harwell Wells, Note, *The End of an Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 *Vanderbilt Law Review* (2001), p. 1805-1809.

⁷² See Lawrence Lessig, “The New Chicago School,” 27 *Journal of Legal Studies*, (1998), p.661-662 cited in Rafael Gely, “Law and Economics of Identity,” 14 *Duke Journal of Gender Law and Policy* 229, (2008) n.12 (hereafter Gely).

The final category of the model is the extent in which actions derived from identity and social categorization correspond to the behavior prescribed by society's expectations as to how that person *should* fit into the ideal of the social category to which that person belongs. Thus, a person's utility is dependent upon that person identity and his or her chosen or socially assigned category and the interaction with society. Increases or decreases in utility that derive from changes in the identity component of the utility function explains much of a “self-damaging” behavior. Moreover, individual and group identities impose also negative and positive externalities on others, and the identity “switching,” “imposing” and other strategies remain unavoidable part of life of any organization. Creation of the new identities and the concomitant removal, muting or destruction of what is considered undesirable identities involves benefits but also significant costs for the organization engaging in it and society at large⁷³.

Recent law and economics of identity literature has made much of the application of Akkerlof-Kranton model on a variety of legal issue ranging from employment and corporate law to bankruptcy, ethnic and religious conflicts and counter-terrorism laws⁷⁴. In doing so, it's generally recognized that a basic problem in the process of the legal “management” of identity is drawing a clear cut line between “pre-existing” identities and “law-created” identities. An example is drawing a line between immutable identities (race, sex or sexual

⁷³ For an overview of different examples of costs and benefits of creating new and destroying old identities, as well as the problem of identity management see Rafael Gely, “Law and Economics of Identity,” *14 Duke Journal of Gender Law & Policy* 229, (2008), p. 232 and Akkerlof and Kranton “Economics and Identity”, p. 718.

⁷⁴ See, i.e., Clair Hill, “Law and Economics of Identity,” *Queens Law Journal*, vol. 32, no. 2(2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=844345 (downloaded 20.08.2008, 13:45); and Avner Ben Ner and Claire A. Hill, “Reducing the Negative Consequences of Identity: A Potential Role for Non-Profit Sector in the Era of Globalization,” *Annals of Public and Cooperative Economics*, Vol. 79, issue 3-4, (September/December 2008) p. 579-600, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266903; and Gely, n. 27.

orientation) and mutable identities (i.e. religious identities, national origin and, in some versions, ethnicity), since they are, more often than not, mixed and difficult to disentangle; and the traits that these identities attach to themselves or is attached to them within the particular social setting varies. In other words, the problem of judging and regulating identity is a problem of reference points or baselines that consist of socially constructed norms which are far from being freely chosen by the individual⁷⁵. In short, overemphasis of individual choice which pervades the literature on law and economics of identity unrealistically assumes infinite number of choices available as a menu for personal identities, without paying a sufficient attention to inescapable social and institutional restraints imposed on individual.

As I will argue below, drawing on new institutional economics, far from being purely organized according to “utility maximizing function,” law “grows” against a certain background of social norms and particular identities attached to them; it is pre-determined, therefore, to advance certain modes of thought in order to self-seal and mutually reinforce the pre-existing social identity, with the concomitant social categorizations and boundary drawing implied in it. Starting from this exogenous point, one could say that legal and institutional regulation advances particular identities (whatever they might be) while controlling for other identities (including religious ones); it creates new identities out of the socially undesirable ones; or changes the meaning of the existing identities. In other words, law is a monologue of pre-existing identity(ies) with Janus face towards past and future.

⁷⁵ Peter Berger and Thomas Luckmann, *Social Construction of Reality: A Treatise in the Sociology of Knowledge*, (New York: Anchor Books, 1966).

1.2 Group cooperation and credibility under conditions of uncertainty

Having dealt with the psychological effects and mechanisms used by religious groups in order to provide group identity, common emotions and beliefs for their members, in this part I describe some mechanisms in accordance with which religious groups produce exclusive (solely for group) and shared (both in and out of group) collective material goods and the underlying motivations for such behavior. Following that, I describe several other types of religious group behavior that are concerned with advancing credibility of group beliefs for both in and out of group members. The underlying premise of this part is that religious groups have to organize both of these activities under conditions of uncertainty.

Group cooperation and collective goods under conditions of uncertainty

Religious groups produce number of collective goods for themselves and goods that are, in a certain sense of the word, shared with both in and out of group members (shared goods) with uncertain effects and returns for the group itself. And if the internal and external screening and within the group sanctioning mechanisms were completely reliable tools of sustaining the group and producing collective goods, ironically almost every religious group would have to stay small in order to be able to engage in sanctioning effectively – but, as history shows, that is not the case. Groups grow in size, population and inhabit territorially remote and far apart areas; a sustainment of cooperation under such conditions would at some point become unviable, leading to a group dissipation and extinction. Moreover, many religious groups engage in charitable activities (sharing goods with both in and out of group members) such as providing help for those in need, education, social welfare etc. in a way that escapes a any cost-benefits explanation, given that likelihood of return on invested

resources appears minimal, and does not necessarily serve internal groups needs. I will explain both activities in turn.

Economists have made many contributions to the understanding of effects the collective goods produced by religious groups play in lives of groups and individuals⁷⁶. Landa and Carr argue that religious rules can be understood if one models groups as tools for provision of public goods in a club like fashion⁷⁷. Tradition of modeling provision of goods in a club - like fashion is one of the oft-quoted strategies for reducing risk and uncertainty⁷⁸. Ethnic groups, clans, tribes and religious groups develop distinct practices, rituals and symbols, in order to provide for the provision of club like goods in an environment characterized by a contract uncertainty and high information costs. Clubs or club-like arrangements evolve in order to provide for the efficient provision of joint goods which, from the point of view of club members, presents a public good, for two reasons. In presence of club-like arrangements (distinct rituals or symbols, say), club members can obtain information on trustworthiness of others in a cheap fashion - those who adhere to common symbols will also adhere to arrangements – hence signal indicates trustworthiness. Using non-market sanctions like ostracism, expulsion from the group and alike, club members can punish shirkers and exclude them from future transactions. Landa and Carr apply their model in order to explain the economic and trading success of smaller ethnic and religious groups,

⁷⁶ Laurence R. Iannaccone "Sacrifice and Stigma: Reducing Free-riding in Cults, Communes, and Other Collectives", *The Journal of Political Economy*, Vol. 100, No. 2 (Apr., 1992), p. 271-291; also Corry Azzy and Ronald Ehrenberg, "Household Allocation of Church and Time Attendance," *The Journal of Political Economy*, Vol. 83., No.1, (Feb. 1975), p. 27-56.

⁷⁷ Jack L. Carr and Janet T. Landa , "The Economics of Symbols, Clan Names and Religion," *The Journal of Legal Studies*, Vol. 12, No. 1 (Jan., 1983), p. 135-156. The beginning of the economic theory of clubs goes back at least to Buchanan, see James Buchanan, "An economic theory of clubs," *Economica* 33 (1965), p. 1–14.

⁷⁸ Frank H. Knight, *Risk, Uncertainty and Profit* (Signalman Publishing, 2009, first editions 1921).

like Maghrebe traders and Jewish diamond merchants in Amsterdam, but the analysis also provides insight into ethnic based business in North America and Europe, Muslim medieval traders in Africa, and the current Islamic sub-economy based on international personal networks.

Similar mode of analysis was applied to a wide array of “traditional” legal and social institutions like gift giving, kinship groups and alike, in order to locate uncertainty issue and information costs as a motivation behind the enactment of these specific institutions in their particular context⁷⁹. Broadly speaking, the club model mode of analysis is similar to repeated cooperation games in game theory (see below), in a sense that it is assumed group behavior repeated over time with an aim of restraining self-interested individual will be reified as a constraining or sanctioning mechanism whose purpose is to secure the collective action to the benefit of all. Imagine, for example, a norm that a diamond merchant ought to wear a headgear. The explanation would be that it was a result of a need of group members to identify fellow trustworthy merchants in a costless way. Going against that norm was punished by other members of the group with a withdrawal of needed support – a sanctioning mechanism. Hence, the norm became commonly accepted.

Another way of explaining development of norms is a game theory model of cooperation, which starts from the oft-quoted prisoner’s dilemma. In one-shot games, the expected outcome is a lack of cooperation yet it is obvious that the most beneficial choice for either side is to cooperate with each other. The cooperation will occur only when players engage in repeated games and define the appropriate signals according to which the

⁷⁹ Richard Posner, “A Theory of Primitive Societies, with special reference to Primitive Law”, 23 *J. Law & Econ* (1980).

cooperators are supposed to be distinguished from shirkers. Hence, different individuals seeking cooperative partners and trying to form a group („senders) for purposes of satisfying any need will have to find a way to identify within the amorphous population the potential cooperators („receivers“) and engage with them in a prolonged cooperative interaction which will eventually be governed by a set of rules⁸⁰. Prior to signal issuing, signal senders (potential future cooperators) cannot distinguish future cooperators, but they know population types (cooperators and defectors). The method of distinguish trust and untrustworthy senders is according to a signal, which must satisfy two conditions: it must be affordable to those who value future benefits more, yet at a same time expensive for others⁸¹. The cost of signaling is important not only for sustaining cooperation, but it has an “epistemological” function, since it allows in and out of group members to correctly update their beliefs about the relative proportion of types in the population. Clear examples of such signals in life of religious groups are distinct clothes (turban, headscarves, etc.); personal markers like tattoos; particular ways of communication, etc.

Repeated games, however, can be sustained only among smaller and easily identifiable groups. But as the everyday life of many religious groups show, groups tend to grow and encompass within the group individuals who are unlikely ever to engage in any sort of cooperation, yet they still remain members of the same group with varying degrees of fidelity. Hence, things become more complicated as the cooperation is supposed to be sustained as the group grows larger and the incentives for free-riding increase. In so far

⁸⁰ Collin E. Camerer, *Behavioral Game Theory: Experiments in Strategic Behavior*, (Princeton University Press, 2003), p. 409.

⁸¹ Id., p. 408.

religious groups are dedicated to production of material and spiritual collective goods for their members in competition with other groups and are interested in growth of membership, they produce formal and informal sanctions in order to prevent their members from relinquishing group status and ensuring collective actions necessary for the production of collective goods.

“Formal” modes of organization of religious groups may include different forms of institutionalization⁸² and breeding of leadership (i.e. clergy) assigned with sustaining collective behavior, in some cases only by proxy, for example when the vicarious minority of “professional” believers acts in the name of all. Combination of more horizontal and institutional mode of organization includes the development of rules and laws for a “religiously appropriate or divinely sanctioned” behavior in a variety of life situation alongside with the appropriately trained person in charge of the interpretation of such laws (as is the case with the Islamic and Jewish law). In a stronger “horizontal” fashion, informal sanctions include members administered sanctions, such as excluding norm breakers from the community, social ostracism all the way to most severe sanctions like corporal punishments. “Efficiency” of sanctions, it is often claimed, depends on the group cohesiveness, size and territory⁸³. For that reason, it is widely assumed that close knitted groups, where observance of norm-obeying or norm-breaking behavior of others is relatively easy, tend to be more efficient in provision of collective goods.

Increase in group size, either in terms of membership or the size it inhabits, as well

⁸² On institutionalization of non-mainstream religions see Kirpal Singh Khalsa, “New Religious Movements Turn to Worldly Success,” in James T. Richardson, ed., *Money and Power in the New Religions*, (The Edwin Mellen Press, 1988), p. 117-140.

⁸³ Eric Posner, “Legal Regulation of Religious Groups,” *Legal Theory* (1997), p. 36.

as an increase in material wealth, requires engaging in from distinguishing in and out-of group members within the population. Distinguishing, however, is not an infinite or always available possibility. Fundamentally, within a large geographically dispersed group, members that do not have face to face contact or likelihood of repeating interaction (i.e. members only very weakly, if at all, connected), have to trust each other.

In other words, though signals like distinctive clothes, language, body markers etc. can be useful for distinguishing coreligionists and non-group members, unlikelihood of repeated interaction (and hence the virtual impossibility of sanctioning or reciprocating either positively or negatively) has to be supplemented by a (risky) trust based on intrinsic motivations based on belonging to a same group. I have argued above that attaching oneself to a group identity implies a psychological process of both self-categorization and identification. Experimental evidence shows that self-categorization and identification on its own produces a heightened level of altruistic behavior towards in-group members⁸⁴. But even apart from the extant and somewhat obvious point that trust might be heightened among even personally distant members of the same group, neuroeconomics evidence suggests that engaging in trustworthy behavior has biological roots as it increases the production of oxytocin, hormone responsible for feelings like happiness and joy⁸⁵, and the role of trust is widely cited as one of the major causes of difference in economic, political and even legal

⁸⁴ Henry Tajfel and John C. Turner, "The Social Identity Theory of Intergroup Behavior," in Stephen Worchel and William G. Austin, ed., *Psychology of Intergroup Relations*, (Monterey, CA: Brooks Cole, 1986), p. 7-24.

⁸⁵ See Paul J. Zak, Robert Kurzban and William T. Matzner, "The Neurobiology of Trust", *Annals of the New York Academy of Sciences*, 1032, (2004), p. 224–227; and Paul J. Zak, Robert Kurzban, and William T. Matzner. "Oxytocin is Associated with Human Trustworthiness", *Hormones and Behavior*, 48,(2005), p. 522–527. For a discussion of literature on trust, impact of religion on trust and mechanisms through which trust is sustained in different religious groups see Richard Sosis, "Does Religion Promote Trust? The Role of Signaling, Reputation and Punishment," *Interdisciplinary Journal of Research on Religion* 1, (2005), p. 1-30 (Article 7).

development. However, the evidence is still inconclusive, since even the everyday experience shows that we can have trust (and enjoy in it) in wrong things over a long period of time. In other words, there is no reason not to believe that trust generally and trust based on group belonging cannot also lead in a self-defeating direction with damaging consequences.

Hence, within religious groups, trust, together with different coordinating mechanisms like institutionalized formal sanctions (i.e. ex-communication), and semi-institutionalized or informal sanctions like group ostracisms, expulsion, shaming etc. provides for production of collective goods or benefits that can function as individual rewards, i.e mutual insurance, help to sick and elderly, support with all kinds of activities, education for children etc. However, there are quite a few potential dangers in the “overproduction” of collective goods. Burdens of contributing to the production of jointly used goods may not be proportionally distributed and might fall disproportionately on those who are badly situated than others and/or are motivated beyond average level (in other words highly committed), while the non-contributing might rip-off benefits and mimic contribution . Moreover, if selective rewards and punishments are strong enough and properly aligned group collective goods can result in collective harms, as in cases of collective suicides⁸⁶.

Notwithstanding the strength of internal motivations, overproduction of collective goods might increase incentives to believe but also provide incentives for free riding (mimicking contribution) and result in a *crowding-out of intrinsic motivations*, a

⁸⁶ For an overview of literature on various social influence that can promote or repress social motivation for religious choices and concomitant results of such choices see Darren Sherkat, “Religious Socialization: Sources of Influence and Influences of Agency,” in Michelle Dillon, *Handbook of the Sociology of Religion*, (Cambridge University Press, 2003), esp. p. 154.

phenomenon by now well researched and confirmed in a variety of culturally different settings⁸⁷.

Crowding-out of intrinsic motivations basically implies that an introduction of a reward (or extra reward) for a task which was previously done without expectation of reward changes internal motivation from “sincere and non-instrumental task engagement” to “reward oriented engagement.” Internal motivation can also be changed by influencing the perceived nature of the performed task or the task environment or actors own self perceptions⁸⁸. One could counter this by claim by pointing out (in a utilitarian fashion) that religious believers are motivated by i.e. care for their souls, fear of eternal punishment etc.; but the distinction needs to be maintained between belief itself and belief-oriented motivation and the action generated. In other words, it is not that belief or the behavioral pattern itself will be crowded out but the motivation to contribute to the specific group, which is obviously damaging to group interests. One instructive though imperfect example from history is the Catholic Church trading in indulgences that provoked Martin Luther’s charges of Papal hypocrisy – basically Luther didn’t lost his belief (let alone stooped exercising religious behavior) , but his motivation to contribute to the Catholic group respectively evaporated.

⁸⁷ For basic overview of theory and cross-cultural evidence see Bruno S. Frey and Reto Jegen, “Motivation crowding theory: a survey of empirical evidence,” Working Paper No. 26.,Zurich: Institute for Empirical Research in Economics, (November 1999), available at http://www.bsfrey.ch/articles/359_01.pdf (downloaded 04.03.2009, 15:40). For a fuller version see Bruno Frey, *Not Just for the Money: an Economic Theory of Personal Motivation*, (Edward Elgar, 1997).

⁸⁸ Bruno S. Frey and Reto Jegen, “Motivation crowding theory: a survey of empirical evidence,” Working Paper No. 26.,Zurich: Institute for Empirical Research in Economics, (November 1999), available at http://www.bsfrey.ch/articles/359_01.pdf (downloaded 04.03.2009, 15:40) , p. 592.

Bundling and the production of collective “shared” goods

That the production of collective goods (be they material or more psychological or spiritual) is one the main functions of the groups is fairly uncontroversial. However, this leaves one large part of the collective goods production out of the picture – that is the production of “collective shared goods”, defined for my purposes here as goods that can be used by the environment without becoming a member of the producing group or subscribing to its beliefs and/or activities. Such collective shared goods in neoclassical microeconomics are considered “positive externalities” or (in case when they enjoyment is open to all) “public goods” but these terms appears somewhat imprecise in this context, since such shared goods are not produced by religious groups as a sort of by-product nor they are necessarily “infinitely open to enjoyment.” Rather, frequently much of group activity is consciously devoted to such activity, for reasons I explain below.

I have stressed that religious practices can be explained as ways of dealing with the uncertainty principle (uncertainty of preferences, social and temporal extension), as well as a way to enhance credibility of beliefs (further on credibility see below) both for in-group and out-of group members, given inability to provide “final proofs” of the veracity of religious beliefs. In that sense, one could say that the primary “trading tool” for religious groups is information. In-group members do not necessarily require so much information, since they have intimate knowledge from the inside. However, information spreading becomes highly important in situations when groups grow very large (increasing anonymity between members) but especially in situations when religious groups function in an environment

characterized by presence of the multitude of other religious and non-religious groups.

One solution for the uncertainty of beliefs to be reduced is bundling of “religious information” with other information that is more susceptible to “ordinary level of proof” and/or immediately experienced sensually. In that way “bundling” of information makes religion look more persuasive which is why religious beliefs and practices are delivered combined with useful and pleasurable services like hospital care, education, etc. Religious groups might engage in such activities in order to enhance their own credibility towards non-group members (in-group members by definition do not require credibility proof in the same extent) in order to make their presence in the public sphere more credible. In other words, apart from having a material impact, such activities have a quality of “symbolic or positional goods” placing religious groups in the sphere of a wider societal and cultural production that is not necessarily attuned according to internal group beliefs⁸⁹.

This is not of course to deny the existence of “purely” internal motivations – many groups hold, as a part of their own belief or action oriented system of religious behavior, that providing helping hand is a part of their behavioral system and is “who they are.” As neuroeconomics experiments show altruism and fairness in non-religious setting and among non-religious individuals provokes production of oxytocin (hormone responsible for feelings like joy) when individuals engage in voluntary charitable giving. The quantity of giving is multiplied when giving is done under conditions of being “socially observed,” suggesting

⁸⁹ Symbolic and positional goods are taken here to mean goods that are valued specifically because of their higher status relative to other substitutes – social status is taken to be one such symbolic or positional good and a difference is difficult to draw. Belonging to a culture (being a part of cultural productions) can also be defined as a symbolic good, see Piere Bordieu, “The Marker of Symbolic Goods,” chapter one in *The Field of Cultural Production: Essays on Art and Literature* (Columbia University Press, 1984); on positional goods in an economics perspective see Robert H. Frank, *Choosing the Right Pond: Human Behavior and the Quest for Status*, (New York: Oxford University Press, 1985).

that public and/or group observed giving multiplies its effects by affecting internal motivations⁹⁰. Moreover, experimental introduction of “god concept” (defined as non-human observer) in experiments with non-religious individuals also increases level of giving and prosocial behavior even when the charity receivers are anonymous⁹¹.

Credibility Enhancing Strategies

Credibility costs are inherent in a religious beliefs and practices. From a point of view of rationalism, beliefs should be affirmed by means of observation, testing, and other methodological tools like deduction or induction. Rational choice decision maker would use information proxies from the pool of available information in order to bring the subjective probability of uncertain as possible to objective one. Updating proceeds according to a Bayesian model, new information is being processed in accordance with the pre-existing beliefs in order to form after-the-information beliefs⁹². But the decision to entertain religious beliefs and act accordingly is decision under complete uncertainty. There is no “prior information pool” since the direct access to fact-like information (true/false information) about religious claims is impossible – and what is proclaimed to be a fundamental part of belief for those concerned becomes a pure fact rather than observation open to infinite discussion. After that primary move has been made, there is no reliable or even necessary

⁹⁰ Ulrich Mayr , William T. Harbaugh , and Dharol Tankersley, “Neuroeconomics of Charitable Giving and Philanthropy,” in Paul W. Glimcher, Collin F. Camerer, Ernst Fehr and Russel Poldrack, eds., *Neuroeconomics: Decision Making and the Brain*, (Elsevier Publishing, 2009), p. 303-319.

⁹¹ A. Norenzayan and A. Shariff , “God is watching you: priming God concepts increases prosocial behavior in an anonymous economic game,” *Psychological Sci.* 18 ,(2007), p. 803 – 809 .

⁹² Christian Eilinghoff, “Religious Information and Credibility”, *German Working Papers in Law and Economics* , vol. 1 (2003), paper 8, p.4, (hereafter Eilinghoff).

new information required for updating to take place, since the information is either not available or is processed in a very peculiar way⁹³.

The credibility of different religious groups becomes even more important in presence of other religious and non-religious groups alike give that, assuming free or at least relatively free choice, perceived “lack of credibility” of one own group or the “superior credibility” of other group could potentially provide a motivation for members to exit or at least significantly alter group coordinating mechanisms. Hence, in a contemporary era of a variety of groups of all colors, it can become even more important for religious groups to constantly advance their credibility especially relative to secular groups given that the secular groups have comparatively easier task of proving veracity and usefulness of their behavior and beliefs, having in mind that in either case growth in production of practical and applicable knowledge characteristic for modernity favors the production of efficient social norms rather than any sort of “moral” norms.

One way out of the uncertainty problem surrounding religious beliefs is to add whole set of additional observable information emotionally charged and “packaged” together with the “regular” religious information in order to make religious beliefs appear more credible⁹⁴. Added information changes subjective probability of a neutral individual with an aim of influencing personal beliefs in a way that makes unconcerned individuals and surrounding environment more likely to accept religious claims as “regular.” Codified rituals, symbols and other means of communication play therefore an important role in life of religious groups and unsurprisingly tend to strengthen and sustain themselves across time, even when their

⁹³ James D. Montgomery, “Contemplations on the Economic Approach to Religious Behavior,” (1996) *American Economic Review*, *Papers and Proceedings* (on file with author).

⁹⁴ Eilinghoff, p.5.

original meaning is lost or has been change or the set of practices organized around rituals and symbols appears almost non-sensical or, on some level, contrary to other rules by which the group abide.

There is several credibility enhancing information mechanisms typical for religion: pre-existing reputation; a repetitive communication from a variety of sources known and/or anonymous sources; branding; and bundling (described above). Ironically enough, all of these mechanisms are well researched in contemporary marketing and neuromarketing – most insights in contemporary marketing have been, in fact, developed on the basis of studying practices of religious sects⁹⁵. To add to a paradox, contemporary religious groups unflinchingly use the whole discipline of marketing in order to reach out to a wider public, receive donations and create an influential public image (symbolic goods) for themselves⁹⁶, which opens a host of potentially interesting question that cannot be take here such is, i.e., can or should the religious communication be regulated like advertising speech?

I have listed several credibility enhancing information mechanisms typical for religion: pre-existing reputation; a repetitive communication from a variety of sources known and/or anonymous sources; branding; and bundling (described above). Pre-existing reputation – a long standing existence of a particular religion or having friends and family members as its members makes particular religion more appealing or “regular” (in a sense of

⁹⁵ See, i.e., the PBS documentary “Persuaders,” (available online at http://www.pbs.org/wgbh/pages/frontline/shows/persuaders/view/?utm_campaign=viewpage&utm_medium=grid&utm_source=grid) graphically and in words of marketing experts themselves describing how brands like Nike or Adidas have been developed on the basis of studying the development of emotional attachment of different individuals to sects.

⁹⁶ On the overview of literature and empirical study of the case of India Sriya Iyer, Chander Velu and Abdul Mumit, “Communication and Marketing for Services by Religious Organizations in India,” available at <http://www.econ.cam.ac.uk/faculty/iyer/IndiaManuscript.pdf> (downloaded on 23.11.2009, 13:23). On marketing for religious organizations generally see N., Shawchuck N, P., Kotler, B. Wrenn B and G. Rath G, *Marketing for Congregations* (Abingdon Press, Nashville, 1992).

expected) and normalizes its presence in a given cultural space for everyone including the unconcerned⁹⁷. However, prolonged existence (in a sense of pre-existing reputation) can also affect motivations negatively by creating an endowment effect – the fact of being accustomed (through sheer chance, by birth or in other ways) to being a part of a certain religious group or culture in general can create disparity between a “willingness to pay” (contribute to a group) and a willingness to be a member⁹⁸. The endowment effect could potentially explain the low level of religious contributions in some European areas where one or several religions have been peacefully existing for a long time without any internal or external shocks. An instructive example in that regard is one of Sweden: after literally centuries of peaceful reigning of the Lutheran Church as the state church, without any internal or external threat, the Lutheran Church itself declared its own disestablishment, claiming that the establishment resulted in members becoming disinterested in the work of the church, though not exactly relinquishing their status as members⁹⁹. It is not, in other words, that the sole lack of supply of different religious groups under conditions of establishment of one religion creates the lack of religious “vitality”; there is *no demand* either. However, as the discussion on differences between Christianity and Islam below will show, it seems that some cultural, organizational and theological conditions need to be in place for this lack of demand to become socially embedded.

Many types of religious behavior such are rituals (with all that they carry with

⁹⁷ Christian Eilinghoff, “Religious Information and Credibility”, *German Working Papers in Law and Economics*, vol. 1 (2003), paper 8, p.7.

⁹⁸ Bruno Frey, “Comments” on Russell Hardin “The Economics of Religious Belief,” *Journal of Institutional and Theoretical Economics*, 153 (281. 1997), p.

⁹⁹ Alternative explanation is that pursued by Iannaccone and the supply-siders: the lack of religious competition negatively affects the work of church, which rejects work with its members and turns to the state for all amenities, consequently negatively affecting group membership and individual members contributions.

themselves) are usually on average highly repetitive and, as already argued, their repetitiveness and the emotions involved gives them an aura of “truth” for group members; but they also affect the unconcerned by providing the aura of “normalcy” through constant repetition. The psychological effects of constant repetition can be explained using familiarity thesis or the source variability thesis¹⁰⁰. The former is basically a “propaganda rule” – repeating information makes information more familiar and easier to believe, in contrast with non-repeated and first time information. The latter thesis follows “spread the word rule” – same information coming from the variety of sources (many different and unknown people go to church on Sunday, number of internet pages with a large number of anonymous users advertise religious messages, chat forums discussing religious issues, etc.) appears more credible than when it comes from only one source.

Reputation is akin to branding, another credibility enhancing information. Religions will “brand” themselves out in order to distinguish their particular beliefs and practices - that is create distinct identities - from competing groups. Christianity is a “brand” name for Jesus as God, membership in the community of believers and so on; Islam is a brand name for strict monotheism and observance of rules; Judaism is equated with Old Testament laws; Buddhism is connected with a desire to achieve Nirvana and escape pains of life, etc.,. Long existing religion given their already established positions do not need to enhance their credibility as much as non-traditional religions or “new comers” need to, but certainly need to distinguish themselves¹⁰¹. Distinguishing one group from another through identity building

¹⁰⁰ Eillinghof, p. 14. For an empirical evidence see Anne Roggeven and Gita v. Johar “Perceived Source Variability versus Familiarity: Testing Competing Explanation of Truth Effects,” *Journal of Consumer Psychology* (2002), vol. 12, no.2, p. 81-91.

¹⁰¹ Id., and see Pascal Boyer, *Religion Explained*, (New York, 2001).

affects both the memory of in and out of group members; and affects general human environment by creating mental models receptive (or not, in the case of failure) to future messages¹⁰². Given the two mechanisms I have described above (reputation and branding) and the dependence of both mechanisms on information spreading from various sources, it appears almost expected that in the information age and through means of internet and wireless communication religion will in effect become more present in everyday life.

Enhancing credibility of religion and religious groups as a function of obligatory rules to be followed shares, in practice, much with the group coordination and the group effort to sustain mutual trust. But enhancement of credibility through rituals has undeniably deeper emotional meanings for the individuals concerned and the common identity they subscribe to. An example will suffice. Having Christmas as a state holiday in many places today does not mean that all individuals or even the majority will necessarily enjoin massive celebration and engage in an ecstatic collective religious fervor or start socializing with their fellow Christians. In fact, many do the opposite and engage during holidays in their own non-religious activities. Yet, the Christmas remains (usually for cultural reasons) the state holiday – one way of explaining this is that the function of this rule is purely to enhance symbolic credibility of Christianity in and of itself *and*, sometimes, relative to other religions.

There are deeper meanings in this rather than “just” credibility. As it was pointed out by Rappaport, rituals entail not solely information but serve as cultural tools for

¹⁰² M. Abreu, “The brand positioning and image of a religious organization: an empirical analysis,” *International Journal of Non-Profit and Voluntary Sector Marketing*, 11 (2006), p. p. 139-146. On the effects on memory and mental models see K.L. Keller, “Memory factors in advertising: The effect of advertising cues on brand evaluations,” *Journal of Consumer Research* 14 (1986), p. 316-333.

constructing different “orders of meaning” sustained by different levels of emotional charges emotions underlying rituals¹⁰³. Rappaport defines ritual as “the performance of more or less invariant sequences of formal acts and utterances not entirely encoded by the performers¹⁰⁴” and distinguishes three levels of the order of meaning¹⁰⁵. Low-level order of meaning of the ritual literally equates ritual with information (it defines what something is) without emphasizing the big picture or evoking emotional response. Middle – order level of meaning is concerned with connections, analogies and emotional responses that give emotional and cerebral charge to everyday life, but this level is heavily dependant on its everyday repetitiveness. Only a final, high-order of ritual meaning (Christmas arguably being one such ritual) can bring about common identity and give rise to society undergirded by commonality, because it is grounded in “unity, radical identification or unification of self with other.”¹⁰⁶ The unification of self with other and a formation of a common social self occurs even if all take action (or even when some abstain from action) for various reasons – common effects are separate from individual intentions. It seems that the effects of ritual are self-sustaining and self-perpetuating.

As examples in the case studies part will show trying to dismantle credibility and, one should add, endangering the cultural orders of meaning of historically present or majority religions through legal means was for different reasons almost regularly resisted or at the very least the demands were altered. Vice versa also. Attempts to advance symbolic public

¹⁰³ See Roy Rappaport, *Ritual and Religion in the Making of Humanity*, (Cambridge University Press, 1999) (hereafter Rappaport).

¹⁰⁴ Id., p. 24.

¹⁰⁵ For a further discussion on the orders of meaning in Rappaport's work, and the discussion on the role of ritual in religion and social life generally see Robert Bellah, “The Ritual Roots of Society and Culture,” in Micheel Dillon, *Handbook of Sociology of Religion*, (Cambridge University Press, 2003), p. 31-45, at 39.

¹⁰⁶ Rappaport, p. 91.

credibility of “new” or non-mainstream religions was for different reasons almost regularly resisted. . Non-mainstream or minority religious groups when enhancing their credibility tend to do so by promoting practices that are visibly different from that of other groups, be that on level of pure group symbols or by means of advancing “unusual” practices. Occurrence of such practices will obviously depend on the background of a religion which motivates such group behavior.

Alternatively, non-mainstream religious groups can focus solely on achieving success in some area of life which can serve to build up their group confidence, mutual pride and credibility both within and outside of the group. Almost obsessive group focus and reinforcement of i.e. the tradition or achievement of extraordinary economic, intellectual or artistic success among some non-mainstream religious and ethnic groups is a good example¹⁰⁷. By doing so, non-mainstream religions attempt to attain the “symbolic legitimacy” status which is meant to reaffirm their existence and permanence in a given setting. At the same time, by advancing their credibility in terms of visible differences, they retain the commitment of their members by “delineating” them from other groups – hence action can be simultaneously one of “inclusion” (attempt to attain external legitimacy) and exclusion (differentiating from others because of visible difference or differentiating because

¹⁰⁷ For such examples and analysis of the non-mainstream religious groups (3HO Foundation a yogic/Sikh group; Divine Light Mission, an Indian devotional group; and Vajradathu, a Tibetan Buddhist organization) focus on a “worldly economic success” as a means of legitimizing themselves in an American society see Kirpal Singh Khalsa, “New Religious Movements Turn to Worldly Success,” in James T. Richardson, *Money and Power in the New Religions*, (The Edwin Mellen Press, 1988), p. 117-140. Of course, focusing on economic success as a means of legitimizing one's group makes sense only against the widespread social background assumption that worldly economic success is indeed worthy of respect. If the context is different, legitimizing strategies of non-mainstream religions can change, i.e. in a society where practicing religion diffidently and with utmost scarcity of outward expressions, pushing an envelope of public expressions of one's religion might work as a tool to sustain intra group legitimacy, but is unlikely to be taken as a move towards legitimization in the wider society, see further below the discussion on boundaries. Many variations of legitimizing strategies are possible.

of success). The meaning of such practices was recognized as such quite some time ago by Max Weber, who argued that the “minorities seek to satisfy their desire for recognition.”¹⁰⁸

The credibility information as a mechanism for sustaining religious groups suffers one major disadvantage relative to non-religious groups: it has to simultaneously cater to professed and accepted beliefs, while remaining “in tune” with the current desires and needs of adherents. Moving too much away from the professed beliefs invites charges of hypocrisy and “betrayal” and can lead to a schism and the breakdown of a group; upholding rigidly professed beliefs without catering to group needs leads to dissipation of membership, especially in cases when there is a competition of several groups or outside pressure.

1.3 Boundaries, polarization effect and categorization as a function of intra-group coordination and solidarity

Observing religious rules signals belonging to one group or adherence to one set of values – but that can be done at the expense of the exclusion of many others, religious and non-religious groups and values alike. In terms of the social identity theory, groups provide means of identifying with themselves, but also a negative comparison between in-group versus out-of-group members. The activity is sustained through formal and informal sanctions aimed at preventing their members from relinquishing group status.

Religious rules and symbols, from time to time, can become a source of a bitter dispute and polarization, not only because of the “inter-group competition,” – which might in reality not even exist – but because the intra-group stability is at stake. For example, the

¹⁰⁸ Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, cited in Kirpal Singh Khalsa, “New Religious Movements Turn to Worldly Success,” in James T. Richardson, *Money and Power in the New Religions*, (The Edwin Mellen Press, 1988), p. 131.

presence of symbols of a competing religious (or non-religious) group at once enhances and diminishes group solidarity. It enhances it because group members can derive utility from derailing symbols of the competing group and by doing so signal their commitment to group values and detect potential in-group defectors. But at a same time, if the competing group is more successful if only symbolically in advancing its own message, there is a possibility that other group's solidarity will be diminished as a result of a reduced individual commitment and/or opt-outs and lack of commitment. It is difficult to know with absolute certainty how strong the polarization effect of religious rules and symbols is, but it is significant that even on the level of some religious scriptures and/or religious teachings references are frequently made to the symbols of the group "in error." Also, this is not to claim that different religious groups are continuously in the state of "competition" or conflict, as the extravagant implications of the social identity theory might suggest. If that was so, we might be able to explain "religious conflicts" – but we might *not be able to explain* arguably long periods of peace between different religions.

In problematic situations, however, religious groups in conflict tend to go as far as destroying each other and each other symbols as a first step of the conflict in order to signal their willingness to fight and strengthen group solidarity. This is hardly a peculiar trait and function of religious groups alone. In times of regime change (i.e. the fall of the German Democratic Republic) one of the first things done was the removal of Communist symbols and passionate destroying of Lenin's statutes. Images of China in the Western media are haunted by thousands of Chinese on stadiums wearing Communist symbols as a sign of their commitment to Chinese government and China in general.

If one assumes, in game theory fashion, the existence of “conflict prone conditions” – i.e. close proximity between groups and the competition for any sort of resources - likelihood of the repeated and/or prolonged interactions (repeated games) leads to a strategic behavior which can intensify the strength of conflict¹⁰⁹. Several factors contribute to this. Deliberation in closed groups can strengthen initial presumptions and biases which group members share, due to reputational cascades, since the perceived loss of reputation acts as a deterrence mechanism against even healthy disagreements¹¹⁰. Secondly, updating beliefs on the expected behavior of “enemies” in an inter-group conflict situations leads to significant occurrence of herding effect and informational cascades within the group, a grave obstacle for conflict settlement and resolution even when settlement presents the most beneficial solution both in short and long term¹¹¹.

It is frequently assumed that the polarization effect in cases of religious groups is even stronger than in the case of “regular” groups. One can conclude that from examples in history: while most groups enter conflict over interests, religious groups (though not only them) enter, as the history plainly shows, “value conflicts” and “identity conflicts.” The possibility of value and identity conflicts can persist in situations when there is a third party

¹⁰⁹ For an overview of the varieties of conflicts, conflict resolution mechanisms and the role of institutions see Christoph Engel, “Causes and Management of Conflicts,” *Journal of Institutional and Theoretical Economics* 159 (2003), p. 1-15, at 5.

¹¹⁰ Cass Sunstein, *Why Groups go to Extremes*, (New York: Basic Books, 2008).

¹¹¹ On a model of herding and informational cascades and its application to ethnic and religious conflict see Timur Kuran in *Journal of Institutional and Theoretical Economics*, “Ethnic norms and their transformation through reputational cascade,” *Journal of Legal Studies*, 27 (Summer 1998, pt. 2), p. 623-659; and Timur Kuran and Cass R. Sunstein, “Controlling availability cascades,” in Cass R. Sunstein (ed.), *Behavioral Law and Economics* (New York: Cambridge University Press, 2000), 374-397.

willing to impose a settlement¹¹².

The view I argued above is largely congruent with again Tajfel and Turner social identity theory and it can be extended in a dynamic fashion using Hirschman's work on economics of exit, voice and loyalty, analyzing response of individuals to a decrease in the quality of group life¹¹³. The group and its members either under duress (perceived or real) or facing just simple out-of group competition have several options as a strategy for coping. In Hirschman's terminology, there are two extreme possibilities. Group members can *exit* the group, i.e. engage in conversions or relinquishing of the current group identity or belonging in an attempt to assimilate or integrate in to the other group; or they can raise *voice* and try to improve the position of their group. Concept of exit corresponds to one of, in Yoshino words, assimilationists biases of *converting* – it is a demand that pre-existing identity is relinquished for the sake of “normal social interaction.” Converting is available only insofar relinquishing important identity is possible – hence, its not an option of the trait is immutable (race or sex) but it is *assumed* that it is an option for traits considered mutable (i.e. religious orientation).

Same goes for the voice option – opportunity to raise voice and fight out-of-group demands is costly and depends on the possibility of sustaining “fight” across time. Hence,

¹¹² For Tajfel and Turner, “the attempt to achieve a comparatively superior position for the in-group, on the basis of valued dimensions, is the key factor leading to discriminatory intergroup behavior. In order to provoke a group level response, group members must believe that their situation relative to out-of-group members can be improved” see Tajfel and Turner (1986) quoted in Saul, p. 557. The strength of conflict will depend on several factors of which two are noteworthy here. First, the level of individual group commitment – the stronger the commitment (heightened group identity), the individual is more likely to perceive the attack on a group as an attack on herself (even when that is not the case); and vice versa – the more committed group is, it is more likely to perceive “attack” on an individual as an attack on the group. Second, though deprivations of material means by one group in hands of another in many cases lies behind many conflicts, arguably the heightened level of conflict will not occur if no sign of the inter-identity conflict exists – groups must perceive each other as competing along some common scale. In other words, one group has to perceive another as the competitor on some identity level, irrespective of whether the competing group is really noteworthy competitor (in terms of strength, numbers, etc.) or no, see id.

¹¹³ Albert O. Hirschman, *Exit, Voice and Loyalty* (Harvard University Press, 1970).

depending on group size, commitment, material resources and availability to produce meaningful alternatives or substitutes for its members, some group will be more willing to entertain the option – others not so much. Both options, exit (conversion) and voice, involve significant costs and benefits, material and psychological, depending on the availability of resources and ultimately success of either strategy.

Exit and voice are extreme opposites, and in practice, as usual, there are also middle ways available for groups whose identity does not comport to what is considered socially acceptable. In a tradition of symbolic interactions these practices are termed *covering and passing*¹¹⁴. *Covering* involves costly dilutions or relinquishment of some traits of an individually held in-group identity as a price for sustaining relation or being accepted into a significant out-of-group. In other words, covering implies that the group is permitted to retain its in-group identity on condition that it mutes the difference between itself and the mainstream¹¹⁵. *Passing*, on the other hand, implies an opportunity to “sneak in” to the significant other group so that the in-group individual is able to function within it while falsifying its own preferences and hiding its pre-existing identity¹¹⁶.

There are important intricacies related to the functioning and the combination of the exit, voice and loyalty mechanisms when exercised within new or non-mainstream religious groups and/or groups of a generally lower social status relative to the mainstream. Two extremes example are illustrative – first a religious martyrhood, second attempts to

¹¹⁴ Kenji Yoshino, “Covering,” 111 *Yale Law Journal* 769 (2002), p. 769-781. These concepts are built on the basis of several works of Erving Goffman but see his *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall, 1963).

¹¹⁵ Kenji Yoshino, “Assimilationist Bias in Equal Protection: the Visibility Presumption and the Case of “Don’t Ask Don’t Tell” 108 *Yale Law Journal* 487 (1998), p. 500.

¹¹⁶ Id..

individual assimilation and success of members of lower social status groups.

Consider, first, the religious martyrhood – what today is most commonly practiced as Islamic terrorism – as an extreme example of both exit and voice options combined in one. Hirschman cites examples of sacrifice undertaken by early Christian martyrs as a prime example of combination of ‘permanent exit’ combined with a voice which resulted in change of opinion in favor of those who engaged in such action, consequently attracting new adherents to than small group of Christians. Curiously enough, the members of the group (those who share similar religious views) who survive martyrhood of their coreligionists were also better off than before the martyrhood. Why is this so? Though Hirschman is not entirely clear at this point, it seems he implies that the fact of “permanent” exit in a sense of physical destruction is beneficial for “left behinds” in-group members and detrimental to out-of-group “opponents,” because it does not leave the opportunity to inquire into all causes and motivation for such action, consequently testifying to and solidifying the strength of devotion to both the cause and the group. Finally, such manifestation of dedication strengthens the in-group cohesion – i.e. they act as a ‘voice mechanism’ - since it testifies to a dedication of the individual member to a cause of improving the situation of the group at all costs both internally (cohesion wise) and externally (relative to out-of-group members), through a willingness to lose one’s own life¹¹⁷.

Example to contrary, an attempt to achieve individual success and assimilate to mainstream, is also interesting. Consider example of in-group members of non-mainstream religious groups moving upwards on a social scale of mainstream society. Minority religious

¹¹⁷ Albert O. Hirschman, *Exit, Voice and Loyalty* (Harvard University Press, 1970), p. 109.

groups, as Hirschman argues, look unfavorably to such individual developments since they lower a social position (status) of the group in the society even further than already, and are therefore treated with indifference and/or despise and/or suspicion¹¹⁸. How does this happen? Those groups that are considered by the mainstream to be of a lower social status, as Hirschman explains using example of the status of people of color African-Americans in the US, can at moments mobilize resources and start moving up on a social scale *as a group and through collective action*. Such upward moves can be shocking to individualistically oriented societies in which the members of mainstream tend to see themselves primarily as *individuals* and most certainly not as bearers of any mainstream homogenous identity, since the members of mainstream may not be (and usually are not) aware of their own identity until the point of confronting differences and different identity¹¹⁹.

There lies a ‘catch.’ For members of lower social status groups interestingly enough it is not the possibility of failing in a collective endeavor to improve their social status as a group that presents real risk. The real risk is that *particular individual* members of such groups may succeed in improving their social status in the mainstream (upper social status) society. Why is this risk? Hirschman argues that such individuals can act as interlocutors for majorities in a sense that they provide a ‘link’ through which upper status members of societies can control and rule over lower status groups¹²⁰.

There are further implications and consequences of this argument, though Hirschmann does not discuss them. It stands to reason to argue that members of lower status groups when striving to improve their social position do so by advancing and trying to prove the ‘goodness’

¹¹⁸ Id., p. 110.

¹¹⁹ Id., p. 109.

¹²⁰ Id.

or even ‘superiority’ of their own values, goals and ways of life. The fact that individual member of lower status group has succeeded on *someone else’s terms* – i.e. on mainstream terms - can arguably present a de-motivating factor for sustainment of collective endeavor of a lower status group attempting to move up on a social scale as a collective. Hence, one might expect that ‘in group members’ that have succeeded in ‘mainstream’ society will be proclaimed ‘suspicious’ or even ‘traitors’ by the rest of the group, not because anyone really believes that they are ‘traitors’, but because in-group solidarity is at stake, jeopardizing the upward moving collective endeavor. Hence, individual exit moves ‘upstream’ by the lower social status groups are likely to be prevented and/or condemned by the in-group members. If however – and that is another implication of Hirschmann’s argument which he does not undertake - one assumes that several individual in-group members move upstream on a social ladder, forming a “group within a group within a group”, it might easily be that such new successful group (“a new elite”) will have incentives to keep everyone else (the rest of group members) in a lower social status, so as to preserve its elevated position amongst both in-group and out-of-group (mainstream) members. In other words, keeping groups in a lower position as a whole can be done via creation of some internal elite also.

When applied to religious groups, Hirschmann’s theory shares some similarity to Leo Pfeffer’s thesis on inclusion v. exclusion of the minority and non-traditional religious groups in the larger society¹²¹, except that Pfeffer focuses not so much on behavior of lower ranking religious groups, but rather on strategic reasons motivating mainstream to permit inclusion of

¹²¹ Leo Pfeffer “The Legitimation of Marginal Religions in the United States” in I.I. Zaretsky and M.P. Leone, ed., *Religious Movements in Contemporary America* (Princeton University Press, 1974), quoted of in Frank Way and Barbara J. Burt, “Religious Marginality and the Free Exercise Clause,” *American Political Science Review*, vol .77, no. 3 (1983), p. 652.

non-mainstream groups . According to Pfeffer, in many instances the real “exit” may not always be possible since out-of-group members or the society at large might impose insurmountable obstacles or at best accept the incoming on condition that they are spontaneously put into a second rate status. Consequently, in many cases no real alternatives exist but to remain in-group member even against ones own will. But the other option – *voice* - is frequently either not realistic or promises no gains whether short term or long term, though religious groups have managed to sustain the *voice* option against numerous pressures. Pfeffer argues that an inclusion of non-mainstream religious groups in the larger society (by which he means society loosely upholding secular norms) basically happens for two reasons. First reason is that either the mainstream norms have changed for strategic reasons or because of sheer indifference and have allowed for a non-conflictual inclusion of minority religious groups into the mainstream. Second scenario is that the minority (meaning not widely accepted) religious group internal beliefs or practices have changed for any reason in order to allow for *covering or passing* with less costs – that is the group has adjusted to the mainstream norms by itself. The second scenario works only as long as the group in place is perceived as or perceives itself as capable of change, that is, as long as its practices and beliefs are not considered immutable, meaning tied to race or ethnic issues.

Both Hirschman’s and Pfeffer’s thesis, on which I rely in this work, have practical relevance for the world of the legal regulation of religious groups, in a following way. To the extent that laws generally reflect majority preferences – or the will of the group claiming the will of majority – of necessity the law will benefit, in theory or in practice, one group over another. Assuming the social identity theory is right in claiming that even minor

differences along the identity axis perpetuate the costly group conflict, another main assumption of this work is that the law – representing a mainstream values and passions - will seek ways to minimize “identity” differences and will therefore act with the assimilationist bias¹²² in order to allow for *exit* or *covering* or *passing* ; and will further seek to discourage *voice* (fight) option of non-mainstream religious groups. In the process, the law will seek to “de-polarize” groups given that behavior to contrary can further entrench in-group identity, promote “undesirable” behavior and increase the likelihood and severity of conflict. On the other hand, religious groups whose beliefs and practices are in opposition to prevalent ones will show *the resistance bias* seeking either to bent prevalent norms their own way; or, in last instance, to attain the less costly covering or passing strategy, which is to say to try to adjust their practices so that the out-of-group cooperation is more likely and less burdensome relative to their identity which they seek to preserve.

1.4 Institutions and decision making

In this part , I first theorize on the rise of institutions as an uncertainty problem-solving mechanisms built against a particular social background of values, customs, religion and alike informal rules. Secondly, I analyze some effects of institutional functioning on behavior, drawing on anthropological work¹²³ and the latest experimental evidence from behavioral economics¹²⁴.

¹²² Kenji Yoshino, “Assimilationist Bias in Equal Protection: the Visibility Presumption and the Case of “Don’t Ask Don’t Tell” 108 *Yale Law Journal* 487 (1998).

¹²³ Mary Douglas, *How Institutions Think*, (Syracuse University Press, 1986).

¹²⁴ Iris Bohnet, “How Institutions Affect Behavior: Insights from Economics and Psychology,” in *Social Psychology and Economics*, David De Cremer, Marcel Zeelenberg and J. Keith Murnighan, eds., (Lawrence Erlbaum Associates, 2006), p. 213-238.

1.4.1 Uncertainty , mental models and the social grounds of institutions

The role of rules of in every group from religious ones all the way up to a level of society is a seminal topic for new institutional economics (NIE), which places emphasis on the effect of collective rules of game (institutions), as well as their influence on societies over time relative to role of individuals. Turning to NIE, one is able to grasp a role of rules, their ubiquity and their path dependency in a given society

The NIE distinguishes four levels of society, and consequently four levels of analysis¹²⁵. First level is so called embeddednes level: it encompasses informal institutions, customs, norms and religion. Second level is the level of institutional environment – these are formal rules of game, i.e., property rules. Third level is marked by governance structures, and it's sometimes called “play of the game” level. Only at a final, fourth level of society, according to NIE, do we find actual resource allocation. Following picture presents this structure¹²⁶:

¹²⁵ This part is drawn from Jusic (2007), p. 38-39.

¹²⁶ Oliver E. Williamson “The New Institutional Economics: Taking Stock, Looking Ahead.” *Journal of Economic Literature*, Vol. XXXVIII, (Sept. 2000), p. 597.

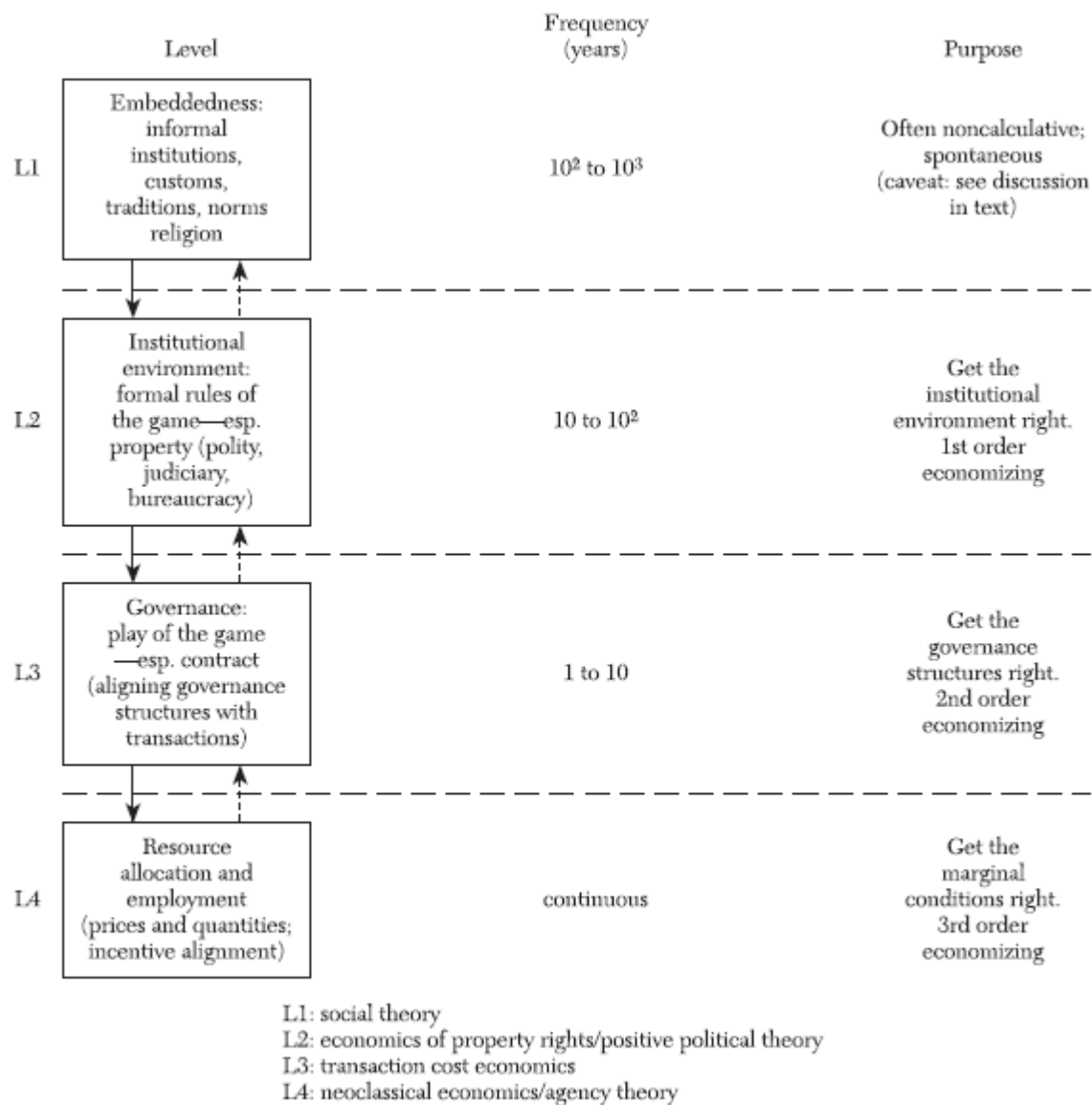


Figure 1. Economics of Institutions

According to NIE theorists, the rules of game are not necessarily conducive to a solely individual benefit and, as North puts it, “Sometimes codes of conduct [formal and informal alike – my comment] – good sportsmanship – constrain players, even though they could get away with successful violations.”¹²⁷

¹²⁷ Douglas C. North, *Institutions, Institutional Change and Economic Performance*, (Cambridge University Press, 1990), p.4.

By introducing rules, formal or informal, groups and their members avoid reflecting on every possible course of action and costly deliberations¹²⁸. “Rules of thumb” provide them with the less costly way of acting with individuals sacrificing the number of choices they can make. The equation, then, is following. Individuals sacrifice some benefits like endless opportunity to choose, and, in return, they bear lesser costs of deliberation on available choices. In return they also receive some part of the collective good to whose producing they contribute by acting in accordance with rules. Punishments for breaking rules, whether formal or informal, act as a pricing system. And it seems that the changes in a system of rules, formal or informal, will depend, at least to some extent, on the relation between the costs individuals bear and their share in social goods and, on the other hand, on the “efficiency” of rules.

“Non-efficient rules” that do not serve group needs will be replaced by more efficient ones, but the “efficiency,” it seems, cannot be judged from the point of view of external observer - otherwise we would not be able to explain prolonged existence of seemingly inefficient rules – but from the viewpoint of a group enforcing rules, or, in other words, only after fully understanding the identity and internal motivations of the group, factors which precede “rule following.” This is why the religious rules and the behavior of religious show high levels of ubiquity and “path dependency.” Moreover, as the above picture shows, the level of embeddedness grows on but it can be also influenced by institutional action – state supplantation of rules or state production of goods previously produced by religious groups can negatively or positively affect the rule and collective good production by the religious

¹²⁸ Jusic (2007), p. 38-39.

group.

For an economic application to a larger societal level, Douglas North and Oliver Williamson and those laboring around their theories argue for incorporation of the psychological and cognitive science evidence of the influence of internalized norms and formed identities on the behavior of groups and individuals and the impact this process has on the nature and formation of legal institutions. As Williamson puts it, on a level one of society (see picture above) “religion plays a large role.¹²⁹” and the change on the level non-rational beliefs that influence groups and prevent even necessary changes occur very slowly and display high level of inertia. The question in need of clarification, as Douglas North says it, is why informal constraints have such a pervasive influence upon the long-run character of economies and society at large¹³⁰?

Other authors have also produced a sustained analysis of the religious behavior from the point of view of the new institutional economics, with special attention to psychological influences religion has on the behavior of groups and individuals¹³¹. Brinitzer argues that factors like the asymmetry of information, i.e. constant deciding under conditions of bounded rationality, high opportunity costs and high transaction costs are reasons why societies and groups devise institutions or the rules of game. And given religion’s enduring impact on the human societies for centuries, the amount of the “social capital ” trough centuries and millenniums seem to be overwhelming and hard to dispose of¹³². In psychological terms,

¹²⁹ Oliver E. Williamson, “The New Institutional Economics: Taking Stock, Looking Ahead.” *Journal of Economic Literature*, Vol. XXXVIII, (Sept. 2000), p. 596.

¹³⁰ Douglas North, cited in Oliver E. Williamson, “The New Institutional Economics: Taking Stock, Looking Ahead.” *Journal of Economic Literature*, Vol. XXXVIII, (Sept. 2000), p. 596.

¹³¹ Jusic (2007), p. 39-40.

¹³² Ron Brinitzer, *Religion – eine institutionen-ökonomische Analyse*, (Egon Verlag, 2004). Hereafter Brinitzer.

prolonged existence of the rules on a level one is internalized via mental models, ideologies and identities, that serve as a tool of lowering transaction costs and reducing uncertainty and which are spread via cultural learning. Long existing societal norms and rules form mental models and ideological with a tendency to endure for a long time, irrespective of whether they are religious or not – there is nothing in this argument suggesting that psychological models need to be religious in order to provide focal organizational points for institutional building¹³³.

Mental models are “internal representations that individual cognitive systems create to interpret the environment¹³⁴” while Ideologies are “...the shared framework of mental models that groups of individuals possess...¹³⁵” Both mental models and ideologies give rise to an identity of a certain group. They are economizing devices by which “individuals come to terms with their own environment and are provided with a ‘worldview’ so that a decision-making process is simplified.¹³⁶”

Hypothetically speaking, as the societies have been floating in the sea of symbols, practices, and beliefs (some religious others not) for centuries, collective consciousness and (perhaps even more important) sub-consciousness has become accustomed to mechanisms of thinking and behaving in a way that was designed and changed through the evolutionary process in order to reduce transaction costs (explain the events in the world and point to the course of action without extensive information search and options analysis) and produce

¹³³ Jusic (2007), p. 40-41.

¹³⁴ Arthur Denzau and Douglas C. North. „Shared Mental Models: Ideologies and Institutions.“ *Kyklos*, vol. 47 (1), (1994), p. 4.

¹³⁵ Id.

¹³⁶ Douglas North quoted in Brinitzer, p. 41, fn. 143.

“social goods and capital” necessary for the survival and well being of the society. Well being, again, has to be judged from an insider point of view¹³⁷. As North argues the ubiquitous existence of ‘beyond rationality’ organized belief systems suggests that it may be a superior survival trait to possess some explanations rather than no explanation for phenomena beyond explanation and that such systems, both religious and secular, provide explanations in the face of uncertainty and ambiguity and act as sources of decision making.¹³⁸

Turning back to the NIE identification of the four levels of society (above) one can identify the position of institutions in the system of producing or reducing the identity connected with the given society and the institutions the society built for itself. On a first level, as noted, we find the religion, social norms and customary laws occupy the first level, while the second level is the level of institutional environment – these are formal rules of game, i.e., property rules; and another one third level, which is marked by governance structure also called “play of the game” level. From this model, one can conclude that a) law and legal institutions are built against a certain background of customs, and identities (including religious ones) that are meant to induce trust and produce “social capital”; and b) in the process of governing, law affects positively or negatively these “identity structures” in a interplay of change as a result of internal factors (internal change) or the external factors.

1.4.2 Function of Institutions

Anthropological work confirms some of the insights of the new institutional

¹³⁷ Jusic (2007), p. 40-41.

¹³⁸ Douglas North quoted in Brinitzer, p. 42, n. 152.

economics I have elaborated above. Mary Douglas emphasizes that institutions themselves do not have “minds of their own.”¹³⁹ Institutions provide emotionally charged “cognitive bonds” for a variety of boundedly rational individuals who work for the sustainment of these institutions. Cognitive bonds are built in a relationship with a variety of social norms and beliefs in order to sustain trust and cooperation necessary for institutional stability which changes over time, as institutions remember and forget according to perceived changes in public memory¹⁴⁰. For those whose lives are governed through institutional decisions, institutions define and confer identity, which is to say that institutional decisions define notions of what does it mean to be a member of the society represented by the deciding institution. Sameness or societal acceptance versus difference and societal rejection is implied in institutional decisions¹⁴¹. Decisions are made on the basis of social categorizations undergirded by the identity which the institutions confer and institutional analogies, previous decisions and the “rules of thumb” differentiate between what is acceptable and unacceptable on a particular social scale¹⁴².

Political scientist John Brigham in his study of the US Supreme Court professes similar view of institutions¹⁴³. Brigham defines institutions as “ways of acting”¹⁴⁴, dialectically defined through past and present human activity and values, changing throughout the time as result of the interaction between values, actions and meanings inscribed in

¹³⁹ Mary Douglas, *How Institutions Think*, (Syracuse University Press, 1986), esp. p. 9-19, and p. 45-53.

¹⁴⁰ On institutional remembrance and forgetting see id., p. 69-80 and p. 81-90.

¹⁴¹ Id., p. 55-67.

¹⁴² Id., p. 91-110.

¹⁴³ John Brigham, *The Cult of the Court* (Philadelphia: Temple University Press, 1987) quoted in Kathleen M. Moore, *Al Mughtaribun: American Law and the Transformation of Muslim Life in the United States* (SUNY Press, 1995), p. 6, n. 25 (hereafter Moore).

¹⁴⁴ Brigham, p.3, quoted in Moore, p. 6, n.26.

institutional acts. Institutions, in short, are context bound, located in a particular social act done in a particular place and time with a *particular meaning*. Institutions have “a capacity to order social life because people act as if they exist, as if they matter.”¹⁴⁵ As one (among others) important parts of general social life, institutions are dependent on social foundations, emotional and material interests which these foundations represent, and hence are always roughly congruent to general social values and expectation, since actions of institutions themselves must be such that they are understandable to those who are or will operate according to the guidance of these institutions. In short, institutions *speak* in similar language as the society they govern, even if the message is not popular one; just as society speaks *to, through* and *back to* institutions. If it was (or is) otherwise, the rift between state and society eventually will proclaim the death of institutions (as in cases of revolutions).

The experimental findings supplied by behavior economics provide ample evidence for the perspective on institutions laid above. In particular, six characteristics of institutions are noted as ones having greatest impact on behavior: creation of incentives; coordination of behavior; selection (both self selection and institutional selection); providing information on procedure; allowing for causal attributions; and influencing preferences¹⁴⁶. Creation of incentives is the most obvious function of institutions, i.e., law rewards lawful behavior through non-punishment, and imposes a cost on a behavior to contrary. Over-incentivizing can, as it was argued above, crowd-out intrinsic motivations (point further developed in a part on establishment and financial grants for religious groups) shifting a locus of behavior

¹⁴⁵ Brigham, p. 17, quoted in Moore, p. 6, n.27.

¹⁴⁶ Iris Bohnet, “How Institutions Affect Behavior: Insights from Economics and Psychology,” in *Social Psychology and Economics*, David De Cremer, Marcel Zeelenberg and J. Keith Murnighan, eds., (Lawrence Erlbaum Associates, 2006), p. 213.

from “inside” to outside.

Creating incentives coordinates behavior of people involved even through the mere announcement of law (“expressive effect”) by so affecting internal preferences (which are not to be confused with belief and identities that are logically prior to preferences) since the announcement of law has an effect of providing information, however incompletely, of wider social preferences consequently affecting the internal expectations on the behavior of others (“other regarding preferences”) and differentiating between “socially acceptable v. unacceptable.” Hence, even without being fully enforced institutions, acting through law, create social capital and trust by reducing uncertainty on the behavior of others. The whole procedure allows for “a causal attribution” – meaning that institutions affect behavior by providing information on why a certain outcome came about, by extension allowing the “blame game” to begin, since people tend to sort out information on procedure leading to outcomes in accordance with their own understanding of what is “fair or unfair.” As the results of psychological field studies and economic experiments involving subjects of various religious and ethnic background show, there seems to be a general tendency to more easily accept outcomes unfavorable to their religious or ethnic group if they perceive the whole institutional system to be “just” as a whole; share at least some common identity (across any scale) with the decision-makers; and perceive the procedures according to which decisions are reached as “unbiased or fair.”¹⁴⁷

Institutions also select people and allow for their self-selection according to their relative status and perceived motivations and hence sort them out in different groups (i.e.

¹⁴⁷ See Tom R. Tyler, *Why People Obey the Law*, (Yale University Press, 1990); and T. Tyler and P. DeGoey, “Collective Restraint in social dilemmas: Procedural justice and social identification effects on support for authorities,” *Journal of Personality and Social Psychology*, 69 (1995), o. 482-496.

sorting out between more cooperative v. less-cooperative groups). The good example of sorting out is the legal difference between not-for-profit organization and profit-oriented ones, which is based on a judgment on motivations (social or more altruistic preferences (in case for nonprofits) relative to the profit-oriented activities of corporations. Such selection can have important consequences for a change in group behavior and affect the endogenous group norms and their level of contribution to the production of common goods. The freer the choice to “self-select” potential cooperators on the basis of pre-existing reputation (and contribution) of potential cooperators increases internal group-efficiency and allows for a successful driving out of free riders¹⁴⁸.

Bottom-line of this part and why it matters for the institutional regulation of religious groups is following. Institutions confer identity and decide in accordance with some background identities the social norms that precede them. Obviously, some of the institutional effects on the behavior of religious group might be very strong – like crowding-out of motivation through over-incentivizing and the creation of endowment effect; creation or destruction of identities through legal means (affecting coordinating behavior); providing (or not) through selection and self-selection a space for competitive ways of coordinating behavior and creating group collective goods. Obviously then, depending on a strength of religious beliefs across group or individuals the institutional effects will be weaker in some other areas, since imposing fines on someone who for religious reasons believes he should engage in a prohibited behavior might not necessarily (and there is the whole problem, taken

¹⁴⁸ See Iris Bohnet, “How Institutions Affect Behavior: Insights from Economics and Psychology,” in *Social Psychology and Economics*, David De Cremer, Marcel Zeelenberg and J. Keith Murnighan, eds., (Lawrence Erlbaum Associates, 2006), p. 219 and accompanying notes on experimental evidence regarding the effects on contribution in public goods experiments.

in the next part) have the intended effect.

1.5 Historical and theoretical roots of contemporary legal systems of regulating religion: from conflict of passions and freedom of conscience towards institutional and emotional influence on decision-making

The historical roots of contemporary theories of legally granted religious freedom, “separation of church and state,” and a process of secularization and the way it unfolded itself to its present stage with all its variances is a somewhat complicated issue that cannot be taken here fully in its full historical richness¹⁴⁹. Generally speaking, most achievements of the process of secularization are the product of Enlightenment and the scientific revolutions, which basically implied the opposition to use and dominance of religious precepts in the sphere of governance and/or public sphere or even any sphere of life generally. Institutional aspect of the showdown between secularization and the organized religion was precipitated by the entanglement (indeed upper hand) of established churches – mostly but not exclusively Catholic Church in Europe and other orthodoxies. Other important aspects that have given powerful motivating factors to the rise of Enlightenment were long and protracted religious wars that have burst throughout Europe resulting in (after mass murders) in the Peace of Westphalia and a principles of “cuius region, eius religio”; further religious persecutions of minorities, and the migration of religious dissenters to the “new world” in order to found a new country (today US) so to escape the above cited horrors.

¹⁴⁹ See on that i.e. Rajeev Bhargava, *Secularism and it's Critics*, (Oxford University Press, 2005); Charles A. Taylor, *A Secular Age*, (Harvard University Press, 2007).

The more important issue to deal with, in the context of this work, is the theoretical roots of the separation of church and state (a somewhat narrower version of secularism) given that these theoretical roots, which predominantly rely on works of John Locke¹⁵⁰, Thomas Hobbes¹⁵¹, Kant¹⁵² and in later versions Rawls¹⁵³ and Habermas¹⁵⁴, inform the legal decision making sometimes even verbatim. Roots of secularization that inform the legal decision making, however, have to be distinguished from secularization as a social practice and a part and parcel of social norms – the two are not necessarily correlated, and more often than not, they live mostly side by side rather than legal secularism fully routing out social presence of religion.

Vice versa also – different institutional arrangement in case studies I deal with, alongside the institutional arrangements across the globe, show a variety of ways of organizing relationships between the state and religion – and many of the call themselves secular ones; in a nutshell, secularism as applied in law has mostly “minimal common denominator content” and this implies there is no blueprint for building perfect secular system. The minimal content appears to be this – no imposition of religious law using governmental tools (which is to say that establishment of religion per se does not run afoul of secularism, assuming formal equality of opportunities for practicing religious freedom); no favoring and disfavoring on the basis of religion; and no use of religiously inspired arguments as political arguments (accepting fallibilism as opposed to infallibilism of religious

¹⁵⁰ John Locke, “The Letter Concerning Toleration,” in *Focus*, ed. John Horton and Susan Mendus, (London, 1991).

¹⁵¹ Thomas Hobbes, *Leviathan*, ed. C.B. Macpherson (New York, 1968).

¹⁵² Immanuel Kant, “Religion within the limits of Reason Alone,” available at <http://www.hkbu.edu.hk/~ppp/rbbr/toc.html> (accessed 20.07.2009, 13:40).

¹⁵³ John Rawls, *Political Liberalism*, (Columbia University Press, 1993).

¹⁵⁴ See i.e. Jurgen Habermas, *Religion and Rationality: Essays on Reason, God and Modernity*, (MIT Press, 2002).

arguments). That is, of course, rather strong version secularism in very broad strokes and highly abstract fashion. In reality, both social and legal, things are always much more complicated and blurred and the question is how were some of these theoretical solutions for secularism squared with the enduing existence of religion with all that comes with that (potential for religious conflicts, social influence of religion etc.)?

Moreover, full separation of “church and state” or “law and religion” appears as practical impossibility for several reasons. Religious groups function not outside of the society but within a society and therefore regulations will have direct or indirect effect on it as in examples of registration laws for religious communities, zoning laws etc. Secondly, disputes between religious groups, or religious groups and the state, or within the religious groups inevitably result in blurring lines between state and religion, because in such cases state in effect or in intent engages in estimating the “veracity” of religious claims against other interests (internal or external to religion); and in some cases state might even, if only indirectly, make pronouncements on the sanity or sincerity of the religiously inspired behavior or beliefs.

On the outset, according to the theory of religious groups I have elaborated above, if one is hoping to have successful governing system that will ensure peace *and* not be based on some religious or theological bases (a far cry of a secular society) there is literally no good *theoretical* reason what so ever to tolerate great variety of religions in most of its forms and that for three reasons¹⁵⁵. First, some religious groups (or a group within any religious

¹⁵⁵ Brian Leiter, “Why Tolerate Religion?,” in *Constitutional Commentary*, Winter 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012910 (downloaded 13.10.2009.) Of course, peace can be ensured on different basis by establishing one religion and removing all others, in a Hobbesian fashion discussed below.

group) will or is likely to strive to impose their own views on everyone or at least would like the reasons their beliefs to be wholly acceptable to everyone in spite of the fact that the understanding implies belief - hence undermining the project. Second, the religious commands might be wholly opposed to the governmental goals, ensuring “disloyalty” to the law and to the state as such – and I have already presented in detail how religion inspires greater loyalty both to religion per se and the religious group, which leads to a third problem. To the extent that there are several religious groups and in case that they are opposed to each other, different types of conflict might be in sight, not a very good news for ensuring peace. What to do?

These and related issues were and are the core of the whole liberal democracy governance, and to a certain extent current solutions were born out of attempts to resolve questions posed above. In what follows below, I discuss and critically analyze some theoretical and practical insights of, firstly, Thomas Hobbes and John Locke; and the arguments for and against (dis)establishment of religion propounded by Adam Smith and David Hume.

Thomas Hobbes and the peace of sovereign control

Similar to Locke, on whom see below, Hobbes was writing in the time of civil war and religious unrest. Hobbes held a rather pessimistic view of human but paradoxically yet not unexpectedly, out of pessimistic premises optimistic view of the potential to solve social problems can follow after few “minor obstacles” have been removed. Opposing, to a certain extent, the teaching of classical natural law as propagated by church fathers like Thomas Aquinas and St. Augustine, Hobbes rejected perfectionist strand of Christian theology and

turned towards the individual and its right to self-preservation. Starting from the concept the “state of nature” (a brutish state of war that precedes and conditions the establishment of government) as the basis of his teaching of “new” natural law, Hobbes arrived at a doctrine of sovereignty and the notion of the “commodious living”; legal positivism and the new concept of justice; and the institutionalization as the basis of the good governance¹⁵⁶.

Only after Hobbes the doctrine of natural law has in essence become the doctrine of the “state of nature.” It was necessary for Hobbes to claim that the state of nature antedating civil society is the brutish condition of the fight for survival, where everyone is a law on to himself. It is a state of perpetual war for survival where everyone is everyone else’s enemy, or the state of the “homo homini lupus.” The human reason might lead the man to conclude that the orderly state of things is preferable to the disorderly and brutish state of nature, since it is easier to save one’s own life if everybody subjects themselves to one sovereign that will have a duty to preserve a peace among the individuals.

There is a contradiction in this claims, since as commentators noted, if Hobbes’s state of nature is present everywhere and people are, by virtue of reason, led to replace it by the state of peace, one could ask why the state of peace is not present all around, since it is supposed to emerge naturally. Hobbes’ explanation is that the prevalence of the state of nature (conflict) is a result of the interference of human stupidity and passions in a natural

¹⁵⁶ This interpretation of Hobbes’ philosophy is drawn from Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), p. 153-170 as interpreted in Asim Jusić, “The Weimar Intellectual Baggage in Leo Strauss’ *Natural Right and History*”, M.A. thesis, 2005, University of Heidelberg (on file with author), hereafter Jusic (2005). On the influence of natural law and natural rights on works of Locke and Hobbes see Ross Harrison, *Hobbes, Locke, and Confusions Masterpiece* (Cambridge University Press, 2003). Richard Tuck argues against Strauss’s depiction of Hobbes as „the demon of modernity“. Tuck recognizes that Strauss has made important insights in to Hobbes’s moral and political philosophy and his relationship with natural science. The reason why, according to Tuck, Strauss depicts Hobbes as „the demon of modernity“ is Strauss’s fanciful reading of the ancient writers rather than Strauss’s reading of Hobbes. See Richard Tuck, “Hobbes as the demon of modernity“ in *Great Political Thinkers*, p. 214-217 (Oxford and New York: Oxford University Press, 1992).

order. Contrary to Hobbes, other philosophers think it is obvious that “The right social order does not normally come about by natural necessity on account of man’s ignorance of that order. The ‘invisible hand’ remains ineffectual if it is not supported by the *Leviathan* or, if you wish, by the *Wealth of Nations*.”¹⁵⁷ Another reason given for why Hobbes’s state of nature is not being overcome everywhere is that the very Hobbesian concept of the state of nature is but a secularized Christian concept of the state of grace, hence a concept not evident to a pure human reason that does not accept fate and variations of the theory of original sin. Essentially, Hobbes replaced the divine grace with the good government.¹⁵⁸

Based on the supposed brutish state of nature Hobbes was able to build his doctrine of sovereignty. The sovereign is the one that preserves peace in the society and elevates it from the brutish state of nature and bases its claim to governance and preservation of social peace in a social contract to which every individual adheres to once it has become a member of the society. In other words, individuals surrender to the sovereign their own right to self-preservation. However, Hobbes did not stop at this. Opposing the classical, Epicurean tradition of the “ascetic hedonism”, according to which nature has given to a man only needful things, driven by the hedonism and the belief in the power of science to conquest and change nature, Hobbes claimed that there are no purely natural wants. For him, all wants are legitimate as long as they are pleasant, with exception of one, namely the desire or passion for disturb the peace in the name of ones own private goals and ideals.

On these premises, it is easy to see why for Hobbes the function of state is not only to preserve the peace and the self-preservation of individuals, but also to make their pleasurable

¹⁵⁷ See generally chapter three in Jusić (2005) and Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), p. 200-201.

¹⁵⁸ Strauss, p. 184.

living possible, to secure “commodious living.” Since sovereign is the result of the contract among individuals, the machine that is supposed to guard pleasurable existence of individuals, the sovereign may do only that to which individuals have consented to. In opposition to the classical natural right, in Hobbes’s modern natural right, consent takes precedence over perfectionist ideals advanced by high flying and demanding principles, including religious principles. The doctrine of sovereignty then becomes a legal doctrine and the natural law transforms itself in to a natural public law. As Machiavelli insisted to replace the “best regime” with the “efficient government”, Hobbes’s natural public law substituted “‘best regime’ with the ‘legitimate government’”.¹⁵⁹

A logical consequence of Hobbes’s doctrine of the state of nature and the doctrine of sovereignty is the legal positivism. Since everybody’s natural right to self – preservation is transferred to a sovereign which, in turn, creates laws that are suppose to guard that very right, there is no reason anymore to oppose the legal norms enacted by the sovereign, since these norms are based in the supposed consent of individuals. The positivist legal position, according to Jean Hampton, understands law as dependable on sovereign’s will.¹⁶⁰ This is a reason why, according to Hampton, Hobbes is frequently regarded as absolutist, since when

¹⁵⁹ Ibid, p. 191.

¹⁶⁰ Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge University Press, 1986), p. 107, hereafter Hampton. Hobbes’s definition of law is following “I define Civill Law in this manner. CIVILL LAW, *Is to every subject, those Rules, which the Common-wealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary to the Rule.*” [italics and capital letters in original] Hobbes quoted in ibid. For M.M. Goldsmith, there is a difference between Hobbes’s and Kelsen’s legal positivism. In case of Hobbes, final authority is the sovereign, beyond which there is no appeal In the case of Kelsen, the final authority is the *Grundnorm* whose validity is presupposed. See M.M. Goldsmith, “Hobbes on law” in Tom Sorrel, ed., *The Cambridge Companion to Hobbes*, p. 274-304 (Cambridge University Press, 1996).

his legal theory is taken to its logical conclusion, individuals cannot oppose any decision made by sovereign as sovereign's will is presumably the will of everyone.¹⁶¹

Hobbes wanted the legal system to endow all the individuals for their entrance in to the social contract and the creation of sovereign and to strengthen his endowment of the individuals, and in consistence with his claim that the good and pleasant are equal and that the function of the state is to preserve the “commodious living”, Hobbes also had to transform the classical notion of justice. Contra Aristotle, for whom the justice was a virtue of serving others, for Hobbes justice becomes an “equivalent to fulfilling ones contracts.”¹⁶²

Hobbes can be regarded as almost a “quazi-religious” political thinker par excellence, since he managed, theoretically, to overcome the traditional position of natural law as defined by Thomas Aquinas, according to which for a law to be “a proper law,” it needs to be just and known by human reason. For natural law tradition, the mere fact that the sovereign commands the law does not suffice and what is “just and known to human reason” in, i.e., Thomist and Augustinian variances of natural law tradition which Hobbes was opposing, is basically inferred from religious teachings. In short, Hobbes was grappling with *the* major problem legal systems have when dealing with religion(s) – the tendency in religion to claim extra-empirical sources of behavior and, on that basis, to (potentially) oppose or subvert sovereign commands¹⁶³.

If human beings are regarded as asocial or evil and are led by reason to install the sovereign in order to preserve peace, the task of *Leviathan* as the sovereign is to enforce laws

¹⁶¹ On the absolute sovereignty in Hobbes's work see Hampton, 98 – 104. On the legal positivism as a result of Hobbes's concept of the absolute sovereignty, see id., p. 107 – 110.

¹⁶² Strauss, p. 187.

¹⁶³ Thomas Aquinas quoted in Hampton, p. 107.

in order to achieve these goals. Since self-interest and the need to satisfy infinite wants is the individuals primary motive, private vices will become public benefits only through the *institutionalization of government*. This orientation towards the institutionalization of government, premised on an almost rational choice view of individuals, is also present in Kantian philosophy. “As Kant put it in rejecting the view that the establishment of the right social order requires a nation of angels: ‘Hard as it may sound, the problem of establishing the state [i.e. the right social order] is soluble even for a nation of devils provided they have sense,’ i.e. provided that they are guided by enlightened selfishness.”¹⁶⁴

Looking deeper in to the problem of the relationship between sovereignty, social peace and religion – the problem Hobbes was grappling with - we can clearly see the truly problematic core of Hobbes’ approach, sometimes called “a competing fear.” As Leo Strauss said, interpreting Hobbes’ *Leviathan*, “In the first passage Hobbes says that the fear of the power of man (i.e., the fear of violent death) is ‘commonly’ greater than the fear of the power of ‘spirits invisible,’ i.e., than religion. In the second passage he says that ‘the fear of darkness and ghosts is greater than other fears.’¹⁶⁵”

And so indeed, as it was apparently well known to Hobbes, that is the biggest issue of regulating religion with an aim of ensuring peace and tranquility. To the extent that people (or even a minority of them) prefer or believe in unknown “otherworldly” gains or fear the “afterworld” punishment more than they prefer “this worldly” gains and fear present punishments and sanctions – including the ultimate one, the threat of death - there seems to be very little that the sovereign can do. Moreover, to the extent that there are several religions

¹⁶⁴ Id.

¹⁶⁵ Id, p. 198.

with conflicting claims, sovereigns set of available actions aimed at ensuring peace is severely restricted. Dealing with this baseline factual plurality of potentially conflicting values and aims makes Hobbes ultimately a modern thinker and certainly a more consistent thinker than Locke, for reasons outlined below.

Hobbes was ultimately a moral psychologist who recognized that the plurality of values and desires is ultimately conditioned on essentially human emotions, the threat human beings share equally – in that sense Hobbes was egalitarian and a rational thinker, conclusions he drew from these premises notwithstanding¹⁶⁶. When Locke says that every church is orthodox to itself and a law unto itself, Hobbes makes basically a same statement that “all men are by nature provided of notable multiplying glasses, (that is their Passions and Self-love).¹⁶⁷” And since “some men’s thoughts run one way, some another¹⁶⁸” and everyone is equal in passions and self-love, hence no man can judge another one and conflict is almost inevitable.

These premises of basic human equality Hobbes shares equally with Locke. But from there on, Locke’s conclusion is that since equality of humans and plurality of values they hold (including religious values) is obvious, and there appears to be a conflict among those values, the best way to assure the peace is minimal government that leaves everyone equally free to pursue their somewhat ignoble goals, on condition that they do not hinder others¹⁶⁹. For Hobbes, same insights recommends different course of thinking and actions. Since all are equally slaves to passions and self-love, and will therefore conflict because everyone prefers

¹⁶⁶ This interpretation of Hobbes relies on Stanley Fish, *The Trouble With Principle*, (Harvard University Press, 1999), p. 178-182 (hereafter Fish).

¹⁶⁷ Thomas Hobbes, *Leviathan*, ed. by C.B. Macpherson (New York, 1968), p. 239.

¹⁶⁸ Id., p. 135.

¹⁶⁹ Fish, p. 179.

his or hers own goals to goals of another, freedom must be curtailed if peace is to reign and the solution is to erect artificial mechanism (*Leviathan*) to which all will's will be equally subject¹⁷⁰. The fundamental law of nature, for Hobbes, is "That every man ought to endeavour Peace¹⁷¹" following up on a Golden Rule, the "Law of the Gospel: *Whatsoever you require that others should do to you, that do ye to them.*"¹⁷² (emphasis in original). Hobbes *Leviathan* is by no means "minimal government" and does not rest on any high flying procedural principle of "what is truly religious or not" (as in Locke). Further, on condition that their pure lives are not endangered, subjects of the Hobbes' sovereign have no means to resist sovereign claims. The rights of subjects are highly restricted and no wonder Hobbes was frequently taken to be authoritarian.

As Fish notes, from the insight of the plurality of values, Locke, Kant, Rawls and others draw the conclusion that any form of absolutism is to be rejected. For Hobbes, exactly the opposite follows: "*because* no one's view can be demonstrated to be absolutely right (and also because everyone prefers his own view and believes it to be true), someone *must* occupy the position of absolute authority."¹⁷³ (emphasis in original) This is a main difference between Locke (and Rawls and Habermas and many others today) and those who are working in a Hobbesian tradition of moral realism. Former group, considered a more liberal one, when asked "how would you persuade the true believer to abandon his efforts to write his beliefs into the law?" responds by arguing from a higher and abstract principle (overlapping consensus, intersubjective discursive truth based on arguments accessible to

¹⁷⁰ Id.

¹⁷¹ Thomas Hobbes, *Leviathan*, ed. C.B. Macpherson (New York, 1968), p. 190.

¹⁷² Id.

¹⁷³ Fish, p. 180.

everyone, etc.) and on the basis of such principle promising a better world, better community, a better self in exchange for a believer foregoing his present religious fervor¹⁷⁴. For a latter, Hobbesian group, the response to the above presented question of how to persuade believer to forego his zeal is “scare him with the spectre of perpetual conflict.”¹⁷⁵

But the flaw in “scaring with a perpetual conflict” is obvious, which is a missing point in Stanley Fish’s interpretation I have relied on, to a certain extent, above. To the extent “otherworldly gains and punishments” are preferred to even the scary potential of perpetual conflict, and the fear of death is consequently perhaps not even a fear, the system might not work. It can almost be said that for Hobbes, widely acknowledged in intellectual history as an atheist, “state of religion” antedates or even supersedes “state of nature” (brutish existence in perpetual conflict). Hobbes came to see, quite logically, that the only way to salvage his project of sovereignty and legal positivism against the “competing fear of invisible powers” that can endanger the purpose of his project, peaceful and commodious living, was to weaken or eliminate the “fear of ghosts”, or, more precisely speaking as Strauss does, to establish a “a-religious or atheistic society as the solution of the social or political problem.”¹⁷⁶ While this might sound as somewhat farfetched conclusion, it is not inconceivable that this is exactly what Hobbes had in mind following this logic: the *cause of the problem is the means* to overcome the problem in order to *ultimately remove the cause*.

How is this to be done? Simply through absolutist imposing of everything and anything, religion included. In Hobbes own words¹⁷⁷:

“The right of judging what doctrines are fit for peace, and to be taught the subjects, is in all

¹⁷⁴ Id., p. 181.

¹⁷⁵ Id.

¹⁷⁶ Strauss, p. 187.

¹⁷⁷ Thomas Hobbes, *Leviathan*, ed. C.B. Macpherson (New York, 1968), p. 31-32.

commonwealths inseparably annexed...to the sovereign power civil, whether it be in one man, or in one assembly of men. For it is evident to the meanest capacity, that men's actions are derived from the opinions they have of the good or evil, which from those actions redound unto themselves; and consequently, man that are once possessed of an opinion, that their obedience to sovereign power will be more hurtful to them than their disobedience, will disobey the laws, and thereby overthrow the commonwealth, and introduce confusion and civil war; for the avoiding whereof, all civil government was ordained. And therefore in all commonwealths of the heathen, the sovereigns have had the name of pastors of the people, because there was no subject that could lawfully teach the people, but by their permission and authority."

In other words, the religion is not being enacted for its own sake and Hobbes does not seem to think religion is inherently worthy of a higher stature in society. It is enacted because such a move makes the control of religious teachings possible. And the religion *should* be, according to Hobbes, used for purposes of inculcating and promoting such values that are useful for whatever civic ends the sovereign finds useful, first and foremost the end of sustaining peace. Sovereign should have a power to determine doctrines, sacraments and the religious personnel in (alongside i.e. controlling university curricula, press and public opinions) in order to make sure that there are no contradictions between the commands of God and the commands of sovereign. Inclination of the subjects to obey "higher religious authority" and follow their conscience instead of legal command will therefore be removed¹⁷⁸.

Given that Hobbes is widely regarded as an atheist it is not unreasonable to assume that Hobbes has foreseen or has at least secretly hoped that the establishment of a uniform religion whose teachings are congruent with sovereigns legal commands will at some point undermine the need for religion per se. In such a case, if one is to take Hobbes view of

¹⁷⁸ Michael W. McConnell, "Why is the Religious Liberty the 'First Freedom'," 21 *Cardozo L. Rev.* 1243, 1248 (February, 2000).

human nature, the human society would finally evolve into a manageable system that rests on infinitely malleable and never satisfied human passions and self love, all kept in check by a sovereign imposition of the fear of death and pain (sanctions). This conclusion makes Hobbes indeed a modern rational choice institutionalist.

Formally speaking, Hobbes' goal can be achieved even with several religions but on condition they make their teachings congruent with the sovereign command. Scholars argue Hobbes was not wrong to point that "no control of numerous religious" and separation of religious and mundane authority - though this in reality never happened - can be a cause of division. But they add that Hobbes was wrong to the extent that he did not fully contemplate possibility that religion can be used also as a tool for resisting sovereign oppression.¹⁷⁹

This argument is frequently advanced mostly in a form of "Yes there is, say, religious tyranny or terrorism, but there is also resistance of various churches to Communism and there is also Martin Luther King, both who in the name of religion fought against oppression and racism having no obvious legal claim or force at their disposal against a sovereign that commanded or at least has not prohibited oppressive practices." The argument might or might not be persuasive on its own terms and assessing whether the damage of suffering religious tyranny or dying as a result of religious conflict is worth one Martin Luther King or charitable deeds by good souls is in any case a matter of personal taste and risk preferences. For Hobbes, this argument would not matter too much, since he was interested, first and foremost, in securing peace above all, rather than satisfying the idea of good and humane social life.

¹⁷⁹ Id.,1250.

Looking back in history, it is not unfair to say that for all *practical* purposes Hobbes views on the proper relationship between state and religion have been mostly if not uniformly accepted in most of Western Europe and in North America (perhaps even all around the world). Hobbes arguments are superior in terms of logical consistency to those of Locke, though among older and modern social contract theorists and those laboring around the issue of law and religion Locke is certainly more popular and has won the popularity contest. One could argue, also, that Locke is Hobbes with softer edges, since Locke's definition of religion as matter of belief rather than conduct in any case has a Protestant religious "spin" which, as I have argued previously, is unlikely to be a satisfactory way of regulating religion in case when background conditions (i.e. population beliefs and practices) change. Though this is a bit of generalization, it is also interesting to note that religious history of Western Europe to a certain extent follows the script I believe Hobbes had in mind when proposing an establishment of religion as means to undermine the religious zeal and, as I have speculated, perhaps even to produce what is today commonly called "secularization." Whether this is possible only on the basis of the background religious systems Hobbes was dealing with, is an entirely different and more complicated question.

John Locke and the "Letter on Toleration"

In his "Letter on Toleration," John Locke has provided many answers for questions of religious toleration and the regulation of religion and many of his arguments have not been, so far, been theoretically very much improved but were certainly well received especially in

Anglo-American or Anglo-Saxon political philosophy and law generally¹⁸⁰. But Locke's "Letter on Toleration" far from being a treatise on mere toleration is discussion of two related issues already familiar from the above laid out arguments. Locke is defining what the "true" religion (and religious inspired behavior) is and is not, so to set the boundaries between religion and state and at the same provide regulatory grounds for state works; and, at the same time, questions, in an interesting way, the issue of loyalty of particular religion and the trustworthiness of non-religious ones (atheists).

Locke's starting point were ensuing religious conflicts of his times and what he basically was looking for was a pragmatic, if belated, form of compromise between the state and the existing religious groups, granting in advance that it is not practically possible to rout all of them or at least some of them (those Locke happened not to approve of). The problem which Locke clearly perceived is that every religious belief is orthodox to himself, not recognizing any objections from the inside, and attempting to persuade others through force of its own veracity – the plurality of opinions is maximal and there is no adjudicating body available here and now, as everyone is claiming divine inspiration.

In order to resolve the issue of clashing orthodoxies, Locke starts by granting that a true religious belief cannot be compelled, and hence the imposition of *belief* is not an acceptable alternative for the magistrate to do, as such compulsion would be insincere and would not lead to what Locke thought true belief is supposed to achieve: a salvation of the soul. The conclusion that follows from that is that the realms of religion (church) and the

¹⁸⁰ On Locke's influence of American Revolution and liberalism see generally Steven M. Dworetz, *The Unvarnished Doctrine: Locke, Liberalism and the American Revolution* (Durham and London: Duke University Press, 1990) and Ruth Green, *John Locke's Liberalism*, (Chicago: University of Chicago Press, 1987). The interpretation of John Locke's "Letter of Toleration" I am drawing on here is from Fish, p. 162-186.

state (magistrate) are separate, religious issues being connected solely with salvation, state business with the wellbeing of the commonwealth¹⁸¹.

Locke perceived another problem, however, the one which might strike a blow to his whole project – if everything is granted as “necessary to salvation” (rituals, outward expressions et.) the magistrate will be incapacitated and the governance will not be successful (the number of exemptions will be overwhelming, since who is there to judge (as an external observer) what is and is not necessary for the salvation?). Locke falls back on what he calls a “true realm of religion” and distinguishes between things necessary for salvation (for Locke that is sincere belief solely) and matters that he perceives as the realm of indifference – the time and place of worship and other more ritualistic matters¹⁸². In other words, the true realm of religion, for Locke, turns out to be *forum internum*, that is one’s own private belief and emotions defined solely as a relationship between an individual and its own God. Religion, in other words, is an individual private transaction between a person and whatever deity or set of particular things he/she might believe in (for Locke, that is a monotheistic God). Now that the religion is defined in such a way, the protection of religion is almost always granted since any regulation that touches on outward expression of religion will in any case (according to Locke) respect the true content of religion, internal belief. Hence freedom of religion appears always absolute ones it is defined narrowly as restricted to basically psychological processes.

There again remains a problem, even after religion has been defined in such a way, the problem of the regulation of “rituals,” since Locke would like to establish a system where

¹⁸¹ “John Locke: A Letter Concerning Toleration,” in *Focus*, ed. John Horton and Susan Mendus, (London, 1991), p.14, and 18-19.

¹⁸² Id., p. 21, 29, 35-36.

de-facto (but not necessarily de jure) no religion prevails (holds no state power). Hence, he poses to himself another question “when and for what reasons can the magistrate regulate outward expression of religion (i.e. ritual slaughtering) even when such expression is a central part of someone’s religion?” The answer is telling, since it is verbatim taken in many legal opinions in many different places. Here it is:

“Melibous ...may lawfully kill his calf at home, and burn any part of it that he thinks fit; for no injury is thereby done to anyone, no prejudice to another mans goods. And for the same reason he may kill his calf in a religious meeting...what may be spent on a feast maybe spent on a sacrifice. And if, peradventure, such were the state of things that the interest required all slaughter of beasts should be forborn for some while, in order to the increasing of the stock of cattle, that had been destroyed by some extraordinary measure; who sees not that the magistrate, in such case, may forbid all his subjects to kill any calves for any use whatsoever/? Only it is to be observed that in this case the law is made not about a religious, but a political matter: nor is the sacrifice, but the slaughter of calves thereby prohibited.¹⁸³”

In other words, regulate religious rituals as long as you want as long as such regulation is based on political and not religious motives (avoid attributing regulation to religion); do not impose literally and openly any religious belief; and the conditions of Locke’s project of religious freedom and tolerance under the aegis of the common state are satisfied. The problem with the above stated perspective is obvious – who will decide (according to what principles) what is central and not central to any religion (especially the more ritually oriented religions); and, even if such decision is available, what to do when in practice it might turn out that the same secularly (politically) motivated regulation might have no effect on some religions, and a devastating effect on others since they are producing psychological and material “taxation”?

With that question, more or less, three hundred years after Locke everyone is

¹⁸³Id., p. 36-37.

grappling without any complete answer that would uniformly satisfying to everyone and for a simple reason – there can be no satisfying answer. And on Locke’s premises certainly there cannot be one, as Jeremy Waldron argues, since in either case Locke is addressing future subjects of his magistrate as members of the Christian congregation, laboring, therefore, against the premises and the background of the majority Christian population adhering to a variance of Christianity with few rules and doctrinal demands¹⁸⁴. Change background conditions, as Stanley Fish notes - that is assume stronger versions of Christianity such is Orthodox Christianity or exchange a population of Christians for the population of Muslims or Jews – and the project of regulating religion and consequently the project of toleration the way Locke constructs it changes shape and likely “assumes another form or maybe no form at all¹⁸⁵.”

But no project of tolerance can last without those who are not to be tolerated in particular conditions and in Locke’s case those, first and foremost, Catholics (on account of their perceived or suspected disloyalty to the state motivated by the loyalty to the Pope); and atheists on account of their “untrustworthiness” – since they have no strong internal beliefs to be relied on as a guarantor of “keeping promises,” no toleration, according to Locke, will be granted to them. The list is extended by those sects who teach that men are not obliged to keep their promises and teaches dethroning the prince in cases when he is of different religion¹⁸⁶. The whole question basically, as I was stressing all along, falls down to a question of loyalty and the suspicion of disloyalty – in other words, none is sure that things

¹⁸⁴ Jeremy Waldron, “Locke: Toleration and the Rationality of Persecutions,” in *Focus*, ed. John Horton and Susan Mendus, (London, 1991), p. 99.

¹⁸⁵ Fish, p. 179.

¹⁸⁶ John Locke: A Letter Concerning Toleration,” in *Focus*, ed. John Horton and Susan Mendus, (London, 1991), p. 45-47.

who you hold dear to your heart might not take precedence over what is suppose to be common concern. And in case if the particular religion has roots or connections or center outside of the present country, than so much worse. The best example is Catholic (allegiance to Pope) and then also Muslims. here is how Locke explains that:

“It is ridiculous for anyone to profess himself a Mohametan only in his religion but in everything else a faithful subject to a Christian magistrate, while at the same time he acknowledges himself bound to yield blind obedience to the Mufti of Constantinople, who himself is entirely obedient to the Ottoman Emperor.¹⁸⁷”

Hence, Locke worked with the underlying premise of the veracity of the Christian faith and worried about the disloyalty and “infidelity” of quite a few other forms of non-religious belief such is atheism and non-Christian variances of religion with, however, at least from the perspective of his own time, quite a diffident attitude towards others. Consequently, he was willing to allow for a use of religious arguments in what is today called public space in order to “draw the heterodox into the way of truth and procure their salvation... But it is one thing to persuade, another to command; one thing to press with arguments, another with penalties.¹⁸⁸” He also supported the financial support of the state religion and the dispensation of the religious patronage¹⁸⁹. From a contemporary point of view, Locke would be a supporter of some form of the state supported religion combined with a mild support for protection of dissenters and members of other faiths.

¹⁸⁷ John Locke, “Other Writings,” in *Focus*, ed. John Horton and Susan Mendus, (London, 1991), p. 65.

¹⁸⁸ Locke quoted in Michael W. McConnell, “The Origins and the Historical Understanding of Free Exercise of Religion,” 1409 *Harvard Law Review* 1441 (1990), n. 127.

¹⁸⁹ Michael W. McConnell, “The Origins and the Historical Understanding of Free Exercise of Religion,” 1409 *Harvard Law Review* 1441 (1990),

Adam Smith and David Hume: marketplace of religion or establishment? From institutionalism and regulatory policy to emotions and moral judgments

In the history of Enlightenment and the successive intellectual history, two figures certainly stand out as the most prominent ones: Adam Smith and David Hume. Influence of Smith and his treatise *The Wealth of Nations*¹⁹⁰ on the development of 20th century economic thought (and practice) can never be overstated. His more skeptical Scottish Enlightenment fellow David Hume had no less venerable influence on the development of philosophy, psychology and the contemporary game theory and he appears to be, especially as of recently, making a big “comeback” in terms of intellectual influence particularly as one of the early theoreticians in the field of influence of emotions and brain processes on a normative judgment in the fields of law and morality¹⁹¹.

In terms of their influence on the law and economics of religion, they are both literally the “founding fathers” of the economically and psychologically informed debate on the consequences of the (dis)establishment of state church and the salutary potentials of such regulation. As we shall see below, various authors credit Smith as a first theoretician to argue for no state church (or at least no support for state church) and the “free market place of religion” on the basis that such regulatory approach would produce a more reasonable religion and reduce a potential for religious strife; while Hume, with an eye on the same goal, reducing religious fervor and a potential for religious conflict, argued for an established

¹⁹⁰ Adam Smith, *The Wealth of Nations*, 1st ed. (The University of Chicago Press, Chicago, 1976).

¹⁹¹ See Oliver R. Goodenough and Kristin Prehn “A Neuroscientific Approach to Normative Judgment in Law and Justice,” *Philosophical Transactions: Biological Sciences*, Vol. 359, No. 1451, *Law and the Brain*, (Nov. 29, 2004), p. 1709-1726 .

church.

Both Smith and Hume started from very similar view of human nature, propensities for moral judgment, the importance of the influence of emotions (“passions”) on moral judgment of facts and their impact on society in general, as well as from a very similar conception of human reason of self-interest that guides human actions. Smith was particularly self-contradicting in that sense, oscillating, perhaps even intentionally, between granting decisive importance to self-interest as a guiding principle of human nature and action; and sympathy, reciprocity and the general influence of emotions (“passions”) as the cornerstones of human decision-making process.

Two quotes from two different Smith’s work can easily illustrate this discrepancy. In *The Wealth of Nations* Smith writes¹⁹²:

“It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest ... This division of labor ... is not originally the effect of any human wisdom, which foresees and intends that general opulence to which it gives occasion. It is the necessary, though very slow and gradual, consequence of a certain propensity in human nature which has in view no such extensive utility; the propensity to truck, barter, and exchange one thing for another.”

In Smith’s *The Theory of Moral Sentiments* we find a passage that sounds as if it was written by a different person¹⁹³:

“How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.”

¹⁹² Adam Smith, *The Wealth of Nations*, in *Harvard Classics*, edited by C. J. Bullock, (New York: P. F. Collier, Volume 10, (1776) 1909), p. 19-20 quoted in Vernon L. Smith, *The Two Faces of Adam Smith*, lecture available at <http://pages.towson.edu/jpomy/behavioralecon/twofaces.pdf>, p. 1 (downloaded March 2nd, 2010).

¹⁹³ Adam Smith, *The Theory of Moral Sentiments* in *Liberty Classics*, edited by D., D. Raphael and A. L. Mactie (Indianapolis: Liberty Press, (1759) 1976), p. 9 quoted in Vernon L. Smith, *The Two Faces of Adam Smith*, lecture available at <http://pages.towson.edu/jpomy/behavioralecon/twofaces.pdf>, p. 1 (downloaded March 2nd, 2010).

It seems an interesting irony of intellectual history with, as Karl Polany has noted, very real and at times almost disastrous consequences that the passage from Smith's *The Wealth of Nations* was so often quoted and applied as the "true" description of the "human nature" (not to mention diatribes about "the invisible hand") while the second Smith's book was relegated to bookshelf's¹⁹⁴. In Polanyi's words:

"No less thinker than Adam Smith suggested that the division of labor in society was dependant upon the existence of markets, or, as he put it, upon man's 'propensity to barter, truck and exchange one thing for another.' This phrase was later to yield the economic concept of the Economic Man. In retrospect it can be said that no misreading of the past ever proved to be more prophetic of the future...The outstanding discovery of recent historical and anthropological research is that man's economy, as a rule, is submerged in his social relationships. He does not act so as to safeguard his individual interest the possession of material goods; he acts so to safeguard his *social standing*, his *social claims*, his *social assets*. He values material goods only in so far as they serve this end."¹⁹⁵ (emphasis added).

The Theory of Moral Sentiments contains some more important, for my purposes here, insights about the nature of human judgment and the social influence on emotions that precede the judgment¹⁹⁶. As the above cited quote show, throughout his work on *The Theory of Moral Sentiments*, Smith argued that sympathy towards well being of others is a natural tendency, but in the similar vein he argued that the judgment, positive or negative, of other's

¹⁹⁴ For a general critique of the idea of markets and the critique of the reception and transformation of Adam Smith's though in economic and political history see generally Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (Beacon Press, 2nd ed. 2001).

¹⁹⁵ Karl Polanyi, *Primitive, archaic and modern economies*, (London: Routledge and Keegan Paul, (1945, 1957), p. 53 quoted in Shaun Hargreaves Heap and Yanis Varoufakis, *Game Theory: a Critical Introduction* (Routledge Press, 1995), p. 161.

¹⁹⁶ Adam Smith, *The theory of moral sentiments*, eds. D. D. Raphael, and A. L. Macfie. (Oxford: Clarendon Press 1975 [1759, 1790]), available freely online at <http://www.econlib.org/library/Smith/smMS.html>.

behavior is determined by whether the one making judgment is sympathizing with the emotions of others or whether their opinions are congruent with ours¹⁹⁷. Throughout the work, Smith also freely attributed the existence of such emotions to the divine spirit and creation.

Further, Smith draw a line between “unsocial passions” such are hatred and resentment¹⁹⁸, social passions like kindness, generosity, esteem etc ¹⁹⁹; and the “selfish passions” such are grief and joy, which in Smith taxonomic hierarchy of emotions are less aversive than “unsocial passions” but lower than “social passions” like kindness and esteem in terms of their benevolent effect on society²⁰⁰.

Apart from the influence of emotions such are sympathy on judgment, Smith was unequivocal in terms of the social dependency of judgment. Custom (or habits) and fashions (of time) have a pervasive influence on the judgment of acceptability/unacceptability of others behavior and condition the emotional and cerebral responses to the behavior of others. What is termed acceptable or unacceptable depends to on the repeated exposure to the event over time combined with the positive social evaluation of such event - what I have termed pre-existing reputation and branding²⁰¹. How pervasive and at times tragic the influence of customs and habits of time is on judgment, in Smith’s view, is apparent in a following quote²⁰².

“...the murder of new-born infants was a practice allowed of in almost all the states of

¹⁹⁷Id, Part I, sec. I, chapter III, “Of the manner in which we judge of the propriety or impropriety of the affections of other men by their concord or dissonance with our own.”

¹⁹⁸ Id., Part I, section II, chapter III: “Of the unsocial passions.”

¹⁹⁹ Id., Part I, sect. II, chapter IV: “Of the social passions.”

²⁰⁰ Id., Part I, sect. II, chapter V: “Of the selfish passions.”

²⁰¹ Id, Part V, sec, V, ch. I, “On the influence of Custom and Fashion upon the Sentiments of Approbation and Disapprobation.”

²⁰² Adam Smith,. *The theory of moral sentiments*, eds. D. D. Raphael, and A. L. Macfie. (Oxford: Clarendon Press 1975 [1759, 1790]), p. 210.

Greece, even among the polite and civilized Athenians; and whenever the circumstances of the parent rendered it inconvenient to bring up the child, to abandon it to hunger, or to wild beasts, was regarded without blame or censure. [...] Uninterrupted custom had by this time so thoroughly authorized the practice, that not only the loose maxims of the world tolerated this barbarous prerogative, but even the doctrine of philosophers, which ought to have been more just and accurate, was led away by the established custom, and upon this, as upon many other occasions instead of censuring, supported the horrible abuse, by far-fetched considerations of public utility. Aristotle talks of it as of what the magistrates ought upon many occasions to encourage. The humane Plato is of the same opinion, and, with all that love of mankind which seems to animate all his writings, no where marks this practice with disapprobation”

Moreover, Smith also believed that how one is judged depends on one’s “rank” (what I have termed “status”) in a given society – the higher person social rank is, judgment of its behavior is likely to be more positive sometimes even irrespectively of how well such behavior comports to social standard of what is acceptable. Benevolent and kind behavior towards a particular person also depends on its rank (“status”) – higher rank implies more benevolence²⁰³. We shall see below how and to what extent this Smith’s claim contradicts or supplements his judgment on the desirability of the “free market place of religion.”

David Hume had made similar and even stronger claims on the impact of emotions on judgments. For Hume, “morality is a subject that interests us above all others²⁰⁴.” Hume was convinced that morality depends on emotional responses (“passions”) and is not accessible to conscious influence or, in his words, “morality, therefore, is more properly felt than judged of...”²⁰⁵ From this assumption, Hume derived an argument that remains influential (and gaining influence) till today, that of “naturalistic fallacy” which posits that since “moral

²⁰³ Id, Part V, sec, V, ch. II: “On the Influence of Custom and Fashion upon Moral Sentiments.”

²⁰⁴ David Hume, *A Treatise of Human Nature* (1739-40) quoted in David See Oliver R. Goodenough and Kristin Prehn “A Neuroscientific Approach to Normative Judgment in Law and Justice,” *Philosophical Transactions: Biological Sciences*, Vol. 359, No. 1451, *Law and the Brain*, (Nov. 29, 2004), p. 1709.

²⁰⁵ Id., p. 1710.

sentiments are separate from facts no logical proposition with facts alone in its predicate can contain a moral judgment in its conclusion.²⁰⁶”

Like Smith, Hume was not unaware of the importance of the social context and the influence of repetition on behavior and the psychology of players as well as a judgment. Today, game theorists claim that Hume was one of the first to note the repetition of behavior has an influence on psychology of the players in the social “game.” The repetition, in other words, has a tendency to move a judgment of the desirability of the behavior from *is* to *ought*. In other words, once in a particular context a behavior is repeated sufficiently, psychological tendency becomes to judge such behavior as a part of *morality and convention* which produces social trust, hence removing the motivation for behavior somewhat away from “pure” self-interest and a realm of uninhibited cost-benefit analysis²⁰⁷. Given that Hume, as shown above, linked the judgment of morality with emotions, clearly he was aware that repetitiveness of behavior and a social context are important parcels of the emotional judgment of what is acceptable or not.

The shared social context (customs and fashions, in both Hume’s and Smith’s words) turns out to be all important – conventions, norms and the emotional judgments preceding morality that underlies them, can arise only on the basis of some shared interpretative background and to that extent “costs and benefits” of conventions make sense only if the starting assumptions are more or less same or shared. In absence of such shared conventions

²⁰⁶ David See Oliver R. Goodenough and Kristin Prehn “A Neuroscientific Approach to Normative Judgment in Law and Justice,” *Philosophical Transactions: Biological Sciences*, Vol. 359, No. 1451, *Law and the Brain*, (Nov. 29, 2004), p. 1710.

²⁰⁷ On influence and the importance of Hume for contemporary game theory, especially with regards to the development of conventions, morality and trust within the context of social interaction games see Shaun Hargreaves Heap and Yanis Varoufakis, *Game Theory: a Critical Introduction* (Routledge Press, 2004), p. 120-123, p. 129 (conventions) ; p. 253 and 259 (morality) ; p. 176 (trust).

or defined norms in a social setting there is no, certainly not for Hume, instrumental rationality to step in as a way of deciding. This claim Hume shares with Wittgenstein and as scholars noted they seem to be forerunners of modern evolutionary game theory and precursors, especially Wittgenstein, of the modern economics and psychology (or behavioral economics) movement. For what Wittgenstein found to be the trouble of “various sources of knowledge” resulting in the “lack of shared interpretative grounds,” behavioral economics inspired by the work of Herbert Simon has found in the inherent incapability of human brain to be infinitely rational (in other words, brain is boundedly rational) and argued that human decision making is dependant on socially prevailing “practices”, “norms” and “rules of thumb” that supply clues of the behavior of others in a given social setting²⁰⁸.

On the basis of the extrapolation of the views of Smith and Hume on the nature of judgment, I will now reassess their arguments about the regulation of religion in order to draw some conclusions that are not so frequently taken in the literature on the (law and) economics of religion. Both Smith and Hume were troubled by the religious strife and religion’s potential to inciting conflict and both have looked for what they thought were practical ways of reducing the destructive potential of religion. Smith is today commonly taken as a first theoretician to argue for no state church (or at least no support for state church) and the “free market place of religion” on the basis that such regulatory approach

²⁰⁸ On the importance of Wittgenstein for game theory and the affinity of his claims to that of Herbert Simon, see Shaun Hargreaves Heap and Yanis Varoufakis, *Game Theory: a Critical Introduction* (Routledge Press, 1995), p. 157-162.

would produce a more reasonable religion and reduce a potential for religious strife²⁰⁹; while Hume, with an eye on the same goal namely reducing religious fervor and a potential for religious conflict, argued for an established church²¹⁰.

As it was frequently argued, for Smith those who entertain religious beliefs are self-interested individuals motivated by their own utility calculations, while the churches, in his view are another type of a firm. Commentators note that Smith “attempted to apply the same principles of economics to understanding religious institutions that he applied to the understanding of ordinary commercial transactions²¹¹” Smith discussed the various advantages and disadvantages of monopoly, potential for religious polarization, and extended conditional support to a free market for religion. Smith also had a keen eye for “unintended” consequences of religion that can create benefits for the society at large. Economists call these benefits “positive externalities” and they give religion the character of a (partially) public good, placing religious organizations in the same category with other socially beneficial institutions such as educational organizations or non-governmental organizations dedicated to acting in the name of what they proclaim to be public good²¹².

²⁰⁹ On the overview of literature on Adam Smith’s influence on the economics of religion see Vikas Kumar, “Critical Overview of Economic Analyses of Religion”, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1193862 (downloaded Nov. 27, 2008. 15:34), p. 11 and infra. A classical overview of the economics of religion starting from Adam Smith is Iannaccone, L.R., „Introduction to the economics of religion,” *Journal of Economic Literature* 36, (1998), p. 1465–1496. Further see Garry M. Anderson, „Mr. Smith and the Preachers: The Economics of Religion in the Wealth of Nations”, *Journal of Political Economy*, 96 (5), (1988), p. 1066-88; Charles G. Leathers and J. Patrick Raines (2008), „Adam Smith on Religion and Market Structure: The Search for Consistency”, *History of Political Economy*, 40 (2), (2008), p. 345-363; Robert B. Ekelund, Robert F. Hébert, and Robert D. Tollison, “Adam Smith on Religion and Market Structure”, *History of Political Economy*, 37 (4), (2005), p. 647–60.

²¹⁰ See Michael W. McConnell and Richard A. Posner “An Economic Approach to Issues of Religious Freedom,” *56 U. of Chi. Law Rev.* 1 (1989), p. 4-5

²¹¹ Garry M. Anderson, „Mr. Smith and the Preachers: The Economics of Religion in the Wealth of Nations”, *Journal of Political Economy*, 96 (5), (1988), p. 1068.

²¹² Ekkehart Schlicht, “Economic Analysis and Organized Religion” in E. Jones and V. Reynolds (eds), *Survival and Religion*, Chichester etc: Wiley (1995), p. 111-62, available online at <http://epub.ub.uni-muenchen.de> p. 143. Hereafter Schlicht.

In Smith's view, the destructive potential of religion in unregulated "market" is visible in its potential to create a parallel centre of power void of state control and damaging to a greater public good. On the other hand, the establishments of religion can create an incentive for a powerful groups (including minority groups within the established religion) to take advantage of the privileged position of religion in the society, therefore undermining religions "moral capital" and creating schisms and fractures²¹³.

Smith's solution was to suggest competition between many religious groups and he held that "provided these sects were sufficiently numerous, and each of them consequently too small to disturb the public tranquility, the excessive zeal of each for its particular tenets could not well be productive of any hurtful effects."²¹⁴ Interestingly, apart from this prescription, the importance of reputation for religion and its adherents did not escape Smith's attention and he noted that, i.e., smaller "sects" by adopting more stricter moral rules attract adherents from socially lower classes who, by virtue of joining the "sect", enhance their creditworthiness in the market²¹⁵. In other words, assuming the right "kind" of religion, Smith has believed in salutary social side-benefits of religion and "spillover effects" a belief which in effect turns religion, as already noted, into a partial public good demanding some level of regulation as most public goods do. This is, indeed, what has happened in some places. As the American religious history shows and as Max Weber has noted during his trip to the US in 1900, membership in socially respected sect was an important credential so

²¹³ Vikas Kumar, "Critical Overview of Economic Analyses of Religion", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1193862 (downloaded Nov. 27, 2008. 15:34), p. 11. Hereafter Kumar.

²¹⁴ Adam Smith, *The Wealth of Nations*, 1st ed. (The University of Chicago Press, Chicago, 1976), p. 315.

²¹⁵ Kumar, p. 80.

much so that if the member of a sect relocated or if he was a businessman he carried with himself a certificate from his congregation which made him “creditworthy” elsewhere²¹⁶.

But, as critical commentators of Smith’s argument for an “unregulated market or religion” showed, his view tends to underestimate the potential for “cutthroat” destructive competition between religions²¹⁷, which was exactly Hume’s counterargument to Smith. Hume, in any case much more than Smith, had a very skeptical opinion of religion²¹⁸, arguing that religion is a result of psychological dynamics of inherently human fear and superstition and he himself hence was labeled as atheist both by his contemporaries and later on. Hume sought to divorce morality from religion, but consistent with his skeptical attitude he has suspended judgment on the ultimate social validity of religion since no ultimate judgment in any case is available to us as finite human beings whose views are generally restricted by the social norms (conventions) in which humans are mostly thrown as a result of chance and happenstance of being born in a particular place and in a particular time.

As far as the organized religion goes, Hume had no illusions. According to him, “Each ghostly practitioner, in order to render himself more precious and sacred in the eyes of his retainers, will inspire them with the most violent abhorrence of all other sects, and continually endeavour, by some novelty, to excite the languid devotion of his audience. No regard will be paid to truth, morals, or decency in the doctrines inculcated.”²¹⁹ Note the irony in this sermon. Hume, himself a skeptic on the accessibility or even the existence of truth or

²¹⁶ Schlicht, p. 143 and n. 41.

²¹⁷ Schlicht, p. 138.

²¹⁸ David Hume, *The Natural History of Religion*, edited with an introduction by James Fieser (New York: Macmillan, 1992). See the overview of Hume’s opinions on religion in Stanford Online Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/hume-religion/#8> (accessed 14.02.2010).

²¹⁹ David Hume, quoted in Schlicht, n. 39.

the final validity of moral claims (if morals is based on, as Hume claims, on emotions and feelings, than it can only be contingent morals never permanent or universal morals), when dealing with religious strife suddenly falls back on the same notions whose existence he ultimately doubts. The point is simple – even a devoted skeptic when facing some real or perceived danger will make use of arguments from decency, morals and truth notwithstanding his previous disavowal of the use or the accessibility of such judgments.

Hume's solution, derived from his view of clergy as self-interested individuals guided by selfish interests, was to argue for the establishment of religion, though he did not say how many "establishments" are possible at once; and for the state supplemented financial aid for the clergy which, being self-interested and satisfied by the financial incentives, would therefore reduce its zeal consequently reducing the potential to incite audience to destructive actions²²⁰.

After extrapolating Hume's and Smith's views of human nature, impact of emotions and rationality on judgment, as well as their arguments about the impact of religion, some critical observations should be self-evident and it can be divided in to two categories. Firstly, criticism inherent to Hume's and Smiths' argument about the desirable way of regulating religion when viewed together with their views of the nature of human judgment. Secondly, some more contemporary observations on the extent and limits of Smith's and Hume's argument for a contemporary regulation of religion.

First major critical point inherent to both Hume's and Smith's view of religion is their contention that religion requires institutionalization and is relatively well defined into

²²⁰ Schlicht, p. 138.

“church” (i.e. mainstream religion) and “sects” (groups of believers sharing more devotion to religious precepts or doctrinal purity or general enthusiasm relative to the “average” church believer). The contention rests on basically Christian assumption of religion and theological understandings of religion peculiar to some versions of Christianity both Hume and Smith were aware of. The point is obviously not to say that Smith and Hume were “parochial” in their worldviews. None can be blamed for sharing convictions of its own time and society and, at any rate, to my comment Hume would probably respond that we are dependant on customs of our times for a guidance of what is “normal” or not.

The point is cultural dependency of their claims that they *were* aware of. If, with Hume, one says that established religion lack of zeal can be produced by “bribing” clergy, the argument assumes that, first, clergy does exist and has no control of its behavior beyond itself; and, secondly, clergy is indeed important for theological interpretation of religion and serves as a guide for members of religious group. The argument holds mostly (if not solely) within the ambits of Protestantism since, as Schlicht notes, Protestant churches are centered around the individual preachers since the source of religion is Holy Bible anyway, and this “preacher-book centeredness” decreases the push for internal religious centralized control²²¹. It is difficult to see how this argument would help in case when the center of religious control is hierarchical and beyond the realm of influence of any state as in, i.e., the case of Vatican.

A conclusion that can be drawn from the discussion above would be that Hume’s argument for “bribing” individual clergy and Smith’s argument for proliferation of individual sects were to a certain extent perhaps even anti-Catholic. Historians have provided, at least in

²²¹ Id, p. 140.

the case of Hume, quite a lot of material that can support this claim, even if the explanation for Hume's behavior could be that he was catering to tastes of his audience. As Christopher J. Wheatley states²²²:

In support of the notion that Hume is making concessions to the prejudices of his audience, consider his treatment of Christianity. Though Hume refers frequently to the unhappy consequences of monotheism, he avoids the Protestant sects of his audience. While he does attack both Judaism and Islam, the attacks on Christianity are always directed at the "superstitions" of "popery" -a safe subject, as Catholicism was the favorite whipping boy of the eighteenth- century. In fact Hume made several changes in the manuscript to avoid any chance of being thought blasphemous. We may therefore conclude that Hume was not interested in publishing the truth whatever the cost."

However this may be, the important point to be taken is that theological and organizational issues within a particular religion matter in cases of deciding for a regulatory regime that should be put in place.

How limited Hume's and Smith's argument can be when applied across the board and how background cultural, theological and organizational factors matter is even more evident if one is to apply Hume's argument for well fed clergy and Smith's argument for a proliferation of sects as a way towards less religious strife and more reasonable religion on Islam. As Schlicht notes, "Interesting empirical suggestions arise here concerning a comparison between Christianity and Islam: Islam seems much better defined and hence less

²²² Christopher J. Wheatley, "Polemical Aspects of Hume's Natural History of Religion," *Eighteenth-Century Studies*, Vol. 19, No. 4 (Summer, 1986), p. 502-514, at 510.

in need of an authority that establishes quality standards. It is also less centrally organized.²²³”

In other words, within the variations of Islam, there is no “central office common to all” that can declare acts and beliefs “contrary” to or “authentically Islamic.” Moreover, there is no clergy in any sense of the word comparable to the term “priests” within the ambits of Christianity, which is a result of a theological belief in Islam that everyone is directly “communicating” with God. As Ernest Gellner puts it, noting major organizational differences that place Islam in a special position relative to other monotheistic and non-monotheistic religions²²⁴:

“Another striking and important feature (of Islam) is the theoretical absence of clergy. No distinct sacramental status separates the preacher or the leader of the ritual from the laity. Such a person is naturally expected to be more competent, above all in learning, but he is not a different kind of social being. Formally, there is no clerical organization. Muslim theology in that sense is egalitarian. Believers are equidistant from God.”

This is not say that resemblances of clergy have not existed throughout Muslim history (i.e. the establishment of Islam as official religion with a structured organization). It did and it does, but it was more a result of political decisions and attempts to base political legitimacy on religious legitimacy (or mutually supporting each other) producing, however, an odd twist and different results.

The irony is that attempt to “institutionalize and standardize” Islam and support it with well fed “clergy” presumably close to the desires of the ruling power have resulted in exactly the opposite what Hume was hoping to achieve. The “standardization and

²²³ Schlicht, p. 140.

²²⁴ Ernest Gellner, *Postmodernism, Reason and Religion* (London and New York: Routledge Press, 1992), p .8.

institutionalization” of Islam have mostly (even almost always), as Gellner further notes, led to a rebellion against such institutionalization in the name of same religion as a result of the non-existence of the “center” within the Islamic religious system however conceived. Gellner drives the point by distinguishing between the ‘High Islam’, Islam concerned with internal purification, norm obedience and scripturalism, driven by scholars close to ruling economic and political elites; and the ‘Low Islam’ which is concerned with everyday life, facilitation of trade, meditation in and between the groups and generally sustainment of the particular group. The result of this distinction was, as noted above, inability to sustain imposition of one form of Islam over another since, in Gellner’s words,²²⁵:

“...High Islam would launch a kind of internal purification movement, and attempt to re-impose itself on the whole of society. In the long term they were never successful, so the resulting pattern was one of what can be called an eternal or cyclical reformation. Ibn Khaldun noted this pattern, as did David Hume.”

Firmly confirmed historical evidence surveying all of the Islamic history from 7th century till 20th century affirms Gellner’s anthropological account. Hence, Ira Lapidus, literally a founder of the academic discipline of Islamic and Middle Eastern history within the American academia, after a long historical survey, finds that political and religious institution in the Muslim world have been under separate control since the eight century when various Islamic orders and local ethnic rulers replaced the institution of Caliphate which claimed both religious and political authority²²⁶. Claims like this are countered by civilization theorists like Bernard Lewis who one the basis of same evidence like Gellner and

²²⁵ Id., p. 10., internal citations omitted.

²²⁶ Ira M. Lapidus, “The Separation of State and Religion in the Development of Early Islamic Society,” *International Journal of Middle East Studies* 6 (October 1975).

Lapidus find that Islam and Judaism are similar to each other and distinct from Christianity to the extent that the first two do not clearly recognize the difference between the clergy and laity and between the secular and sacred law in a way the former does and hence particularly Islam is unable to produce secularization²²⁷.

This historical debate may or may not matter these days, but the relevance of major point for a present discussion is following. The attempts to ‘institutionalize and standardize’ a particular form of Islam are unlikely to work for reasons cited above and, contrary to Hume, they can lead to *more* religious observance rather than less. Ironically, however, in the opposite case results can be the same or even worse, as Gellner notes, given that it seems that unlike in cases of other religions, the raise in religiosity within Islam goes hand in hand with modernization, globalization and the whole sale disappearance of institutionalized religious authorities²²⁸.

It seems that choice is between bad and even worse – more religion and more religion - and the most important contemporary sociologists of religion dealing with this issue have came to a similar conclusion. For example, once there is no ‘Islamic institutionalization and standardization’ what so ever as, for example, at a time when Ataturk removed the Caliphate of the Ottoman Empire, which spent more time fighting and attempting to control various internal oppositional Islamic movements and autonomy seeking groups looking to overthrow it than waging imperial wars, the result was literal springing numerous religious movements. As Nilufer Gole, commenting on the end of Ottoman Caliphate, claims there is a relationship

²²⁷ See Bernard Lewis, “Secularism in the Middle East” (Chaim Weizmann Lecture, Rehovot, Israel, 1991), p. 10–12, 26; and Bernard Lewis, *The Political Language of Islam*, (Chicago: University of Chicago Press, 1991), p. 2–3.

²²⁸ See generally Gellner, n. 199.

between the end of Caliphate and the renewal of Islamic movements – the end of Caliphate resulted in springing of Islamic movements competing with each other over the interpretation of religious norms and political authority²²⁹. “Jose Casanova affirms the same and draws a parallel with Tocqueville’s observations on Catholicism in the US, noting that²³⁰:

“The Tocquevillian argument can easily be applied to Islam. More perhaps than any other religion, Islam stresses discursively and ritually the equalization of all Muslims before God. Moreover, in comparison with the clerical, hierarchic and hierocratic, centralized administrative structure of the Catholic church, the Islamic *umma*, at least within the Sunni tradition, has a more counciliar, egalitarian, laic and decentralized structure. Moreover, in comparison with the canonical and dogmatic modes of official “infallible” definition and interpretation of the divine doctrines, Islam has more open, competitive and pluralistic authoritative schools of law and interpretation with a more fluid and decentralized organization of the ulama...The pluralistic and decentralized character of religious authority which had always been distinctive of traditional Islam has become even more pronounced in the modern age. Actually, if there is anything on which most observers and analysts of contemporary Islam agree is on the fact that the Islamic tradition in the very recent past has undergone an unprecedented process of pluralization and fragmentation of religious authority, comparable to that initiated by the Protestant Reformation and operative ever since within Protestant Christianity. Unlike the sectarian tendency of Protestantism to fragment into separate communities, however, Islam has been able to preserve its identity as an ‘imagined community’.”

What remains the question after these assertions – a question to which I have no answer too nor will try to discuss – is something that for example worries Russell Hardin, when he draws on Hirschmanns’ concept of exit (which I elaborated above) and asks what is it about Islam that even after allowing for exits from the ‘institutionally organized structure’ the result seem to be more religion rather than less contrary to, for example, what happens

²²⁹ Nilufer Gole, “Manifestation of the Religious - Secular divide: Self, State and the Public Sphere,” in Linell E. Caddy and Elizabeth Shakman Hurd, *Comparative Secularisms in a Global Age*, (Pallgrave MacMillan, 2009), p. 49.

²³⁰ Jose Casanova, “Civil Society and Religion: Retrospective Reflections on Catholicism and Prospective Reflections on Islam,” forthcoming (on file with author.).

with members of the Southern Baptist church which after the exit claim at least some level of liberalization ? Whatever is the answer and assuming the question itself is important, there are several important cues to take from the above discussion, as they will be of some relevance with for case studies of Germany and France. First, unlike in some variations of the Enlightenment criticism of religion, anti-clericalism will be of very little or no use when dealing with Islam. Second, attempts to ‘institutionalize across the board’ (i.e. create French or German Councils for Islam or something alike) might be as problematic as no-control over Islamic communities in those countries and instead of resulting in more ‘domesticated’ versions might produce more undesirable religious variety.

After this excursion, I now return to Smith and Hume debate. Second objection to arguments both of them made is also inherent yet not so visible within the ambit of arguments of competition v. establishment. Logically, Hume turns out to be a “friend of less regulation” of religion, given that his theory of establishment of religion as means for reducing religious strife is coherent and does not demand overly excessive regulatory measures beyond perhaps controlling for the behavior of clergy and reducing the number of “competitors.” On the other hand, Smith approach, celebrated as a call for a “free market place of religion,” would paradoxically require *more* regulation of religion rather than less, though this in fact might be both *paradoxical and logically necessary*, since the foundations of some freedom (i.e. freedom of religion) requires quite a lot of investment in creating conditions for such freedom. In fact, regulation as proposed by Smith, it seems, would have to be both “internal” to religion and “external” to religion.

“Internal” regulation of religion would mean the following. Note that Smith claims

that the condition for the competition of religions to produce “more reasonable” religion is that “sects” are “sufficiently numerous and each of them consequently too small.” But, in order to produce sufficient number of sects required one would have to engage in breaking down any already existing religions, measure that does not seem available unless either sects are naturally springing, which holds only if background theological and organizational structures allow for that; or, if that is not the case, by using quite brutal means (how else?) in order to break down existing religions which for any reason are opposing such sectarianism.

Another measure “internal” to religion that seems counseled by Smith would require quite a lot of costly effort. Namely, one of Smith’s conditions for religious competition is that “sects” are “too small.” But how is this to be achieved? Short of some sort of eugenics or birth control or again engagement in breaking down those that grow larger in numbers, there does not seem to be any “spontaneous” way of keeping the sect membership low. Further, Smith’s claim that springing of sects produces “more reasonable religion,” since in absence of external support sects have to compete for adherents that are supposedly free to switch from sect to sect, flies in the face of Smith’s claim from the *Theory of Moral Sentiments* that judgments of others behavior is socially embedded and conditioned by “customs”. But if, similarly, one is born into one of these sects and consequently holds opinions of his environment to be “natural and normal” (and might perceive members of other “sects” as “abhorrent”) how frequent switching from sect to sect will be in any case? The costs would be excessively high for individuals. In short, Smith’s counsel for numerous small sects as a way towards “more reasonable religion” would hold only if teachings and beliefs of all these sects are roughly the same at some fundamental level, that is theological differences are not

pronounced as sharply and individual switching between sects does not require an extremely costly and indeed in everyday reality relatively rare *total* change of the belief system or behavioral patterns.

What Smith wants to achieve is a more reasonable religion, since reason, in Smith's view, everywhere counsels more or less same beliefs and actions. Hence, Smith's argument is paradoxical to the extent that he takes his *end point* (aim) as his starting point. In other words, Smith's celebrated "competition" would work only to the extent that all sects belonging to largely one family of religion and fundamentally share *some common grounds*, i.e., if they are all Protestant sects and therefore a subset of Christianity, consequently making the "switching" process relatively affordable and the production of "sects" a regular way of practicing religion inspired by the background theological beliefs and organizational peculiarities.

Extensive "external" regulation of religion that Smith's model would require is the problematic aspects of adjudicating conflicts between religion, unavoidable as they are, plus the "quality standard" control of religion, in which the state would have to engage. If, as Smith claims, approval or disapproval of others behavior is socially conditioned, how can there be any heroic neutral figure that would make pronouncements unaffected by any particular perspective or, in other words, who is the person standing on an Archimedean point engaging in "judgment from nowhere?" Smith claims that the existence of such adjudicator is possible and calls him "an impartial spectator," a person that is able to

empathize and see things *the way other people see them*²³¹. Laudable and attractive as this idea is, it seems extremely difficult to raise oneself to that position and it is not clear how Smith plans to get to that position after arguing that judgments are socially conditioned.

Moreover, the quest for “an impartial spectator” as a perfect adjudicator is unlikely to be fruitful in the case of religion for a simple reason. How can anyone who is not within the ambit of a given religion understand its claims and practices in a way those who are in “the center” understand them? Descriptive understanding of moral claims without accepting the normative validity of such claims is of course possible, but if Smith is saying that empathy, sympathy and customs govern judgment, than in principle it does not seem likely that in reality “impartial spectator” adjudicating religious claims exists (on Smiths own terms) or will ever exist except in one case and that is the case already mentioned above. Smith’s “impartial spectator” can function and indeed be “impartial” only to the extent that all sects belong to largely one family of religion and fundamentally share *some common grounds*²³², as when, for example, they are all Protestant sects and therefore a subset of Christianity. Some, if only minimal, common grounds that give raise to common custom that precedes and conditions emotions and sympathies would need to be set in place in order to give the “impartial spectator” an “emotional starting point” necessary to get sympathy going, see things in the way other people see it and finally reach the judgment. Hence, Smith’s theory of

²³¹ On Adam Smith’s concept of impartial spectator see Amartya Sen, “Adam Smith and the Contemporary World,” *Erasmus Journal for Philosophy and Economics*, Volume 3, Issue 1, (Spring 2010), p. 50-67 available at <http://ejpe.org/pdf/3-1-art-3.pdf> (downloaded March 2nd 2010, 12:40). Sen argues against the contractarian philosophy of Kant, Rawls, Buchanan, Nozick and others, claiming that Smith’s “impartial spectator” theory given much more realistic and goal oriented way of deciding disputes while taking into account the opinions of those who are not necessarily fellow citizens (which is, in Sen’s view, the limitation of social contract theories). However, in my view, even on his own premises, Sen reaches unsustainable conclusion contrary to the conclusion I have drawn in the text above.

²³² It is for this reason - a need for common ground - an ultimate if unspoken deficit in Smith’s theory of “impartial spectator”, Amartya Sen clings to human rights as common to all humanity.

“competition of religion” even on its own terms is largely a theory for producing diversity within one family of religions that do share – or might be even coerced to share – some common ground.

Hume’s theory, on the other hand, would suffer no such problems given its consistency. Hume removes the competition of religions through simple establishments and in any case remains convinced that our judgments of others people behavior are emotionally conditioned and that our emotional judgments of what is “acceptable or not” are to a large extent contingent and socially conditioned. Consistent with his skepticism, Hume can be taken to say that people are doing what they “naturally” have to do within the ambits of historically contingent circumstances.

In sum, it seems that for both Smith and Hume judgment of others depends on the time and place where we are born and therefore the question of regulating religion is not even so much whether there is or there is not an established religion or the variety of religions being regulated by an “impartial spectator”. What really matters is the social way of life that conditions people’s emotions which, in turn, precede, sometimes unconsciously, judgments of the behavior of others whether on a social or institutional and legal level.

Here, Hume and Smith precede Marx’s conclusion in his “On Jewish Question.”²³³ As Gedicks says, “Marx understood the political and cultural dominance of Christianity enables it to control society implicitly, without making exclusionary sectarian arguments,

²³³ Karl Marx, “On the Jewish Question”, in Karl Marx and Friedrich Engels, *Collected Works* (Progress 1975), p. 146-159 quoted in Frederick Mark Gedicks “Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason,” *Alabama Law Review*, Vol. 61, No. 2,(2010), p. 357, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354175 (downloaded March 1st, 2010).

merely by encouraging profession of ‘religion in general, any kind of religion.’²³⁴ Today one could perhaps say that “political and cultural dominance” of Christianity is allegedly weakened in seemingly secularized societies of (at least) Europe, but, as the case studies will show, institutional decision making has its own logic of path dependency. What Gedicks, with Marx, calls “the political and cultural dominance” in this work translates into the influence of social norms on the institutional setting and the psychology of decision making, just as Hume has concluded long time ago.

Summary

What I have elaborate above are basically some fundamental problems of the regulation of religion given to us by Locke, Hobbes, Smith, Hume and others. Some of these problems were and are still slowly refined throughout the time making the protection of the free exercise of religion theoretically stronger than some of the philosophers I mentioned above would have; while, on the other hand, weakening to a certain extent establishment of religion. In a contemporary era few principles of understanding of if not secularism than at least a “religiously neutral state” can be distilled as relatively well established. Firstly, no imposition of religious law using governmental tools (which is to say that establishment of religion per se does not run afoul of secularism, assuming equality of opportunities for practicing religious freedom); no favoring and disfavoring on the basis of religion; and no use of religiously inspired arguments as political arguments (accepting falibilism as opposed to infalibilism of religious arguments). These are, however, principles, and the reality is

²³⁴ Frederick Mark Gedicks “Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason,” *Alabama Law Review*, Vol. 61, No. 2,(2010), p. 357, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354175 (downloaded March 1st, 2010).

different.

According to my interpretation of the functioning of religious groups and the way they affect the emotionally charged group identity and advance the religiously inspired (hence infallible) arguments, if there is to be a truly secular society there is than no theoretical reason whatsoever to tolerate religion. Toleration in practice basically turns out to be a *pragmatic issue*, since many in varying degrees and with varying purposes subscribe to religion which is giving them reasons and answers that cannot be found (or even asked) using any rational evidence. Hence no general shape of secularism as a finished project can ever be given. Behind the general shape of “secularization” or legal secularism, unresolved questions are always the same: what are some common historically contingent emotional and normative understanding of what is “normal” or not in a particular society; who’s religion will be burdened and with what effect and towards what purpose; and finally the question of common political identity and loyalty such is “are members of a non-familiar or spread out religious groups really trustworthy” and how likely are they to create “disturbance”?

1.6 Wrapping it all together: regulation of non-mainstream

religious groups – benchmarks, assumptions and institutional factors

Above discussion leaves open an issue of benchmarks or the question of reference (baseline) and outcome or end point towards which the regulation is of non-mainstream religious groups is targeted. Normative economics would advance a claim that if majority of inhabitants of a particular society derive a great utility from the establishment of any or few

particular religions, there is a clear welfare maximizing case for that to be done²³⁵. The establishment of a particular religion, for example Mormonism, might be also justified on the basis of promotion of more efficient production of public good by means of instilling “virtues of good citizenship,” i.e. the internalization of prohibitions on the consumption of drugs, alcohol, smoking and drive for a voluntary charitable contributions without the undue costs of state enforcement of such prohibitions and/or incentivizing for contribution.

Furthermore, if such inhabitants strongly dislike a particular minority within their ambit it would be welfare maximizing to engage in their elimination. If within a purview of a given country there exists a group (i.e. Muslims) whose practices and beliefs are repugnant to the others, even if the practices itself are not necessarily disruptive of say public order, than there is a clear case for removal and suppression of such group on theory that the increase of overall utility experienced by majority in the case of removal is greater than the overall disutility experienced by minority. What I have just stated, however, would run against every sense in which one imagines that the freedom of religion exists or at least should exist in regular times, though as the history shows moves towards eradication are quite often (if not a regular occurrence). In any case once the popular machinery of dislike starts going, there is very little save from the similar machinery on the other side to stand in its way.

However, instead of being normative, this analysis rather strives to be positivistic and descriptive. A benchmark remains a meaning of the group religious freedom of religion guaranteed by the legal systems under scrutiny to the “mainstream” or traditional and well established religious groups. In jurisdictions that I will be describing in this workresearch,

²³⁵ On analysis of economic efficiency of the establishment of religion see Michael W. McConnell and Richard A. Posner “An Economic Approach to Issues of Religious Freedom,” 56 *U. of Chi. Law Rev.* 1 (1989), p. 9.

there cannot be much debate about what type of group exercise of religion is counted as a regular one. As Peter Beyer has argued, the institutionalized form of *Western Christianity* as practiced in the Western Europe and the US, as a result of peculiar historical developments like Reformation, Enlightenment, separation of church and state in the US, influence of religious wars etc., remain a benchmark of what is “normal organized religion” for Western societies and also the benchmark by which organized religion in other societies is measured²³⁶.

Beyer notes that organized Western Christianity *as it has developed* - since, as others have shown²³⁷, even a cursory overview of the types of Christianity as practiced in say Russia or Latin America show that the same faith can have very different threats - in Western Europe and the US rests on following assumptions or practices²³⁸. Firstly, programmatic reflexivity, that is a continuous process of a reflection on one’s own religions assumptions and social demands, rights and obligations derived from it. Secondly, *differentiation*, meaning that a sphere of what is properly religious is separated from other spheres such is that of economy, law and other social spheres. Thirdly, *organization*, an assumption that differentiation of religion from other spheres and the preservation of its identity involve not solely any form but *organized institutional form*. Finally, *the assumption of voluntariness and individualism*, the belief that religion is basically individual and personal affair and not a

²³⁶ See Peter Beyer, “Globalization and the Institutional Modeling of Religions,” in Peter Beyer and Lori G. Beaman, *Religion, Globalization and Culture* (Martinus Nijhof Publishers, 2007), p. 167-186. Beyer’s discussion includes excellent short overview of the main organizational differences of major “world” religions like Islam, Hinduism and Judaism.

²³⁷ See Jakelic, p. 1-14, for a literature overview and discussion of some crucial differences between Western Christianity and Orthodox Christianity, as well as difference between practices of Christianity in Africa, Asia and Latin America.

²³⁸ Id., p. 170-173.

matter of necessarily collective endeavor or an issue that requires collective action.

Generally speaking, against the above outlined assumption, minimum guarantees of freedom for religious groups appear to be almost always satisfied assuming no persecution – but that is just a formal freedom, since the operation of such groups will be somewhat hindered by the institutional identity and the underlying social norms operating within each of the jurisdictions in question. This is why the comparison of the “traditional” and “new” religious groups and a difference in costs and benefits imposed on either of the two groups needs to be judged differently, since costs and benefits only have a meaning relative to something – and that “relative to something” is basically institutional setting of functioning of religious groups already in place when another group requires “equal” treatment or same benefits as other groups.

In a contemporary legalistic era, three important factor that affect institutions-religious group’s relations can be taken here, as the previous research has confirmed as crucial ones and are taken as *given a background of institutional and legal setting, which plays itself out (for purposes of this work) on three levels* ²³⁹. First level is the level and the nature of the “legalization” of works of religious groups and the (de)centralization of the level of regulatory decision making has direct effect on the life of religious groups . As it was noted by many, at least in the societies whose jurisdictions I will be discussing here, the life of religious groups is increasingly legalized so much so that for all intense and purposes functioning of non-mainstream religious groups in societies where they do not enjoy previous “good status” can be made very difficult depending on the type of legal demands which they

²³⁹ The three assumptions are drawn and remodeled from James T. Richardson, “Religion, Law and Human Rights” in Peter Beyer, ed., *Religion, Globalization and Culture* (Martinus Nijhof Publishers, 2009), p. 407-423.

have to satisfy in order to be able to fulfill their needs. Notable examples include religious association's laws whose demands are such that different religious group's for internal or external reasons cannot satisfy them; other important examples include restrictions on access to financial aid normally available to traditional religious groups, prohibitions of proselytism and solicitation, or particular law that have "unintended" effects on the material and economic group coordination of religious groups²⁴⁰.

Centralization of the decision making process of passing of laws that influence daily functions of religious groups is another important part for different reasons. Centralization of decision making usually opens a space for different special interests to influence the process in various directions favoring some groups at the expense of others. On the other hand, decentralization, as in various forms of federalizations, opens up a space for a more flexible approach and a "face to face" dealing with various religious groups present in the particular area. However, decentralization itself also creates problems – without some form of control within a given area particular groups can seize the influence and effectively create rules that benefit mostly in-group members²⁴¹.

Second level is that of the judicial influence on decisions regarding status of religious groups, as well as the level of judicial autonomy and discretion in the process, will have

²⁴⁰ On argument for a vital importance of legal structures governing the life of religious organizations and the problems in its application see Durham W.C. Jr., "Facilitating Freedom of Religion or Belief through Religious Associations Law in Lindholm T., Durham W.C., Tahzib Lie, ed., *Facilitating Freedom of Religion or Belief: a Deskbook*," (Martinus Nijhof Publishers, 2004), p. 321- 405. For an overview and commentary of case involving disputes over (non)recognition of the equal legal status of non-mainstream religious groups in various European, supranational and international jurisdictions see Renata Uitz, *Freedom of Religion in European and International Case Law*, (Council of Europe Publishing, 2007), p. 87 and *infra*.

²⁴¹ For a general debate on the relationship between federalism as a form of governance and religion, see William Johnson Everett, *Religion, Federalism, And The Struggle For Public Life: Cases From Germany, India, And America*, (Oxford University Press, 1997); for a gloomier view of how federalism at times works against religious minorities depending on political changes in the US context see Rosalie Berger Levinson, "First Monday--The Dark Side of Federalism in the Nineties: Restricting Rights of Religious Minorities," 33 *Val. U. L. Rev.* 47 (1998).

further important influence. In jurisdictions under examination in this work, there is a relatively high level of the judicial influence on decisions regarding the status of religious in various areas starting with the decision whether the group will be recognized as such for purposes of law, with all the concomitant rights and obligations from a right to access to funding and different levels of internal autonomy to the obligation to abide by general laws; decisions on accommodations and exemptions, etc.. There is, on the other hand, also a relatively high level of the judicial discretion and autonomy within this process²⁴².

Discretion, for example, comes into a foray when deciding whether a group has a standing to bring a law suit as a group at all or whether the group will receive judicially granted accommodations and exemptions. The discretion is not boundless, but bounded by institutional constraints (constitutional norms, prior precedent and legislation) and open to political, cultural and social influences. Similarly, the autonomy of judicial making, assuming a relatively high degree of judicial material independence and a freedom from undue influence from other corners of society, is still far from absolute for cultural and social reasons which have an undeniable impact on the psychology of jury and judicial decision

²⁴² On judicial discretion, its uses and a potential for abuse see James T. Richardson, "Discretion and Discrimination in Legal Cases involving Controversial Religious Groups and Allegations of Ritual Abuse," in Rex J. Ahdar, *Law and Religion*, (Ashgate Publishing, 2000), p. 111-132.

making process²⁴³.

Some of the psychological impacts on decision making regarding out-of mainstream group members are well researched.²⁴⁴ Firstly, social cognition and the reliance on mental shortcuts (“heuristics”) which allows individuals to reach decisions on the basis of the readily available and “socially normal” information, as well as the reliance on prevalent social stereotypes²⁴⁵. Secondly, influence of what decision makers see as worthy or prevalent societal norms²⁴⁶. Finally, out of group bias, a tendency to judge in-group members more favorably than out-of-group members²⁴⁷. From the theory of religious groups laid out above, it should be clear that these psychological influence are likely to be conditioned, in a various degree by, on the one hand, by the religious groups trading in credibility information and boundary settling; and on the other hand by the institutional setting and social and cultural

²⁴³ On the influence of religion as a personal trait or judges or jurors affecting decisions made in the legal process and the impact of religion as evidence and argument in the US courts see Brian H. Bornstein & Monica K. Miller, *God in the Courtroom: Religion’s Role at Trial* (Oxford University Press, 2009). There is very little work on the psychological impact of religion on judges and jurors beyond the American context, but see Edie Greene & Lawrence S. Wrightsman, “Decision Making by Juries and Judges: International Perspectives,” in D. Carson & R. Bull, eds., *Handbook of Psychology in Legal Contexts* (Cambridge University Press, 2003). For an overview of findings on the impact of a specific religion on judges decision making see Brian H. Bornstein & Monica K. Miller, “Does Judges Religion Influence Decision Making”, manuscript (on file with author). On the impact of religion in various stages of trial, see Monica K. Miller, M. K., J.A. Singer, & J. A. Jehle, “Identification of circumstances under which religion affects each stage of the trial process” *Applied Psychology in Criminal Justice*, 4(1), (2008), p. 135-171, electronic version available at <http://www.apcj.org/journal/index.php?mode=view&item=39> (accessed March 1st, 2010, 13:40), arguing that in the US context a Christian is more likely to receive a lenient treatment relative to a defendant who belongs to a “deviant” (outside of Christian mainstream) religion. Experimental evidence with mock-juror trials also show that biases have strong effect on decision making in cases of minority religions, see J. Pfeifer, “Perceptual biases and mock juror decision making: Minority religions in court,” *Social Justice Research* 12(4) (1999), p. 409-420.

²⁴⁴ For an overview of various psychological mechanisms through which religion can influence a trial outcome see Monika K. Miller, Alayna Jehle and Alicia Summers, “From Kobe Bryant to Saddam Hussein: A Descriptive Examination of How Religion Likely Affected Twenty-Five Recent High Profile Trials”, *9 Flo. Coastal L. Rev* 1 (2007), p. 24-33.

²⁴⁵ Id., p. 24-25. Further on influence of heuristics and biases see Christoph Engel and Gerd Gigerenzer, eds., *Heuristics and the Law* (Cambridge University Press, 2007).

²⁴⁶ Monika K. Miller, Alayna Jehle and Alicia Summers, “From Kobe Bryant to Saddam Hussein: A Descriptive Examination of How Religion Likely Affected Twenty-Five Recent High Profile Trials”, *9 Flo. Coastal L. Rev* 1 (2007), p. 29.

²⁴⁷ Id., p. 30.

background in which the decision making takes place, since cultural setting defines the “normalcy” and prepares a ground for a judgment.

Third level is related to the nature and the socially generated and conditioned structure of judicial argumentation and evidence in cases dealing with the non-mainstream religious groups²⁴⁸. Evidence included in cases related to religious groups is subject to regular evidentiary rules (deciding what admissible or inadmissible evidence is) but also requires types of evidence particular to a specific case and a religious group involved, i.e. different social science and historical evidence on the harm of a particular group practice or belief; or evidence on the sincerity of group held beliefs in cases of accusations of fraud. Moreover, the judicial argumentation itself has a normative function, since it is socially dependant on a particular judgment of what is “normal” or “deviant” standard of accepted behavior of religious groups generally in a particular society. In jurisdictions under examinations here, some regular expectations of how “normal” religion looks like were outlined above, in the analysis of the current state of organized Western Christianity in the US and Europe.

The major thesis of this work, building on Weberian sociological concepts, is that the contemporary systems for regulating religious groups judge all non-mainstream religious

²⁴⁸ Mark Cooney, “Evidence as Partisanship” *Law & Society Review*, Vol. 28, (1994), p. 833-858. Other examples of how evidence is basically socially constructed depending on an issue being decided can be found in S.S. Gatowski, , S. A. Dobbin, J. T. Richardson and G. Ginsburg, ”The globalization of behavioral science evidence about battered women: A theory of production and dif fusion. *Behavioral Sciences & the Law* 15 (1997), p. 285-306; G. Ginsburg, and J. T Richardson, “Brainwashing’ evidence in light of *Daubert*” in *Law and science*, edited by H. Reece, (Oxford Press, 1998), p. 265-288. Evidence that might aid non-mainstream religious groups can be rejected in order to suppress legal claims of unpopular religious groups, but evidence working against the group can be operationalized in a way that works against the group, as when the group is suspected of engaging in “brainwashing,” see J. T. Richardson, “Cult/brainwashing cases and freedom of religion.” *Journal of Church and State* 33 (1991), p. 55-74); or when claims that the group is a “cult” are advanced, see J. Pfeifer, “The psychological framing of cults: Schematic representations and cult evaluation,” *Journal of Applied Social Psychology* 22, (1995), p. 531-544.

groups by assessing them according to their *status* in a given social stratification. However, this work goes further and claims that the judgment on the status of a given religious group is based on perceived group potential for „disloyalty“ to the state; and the perceived and socially constructed social distance of a given group from what is legally constructed as the „mainstream.” Generally speaking, one can locate a status of religious groups in a given society by placing religious groups in a following hierarchy²⁴⁹.



Of course, no “officially sanctioned church “ need to exist *de jure* – it is enough for

²⁴⁹ James T. Richardson, “The Sociology of Religious Freedom: A Structural and Socio-Legal Analysis,” *Sociology of Religion*, Vol. 67, No. 3 (Autumn, 2006), p. 271-294, table 1 at 277.

my purposes that a particular religion or a variation of it holds a strong sway and an upper status, when taking into account factors like history, numbers and institutional influence in given society, in order to consider it for all intents and purposes, “official.”

I assume that law functions as a tool of social control²⁵⁰ and furthermore claim that the legal judgment of non-mainstream religious groups is based on judgment of the three major functions of religious groups as I have described them above. In short, the legal judgment of group “status”, a “disloyalty potential” and social distance is a judgment based on the perception of group cooperation and credibility-enhancing mechanisms, as well as boundary sustaining mechanisms, which serve as proxies for a decision on the (un)acceptability of emotions, beliefs and identities that precede them, resulting in a positive or more likely negative legal decision.

Of course, judgments of (dis)loyalty and/or social distance are in practice intertwined, but analytically they can be distinguished since the judgment of disloyalty is a normatively stronger one and usually has more immediate implications in practice depending on whether the disloyalty is considered to be of such level that it creates (or is perceived as creating) present or future social harm and danger. It is expected that the judgment of disloyalty of a non-mainstream religious group is directly proportional to its non-recognition and a penal treatment within the legal and social system.

Social distance, on the other hand, is present relatively frequently in cases of non-mainstream religious groups given their “deviance from normalcy.” But the judgment of

²⁵⁰ On law as a tool of social control, see Donald Black, *The Behavior of Law*, (New York: Academic Press, 1976), p. 2. On relationship between law as a tool of social control and minority religions see James T. Richardson, “Law, Social Control, and Minority Religions,” in Pauline Cote (ed.), *Chercheurs de Dieux Dans L'espace Public* (trans. Frontier Religions in Public Space) (Ottawa: University of Ottawa Press, 2001), p. 139-168.

“social distance” itself need not imply denials of legal status and rights available to other religious groups, especially in cases of small socially secluded religious groups who are able to fully internalize costs of their functioning without imposing any costs on the rest of the society; and in cases of non-mainstream religious groups who have moved, on some scale, closer to mainstream. In other words, further the group is on a scale of social distance (i.e. the more secluded it is without creating perceived social harm and avoiding being judged as disloyal) from what is legally perceived as mainstream, the more likely it is to succeed with its legal claim. Non-mainstream religious groups that move within the mid-level range of social distance receive mixed treatment depending on whether the legal claim they are making encroaches on mainstream “values” (in which case they fail); or whether their claim is “internalized” , that is it concerns predominantly the group itself., in which case they are more likely to succeed. In that sense, judgments on the status and the unacceptability or legal claims of non-mainstream religious groups is curvilinear.

Finally, building on a simple description that laws generally reflect majority preferences or the will of the group claiming the will of majority, and of necessity the law benefits, in theory or in practice, one group over another, final assumption of this work is that the law – representing a mainstream values and passions - will seek ways to minimize “identity” differences and will therefore act with the assimilationist bias²⁵¹ in order to allow for *exit* or *covering* or *passing* ; and will further seek to discourage *voice* (fight) option of non-mainstream religious groups. In the process, the law will seek to “de-polarize” groups given that behavior to contrary can further entrench in-group identity, promote “undesirable”

²⁵¹ Kenji Yoshino, “Assimilationist Bias in Equal Protection: the Visibility Presumption and the Case of “Don’t Ask Don’t Tell” 108 *Yale Law Journal* 487 (1998).

behavior and increase the likelihood and severity of conflict. On the other hand, religious groups whose beliefs and practices are in opposition to prevalent ones will show *the resistance bias* seeking either to bent prevalent norms their own way; or, in last instance, to attain the less costly covering or passing strategy, which is to say to try to adjust their practices so that the out-of-group cooperation is more likely and less burdensome relative to their identity which they seek to preserve.

Chapter II: Free Exercise of Religion and non-mainstream religious groups in the US: from constitutional transformation towards limited approved seclusion

2. Introduction

This chapter is devoted to analyzing and illuminating the treatment of non-mainstream religious groups in the US. It starts by providing a general overview of relationship between law and religion in various historical periods. The argument is that the contemporary proclamations of religious freedom (or toleration) for various faith or a more stringent version of non-establishment of church or religion is basically a historically very recent development and likely a result of contingent historical circumstances such as increase in immigration during the 19th and 20th century, which produced a social and religious diversity that nevertheless remains far lower than usually assumed. In short, contemporary system of regulating religious groups is not a result of any conscious plan or historically rooted legal practice or the inevitable consequence of institutional or even social commitment to religious freedom or any other nicety.

Case studies that follow deal with several most prominent non-mainstream religious groups such as Mormons (Church of Jesus Christ of Latter Day Saints), Jehovah's Witnesses, Old Order Amish, Orthodox and Hassidic Jews. The argument set forward in that part is following. Most prominent non-mainstream religious group of the 19th century, Mormons were remodeled in such a way so that its particular group cooperation mechanism this group practiced at a time have been nudged so as to bring out the process of a limited assimilation and a breakdown of the boundary of the group.

On the other hand, though they historically also suffered harsh treatment, groups such as Old Order Amish or Jehovah's Witnesses have progressively received better treatment on account of both groups being relatively secluded; and as a result of the strategic shift in legal

norms which have moved the mainstream norms in direction of more indifference of and perhaps even sympathy (coupled with a benign neglect) towards secluded groups. However, ‘seclusion approval’ was not granted to Orthodox and Hasidic Jews in several major cases and I contend that the main reason was not any underlying animus towards group as such, but a resistance to the demands they made which have been, with dubious foundations, perceived as encroaching on mainstream values. Throughout both parts, I discuss cases studies using theory developed in the chapter one. In the conclusions I summarize findings of this chapter.

2.1 Constitutional framework

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The text of the Amendment is vague on its face and allows for many different interpretations²⁵². It does not say there shall be no state church, though that is usually taken to be one of its main aims. It refers to “respecting the establishment of religion.” Meaning of the word “respecting” can be analyzed from many different perspectives. Conversely, in the case of free exercise clause, the phrase “prohibiting the free exercise thereof” was hardly ever interpreted as meaning that the state is not allowed to regulate or prohibit any kind of religious behavior. Contemporary approaches to this taken by the US Supreme Court and state and federal legislation will be analyzed further below and placed within the historical context in which the whole thing has unraveled itself.

2.1.1 Establishment clause history and contemporary jurisprudence

Before and well after the drafting and ratification of what is today a US constitution, many territories and future federal states have had some form of established church, irrespective

²⁵² Jusic (2007), p. 59.

of the fact that many of the settlers have been persecuted by established religions in the countries from which they came from. It seems reasonable to argue, as Kuru does, that than America consisting of various Christian, mostly Protestant groups, none of them strong enough to be hegemonic on a national level; influenced by the vaguely secular – though not secular in contemporary sense of the word – or deistic elite consisting of people like Washington, Jefferson and Madison and evangelical missionaries who were busy preserving the ‘garden of church’ from the ‘wilderness of the state’; as well as unhindered, following the end of the War of Independence, by the presence of the *ancient regime*; has almost inevitably (in retrospect) developed towards a national constitutional system without a national church, forging a vague consensus around a ‘live and let live’ policy – that is to say one Christian Protestant group letting other Christian Protestant group to go on about its business²⁵³. Live and let live policy had, however, its limits – it did not apply to Native Americans or later on to Mormons.

In the colonial period, the Anglican Church was established in six colonies, while seven other colonies had established Congregational churches²⁵⁴, and establishments have continued following the ratification of the Constitution, the process of disestablishment being finished sometimes during half 19th century. As Charles Taylor argues, during and well after that time, given that the First Amendment concerned itself with the separation of church and state – that is organized and institutionalized religion - a significant space was left for the presence of religion as such in the public space, the description that might as well be accurate to a certain extent even today²⁵⁵. In 1830, for example, the Supreme Court Justice Joseph Story, appointed by James

²⁵³ Ahmet T. Kuru, “Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies towards Religion,” *World Politics*, Vol. 59, No. 4 (2007), p. 586-587.

²⁵⁴ Carl H. Esbeck, “Dissent and Disestablishment: The Church-State Settlement in the Early American Republic,” *B.Y.U. Law Review* 30 (2004), 1415, 1457, quoted in Kuru *supra* n. 61.

²⁵⁵ Charles Taylor, “How to Define Secularism”, paper presented at the NYU Colloquium on Legal and Political Philosophy (on file with author).

Madison, argued that the goal of the First Amendment was „ to exclude all rivalry among Christian sects „ and that „Christianity ought to receive encouragement from the state.“ Christianity , for Story, remains essential to the state because the belief in „a future state of rewards and punishments“ therefore „ indispensable to the administration of justice.²⁵⁶“ Story was also clear minded regarding the religious scope of the First Amendment. For him, „The real object of the First Amendment was not to countenance, much less to advance Mohammedanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects...and to prevent any national ecclesiastical patronage of the national government.²⁵⁷”

The process of disestablishment, as it will be argued in discussion on free exercise clause, did not produce any better position or status for dissenters in most places, especially for Native Americans, Mormons, Jews, Catholics, dissenting Protestants and countless others. As Douglas Laycock says, from the ratification time onwards history of law and religion in America can be generally speaking divided in three alignments of religious conflict: Protestant-Protestant; Protestant – Catholic; and religious – secular²⁵⁸. This division, accurate as it might be, leaves out of the picture, at a very least, destiny of Native Americans and Mormons (alongside other members of religious nonmainstream) who had important if not decisive influence on how the US law treats religious and ethnic outsiders.

The beginning of the modern establishment jurisprudence of the US Supreme Court can be safely placed in an immediate pre World War Two and definitely in to a post-World War Two context, when for strategic reasons American government had to invest resources into simultaneously projecting a picture of ‘God-loving’ country opposed to ‘atheistic communism’

²⁵⁶ J. Story, quoted in Taylor, *supra*, pages unnumbered.

²⁵⁷ Justice Story, III, *Commentaries on the Constitution of the United States*, s. 1871 (1833).

²⁵⁸ Douglas Laycock, „Church and State in the United States: Competing Conceptions and Historic Changes“ 13 *Ind. J. Global Legal Stud.* 503 (2006), p. 530.

of the Soviet Union; as well as engaging in actions of promoting religious freedom on its own soil so as to be able to promote it externally, especially towards the Communist countries who were portrayed as “prohibiting free exercise of religion” and “coercing conscious of believers.”²⁵⁹ In one of the first and most important decisions of the US Supreme Courts were the modern meaning of the establishment clause was defined, Justice Black stated that Establishment clause means at least this²⁶⁰:

“Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs, for church attendance or non-attendance. No tax..., large or small, can be levied to support any religious activities or institutions...”

Out of this general statement, throughout the time the Court has developed many ‘tests’ to determine what does or does not run counter the Establishment Clause. As a whole, there exists no single analytical tool that would, standing on its own, explain fully puzzling paths of establishment jurisprudence. Several most important doctrinal approaches stand out in the burdensome caseload as frequently applied: the Lemon test, the endorsement test, the coercion test, the denominational preference test, the original history test and a test of ceremonial deism²⁶¹.

The Lemon test., dating back to case *Lemon v. Kurtzman*²⁶² has been the most-used establishment clause test and frequently cited since 1971. It holds that governmental action hoping to survive an establishment clause challenge must satisfy a three pronged test: “First, the

²⁵⁹ See Sarah Barringer Gordon, *The Spirit of Law: Religious Voices and the Constitution in Modern America*, (Harvard University Press, 2010), p 15-55, and part II, *infra*.

²⁶⁰ *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 15 (1947).

²⁶¹ See Jusic (2007), p. 62 and William A. Kaplin, *American Constitutional Law: An Overview, Analysis and Integration*. (Carolina Academic Press: Durham, North Carolina, 2004), p. 395-400. Hereafter Kaplin.

²⁶² 403 U.S. 602 (1971).

statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances, nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion²⁶³’.” A more recent test is ‘endorsement’ or ‘endorsement-and-disapproval’ test. It is used to determine whether certain government sponsored message promoting religion violates an establishment clause in a way that such “endorsement sends a message to non-adherents that they are outsiders, not full members of the political community...” while “disapproval sends the opposite message²⁶⁴”. Whether a governmental practice is an endorsement or disapproval of religion is to be judged from a viewpoint of “the reasonable observer.”²⁶⁵

The third type of establishment clause test is the coercion test, developed in *Lee v. Weisman*²⁶⁶. So far, its application was very limited to number of cases where state-sponsored activity, voluntary or not, may be interpreted as either psychological (i.e. peer student pressure) or physical coercion to engage in a ritual that has religious meaning. Similar to the coercion test is the denominational preference test developed in *Larson v. Valente*²⁶⁷. The denominational preference forbids the government to create, either in intent or in effect, a preferential status for one religion over another, unless there is a compelling government interest under the strict scrutiny standards. In the *Larson* case itself, the Court found that state legislation prohibiting religious solicitation activities on the public streets targeted not members of all religions, but only members of non-traditional religions. Creating preferential treatment was clear, both in effect, and from legislative history and was held to be unconstitutional²⁶⁸.

²⁶³ *Lemon* at 612-613.

²⁶⁴ *Lynch v. Donnelly*, 465 U.S. 668 (1984) at 687-695.

²⁶⁵ *Id.*

²⁶⁶ 505 U.S. 577 (1992) and see *Jusic* (2007), p. 64 and *infra*.

²⁶⁷ 456 U.S. 228 (1982).

²⁶⁸ *Id.*, p. 398.

Two other tests, ‘original history’ and ‘ceremonial deism’ deal mostly with a symbolic behavior. Rarely applied, for my purposes here both are useful to mention since they, in words of various judges, speak volumes on the social and historical norms which the Courts clearly perceives as important and mainstream. In *Marsh v. Chambers*,²⁶⁹ the Court found a practice of having a state-employed chaplain lead prayers during the opening of the legislative sessions was established and practiced immediately after the enactment of the First Amendment and such a practice should not be deemed unconstitutional, as the Founding Fathers did not perceive it as an establishment of religion²⁷⁰.

In Justice Brennan’s words:

“We have noted that government cannot be completely prohibited from recognizing in its public actions the religious belief and practices of the American people as an aspect of our national history and culture.... While I remain uncertain about these questions, I would suggest that such practices as the designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance can be understood... as form of “ceremonial deism,” protected from the Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”²⁷¹

Ceremonial deism was invoked in *Zorach v. Clauson* stating “We are religious people whose institutions presuppose a Supreme Being,”²⁷² and in *School District Abington Township v. Schempp*: “...a vast portion of our people believe in and worship God...many of our legal, political and personal values derive historically from religious teachings....”²⁷³ The conclusion of all cited opinions is that such practices, through repetition, have lost their religious meanings and amount only to patriotic ceremonialism.

Setting aside doctrinal niceties, the application of the above said establishment clause

²⁶⁹ 463 U.S. 783 (1983).

²⁷⁰ Jusic (2007), p. 65.

²⁷¹ *Marsh* at p. 811, internal citations omitted.

²⁷² 343 U.S. 306 (1952).

²⁷³ 374 U.S. 203 (1963).

‘tests’ have evolved throughout the time, generally following up in uneven manner perceived (or just desired) changes in the mores and expectations of American society, as the society became relatively speaking more diverse. Catholic and Jews together with Mormons have gone through the process of ‘Americanization’ and become a relatively accepted part of mainstream and members of what came to be called a ‘Protestant-Catholic-Jew’ triumvirate; or what came to be called, roughly from the end of 1970’s, a Judeo-Christian culture; or, even more recently, a diverse or pluralistic culture celebrated by pronouncements that, i.e., America is most religiously diverse and religiously vital country in the world.

The last two terms, Judeo-Christian culture and a pluralistic culture are of dubious validity. As Mark Tushnet argues, Judaism cannot be really located anywhere within the ambits of what is in American called Judeo-Christian culture and in fact Judeo-Christianity looks pretty much like regular Christian culture stretched at margins²⁷⁴. As Tushnet states it: “I had thought that the Judeo-Christian tradition was actually a Christian tradition; that is, only Christians can describe a Judeo-Christian tradition because they orient themselves to a set of ideas that includes elements that comprise the essence of Judaism. Conversely, Jews do not orient themselves to a set of ideas that includes elements that comprise the essence of Christianity.”²⁷⁵ Frederick Mark Gedicks basically affirms this same claim, arguing that what is called Judeo-Christian tradition in the US symbolizes essentially Christian beliefs and values²⁷⁶.

Both Tushnet and Gedicks might or might not be right. But their claim that what was and still is, to a certain extent, called Judeo-Christianity in the US is basically Christian values stretched at margins is largely unexceptional and fairly obvious. In this particular case, we are

²⁷⁴ Mark V. Tushnet, “The Conception of Tradition in Constitutional Historiography,” 29 *William and Mary L. Rev.* 93 (1987).

²⁷⁵ *Id.*, at 93-94 and n.6 (1987).

²⁷⁶ Frederick Mark Gedicks and Roger Hendrix “Uncivil Religion: Judeo-Christianity and the Ten Commandments,” *West. V. L. Rev.* 273 (2007).

effectively dealing with a classical toleration of a larger and more capacious religious and secular tradition capable of integrating other traditions. This development had significant political roots. As Kathleen Moore states, the use of term Judeo-Christian culture started developing in the US during mid-fifties as a result of the influence WWII, knowledge of Holocaust and the Cold War had on the US government and people in general²⁷⁷. Its full fledged use dates back to the time of Eisenhower's and Reagan's administrations. Throughout, the term was mostly used to denote relatively open and tolerant culture in which one is free to exercise his religion and openly states his affiliations, as opposed to Communist countries who were perceived and/or just portrayed as tyrannical and oppressive. But as Alfred Cohen argues, many things can be derived from the history of Judeo-Christianity, but hardly a history of mutual tolerance and openness²⁷⁸.

The same goes for pronouncements of religious diversity, which have almost become a common thing to evoke, as well as statements proclaiming America to be a country of greatest religious vitality, which is a popular theme among economists and sociologists of American religion. The former statement has been thrown into a high-scale doubt by an acclaimed empirical study of Hadaway, Marler and Chaves, a study which in itself produced many controversies and conferences. They found that the level of church attendance in the US is at least fifty percent lower than generally reported in public polls, which implies there is a general tendency among common Americans to misreport their religious inclinations in public polls and among family and friend²⁷⁹, which again seems to imply that majority of Americans *believe* that their immediate environment expects them to self-report some sort of religious affiliation and/or

²⁷⁷ Kathleen M. Moore, *Al Mughtaribun: American Law and the Transformation of Muslim Life in the United States* (SUNY Press, 1995), p. 145.

²⁷⁸ Further, see Arthur A. Cohen, *The Myth of Judeo-Christian Tradition*, (Harper and Row, 1970), esp. p. 55-56, 69-70.

²⁷⁹ C. Kirk Hadaway, Penny Long Marler and Mark Chaves, „What the Polls Don't Show: A Closer Look at U.S. Church Attendance” *American Sociological Review*, Vol. 58, No. 6 (Dec., 1993), p. 741-752.

activity whose presence in reality is dubious. In another study, Chaves and Gorski debunk another common topic among political scientists and economists of religion, the claim that separation of church and state produces voluntarism and pluralism, consequently breeding religious vitality. Chaves and Gorski found no causal relation between the separation of church and state, pluralism and religious vitality in the US²⁸⁰.

As to the claim on religious diversity, obviously this is a subjective judgment which crucially depends on how one defines diversity. If by diversity one means a variety of Christian and mostly Protestant denominations, than the claim of diversity is correct. However, that claim assumes that, i.e., behavioral difference between Anglicans and Methodist in the US are of a same degree as difference between for example Hindus and Muslims in India. If, however, all possible variations of Christianity are subsumed under one religious family, than the claim of ‘extraordinary diversity’ is largely gone and Russia or India or China would by all means look far more diverse countries than the United States, given that they include within their ambits highly significant numbers of Buddhists, Muslims, Jains, Sikhs, animists, Christian denominations, alongside (in Russian and Indian example) the mainstream Orthodox Christianity and Hinduism in all its variety, rather than, as is the case in the US, including the fringe numbers of the above said religions .

The degree of confusion regarding the abuse of the concept of diversity is noted in literature. As Lori Beaman states, a cursory overview of studies on sociology and economics of religion in North America shows that most have been done on the basis of dubious data under which misclassified Christian denominations were taken to be ‘non-Christian religious groups’

²⁸⁰ Mark Chaves and Philip S. Gorski. “Religious Pluralism and Religious Participation,” *Annual Review of Sociology* 27 (2001), p. 261-281.

which have been added to the ‘diversity calculus’²⁸¹. In sum, the claim of religious diversity is dubious and empirically yet to be researched. Interestingly, only in last few years and mostly as a response to debates regarding American relations with the Muslim world, sociologists of religion have accepted that contemporary United States – contrary to commonly accepted wisdom only a decade ago – is definitely not among the religiously diverse nations in any interesting sense of the word. As David Briggs of Association of Religious Data Archive says²⁸²:

“Research consistently shows more than three-quarters of Americans identify themselves as Christian. Compare that to the total of 5.5 percent of respondents among the more than 35,000 American adults who told the 2007 U.S. Religious Landscape Survey they affiliated with other religions. An even larger project, the 2008 American Religious Identification Survey of more than 54,000 respondents, found a combined 3.9 percent said they were Muslims, Buddhists, Hindus or members of another non-Christian world religion. Now look at a nation like Korea where Christians are 41 percent of the populace, Confucianists 15 percent, Buddhists 11 percent and 31,20 percent identify with ethnic or new religious movements. Or India, where along with the Hindu majority, 14 percent of the populace is Muslim, 4.6 percent Christian and 2 percent Sikh. Indonesia, which does have the world’s largest Muslim population, also is 12 percent Christian and 2 percent Hindu, with some 7 percent following other beliefs. Nations like Nigeria, with almost equal numbers of Muslims and Christians, and Bosnia and Herzegovina and Lebanon are where significant numbers of the world’s two largest faiths live within the same borders. Lebanon even has a larger percentage of Buddhists than the percentage of Muslims in the United States, according to some research.”

Given this social background, on the level of decision making in establishment clause jurisprudence the move from predominantly Protestant to vaguely Judeo-Christian to even more vaguely pluralist culture predictably produced varying degrees of confusion rather than clarification. Reason is obvious. Both pronouncements of Judeo-Christian culture or pluralist and diverse culture are descriptions of a social phenomenon rather than guides for social action and

²⁸¹ Lori G. Beaman, "The Myth of Plurality, Diversity and Vigour: Constitutional Privilege of Protestantism in the United States and Canada", *Journal for the Scientific Study of Religion*, 42(3)(2006): p. 311-325. As an example Beaman points to Sherkats study of the General Social Survey for a period 1972-1996, see Daren Sheerkat, "Tracking the "other": Dynamics and composition of "other" religions in the General Social Survey, 1972-1996," *Journal for the Scientific Study of Religion* 38(4) (1999): p. 551-60.

²⁸² Available at <http://blogs.thearda.com/trend/religion/america-is-not-no-1-in-religious-diversity/> (accessed 24.09.2010).

institutional decision making. As the popular joke, attributed to a Massachusetts congressman, goes, one is yet to meet a person who introduces him/herself as a Judeo-Christian or professes to act in accordance with Judeo-Christian principles for action, all of them all of the time simultaneously. The same is true for a self-professed pluralist. While pluralism might be state of facts in the world, the moment of making decisions compels one to seize being a pluralist as no decision can subsume in itself conflicting plural values. Moreover, while there might be a plurality of values formally and descriptively speaking, not all of those values have same *capabilities* given that values live through human beings and their social action in a *predefined social space*. In short, plurality of values remains a bottom ground fact which does not remove another fact – some values will have precedence because either its proponents are in a position to impose them on others or, more often than not, proclaim them all inclusive and good for everyone; or the proponents of some values will have no means to live up to their own professed commitments because they are either fewer in numbers or just simply without resources to attain their ends.

As a proof, consider examples of how *Lemon* test and the endorsement test have evolved and produced self-contradictory results in practice. Commenting on the state of affairs of the application of *Lemon* test in cases involving financial aid to religious groups (predominantly religious schools) McConnell and Posner state that²⁸³ courts came out “in favor of school lunches, state prepared standardized tests, on-premises diagnostic services, off-premises therapeutic services, and off-premises remedial education” but “against bus rides on field trips,

²⁸³ McConnell and Posner, p. 20.

maps, films, laboratory equipment and other instructional materials, teacher-prepared tests, on-premises therapeutic and remedial services, and maintenance and repair of school buildings²⁸⁴.“

The above statement is a pretty accurate description of the state of affairs today, and it seems to rest on an unstable line which the Supreme Court has drawn between direct and indirect aid to religion – a line that for all practical purposes is impossible to draw given the extensive public involvement in every area of life coupled with the equally high involvement of religious groups in areas such as education, social welfare and general organization of community activities²⁸⁵. It does not take much that to conclude that within this process of „entanglement“ religions with greater mobility, social influence, size and a potential to use internal and external resources will certainly be winners of the day; and the process will definitely affect the general atmosphere in the society in ways that are as yet unforeseeable.

Another evidence of the current unstable and confusing state of establishment clause is a use of the “endorsement” test, developed by Justice Sandra Day O’ Connor, which was applied in various versions ever since. The motivation behind developing this highly ‘psychologized’ test seems to have been, as Susan Hack argues, that

“the possibility that Anglicanism or Methodism or etc., might be legally established as a national church (or even that Mormonism might be legally established as a state church in Utah) seems remote; the danger to be averted now is, rather, that atheists or Catholics or Jews or Unitarians or Anabaptists or Jehovah’s Witnesses or Seventh-Day Adventists or Christian Scientists or Muslims or Hindus or practitioners of Santería or of one or another Native American religion or ... etc., etc., be treated as less than full citizens. And this is the very idea that, extrapolating the

²⁸⁴ List of cases is too long to be cited here, but see McConnell and Posner, *supra.*, p. 26, n. 48, citing John Garvey, “Another Way of Looking at School Aid,” 1985 *S. Ct. Rev.* 61. Also see Michael W. McConnell, “Political and Religious Disestablishment,” 1986 *BYU. L. Rev.* 405.

²⁸⁵ Terms direct and indirect aid can be trace to *Grand Rapids School District v Ball*, 473 US 373, 393-94 (1985), when the Court found that loans of textbooks and the provision of transportation to parochial school student is 'indirect aid' while 'direct aid' is loans of instructional materials or provision of tuition tax deductions to parochial school students.

meaning of “establishment” to cover *any* kind of government endorsement of religion, Justice O’Connor tried to articulate.²⁸⁶”

That is to say, the application of the endorsement test was motivated by the perceived need to provide a sense of “inclusion” and avoid the sense of “exclusion from political community” – which is close to the status considerations I have analyzed in chapter one - for those who might not necessarily and under all conditions perceive all government actions, even those traditional and symbolic, as “respecting” the separation of church and state and being “all inclusive” and representing all traditions. As Justice O’Connor stated : “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message²⁸⁷”.

But, even on the level of symbols, that is easier said than done and requires a lot of second guessing. So, for example, in the same case *Lynch v. Donnelly*²⁸⁸, relying on an imagined reasonable observer, the Court found a nativity scene to be a passive commemoration of the historical origins of Christmas, and means to promote friendship and a spirit of goodwill, given that the crèche was surrounded by a plastic Santa Claus, plastic reindeer, candy canes and talking toys. However, in another case, *County of Allegheny v. American Civil Liberties Union*

²⁸⁶ Susan Haack, “The Growth of Meaning and the Limits of Formalism: in Science and in Law”, *Analysis Filosofico*, Vol. 29, No. 1 (May 2009), p. 24, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629193 .

²⁸⁷ *Lynch*, *infra* at 668. The Supreme Court has made many statements similar to this one. Cf. following descriptions of the messages that state support for religion or hostility towards the religion conveys: "The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public," *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 397 (1985), while any state actions that "manifest a governmental hostility to religion" would violate the Free Exercise Clause, *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).

²⁸⁸ 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984).

*Greater Pittsburgh Chapter*²⁸⁹, the court prohibited a county courthouse from placing a cross on its staircase during the holiday season, though the cross was also surrounded by Jewish menorah and some other symbols, the court being quick to add that both cross and menorah are secular symbols of a winter season. In both cases, as the endorsement tests requires, the “reasonable observer”, according to the Court, would see differences between these symbols in different places, and would also see that their meaning is secular. The secular meanings of those symbols turned out to be clear to everyone except the people who brought complaints.

These two examples were brought just to illustrate the degree of instability and rhetoric’s marshaled to justify a simple desire of most people in a given society. And instead of going through pains of explaining the “inclusiveness which reasonable observer would notice”, it would have been simpler – though not exactly politically or legally correct - to say what is a common knowledge: a lot of people want affirmation of a symbolic and meaningful emotional credibility of particular religious symbols, even if for purely secular motivations, along the lines I have analyzed in chapter one speaking of symbolic credibility of religion. Moreover, none is necessarily imposing physically their desire on others, issues of social pressure to conform notwithstanding. Hence, those who do not share same feelings are free to look the other way or generally toughen up, as Noah Feldman has advised present and future complainants²⁹⁰.

In sum, the establishment clause has travelled a long way as a result of social and legal changes especially during the 20th century, immigration, the growth of public involvement of religion in various areas of life and the strong organization of religious groups who are pushing for access to public resources and are active in every area of life. It is impossible to say how future will look like but if current trends hold, as Richardson argues, and the growth of

²⁸⁹ 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

²⁹⁰ Noah Feldman, *Divided by God*, (Farrar, Strauss and Giroux, 2005), p. 185 and infra.

government funding for religion coupled with more paternalistic state attitude and the increase of state control (via funding and other conditions) over religious groups and organizations continues, the American system of church-state relations will in effect and de facto look more similar to what was historically considered a more European paternalistic approach to state-church relations²⁹¹.

2.2 Free exercise: history, doctrine and empirical reality

History, Development and Reality of Free Exercise of Religion

Overbroad and general historical narratives sometimes claim that the settlers to what was termed ‘the New World’ (as usual, ‘new’ only depending on who you ask) have come to what is today the United States in order to escape religious persecution and enjoy ‘religious freedom.’ The claim is only partially true. Certainly some of the religious dissenters have escaped England and other places as a result of religious persecution; but most of dissenters were definitely not into extending religious freedom to everyone. At best, given that most previously persecuted groups will employ same means once applied on them against others as soon as they have a chance to do so, they were into practicing religious freedom their way and for themselves, leaving little (sometimes not even that) *private* space for those that happened not to share similar religious views.

This is not a very controversial claim: in 1966 when, as a response to the recent ruling of the US Supreme Court prohibiting compulsory prayer in the schools, Congress considered an amendment that would permit prayers, the Chairman of the Senate Subcommittee on

²⁹¹ James T. Richardson and Tom Robbins, “Monitoring and Surveillance of Religious Groups in the United States,” p. 16, forthcoming, on file with author.

Constitutional Amendments Birch Bayh explained eloquently that “Our forefathers came here not to seek religious freedom for all, as myth would have it, but freedom to propagate their own particular kind of religion.”²⁹² This is probably an accurate judgment. For example, one of the first laws enacted in Virginia back in 1619 was a law providing a one pound of tobacco penalty for those failing to attend weekly Sunday service, to be raised to fifty pounds if the same mistake has been repeated for a month and further that there shall be “uniformity in our church as neere as may be to the canons in England” and that “all persons yeild readie obedience unto them under paine of censure.”²⁹³ 1648 „Lauues and Libertyes” law enacted in Massachusetts baned Jesuit order and threatened punishment for anyone who criticized infant baptism and execution for those who worship any other God but „the LORD GOD”; witches were burned in Salem; Quakers were hanged in Boston for preaching direct relationship with God (by passing clergy); and so on²⁹⁴.

Generally speaking, prior to the American War of Independence and the drafting of the Constitution the religious majorities in a given area and in the future federal states have been fully in charge of the religious life of the respective areas they controlled, and with some notable limited exceptions such as Rhode Island and Pennsylvania most were not interested in anything resembling contemporary idea of freedom of religion . During the process of negotiating the federal constitution, many of the prominent persons involved in the drafting of the Religion Clauses of the federal constitution such as Jefferson or Madison have envisaged various degrees

²⁹² Bayh quoted in T. Jeremy Gunn, „Religious Freedom and Laicite: Comparison of United States and France“ *B.Y.U. L. Rev.* 419, 446 (2004).

²⁹³ T. Jeremy Gunn, „Religious Freedom and Laicite: Comparison of United States and France“ *B.Y.U. L. Rev.* 419, 442 (2004).

²⁹⁴ *Id.*, p. 443.

of freedom of religion or freedom of conscience to be incorporated in the federal constitution²⁹⁵, apparently influenced, though the degree of influence is debatable, by the ideas of John Locke and important religious Protestant thinkers like Roger Williams, John Witherspoon and Isaac Backus.

Frequently, historical narratives of, i.e., Thomas Jefferson's view of freedom of religion or conscience celebrate his Unitarian and rationalist view of religion as a private matter as a form of 'toleration'; endlessly cite Jefferson's 'wall of separation' phrase, which is in fact an intellectual property of John Locke's important 16th century precursor Anglican priest and theologian Richard Hooker (who opposed the separation)²⁹⁶; and his statement "It does me no injury for my neighbor to say believes that there are twenty gods or no God. It neither picks my pocket nor breaks my leg" as a proof. But, as a historical record shows, that positive view is exaggerated both in case of Jefferson and likely in case of many other prominent figures of those days. I.e., Jefferson had no problem publicly calling some Protestant sects he disliked brutal savages, as well entertaining (and acting upon) a strong anti-Catholic sentiment²⁹⁷ or writing of the ethics of Judaism as repugnant²⁹⁸; or sending a message to Native Americans, in Jefferson's mind 'noble savages', to become civilized and accept Jefferson's views which did not happen given that same Jefferson, foreseeing Louisiana cession, on pragmatic grounds found Native American removal east of Mississippi a much faster solution²⁹⁹. To add another example, in 1785

²⁹⁵ Michael W. McConnell, „The Origins and Historical Meaning of Free Exercise of Religion,“ *103 Harv. L. Rev.* 1409, (1990) (discussing various views on free exercise of religion, its relationship with the freedom of conscience and its limits amongst various influential figures during the Revolution).

²⁹⁶ As noted by Jeremy Waldron, Hooker used the phrase two centuries before Jefferson in his work *Ecclesiastical Polity*. See Jeremy Waldron, "Toleration and Calumny," p. 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699895 (downloaded November 1st, 2010).

²⁹⁷ T. Jeremy Gunn, „Religious Freedom and Laicite: Comparison of United States and France“ *B.Y.U. L. Rev.* 419, 444 (2004).

²⁹⁸ On Jefferson's views see generally McConnell (1990), *supra*.

²⁹⁹ On Jefferson mixed views of and a treatment of Native Americans see generally Bernard Sheehan, *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian*, (Chapel Hill, 1973).

James Madison, the author of the First Amendment, introduced a bill, enacted by the Virginia legislature, to punish as a criminal offense any citizen found working on the Christian Sabbath of Sunday³⁰⁰.

Setting aside for a moment ‘special circumstances’ of Mormons and Native Americans, the situation regarding the local control over matters of religion have not changed substantially following the enactment of the Constitution and the federal states have retained a control over religious affairs though, as it was argued above, the process of disestablishment continued slowly. With the exception of *Reynolds v. United States*³⁰¹ and few other cases, throughout the 19th and well into the 20th century the Supreme Court mostly affirmed that the First Amendment applies only to the federal government, basically throwing out any and all claims unpopular religions brought against states³⁰². State courts were not interested in the matter also. As John Witte, summarizing the 19th and the beginning of the 20th century state legal practices regarding religious dissenters, states³⁰³:

„Local legislatures...clamp down on . . . dissenters. At the turn of the twentieth century and increasingly thereafter, local officials began routinely denying Roman Catholics their school charters, Jehovah's Witnesses their preaching permits, Eastern Orthodox their canonical freedoms, Jews and Adventists their Sabbath-day accommodations, non-Christian pacifists their conscientious objection status...Far from promoting any doctrine of freedom of religion, many state laws were designed to promote the majority religion at the expense of minorities.“

³⁰⁰ Steven b. Epstein, „Rethinking the Constitutionality of Ceremonial Deism,“ 96 *Colum. L. Rev.* 2083, 2100 (1996).

³⁰¹ 98 U.S.145 (1879)

³⁰² For a detailed analysis, which cannot be taken, of the early Supreme Court cases involving Religion Clause see Michael W. McConnell, “The Supreme Court Earliest Church – State Cases : Windows on Religious-Cultural – Political conflict in the Early Republic,” 37 *Tulsa L. Rev.* 7 (2001).

³⁰³ Witte quoted in T. Jeremy Gunn, „Religious Freedom and Laicite: Comparison of United States and France“ *B.Y.U. L. Rev.* 419, 449 (2004).

Only in 1940 after *Cantwell v. Connecticut*³⁰⁴ is free exercise of religion to become a nationwide issue through the incorporation, as the Supreme Court stated that First Amendment applies to the states by virtue of being ‘incorporated’ in the Fourteenth Amendment due process clause, the issue which though readily applied by most courts has not been fully accepted even by the members of the current Supreme Court.

The institutional history and history of ideas of the freedom of religion, presented above, was matched by equally hardly harmonious history of relations among mainstream and non-mainstream religious groups in a particular area. Even before the founding of the United States and especially after, the attacks on Native Americans in various parts of the country were everyday normal occurrence given land grab race, later on to be followed up by a conscious policy of Christianization and assimilation of Native Americans in an attempt to destroy their religion, culture and the claim to land attached to it³⁰⁵. Others have had their share of ‘tough love,’ too. In 1842, in Nauvoo, Illinois, Mormon Prophet Joseph Smith was killed by a lynch-mob and the Mormons were chased out from city to city and from state to state, their houses and belongings frequently burned, men killed and women raped. Jews have suffered exclusion that was mostly social and legal rather than continuously violent one until well after the end of WWII.

In a period 1830-1860, attacks on Catholics by Protestant mobs, burning of Catholic churches and literal small scale wars that left dozens of dead bodies on streets have been frequent, with an “America-first” anti-Catholic Know Nothing party being among one of the lead inciters. Consider a following testimony of the strength of a dislike of Catholics, Mormons and

³⁰⁴ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

³⁰⁵ See Allison M. Dussias, “Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases,” *Stanford Law Review*, Vol. 49, No. 4. (1997), p. 773-852.

immigrants: in 1890 Protestant reverend Josiah Strong published a hugely popular book “Our Country” calling upon true Americans to take America back to themselves and proclaiming Catholics and Mormons as well as immigrants ‘disloyal spies’ and the greatest peril to the well being of America³⁰⁶. Nevertheless, many of these groups, predominantly Catholic and Jews together with Mormons have gone through the process of Americanization and acculturation, so as to remove the suspicion of disloyalty thrown at them by the rest of the society, and through different paths became members of what is called a ‘Protestant-Catholic-Jew’ triumvirate or to use a more up-to date term a Judeo-Christian culture or even more recent pluralistic culture.

On the level of decision making, as one would expect, the move from predominantly Protestant to vaguely Judeo-Christian to even more vague pluralist culture produced a high degree of rhetorical devotion to religious freedom which was, as the next part shows, both theoretically incoherent and has relied heavily on the past ideas of what religion is; and, as the empirical analysis of religious freedom cases will show, had not have any overwhelmingly significant impact on the actual decision making.

Doctrine of Free Exercise Clause

Generally speaking, it can be said that the free exercise clause of the First Amendment forbids a government to prohibit freedom to engage in religious beliefs in the repose of one’s own mind – in other words, coercing mind so as to burden religious belief is virtually always unconstitutional.³⁰⁷ Regulating a religious *practice* is, however, an entirely different and more complicated matter³⁰⁸. The professed logic behind this approach is one of sustaining peaceful society and the general reason given in various US Supreme Court decisions is that if all

³⁰⁶ T. Jeremy Gunn, „Religious Freedom and Laicity: Comparison of United States and France“ *B.Y.U. L. Rev.* 419, 447-449 (2004).

³⁰⁷ See, i.e., *Torcaso v. Watkins* 367 U.S. 488 (1961), holding that Maryland constitutional provision requiring state officials to declare belief in God is unconstitutional since it constitutes a coercion of mind.

³⁰⁸ This part draws on Jusic (2007), p. 67 and infra.

religious practices are to be tolerated because they are religious, it would be difficult or at time impossible to sustain social peace or achieve various goals that fall under the rubric ‘government or social interest’, as everyone would be a law unto themselves. This is a general idea behind differentiating between *religious belief* and *religious practice* as the Supreme Court stated in *Reynolds v. United States*³⁰⁹, holding that practice of polygamy was unconstitutional while the belief in religious value of polygamy is not, irrespective of the fact that it is repulsive to civilized people. The belief – practice distinction which, as I have argued in chapter one, goes back to Locke is a nit idea and allows a high degree of regulatory freedom for the government, for if indeed a religion is about belief than no regulation whatsoever can prohibit religious exercise fully, given that even in a prison one is still free to believe whatever one wish in the repose of one’s own mind, which none is attempting to reach anyway. In other words, under this regulatory regime the religious freedom appears protected at almost all circumstance because it is defined narrowly and the gains are double – courts and legislators can speak of full respect for religious freedom and beliefs while proceeding with the business unhindered. It is fair to say that most of the history of the application of free exercise clause in the United States till roughly mid-20th century was governed by the belief-practice doctrine which, as I will show below, remained a *de-facto* leading doctrine even after the introduction of ‘compelling government interest’ test, later on making its open come back to the scene after *Smith* decision.

A rhetorical shift in the Supreme Court free exercise jurisprudence occurred in cases *Sherbert v. Verner*³¹⁰ and *Wisconsin v. Yoder*³¹¹. In *Sherbert*, the Court developed (and remained faithful to for next almost thirty years) a strict scrutiny test, which demands from those claiming

³⁰⁹ 98 U.S.145 (1879).

³¹⁰ 374 U.S. 398 (1963). For a similar and more detailed analysis of the cost-benefit as a criterion behind Courts free exercise jurisprudence, see McConnell and Posner, *supra*.

³¹¹ 406 U.S. 205 (1972).

burden on their religious beliefs or practices to prove that religious *beliefs* allegedly burdened are *central* to a practice of a particular religion. Once burden so defined is proven, the government has to prove that challenged regulation was necessitated by a “compelling government interest” and that no alternative forms of regulation were available.³¹² In *Sherbert*, the Court struck down a governmental denial unemployment benefits to Ms. Sherbert, a member of Seventh-Day Adventist Church, who refused to work on Saturday, her Sabbath day. In *Yoder*, the exemption from compulsory school attendance for Amish children was upheld. However, neither theoretically nor empirically were any of these two decisions a “victory” for religious freedom, in spite of them being cited many times as such. Theoretically speaking - that is in terms of the theoretical coherence of proclaimed tests – defining what is *central* to a particular religion is difficult and almost a theological assessment, a judgment imposed on an allegedly private practice which is, as many courts are quick to add, not prone to rational assessment. The approach also begs a question of baseline and reference point. That is to say, in order to claim something “central” one has to compare centrality of something to the equal centrality of another claim in some other system of beliefs and practices which count as a guiding religious system, given that for ones who are within a particular web of religious beliefs and practice almost everything can be central. In other words, centrality can not be judged from within any religious system, but only in comparison with some other system of knowledge, belief or practice.

However this may be, this type of assessment is convenient for the courts since, as the overview of cases in parts to follow will show, it turned out that in practice very few things *except pure belief* matters to religion – which makes all available religions out there subsets of one vaguely defined religion that concerns itself solely with thoughts in mind. In short, the difference between belief and practice test taken over from the *Reynolds* era remained well and

³¹² Kaplin, p. 402.

alive under a guise of figuring out what might be high or low, important or not so important part of a particular religion. As I will show further below, empirically the impact of *Sherbert* and *Yoder* on religious freedom cases in federal courts or the Supreme Court was very weak, in particular in cases that concern non-mainstream religious groups which file most complaints under the free exercise jurisprudence.

Formally, the strict scrutiny standard developed in *Sherbert* was limited and almost relinquished but not clearly overruled in *Employment Division v. Smith*³¹³. There, two members of a Native American Church were fired from their positions as counselors in drug treatment programs because of ingesting the hallucinogenic drug peyote during a religious ceremony, which is considered to be a vital part of the ritual. Court concluded *Sherbert* strict scrutiny standard applies only in cases when laws are *not* generally applicable and neutral. The reason for this is, according to Justice Scalia, that enforcement of law “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.”³¹⁴ Different outcomes, Justice Scalia opinionates citing *Reynolds* decision, would allow for each individual to become “a law unto himself.”³¹⁵ Although aware that this approach might have unfavorable consequences for the non-mainstream religious groups and their unpopular practices, the Court opined that the decision “place(s) at a relative disadvantage those religious practices that are not widely engaged in” but that is an “unavoidable consequence of the democratic government that must be preferred to a system in which each conscience is a law unto itself or in which judges weight the social importance of all laws against the centrality of all religious beliefs.”³¹⁶ Again, formally speaking this is indeed true, but as the empirical overview below will show it does not

³¹³ 494 U.S. 872 (1990) and see Jusic (2007), p. 71.

³¹⁴ 494 U.S. 872, 885 (1990).

³¹⁵ *Id.*

³¹⁶ *Id.* at 890.

seem that the things have change for worse as much as one would expect, given that the non-mainstream groups have not been winning in any important percentage under *Sherbert* also.

However, it is important that in the same decision the Supreme Court, relying on “diversity” argument, affirmed some of the major points I have extrapolated in chapter one discussing approach to religion of Thomas Hobbes. In essence, the Court predicts the parade of horrible and the falling of the sky if the compelling government interest test as applied to religious freedom cases is sustained, and states that³¹⁷:

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. *Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.* The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind - ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, ,compulsory vaccination laws, drug laws, see,; to social welfare legislation such as minimum wage laws,), child labor laws, animal cruelty laws, environmental protection laws,and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.” (italics added).

The above statement turns out to be an amazing line of arguments. In other words, because there are so many religions and because they are so different and, in addition, because of the cosmopolitanism, there is a good reason to disregard the diversity – the very same diversity whose, as I have shown above, empirical existence seems uncertain. Neither of the arguments really follows from each other and it turns out that this is an updated reiteration of Hobbes – affirm the basic plurality of values and then proceed by disregarding it by means of proclaiming

order to be a highest value. In other words, because there are so many religions and some of them preach very different things, someone *must* occupy the superior position in order to decide who will be disregarded and the only question is who will it be. The empirical overview of cases below will show who was and is regulating at whose expense.

In the aftermath of *Smith* the Court has prevented governmental regulation is directed towards only a certain religion or certain religious groups. This was the case in *Church of Lukumi Babalu Aye v. City of Hialeah*³¹⁸, where the Court struck down a city ordinance prohibiting slaughtering of animals. Though the ordinance was facially neutral, the Court found that the effects of the ordinance were not neutral, since it impermissibly targeted members of Santeria religion, for whom ritual animal sacrifice is an important part of religious ritual. As the Court stated a wording of the city ordinance prohibiting “ritual slaughtering of animals³¹⁹,” was of dubious facial neutrality (only ‘ritual slaughtering’ was prohibited) and the circumstances surrounding the enactment of ordinance suggest that primary target was Santeria religion³²⁰. As Justice Kennedy stated

“There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria. Resolution 87-66, adopted June 9, 1987, recited that ‘residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety,’ and ‘reiterate[d]’ the city's commitment to prohibit “any and all [such] acts of any and all religious groups.” No one suggests, and, on this record, it cannot be maintained, that city officials had in mind a religion other than Santeria³²¹.”

In other words, leaving too much paper trail and evidence that a particular regulation is targeting one religious group, usually an unpopular one, is still not welcomed. For how long a

³¹⁸ 508 U.S. 520 (1993) and see Jusic (2007), p. 68 .

³¹⁹ 508 U.S. 520 (1993), internal citations omitted.

³²⁰ Id. at 533-534.

³²¹ Id. at 534-535, internal citations omitted.

time this will be the case time will tell and probably much will depend on who is the target and what is at stake. Nevertheless, for all intense and purposes, such directed regulations are not so frequent at all, given that the same result can be achieved by using generally applicable laws and without inviting unnecessary attention. Therefore it is safe to conclude that *Lukumi* decision was basically an attempt by the Court to retain the position of the protector of religious freedom at least in most egregious and clear cut cases.

In response to *Smith* decision, Congress enacted Religious Freedom Restoration Act (RFRA) in order to reinstate “compelling government interest” as a proper test of constitutionality of laws of general applicability burdening religion³²². Supreme Court, however, responded by overruling the RFRA in *City of Boerne v. Flores*³²³, reinstating *Smith* test. RFRA was held to apply only to federal and not the state laws, and many states have consequently enacted their own versions of RFRA. In 2006, however, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*³²⁴, which was not strictly speaking a free exercise clause case though it involved a small religious community from Brazil and their religious use of illegal

³²² 42 U.S.C.A. §2000bb-1 (1993): “In general, government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.; (b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. Id.; In addition, the statute explicitly lays out the findings and purposes of Congress in its enactment, as follows: (a) Findings: The Congress finds that-- (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; (2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification; (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.(b) Purposes: The purposes of this chapter are--(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government” cited in Christina A. Baker, “French Headscarves and the US Constitution: Parents, Children, and Free Exercise of Religion,”13 *Cardozo J.L. & Gender* 341 (2004), n. 122.

³²³ 521 U.S. 527 (1997).

³²⁴ 126 S. Ct. 1211, 1223 (2006).

hallucinogenic tea hoasca, the Supreme Court found that the RFRA is to be taken seriously by the courts even when applied to the federal government. Whether this decision makes any important difference is currently hard to judge but, again, the empirical overview of cases on federal level shows that compelling government interest test did not have much bite at all and this brief dialogue between courts, legislators and the public was mostly about who has the upper hand and final authority over what is and is not religious freedom.

From Doctrine to the Empirical Reality of Judicial Decision Making in Modern Free Exercise Cases

The doctrine of free exercise clause has passed through various historical stages – from literal non-existence in the beginning of 19th century to the belief/action doctrine which rhetorically lasted till well into the 20th century; to the compelling government interest era which lasted until the *Smith* decision; and, though the field is still open for debate, back to belief/action doctrine. It might well be the case, as suggested, that even theoretically there is no difference between belief/action doctrine and compelling interest doctrine. However this may be, as I will show in this part, on the empirical level the compelling government interest had much less influence on the success of the free exercise claims and it was certainly not a shining rod for non-mainstream religious groups, rhetoric's notwithstanding.

Several important empirical studies have investigated the free exercise case loads of federal courts in the second half of the 20th century, and the political scientists and psychologists have been quick to prove their theories regarding the influence of the religion of judges and

claimants on the outcome of free exercise cases³²⁵. Most of these studies have been done more or less in line with the theory presented in chapter one, where I argued that institutional decision making and decision makers are restrained by the influence of social norms prevailing in the society. These social norms are taken as baselines or reference points against which every claim in religious freedom cases is measured against. Moreover, the institutions themselves draw the boundaries between acceptable and unacceptable behavior and therefore restrain, to a certain extent, the behavior of future decisions makers. In this part, I will provide an overview and analysis of the most important studies regarding the free exercise cases *en masse*, while the more detailed analysis of claims of particular groups and the dependence of the success of their claims on their social distance and the perception of their group coordination, credibility enhancing and boundary sustaining mechanisms will be taken up in Part II.

In order to investigate the influence of judges' religious preferences on judicial decision making, Songer and Tabrizi³²⁶ (hereafter Tabrizi study) have analyzed the decisions of Christian Evangelical judges in state supreme courts, finding that in most cases, especially those which were "morally charged" – i.e. obscenity, gender discrimination etc. – the judge's religion was one of the most important factors predicting the outcome of the case, relative to non-Evangelical judges. This might not be a surprise given that the group of judges studied held particularly salient religious views, however things are not very much different on the level of federal or appellate courts and on the level of the Supreme Court. Seagal and Spath³²⁷, in their recent application of the attitudinal model to the supreme court justices' decision making in religion

³²⁵ For an analysis of these studies, on which I am partially drawing upon, see Stephen Feldman, "Empiricism, Religion and Judicial Decision Making" 15 *William and Mary Bill of Rights Journal* 42, (2006).

³²⁶ Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 *Journal of Politics* 507, 521 (1999).

³²⁷ Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Harvard University Press, 2002).

cases, argued that the particular opinion of a given judge in religious freedom cases was highly influenced by the level of the group identification (i.e. social identity) of a particular judge with his/her religious group, which is to say, as I have already argued in a chapter one, that the level of an individual's group identification affects the decision making process.

In one of the earliest studies regarding the influence of the position as a non-mainstream religious groups (marginal groups) by Frank Way and Barbara J. Burt³²⁸, authors found, after reviewing district and appellate court free exercise cases in the period from 1960s till beginning '80s, that mainstream religious groups rarely if ever bring free exercise claims but also found that a claim presented by marginal groups was more likely to attract sympathy of judges. Way and Burt concluded that marginal groups prevail on free exercise claims more often than mainstream groups, but the overall success was very small, usually around 10% of cases depending on a time period. Joseph Ignagni³²⁹ reviewed similar case load of free exercise clause cases to Way and Burt and equally found that in the Yoder/Sherbert era (the era of "compelling government interest" test) non-mainstream religious groups also prevailed more often than mainstream groups, albeit in very small percentages, again generally around 10%. Unlike Way and Burt who used the degree of "marginality" (what I called a degree of social distance from a mainstream) as a predictor of decision and dependant variable, Ignagni used both the degree of marginality and "cognitive-cybernetic decision-maker" which describes judges as decision makers with computational limitation, that is boundedly rational decision makers³³⁰.

³²⁸ Frank Way & Barbara J. Burt, "Religious Marginality and the Free Exercise Clause," 77 *American Political Science Review* 652 (1983).

³²⁹ Joseph A. Ignagni, "U.S. Supreme Court Decision-Making and the Free Exercise Clause," 55 *Review of Politics* 511 (1993).

³³⁰ *Id.*, p. 516-517 and p. 528.

James Brent³³¹ analyzed free exercise claims at the Court of Appeals level both prior to and after the *Smith* decision. As I have noted already, arguing that law generally reflects majority preferences and therefore mainstream religions are unlikely to be free exercise claimants, Brent found the same pattern when comparing legislation with the outcome of cases, concluding that “Because of the majoritarian process, lawmakers are less likely to adopt laws that place burdens on adherents of Christianity, the majority religion³³².” Unsurprisingly, members of the mainstream were free exercise claimants significantly less often than the members of the non-mainstream religious groups. On the overall success result of free exercise claims, Brent found that they generally failed, winning only 26.1% of times and failing 69.9%³³³; however, even with the low participation in free exercise cases, members of mainstream religious groups were still more successful than others, winning in 38.9% percent as compared to 24.5% in which members of non-mainstream (i.e. generally non-Christian) groups have prevailed³³⁴.

All in all, when subtracting for the success of mainstream religious groups in free exercise cases, non-mainstream religious groups turned out to be losers roughly in almost 90% of cases. Brent argues that this effect is largely attributable to religious preferences and affiliations of judges, as well as the prevailing ideas of what is a normal religion in a given society. Brent states correctly that the United States is a Christian country, and therefore judges are more likely to sympathize with a plight of fellow Christians. Moreover, Brent found that appellate courts have shown some degree of increased ‘hostility’ towards the free exercise claims since the *Smith* decision has been handed down, but the attitude changed somewhat after Congress enacted

³³¹ James C. Brent, “An Agent and Two Principals: U.S. Court of Appeals Responses to *Employment Division, Department of Human Resources v. Smith* and the Religious Freedom Restoration Act,” 27 *American Political Quarterly* 236 (1999).

³³² Id., p. 248.

³³³ Id., p. 249.

³³⁴ Id.,

Religious Freedom Restoration Act (RFRA). Nevertheless, it is hard to not miss the irony in Brent's finding – it turns out that percentage of success of free exercise claims have gone up or down by few percents in era before and after *Smith* decision, as well as after enactment of RFRA. In other words, the rhetorical drama that had played itself around *Smith* decision (sometimes even referred to as the death of free exercise clause) and the RFRA was merely that – a rhetorical drama without overly significant effects on the success of free exercise claims in courts.

Gregory C. Sisk and others have made a so far the most extensive empirical study of free exercise and establishment clause claims in lower federal courts, both district and Court of Appeals, available to date, covering a period 1986-1995³³⁵. At many points, Sisk and others have made same findings as other authors, i.e. that mainline Protestants very rarely bring free exercise claims in the courts, only in 1.7% of cases, affirming the contention that desires and preferences of mainstream religions are already inculcated into the legislative decision making and are unlikely to be burdened. However, Sisk and others were more pointed regarding the failure of non-mainstream religious groups and the statistical effect of judges religion on outcome of decisions. Hence, predictably, they found that Muslims, a group far outside of religious mainstream in America, have lost free exercise with a percentage of 95-98% of all cases (the study encompasses only cases up to 1995, hence the effect of 9/11 cannot account for these losses)³³⁶. However, other groups, certainly not mainstream but hardly immigrant religions, have followed a losing streak. For example, Native Americans had a staggering percentage of losses of free exercise claims mostly matching up to percentage of losses acquired by Muslims. As to the influence of their social identity and religious background on decision making, Sisk

³³⁵ Gregory C. Sisk et al., "Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions," 65 *Ohio St. L. J.* 491 (2004).

³³⁶ *Id.*, p. 566.

found that judges from non-mainstream Christian and Jewish backgrounds (given that there are negligibly few if any judges of non-Christian or non-Jewish background sitting on the federal bench) were significantly more likely to approve free exercise claims. That is to say, some background, however weak, of being a member of the non-mainstream seems to make non-mainstream judges more receptive to free exercise claims. In conclusion, Sisk frankly states that in “our study of religious freedom decisions, the single most prominent, salient, and consistent influence on judicial decision making was *religion*—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.”³³⁷ In other words, and broadly in line with what I have argued in chapter one, Sisk’s findings affirm that the identity of a claimant matters very much in free exercise (is it mainstream or non-mainstream?), as does the social consensus on what constitutes a “normal” or “not so normal” religious behavior or prevailing practices (“demographics of the community”).

However, Sisk’s claims (as well as claims of some other authors) regarding the influence of judges’ religion on decision making do not appear as claims to be taken for granted, at least as a matter of explanation. Those claims open a methodological debate on whether psychological ‘peeking’ into other peoples minds is ever really possible in some ultimate sense of the word. In short, despite Sisk’s and others evidence, it is perfectly possible and even highly likely that though a judge has some religious affiliation that might influence his or her train of thoughts, other considerations prevail in many cases. It stands to reason to think that what society expects of judges (or what judges think the society expects of them) and the framing of social norms regarding what constitutes normal religious behavior, not to mention institutional constraints and path dependency, can have a stronger, if not ultimately decisive, influence on the decision making process.

³³⁷ Id., p. 614.

There is an important conclusion to be taken from the above analysis, yet the mode of analysis has to be extended in order to explain the difference in successful/unsuccessful outcome of free exercise claims used by these studies. That can be achieved if the data is seen in light of historical development of the free exercise clause in the US and the light of theory presented in chapter one. Firstly, as the cited studies and claims made in the chapter one affirm, the scope and direction of the influence of the distance of particular religious group from what is legally taken to be a mainstream is decisive for the outcome of the case. The degree of social distance of a group makes it more likely that the claim will fail, while mainstream group values are already inculcated or at least not burdened to a same degree. Statistically, the data available confirms this claim - that is mainstream groups bring by far less claims to courts than non-mainstream groups. Moreover, non-mainstream groups *are losers* in a very high percentage and this percentage is definitely tied to their position (status) as *non-mainstream religious groups*. However, as the studies also show, during the Yoder/Sherbert era there has indeed developed a higher degree of a federal level judicial sympathy for non-mainstream religions when compared to the disregard of same claims in a period prior to 1960, and, as the historical overview has shown, especially prior to 1940 and the 19th century, when thanks to the strong protection of states rights they were literally nonexistent. In other words, there was some general, if small, judging by the percentage of successful claims, move in the aftermath of the WWII on the level of society and institutions towards more toleration of the non-mainstream (predominantly non-mainstream Christian) groups during this period.

The second claim – and a criticism - follows from the first claim and is basically an attempt to explain missing points in the previously analyzed empirical studies using the theory of religious groups elaborated in chapter one. Namely, throughout most studies, the difficulty (and

the difference between the studies) remained how to draw a line between what is and is not a mainstream religious group? As Stephen Feldman argues³³⁸, analyzing articles Sisk's, Brent's and others study, to say that all groups that profess some sort of belief in Jesus Christ are mainstream would be an undue stretching of the borders of mainstream society since drawing borders so generously would include in the mainstream some fairly distinct Christian groups that have generally lived in a sort of 'tension' (due to their religious practices) with their environment, such as Seventh-Day Adventists, Jehovah's Witnesses, Unitarians, the Vow of the Nazarene, Church of Jesus Christ Christian (Aryan Nation) and others. Moreover, if the claim of Judeo-Christian culture is taken wholly seriously, all strands of Judaism would constitute mainstream, which again would be an undue stretching of the borders of Judaism, however conceived, given that groups such as Orthodox and Hasidic Jews also live a distinct way of life quite different from both the general environment and from other strands of Judaism and for that reason are frequent parties to free exercise claims, a sure sign of distance from the mainstream. Sisk, for example, resolves this problem by including into the mainstream only mainline Catholics and Protestant denominations, but excluding above-mentioned smaller Christian groups and Jews also, due to their numerical underrepresentation in the whole population³³⁹.

But this drawing of lines begs a question. Why is it, for example, that Mormons, largely despised group and fought against group throughout the 19th century have, in the course of the 20th century (and in the studies quoted above) been listed and, relatively speaking, accepted, as a mainstream group? In other words, what has changed, either within the Mormon religious group norms, or in the mainstream society? And if it is true that mainstream social and legal norms have become more tolerant and open, why then, in contrast to Mormons, have Native Americans

³³⁸ Stephen Feldman, "Empiricism, Religion and Judicial Decision Making" 15 *William and Mary Bill of Rights Journal* 42, 53 (2006).

³³⁹ Sisk, *supra* n. 74, p. 259.

(hardly members of a ‘new religion’) been so singularly unsuccessful in the free exercise claims, comparable to the example of Muslims, clearly an outsider religious group in America? Further, what explains some amount, even if small, of success by Jehovah’s Witnesses and Old Order Amish, a group with some tension with the rest of environment, relative to the modest failure of claims brought by Orthodox and Hasidim Jews, a group supposedly accepted, at least in the second half of the 20th century, in the ambits of the American Judeo-Christian culture? In short, the empirical overviews presented above need to be supplemented with the qualitative analysis of the type of religious groups that have been making claims in order to explain variations.

Next part fulfills that task and explains the difference using theory presented in chapter one. The groups used as examples are divided in two large subgroups: “strong boundary” sustaining groups that have laid strong claim against the mainstream at some point in history, as it was case with Mormons; and smaller secluded groups who have made also strong claims against mainstream values (Old Order Amish, Jehovah’s Witnesses, Orthodox and Hasidic Jews) but whose effects on the mainstream remain reasonably low. The argument is that Mormons have, for various reasons, passed through the process of constitutional transformation since their claim to symbolic and material exceptionalism in relation to the federal government has been literally defeated.

As to smaller groups, the argument is that, due to the peculiar historical changes of the mainstream norms *and the degree of seclusion and sheer small numbers*, Old Order Amish and the Jehovah’s Witnesses have been somewhat successful in their claims, however, only to the extent that their claims had very little effect on the mainstream and were indeed *beneficial to the mainstream values at one point in history*. The perception of the effect on mainstream values by

claims made by Orthodox and Hasidic Jews explains their relative failure in free exercise claims, despite general pronouncements of mainstream devotion to Judeo-Christian culture.

2.3 Law and the Degrees of Separation

This section deals with several most prominent non-mainstream religious groups such are Mormons (Church of Jesus Christ of Latter Day Saints), Jehovah's Witnesses, Old Order Amish, and Orthodox and Hassidic Jews . The argument advanced is following. Most prominent "strong boundary" sustaining non-mainstream religious groups of the 18th and 19th , Mormons, were treated in a way that their particular practices and organizational patterns they have entertained in have been attacked so as to bring out the process of assimilation even up to a point of fully eradicating traces of group boundaries and cooperation mechanisms, consequently almost destroying their existence *as a group*.

On the other hand, though they historically also suffered harsh treatment, groups such are Old Order Amish and Jehovah's Witnesses have progressively received better treatment on account of both groups being relatively secluded; and as a result of the strategic shift in legal norms which have moved the mainstream norms in direction of more indifference of and perhaps even sympathy (coupled with a benign neglect) towards secluded groups. The reasons for this move from relatively malign neglect towards limited approved and even benevolent approval of seclusion has, however, nothing to do with the change in religious group norms; rather this development is a result of strategic interest for change in norms on the side of the mainstream. However, this 'seclusion approval' was not, at a time, granted to Orthodox and Hasidic Jews in several major cases and I contend that the main reason *was not* any underlying animus towards

group as such, but a resistance to the demands they made which have been, with dubious foundations, perceived as encroaching on mainstream values.

2.3.1 Strong separationists: case of Mormons

Church of Jesus Christ of Latter Days Saints or the Mormon Church, named according to the “Book of Mormon” a revelation received by the Mormon Prophet and founder Joseph Smith, is quintessentially an original born and breed in American religion, intertwined into the almost every aspect of the history of religion and church state relations. Mormons have travelled long way. From their humble and enthusiastic beginnings on East shores of North America in 1830’s; through expulsions and at times attempts to physical eradication in various places at hands of various local populations and/or the levels of the American government; the exodus in to the territory of Utah; literal physical and legal war with the federal government that have raged full scale in the period till the end of 19th century and with much lower even in the first half of the 20th century; to being a faith present at literally every continent in the world, its members being among the richest of religious group in America, members of Congress and presidential candidates.

Mormonism was founded in 1830 when a young man Joseph Smith claimed to have received a revelation according to which America is the new Zion and those who follow Joseph Smith will be among the best and prestigious of both this world and hereafter. Smiths interpretation of Christian teachings was highly unorthodox relative to Protestant mainstream, though it certainly fitted in to a Puritan tradition of “City upon a Hill,” with a highly elaborate (both in the Book of Mormon and in the practices transferred to and demanded of his followers by Smith and successive church elders) vision of a social order in which the church and state were highly intertwined, just as the religious and collective social life Mormons as a group

turned out to be thoroughly intermingled on almost every level³⁴⁰. In other words it is safe to say that even by than standards of differentiation of religion and various spheres of life, a religious and secular vision advanced (and legislated for) by than ruling Protestant elites on especially local and somewhat less federal level, was something that Mormons have eschewed if not out rightly rejected. Appearing at a time when most of those days America was witnessing religious reawakening and the new enthusiastic religious groups, both indigent and immigrant, have been flourishing at every corner, Smith has managed to quickly find followers amongst the members of his family as well as neighbors, and the word about a founder of new religion has spread quickly even in far remote areas of East Coast as well as across the ocean in Europe.

The results of attention have not been all that sweet. Following the revelation delivered to Joseph Smith in 1830, during next sixteen year his growing band of followers were successively expelled in a very brutal fashion from Ohio and Missouri; only to settle in Nauvoo, Illinois. In Missouri, for example, than Governor Wilburn Boggs issued an extermination order directing authorities to treat Mormons as enemies³⁴¹. Temporary settlement has lasted for some time in Nauvoo but again ended as Mormon Prophet Joseph Smith was killed by a lynch mob in 1844, after which the Mormons have finally gave up their otherwise admirable (and firmly theologically founded in the Book of Mormon) admiration for the US Constitution guarantees of religious freedom and began their exile to the deserted, sandy and inhospitable territory of Utah³⁴², where they were to enjoy a short decade long period of complete isolation from the rest of the world.

³⁴⁰ Cole W. Durham and Nathan B. Oman, "Century of Mormon Theory and Practice in Church-State Relations: Constancy Amidst Change", p. 2-3, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942567.

³⁴¹ Id., p. 2-3.

³⁴² Id, p. 3.

However, Mormons were basically unlucky and as a result of historical contingency have become a target of the then expanding Union, which was in the midst of its process of nation-building which led to a Civil War as well as westward expansion (“Manifest Destiny”) and first American military engagements outside of North American continental shelf³⁴³. The lightning rod and the usual explanation of the conflict between Mormons and the federal government – though as I will show *not even remotely the real reason* – was one of the Mormon practices, plural marriage, which was practiced and commanded, though not without reluctance and opposition, already during the life of Joseph Smith and has become a publicized religious command in 1852³⁴⁴.

Plural marriage command, incorrectly referred to as polygamy though it is really a poligyny given that it was command for a man to have multiple wives, has become a widespread practice among Mormons and an affront to almost every strata of society in the rest of than United States. Using false rumors of rebellion in the territory of Utah and the emotional tension in Washington produced by various pamphlets and speeches liking polygamy to slavery – both referred to collectively as “stationary despotism” – as well as statements who stressed the racial inferiority of Mormons who were likened to Asiatic savage and Mahomedans³⁴⁵, than President James Buchanan dispatched federal troops in 1857 engaging in a whole sale war against

³⁴³ See Martha M. Ertman, “Race Treason: The Untold Story of America's Ban on Polygamy”, *Columbia Journal of Gender and Law*, Vol. 19,(2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270023 (downloaded October 15th, 2010) and Martha M. Ertman, “The Story of Reynolds v. United States: Federal 'Hell Hounds' Punishing Mormon Treason”, *Family Law Stories*, (Carol Sanger, ed., Foundation Press, 2008), p. 51-75, available online at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1135610 (downloaded October 15th 2010).

³⁴⁴ This is the main thesis of a groundbreaking work on history of the legal dispute over polygamy involving Mormons in Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*, (University of North Carolina Press: Chapel Hill and London, 2002), hereafter Gordon (2002).

³⁴⁵ On this “racialized” aspect of the federal government treatment o333f Mormons see Martha M. Ertman, “Race Treason: The Untold Story of America's Ban on Polygamy”, *Columbia Journal of Gender and Law*, Vol. 19,(2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270023 (downloaded October 15th, 2010). Hereafter Ertman (2010).

Mormons³⁴⁶. That conflict as well as lower intensity conflicts later on ended up with quite a few dead persons and atrocities that were, to be sure, committed by both the federal army and Mormons who engaged in armed resistance using their newly formed Nauvoo Legion³⁴⁷. In the course of this conflict, Mormon forces together with Indians killed Arkansas settlers who travelling through Utah, sparing apparently only children younger than eight years for religious reasons. The event became known as Mountain Meadows Massacre³⁴⁸.

Apart from its military aspect, the conflict was also legal, resulting in several important legislative acts and court cases. The Congress has used its powers to draw borders of the dependant territory of Utah without granting it full access to the Union as a federal state, insisting on full prohibition of polygamy but really being wary of the full control of the local legislature by Mormon representatives, most of them high profile religious leaders. Legislative acts were aimed either at prohibiting polygamy (Morril Act); disenfranchising Mormon women who were given a right to vote (first such example in than North America) by a Utah legislature Female Suffrage Bill of 1870; and finally disenfranchising Mormons wholesale and taking away the property of the Mormon Church (Edmunds Tucker Act) consequently bringing Mormons as a group to a brink of complete armed, legal and moral defeat that would, in the long run, endanger their existence as a group³⁴⁹.

As it is known, throughout this process, Mormons themselves have not been sitting idly. According to the historical sources, the control the Mormon church exhibited over social life was

³⁴⁶ Id., p. 51-75.

³⁴⁷ Martha M. Ertman, "The Story of Reynolds v. United States: Federal 'Hell Hounds' Punishing Mormon Treason", *Family Law Stories*, (Carol Sanger, ed., Foundation Press, 2008), p. 51-75, available online at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1135610 (downloaded October 15th 2010), esp. p. 65 and infra. Hereafter Ertman (2008).

³⁴⁸ Id., p. 66.

³⁴⁹ On a succession of various laws and cases aimed at Mormons see Cole W. Durham and Nathan B. Oman, "Century of Mormon Theory and Practice in Church-State Relations: Constancy Amidst Change", p. 5-6, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942567. Hereafter Durham and Oman.

overwhelming and have spanned from bottom to the top – from family relations to everyday economics and trading to full control of legislative process. As a result, the Mormon church was officially “incorporated” under local laws and has been granted by the local legislature almost a blank check and near-exclusive access to land, resources and trading in the Territories³⁵⁰.

Furthermore, noting that the practice of polygamy is their opponents’, the federal government, main “spiritual” weapon used to justify all actions taken against them, Mormon legislature has engaged in some pretty effective moves in order to solidify their position on each front. It established Perpetual Immigration Fund which was used to finance the immigration of new converts from Europe, hence availing the Mormon leadership of healthy supply in human resources and new members. Other moves were next to ingenious considering Mormons general position relative to the rest of the Union. In 1870, Utah legislature enacted Female Suffrage Bill granting all women in the Territories a right to vote, which was the first instance in the modern American history when women have been given such right. Ironically, of course, the very first referendum question on which the population of Utah has voted after the Female Suffrage Bill was whether they support polygamy as a religious freedom practice or no. Predictably, given social structure of than Territories, the response was overwhelming yes³⁵¹. With this move Mormon leadership has gained even greater legitimacy given that the percentage of Mormon voters increased to 95 percent, and has basically sent a “slap in the face” of federal government, than suffragist movement at the East Coast and all their critics who were busy for years advocating intervention against Mormons on theory that polygamy enslaves women³⁵². To make

³⁵⁰ On the overwhelming control of all aspects of life in the territory of Utah with the Mormon church exhibited during this period, see generally Gordon (2002), describing the legal and social instruments which the Mormon leadership have used, as well as the great degree of legitimacy they have enjoyed among their followers.

³⁵¹ Gordon (2002), p. 95-107.

³⁵² Sarah Barringer Gordon, "The Liberty of Self-Degradation: Polygamy, Woman Suffrage, and Consent in Nineteenth- Century America", *The Journal of American History*, Vol. 83, No. 3 (Dec., 1996), p. 815. Hereafter Gordon (1996).

things worse for the federal government and its supporters – basically everyone but Mormons - a significant Mormon women movement has emerged, comparing favorably Mormon practice of polygamy to the number of impoverished and non-married women in the East and North of the country, claiming that polygamy is both a part of religious freedom but, more significantly, a part of what Mormon women called “a right to marriage.”

On a litigation side, Mormons have put a formidable legal defense of their general cause of advancing their way of life³⁵³. In legal technical terms, Mormons used some quite ingenious ways and arguments to defend what they perceived as their constitutionally guaranteed rights to free exercise of religion (in case of defense of plural marriage) or in other areas of constitutional law, like federalism or criminal law, which were used by the federal government as tools of disciplining Mormons or, alternatively, used by Mormons as a defense against such attempts. Drawing on example of Southern states who still practiced various forms of de facto slavery in spite of losing the Civil War, Mormons have argued that polygamy is part of state rights shielded from the federal law intrusion.

In the most famous case, *Reynolds v. United States*, which Mormons have lost and which gave a birth to “belief-practice” distinction, Mormon representatives have gone at great rhetorical length to prove their case. Drawing on variety of natural law and theological arguments, they tried to show that polygamy is not *mala per se* but solely *mala prohibita* that does not necessarily stands out of the general Christian tradition given that no consensus even among variations of Christianity exists regarding the “divine legality” of polygamy. The arguments advanced during the Reynolds trial by Mormon lawyers show that they have well understood the nature of the Protestant Christian arguments advanced by their opponent, the

³⁵³ For a full history of litigation pro and contra Mormon cause during that era see Edwin Brown Firmage and R. Collin Mangrum, *Zion in Courts: a Legal History of the Church of Jesus Christ of Latter Days Saints, 1830-1900* (University of Illinois Press, 2001).

federal government. Mormon lawyers have done all they possibly could to distance themselves from the label of Mahometans and “Asiatic people” or “inferior Indian race” which the opposing side has thrown at them and tried to prove that they are indeed, only in their special way, a part of the general family of American Christians³⁵⁴. In other words, Mormon lawyers have tried to remove the label I have described at length above, the one of social distance, however unsuccessfully. The opposing side, speaking through the US Supreme Court has done exactly the opposite. Throughout *Reynolds* opinion the distinction was made between white people and uncivilized Asiatic peoples, along side the distinction between the civilized and non-civilized Christians, in addition to one of the main argument, namely that polygamy is not congruent with the republican form of government since it breeds tyranny. In other words, irrespective of them being geographically as well as ethnically insiders, the Mormons were basically, in the eyes of the US Supreme Court and almost everyone else, distant and despised outsiders³⁵⁵.

In spite of all armed resistance, legal defenses and a control of local population and economic resources, Mormons were finally historically unlucky and were destined to fail. Facing enthusiastic new nation led by the Northern government, which has emerged victorious and emboldened from the Civil War, various small scale wars with Native Americans, as well as confrontations with other imperial powers still present in the Western Hemisphere, Mormons did not stand much chance³⁵⁶. Strategically expelled on to a small, hard to inhabit and survive desert territories, surrounded by the territories and states which have one after another become member of the Union, Mormons had very little choice. The Morrill Act and constant persecution of real or

³⁵⁴ See Ertman, (2010).

³⁵⁵ On this point, see Nathan B. Oman, “Natural Law and the Rhetoric of Empire: Reynolds v. United States, Polygamy, and Imperialism” http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1560015 (analyzing in depth the rhetoric of the US Supreme Court at Reynolds trial and connecting it with the newly discovered imperialistic tendencies of the then US government).

³⁵⁶ Ertman (2008), p. 51-75.

just suspect polygamists – as well as their wives – has sent many Mormons in to prison. Edmunds Tucker Act has disenfranchised them and seized most of the property of the Church, undermining fully Mormon access to resources and a potential to sustain their way of life. Facing extremely grim prospects of slow physical extinction or at least sustained intergenerational impoverishment on a Native American model, the Mormon leadership has literally proclaimed a capitulation³⁵⁷.

In 1890, the leader of the Church Woodruff has issued a “Manifesto” vaguely claiming that he and other church elders inform their followers that the polygamy is from now on prohibited, though the Manifesto itself never uses words like “thus say the Lord” but is framed more as a good advice given circumstances. In either case, the content of Manifesto was suggested to members as a religious obligation and, in informal terms, it remains such until today. As a gift for defeated and in return, the federal government has accepted new state of Utah in to the Union and granted general abolition, as well as returned significant portions of Church property³⁵⁸. The Manifesto has resulted in a split within the Mormon community, with a new group today labeled Fundamentalist Church of Jesus Christ of Latter Day Saints continuing to practice polygamy and being submitted to occasional legal action up to these days³⁵⁹. On the other hand, the majority of the Mormon membership has embarked on a lengthy road towards the assimilation in a general American way of life, aligning and identifying themselves vigorously with the mainstream American Christianity. At the beginning of the 21st century, Mormons, only one hundred years ago one of the most despised and fought against groups, are among the

³⁵⁷ Durham and Oman, p. 5-6. Regarding the literal capitulation of Mormon leadership in the face of federal government pressure (Woodruff Manifesto and other symbolic acts aimed at pleasing the federal government) see Gordon (2002), p. 214-218.

³⁵⁸ Durham and Oman, p. 7.

³⁵⁹ See Ken Driggs, "After the Manifesto: Modern Polygamy and Fundamentalist Mormons," *Journal of Church and State* 32 (1990).

presidential candidates, influential senators and congressmen's and one of the richest and fastest growing religious groups in the US and possibly in the world.

However, as the old habits of the heart of every society rarely ever disappear completely, occasionally and in cases when they get too close to the seat of political power, as in the case of the presidential candidate Mitt Romney, Mormon loyalty to America in general over their loyalty to their group is questioned, alongside the "sincerity" of their marriage practices. In spite of these incidents, almost everyone agrees that today Mormons are among the mainstream American religions. Mormon efforts to assimilate themselves have fundamentally succeeded and today likely the worry of devoted Mormons or the Mormon leadership is more whether the assimilation process will eventually go so far that any difference between Mormons and other religious groups or the rest of the society will all but disappear. The curiously missing part in literature, to my knowledge, is that very much is known of Mormon fight against the federal government in the 19th century, yet very little of their efforts to become a mainstream during 20th century.

There is, however, one well-known example of efforts of the "mainstream" Mormon Church to distance itself from "fundamentalists" in order to prove its transformation and allegiance (and belonging) to mainstream American Christianity: raid in the city of Short Creek (today Columbus City) in Arizona in 1953³⁶⁰. There, Arizona police has organized a biggest mass arrest of Mormon "fundamentalist" group in the 20th century, with some 400 hundred persons man and women living in an isolated community arrested and their children taken away from them under rationale that they were being enslaved (alongside the women who were living in polygamous communities). Than governor of the state of Arizona John Howard Pyle has

³⁶⁰ Martha Sonntag Bradley, *Kidnapped from That Land : The Government Raids on the Short Creek Polygamists* (Salt Lake City, Utah: University of Utah Press, 1993).

called Mormon fundamentalists way of life a form of “mass insurrection” and publicly proclaimed the raid in Short Creek a glorious action taken against this rebellion.

There remained a big “problem” with this “insurrection” – it was hard to convince Arizona and the rest of American public that four hundred persons living in an isolated community are a danger to national security. The other irony, duly recorded by the mass media, was that following the attack of Arizona police the members of Mormon community instead of taking up weapons or engaging in some other form of resistance – as one would expect of rebels – have basically gathered en masse to “greet” police forces and started singing “God Bless America.” The image turned general public opinion against the police and helped change the perception of this Mormon community from ‘weirdoes’ to victims of governmental harassment. Mainstream media in Arizona and around America sharply criticized government of Arizona action, and has mobilized the public opinion on a side of that Mormon community. Ironically, as almost 90 percent of media around the country was portraying member of the Short Creek Mormon community as victims, one of the very few media that has fully taken side of Arizona police and justified the whole action was “Deseret News” of Salt Lake City – a newspapers fully owed by the “mainstream” Mormon church³⁶¹. This ironic story just shows what sort of action the mainstream Mormon Church was willing to take in order to prove its allegiance to what they perceived as the mainstream American values and distance themselves from their own past and the “rotten apples.”

How can this historical overview of events be explained by the theoretical framework I have put forward in chapter one? Concepts from chapter one that can help the explanation of events are, firstly, a suspicion of disloyalty and a social distance perception thrown at non-mainstream religious groups (in this case Mormons) by the mainstream, alongside the

³⁶¹ *Deseret News*, 27/07/1953.

assimilationist bias and opening of exit options for the non-mainstream group membership so as to secure tearing down of the boundary the group has erected between itself and the mainstream. The judgment of social distance and a potential disloyalty – a status judgment, in other words – is based, as I have already argued in chapter one, on the mainstream perception of the group cooperation and boundary-sustaining mechanisms of the non-mainstream group, which serves as a proxy for the judgment of emotions and identities that precede such mechanisms.

The question that demands explanation is what were the group cooperation mechanisms and boundary sustaining procedures Mormons have used to delineate their membership from the rest of the society and which have “outraged” the mainstream to such an extent? Secondly, were those exact cooperation and boundary sustaining mechanisms indeed “true” reasons or was there more behind this identity based conflict between the Mormons and the federal government, alongside the social rejection which Mormons have suffered in the hands of the various local populations in places where Mormons have temporarily settled on their way towards Utah?

From the overview above, three mechanisms (or factors) stand out as the most visible ones. Firstly, polygamy. Secondly, great overlap between the well functioning organization of the Mormon Church, its access to political power and especially its control over economic resources that was not amiable to external penetration due to Mormon Church membership defiance. Finally, overlap between the religion and local social bonds, which in the eyes of the federal government alongside first two factors, as it will be shown below, was a true sign that Mormons were unfit for republican citizenship given that their loyalty lies with their religious group rather than the federal government or the society at large.

To start with the most oft quoted – and at a time publicly pronounced - reason for a conflict between the federal government and the Mormons – the polygamy. The basic argument

advanced here is that polygamy was certainly not the real cause or at least it was not a primary or the sole cause. The polygamy must be put in a context of two other factors and it must be viewed as solely an emotional and identity mobilizing mechanism which *mainstream* has stressed in order to mobilize itself and the population against the Mormons. Further, the trouble with polygamy was not solely practice of polygamy, but the fact that Mormons, through various means, have managed to legitimize it within Territories and *present it to the outside world as a voluntary uncoerced practice* and, moreover, tried hard to present it as *a practice that is within the boundaries of a than American law and society*. In short, the Mormon polygamy was a threat to mainstream because Mormons have legitimized it using democratic and legal means by so attempting to act as a sovereign power that draws boundaries, thereby depriving the mainstream of “sacred right” of sovereignty which the mainstream obviously claimed for itself.

The historical research is rich with evidence of this phenomenon. Sarah Barringer Gordon in her extensive work regarding the female Mormon lobby influence on the Female Suffrage Bill of 1870 - granting a right to vote to women who immediately after have approved polygamy with their vote – argues this case most forcefully³⁶². As she states, in a period preceding the Mormon women voting approval of polygamy, the humanitarian empathy for Mormon women was one of the oft-cited reasons of conflict with Mormons in Utah :

“...antipolygamy sentiments were common coin among politicians, clergymen, newspaper editors, novelists, and temperance activists. Field's advocacy of using the "dynamite of law" to reconstruct Mormon marriage reflected a widely shared sense that legal reform, even legal upheaval, was necessary to protect women in Utah and to prevent the spread of political contamination to the rest of the country.”³⁶³

Ironically, however, as soon as the Female Suffrage Bill of 1870 was voted in and Mormon women voted for legalization of polygamy in Utah, the sentiment has suddenly turned

³⁶² Gordon (1996), p. 815-847.

³⁶³ Id., p. 816.

against the previously empathized with poor women in need of salvation. In an ironical twist, same antipolygamists who claimed that ‘poor Mormon woman’ are in definite need of salvation suddenly found themselves arguing that women suffrage is not a solution but a problem, given that suffrage exists alongside polygamy.

In other words, Female Suffrage Bill of 1870 and the women (as well as the Mormon leadership standing behind, who undoubtedly had influence) who have voted for polygamy have defeated humanitarian concerns of the public opinion and the federal government in the East in their own game. What the women vote has shown was that there is some (historically dubious, to be sure) *degree of voluntarism and mass support* behind the acceptance of the polygamy – and by extension the acceptance of the Mormon Church leadership with its religious precepts. As Barringer Gordon notes, the affair with women suffrage was a proof that Utah under Mormons is not (at least on its face) a tyrannical “theocracy,” as the federal government and opponents charged, but a form of “theodemocracy.”³⁶⁴ To add insult to injury, Mormons have also engaged, as noted above, in litigation with some success, pledging their allegiance to the Constitution of the United States while all the same arguing that the same Constitution legalizes their preferred practices either under umbrella of the First Amendment, or the umbrella of federalism or any other legal arguments. In other words, Mormons used a legal system towards their own goals, depriving, to a certain extent, the mainstream from the position of the sovereign decision maker and the final arbiter of what the law is.

This kind of challenge to the authority of the federal government would not have been seriously taken had it not been for the second factor I have described above, the Mormon overwhelming control of political power, economic resources and the social life in the territory of Utah. Combinations of these three factors, polygamy as the identity challenge (seemingly)

³⁶⁴ Gordon (2002), p. 95-107.

democratically and voluntarily accepted, the control of political, economic and social life by the Church in the territories, was explosive from the standpoint of the federal government and was taken as a serious threat³⁶⁵.

Those in power in federal government were well aware of the Mormon Church tight grip over the population of Utah – and have quickly come to a conclusion that Mormons, if allowed to enter the Union under their conditions, would constitute a “group within a group”, a parcel of society whose hearts and loyalty lie with their preferred way of life. In other words, Mormons under these conditions could not have been trusted as future good citizens of the Union and therefore had to be coerced to become good citizens.

Those who brought the legislation aimed against Mormon Church, George Edmunds (the drafter of Edmunds-Tucker Act) were unequivocal regarding this issue, especially the position that Mormon Church has seized in relation to polygamy and access to resources it gained once the Church was officially incorporated under Utah laws. Edmunds argued that the church incorporation is church “is devoted to...the purpose of imposing upon (ignorant and degraded people) the doctrines and the practice of polygamy.”³⁶⁶ The Report of the House of Judiciary Comitee in 1886 similarly states that polygamy “assumed the garb of religion...and sought trough the rapid propagation of the species under the economy of celestial (marriage and) its church (corporation) ...to make Utah the permanent seat of the Mormon supremacy and power.”³⁶⁷,

The most interesting thing about Edmunds and quite a few other federal legislators who wanted to take down the Mormon Church was that they agreed that what Utah needs is nothing less than the – marketplace of religion, meaning the religious competition between Mormons and

³⁶⁵ Gordon (1996), p. 825.

³⁶⁶ George Edmunds, quoted in Gordon (2002), p. 202.

³⁶⁷ Quoted in id.

other Protestants sects. To that aim, federal government has supported flocking of various missionaries to Utah (with not much success), given that the Protestant elite on the East Coast had unfettered trust that the religious competition and voluntarism as a foundation of what they considered a trait of normal religion, would eventually result in a separation of church and state³⁶⁸.

Consequently, relying on the marketplace of religion argument, Edmunds has proposed and pushed through Edmunds Tucker Act. This Act resulted in complete seizing of the property of the LDS Church and the rationale behind was clear - taking away access to economic resources and land from the Church would eventually force Mormons to accept other religions and deprive the Church of influence it has over population in Utah. The marketplace of religion argument was interesting, but in retrospect it seems that it functioned unevenly – none protected the functioning of the free marketplace of religion at a time when Mormons were chased out from city to city – and the evidence that people were coerced to emigrate to deserts of Utah and accept Mormonism were in any case weak. Nevertheless, for purposes of supporting the legislation, the argument worked.

Federal legislators clearly saw the link between Church access to resources, Mormon communalism and Mormon Church influence through religion. Most interestingly, the legislators drew clear parallels between proposed actions against Mormons - taking away of property, breaking communal ties, removing access to property etc. - and actions taken against Native Americans³⁶⁹. The discussion among legislators moved in a direction of civilizing Mormons through same means as Native Americans – breaking down their communal property in smaller

³⁶⁸ Id., p. 202-203.

³⁶⁹ Id., 204.

individualized pieces, educating them and exposing to the influence of Protestant Christianity in order to eventually turn Mormons into desirable citizens of a republic.

The Act on which legislators relied on was Dawes Act of 1887 – named after its proposer, Senator Henry L. Dawes, Republican of Massachusetts, - which resulted in allotment of Native American land away from tribes as a means of breaking tribes into small pieces with a clearly stated aim of assimilating Indians. Theodore Roosevelt lauded the success of Dawes Act as a mighty pulverizing engine to break up the tribal mass promoting competition and mobility by replicating common law of property in the states of Indian territories³⁷⁰. Drawing a clear parallel between Mormons and Native Americans Senator Tucker, the second proposer of Edmunds – Tucker Act, stated that the aim of Act, which disenfranchised Mormons and seized the church property, was similar to Dawes Act because its aim was to “dissolve the tribal relations of the Indians in order to make the Indian a good citizen; so we shatter the fabric of this church organization in order to make each member a free citizen of the Territory of Utah.”³⁷¹

To finalize this part and connected with the theory in chapter one. What is obvious in the case of Mormons was following: they were considered both socially distant and disloyal – and in effect, they were more loyal to their group and were willing to resist claims in the name of their allegiance. On the other hand, mainstream had clear well founded interest to act with assimilationist bias and provide at least some exit options for member of the Mormon group (i.e. through introduction of Protestant groups in Utah). However, when the Mormons defied the invitation for exit and remained stubbornly attached to their own ways, the federal government moved towards attacking the main group cooperation mechanisms (i.e. polygamy, economic cooperation, social bonds) which were considered to be a hot bed of a Mormon “claim to

³⁷⁰ Id.

³⁷¹ Senator Tucker, 49th Congress, 2nd Session, p. 694.

exceptionalism” and the “Berlin Wall” of boundary that the group has erected between itself and the mainstream. The moves were meant to break the hope for resistance within the group, provide for exit options and motivate the groups to move towards the assimilation process – these mainstream moves I have referred to as assimilationist bias.

Ultimately, Mormons had no choice but to accept the invitation. The irony, of course, remains, that the whole dispute was never about polygamy – the stress on polygamy was emotional and identity mobilizing mechanism for mainstream - but the control over group mechanisms of cooperation, breaking down of the group boundaries and seizing the control over access to resources.

2.3.2. Seclusion, size and strategic interests of mainstream

After discussing “strong separationists” non-mainstream religious group above, this part is devoted to small and secluded groups whose religious practices have at various points in history became contested by the mainstream and were legally prohibited or thwarted. The argument advanced in this part is simple and was laid out in chapter one – the small, socially distant and secluded religious groups will mostly prevail on their claims to the extent that mainstream norms have *an interest* in allowing them to prevail or if mainstream norms have sufficiently changed so as to allow for uninterrupted secluded way of life which is not a burden on anyone and does not present, on aggregate, any sort of *actual or perceived* challenge to mainstream norms.

To illustrate the claim, this part discusses various cases involving Jehovah’s Witnesses, Old Order Amish and Seventh Day Adventist , as well as cases involving Orthodox and Hasidim Jews challenges to Sunday closing laws and the drawing of school district boundaries that have

benefited Hasidim Jewish children. As to Jehovah's Witnesses case, the argument is that the mainstream in a particular and very specific point in American history has found an interest in allowing them to prevail on their claims – in other words, it is not that Witnesses were successful in arguing their case; rather they were a sort of proof, for internal and external purposes, that American society and law is indeed devoted to religious freedom. As to the *Sherbert v. Werner* Seventh Day Adventist case, it serves as a lonely example how consistent application of the compelling government interest would look alike if taken seriously. In a follow up to *Sherbert*, *Yoder* case, the argument is that though the outcome of the case seems to be a win for free exercise of religion, in fact the case is fully satisfying governmental interest – no burden or loss, in other words, has been placed on the government, due to a seclusion and size of the Amish group involved. Cases involving Orthodox and Hasidim Jews are introduced to show that in spite the post.-WWII acceptance of the social definition of America as a Judeo-Christian society, the Orthodox and Hasidim Jews have failed in their claims not because there was any specific animus towards them as a group, but because their claims involved too strong of a claim to sustainment of group coordination mechanisms which eventually, if followed up by others, would create boundaries between various groups which the mainstream was not, at least on the legal level and at that time, ready to accept.

Jehovah's Witnesses

Jehovah Witnesses emerged as an offspring of the pre-milenial Adventist Christians group due to an inspiration of the Charles Taze Russell, who in Pittsburgh in 1870 predicted the coming of the end of the world as we know it in 1914, to be survived only by the faithful members of his group³⁷². Russell also strongly condemned most of the than contemporary mores

³⁷² Sarah Barringer Gordon, *The Spirit of Law: Religious Voices and the Constitution in Modern America*, (Harvard University Press, 2010), p 15-55. Hereafter Gordon (2010).

of the American society, like materialism, self indulgence, optimism and industrialization and along with it various forms of organized religion, including some influential strands of Protestantism as well as teachings of the Catholic Church. In 1914 end of the world did not occur as predicted – World War One started – and Russell was forced to revise the prediction, loosing many group members in the process. Russell died in 1916, to be succeeded by Joseph Franklin Rutherford, who was his lawyer for six years (aka Judge Rutherford)³⁷³. Rutherford, according to historical sources a person of strong temperament and prone to alcohol, has crucially revamped the way in which Witnesses were functioning as a group to a large extent, instructing his flock to proselytize when and where ever possible while sustaining a “group based” despise and distance from the outer world who was considered sinful and corrupt. In particular, the American society at large was considered damned and along with it various forms of organized religion. The American government was also claimed by Witnesses to be an embodiment of the Satan’s rule and a Satan’s representative in this world.

Witnesses whole sale rejection of any idea of allegiance to the state, their open “disloyalty” to the prevailing mores and laws of than American society, as well their determination to bring as many persons aboard their own group brought them large amounts of persecution. Indeed, one of the first ever important cases that had effect on religious freedom, albeit tangentially and in long term was *Cantwell v. Connecticut* ³⁷⁴. There, the family of Witnesses was arrested for proselytizing in a majority Catholic area, in breach of a Connecticut statute prohibiting solicitation for religious (and charitable) purposes. It is important to note that Witnesses were spreading several of their own particular religious messages that have been apparently especially critical of the Catholic Church, as a result of which several locals have

³⁷³ Id. p. 20-21.

³⁷⁴ 310 U.S. 296 (1940).

attacked Cantwell family. Moreover, Witnesses themselves stated that they have not applied for a license given that their religious beliefs counseled them not to cooperate with the government and particularly not to let the government determine whether their beliefs are religious or not. Witnesses arrest and fine were affirmed on both lower level and on appeal, but the Supreme Court overruled the conviction upholding Witnesses claims on the grounds of their freedom of religious expression stating that First Amendment applies to the states by virtue of being ‘incorporated’ in the Fourteenth Amendment due process clause, the issue which though readily applied my most courts has not been fully accepted even up to this by the members of the current Supreme Court.

Few years after, the uproar and the controversy regarding Witnesses practices have become even more heated, after the decision in case of the Jehovah Witnesses children refusing to salute the flag and recite the Pledge of Allegiance in cases *Minersville School District v. Gobitis*³⁷⁵ and *West Virginia State Board of Education v. Barnette*³⁷⁶.

In *Gobitis*, a children coming out a family of a recent convert, refused to pledge allegiance and salute a flag at the beginning of the school class, right at a time when American was entering the WWII, inviting a public criticism and suspicion of disloyalty, as well as outright attacks across country on Witnesses who were publicly proclaimed disloyal citizens, sometimes “Nazi sympathizers” or plain crazy people³⁷⁷. Facing public pressure and physical attacks, Witnesses have tried to withhold kids from public schools and provide home schooling, in addition to generally exercising seclusion form the society. Yet nevertheless they continued proselytizing. During *Gobitis* case trial, Witnesses cited many Christian phrases from various Gospels to show that saluting the flag or pledging allegiance to the government or engaging in

³⁷⁵ 310 U.S. 586 (1940).

³⁷⁶ 319 U.S. 624 (1943).

³⁷⁷ Gordon (2010), p. 25-26.

war in effect constitutes worshiping of idols and an abomination to Witnesses religious beliefs and practices. In order to dispel the suspicion of sympathizing with Germans, they pointed out that Witnesses have been persecuted for the same thing in National-Socialist Germany well before the beginning of the WWII for failing to chant in schools and in public to Hitler.

The Supreme Court, however, was not at all impressed, at least not publicly. Justice Frankfurter, writing for eight to one majority, rejected Witnesses claim arguing that the flag and pledge are symbols of national unity necessary to build a common core of social values and therefore a promotion of it is a government interest. Moreover, Frankfurter reasoned that the mere possession of religious convictions that contradict legal and political demands do not excuse or relieve citizens from their responsibilities, a reasoning which was, to be sure, fully well grounded in the case law and precedents of the day³⁷⁸.

Social consequences of the Gobitis decisions were disastrous to say at least. Emboldened by lenient treatment of authorities and likely feeling that widespread social rumors of Witnesses disloyalty were legitimized by court's opinion, in next three years the number of physical attacks on Witnesses and their children literally sky rocketed, drawing much media attention who posed a question of the moral superiority of America over its National-Socialist German opponents who have in Europe already completely forbidden Witnesses as a religious movement, engaged in massive persecution and at times attempts to eradicate persons affiliated (or suspected of being affiliated) with the Witnesses.

In the mean time, than President Franklyn Delano Roosevelt has already managed, after threatening to apply his "court packing plan" against the hostile Supreme Court, to appoint three new justices who were sympathetic to his social and political views of New Deal and his general attempts to engage in social engineering and reeducation of the American society, which FDR

³⁷⁸ See J. Frankfurter for majority 310 U.S. 586, 594 (1940).

has felt necessary to do. Almost by chance, FDR managed to change the court composition into one more hospitable to his goals³⁷⁹. In *Barnett*, decided three years after *Gobitis*, one of the three justice appointed by FDR, Robert Jackson, later a prosecutor at the Nuremberg War Crimes Court, deciding the same issue as in *Gobitis*, upheld Witnesses' children right not to recite the pledge and salute the flag on grounds of protecting their freedom of *expression*. In a rhetorically passionate opinion, one sentence written by Jackson turned out to be most important and is quoted over and over again: "Those who begin in coercive elimination of dissent soon find themselves eliminating dissenters. Compulsory unification of opinion achieves the unanimity of graveyard."³⁸⁰

Inspiring and wonderful as these statements sounds, it is not difficult to perceive its true targets, as well as practical meaning and contradiction between the first and second sentence. Coercive elimination of dissent can be easily read as the assertion of the moral superiority of American law (and, by extension, America as a society) over their National Socialist adversaries across the ocean. The second sentence is clearly formulated as one protecting the freedom of speech and opinion *and*, if by implication only, an affirmation of the Reynolds doctrine of distinction between belief and practice. In other words, while the compulsory unification of opinion might indeed achieve unanimity of graveyard, no judgment is made regarding the compulsory unification of behavior. Hence, everyone is free to think whatever they want to the extent the opinion is not consequential. This is a quite a safe opinion assuming, of course, that the line between speech and act is possible to draw with full clarity – hardly a safe assumption.

One can already sense the crux of my argument explaining reasons why Jehovah's Witnesses in the *Cantwell* and *Barnett* case (just as Old Order Amish below) were granted an

³⁷⁹ Gordon (2010), p. 43 and *infra*.

³⁸⁰ 319 U.S. 624, 641 (1943).

accommodation and exemption. Witnesses' religious beliefs and practices differ to a great extent from the mainstream values – and might even be hostile to such values, as in proclaiming the government to be a “Satan.” To the extent they are socially distant or disruptive of social order and even “potentially disloyal to the state and law”, as Witnesses were considered at a time and especially in the case of Gobitis, one would expect their legal claim to fail. But there are other considerations also. I have argued that the size of group also matter , that is the smaller the group, greater is the likelihood of success of claim given that outside of group material effects are small. The quality of a claim is of importance too - if the claim encroaches on the strongly held mainstream value, the likelihood that it will fail is higher.

At a time and up till today, Witnesses were and remain a small and largely secluded religious group, preserving a distance and a boundary between themselves and the mainstream society, hence satisfying one of my conditions. On the other hand, superficially speaking, the demands Witnesses have made against the mainstream values have been perceived as encroaching on mainstream value. But, in both Barnett and Cantwell, the mainstream values have been legally bent not for a reason of sudden change of heart but for strategic reasons. In other words, after analysis, it turns out not that Witnesses have prevailed on their claim *not* because of the bleeding hearts of the majority of population or a sudden discovery of love for religious freedom or tolerance by the judiciary, which was empirically obviously not present given attacks on Witnesses and their children and the judicial and legislative rejection of their demands. Witnesses have prevailed because some (influential) part of the mainstream has found an interest in letting them win their case in the court. That is to say, what was previously considered (from the point of view of mainstream) as Witnesses potential for “disruption” or

“disloyalty” was, under new conditions, deemed to be useful and a part of the new strategic calculus.

Why and how did this happen? Basically because of the FDR newly discovered policy of New Deal and the influence of the World War II and the behavior of the Third Reich in Europe³⁸¹. Attempting to forge new political majority as a response to Great Depression and than responding to news of National-Socialists atrocities in Europe, FDR has proclaimed political liberalism and the Christian humanitarianism to be two sides of the same coin³⁸². Later on, he followed up with the proclamation of Four Freedoms as a guiding light of American politics both internally and externally. Among these four freedoms, freedom of belief was an important one.

At a time, mainstream religious groups responded enthusiastically to FDR’s newly founded politics. During 1930’s, the World Council of Faith was organized in Chicago, proclaiming as its main tenant that many faiths lead to truth and salvation, not solely Christianity (by which they meant mostly Protestant and Catholic variations of Christianity). American Protestants have started organizing outreach group and welcoming Catholics and Jews aboard and promoting the more inclusive approach to religion, as well as arguing that the work for social justice – roughly in line with the FDR New Deal policies – was a part of a general nonsectarian Christian morality. As a result, so called “Goodwill Movement” was formed, arguing for a social equality and praising New Deal as a worthy moral endeavor aimed at social justice aligned with teachings of various faith, secular overtures and tones notwithstanding³⁸³.

After the Gobitis case was decided and the attacks on Witnesses and their children ensued, members of the Goodwill Movement and various other religious organizations have expressed their shock, while the press has questioned the moral superiority of America over its

³⁸¹ Gordon (2010), p. 41-43.

³⁸² Id., p. 34-41.

³⁸³ Id., p. 39-41.

Third Reich competitors, pointing out that in Europe under Nazi rule Witnesses were banned as a religious group³⁸⁴. In short, Gobitis case and the treatment of Witnesses was a test case to positively compare America to National-Socialist regime, promote pluralism as a policy and claim moral victory over Nazism on the home ground³⁸⁵. After Barnett decision, press and the general public as well as religious organizations have praised FDR and celebrated America's devotion to pluralism and liberalism as a sure sign of the impending moral victory over darkness that reigns large in Europe.

This line of reasoning has generally continued later on. Following the end of the WWII and especially after acquiring knowledge of Holocaust, President Eisenhower has proclaimed religious freedom to be a general part of human freedom³⁸⁶, by so positively contrasting America to atheistic communism who forbids freedom of religion. Eisenhower moved the cultural rhetoric from nonsectarian Christianity towards vaguely inclusive Judeo-Christianity; and claimed that religion is one of the most potent spiritual weapons in Cold War³⁸⁷. Ironically enough, this approach resulted in inserting words "under God" in the Pledge of Allegiance, the insertion whose constitutionality remains disputed until this day³⁸⁸.

³⁸⁴ On treatment of Jehovah's Witnesses by National Socialist in Germany see Gabriele Yonan, "Spiritual resistance of Christian conviction in Nazi Germany: the case of the Jehovah's Witnesses," *Journal of Church and State* (1999), Vol. 41, issue 2, p. 307.

³⁸⁵ Gordon (2010), p. 41, 48-51.

³⁸⁶ Id, p. 51-53.

³⁸⁷ On relationship between Eisenhower, his own personal religious view and foreign policy see William Inboden III, *Religion and American Foreign Policy: the Soul of Containment*, (Cambridge University Press, 2008), p. 257 and infra.

³⁸⁸ See challenge to constitutionality of inclusion of "under God" words in the Pledge of Allegiance and the overview of history behind its inclusion in *Newdow v. U.S. Congress*, 292 F.3d 597, 609 (9th Cir. 2002) where the court after reviewing legislative history plainly states that "the words 'under God' were intended to recognize a 'Supreme Being,' at a time when the government was publicly inveighing against atheistic Communism."

Old Order Amish and Amish Mennonite Church

Case *Wisconsin v. Yoder*³⁸⁹ is another example that serves to basically confirm theoretical claims advanced in chapter one, as well as show the institutional approach (exemplified through judicial opinions) towards free exercise claim that involve significant group effect, in this case effect on both parents and children members of the Old Order Amish as well as on their immediate social surrounding. In short, it proves that, on the one hand, non-mainstream religious groups are concerned about the credibility of information they spread among the group members and the group cooperation mechanisms; and that the sustainment of the credibility of such information and cooperation mechanisms pushes such groups towards sustaining the boundary between themselves and the rest of social environment. On the other hand, this case also shows that institutions – basically entities involved in defining mainstream norms – judge those groups by judging those very same mechanisms – boundary sustainment and group cooperation mechanisms. But institutional decision makers also take into account the degree of seclusion, size and the impact of group behavior on mainstream values and norms, all of which serves to draw a final judgment on the relative status of a given non-mainstream group being held accountable for its actions in a particular case.

In *Yoder*, the State of Wisconsin punished several members of the Old Order Amish and the Conservative Amish Mennonite Church for withdrawing their children from public schools in violation of state compulsory school-attendance law, which required that all children attend public or private school until the age of 16. Parents of Yoder family and two other parents claimed that compulsory school attendance laws violate their free exercise rights, given that, according to them, sending their kids is a breach of their religiously inspired secluded way of life

³⁸⁹ 406 U.S. 205 (1972).

which demands of all members of group to stay within the community and especially to socialize children into peculiarities of group living which is in tension with the way of life and knowledge which Amish children would be exposed to if they continue public school beyond a certain age³⁹⁰.

We do not need to look for extra evidence of the secluded way of life these two Amish groups lead, as well as to prove that their way of life is indeed socially distant from the rest of the society (i.e. non-conformist), group based and fully religiously inspired. The majority opinion states it amply, summarizing expert opinions and historical evidence presented during the trial. As Chief Justice Burger, delivering the opinion, explains³⁹¹:

„...we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living...Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical... *The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards.*“ (italics added).

However, J. Burger is quick to explain the virtues of Old Order Amish and Amish Mennonite Church way of life, especially noting that the group is productive, secluded yet self-sufficient and well behaving – in other words not a burden on anyone. In a similar venue, J. Burger notes that though children will be withdrawn from the regular public system of education, they are being incorporated into a group way of life which effectively produces a well behaved citizenry that is not unlikely to be of some value both materially and symbolically to the rest of

³⁹⁰ Id., 210-212 and p. 217-218.

³⁹¹ Id., p. 216-217, internal citations omitted.

society. In couching his argument, J. Burger at times sounds almost like a full scale relativist (and confirms one of my theoretical claims regarding the inverse relationship between the level of seclusion and the approval of accommodation). At one point he states that³⁹²,

“We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. *There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.*” (italics added).

The “material” crux of J. Burger arguments follows two pages below, showing that Amish way of education neither burdens anyone, nor creates less productive or politically responsible citizenry³⁹³:

“The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. *In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.*” (italics added).

As Martha Nussbaum, in an otherwise idealistic work celebrating what she believes is peculiarly American tradition of liberty of conscience and religious equality, lucidly notes analyzing potential reasons why Old Order Amish claim was approved by the Supreme Court³⁹⁴.

“One can’t help feeling that the status of the Amish as a kind of “model minority” – wealthy, orderly, no problem to anyone – influences the reasoning of the majority more than it really should, given that what we’re dealing with is the education of children for a life in which they may be part of that community, but also may not. Given the Court’s uneven track record in

³⁹² Id., p. 223.

³⁹³ Id., p. 225.

³⁹⁴ Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*, (Cambridge University Press, 2008), p. 145.

dealing with strange, minority religions . . . the favorable treatment meted out to the Amish seems a little unfair: *they get a break in part because they are wealthy and established, and don't pose any big challenge to majority Protestant values of thrift and virtue.*" (italics added).

Exactly. Though, too be on a safe side, there is nothing particularly "unfair" or uneven about this treatment of Old Order Amish relative to other free exercise decisions, for following reasons. When one analyzes the arguments of the majority and dissent, there is one main difference between the two, the difference which, ironically, is insignificant in terms of consequences for the mainstream. The majority opinion speaks highly of values of the religiously inspired traditional way of life espoused by Amish, but the crux of the majority argument is that Old Order Amish are well established, wealthy, small, secluded and law abiding community, not distracting anyone else's (meaning mainstream) business to a large extent. In fact, they are a type of community one would wish for as model for exercising tolerance with no large costs imposed outside of that community.

Dissent in *Yoder* case, on the other hand, speaks in terms of the concept I have used amply in the chapter one – that is state promoted option or a possibility of exit from the religious group membership for children . Written by J. Douglas, dissent goes at great length, very persuasively and presumably to lay grounds for its reasoning to be used in future cases involving not so "orderly" non-mainstream group, to show that if not given opportunity the Amish children will be disadvantaged in terms of choices and options they are aware of and capable of using if they do not become a part of mainstream³⁹⁵.

Throughout his opinion, J. Douglas simply states that religion is basically exactly what it says it is – a religion – a group organized way of life that cannot be simply judged by its social consequences weighted against mainstream values. In short, J. Douglas stresses that emphasis of the analysis should not on social consequences of Amish behavior but the *credibility of*

³⁹⁵ 406 U.S. 205, 242-245 (1972).

information which the Amish children will be able to receive if pushed towards the continuation of the education in a public schools. I have already stressed that aspect of the religious group behavior. To a large extent, both symbolically and materially (as already noted in majority opinion above), religious groups are struggling to sustain themselves as the only source of information for their members – and in order to remain the only credible source of information especially non mainstream religious groups whose values are not inculcated among the mainstream sources of information (in however a diluted way), sometimes they strive for seclusion and drawing of sharp borders between themselves and the rest of environment. The credibility (or availability) of the sources of information available to religious group members is a philosophical (Kantian) issue of personal self- autonomy that cannot be taken here, however interesting it might be - but it is important to note that most fights regarding presence of religion in education (or the presence of religious information in public space) is basically a discussion regarding the sources and the credibility of information .

The irony and the real rationale behind the Yoder decision is obvious, just as Nussbaum points out above. Majority argues that allegedly the free exercise interest in this case has to prevail over compelling government interest (education of productive future citizenry), which in turn allegedly has to back off. But it is not hard to see that government interest is in fact fully satisfied, even when claiming that free exercise has prevailed. The government has gotten a productive citizenry, that is a future citizens who will be a part of the old, established, wealthy, hard working, small and law abiding community which does not impose any costs nor makes any huge demands on the mainstream, except the modest demand to be left alone to mind its own business. Amish children are withdrawn from the educational process into another form of “educational” process. In short, what majority opinion is saying is that basically a group can be

fully integrated and assimilated into a mainstream by means of not making demands and preserving its own secluded and established status.

If the Old Order Amish were a group that is likely to attract many (perhaps way too many) converts and/or grow dramatically in numbers, presumably the majority opinion would be different. The decision would also be different if the Amish have attempted, as it happened in the *Kyrias Joel* case with Hasidic Jews (see below), to draw others into their own preferred version of educational process – over which the state and mainstream have clear interest in preserving control – the outcome would have been entirely different.

Yoder decision was basically a continuation of Sherbert decision. As it was already noted, in *Sherbert v. Verner*³⁹⁶ the Court developed a strict scrutiny test, which demands from those claiming burden on their religious beliefs or practices to prove that religious *beliefs* allegedly burdened are *central* to a practice of a particular religion. Once burden so defined is proven, the government has to prove that challenged regulation was necessitated by a “compelling government interest” and that no alternative forms of regulation were available.³⁹⁷ In Sherbert, the Court struck down a government decision to deny unemployment benefits to Ms. Sherbert, a member of Seventh-Day Adventist Church, as a result of her refusal to work on Saturday, her Sabbath day. Now, the explanations that I have advanced above – social distance, seclusion and non-burdening of mainstream values as a precondition for the approval of the accommodation claim advanced by the non-mainstream group - in Sherbert case are only partially satisfied. Seventh Day Adventists certainly entertain some level of social distance from the mainstream and are relatively small and secluded group, and the whole analysis hinges on a question whether unemployment benefits is a significant governmental and mainstream value.

³⁹⁶ 374 U.S. 398 (1963).

³⁹⁷ Kaplin, p. 402.

Arguably it is, given its availability and importance to many persons irrespective of their background, as well as because of its role in the general economy.

In short, the Sherbert case cannot be explained by the theory I have outlined, yet, ironically, the application of the compelling government interest test in this case is a prime time example of how that application should be done, if the compelling government interest test is taken seriously and if indeed, i.e., some major mainstream or governmental interest is burdened. No wonder, however, that, as the overview of the empirical studies of the free exercise clause cases presented above show, compelling government interest test advanced in Sherbert has been apply rarely and in case of non-mainstream religious groups wholly unevenly.

Orthodox and Hasidim Jews

Following three cases that will be analyzed below all involve claims raised by Orthodox and Hasidim Jews at various points in the second half the 20th century. McGowan and Brownfeld cases took place in 1961, while Kyrias Joel case took place in 1994 – in other words all three cases were decided at a time when, for all intense and purposes, as a part of official political statements *and* as confirmed by the various legal opinions dealing with either establishment or the free exercise parts of the Religion Clause, American society was referred to as a Judeo-Christian for reasons and with limitations already explained in part I above. All three cases are analyzed here irrespective of the fact that formally two of them (McGowan and Kyrias Joel) do not involve free exercise claim by the Orthodox and Hasidim Jews respectively, but a claim to violation of the Equal Protection Clause of the 14th Amendment and the First Amendment Establishment Clause raised either by them or by third parties.

However, irrespective of legal grounds, all three cases involve significant burdens on free exercise of religion and it stands to reason to analyze them within that framework both because one could argue that holdings in all three cases raise some free exercise issues (as dissent in several judgments argues); and, more importantly, because they amply serve to prove, in a strong manner, the explanatory value of the theory of relationship between non-mainstream religions and the wider mainstream institutional and social setting I have advanced in chapter one.

In *McGowan v. Maryland*³⁹⁸, Orthodox Jews claimed that Sunday closing laws violates their economic interest and is a form of establishment of religion, given that their faith commands them not to work on their own Sabbath (Saturday), while the law prohibits them from staying open on Sunday, a Christian Sabbath whose roots are traced backed to the New Testament Fourth Commandment, consequently violating equal protection clause and the establishment clause³⁹⁹. The US Supreme Court held that having a Sunday as an obligatory day of rest indeed has a religious background as a root of the rule – Christian Sabbath as the uniform day of rest. However, the US Supreme Court claimed that due to a passing of time and repetition, the rule providing for Sunday as a uniform day of rest has lost its religious value and therefore serves secular purpose, the state proclaiming a uniform day of rest for everyone.

A similar outcome, only this time involving Free Exercise in addition to the Equal Protection claim, was raised in *Brownfeld v. Brown*⁴⁰⁰. In that case, Orthodox Jews in Pennsylvania again raised a claim against Sunday closing law commanding that all commercial enterprises remain closed during Sunday. The response of the plurality of the US Supreme Court

³⁹⁸ 366 U.S. 420 (1961).

³⁹⁹ 366 U.S. 420, 429,430 (1961), finding that “since appellants allege only economic injury to themselves, and do not allege any infringement of their own religious freedoms, they have no standing to raise the question whether the statute prohibits the free exercise of religion, contrary to the First Amendment” and “since appellants have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion, they have standing to complain that the statute is a law respecting an establishment of religion.”

⁴⁰⁰ 366 U.S. 599 (1961).

was the same – irrespective of the Christian roots of the rule, the rule as practiced at a time has a significant secular purpose and though its repetition has lost any religious meaning. Moreover, because the rule is generally applied, there is no violation of Equal Protection Clause nor the Free Exercise Clause. However, the sheer number and tone of simultaneous concurrence and/dissents by several justices can serve to show that such reasoning seems to stand on a shaky ground.

In a dissenting opinion, J. Douglas straightforwardly argued that Sunday closing laws have clear religious root that cannot be swept under the rug of secular purpose, and therefore such laws should be held in violation of both Establishment and Free Exercise clause given that they impose a rule attributable to a certain religion while simultaneously preventing exercise of other religions⁴⁰¹. In concurrence/dissent, for example, Justices Harlan and Brennan argued that the statute commanding compulsory Sunday closing of commercial enterprises does not violate either Equal Protection or Establishment clause, but that it should be struck down as unconstitutional in violation of Free Exercise Clause given that it imposes costs on religious practices of minority because of majority decision, something which, according to both Justice, Free Exercise clause was meant to prevent⁴⁰². Justice Stewart joined the dissent of J. Brennan, and stated matters clearly⁴⁰³:

„Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.“

⁴⁰¹ Id., 561-582.

⁴⁰² Id., 610-616.

⁴⁰³ Id., 616.

There are clear utilitarian ways of analyzing these decisions in a following manner. Assuming that the mainstream or majority is disinterested in practices of a tiny minority, it would not be a matter of great concern (cost) to allow such commercial enterprises to stay open on days when all others are closed, while being closed on days when all others are open – cumulative effect, assuming small number of such enterprises, would be negligent. The outcome of the analysis would be different if one assumes that the mainstream had a particularly negative or even hostile attitude towards this particular minority – in that case, the imposition of a rule on such minority would at least bring psychological utility or benefit – for example the feeling of superiority – for the mainstream.

But given time when these decisions were made (1961) when already the social and legal attitude towards various strands of Judaism has progressively improved relative to previous periods, the former assumption does not appear to be persuasive and as an evidence one could at least cite the number of concurrences and dissents in *Brownfeld*. Further, at a time when the decision was made the process of what Noah Feldman has called a legal secularization of American law has already started⁴⁰⁴, not to mention that a devotion to religious freedom, whose Cold War roots have already been described, became a part and parcel of legal discourse.

What could then be an alternative explanation? Kent Greenawalt is straightforward regarding this issue. The most important, even if not clearly stated reason, was that providing this type of accommodation even for a small minority would function as an incentive for this non-mainstream groups (and than likely others to follow) to legally frame their activities in such a way that would allow them to only hire their coreligionists, that is those available for work on that day. In short, working on a day when most others (members of mainstream) are closed, while closing on days when others are working, would make it less costly for the members of

⁴⁰⁴ Noah Feldman, *Divided by God*, (Farrar, Strauss and Giroux, 2005), p. 177-185 and *infra*.

this group to form a coordinating structure within which only those exercising these particular practices (members of the same religious group) would engage in⁴⁰⁵.

Consequently, such group would create a boundary between itself and the rest of the society, a boundary which, if allowed now and then followed by other groups, would create locus's of private group dominance which would be both economic and religious at a same time and which might, in some likelihood and if followed by other groups, undermine, for example, the unity of a shared citizenship as a mainstream value or the openness of the economic space without boundaries arising from religion. This is basically in line with what I have argued for in a chapter one. Mainstream assesses boundaries nonmainstream religious groups form around them by looking at both boundaries and group cooperation practices, given that the two are intertwined, and then compares it with its own notion of boundaries and cherished values. Here, the group cooperation practices basically created a boundary which was both, to a certain extent, economic and religious. Whether this boundary was indeed sufficiently important and valuable so to justify lack of accommodation must remain an open question.

Today, as the American society is becoming, in a however limited way, more and more multi-religious, it would be more difficult to justify these limitations and Sunday closing laws. Indeed, as of 1996, only thirteen out of fifty states have Sunday closing laws, and the likely number, at a time of writing, is even smaller⁴⁰⁶. Probably, this is a result not so much of accommodations and exemptions provided for dissenters but the general process of legal secularization combined with the growth of consumerism which demands the availability of

⁴⁰⁵ Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness*, (Harvard University Press), p. 185-187.

⁴⁰⁶ Steven b. Epstein, „Rethinking the Constitutionality of Ceremonial Deism,“ 96 *Colum. L. Rev.* 2083, n. 298 (1996), citing following laws, „Ala. Code s 13A-12-1 (1996); Conn. Gen. Stat. s 53-302A (1996); Ky. Rev. Stat. Ann. s 436.160 (1996); Me. Rev. Stat. Ann. tit. 17, s 3204 (1996); Mass. Gen. Laws ch. 136, s 5 (1996); N.H. Rev. Stat. Ann. s 332-D:1 (1996); N.Y. Gen. Bus. Law s 5 ; N.D. Cent. Code s 12.1-30-01 (1996); 18 Pa. Cons. Stat. s 7363 (1996); R.I. Gen. Laws s 11-40-1 (1996); S.C. Code Ann. s 53-1-40.“ (internal citations omitted).

services at all times and at all places. In other words, as it was noted in chapter one drawing on a work of Leo Pfeffer, what today might be considered a de-facto accommodation of religious practices (i.e. demise of prohibitions to adhere to religious prohibition to work on a given day) is a result of change in mainstream norms.

Another relatively more recent case involves religiously observant (“strict”) small and secluded Jewish group Satmar Hasidim, residing in a Village of Kiryas Joel in upstate New York⁴⁰⁷. Though the case itself was brought and decided as an Establishment Clause case, as the J. Scalia’s dissent shows, the issue of free exercise of religion – overlapping with cultural issues – was clearly present. The case and reasoning in the case serves amply to show that the legal decision making with regards to religion clearly functions, to a large extent, by relying on terms and concepts I have described in chapter one – assimilationist bias operating within the mainstream institutional structure assessing boundaries and group coordination mechanisms of the non-mainstream religious groups.

The inhabitants of the Village of Kiryas Joel are descendants of the small Jewish group which originated from a city (whose name they bear) located on what is today a Hungarian – Romanian border. The group was formed and preserved as a distinct one, both relative to the rest of the world as well as other Jewish groups, by Grand Rabi Joel Teitelbaum who led the group to the United States after the WWII and Holocaust, where they have settled and formed, in accordance with law and after some dispute with neighbors who apparently did not exactly welcome their presence, a village whose borders were drawn in such a way to include solely Satmar Hasidim members, all 8500 of them. Within the borders of the village, children of the observant parents, who obviously comprised a majority in that village, have attended private religious schools (separate for boys and girls) in which they were instructed in and lived

⁴⁰⁷ *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

according to what, as the opinions of judges quoted below states, outsiders would consider “odd” or socially secluded way of life⁴⁰⁸.

However, the problem was that such private religious education was not able to provide a proper education for handicapped village children who had suffered a number of physical and emotional problems in development and required special education. Early on, parents decided to send such children to a public school specialized in education of minors with problems in development, one such schools being located adjacent to the village. Yet, the cure was as bad as a problem – as the record of the case states, the children have suffered even more traumas after being put in a completely new environment with unknown persons whose behavior was completely different than the one they were used too⁴⁰⁹. As a response and after negotiations, New York State Board of Education decided to redraw the borders of public school districts in such a way that a new border includes solely inhabitants of Village of Kiryas Joel, consequently giving the village inhabitants the control over the public school board and making it possible for them to provide their children with the special education they required⁴¹⁰. The suit that followed alleged that drawing public school district’s boundaries on the basis of religion runs afoul of the Establishment Clause.

Plurality opinions were sympathetic to the plight of children, and in the beginning of the opinion started by describing a peculiar and secluded way of life that Satmar Hasidim follow, noting particularly that the village inhabitants avoid any sort of assimilation into a modern ways of life. As J. Souter stated⁴¹¹:

“The residents of Kiryas Joel *are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it.* They interpret the Torah

⁴⁰⁸ Id., 688-689.

⁴⁰⁹ Id.

⁴¹⁰ Id.

⁴¹¹ Id., 688-690, internal citations omitted.

strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English language publications; and dress in distinctive ways that include head coverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools, most boys at the United Talmudic Academy, where they receive a thorough grounding in the Torah and limited exposure to secular subjects, and most girls at Bais Rochel, an affiliated school with a curriculum designed to prepare girls for their roles as wives and mothers.” (italics added).

However, the same plurality unequivocally rejected drawing borders (boundaries) of school district in such a way that only members of one religion are included as a violation of the Establishment Clause. J. Kennedy’s opinion, concurring with plurality, states the issue clearly, drawing on, all the while rhetorically rejecting it, a concept of assimilation and trying to garner a fine line between assimilation, distinctiveness and political rights. As Kennedy says:

“As the plurality indicates, the Establishment Clause does not invalidate a town or a state ‘whose boundaries are derived according to neutral historical and geographic criteria, but whose population happens to comprise coreligionists.’... People who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all American citizens enjoy, so long as they do not use those rights to establish their religious faith. *Religion flourishes in community, and the Establishment Clause must not be construed as some sort of homogenizing solvent that forces unconventional religious groups to choose between assimilating to mainstream American culture or losing their political rights.* There is more than a fine line, however, between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples’ faith. In creating the Kiryas Joel Village School District, New York crossed that line, and so we must hold the district invalid.” (italics added).

Perhaps the Establishment Clause, as J. Kennedy states, should not be construed as one commanding assimilation. But, as I have tried to show, it seems that the application of Free Exercise Clause as well as Establishment Clause historically, as the example of Mormons and others shows, certainly functions like that, even if unintentionally and by virtue of borrowing concepts of what is socially accepted as “religion” as opposed to socially distant, nonconventional groups. In his wordy and passionate dissent, J. Scalia shows problems of the application of the Establishment Clause in this way and argues that this type of argument

presents basically a burden on cultural distinction which is accompanied by religious peculiarities, accommodation of which, according to him, remains an important trait of American law when dealing with non-mainstream groups and “tiny minorities”. As he states it⁴¹²:

“The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar. The Grand Rebbe would be astounded to learn that, after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an “establishment” of the Empire State. And the Founding Fathers would be astonished to find that the Establishment Clause - which they designed “to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters,”...has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect.”

Further, J. Scalia states that:

“I have little doubt that Justice Souter would laud this humanitarian legislation if all of the distinctiveness of the students of Kiryas Joel were attributable to the fact that their parents were nonreligious commune dwellers, or American Indians, or gypsies. The creation of a special, one-culture school district for the benefit of those children would pose no problem. The neutrality demanded by the Religion Clauses requires the same indulgence towards cultural characteristics that are accompanied by religious belief. “The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as . . . subject to unique disabilities.”

What are the key disputed issues in all above cited opinions? Basically there are four, all of which I have amply used in chapter one: assimilation, boundaries, “sect” (social distance), and “tiny minority.” All three J. Souter, Kennedy and Scalia speak of assimilation as the molding of various nonmainstream religious groups, even if J. Kennedy states that Establishment Clause (in this case) should not be construed to act as an assimilation machine (a molding mechanism, in his words). All three justices note that Satmar Hasidim are secluded and tiny group, leading a

⁴¹² Id., p. 391.

peculiar way of life which does not comport to mainstream norms and indeed is framed in a way that the group remains secluded, preserving a boundary between themselves and the rest of the world.

However, this is where they part ways. Both J. Souter and Kennedy find this type of a governmental drawing of borders so as to include the members of one religion an establishment of religion, on account that such drawing, if allowed in this case, would provide an incentive for other groups to lobby and create borders of their own religions, endangering ultimately the relationship between the various local governments and the people belonging to a faith that does not “belong” within newly set borders. To be sure, neither of them states that political borders comprising members of the same religion who have voluntarily settled in one area is per se unconstitutional (an example of Utah, with 85% Mormon majority, comes to mind). Their fear, basically, is a herding effect and a “jumping on board” of various other religious groups that might want to seize the opportunity and create “one religion” districts, potentially (as it is popular to say) “Balkanizing” the society. Emphatically neither of them is insensitive to the plight of Satmar Hasidim children and they both note, at various places, that other means could have been used to resolve the problem, means that would not run afoul of the Establishment Clause.

J. Scalia, however, places emphasis on two facts. First, Satmar Hasidim are a tiny minority group that lives a secluded existence not sharing much in terms of values and norms with the mainstream – that is, to translate into terms I have used in chapter one, they are socially distant and, due to seclusion, unlikely to pose a threat to mainstream either in terms of impact of their lifestyle or in terms of numbers. Second, J. Scalia states that Satmar Hasidim way of life should be analogized to the way of life of “American Indians and Gypsies” (in his words), their

cultural distinctiveness arising from their religious peculiarities, and the accommodation of such practices should follow since that is, according to Scalia, quintessentially American practice rooted in law. In short, what J. Scalia has given us here – and the theme will be further taken up in the conclusion to this chapter – is a statement that I have argued for in chapter one: the toleration of unconventional practices should follow once the nonconventional group is small, secluded and not imposing any costs on the mainstream values, even if its practices are odd to mainstream. That statement is a definition of classical tolerance.

2.4 Conclusion: a slow path of law from fighting separationists towards the toleration of petty claims

As the historical and institutional analysis laid out above shows, generally speaking American society and law has gone through a slow process of an increase of social and legal toleration of non-mainstream religious groups – from fighting Mormons in 19th century towards legal and to a certain extent also social approval of a religiously inspired behavior of socially distant smaller and secluded religious communities. As documented, this process was by no means very nice or painless for non-mainstream religious groups. Yet the improvements are obvious alongside changes in institutional and regulatory mechanisms which the legal system uses to treat communities – there is a clear moving away from direct social and legal prevalence of the Protestant Christianity towards pronouncements of vaguely more inclusive Judeo-Christian culture or a pluralist culture. But the toleration of course remains limited with the mainstream norms – today commonly labeled with a vague term “culture”; as well as the majority preferences, whose religious or religiously rooted secularized practices, alongside governmental interests, define such limits.

As I argued in a chapter one, moves towards more acceptance and toleration are motivated and limited by two social factors and three institutional factors, both to a certain degree intertwined. On a social side, two factors are important. First, the majority inclination to act with assimilationist bias and to provide for exit options for members of unpopular non-mainstream groups, using various methods of pressure if necessary to achieve its aims; and, second, the acceptance of some non-mainstream groups follows once the mainstream norms change for *strategic reasons that benefit the mainstream and on condition that such change imposes no costs on mainstream and is internalized by the group under scrutiny.*

In the US case presented above, we can clearly see both social factor strategies at their fullest. In a first scenario (assimilationist bias coupled with provision of exit options), when the group itself defies the invitation for exit and remains stubbornly attached to its own ways – as it was the case with Mormons – the mainstream moves towards attacking the main group cooperation mechanisms (i.e. polygamy, economic cooperation, social bonds) which are considered by the mainstream to be a hot bed of group “claim to exceptionalism” and the “Berlin Wall” of boundary that the group has erected between itself and the mainstream. Such moves are meant to break the hope for resistance within the group, provide for exit options and motivate the groups to move towards the assimilation process – these mainstream moves I refer to collectively as assimilationist bias.

In a second social factor scenario, the acceptance of smaller secluded non-mainstream groups follows once the mainstream norms change for *strategic reasons that benefit the mainstream without costs to it*. The example of *Gobitis* and *Barnette* case involving Jehovah’s Witnesses is the clearest example of what is meant in this context by strategic reasons of the mainstream. The popular opinion pressure and the FDR policy during the WWII were clearly main reasons why unpopular group previously considered suspicious and disloyal and susceptible to persecution both in and outside of the country has ironically enough become a beneficiary of its own persecution in a sense that the approval of their legal claims was found to be in congruence with (part) of the mainstream interests in proving its own moral superiority over adversaries during both WWII and later on Cold War. *Yoder* case further testifies to a fact that there is an increased toleration in American constitutional law (and likely a society) of small, socially distant and secluded non-mainstream religious groups that *place no cost at mainstream*.

In other words, the toleration of “weird” religious claims advanced by non-mainstream groups, to paraphrase Stanley Fish, *is inversely proportional to something important being at stake*- the more important the issue (meaning costlier or perceived to be costlier to mainstream), the less likely the approval and toleration. Satmar Hasidim Jews one-religion school district and former disapprovals of Orthodox Jews demand to open their stores on Sunday are cases that prove this claim.

It is unlikely that approval of such claims, as many judicial dissenting opinions quoted above show, would bring the whole society to a halt or cause any major disturbance. The real reason were the transgression of the mainstream which were still held seriously, in addition to, as it was argued above, the fear of a “band wagon” effect – the fear that if one group receive however small and perhaps even insignificant approval of its claim *as a group* others would follow. In short, the erection of group boundaries that was anticipated as a result of such legal approvals is considered a too high of a price or a risk to take. Hence, disapproval of non-mainstream religious group claims tells us a lot about a group itself – but it tells even more about the mainstream values and inclinations. Only when – as it happened later on with abandonment of Sunday closing laws – the mainstream moves somewhat further from the emotional-identitarian attachment to a certain practice and in a process adjusts its norms, non-mainstream religious groups can fit in without social and institutional costs to bear . To rephrase – what appears as the acceptance and accommodation of what was previously considered “odd” religious group practice is basically a process in which the mainstream gives up some attachment to previously emotionally cherished practiced, and a process in which boundaries of what is “acceptable/not acceptable” is stretched at margins.

On an institutional – legal side, as it was argued in chapter one, three institutional legal mechanisms define the limits of toleration and generally follow social developments. *First institutional mechanism* is the level and the nature of the “legalization” of works of religious groups and the (de)centralization of the level of regulatory decision making. *Second institutional mechanism* is the level of judicial influence on decisions regarding status of religious groups, as well as the level of judicial autonomy and discretion in the process. *Third institutional mechanism* is the nature and the socially constructed structure of judicial argumentation and evidence in cases dealing with the non-mainstream religious groups.

As far as these three mechanisms are concerned, their impact on relationship between mainstream and non-mainstream religious group is again clearly present in the US case. The level of and the nature of the legalization of works of religious groups and the level of decentralization of the regulatory decision making has clearly changed during 19th and 20th century in the US. From a full fledged local control that was hostile to minority religions throughout 18th and 19th century towards increased federal control of the religious group freedom issues, non-mainstream groups, at least in the US case, have certainly fared better compared to previous times, even though the control over many main issues that affect non-mainstream groups still remains tightly in hands of local majorities, for various pragmatic reasons. Nevertheless, the whole process was clearly marked with one major trait that was described in the chapter one, namely that the various (at one point, and not necessarily always) non-mainstream religious groups at various points in time were considered suspicious and suspected of disloyalty, Mormons, Catholics, Witnesses and likely many, many others .

Such suspicions were either a part of the nation building process, as it was the case with 19th century Mormons (or Native Americans or Catholics); or a part of waging a low or high

intensity internal and/or external conflict, as the case of Witnesses shows. The process of either nation building or engagement in conflict obviously involves clear emotional and identity based behavior on the side of mainstream, with clear boundary drawing effects on the non-mainstream groups which were considered or suspected as being internal enemies. But the process of federalization in which Mormons were “squeezed” into Utah, and the various processes in other federal states which have spontaneously created their own majorities; as well as a push towards increased federal control of the religious group freedom issues, certainly had some pacifying effects, even though the control over many main issues that affect non-mainstream groups still remains tightly in hands of local majorities often at expense of religious “outsiders” in a given area. It is not, however, certain that in future more federal involvement will necessary bring advantages for non-mainstream groups – if anything increase in provision of federal funding for religious groups might put non-mainstream groups in a disadvantaged position relative to mainstream groups, as well as place them under increased federal government scrutiny.

Second institutional mechanism, as it was noted above, is the level of judicial influence on decisions regarding status of religious groups, as well as the level of judicial autonomy and discretion in the process. In the overview of historical development of free exercise doctrine and empirical analysis of decisions, it was shown the plain level of judicial involvement has certainly increased, especially in the 20th century. However, the results of this involvement are by and far mixed and there is no reason to think that courts are some sort of “last refuge of protection” for non-mainstream religious groups. If anything, as the empirical overview showed, non-mainstream religious groups are definite losers in free exercise cases at least on a federal level – and as most authors agree, their losses are clearly attributable to their *social status as non-mainstream groups exemplified by their social distance from the mainstream*. In other words,

social distance of a non-mainstream group and the probability of losing a religious freedom claim in the courts are to a large extent directly proportional. Moreover, same empirical studies point to much evidence that judges cultural background, coupled with the influence of social norms and institutional limitations, has strong effect on decisions that involve non-mainstream religious groups.

Third institutional mechanism of importance here is the nature and the socially constructed structure of judicial argumentation and evidence in cases dealing with the non-mainstream religious groups. As the overview of judicial arguments in 19th and 20th century cases shows, the judicial argumentation can hardly be said to be “out of tune” with times and demands of society. In other words, what is a “normal” or “not normal” religion is historically fully contingent definition, stretching at margins yet retaining some level of stability. The argumentation, for example, thrown at Mormons describing them as Asiatic peoples and Mohamedans appears somewhat too strongly worded for contemporary tastes (at least publicly proclaimed tastes) and the general rhetorical moves of American society from fully Protestant Christian towards Judeo-Christian and finally a pluralist culture have left quite a mark on a structure of contemporary courts argumentation.

As Susan Hack noted, the establishment clause rhetorical structure is concerned not with, as in case of 19th century Justice Story, affirmation of the superiority of Christianity, but with providing a sense of “inclusion into the political community”. Yet, the free exercise clause rhetorical structure seems to be moving in opposite directions, as the *Smith* case shows – the perceived increase in religious diversity leads courts to affirm general subservience of non-mainstream religions claims so much so that one could conclude the content of religious life is again subsumed under belief-practice doctrinal approach. Finally, the overview of cases

involving smaller and secluded communities such as Old Order Amish and Hasidim Jews shows that the judiciary is indeed well aware and is operating using concepts I have elaborated at some length in chapter one – assimilation, size, social distance and the seclusion from the rest of the society, costs of behavior to mainstream and a group itself etc. - and threats these concepts as helpful guides for deciding the faith of non-mainstream group claims.

Either way, one thing is certain – what is considered to be mainstream social norms and a perception of what is mainstream or normal religion remains a baseline against which non-mainstream group's claims are pitted. This is not to say, as the lengthy quotes from various dissenting opinions show, that the content and source of these rhetorical moves are not clear and known to the members of the judiciary.

Chapter III: German cooperationist system

3. General legal framework

3.1 Constitutional provisions for the protection of freedom of religion and belief

On its face German Constitution or *Grundgesetz* (Basic Law, hereafter GG) is straightforward on religious freedoms and the prohibition of establishing a state church⁴¹³. Protection of freedom of belief is extended, in comparison to the US First Amendment, as Article 4 (1) protects not only freedom of belief, but also a general freedom of conscience, freedom of religion and philosophy, as well as specifying the right to freely practice one's religion without interference (Art. 4 (2) GG). The original text reads:

„(1) Freedom of faith and conscience as well as freedom of creed, religious or ideological, are inviolable.
(2) The undisturbed practice of religion shall be guaranteed.“

Other provisions affecting freedom of religion and belief are in Art. 3 (‘none shall be prejudiced or favored because of his faith or religion’); Art. 33, guaranteeing the protection of civil servants, public servants and officers against discrimination or favoritism on account of religion; and Art. 4, stipulating right of conscientious objection to military service on religious grounds. The issue of religious education in the schools is far less contentious than in other countries as Art. 7 (paragraph I) states that “Entire education system is under the supervision of the state” while paragraph three of the same articles clarifies that “Notwithstanding the State’s right of supervision, religious education will be given in accordance with the principles of the religious denominations.”

⁴¹³ This part is drawn from Jusic (2007), p. 72-74.

Irrespective of the textually open-ended provisions cited, as commentators noted, protections of fundamental rights can only be limited by other values of constitutional dimension; moreover, the reservations and limitations of rights follow European tradition in which rights are exercised within community⁴¹⁴. Hence, articles and accompanying norms defining however generally the scope and substance of collective religious organization are not to be viewed in isolation, but within the general normative and structural framework created by the German government and the Allied forces after the WWII, guaranteeing democracy, federalism and human rights, in an attempt to create a bond between the text and polity and the "normativity of the constitution and the existentiality of the political reality."⁴¹⁵

Three fundamental principles of the Basic Law can be summarized as follows. Article I dictates: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority"; and Article XX establishes a democratic and social federal state and provides that all agencies and officials are bound by law and justice. In sum, Germany is simultaneously a state governed and bound by law, and welfare state⁴¹⁶.

In terms of methodological and normative questions, it is usually argued that the GG presents a partial overcoming of the *Rechtstaat* (approximate translation would be 'state bound by law'), a popular (to say at least) concept in German legal theory similar but not identical to the Anglo-Saxon 'rule of law' term. A *Rechtstaat* would be "a closed system of logically arranged and internally coherent rules"⁴¹⁷ while the contemporary GG would be *Rechtsstaat* without value neutrality. As it was argued by other scholars, given experience of National-

⁴¹⁴ Edward J. Eberle, "Free Exercise of Religion in Germany and the United States," 78 *Tulsa L. Rev* 1023 (2004), p. 7. Available at <http://ssrn.com/abstract=837724> (downloaded 25.03.2007, 13:45).

⁴¹⁵ Emily Mosley, "Defining Religious Tolerance: German Policy Toward the Church of Scientology," *Vanderbilt J. of Transn. Law* 1145 (Nov. 1997).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*, and further on *Rechtsstaat* see n.86, Donald P. Kommers, "German Constitutionalism: A Prolegomenon," 40 *Emory L. J.* (1991).

Socialism, the individual liberty is conditioned on being a part of the whole or *belonging* – already a concept that introduces loyalty issues (of which see below). The Basic Law, in short, encompasses communitarian values and positive law is subject to a higher moral order⁴¹⁸.

Hence, without running a risk of overstating the issue, the text of the German constitutional (and a legal order based on it) remains committed to the order of values in which human dignity (Art. 1), is the most superior and penultimate of all values, with freedom of life (Art.2) and equal protection of law (Art. 3) next below and taking precedence over religious freedom. The state does not remain ‘merely’ neutral or reassess what is ‘right or wrong’ in accordance with the demands of situation and competing interests, but holds that normative values (human dignity, first and foremost) are intrinsic, have their own independent validity within the presumably overarching higher moral order to which, consequently, positive law is subject to⁴¹⁹. The Federal Constitutional Court confirmed this over and over again, holding firmly that the Basic Law encompasses „the objective order of values" as well as "a unified structure of substantive values."⁴²⁰

Tentatively, this type of order might be called ‘the order of closed pluralism’ or, as Brugger argues, the legal and political order of “liberal communitarianism” as distinguished from “liberal neutralism” ala Immanuel Kant and John Rawls⁴²¹. In light of that, some consequences for the regulation of religious groups are inevitable and sometimes far reaching. Given the order of values theory and accompanying general and more specific constitutional provisions it is far easier to theoretically justify succor and support enjoyed by traditional and

⁴¹⁸ Emily Mosley, „Defining Religious Tolerance: German Policy Toward the Church of Scientology,” *Vanderbilt J. of Transn. Law* 1146 (Nov. 1997).

⁴¹⁹ *Id.*, 1146.

⁴²⁰ *Id.*

⁴²¹ Winfried Brugger, “Communitarianism as the social and legal theory behind the German Constitution,” 2 *Int’l J. Const. L.* 431 (2004).

historically established religious groups. From the standpoint of the “liberal communitarianism,” the state needs to advance or, at the very least, provide grounds for positive freedom of realizing goals of religious groups and/or individuals looking to form such associations, while simultaneously remaining neutral and distanced in relation to any and all religious groups or, for that matter, worldviews and philosophical beliefs. Yet neutrality does not require the state to remain absolutely neutral towards those religious elements in everyday life (Sunday closing laws, observance of Christian holidays, etc.) that by virtue of their repetition are considered a part of the “wider social culture” and deemed by liberal communitarians to be a part of the process of “secularization in the widest sense of the term.”⁴²²

Such “sufficiently secularized” religious elements and the state support for their advancement or sustainment is, in liberal communitarian perspective, a legitimate interest of political community which retains an umbilical cord with a society by means of building a community-state nexus for entrenchment of contingent and precarious values of morality, solidarity and tolerance. Sharp lines between the state and society, as required (at least rhetorically) by the liberal universalists demand for strict neutrality of the state towards all value-laden systems of belief and behavior, are consequently blurred and state signals its own mixed “secular-but-pro-religion” or, at minimum, a diluted secular character⁴²³.

I submit there is a form of “democratic Schmittianism”⁴²⁴ lurking beneath the whole argument for liberal communitarianism as the theory behind the German constitution.

⁴²² Brugger, p. 452.

⁴²³ Id., p. 453.

⁴²⁴ The term “democratic Schmittianism” is a reference to Carl Schmitt, ex KronenJurist during Nazi era in Germany., renowned for his work on the concept of political and theory of sovereignty as a power to decide, in an almost arbitrary fashion, on “friend/enemy” distinction. Basically, friend/enemy distinction serves to delineate between loyal citizens as members of the political group that comprises closely knitted territory within whose borders citizens enjoy rights of protection in return for their allegiance to the state. All “outsiders” remain in the status of enemy. While a term “democratic Schmittianism” is itself problematic, it is drawn from works of Ernst-Wolfgang Beckenforde, the renowned judge of the German Constitutional Court and an acclaimed legal theorists,

“Democratic Schmittianism” demands, on some level, communal devotion to one or few (within the same framework or based on same premises) conceptions of good and, on top of it, reverence to law and state as the major premise underlying or providing necessary conditions for the realization of said concepts. The society – state relationship turns out to be one of intermingling: though the state provides conditions for the realization of the “communal values,” the state itself cannot produce said values. In short, there needs to be both devotion to value and the loyalty to state for two aspirations to be achieved simultaneously, which will become operationalized in a discussion of judicial conditions set for the registration of religious associations as corporations under public law below. In the church-state jurisprudence of the German Constitutional Court, this belief in necessity of underlying beliefs necessary for the existence of state is succinctly stated in what came to be known as “Boeckonforde’s dictum: ”the free, liberal and democratic state rests on assumptions which itself cannot deliver⁴²⁵.”

The whole idea of liberal communitarianism or “democratic Schmittianism” has two problematic spots, one theoretical, the other practical. Theoretically, problems are rather obvious. On the one hand, one could applaud the idea of “liberal communitarianism” as an attempt to cure a blind spot of the more “individualistically” oriented liberal theory, namely its difficulty in explaining and regulating life individuals lead not solely as individuals but at members of various groups, some of them not freely chosen – family and culture into which one was born being just two examples. On the other hand, the whole concept of “liberal communitarianism” might sound as an oxymoronic contradiction in terms: one cannot sustain devotion to communal goods *and* free choice of individuals to choose their own conceptions of good simultaneously all

see Ernst-Wolfgang Beckenforde “The Concept of the Political: a Key to Understanding Carl Schmitt’s Constitutional Theory” in *Carl Schmitt: Law as Politics*, David Dyzenhaus, ed., (Duke University Press, 1998), p. 37-55.

⁴²⁵ Ernst-Wolfgang Bockenforde “Die Entstehung des Staates als Vorgang der Sakularisierung” in *Recht, Staat, Freiheit*, (Frankfurt am Main, 1992), p.112.

the time without one or the other value (communal good v. individual choice) necessarily backing-off at some point. Presumably, liberal communitarians would respond that state is there to use legal means in order to balance between two individual and community – as every legal system does, in final analysis. To this one could reply with the old counter-question: who gets to decide and in accordance with what criteria on conflict between apparently incommensurable values? And who is in-charge of defining community good- majority, minority, somebody between, or perhaps pseudo-independent bodies? The point here is not to discuss theoretical issues in detail, but to set ground for a discussion that will become pertinent in several cases decided by the German Constitutional Court (of which shortly).

Second issue connected with the liberal communitarianism as the theory behind Grundgesetz is of a practical nature and is much more of my concern here. As it is obvious from the discussion above, two basic assumptions of liberal communitarianism are, first, devotion to communal good or, in reference to religious values and practices shared by majority, translation of some very basic religious practices and consequent support for religion – state relation which sustains the same into the “cultural heritage with secular purpose”; and, second, loyalty to the state as the “sustainer” of those practices. Here, new institutional economics would neatly fit in with its theory “path dependence” and the insistence on shared mental models and ideologies as the cognitive mechanisms providing social glue as a means of dealing with an uncertain world via provision of the informal rules of game which explain the institutional structure built on that very same ground. With regards to state-church relations, there is much to say in favor of this view: it provides for an elegant explanation of slow yet steady development of legal-institutional practices governing relationship between religion and state in within the German legal context.

There is, however, an overly statist and overly static tone to the whole liberal communitarian/institutional economics avenue of analysis. The overly statist assumption that the state is absolutely necessary for the provision of basic goods and conditions required for activities of religious group is, in current times, not as obvious as it used to be, at least not for all religious groups. There lies a first problem with this system: it appears even-handed yet evenhandedness requires preservation of status quo, that is, protectionist measures. Protectionist measures, measures against the entrance of non-traditional religious groups reveal the overly statist view taken by this whole venue of thinking: evolutionary-cognitive mechanisms behind and the institutional super-structure overhauling it was meant to erect an appropriate superstructure reflecting needs of society and to achieve a *stasis* of the legal system – retain the equilibrium, in economic terms. The institutional structure serves majority preferences as well as institutional stability well, and the practical problems of dealing with the non-traditional or non-Christian religions are easily resolvable as the shifting of costs on either uninfluential or less represented religious groups is an affordable option. Given current influences of the freedom of movement inside the EU, globalization, migration and the flow of information, it's an open question how long and in what form the statist view will be able to sustain itself in a satisfying way. There are some legal problems that stem from this type of system and they will be further explored below, with reference to protectionist measures against entrance of new religious groups and the legislative and judicial regulation of non-traditional religious groups.

3.2 Role of international and European law

Within the framework of German Constitution, international law ranks below the Constitution but, in accordance with Art. 25 of GG, above ordinary laws (statutes, statutory regulations and by-laws). General norms of international law create rights and duties for German

citizens and in some cases non-citizens also⁴²⁶. Germany is a signatory to all major international and supranational treaties involving religious freedom, i.e. International Convention on Civil and Political Rights⁴²⁷ and the European Convention of Human Rights (ECHR)⁴²⁸, whose articles 18 and 9 respectively protect religious freedom by virtue of being transformed into the part of national German legal system. Nevertheless, these guarantees and their limitations clause do not play any major role, as they are interpreted by German courts as guaranteeing no more than the above cited Art. 4 of the GG⁴²⁹. In case of other international human rights treaties, they became part of the German domestic law by means of ratification, as specified in the Art. 59 of GG.

Generally speaking, the legislature on federal level and the level of federal states would amend statutes in order to ensure their harmony with obligations arising from international law. The same goes for judicial interpretation of the role of rights and duties of international law with respect to German internal legal system: German Constitutional Court holds that in all cases German law needs to be interpreted in accordance with the principle of “openness to international law.” Though cases of collision between constitutional obligations and international norms with respect to religious freedom have not arisen as yet, most likely constitutional rights and obligations would take precedence over norms of international law in congruence with the “inferior” position of international law relative to the GG⁴³⁰.

German law in practice has taken a similar position in relationship with the ECHR and its Art.9 as with its relationship with international law. Provisions of the ECHR protecting freedom of religion or belief are a part of the German domestic, but the limitations clause of the

⁴²⁶ Gerhard Robbers, “The Permissible Scope of Legal Limitations on the Freedom of Religion and Belief in Germany,” *19 Emory Int’l L. Rev.* 841, 843 and *infra*.

⁴²⁷ 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ICCPR).

⁴²⁸ European Convention of Human Rights, available at [http:// www.echr.coe.int/](http://www.echr.coe.int/).

⁴²⁹ Gerhard Robbers, “The Permissible Scope of Legal Limitations on the Freedom of Religion and Belief in Germany,” *19 Emory Int’l L. Rev.* 841, 843 (2005)

⁴³⁰ *Id.*, p. 845.

Art. 9, would be interpreted in accordance with the approach of „constitution conforming interpretation,“ which in theory means that among competing interpretations of a particular law, only such interpretation that keeps the law within the boundaries set by the constitution and relevant case-law would be upheld. In practice, all of the above is negligible or irrelevant. German courts mostly disregard the limitations clause of the ECHR and interpret all limitations and law in accordance with the relevant constitutional provisions which are perceived as guaranteeing far more reaching protection of freedom of religion and belief than the ECHR⁴³¹.

Relationship between the EU law and German domestic law has not played, at least so far, very significant role with regards to regulation of the collective aspects of the freedom of religion and belief. Again, in theory, EU law should prevail over domestic law of member states. Nevertheless, the prevailing attitude of the German Constitutional Court so far was that though this primacy of the EU law is to be respected, the Constitutional Court retains a right to step in and protect fundamental rights guaranteed in the Bill of Rights of GG in case if the encroachment of these rights by the EU law is „gross.“ Future positions and holdings of German courts with respect to as-yet legally non-binding Constitution of the EU and its European Charter of Fundamental Rights will also not be significantly altered: Art. 53 of the European Charter of Fundamental Rights states that the limitation clauses of the Charter will not extend further than limitation clauses of Member States. At any rate, limitation clause of the Art. 9 of the ECHR prevails over one in the Charter, and the attitude of German courts towards the ECHR was already explained above. In short, it is safe to say that most powers of deciding cases relating to religious freedom will remain firmly in hands of German courts⁴³². Moreover, other European

⁴³¹ Id.

⁴³² Id., p. 844.

treaties stand firm on respecting and preserving national cultures and traditions, as it is, i.e., stated in the Art. 6(III) of the Treaty establishing the European Union (Amsterdam Treaty).

There are, however, areas of the activity of religious groups already, at least on the level of „letter law“, indirectly yet significantly under the influence of the EU law. Primarily, those are guarantees of the freedom of movement of goods and services and the relevant EC competition rules protecting proper functioning of the market and the corresponding freedom of market participants. Many economic activities of religious groups, profitable or not, would fall under provisions of the Art. 81 of the Treaty Establishing European Communities ensuring equal access of all market participants within the EU and disabling domestic protective measures of the Member States⁴³³. In the same venue are activities of religious groups that might fall under merger control regulation, given that many groups are either a part of a larger, hierarchically organized religious organization, or they act in concert, which would mean that their activity could of considerable interest of the EU Merger Task Force. Potential area of conflict is also perceivable in terms of state aid, given that Art. 87 of the TEC prohibits the same, yet allows for exception when it comes to promotion of „culture and heritage.“⁴³⁴ Secondary legislation of the EU, primarily that relating to equal treatment in employment and the more recent regulations forbidding discrimination on the basis of race, national origin, religion, sex or sexual orientations, will also be another area where significant discrepancies might occur in future, although so far no case law in this area is available.

⁴³³ Lasia Bloß, “European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process.” Jean Monnet Working Paper 13/03 (2003), p. 63. Available at <http://www.jeanmonnetprogram.org/papers/03/031301.html> (downloaded 24.02.2007, 16:15). See Art. 81 of the TEC at <http://www.europa.eu.int/eur-lex/en/>.

⁴³⁴ Lasia Bloß, “European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process.” Jean Monnet Working Paper 13/03 (2003), p. 64.

3.3 Contemporary federalist system and a historical overview of the development of the cooperationist system

Germany is organized as a federal country, consisting of sixteen federal states (Länder). This means that in addition to the supreme federal constitution, there are also states constitution and legal practices of states which, more or less, retain considerable freedom of regulating religious groups by means of legislation, different agreements between states and churches and religious groups, as well as large and growing body of case law of lower courts⁴³⁵. Practically, almost all everyday issues arising in relationship between religious organizations and groups on the one hand and the state on the other hand are resolved on the level of federal states or their subdivisions⁴³⁶. Far from being just a trait of the federal system, effects of this horizontal separation of authorities are crucial for regulation. I.e., the amount of money certain religious group receives from the state varies, as the example of different sums of *Kirchengeld* (church money distinct from church taxes) churches receive in, i.e., Bavaria and Berlin. In addition, peculiarities of everyday regulation of religious groups depend to a large extent on the historical background and social practices prevalent in a given federal state.

For historical reasons, the representation of Catholic and Protestant churches across states varies geographically and there remains (though this has changed throughout the time) more or less a line of division between predominantly Catholic v. predominantly Protestant federal states. The division goes back far in history, dating to Martin Luther's Reformation in 1517 and the Religious Peace of Augsburg in 1555 which granted monarchs in a given territory ability to decide on which religion they would follow, deciding simultaneously for themselves and their

⁴³⁵ Gerhard Robbers. "Religious Freedom in Germany," *International Law and Religion Symposium*, Brigham Young University Law Review, 2001 (available via WestLaw).

⁴³⁶ Literature on regulation of church-state relations on level of federal states in Germany is vast and I do not intend to discuss it in detail here. For analytical overview and analysis, see Axel Freiherr von Campenhausen, *Staatskirchenrecht: Ein Studien-buch*, (3d ed. 1996).

subjects – cuius region, euis religio⁴³⁷. Further improvements were made in after the Peace of Westphalia in 1648, which explicitly mentioned the “freedom of conscience”. Not everyone was included in these grand proclamations – Jews, along with some other smaller religions, remained for long under a separate disfavored status, though some improvements were made especially after the 1812 Emancipation Edict for Jews in Prussia which granted (at least on paper) same civil rights to the Prussian Jews as to the Prussians of Christian faith⁴³⁸. The German Constitution of 1848 proclaimed full freedom of conscience and belief for all Germans irrespective of religious affiliation and prohibited establishment of the state church. The trend was followed up in the Weimar Constitution of 1919, whose provisions on prohibition of state church and freedoms of religion and belief were incorporated into currently governing Basic Law following the end of the Second World War⁴³⁹.

Throughout the turbulent Weimar period and the National Socialist period, churches have played at a time a positive but also negative or at least controversial role as well, and the historical record remains disputed. Following the defeat of the German Reich in the WWI, the Protestant church “initially welcomed the advent of the Third Reich and in statement after statement enthusiastically described Hitler's rise to power as a divine miracle“ which was followed, in 1933, by Hitler's creation of the pseudo-Protestant German Evangelical Church⁴⁴⁰. Catholic Church, on the other hand, was resilient towards inside infiltration of Hitler's apparatchiks into the Church ranks, yet it seems that it also had a role in Hitler's rise to power, give that the Catholic Center Party, influenced by the Catholic Church, approved the Enabling

⁴³⁷ Gerhard Robbers, “The Permissible Scope of Legal Limitations on Freedom of Religion or Belief in Germany”, 19 *Emory Int'l L. Rev.* 841, 869 (2005).

⁴³⁸ *Id.*, 870.

⁴³⁹ *Id.*, 871.

⁴⁴⁰ Emily Mosley, „Defining Religious Tolerance: German Policy Toward the Church of Scientology,“ *Vanderbilt J. of Transn. Law* 1142 (Nov. 1997) citing Frederic Spotts, *The Churches and Politics in Germany*, at x (1973).

Act on March 24, 1933, de facto surrendering dictatorial powers to Hitler. This was, in turn, followed by the signing of Concordat between the Vatican and Hitler's Germany. The Concordat is legally valid to this day⁴⁴¹.

After National Socialism has been defeated, the Protestant Church already in 1945 issued a proclamation regarding their responsibility for the crimes committed during the WWII and the reign of Hitler, while however Catholic Church has never entered a serious debate on the events. Nevertheless, in the materially and morally ruined German society, both main churches have survived the war with a much higher degree of authority than any other institution with a long tradition in a German society, and have been regard both by themselves and the Allied forces as one the important partners in the project for reconstruction of the democratic society committed to basic liberties and protection of civil and human rights⁴⁴². As one author notes, "as the principal element of stability in the post-war chaos and as the main source of values for a spiritually starved people, the churches found themselves at the war's end in a position of unique authority."⁴⁴³ Military authorities decided that that "moral rehabilitation would be the churches' business while economic, political, and social reconstruction was the concern of the occupational authorities."⁴⁴⁴ The social role of traditional churches was once again reestablished and firmly entrenched, and during the drafting of the GG the Allies decided not to alter legal system of cooperation between church and state established in the Weimar constitution and the system was preserved verbatim.

Historical background coupled with the economic immigration flux beginning in 1960's and accelerating at a faster and faster pace ever since, by and large, determined the religious

⁴⁴¹ Id.

⁴⁴² Id., 1142.

⁴⁴³ Id., citing Frederic K. Spotts, *The Churches and Politics in Germany*, at 47 (1973). Also see Spotts, p. 51-111 for a recount of Allied Forces cooperation with churches during the reconstruction.

⁴⁴⁴ Id., citing Frederic K. Spotts, *The Churches and Politics in Germany*, at 59 (1973).

structure and demographics in Germany today. With an estimate population of some 83 million inhabitants, Catholic Church officially claims 26.5 million adherent, while numerous Protestant churches (Lutheran, Reformed or Unified), which are territorially organized into „State Churches“ (Landeskirchen) officially claim some 26.3 million members⁴⁴⁵. One should also add that some 22 million Germans, mostly those located in former Eastern Germany, make no confessional allegiance. Of other religions, Islam has some 3.2 million adherents, though the real numbers are difficult to know precisely given migration patterns and the complexity of deciding who is a Muslim. Orthodox Christians have some 1.2 million adherents; Jehovah's Witnesses 170.000; Jewish communities some 100.000; and the rest is occupied by number of other religions including the Church of Jesus Christ of Latter Day Saints (LDS) and new religious movements.

Every “entering” religious group, mostly non-traditional ones (outside of the triad Catholic, Protestant and (partially) Jewish communities) without a set entrenched legal status, needs to obtain a separate recognition of its legal status in every federal state and the treatment and obstacles and benefits again vary widely, depending on cultural, demographic, historical and political reasons. Different status of Jehovah's Witnesses or Muslim associations across German states is a practical evidence of this phenomenon. These particular problems will be in focus of discussion further below - for now suffice it to say that the German federal system produces unevenness of treatment of religious groups across states, providing incentives for concentration of particular religious groups in certain states relative to others, be it for historical reasons or the reasons of legal and political easements; yet the same system simultaneously opens spatially

⁴⁴⁵ Id., 868.

closed spaces for “trial and error” – or more likely “error and error” - experiments in new ways of dealing with regulatory issues, one of the known features of federal systems.

3.4. Between corporations under public law and private association: status of religious organizations

3.4.1 General constitutional framework regulating religious groups

In GG, the prohibition of the establishment of the state church and the special status of religious institutions as “corporations under public law” with guaranteed autonomy and self-governance is achieved via Article 140 GG, which incorporates into the GG the relevant articles of the Weimarer Reichsverfassung (hereafter WR) 136 to 141⁴⁴⁶.

As it obvious from the text, these constitutional provisions favor those churches already historically present in Germany, the Catholic Church and the Evangelical Church (which shall be treated here as one church, living aside its rather peculiar organization). In addition, the par. 5 of the Art. 137 of the WR is a clear cut administrative obstacle for the non-traditional religious

⁴⁴⁶ This part is drawn from Jusic (2007), p. 73, n. 26. Quoted provisions state following: “Article 140 GG: “The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919, are an integral part of this Basic Law.”

Article 137 WRV:

(1) There is no state church.

(2) Freedom of association is guaranteed to religious bodies. There are no restrictions as to the union of religious bodies within the territory of the Federation.

(3) Each religious body regulates and administers its affairs independently within the limits of general laws. It appoints its officials without the cooperation of the Land, or of the civil community.

(4) Religious bodies acquire legal rights in accordance with the general regulations of the civil code.

(5) Religious bodies remain corporations with public rights in so far as they have been so up to the present.

Equal rights shall be granted to other religious bodies upon application, if their constitution and the number of their members offer a guarantee of permanency.

When several such religious bodies holding public rights combine to form one union this union becomes a corporation of a similar class.

(6) Religious bodies forming corporations with public rights are entitled to levy taxes on the basis of the civil tax rolls, in accordance with the provisions of Land law.

(7) Associations adopting as their work the common encouragement of a world-philosophy shall be placed upon an equal footing with religious bodies.

(8) So far as the execution of these provisions may require further regulation, this is the duty of the Land legislature” in Lasia Bloß, “European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process.” *Jean Monnet Working Paper* 13/03 (2003), p. 37. Available at <http://www.jeanmonnetprogram.org/papers/03/031301.html> (downloaded 24.02.2007, 16:15).

groups in attaining status of corporations under public law, since one of the requirements is that “their constitution and the number of their members offer a guarantee of permanency.” Hence, non-mainstream religious groups are of course allowed to spread their message, but, as it will be shown in some detail further below, they face severe administrative obstacles in the case they try to entrench themselves in the sphere of social production. In addition, non-mainstream religious groups have to compete with the de facto state-backed monopoly of established churches⁴⁴⁷. Irrespective of this obvious drawback, German legal rhetoric’s remains firmly stands on position that the German church-state system is organized around three basic principles: neutrality, tolerance and parity⁴⁴⁸.

3.4.2 Established and not so established: corporations, church taxes and private associations

Religious institutions recognized by the state as “corporations under public law” qualify for a great number of statutory privileges. The autonomy of churches is highly protected, absolutely protecting matters of religious teaching and conferring to corporations rights of self-administration and ordering of internal affairs, as well as a number of exemptions from applications of general laws (i.e. discriminatory practices on a basis of gender on the basis of religious views) are allowed.⁴⁴⁹ Ecclesiastical service and labor law, promulgated by the internally governing organs of a particular group on the basis of the religious belief, is also

⁴⁴⁷ Jusic (2007), p. 73-74.

⁴⁴⁸ Gerhard Robbers, “State and Church in Germany,” in *State and Church in the European Union* (Gerhard Robbers ed., 1996), p. 57-60.

⁴⁴⁹ Alex von Freiher Campenhausen, *Staatskirchenrecht* (C.H. Beck’sche, Munchen 1996), p. 346-347. Hereafter Campenhausen (1996).

protected and given a “special stance” unlike ordinary service and labor law⁴⁵⁰. The stance was confirmed in several important cases. Federal Constitution Court affirmed that the Evangelical Church in Bremen is acting within the protected sphere of self-determination and governance once the church suspended minister’s pastoral rights and duties during his time in service as a representative in the state or federal legislature⁴⁵¹. Also, Catholic hospital may fire a doctor taking a public stance pro abortion notwithstanding provisions of general law protecting employees from arbitrary dismissal⁴⁵² since, as judges defined it, “the credibility of the Church may depend upon whether those of its members whom it employs respect the Church rules.”⁴⁵³

Church property is tax exempt and enjoys special state protection as a part of a national heritage.⁴⁵⁴ Religious services provided by the clergy in military and hospital settings are also guaranteed⁴⁵⁵. Faculties of theology, though nominally part of the state public higher education system, are also exempted from a number of the federal state’s general laws on higher education, and are, in effect, almost solely run by churches without much state intrusion⁴⁵⁶. On the taxation side, corporations under public law also qualify for various tax concessions such as relief from corporate income tax (§ 9 *Körperschaftsteuergesetz*), inheritance and gift taxes (§ 13 (1), No 16 and 17 *Erbschaftsteuergesetz*) and quite a few others⁴⁵⁷.

The limits of this wide reaching autonomy are, as the GG provides in the above cited Art. 140 (incorporating Art. 137 of the Weimar Constitution (WrV), “limits of law applicable to all.”

⁴⁵⁰ 70 BVerfGE at 138 (165 ff.).

⁴⁵¹ David Currie, *The Constitution of the Federal Republic of Germany*, (University of Chicago Press, 1994), p. 265 and n. 105, see case 42 BVerfGE at 336.

⁴⁵² Id., p. 266 and n. 113, see case 70 BVerfGE at 401-407.

⁴⁵³ Id., p. 266 and n.114, 70 BVerfGE at 166.

⁴⁵⁴ Campenhausen (1996), p. 310-319.

⁴⁵⁵ Id., p. 229-237.

⁴⁵⁶ Id., p. 248-254.

⁴⁵⁷ Bloß, p. 41.

There appears to be a consensus among commentators that generally speaking not many cases (the number is minimal) are brought for reasons of the collusion between generally applicable laws and the practices of the established traditional churches. Traditional churches rarely if ever dispute the fidelity to the GG and the upper hand of ordinary laws or the application of general laws onto them, save in areas shielded by autonomy which, as shown above, is very wide. Discrepancy in requirements between traditional churches and the general law is resolved on friendly basis and mostly through negotiations with local level authorities, in which both the traditional churches aspire to uphold public order and peace, while authorities try to satisfy interests of the other side in a most generous way. No dramatic and very important court decisions have been rendered in this area, and the Constitutional Court has stated in a clear way that in cases when self-determination of churches is being dealt with and balanced against other legitimate state interests, "the self understanding of the churches has to be given special consideration."⁴⁵⁸ To illustrate that this is indeed the case, it is enough to mention that in case concerning a challenge to neutral statutory provision regulating the decision making in hospitals (used by everyone, to be sure) the Constitutional Court concluded that that decision making regulations could not be applied to those hospitals operated by religious institutions⁴⁵⁹. Considering the important role traditional churches play in the German society and the link between them and the state established after the WWII, there is no reason to think that legislator's preferences or future court decisions will shift in a way that would disturb this peaceful union.

To illustrate a privileged position of churches recognized as corporations under public law, one only needs to mention that one of the main sources of funding of religious institutions is

⁴⁵⁸ BVerfGE 53, 366 (401).

⁴⁵⁹ Currie, *supra*, at 265 and n. 109, 53 BVerfGE 366 (1980).

church tax (*Kirchensteuer*.) It is collected using the regular state tax system. The amount of tax is approximately 8-9% of individual yearly income tax and roughly 3-4% of collected church taxes are withheld by the state on account of administrative costs⁴⁶⁰. Though the nominal membership of Catholic Church and Protestant Churches in all federal states is not equal, both biggest churches receive approximately equal sums, i.e. in 2000 each church received circa 4 thousand million EURO each⁴⁶¹ and the churches are entirely free to decide how to spend that money. Church tax is not obligatory and as the freedom of religion is guaranteed everybody has an opportunity of opting-out by means of so called *Kirchenaustritt*, which is a simple statement of relinquishing the status of Church member, proven by means of presenting the legally validated certificate authorized by the state authorities in charge.⁴⁶² Judged by the amount of taxes churches are collecting, and having in mind the opt-out provisions (which mean that this kind of tax is not a proper tax *stricto sensu*), it seems that the substantial part of population is not full resentful towards paying, yet the number of collected church taxes is continually dropping, according to Deutsche Bischofskonferenz⁴⁶³.

In return for the elevated status they enjoy, churches have been the most important organizers of the social welfare services in Germany, providing services ranging from preschool education and hospitals to care for disabled and elderly persons. Roughly 1/5 of the total sum collected by church taxes is spent by churches on providing welfare services; however, the state also provides substantial additional funding. Usually, churches argue that it is cheaper for the

⁴⁶⁰ Bloß, p. 47.

⁴⁶¹ Id. and n. 114.

⁴⁶² Id., p. 49 and see Jusic (2007), p. 75.

⁴⁶³ See statement of Deutsche Bischofskonferenz on church taxes at http://dbk.de/zahlen_fakten/kirchensteuer/index_en.html (last viewed 11.10.2007, 7:46 p.m.).

state to use already existing churches human and material resources for provision of social welfare services, than to organize everything anew⁴⁶⁴.

The whole system of church taxes collected by the state alongside with prevalence of religious organizations as main suppliers of social welfare services is well entrenched, but has been challenged and altered legally ever since the WWII and has come again under critical scrutiny especially following the collapse of the Berlin Wall and the reunification of Germany in 1989. Traditional churches argue that the current system serves the state well as it is ‘fair and efficient.’ Critics maintain that the collection of church taxes by the state directly is anachronistic system and compromises both position of the state and the church and might ignite resentment among populous at a time when Germany is becoming increasingly diverse country. Yet others respond that the mere fact of state-collection of church taxes does not represent any form of excessive entanglement of two or a form of coercion, but the mere efficient administrative measure whose transparency leave no place for doubt in good intentions of either.

The opportunity for churches to levy taxes was previously broader than it is today. Until 60’s and mid-70’s churches were allowed to levy taxes on corporations or any other associations,⁴⁶⁵ against the spouses of their members,⁴⁶⁶ or against individuals who have withdrawn from the congregation⁴⁶⁷ and all of these privileges were found to be contrary to principles of religious freedom or the right to personal autonomy. Nevertheless, in the two so-called “church tax cases” (challenging constitutionality of church taxes as either contradicting provisions on the freedom of religion and church autonomy given intrusion by the state in church affairs or because they constitute a de-facto establishment of the state church,) the court upheld

⁴⁶⁴ Id., p. 49-50 and Jusic (2007), p. 75-77.

⁴⁶⁵ Currie, *supra* n. 38 at 247 and n16. 19 BVerfGE 206 (1965).

⁴⁶⁶ Id., n. 17 and see case 19 BVerfGE 226 (1965).

⁴⁶⁷ Id., n. 18 and see case 44 BVerfGE 37 (1977).

almost per se obvious, given explicit regulations to that effect, constitutionality of the right of churches to use state machinery to administer church taxes⁴⁶⁸.

In *Church Tax I* case, the Federal Constitutional Court reiterated provisions of the GG and arguing that the prohibition of the establishment of state church is absolute, while churches are granted corporate and public status. However, since the collection of church taxes by the state machinery represents involvement of a sovereign power in church affairs (and vice versa, one could add), church freedom is partially curtailed and the judicial review (as in a present case) of church internal affairs is in order⁴⁶⁹. *Church Tax II* case presented another challenge to the collection of church taxes by the state. Plaintiff's, former members of churches who have relinquished their membership and hence were exempted from taxes, claimed that the fact state is administering collected taxes to denominations proportionally to their membership represents an establishment of state church and a form of coercion. The Constitutional Court responded that state is merely lending its administrative apparatus to churches so as to live up to its constitutional obligations and create necessary conditions for the fulfillment of church functions, without however coercing anyone to accept teachings of any church or religion. In other words, as long as there is no coercion – as it is rather obvious that there is not, given possibility to relinquish status in the church and not pay any taxes without incurring legal costs or legal punishments - cooperation between state and church does not violate prohibition against the establishment⁴⁷⁰. In short, legal challenges to church taxes are not likely to succeed at this juncture in time as that would not be met by either public support or institutional support.

⁴⁶⁸ Emily Mosley, „Defining Religious Tolerance: German Policy Toward the Church of Scientology,“ *Vanderbilt J. of Transn. Law* 1162 (Nov. 1997) citing Donald P. Kommers, *Politics and Government in Germany, 1944-1994: Basic Documents* 57 (1994).

⁴⁶⁹ Id., n. 179, 18 BVerfGE 386 (1965), as translated in Kommers, at 311-312.

⁴⁷⁰ Id., n. 179 and infra, 19 BVerfGE 217 (1966).

On the opposite side of spectrum of the corporations under public law, one can identify a large number of the non-traditional or minority religions and even some more traditional ones that are registered as the private associations whose status, rights and obligations is governed by the private law⁴⁷¹. In principle, for a religious group to attain a status of recognized religious organization, the group must satisfy must satisfy four requirements. First, at least two members (for „non-registered“ associations) or seven members (for „registered“ associations) and the existence of „long-lasting goals“; second, compliance with the constitutional order; third, in accordance with the words "religious community," the organization's cause and purpose must create a common religion for its members; finally, the organization must intend to perform its tasks thoroughly⁴⁷². Difference between registered and non-registered associations reflects mostly on their legal personality and the possibility of tax concessions. Registered associations have full legal personality and the executive organs, and their structure is similar to that of limited liability companies in German law. Non-registered associations are corporations with possible tax-concessions but without a full legal personality. The whole process of registration is done on a state level and frequently German courts have final saying in granting or rejecting status of these associations, which has led to quite uneven practices across states and courts⁴⁷³.

Both registered and non-registered associations must pursue charitable purposes in order to retain their status and qualify for tax concessions. Donors, whose names and ammounts of donations are protected with data protection laws, have a right to deduce 5-10% of their income tax on account of donations for charitable purposes. Outside of this area, associations with

⁴⁷¹ Josef Jurina, “Die Religionsgemeinschaft mit privatrechtlichem Rechtsstatus” in *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland* [Federal Republic of Germany's Handbook on Church-State Rights] (Joseph Listl & Dietrich Pirson eds., 2d ed. 1994), p. 689.

⁴⁷² Id., p. 690-94.

⁴⁷³ Michael Ernst Porksen and Til Porksen, “Third Sector Organizations in Germany: Legal Forms and Taxation,” *International Charity Law: Comparative Seminar*, Beijing, China, October 12-24, (2004), on file with author.

religious purposes can compete for government funds on equal footing with all other legal and physical persons, but cannot make unrelated business income in amount of more than 3000€ yearly. Special and more restrictive regulations pertain to foreign or foreign – related groups⁴⁷⁴. On a whole, compared to status of corporations under public and the their immense list of privileges (and the ammount of money received yearly), private associations in spite of their number and presence remain fractured and mainly disadvantaged.

3.5 Non-mainstream groups attempts to social entrenchment

This part gives overview of three case studies of a treatment of typical non-mainstream religious groups in Germany, Jehovah's Witnesses, Muslims and "sects" or New Religious Movements. The case studies are meant to analyze (non)attempts of these groups to either become recognized as corporations under public law after long, peaceful existence (Witnesses), entrench themselves in the society (Muslim) or spread their activity ("sects").

3.5.1 Jehovah's Witnesses

Given the privileged status religious institutions recognized as corporations under public law enjoy, no wonder that 'new religions' (non-traditional ones) have applied for such status. Yet, the success was scant and the case of Jehovah's Witnesses is instructive in this respect⁴⁷⁵. Witnesses have been fighting legal battles to attain the status of recognized religion for some 25 years. In March 1990, forty years old ban on Witnesses religious activities by the former German Democratic Republic was revoked and Witnesses attained a legal status of religious

⁴⁷⁴ Id.

⁴⁷⁵ This part draws on Jusic (2007), p. 81.

community⁴⁷⁶. Following the reunification of Germany in October 1990, Witnesses requested that they be granted a status of public corporation under public law by the Landesregierung Berlin (Berlin's administrative body granting corporation status). The final response came only two years after and Landesregierung declined Witnesses application on two grounds. First, Landesregierung argued that public corporation status was did not exist as legal caterogy under laws of the former GDR, most likely suggesting that Witnesses should seek less favorable status as private association. Second, Landesregiereung held that Witnesses beliefs are at odds with the Constitution, as Witnesses did not adhere to the principle of tolerance and had almost 'hostile,' in Landesregierung view, attitude towards the state⁴⁷⁷. On first appeal to the Berlin State Administrative Court, the Court upheld Landesregiereung view on the issue of status of Witnesses in the former GDR while simultaneously affirming the right of Witnesses to the status of corporation under public law as prescribed in the GG.

The culmination came in 2000, after the Berlin State Supreme Court affirmed the administrative denial of granting the status of the corporation under public law⁴⁷⁸. Both parties appealed again, this time to the Federal Administrative Court. Jehovah's Witnesses argued they were hardly a new religion, as they have been present in Germany for almost one hundred years. Furthermore, in accordance with the Art. 140 GG and incorporated Art. 137(5) WR, they claimed the permanent membership of some 170,000 individuals. However, the Federal

⁴⁷⁶ Scott Kent Brown II, „Jehovah's Witnesses v. Land of Berlin: Requiring Religious Communities seeking Public Corporation Status in Germany to satisfy „Meaning and Purpose of Corporation Status“ Test,“ International Church-State Symposium, *Brigham Young University Law Review*, 1999, (on file with author, available at WestLaw), p. 683.

⁴⁷⁷ Procedure of Witnesses seeking public corporation status was described in Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] [Federal Administrative Court], reprinted in 36 Neue Juristische Wochenschrift 2396 (1997), cited in Scott Kent Brown II, „Jehovah's Witnesses v. Land of Berlin: Requiring Religious Communities seeking Public Corporation Status in Germany to satisfy „Meaning and Purpose of Corporation Status“ Test,“ International Church-State Symposium, *Brigham Young University Law Review*, 1999, (on file with author, available at WestLaw), p. 683-684 and n.64.

⁴⁷⁸ BVerfG 2 BvR 1500/97, 19 December 2000, NJW 2001, in Bloß, p. 42.

Administrative Court denied their application claiming that granting status of corporation under public law demands loyalty to the state, which the courts found missing, as the Jehovah's Witnesses do not participate in the political process either by voting or being voted for. In order to support this claim, the Federal Administrative Court applied hitherto unknown and novel test which they termed "meaning and purpose of corporation status,"⁴⁷⁹ whose essence, or so the Court claimed, is based on two conditions which a religious organization is suppose to fulfill if it is to move from private to public law setting with all concomitant benefits.

First condition is the "reciprocal respect between the church and the state."⁴⁸⁰ Basically, though the Court reasoning remain obscure at this level, the religious community which like Witnesses does not take part in the political process and even questions the foundations of state existence does not satisfy the reciprocity part of the test. Not much has been said about any positive action that Witnesses have taken in order to shake the foundations of the German state, though on closer reading it seems the Court implicitly granted that the passivity of and abstention of Witnesses in terms of political engagement somehow has same effect as an action geared towards undermining the state authority.

Second condition was termed loyalty to the state and it looks very similar to the reciprocity part⁴⁸¹. Essentially, the discussion of the Court came down on same issue. Contradicting the discussion in reciprocity part of the test, Witnesses were "praised" by the Court for not having a negative attitude towards the state, yet at a same time chastised for the not engaging in election (either as voters or being voted for) and further more for excommunicating

⁴⁷⁹ Scott Kent Brown II, „Jehovah's Witnesses v. Land of Berlin: Requiring Religious Communities seeking Public Corporation Status in Germany to satisfy „Meaning and Purpose of Corporation Status“ Test,“ International Church-State Symposium, *Brigham Young University Law Review*, 1999, (on file with author, available at WestLaw), p. 684 and seq. and n.64 and infra.

⁴⁸⁰ Id., p. 686.

⁴⁸¹ Id., p. 687 and infra.

members who disobeyed this rule. Critics of the decision have jumped on this point in order to argue that the court interfered in the church autonomy or even made an attempt to coerce conscience⁴⁸².

Yet, even if “not voting” argument is accepted, the Court nevertheless traveled very far down the path of the parade of horrible in a following way. The Court claims that non-participation in a democratic process contradicts democratic principles of the GG, arguing that laws must be validated and legitimized by the will of the people through their elected representatives. Since Witnesses refused to participate in the legitimacy game and were to, so the Court argues, gain larger social influence on the religious and consequently political behavior of ordinary Germans if they are granted the public law status, conclusion was imminent – no engagement in the legitimacy game plus the possibility of affecting the behavior of the “large” number of Germans means no succor from the state. There were two “minor” contradictions with this judgment, even on its own terms. Firstly, German law does not punish anyone for not voting – but the Court found a way around this inconsistency by arguing that there is a legitimate expectation on the side of the state that citizens will do so and express their legitimate will, while Witnesses obviously won’t and hence they express will to contrary (or so it would follow from cited reason). Secondly, given that Witnesses were around for some one hundred years (including during the Weimar and Nazi period) and gained only 170.000 adherents, what was the real possibility that having attained public law status they would convert Germans in great numbers, following which the passivity of new converts will miraculously destabilize social order? Noting this discrepancy, on a final appeal, the Federal Constitutional Court found a violation of the right to religious congregation in Art. 140 GG.⁴⁸³ The Court’s ruling was careful,

⁴⁸² See *id.*, p. 680 and *infra*.

⁴⁸³ Bloß, p. 42-43.

holding that the state cannot condition the granting of public corporate status on the basis of a failure to vote; alternative ways must be pursued to ensure loyalty to democratic order.⁴⁸⁴

3.5.2 Muslims

It is difficult to believe that the above particular judgment was directed towards Witnesses specifically. Rather, one is inclined to believe that the main target where future public law status bidders who were to be informed up front of the basic rules of the game, and the similar reasoning as the one described above was applied in cases of other non-traditional religions, first and foremost Muslim organizations and likely so called „sects“ or New Religious Movements. There was one consistency, nevertheless, in the above line of reasoning, but its mostly political and informs legal decision basically by means of an implicit assumption driven by history. What the Court argued for was in line with the post-World War II German notion of a strong cooperation of the church and state in a sense that the churches accepted their responsibility of promoting values of democracy and tolerance embraced by the state.⁴⁸⁵

Not everyone have fit in to this consensus, mostly as a result of demographic changes, immigration and increasing communication of Germany with the rest of the world, which “invited in” new religious movements of all strands. A widely debated issue with regards to freedom of religion in Germany was a question of the position of Islam⁴⁸⁶. To date, no Muslim religious organization has attained the status of the corporation under public law and the accompanying privileges, are various federal states deal with Muslim associations in different ways. This is understandable given that Islam as a religion does not have a unified structure

⁴⁸⁴ Eberle (2004), p. 10 fn. 36.

⁴⁸⁵ Eberle (2004), p 13 – 15.

⁴⁸⁶ This part draws on Jusic (2007), p. 85-86.

(“church”) or a unified teaching that would allow for religious classes to be taught in schools.⁴⁸⁷

Nor was that really necessary back during 1960’s and 70s when most of Turkish-Muslim immigrants started flocking in given that the Turkish state provided religious organization for them “from afar” and that, furthermore, they were expected to stay for a while, contribute to Germany’s economic development and then leave (which did not happen). Back in those days the mainstream had no strategic reason to pay much attention to this, nor did the Muslims cared about the issue a lot, mostly organizing themselves into voluntary private associations on the level of particular states where their numbers warranted so.

In following decades and till now, the expected ‘return’ of immigrants back home did not occur, and Muslims (mostly of Turkish decent) have build a society of their own, sustaining and even deepening the social distance between themselves and the mainstream of the German society. As Wolf Aires notes in his overview of the historical and legal developments of Islamic minority in Germany⁴⁸⁸, only by mid and end 80's did the German government or Muslims felt any need to look for more mutually acceptable ways of organizing religious communities which would be incharge of communicating with the government in order to satisfy everyday needs of the particular group, i.e. education, building of mosques, etc. The problems started immediately, given that German government and courts kept on insisting on clear theological legitimacy of Muslim representatives, as well as a form of formal vertical organization, something that was not up for delivery for various reasons having to do with theological and ethnic-based differences among Muslims⁴⁸⁹. In fact, even identifying a consensus on who is a Muslim turned out to be a

⁴⁸⁷ Bloß, p. 45.

⁴⁸⁸ Wolf Aires, „Germany's Islamic Minority: Some Remarks on Historical and Legal Developments“ “ in James T. Richardson, *Regulating Religion around the Globe*, (Kluwer Academic Publishers, 2003), p. 103 -112.

⁴⁸⁹ Id., p. 104-105.

mission impossible given lack of any legitimate institution that might attest to that, as a state court judgment on religious education in a federal state of Northrhine-Westphalia recognized⁴⁹⁰.

In the mean time, as analysis of developments before the September 11th shows, mainstream Germany and public opinion has already become somewhat alarmed or annoyed with the presence of socially distant and foreign people of second or third generation of immigrants with German nationality, who in the opinion of the German mainstream fend to themselves and do not express any willingness to integrate or assimilate into the mainstream. Ensuing conflicts and hot public debates continued especially in cases of building local mosques, call for prayers, and other symbols of Islamic life such is headscarf wearing (of which see below)⁴⁹¹ and reasonably disturbed by the content of Islamic teachings which contradict German mainstream understanding of democracy, human and constitutional rights, secularism and so on. In other words, German mainstream had to start questioning Muslim loyalty or the potential for loyalty to the mainstream idea of what Germany is or is suppose to be. Of course, matters became more complicated after September 11th and by now the measures for regulating Muslim religious groups, whether formally organized or not, are those of a general social control.

3.5.3 “Sects” or New Religious Movements

The issue of “sects” or New Religious Movements in Germany has not been as publicly prominent in a period immediately after the WWII and has attracted some negative attention only during 70’s and 80’s. However, with the growth of communication and transportation, as well as the German unification, collapse of communism and a building of an “ever closer” Europe, the number of and a public salience of activities of “sects” has drawn both negative public reactions

⁴⁹⁰ Id., p. 107.

⁴⁹¹ Id.

and the attention of government agencies and courts⁴⁹². From the beginning, several “youth religions” – as some in Germany have called them – were under particular scrutiny, namely the Unification Church, ISKCON, the Children of God and the Divine Light Mission, although Church of Latter Day Saints also had its fair share of some “tough love.” After several incidents involving sects in foreign countries – like the Waco (the US) incident in 1993; the murder and suicide of Solar Temple followers in Canada and Switzerland in 1994; and illegal activities of Aum Shinrikyo in Japan in 1995 – the public reaction, followed by government actions initiated apparently under public pressure, has taken what some authors have properly described as hysteria⁴⁹³.

In particular, the Church of Scientology has been targeted, under rationale that its practices are both socially subversive and economically oriented, leading to financial and even personal “abuse” of individuals and even children⁴⁹⁴. As Paul Horwitz shows in an extensive overview of the legal and social treatment of the Church of Scientology, actions taken were not at all shy⁴⁹⁵. Hence, important public persons in German society have called the renewed interests in new religious movements a “flight from reality” which distract younger persons from their educational and career trajectories consequently alienating from shared social responsibilities⁴⁹⁶. Furthermore, the government officials described the Church of Scientology in disparaging and alarmist way, with the leader of the German government department investigating the Church of Scientology claiming that Scientology is an extremist and subversive

⁴⁹² See the historical overview of German public opinion and governmental agencies responses in Hubert Seiwert, „The German Enquete Commission on Sects: Political Conflicts and Compromises“ in in James T. Richardson *Regulating Religion around the Globe*, (Kluwer Academic Publishers, 2003), p. 85-102, esp. p. 86-87.

⁴⁹³ Id., p. 86.

⁴⁹⁴ Id.

⁴⁹⁵ Paul Horwitz, “Scientology in Courts: A Comparative Analysis and some Thoughts on Selected Issues in Law and Religion,” 47 *DePaul L. Rev.* 85 (2005).

⁴⁹⁶ Id., p. 121, internal citations omitted.

movement to the the cabinet minister for Family and Youth Affairs claiming that under the cloak of religion Scientology is really a dubious pro-totalitarian organization⁴⁹⁷.

The Church of Scientology, in return, has tried to fight numerous legal battles in order to receive the official „stamp of approval“ of a „regular religion.“ The success was poor, and according to available reports many state and federal courts, especially Federal Labor Court and Federal Administrative Court, have declined to recognize Church of Scientology as a religion⁴⁹⁸, again mostly under rationale that economic activities immersed in what Church of Scientology deems its religious practices are suspect of deceit under a cloak of religion.

The general public attitude and the legal treatment of the Church of Scientology created a pretext and built a public support (and a political need) for a creation of the so called Enquete Commission of the Bundestag in 1996, whose task, in its own words, was to inspect the work of sects and „identify dangers emanating from these organizations for the individual, the State, and society.“⁴⁹⁹ As Hubert Seiwert, a former non-politically appointed member of that commission testifies, from the beginning of its work, this Commission was charged with internal political conflicts between members of than governing CDU-FDP coalition and the oppositional SPD and Green Party, in addition to a personal zeal of its members, some of whom apparently had special distaste for „sects“generally.⁵⁰⁰ Emotional and conviction based motivation notwithstanding, from the outset the Commission found itself in trouble not being sure how to set up acceptable criterions necessary to properly identify dangerous object of its study. Failing this, the empirical solution took hold and the representatives of 15 „sects“ chosen, so it seems, according to the level of negative public attention they have attracted thus far, were invited for confidential

⁴⁹⁷ Id., p. 124, internal citations ommited.

⁴⁹⁸ Id., p. 124.

⁴⁹⁹ Hubert Seiwert, „The German Enquette Commission on Sects: Political Conflicts and Compromises“ in in James T. Richardson, *Regulating Religion around the Globe*, (Kluwer Academic Publishers, 2003), p. 87.

⁵⁰⁰ Id., p. 87-90.

hearings. The list included groups as varied as Witnesses, Soka Gakkai, Mormons, Rosecrucians, the Church of Scientology and others.

Throughout the process, the evidence on which the Commission has relied was largely non-existent in terms of its scientific quality, and it seems that the evidentiary procedure used by Commission boiled down to reiterations of anti-cult literature and personal biographies of „sects“ leaders and members. Sourly lacking in evidence of danger of „sects“, in one of the reports published, Commission finally switched its attention to the discussion of „the conflict potential of sects.“⁵⁰¹ After that, as a result of some introspection and under a pressure to reach a political compromise, the Commission published a final report with recommendations for action. In the Report, the majority opinion claimed that the Commission found forms of „economic abuse and creation of psychological dependency“ that sects use to manipulate their members, all the while simultaneously stating that negative public image of „sects“ is largely exaggerated!⁵⁰² However, minority opinion included in the report, submitted, strangely enough, by the SPD, was more frank, stating that ⁵⁰³:

„Numerous new religious and ideological communities and psychogroups offer deceptive and fictitious to the problems faced by individuals or society as a whole. Involvement in these groups is often synonymous with a withdrawal from the political system and real life...It is therefore necessary to realize that values influencing individuals activities trough new religious and ideological communities and psychogroups are a form of political and social protest. In the most extreme cases such values do not coincide either with the predominantly Christian values and standards of our country or with the concept anchored in the Constitution that have to be defended primarily by political means.“

To add a final irony, although one of the founding's of the majority opinion of the report was that negative public image of „sects“ is largely exaggerated and unsupported by evidence,

⁵⁰¹ Id., p. 92.

⁵⁰² Id., p. 94.

⁵⁰³ Report of the Commission in Seiwert's translation quoted in id., p. 96.

the recommendations for action were very „active,“ to say at least. Proposed actions have included following restrictive measures, among others,: charging the Federal Administrative Office with the responsibility to act an information and documentation center for new religious and ideological communities and psychogroups; changing the definition of usury in criminal law to include the exploitation of psychological predicaments; calling for observation of Scientology Organization by intelligence agencies; etc. The list is a general example of regular social control measures, with little rational evidence to support it. Yet, as the above quoted statement of the SPD minority report states, other values are at stake and should be defended – evidence notwithstanding.

3.6 The German Constitutional Court jurisprudence of religious freedom

Text of the Basic Law (hereafter GG) is clear on many questions that have proven to be contentious in other places, especially when it comes to what in the US law parlance would be termed “establishment.” And given that in many cases discussed above (i.e. church tax cases or the cases deciding line between the autonomy of religious organizations and state intrusion) it was firmly entrenched that the state action aimed at creating conditions for realization of group (and individual) religious freedoms (mostly for traditional religions) does not constitute a breach of prohibition on establishment of state church, jurisprudence in this area remains largely uncontroversial⁵⁰⁴.

German Constitutional Court, in order to deal with the cases of religion jurisprudence, defined these principles in a following way: principle of neutrality, tolerance and parity. Neutrality implies state’s duty to remain religiously and ideologically neutral; tolerance requires religions acceptance of state laws within the parameters of religious freedom; while parity

⁵⁰⁴ This part draws on Jusic (2007), p. 81.

implies cooperation between the religious groups and the state in such a way to ensure mutual coexistence without costs of cooperation being shifted unnecessarily and in a large degree to either side or what in practice came to be known as “positive liberty” – an obligation on the side of the state to create conditions for practicing religious freedom.

Given the status of religious freedom as a fundamental right, limitations are defined on three levels as, firstly, limitations according to the range of protection; secondly, reservations by law, general or qualified; and, finally, limitations inherent to the Constitution⁵⁰⁵. Limitations according to the range of protection basically fall down on the interpretation of what exactly the guaranteed freedom encompasses; statute (general or qualified) limitations, which however must be done in accordance with the proportionality principles, meaning that the aim of the statute must be legitimate, cannot destroy the essence of the fundamental right and the means must be proportional to aims of the statute. Finally, limitations inherent in the Constitution are those found specifically in the text in the text of the GG. Since religious freedom has no limitation clause specified in the GG, the limitation inherent in the Constitution is interpreted in accordance with a demand for constitutional unity and with an aim of preservation of the hierarchy of norms, human dignity being the highest norm⁵⁰⁶.

Limitation themselves can be and are limited (“limitation on limitations.”) As Robbers defines it, one cannot point precisely how limitations are to be limited themselves, but most important criterions are following: law must be clear and definite, with limitations following from its wording; limitation must apply generally and not solely in a single case; basic right affected must be specified; an essence of right must not be affected by limitation; and the

⁵⁰⁵ Gerhard Robbers, “The Permissible Scope of Legal Limitations on the Freedom of Religion and Belief in Germany,” 19 *Emory Int’l L. Rev.* 857 (2004).

⁵⁰⁶ *Id.*, 857-858.

limitation itself must be proportional⁵⁰⁷.

For these reason, the majority of cases which were or would be resolved under the establishment clause in the US Supreme Court were resolved by the GCC on grounds of the free exercise of religion but in a wholly different direction, given the insistency on the positive attributes of religious freedom and the corresponding state obligation derived from it. Social and legislative responses varied depending on the outcome. In some disputed (or hard cases) like the courtroom crucifix case the German Constitutional Court has affirmed its authority and willingness to protect dissenters, however, in other cases, so to say, the court “overstepped” the limits of its influence and after a public response more or less reiterated, as the one can see comparing *Courtroom Crucifix* (Crucifix I) case⁵⁰⁸ with *Classroom Crucifix II* case.⁵⁰⁹

In *Courtroom Crucifix* case, the GCC found that a display of crucifix in the courtroom is unconstitutional, but only insofar it infringed religious freedom of the dissenting Jewish attorney, consequently affirming that absent expressed dissent courtroom crucifixes is not per se unconstitutional⁵¹⁰. No dissatisfaction on the side of public and state legislators has been recorded (as far as I am aware), however in a very similar *Crucifix II* case (Classroom Crucifix), the Court held that the statutory display of crucifixes in public school classrooms in Bavaria is unconstitutional across the board (and not only in the face of a complaint by dissenters). The Court held distinguishable from the courtroom case because of the impressionable nature of children attending school and the possibility of coercion, while the crucifix in the courtroom (apparently not a very impressionable setting) is more likely to be in accordance with the beliefs of most. The decision caused a public stir, with Chancellor Kohl calling it ‘incomprehensible’

⁵⁰⁷ Id., 859, internal citations omitted.

⁵⁰⁸ See 35 BVerfGE 366 (1973) reprinted in Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Duke University Press, 2nd edition, 1997), p. 452-453. This part draws on Jusic (2007), p. 81.

⁵⁰⁹ 93 BVerfGE I (1995) reprinted in Kommers, supra, p. 472-483.

⁵¹⁰ Jusic (2007), p. 82.

influential legal academics disparaging the decision and the ex President of the Federal Constitutional Court calling the decision “a bad mistake⁵¹¹.”

However, facing pressure, the Federal Constitutional Court backed off rather early and issued a public „clarification" claiming that the head notes for the opinion were incorrectly interpreted and the prohibition was not really across the board – it referred only to the state-ordered placement of the cross in the classroom, implying that voluntary placement of crosses would be not be prohibited under this reasoning. But it seems that „clarification“ brought only more confusion, as the commentators could not help but claim that reasoning of the Court demands complete removal of crucifixes⁵¹². In addition, academic commentators indulged in criticizing court decision on various grounds, finding the reasoning of the court inconsistent with previous cases (especially Courtroom Crucifix case); overbroad and not attentive to details that make the difference between coercion of beliefs and expression of historical religious traditions shared by most in a given local setting; or wrong on account that the Court meddled unconstitutionally into the authority of states which according to GG decide on all matters related to education⁵¹³.

Finally, Bavaria itself responded by enacting a new law in December of 1995 which was written by the former president of the Federal Constitutional Court. The law re-instated the right of the Bavarian state to display crucifixes in the public schools under its authority so as to affirm religious and historical values underlying the development of the said state. The law vaguely provided that in the case of dissent a compromise should be reached, albeit in such a way that positive rights of those seeking the expression of religious traditions shared by most should not

⁵¹¹ See Ingrid Brunk Wuerth, „Private Religious Choice in German and American Constitutional Law: Government Funding and Governmental Speech,“ *Vanderbilt J. of Transnational Law* 1184-85 and accompanying notes (November, 1998).

⁵¹² Id.

⁵¹³ See id., p. 1185-86 and accompanying notes for an overview of different articles wrote on this matter.

be disparaged. On appeal to the Bavarian Constitution Court in 1997, the decision was made holding that law had two legitimate purposes, to recognize historical and cultural importance of Christianity and promote religious expression of those who wanted that, distinguishing the decision from the one issued by the Federal Constitutional Court by claiming that the law provided for means of satisfying rights of dissenters. For procedural reasons, the Federal Constitutional Court denied the review of the decision⁵¹⁴.

The judges of the Federal Constitutional Court themselves acknowledged that the effects of decisions were none - crucifixes are there, in larger numbers than before - and that from there on they should not „gamble“ with the public trust in courts which they find to be the strongest weapon and a leverage the Court enjoys over all other state institutions⁵¹⁵. In other words, excluding extreme cases of religious coercion, private preferences stirred through state channels are to be taken into account when deciding.

Not that one would think the judges did not know this before, but most likely for reasons cited above (a continued maintenance of public trust and keeping in line with the societal and cultural expectations) the courts other decisions are less disputed and more welcomed in cases of governmental accommodation of private preferences in the public sphere (or in other words “positive liberty.”) As one would expect, the incorporation of religious teaching in the regular public school curriculum was repeatedly interpreted solely as recognition of the historical tradition of Christianity as one of the cornerstones of the society and of the Western civilization, and not as the establishment of the state church or infringement on the negative freedom of non-believers or members of different faiths.

⁵¹⁴ Id., and accompanying notes, especially note 397, Decision of the Bavarian Constitutional Court, August 1, 1997, reprinted in 50 NJW 3157 (1997).

⁵¹⁵ See generally Georg Vanberg, *Politics of Constitutional Review in Germany* (Cambridge University Press, 2009), p.21-22, 48, and p. 121-126.

In the *Interdenominational School Case*,⁵¹⁶ the GCC upheld the amendments that federal land Baden-Wurtemberg made in its constitution, making Christian-denominational schools the uniform type of public schools within that federal state⁵¹⁷. Holding that the negative right of parents not to have their children subjected to any kind of religious education was trumped by the constitutional provisions that envisage state support for religious education, the GCC found that state and parents on equal footing when it comes to state supported school system⁵¹⁸. Moreover, positive rights of parents that want their children to be introduced to religious tenants were found to be of decisive importance, according to the Court, as long as schools do not become missionary and zealous.

The essence of the GCC's reasoning on allowing Christian religious education in public schools, even against dissent, was frank stating that:

“Affirming Christianity within the context of secular disciplines refers primarily to the recognition of Christianity as a formative cultural and educational factor which has developed in Western civilization...Confronting non-Christians with a view of the world in which the formative power of Christian thought is affirmed does not cause discrimination either against minorities not affiliated with Christianity or against their ideology.”⁵¹⁹

Basically the same line of reasoning was followed in a *School Prayer Case* decided after the *Interdenominational School Cases*. After the Constitutional Court of the State of Hesse found that a voluntary school prayer was a form of coercion and consequently an infringement of religious freedom since to excuse oneself from group activity requires revealing ones religious

⁵¹⁶ 41 BVerfGE 29 (1975) cited in Kommers, p. 467-470. The cases were in fact consolidated as they were coming from several states.

⁵¹⁷ Jusic (2007), p. 83.

⁵¹⁸ Kommers, supra, p. 467.

⁵¹⁹ Id., p. 470.

preference (or the lack of it), the Federal Constitutional Court overruled the decision⁵²⁰. The decision was grounded in two reasons. First, the Federal Constitutional Court held that negative liberty of religious freedom (freedom from religion) does not trump positive rights of religious freedom of those who want to exercise a joint prayer, as long as there is a possibility of non-participation and hence no coercion. Secondly, the Court held that since educational system is under state supervision with state and parents being on equal footing when it comes to deciding on educational issues, the state is merely granting the permission to those students and parents who want to engage in prayer to do so, without coercing anyone to enjoin⁵²¹.

As already mentioned, the most hotly debated issue with regards to freedom of religion in Germany was a question of the positions of Islam, with status of Muslim religious organizations varying across states and the Islamic religious teaching not being recognized as part of the curriculum in many places. Education wise, the cost of such an attitude was a flourishing of awkward private religious schools, with suspicious and potentially socially hostile interpretations of Islam, and so far has contributed only to, generally speaking, a widening of the already existing gulf between non-ethnically German population (mostly of Turkish descent) and the rest of the German society⁵²².

The GCC attitude towards the question of Islam expressed in judicial argumentation was marked by its decision in the Headscarf case.⁵²³ Afghan born German citizen Fereshta Ludin was denied a teaching position in a public school unless she would remove a headscarf, which she refused to do for religious reasons. After a prolonged debate on a topic of what could headscarf

⁵²⁰ Wuerth, p. 1180-1181, see 52 BVerfGE 223 (The School Prayer Case). The Federal Administrative Court deciding on a similar case coming from Nord-Rhein Westfalen held that voluntary prayers with the possibility of being excused on account of ones beliefs are constitutional, see id.

⁵²¹ Id.

⁵²² This part draws on Jusic (2007), p. 83.

⁵²³ Islamic Teacher's Head Scarf, 2 BvR 1436/02 (BVerfGE Sept. 24, 2003), available at http://bverfg.de/entscheidungen/rs20030603_2bvr143602.html.

mean in various contexts and what might be its impact on pupils, the conclusion was that the Court majority cannot make up its mind on either the exact meaning or the effect of headscarf. Three dissenting judges were more straightforward and frank, arguing that headscarf represents political Islamism and distinguishing the present issue from *Classroom Crucifix* case and the continuous presence of crucifixes in public school on the basis of the cultural familiarity of the crucifix and the converse cultural distance of headscarf⁵²⁴. Ultimately, the majority held that constitutional complaint was founded, but nevertheless added that, since the education is constitutionally an authority of the federal states and the teacher is in a position of civil servant who voluntarily forfeits some of its right when entering the state service. Consequently, federal states are free to regulate issue but with ‘sufficient clarity.’ In effect, the GCC left the issue to the democratic process, most likely having in mind the public stir that his *Crucifix II* decision caused⁵²⁵.

Some notable commentators raised both criticisms and appraisal of the decision. Criticism was targeted at parts of Court’s reasoning which held teachers complaint to be constitutionally founded, claiming that the decision is inconsistent with the previous holding in *Classroom Crucifix* case given that the Court found crucifixes to be “impressionable” in a school setting. Yet, at the same time, same commentators, without mentioning that the crucifix decision was basically unenforced and de facto ignored, held that the primary difference between the crucifix and the headscarf is that crucifix is a culturally familiar and hence does not stand for any sort of coercion⁵²⁶. Either way, the effect of the case went in the same venue but in a different

⁵²⁴ See dissenting opinion argumentation in *supra*, paragraph . 75 and *infra*, especially paragraphs 113, 117, 118 and 125.

⁵²⁵ Bloß , p. 45, fn. 110.

⁵²⁶ See generally Axel Frhr. von Campenhausen, “German Headscarf Debate,” International Law and Religion Symposium Article, *Brigham Young University Law Review* 2004 (on file, available via Westlaw). For a different opinion see Matthias Mahlmann, “Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court’s Decision in the Headscarf Case”, 4 *GLJ* 1099 (2003),

direction and, rightfully so having in mind preferences of their constituency, German federal states proceeded one after another to legislate in sufficient detail the prohibition of headscarf for public school teachers. After Bavaria changed laws on employment to affirm that public education and its employees have to behave in a way which affirms Christian and Occidental values, *actio popularis* was initiated and the Bavarian Constitutional Court on appeal ruled that the Bavarian law on public education does not discriminate against Muslims by banning symbols which might be seen in contradiction with Christian occidental values⁵²⁷.

3.7 Conclusion: loyalty and its limits

As the historical and institutional analysis laid out above shows, generally speaking German society and law have legally formalized status based ranking of religious communities, ranging from those public status all the way down to private associations to private non-recognized associations freely wondering in the legal jungle in an attempt to seize some access to resources for themselves, with scant success. This ranking is basically a result of historical developments going way back in past, as well as peculiar historical developments of post-WWII Germany.

Some improvements are obvious alongside changes in institutional and regulatory mechanisms which the legal system uses to treat communities – there is a clear moving away from direct social and legal prevalence of the Western versions of Christianity towards more sensitivity, as the *Crucifix case I* with dissenting Jewish lawyer show. But, similar like in the case of the US, the toleration of course remains limited with the mainstream norms today commonly labeled with a vague term “culture” and not so vague term loyalty, as it was shown in

available at: www.germanlawjournal.com/pdf/Vol04No11/PDF_Vol_04_No_11_1099-1116_Public_Mahlmann.pdf (downloaded 28 of June 2009).

⁵²⁷ Hans-Christian Jasch, „State-Dialogue with Muslim communities in Italy and Germany - the political Context and the legal frameworks for dialogue with Islamic Faith communities in both countries”, n. 114, 8 *GLJ* 342 (2007).

Witnesses' and headscarf case, notes on the treatment of Islamic communities and "sects"; as well as the majority preferences, whose religious or religiously rooted secularized practices, alongside governmental interests, define the limits. One can argue that social distance of non-mainstream religious groups in Germany is measured through a perception of their loyalty and is not so much a function of the size of the group as much as it was noted in the US case, at least after reviewing Witnesses case and the case of "sects", whose numbers certainly should not warrant any "emergency" on the side of the mainstream – yet in fact that is what happened.

However, marked differences separate German case from the US one, and show deviations from the general model of regulation of non-mainstream I have developed in chapter one. In the German case, moves towards more acceptance and toleration of non-traditional faiths are clearly a result of WWII experiences combined, in a curious manner and with almost paradoxical results, with historical path dependencies, motivated and limited by two social factors and three institutional factors, all to a certain degree intertwined and affecting each other.

On a social side, two important factors elaborated in part one – assimilationist bias and acceptance of non-mainstream group norms for strategic reasons - are less developed in German case than in the US one. First, the mainstream inclination in Germany – in the words of judges and legislators, not necessarily 'the people' itself - is not so much to act with assimilationist bias and to provide for exit options for members of unpopular non-mainstream groups, using various methods of pressure if necessary to achieve its aims. Rather, the aim is, first, securing or assuring oneself that a non-mainstream group is *loyal or that it formally pledges its loyalty* to the equilibrium and cooperation between the state and religious communities established as a result of history, especially the experience of the WWII. *Loyalty* here basically means that non-mainstream group, as the Jehovah's Witnesses cases shows, will be asked to prove fidelity to

democracy and constitutional rights as defined by the GG and the German elite after the WWII, sometimes even to an absurd degree. This is paradoxical – if at least one of the root causes of persecution of Jews in pre-WWII Germany was a suspicion of their “non-loyalty” and “foreignness” to the mainstream, it seems at least odd to say that the experience of post WWII should result in – asking for more loyalty.

Second, the non-mainstream group norms (and group members) were requested to, in the words of German Constitutional Court, ‘confront’ (whatever this means) the affirmative influence of Western Christianity expressed through culture and in the daily setting (including public setting). In that sense, one could say that mainstream norms in German case are not fully assimilationist but rather “protectionist” ones, playing a role of first guardian at the fence.

The second claim about the influence of social factor I have elaborated in chapter one, holding that the acceptance of some non-mainstream groups follows once the mainstream norms change for strategic reasons that benefit the mainstream and on condition that such change imposes no costs on mainstream and is internalized by the group under scrutiny, is present only in a very limited way in the German case, at least in the material I have reviewed. Presumably, the reason might be well developed and entrenched religiously homogenous population that has governed Germany throughout most of its history once, of course, Catholic-Protestant divide is discounted as a matter of long gone past. In other words, the relative homogeneity which has social norms that have become mainstream norms as a result of the German history have not yet produced any strongly felt need to develop mechanisms for strategic change of mainstream norms and shifting costs of change to non-mainstream groups. There was no reason yet, external or internal, to engage in games of strategic shifts and “acceptance” in a way I elaborated in the chapter on US. In fact, things are likely opposite and can be well combined with the loyalty-

Christian culture-protectionism demands elaborated immediately above. To the extent that homogeneity is or will be reduced in future, it should be rather clear that opportunistic temptations to play strategic shifts and “acceptance” games will be stronger, while the loyalist-Christian culture-protectionism strand, given its firm roots in society, will likely also take stronger positions in order to set boundaries firmly.

On an institutional – legal side, as it was argued in chapter one, three institutional legal mechanisms define the limits of toleration and generally follow social developments. *First institutional mechanism* is the level and the nature of the “legalization” of works of religious groups and the (de)centralization of the level of regulatory decision making. *Second institutional mechanism* is the level of judicial influence on decisions regarding status of religious groups, as well as the level of judicial autonomy and discretion in the process. *Third institutional mechanism* is the nature and the socially constructed structure of judicial argumentation and evidence in cases dealing with the non-mainstream religious groups.

As far as these three mechanisms are concerned, their impact on relationship between mainstream and non-mainstream religious group in the German case can be described as follows. The level of and the nature of the legalization of works of religious groups and the level of decentralization of the regulatory decision making has clearly changed during 19th and 20th century in Germany. In that sense, firstly, it is rather clear that combination of the federalist system that has inculcated the Catholic-Protestant divide and has left much of authority of deciding the faith of non-mainstream groups on a level of federal states. Clearly, as at least the Bavarian example have shown, the local social norms and mainstream opinions will govern decision making process on that level. Secondly, the constitutionally entrenched division between the public law corporations and the private law associations marks a clear *social status*

of various groups, resulting in a differentiated social treatment. It is difficult to see how else it could be, given constitutional setting and the background social norms.

Second institutional mechanism, as it was noted above, is the level of judicial influence on decisions regarding status of religious groups, as well as the level of judicial autonomy and discretion in the process. As the overview of cases show, non-mainstream religious groups are definite losers in free exercise cases on both state and a federal level and these losses are clearly attributable to their *social and legal status as non-mainstream groups exemplified by their social distance from the mainstream social and legal ranking of mainstream religious groups*. In other words, social distance of a non-mainstream group and the probability of losing a religious freedom claim in the courts are to a large extent proportional. However, it seems that German courts have attempted to do as much as possible to deal with a growth of religious heterogeneity, with mixed success so far, as Headscarf and Crucifix case II have shown, when social norms have backfired on judicial attempts to forge some social- attitudinal reconsideration (if not exactly change). It is way too early to for any final judgment. After all, a low level religious heterogeneity – meaning heterogeneity beyond usual variations of Western Christianity and Judaism - has confronted German courts only in last two decades.

Third institutional mechanism of importance here is the nature and the socially constructed structure of judicial argumentation and evidence in cases dealing with the non-mainstream religious groups. In this area, as far as the reviewed case law has shown, there is not much to be said. The judicial argumentation draws clearly on what is perceived to be a definition of a normal religious group, with additional demands of loyalty to constitutional rights, fidelity to the state and a „proof“ of social entrenchment incorporated into various lines of legal reasoning. But, again, that is to be expected considering constitutional structure and social norms

which after all have to support any conclusion and judicial decision – if it is to be a lasting and enforced decision – since norms and social conventions are basis of legal reasoning, whether one likes it or not, especially in emotionally highly charged areas of law such is deciding the faith of non-mainstream religious groups.

Chapter IV: French laïcité – social unity and “groups within groups”

The debate on French laïcité constitutes a relevant case study because the French model was recently the object of various attacks and criticisms. Introduced into French law in 1905 (“Loi 1905”) as a sign of rebellion against the Catholic Church, laïcité is strongly protected by the 1958 French Constitution which states that “France is an indivisible, secular, democratic and social Republic, (insuring) equality before the law of all citizens without any distinction of origin, race or religion, (and respecting) every beliefs”.⁵²⁸ The protection of secularism has however evolved and a shift from anti-clericalism to anti-communitarianism or a fight for social unity and against “groups within groups” has taken roots. But as I will show below fight against “groups within groups” was probably at least equally important reason behind laïcité from the beginning just as it was anti-clericalism strand, yet it has escaped the view for various contingent reasons. In what follows below, I firstly present a short history of laïcité in France and its impact on a contemporary model of regulation of religious groups in France. Following that, in order to illustrate my main thesis, I take up several case studies, namely the position and treatment of Jews in the aftermath of French Revolution; position of Muslims today; and the treatment of “sects” by the contemporary French law and society.

4. French Laïcité – a short history of a good idea and its practical implementation

The general historical trajectory of laïcité and the French way of secularism the way it has developed are rather clear. Until the Revolution in 1789, the Catholic Church functioned as the official religion of France for a long time. During the Revolution the freedom of religion was

⁵²⁸ French Constitution of Octobre 4, 1958, Art.1, Available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constiution_anglais_juillet2008.pdf>

laid down in *La Déclaration des droits de l'homme et du citoyen*⁵²⁹. But history would not back off that easily – in 1801 Napoleon concluded *le Concordat* with the Catholic Church in 1801 stating plainly that ‘the Catholic faith is the faith of the majority of the French population’ all the while affirming (or perhaps just assuming) a separation of civil law and religion. The Restoration that followed up after Napoleon's departure(s) did not reinstate the Catholic faith as the official religion of France⁵³⁰ and the battle between secular France and the Catholic Church continued during the nineteenth century, especially in the area of education where Church had immense influence effectively preventing the advent of secular forces through the control of everyday social opinions. To strike back, *La Loi de Jules Ferry* of 28 March 1882 introduced obligatory free public education free of religious precepts and influence⁵³¹. As Jansen states, one can speak of ‘*les grandes lois de laïcisation des années 1880*’⁵³² which lead directly to the most important legal and social event: the enactment of the *La loi de 1905*⁵³³. This law set – without necessary details – idealistic cornerstones for the separation of church and states. Article 1 of the law regulates the freedom of religion, providing that :

‘La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public.’

Article 2 regulates the separation of the church and the state and runs as follows: ‘La République ne reconnaît, ne salarie ni ne subventionne aucun culte.’ This law has served as a cornerstone for contemporary legalization of *laïcité* only to be mentioned for the first time in the

⁵²⁹ A.J. Nieuwenhuis, ‘Tussen laïcité en AWGB’, *NJB*, issue 18, 30 April 2004, p. 938 quoted in Esther Jansen, “Limits to Expression on Religion in France” in “Agama & Religiositas di Europa”, *Journal of European Studies*, Vol. V., Nr. 1, 2009, p. 22-45 (on file with author), p. 23.

⁵³⁰ Id.

⁵³¹ Id., 24.

⁵³² Id.

⁵³³ Rapport public du Conseil d'État, 2004, “Considérations générales: *Un siècle de laïcité*,” Paris, France: La Documentation Française, 2004, p.16, quoted in Jansen, *supra* . p. 24-25.

Constitution of 1946 and figures in the current article 1 of the current Constitution of 1958 that runs as follows⁵³⁴:

‘La France est une République indivisible, laïque, démocratique et sociale. Elle assure l’égalité devant la loi de tous les citoyens sans distinction d’origine de race ou de religion. Elle respecte toutes les croyances.’

Laïcité as an idea and a legal concept has become a hallmark of French national identity, as recognized very recently in public speeches by almost every important French politician. In a speech in December 2003 then President Jacques Chirac stated that “laïcité is inscribed in our traditions. It is at the heart of our republican identity...It is in fidelity to the principle of laïcité, the cornerstone of the Republic, the bundle of our common values of respect, tolerance, and dialogue, to which I call all of the French to rally... Its values are at the core of our uniqueness as a Nation. These are the values that create France... It is a crucial element of social peace and national cohesion. We can never permit it to weaken!”⁵³⁵ Concurring, Prime Minister Jean-Pierre Raffarin claimed that “laïcité is a cardinal value that precisely permits each person to express his or her convictions in freedom, security, and tolerance. Laïcité is our common approach. Laïcité allows France to be a land of tolerance. Laïcité prevents France from pitting [religious and ethnic] communities against each other”⁵³⁶; while then Minister of Interior (now a President) Sarkozy in a speech to Freemasons further asserted that “[l]aïcité is not a belief like others. It is our shared belief that allows others to live with respect for the public order and with respect for the convictions of everyone.”⁵³⁷

⁵³⁴ French Constitution of Octobre 4, 1958, Art.1, Available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constiution_anglais_juillet2008.pdf>.

⁵³⁵ Jacques Chirac quoted in T. Jeremy Gunn, “Religious Freedom and Laïcité: A Comparison of the United States and France” 2004 *B.Y.U. L. Rev.* 419, 428 (2004).

⁵³⁶ Raffarin quoted in T. Jeremy Gunn, *supra*, id.

⁵³⁷ Sarkozy quoted in T. Jeremy Gunn, “Religious Freedom and Laïcité: A Comparison of the United States and France” 2004 *B.Y.U. L. Rev.* 419, 429 (2004)

In short, the laicite the way it stands now is simultaneously a social ideal protecting conscience and freedom and an instrument for preserving social unity and cohesion, consequently keeping religious and ethnic conflicts – always lurking beneath – at bay. Unfortunately, admirable speeches about the position of laicite in the French society today are both correct and simultaneously simplified versions of the history of laicite. As T. Jerremy Gunn shows, contrary to statements quoted above, laicite – not even a clearly defined term at a time of French Revolution or later on – has hardly been a concept which stands for abstract and nice things like toleration for others, respect etc⁵³⁸. Rather, the meaning and practice of the laicite followed combative patterns of French history. Hence, during a period which Gunn calls “the phase I of laicite” – a period right after the French Revolution – Jacobins have rushed against their first and foremost enemy, the Catholic Church, which was already opposing Jacobins moves to grant civil rights to Protestants and Jews, all in the name of creation of the socially unified revolutionary society of equal individuals free of superstition and clerical influence. In the end, the Jacobins turned against not only the Catholic Church but the Protestants and the Jews as well, and eventually – as every real revolutionary social engineer must do – the culture and society as a whole⁵³⁹:

“In Year II (fall 1793 to fall 1794), the Jacobin revolutionaries began to turn their animus toward Protestants and Jews, and added them to their growing list of enemies of the patrie. Year II, which is sometimes equated with a campaign of “de-Christianization,” has been described as having “cast a heavy shadow on the future.” Priceless French cultural treasures of religious architecture, sculpture, painting, and stained glass were looted or destroyed. From the Cathedral of Notre Dame in Paris, hundreds of medieval sculptures of prophets, priests, and kings were decapitated, ripped from their coves, and ignominiously tossed into the Seine...By the time the Revolution had completed its de-Christianization, the abbey was a pile of rubble...By starkly polarizing church and state, the revolutionary crowds demolished a cultural legacy of France.”

⁵³⁸ T. Jerremy Gunn, “Religious Freedom and Laicite: A Comparison of the United States and France“ 2004 *B.Y.U. L. Rev.* 419, 432 (2004)

⁵³⁹ *Id.*, 437-438.

What Gunn further calls “the phase II of laïcité” – roughly covering a period from 1880 till 1940 and effectively continuing after the short break marked by WWII – continued with much less violence, given that the secularist strand of French Republicans have managed to marshal solid support in the society and firm grasp over state. The process continued mostly through legalization of secularism, as marked by laws on public education and the separation of church, in , of course, strong version. As Gunn states⁵⁴⁰:

“On December 9, 1905, the National Assembly adopted the Law on the Separation of Churches and the State. Articles 3 through 6 effectively expropriated all religious property that had been acquired or built prior to 1905, and established procedures for state officials to conduct inventories of the property. The French state continues to own church buildings constructed before 1905, including all of the famous cathedrals of France, though it pays for their maintenance and allows the Church to use them. The law also unilaterally revoked the Concordat of 1801, which had provided that the state would pay clerical salaries in compensation for lands seized during the Revolution. By seizing church property and refusing to salary the clergy, the state effectively rendered the Church destitute...We may at least take comfort in the fact that the Third Republic was less bloody than the First. ...The examples of conflict cited above do not purport to give a full explanation of the historical circumstances that gave rise to the modern doctrine of laïcité-- and reasonable people may disagree about which of the measures were necessary or appropriate given the deep and complicated issues surrounding the wealth, power, and influence of the Catholic Church. Nevertheless, the notion that laïcité embodies “tolerance,” “neutrality,” and “equality” should be seen for what it is: a myth.”

There are not many reasons to suspect overall historical veracity of Gunn’s judgments, but the criticism of it is obvious – the judgment is inconsequential. It does not really matter whether a certain group knows or rationally ignores some (currently) embarrassing strands of the concept or the idea they hold dear to their hearts, so long as they believe it and act together as a group upon it. In short, history notwithstanding, you can fake it till you make it, and many reasonable or even relatively well informed persons will know facts laid out above and yet that will by no means undermine the emotional meaning a concept of laïcité has in the French social and legal

⁵⁴⁰ See T. Jeremy Gunn, “Religious Freedom and Laïcité: A Comparison of the United States and France” 2004 *B.Y.U. L. Rev.* 419, 441-442 (2004) and accompanying notes, reviewing historical sources.

context. There are, hence, for now two important things to be taken as given from what was analyzed above. Firstly, contemporary laïcité, irrespective of its history, commands major emotional and group reaction in France and is perceived as the victory of tolerance and Enlightenment values. And, secondly, the legal system for regulating religious groups, presented immediately below, has been developed - or has developed itself, - as a result of fighting the Catholic Church yet it has not managed to fully rout out the “Catholic counterculture” against which it has grown. As the old joke attributed to the events in Northern Ireland goes, it is not the question whether you are an atheist, but whether you are a Catholic or Protestant atheist. Background matters.

Although contemporary French government does not – for reasons having much to do with laïcité – keep records on religious affiliations (or absence of it) of its citizens, according to the available data the vast majority is at least nominally Roman Catholic, with Muslims being second largest religious group; 6 percent are unaffiliated; 2% are Protestants; Buddhists count for 1%; while Jewish Communities, Jehovah’s Witnesses and Orthodox Christians are below 1%⁵⁴¹. And interestingly enough, considering the public image of France as a state of strong separation of church and state and equal distance towards all religions, religious communities are clearly organized in ranks, first rank being those recognized by the state, second rank being those operating as private associations and hence not recognized as religious but cultural associations (some religious groups consciously assume the second position).⁵⁴²

Under Loi 1905, religious associations cannot receive public funding, unlike other forms of associations. Procedure for receiving a stamp of association organized for religious purposes

⁵⁴¹ Lasia Bloß, “European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process” NYU Jean Monnet Working Paper 13/03 (2003), available at <http://www.jeanmonnetprogram.org/papers/03/031301.html> (downloaded 24.02.2007, 16:15), p. 22. Hereafter Bloß.

⁵⁴² Id.

with tax exempt status happens mostly on the level of local prefecture, on condition that the purpose of the group is solely to practice religious rituals – gainful employment within the association, printing of materials and so on can result in a denial of religious association status⁵⁴³. In effect, most groups end up being separated into a group of « *associations cultuelles* », religious association associations exempt from taxes; and « *associations culturelles* » which are not exempt from taxes. For example, recognized religious communities include Catholic Church, Protestant Church, Israelite Community of France (notwithstanding the fact that not all Jewish groups subscribe to this de facto federation of Jewish communities) and organizations representing (without a clear hierarchial or theological legitimacy) Islam in France; while Scientology and Jehova's Witnesess are still not recognized religious associations and are liable for 60% tax on all funds they receive.⁵⁴⁴ But, practice of funding for religious organizations and activities are numerous, so much so that the „exception“ seems more of a rule. The president of France is the only head of state, with exception of Pope, whose has authority to appoint Catholic bishops; the French state owns and funds all churches built before year 1905, and has directly financed the construction of the Paris mosque; and a practice of funding predominantly Catholic schools with nuns and priests as teachers is an everyday matter⁵⁴⁵.

Teritorially speaking, there are differences too. Hence, so called „Decrets Mandel“ govern French Overseas territories and do not incorporate the same version of the separation of church and state as the Law of 1905; area of Rhin and de la Moselle is governed by laws dating back to 1802, incorporating Concordat and officially recognizing four traditional religious communities; Catholic cult is also especially recognized in Gyana; and the area of *Alsace – Moselle* is also

⁵⁴³ Id., p. 23.

⁵⁴⁴ Id.

⁵⁴⁵ T. Jeremy Gunn, “French Secularism as Utopia and Myth,” 42 *Hous. L. Rev.* 81, 89-90 (2005), internal citations omitted.

governed by a peculiar mix of local laws and doctrines and largely exempt from law of 1905 and the one from 1901, which allows government in this area to grant public subsidies even to non-recognized denominations.⁵⁴⁶

Finally, apart from special territorial structures and laws which affect and even permit funding of religious groups, with regards to the general funding of the religious communities on the most of the French continental territory, there are clear ranks also. While strictly legally speaking no religious community is suppose to receive public funding, traditional religious communities are mostly, as Lasia Bloss shows, indirectly supported trough public funds geared towards the preservation of the cultural heritage. As Bloss also shows, the „bottom of the rank“ groups – mostly new religious groups, „sects“ and other non-mainstream religious groups whose social nature is deemed controversial or perceived by the French government as contrary to prevailing social beliefs and mores – are not only denied funding, but actively routed out trough a denial of legal status, prohibition of economic activities mostly under the rationale of preserving the public order⁵⁴⁷ as it will be documented further below.

4.1 Jews or the question of the „nation within a nation“

The history of secularism, anti-clericalism and republicanism in France can clearly be traced back to Enlightenment ideals and the influence of figures such are Voltaire and especially Jean Jacque Roussau, whose ideas regarding religion and of social contract had formidable effect on the French Revolution⁵⁴⁸. However, no revolution, even a most anti-religious one and one

⁵⁴⁶ Bloß, p. 24.

⁵⁴⁷ Id., p. 25-26.

⁵⁴⁸ See Ourida Mostefai and John T. Scott, eds., *Rousseau and L'Infame: Religion, Toleration and Fanaticism in the of Age of Enlighntment* (Amsterdam/New York, 2009), describing the influence of Rousseau on French

seeking to grant equal rights to previously disparaged groups, is spared from dealing with those who practices, beliefs and communal identities – or at least identities perceived as communal by the environment – can be an obstacle in the process of the building a homogenous nation of free individuals relating to each other in the public space as equal and basically the same. For French revolutionaries, driven by a zeal to create new society and expell clerics or even traces of religion from public space, such obstacle were, among others, observant Jews.

In December 1789, immediately in the aftermath of the French Revolution, the National Assembly started an intense discussion about the status of Jews in the new French society, with representatives furvently discussing whether Jews can ever be Frenchman fully and, if so, how that might be achieved and how can Jew's become full citizens⁵⁴⁹. Considering the full force of anti-religious and secular leanings of representatives, the Assembly was not able to argue for a „toleration“ of practicing Jews, since that would imply continued existence of a public, hegemonic religion, against which the new French Republic has risen in arms⁵⁵⁰. The debate turned towards the question whether Jews constitute a 'nation within a nation' or even a 'state within a state', a preffered view of many representatives, especially fans of one Abbé Grégoire, apparently at a time influential figure in the Royal Academy of Arts and Science, who believed that Jews are a separate race formin a state within the state and hence in urgent need of 'reform'⁵⁵¹.

Accepting this view, however, would imply that Jews were not up for enfranchisment and the project of „turning“ them along with the other Frenchman into full fledged citizens of the

Revolution and arguing that Voltair's call for fight against Catholic Church was the main motivational force behind the Enlightenment in France.

⁵⁴⁹ See the overview of the “Jewish Question” in France, on which I partially draw here, in Wendy Brown, *Tolerance in the Age of Identity and Empire*, (Princeton University Press, 2006), p. 48 and infra. Hereafter Brown.

⁵⁵⁰ Id., p. 51.

⁵⁵¹ See Abbé H. Grégoire, *An essay on the physical, moral, and political reformation of the Jews*, London, (C. Forster, 1791), p. 150-194.

Republic⁵⁵². For if indeed Jews are the nation, it would follow that they are simultaneously located in two nations, which for representatives meant the violation of social contract and a social impossibility, implying that Jews lack the real loyalty to new France.

The issue was resolved in a speech by Count Stanislas–Marie–Adélaïde de Clermont–Tonnerre, a member of a liberal eschelon of the French National Assembly, who forcefully and all the way down to its logical conclusion argued for inclusion of Jews as individuals into a body politics of the new Republic, all the while rejecting their standing as separate religious or ethnic group. The curiosity is that the speech, given on December 23rd, 1789, was entitled “Speech on Religious Minorities and Questionable Professions” and its content speaks for itself⁵⁵³:

“Every creed has only one test to pass in regard to the social body: it has only one examination to which it must submit, that of its morals. It is here that the adversaries of the Jewish people attack me. This people, they say, is not sociable. They are commanded to loan at usurious rates; they cannot be joined with us either in marriage or by the bonds of social interchange; our food is forbidden to them; our tables prohibited; our armies will never have Jews serving in the defense of the fatherland. The worst of these reproaches is unjust; the others are only specious. Usury is not commanded by their laws; loans at interest are forbidden between them and permitted with foreigners. . . . *But, they say to me, the Jews have their own judges and laws. I respond that is your fault and you should not allow it. We must refuse everything to the Jews as a nation and accord everything to Jews as individuals. We must withdraw recognition from their judges; they should only have our judges. We must refuse legal protection to the maintenance of the so-called laws of their Judaic organization; they should not be allowed to form in the state either a political body or an order. They must be citizens individually. But, some will say to me, they do not want to be citizens. Well then! If they do not want to be citizens, they should say so, and then, we should banish them. It is repugnant to have in the state an association of non-citizens, and a nation within the nation. . . .* In short, Sirs, the presumed *status* of every man resident in a country is to be a citizen.” (italics added)

This speech, in this case targeting Jews, uses *in concreto* all concepts I have elaborated in chapter One. It explains – and criticizes - the social perception of social distance of a particular non-mainstream religious groups from the mainstream; explains particular methods of group

⁵⁵² Brown, p. 51.

⁵⁵³ Reprinted in Lynn Hunt, ed., *The French Revolution and Human Rights: A Brief Documentary History*, (Boston/New York: Bedford/St. Martin's, 1996), p. 86–88.

cooperation that create a boundary between the group and the mainstream (example of usury, dietary prohibitions, etc.); and finally proposes a „method“ of dealing with peculiarities in order to create social unity and break the „nation within a nation.“ It ends with an ominous threat, which reads almost as „or else“ – either the Jews will be become individuals and seize being group members or they will be „bannished.“ In other words, its either, as Stanley Fish says, shape up or be shipped out – grewsome as it sounds.

The concept presented in the above quoted words has started the project of the emancipation and the assimilation of the „socially distant and foreign“ French Jewry into the French Republic, to run trough the whole of 19th century. As Julien Taieb, in an unjustly neglected work on relationship between Jews, Judaic laws and secular laws of post-Revolutionary and contemporary France shows⁵⁵⁴, Napoleon, who in personal letters to his brother openly stated his despise for Jews and a desire to 'correct them'⁵⁵⁵, has basically viewed Jews the same like the National Assembly before him – a nation within a nation and a group of dubious loyalty⁵⁵⁶. Napoleon proceeded to establish control mechanisms over Jews by firstly establishing, on suggestion of one of the Jewish leaders, Israel Jacobson, a Supreme Jewish Council (*Consistoire Central*) and gathered a Sanhedrin (a Jewish legislative assembly) to which he posed twelve questions regarding application of Jewish law and Jewish relationship towards Napoleon's Civil Code. Some questions were telling: “Do Jews born in France, and treated by the laws as French citizens, consider France their country? Are they bound to defend it? Are they bound to obey the laws and to conform to the provisions of the Civil Code?” As

⁵⁵⁴ Julien Taieb, “From Maimonides to Napoleon: the True and the Normative,” *Global Jurist*, Vol. 7, Iss. 1 (Topics), Article 8 (2007), available at: <http://www.bepress.com/gj/vol7/iss1/art8> (downloaded April, 20th, 2010).

⁵⁵⁵ Id., n. 60, stating that on March 6th, 1808, Napoleon sent a letter to his brother writing describing his despise Jews and a desire to correct them, quoting L. Lecestre, *Lettres inédites de Napoléon I*, vol. 1, (Paris, 1897), p. 158-9.

⁵⁵⁶ Taieb, *supra*, p. 10-11.

Taieb notes, the answer given by Sanhedrinto all above cited questions was equally subversive, from Napoleon's point of view. The loyalty to Napoleon's laws was affirmed, with reservation that such loyalty is based on rights of citizens and not on a will of Napoleon as a law-giver and emperor⁵⁵⁷.

In comparison, it seems that despite problems the French Jewry has fared better in terms of social mobility, access to resources, professions and general enjoyment of a higher social status relative to their German and Austro-Hungarian counterparts,. The pricetag and costs were there, as Brown documents drawing on primary historical source. In the course of emancipation and assimilation, the remaining religiously observant French Jews were pushed towards privatizing their practices not only by the French authorities and society of the 19th century, but by the emancipated Jews of the higher social status as well. Increasingly, the French Jews or at least their elite became socially and politically conservative, aligning themselves vigorously with the French nationalism of the day, including the belief in a messianic mission of France which they shared with the rest of the French elite, all in order to remove from themselves any suspicion of disloyalty to French ideal of a unified Republic , a suspicion which, as a result of anti-Semitism, was known to them to be always lurking in the background⁵⁵⁸.

The task included an odd task of controlling in-group members, as it was the case with the entrance of „new Jews“ who have arrived to France as a result of the Jewish pogroms in Eastern Europe in 19th century and later on as a result of decolonization in the 20th century. As Brown notes, the newcomers from Eastern Europe were an embarrassment to French Jewish elite because they were everything the elite tried hard to leave behind in a process of assimilation – too much

⁵⁵⁷ Id.

⁵⁵⁸ Brown, p. 56-57.

Jews, too little French⁵⁵⁹. In effect, the newcomers were treated with disdain by the French Jewish elite and have faced clear demands of change not only by the French mainstream but by the French Jewish elite also. In the 20th century, a similar event occurred again. The North African Jews, mostly Sephards and Mizrahi, in spite of their significant contribution to the construction of Jewish identity in France, have been treated similarly by the elites and middle class of French Jewry in the aftermath of the Algerian Independence, once they started flocking in great numbers to France, expecting hospitality as French citizens and former members of colonial administration in Algeria and elsewhere⁵⁶⁰.

To conclude this part, the problem of „groups within groups“ or nations within nation has been ingrained in the project of the French Republicanism, secularism and anticlericalism from the beginning. French Jews were among the first to become suspect of „national disloyalty“ as a result of their „suspicious belonging“. Simultaneously, the demands for assimilation were stated openly, giving them „exit“ options – the opportunity to move upstream on the social scale in return for forsaking or at least muting their previous identity; and promising „banning“ in case the exit and assimilation invitation was not accepted. The elite of the French Jewry accepted the invitation, fully aware of the price of refusal and the price of acceptance of the invitation. In short, the elite became an interlocutor for the mainstream, a generator of assimilation and a producer of internal change in group norms. Later on, as the unfolding of events in XXth century shows, it became painfully clear to many among Jews that not even republican citizenship and

⁵⁵⁹ Id.

⁵⁶⁰ On the arrival of North African Jews to France see Esther Benbassa and M. B. DeBevoise, *The Jews of France* (Princeton University Press, 2002), esp. p. 185 – 188: on the process of 'dual integration' of North African Jews in to the both mainstream French society and among the ranks of French Jewry see Michel Abitbol and Alan Astro „The Integration of North African Jews in France,“ *Yale French Studies*, No. 85, (1994), p. 248-261.

success in assimilation will fully remove the suspicion of 'disloyalty' and 'foreignness' throwned at them and accompanied by emotional indifference towards their suffering⁵⁶¹.

4.2 Muslims

Muslims in France are a heterogeneous group – heterogeneous, of course, depending on who you ask and where do you stand - and are an unwanted historical gift to contemporary France from a colonial France. Mostly, they are coming from Senegale, the Arab Maghreb, which means mostly Algeria and also Tunisia and Morocco⁵⁶².

Although de Gaulle, a French WWII hero and one of its most important post-WWII presidents, heroically understanding that France will not be able to exert civilizing mission in its colonies following the end of WWII and in the face of growth of the anti-colonialist movement, approved the Algerian independence in order for a rest of continental France to continue functioning without unnecessary hindrances, things did not work out as planned⁵⁶³. As result of migration from former colonies, the number of Muslims has been growing steadily throughout 60s, accelerating in 70s and then rapidly increasing throughout 80's and 90's up till today. However, back in a period from 160 till roughly mid-80's mainstream problems with Muslims in France were negligible or at least not as visible as today, since they usually kept to themselves in

⁵⁶¹ See the overview of tragic Jewish history in France during 20th century in Esther Benbassa and M. B. DeBevoise, *The Jews of France* (Princeton University Press, 2002), esp. p. 161 – 178. For an argument that illiberal and authoritarian impulses ingrained in French political culture during Napoleonic years have effectively prevented successful integration of Jews see Frederic Cople Jaher, *The Jews and the Nation*, (Princeton University Press, 2002), comparing strategies of liberal inclusion of Jews in the US and France.

⁵⁶² Bloß, p. 27.

⁵⁶³ On legal and social history of relationship between Algeria and French identity under de Gaulle and its influence on contemporary French identity and its relationship with “Muslim factor” with its complicated mix of religious, ethnic and gender difference see Todd Shepard, *The Invention of Decolonization: The Algerian War and the Remaking of France* (Ithaca: Cornell University Press, 2006), esp. p. 11-12 (on relationship between De Gaulle's France); p. 183-204 (on headscarfs, gender and ethnic differences conditioning relationship between Muslims in Algeria and French government); and p. 229-248 (on the migration of Muslims to continental France after the Algerian independence, and their treatment). According to Shepard, it is curious to note that only after France has lost Algeria de Gaulle started referring to Muslims from Algeria that started settling in France as „group within a group.“

suburbs, living geographically and symbolically far away from general mainstream, which has welcomed this tranquil state of affairs expecting them to go back to their respective home countries after few years of work. Instead, most stayed and brought or raised families in which several new generations of people born in France grew.

One of the „affairs“ that has shown that during these few decades the problems between what defines itself as French mainstream society and Muslims have become very deep and are showing all signs of intractable conflict was a recent headscarf affair. In 1989, in a local school in Grenoble officials have denied Muslim female students the right to wear their headscarf, claiming that such behavior implies proselytizing in schools, which is illegal.⁵⁶⁴ The prohibition was upheld in a decision rendered in 1989 by the *Conseil d'Etat*, holding that the “ostentatious” wearing of the Muslim headscarves violated the law in question.⁵⁶⁵ The decision and the ensuing debates became a lightning rod for expressing opinions of all colors and inclinations, and was followed by the Ministry of Education directive in 1994 prohibiting the wearing of “ostentatious political and religious symbols” in schools. The directive does not specify the “symbols” in question, leaving school administrators considerable authority and discretion to do so. However, in a *Conseil d'Etat* 1995 decision on appeals against the directive it was held that „simply“ wearing a headscarf does not provide grounds for exclusion from school and the decision was struck down, though apparently its application in everyday life continued.⁵⁶⁶

The controversy led to the creation of the ‘Bernard Stasi Commission on the Application of Secularism in the Republic’⁵⁶⁷ charged with a task of resolving tensions between strongly rooted secular values and religious traditions resulting from demographic changes. The list of tensions to be dealt with was rather long, i.e., documents proving a strong link between Islam and politics, claims for sexual discrimination and segregation in public swimming pools,⁵⁶⁸ or

⁵⁶⁴ Bloß, p. 27.

⁵⁶⁵ See decision of Conseil d’Etat, Assemblée Générale, No 346.893, of 27 November 1989 at <http://www.conseil-etat.fr/ce-data/aquoi/avis7.html>, cited in supra, id., p. 27.

⁵⁶⁶ See Conseil d’Etat decision of 10 March 1995, *Fatima et Fouzia Aoukili c. Collège Xavier Bichat de Nantua* quoted in Bloss, p. 27.

⁵⁶⁷ Stasi Commission Report (hereafter Stasi Report), “Rapport à Monsieur le Président de la République par la Commission de réflexion sur l’application du principe de laïcité dans la République,” Paris 2003, available <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>, (download on April 30th 2011).

⁵⁶⁸ Id., p. 34.

the refusal by husbands, fathers or brothers to have their wives, daughters or sisters followed by male teachers or doctors under either scholar or medical contexts reflected “preoccupying harms” to traditionally neutral public services nowadays left without means to face such problems.⁵⁶⁹ With regards to headscarves themselves, the Report states that “religious signs are not prohibited as such but only if they reflect an ostentatious or protest character”.⁵⁷⁰

Public debates and legal reactions that followed clearly referred to a fear of communitarianism and a rise of groups within groups, a cause of distress to those who have welcomed the end of the 20th century as a century of secularism and have now started suffering from doubts and fears of future beleaguered with ensuing communalism where pressure to chose sides are high and a risk of being left on the “wrong side” of the fence which is suppose to ‘make good neighbors’ might be an everyday reality.⁵⁷¹ As a preemptive guard against this unwelcomed development the defense of laicite has increased, given that it seems laicite is culturally perceived as a means to facilitate social unity or at very least “peace” between communities,⁵⁷² as well as a fundamental principle (second principle after universal suffrage⁵⁷³), “corner stone of the Republican pact, founded on three non-dissociable values: freedom of conscience, equality of spiritual and religious options before the law, and public power’s neutrality”.⁵⁷⁴ Just to illustrate the strength of convictions mobilized as a result of headscarf affair, consider following statement

⁵⁶⁹ Timothy Savage, ‘Europe and Islam: Crescent Waxing, Cultures Clashing’”, 27(3) *The Washington Quarterly* (2004), p. 25-50, available at http://www.twq.com/04summer/docs/04summer_savage.pdf (downloaded on June 12th, 2011), p. 40-42 (hereafter Savage). See also Ellen Sciolino, *Ban Religious Attire in School, French Panel Says*, NY Times (December 12, 2003) available at <http://www.nytimes.com/2003/12/12/world/ban-religious-attire-in-school-french-panel-says.html> (last visited on November, 14th, 2010). Hereafter Sciolino.

⁵⁷⁰ Stasi Report, p. 30.

⁵⁷¹ Savage, *supra*.

⁵⁷² *Id.*

⁵⁷³ *Id.*

⁵⁷⁴ Stasi Report, p. 9.

of what is called combative secularism, expressed in a letter by four prominent French intellectuals written to than Prime Minister Lionel Jospin⁵⁷⁵:

„ Secularism has always been an issue of power struggle. Should we abandon—what you call—“combative secularism” for the sake of good feelings at this time when religions again have an appetite for combat? Secularism, as a principle, is and will remain a battle, like public education, the Republic, and freedom itself. Their survival imposes on all of us discipline, with benevolence....The French republic should not be 'a mosaic of ghettos,' and 'the destruction of the school would precipitate that of the Republic.' The school should not (accept headscarfs) ..since it is 'the symbol of female submission.’“

Commentators noted that in a situation where many “younger Muslims are resisting assimilation into secular European societies even more steadfastly than the older generation did (because) they fear that assimilation, that is, total assimilation into European society, will strip them of this identity”,⁵⁷⁶ Savage emphasises a demand “to have Europe become a melting pot without accommodation by or modifications of the existing culture”.⁵⁷⁷ Unfortunately enough for French mainstream, the author highlights that studies in France demonstrate that second- and particularly third-generation Muslims are less integrated than their parents or grandparents were⁵⁷⁸.

Analysis of failed legal attempts to resolve headscarf issue have shown that no judge has tried to elaborate on the meaning of the religious signs at stake, or on the meaning of the word “ostentatious,” which remained undefined and used freely.⁵⁷⁹ Such indecisiveness, however, is not really surprising. It is rather illustrative of a societal unease flowing from a growing

⁵⁷⁵ Letter was written by Elisabeth Badinter, Régis Debray, Alain Finkielkraut, Elisabeth de Fontenay, and Catherine Kintzler, “Profs, ne capitulons pas!,” *Le Nouvel observateur*, Nov. 2–8, 1989, quoted in Ahmet T. Kuru, „Secularism, State Policies, and Muslims in Europe: Analyzing French 1 Exceptionalism“, *Comparative Politics*, Vol. 41, Nr. 1, (October 2008):p. 1-20, p. 14.

⁵⁷⁶ Savage, p. 31.

⁵⁷⁷ Id.

⁵⁷⁸ Id.

⁵⁷⁹ Id.

incapacity to cope with demographic and cultural evolutions. As Sciolino notes the French government itself was divided on this issue. Back in 2005 President Chirac has made no secret of his opposition to head scarves in school in a speech to students at the French High School in Tunis where he plainly stated he saw ‘something aggressive’ in the wearing of Muslim veils and pledging that the French state would forbid students to wear what he thinks are ostentatious signs of religious proselytism. By contrast, France’s interior minister, Nicholas Sarkozy - the current President of the French Republic - opposed such a law, arguing that an outright ban would represent ‘secular fundamentalism’.⁵⁸⁰ The issue of ‘adapting’ to cultural “evolutions” remains unsolved.

In short, as Stasi Report states, there is clearly a form of a, at very least, symbolic clash of various groups amongst themselves, based on the “conjunction of two simultaneous phenomenon’s: a social integration breakdown and the mutation of religious and spiritual backgrounds”.⁵⁸¹ This conclusion is probably largely correct. However, it is also clear that the debate essentially relates to presence of Muslims in France and not Islam per se as some say, given that throughout most of the 19th and until mid-20th century history Islam in France was not an issue but rather a matter of philological or anthropological studies and notes from far away colonies comparable to, say, interest in Buddhism.

Further, the debate is definitely de facto (formally perhaps) not about Christmas, Easter breaks, Christian crosses or Jewish kippahs. Stasi report was also criticised for this reason, and some have claimed that it was hiding widespread though not fully expressed emotion of imminent danger or upcoming emergency and a wholesale conflict behind the creation of public

⁵⁸⁰ See Sciolino, *supra*.

⁵⁸¹ Stasi Report, p. 35.

order regulations on religious signs.⁵⁸² The Report was also downgraded as unconstructive for a lack of productive suggestions on solving the issue in which ever direction.⁵⁸³ Some of those working on the ranks of the Stassi Commission were frank about that. Jean Bauberot, a sociologist and a renowned historian of laicite, wrote that “large crosses, let’s face it, have nothing to do with this kind of report.”⁵⁸⁴ Moreover, he argued that to claim that Islam was not the primary target of the strategy of containment is disingenuous and dangerous, skewing the debate and masking the widespread moral panic in the French society. Bauberot further insisted that treatment and debate of Muslims was similar to the debate about Jews in 18th century France⁵⁸⁵.

It should be added that although the link between secularism and the French national identity sacralizes the absence of religion in the public life, the principle corresponds to a need for public neutrality without claiming that the French identity has no religious background whatsoever. Catholicism subsists in the French identity and everyday life, from the holiday calendar to the one-village-one-church tradition. But for pragmatic purposes that is, again, irrelevant – there is no reason, acceptable to everyone, why the preferred views of the society, or those in elite setting the tone of mainstream society, are suppose to be disregarded for reasons of accommodating someone else. And there are still no strategic reasons let alone reasoned and emotional support for bending and softening one’s cultural standards for the sake of some others (especially when those other standards threaten to nullify the former ones). The way things stand

⁵⁸² Jean Herrgott, "Le rapport Stasi ou l'invention de la commission réalité," available at <http://www.islamlaicite.org/article183.html> (last accessed on May 13th, 2011).

⁵⁸³ Id.

⁵⁸⁴ See Jean Bauberot, "The Secular Principle" available at <http://ambafrance-us.org/IMG/html/secularism.html> (last accessed July 14th, 2011).

⁵⁸⁵ See Jean Bauberot, *Histoire de la laicite francaise* (Paris: PUF, 2000) and Bauberot "La laïcité française et ses mutations," *Social Compass*, Vol. 45, Issue 1, (1998), p. 175-187.

now, none really knows what the right decision to be made by the mainstream should be. The current state of affairs is, hence, of *no-decision* – a state of affairs that cannot last for long.

For a world of law this indecisiveness is not really surprising, but is rather illustrative of one of the main assumptions of laïcité: namely the assumption of relative homogeneity and a problem of dealing with demographic and cultural evolutions. The headscarf affair was just a symbol of it, an issue endlessly – and largely in an inconsequential fashion – discussed as a ‘tradition and religious ideal v. laïcité and social unity v. feminist freedom v. colonialism v. post-colonialism v.’ altogether creating more confusion. Laïcité is deeply present in the French national identity and even slightly softening the principle to allow the exercise of personal convictions with clear group-based coordinates – headscarf being clearly a group coordinating and credibility advancing, as well as boundary sustaining mechanism – generates what some call “fear” whilst others call a realistic urge for a preservation of identity or a civilization. The whole discussion can be distilled to one line. Realistic or not – it is irrelevant after all – there is a widespread mobilizing feeling that the culture of what mainstream considers a non-French population, citizenship notwithstanding, is progressively taking over the social fabric.

T. Jeremy Gunn convincingly describes a “suspicion among some that those who wear the headscarf are not really French and that they prefer their Muslim identity over their French identity. Thus, the headscarf is increasingly seen as the symbol of foreign people –with a foreign religion– who have come to France, but who do not wish to integrate themselves fully into French life or accept French values”.⁵⁸⁶ To make things more difficult for mainstream this foreign population are mostly French nationals, whose knowledge of French language and way of life is by no means poor, given long term “coexistence” of France and its colonies. Pointing at

⁵⁸⁶ T. Jeremy Gunn, “Religious Freedom and Laïcité: A Comparison of the United States and France” 2004 *B.Y.U. L. Rev.* 419, 456 (2004).

a situation where many “younger Muslims are resisting assimilation into secular European societies even more steadfastly than the older generation did (because) they fear that assimilation, that is, total assimilation into European society, will strip them of this identity”,⁵⁸⁷ Savage denounces a demand “to have Europe become a melting pot without accommodation by or modifications of the existing culture”.⁵⁸⁸ To make things more complicated, empirical studies conducted in France and Germany show that second- and particularly third-generation Muslims are less integrated into European societies than former one or two generations were.⁵⁸⁹

To finalize this part, the relationship between Muslims in France and the French mainstream is a tenuous one, showing all signs of increasing social distance and a conflict and marking a form of fracture in a social contract. Long term, this will lead to a renegotiation of a social contract in a direction none can clearly foresee.

Short term measures, however, are already there, some legally “combative,” other more refined ones. Legal combative measure such as restrictive preventions and prohibitions are a form social control exercised in order to preserve social unity. However, when compared with the passionate semantics and alarming descriptions of the breakdown of a social contract, restrictive measures seem to be relatively disorganized and somewhat more feeble than one would expect pointing, at some level, to an absence of clear strategy or devotion of resources and capabilities on the side of mainstream.

More refined measures are also in place and generally correspond to some of the exit, voice and loyalty strategies described in chapter One. In this particular case, there are several basic types of measures taken to deal with Muslims, already described in detail by various

⁵⁸⁷ See Savage, *supra*, p. 31.

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.*

authors.⁵⁹⁰ First, a regular one, is a heroic push towards further integration and assimilation into a French tradition, as documented in speeches and documents quoted above. Second one, practically relatively more recent, is an attempt to claim birth to “French Islam,” a domesticated version of an unwanted phenomenon, which is or will be supposed to encompass in itself laicite, French and Muslim identities, all at the same time, so as to avoid further homogenizing of Muslims as a group and to allow and incentivize particular members to exit the group and move upstream as individuals, consequently legitimizing mainstream ideas and beliefs.

If the theory presented in chapter One is correct, this should result in leaving a lot of group members stuck behind, yet intuitively speaking this measure seems first one to attempt, from a point of view of mainstream. Probably the crucial factor conditioning the success of this measure is what type of decision the in-group members take, that is to say whether group action will actively pre-empt this development and demand upstream moving all together or no, sensing that the success of one means that others will go back or stay in place; or whether the group actively pre-empts any action in order to strengthen internal solidarity and mark firm group boundaries. Hence, as Hirschmann elaborated, the problem always remains voice issuers and loyalists – the rest of in-group members - not necessarily those who exit the group. Other issues, which cannot be dealt with here, might stand in the way also, namely racial and ethnic differences and the “shared past”, which makes matters even more complicated. Once when, in principle, a mutable characteristic like religion mixes up with an immutable one like racial or

⁵⁹⁰ For an overview of governmental measures aimed at dealing with Muslims, together with an overview of literature on this topic, see Joel S. Fetzer, J. Christopher Soper, *Muslims and the State in Britain, France, and Germany* (Cambridge University Press, 2005), p. 62-97; and generally John R. Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public State* (Princeton: Princeton University Press, 2006).

ethnic difference and threatens to become inseparable, complexity of a problem grows beyond recognition.

Further measures enacted are or will probably include further entrenchment of some sort of a domesticated overarching religious institution claiming religious legitimacy authority over all Muslims in France. Such measures already seem at work: in 2003 the unified Conseil français du culte musulman (CFCM) was formed under the encouragement of the state with an aim of being centralized representational body for all of Muslim communit(y)ies; and in 2005 than Minister of Interior Sarkozy requested review of *Loi 1905* provisions prohibiting the funding for building of new religious objects and religion generally (exceptions already cited notwithstanding.) In spite of the controversy, the ‘Foundation for Islam’ was established to supervise the financing of Islam in France with funds held in a state-owned bank to ensure maximum transparency, and earmarked for financing and supporting the building of mosques and the training of imams⁵⁹¹. While these measures are obviously strategic, ensuring control over financial flows likely suspected of funding terrorists activities or something alike, they will, if the theory presented in chapter One is correct, probably not succeed, considering internal organizational issues of Islam. In short, dealing, either in a combative or other way, with a group that has no vertical religious organization, is an unsatisfactory type of work and it feels like talking to (or punching) with fog.

4.3 “Sects”

Translation of the English phrase "*destructive cult*" into the French language is word „*sectes*". The French word "*cultes*" refers to religious rituals of faith groups, and does not carry a

⁵⁹¹ See data on Islam in France and the overview of all measures at <http://www.euro-islam.info/country-profiles/france/> (last accessed July 31st, 2011).

negative meaning. This is the original meaning of the word "cult" in English, before it developed its present pejorative meanings.

In today's France and in at least three or four last decades, sects („new religious movements“) are targeted with a zeal hardly comparable to any other country in the Western Europe. In 1981, an *Information Mission on Cults* was formed by the Parliament and in 1985 it has published a report authored by Alain Vivien entitled "*Cults in France: Expression of Moral Freedom or Factors of Manipulation.*" (i.e. the *Vivien Report*.) The report was devoted to what was described as manifold ways in which „dangerous“ sects are attempting to disrupt the public order via mental and economic manipulation⁵⁹².

In 1995/96, similar as in the German case, following the mass-murder of the members of Order of the Solar Temple and the gas attack in Tokyo by Aum Shinri Kyo, the National Assembly established another commission which has produced what is known as Guyard-Gest report. This report relied mostly on information delivered by the French intelligence services, stating in tough language that „sects“ pose a danger to the French society and values and that the government should set up a Cult Observatory. In addition, the report has listed around 172 „sects“ whose activities, according to the report, are supposed to be „monitored“⁵⁹³. The list has included indeed strange bed fellows and groups who do not share many similar beliefs let alone practices, ranging from Evangelical Christians to Catholic orders to Scientology to Buddhists to the LDS church to Hare Krishna's. Amongst others, those on the list included: Pentecostal and Evangelical Christian churches, including the Pentecostal Evangelical Church of Besançon and the Universal Church of God; Jehovah's Witnesses; Nîmes Theological Institute (Baptist Christian); Soka Gokkai (a Buddhist group); Paris Dharma Sah (Buddhist); Sri Chinmoy (a

⁵⁹² On this report see James A. Beckford, „'Laïcité', 'Dystopia' and the Reaction to New Religious Movements in France" in *Regulating Religion Around the Globe*, James T. Richardson, ed., (Kluwer, 2003), p. 27-40 at 30.

⁵⁹³ Id., p. 29.

major new Eastern religion); International Society for Krishna Consciousness (Hindu group also known as “Hare Krishna”, ISKCON); Culture Office of Cluny (Catholic religious retreat); Order of Invitation to Intense Life (Catholic group); Fraternity of Notre Dame (Catholic order of nuns); Church of Scientology; The Rosicrucians (old Christian movement oriented towards mysticism and healing), etc⁵⁹⁴.

The establishment of the Cult Observatory was followed by even harsher measures. In October 1998, by a Presidential decree, an Inter-Ministerial Mission to Combat Cults (MILS) has been established, with, just as the name states a full scale mission to fight cults on every level⁵⁹⁵. The decree establishing the mission *No. 98.890* specifies that concrete measures the Mission will take range from various government departments collecting information about sects to informing other departments and public prosecutor about instances of sects that violate human dignity, to educating public representatives on the method of fighting sects, as well as educating the public on the danger that the sect phenomenon represents⁵⁹⁶.

The „sect affair“ culminated in 2001, when the new legislation, relying on the reports mentioned above, was introduced. Apparently, the new law has drawn a support from legislators and the executive who, in turn, drew their strength from apparently very vocal French public who demanded „tough stance“ against the perceived threats the „sects“ listed above allegedly present for French public order, lack of evidence notwithstanding. Numerous human rights groups from France and abroad, alongside religious groups, have criticized the new legislation,

⁵⁹⁴ A list is drawn from Lasia Bloß, “European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process” NYU Jean Monnet Working Paper 13/03 (2003), available at <http://www.jeanmonnetprogram.org/papers/03/031301.html> (downloaded 24.02.2007, 16:15), note 58.

⁵⁹⁵ On this report see James A. Beckford, “‘Laïcité’, ‘Dystopia’ and the Reaction to New Religious Movements in France.” In *Regulating Religion Around the Globe*, in James T. Richardson, ed., (Kluwer, 2003), p. 27-40 at 30.

⁵⁹⁶ *Note on Establishing an Inter-ministerial Mission to Fight Against Sects*, (English translation) available at: <http://www.cesnur.org/decree98.htm> (last accessed April 24th, 2011).

while the academics and specialists have repetadly warned that none of the previous reports on which the new legislation has relied upon has any credible scientific backing which would justify harsh measures introduced⁵⁹⁷. The list of measures targeting „sects“ introduced by the new legislation is long, but the most important ones are those which have included special provisions enabling the government to dissolve sects almost at will; and the list of new offenses added to the Criminal Code, the most interesting new offense being 'mental manipulation' , the term whose concrete definition was again left to a rather arbitrary will of the executive. Apparently, the legislation enjoyed not only widespread French public support, but also a support of the Catholic Church and the various anti-Cult movements in France, who joined elbs to fight what they have perceived as an encroachment of French values by intruders and spoilers⁵⁹⁸.

In the case of the above mentioned “sects”, clearly measures undertaken were rather harsh ones, exemplifying a full scale social control and a wholesale fight for preservation of a public order which the French legal system initiated from a highest level. Especially disturbing in this case is the level of public support these measures have enjoyed in the France itself, as well a lack of documented forms of control over measures undertaken against “sects”. Obviously, the empirical and scientific evidence necessary to prove that “sects” are indeed so harmful of public order was sourly lacking, and it is indeed amazing that measures have continued lack of evidence notwithstanding. The list of sects targeted jointly is another amazing fact about reports produced and legislation that followed – finding any similar belief or practice which would put Hare Khrisna’s and, say, Church of Scientology into a same category to be treated with same legal measures is clearly mission impossible.

⁵⁹⁷ Cyrille Duvert, “Anti-Cultism in French Parliament: Desperate Last Stand or an Opportune Leap Forward? A Critical Analysis of the 12 June 2001 Acti” in James T. Richardson, ed., *Regulating Religion Around the Globe*. (Kluwer, 2003), p. 41-52.

⁵⁹⁸ Id., p. 48.

The harshness of measures taken is difficult if not impossible to understand using some of the concepts I have tried to develop in chapter One – i.e. group size or the costs that a given non-mainstream group imposes on a mainstream – considering that the size and number of New Religious Movements in France is negligible, alongside the amount of “extraordinary problems” they create for public order. Nor are these disparate sects are likely to form “nation within a nation.” This fact implies that peculiar emotional and motivational forces supporting a strong strive for social unity are at work in the case of French law and society dealing with the New Religious Movements. The issue demands a further research.

4.4 Conclusion: social unity and separate groups

To conclude this part, the problem of „groups within groups“ or nations within nation has been ingrained in the project of the French Republicanism, secularism and anticlericalism from the beginning. French Jews were among the first to become suspect of „national disloyalty“ as a result of their „suspicious belongings“. Simultaneously, the demands for assimilation were stated openly, giving them „exit“ options – the opportunity to move upstream on the social scale in return for forsaking or at least muting their previous identity; and promising „bannishing“ in case the exit and assimilation invitation was not accepted. The elite of the French Jewry accepted the invitation, fully aware of the price of refusal and the price of acceptance of the invitation. The tradition of preserving and guarding social unity continues up till today.

Looking at a side of social factor elaborated in part one – assimilationist bias and acceptance of non-mainstream group norms for strategic reasons – we can conclude that in the French case the former is fully underdeveloped, while the later is fully developed, both mutually supporting each other in an interesting way. That is to say, the assumption that one is to assimilate in order reach status of “inclusion” in the body of the Republic – irrespective of race

and ethnic issues standing in the way - is absolute, demanding full scale assimilation, and not just milder versions of toning down one's inclinations, rhetoric's of privatization notwithstanding. In the words of legislators, the aim of assimilation is to achieve social unity and prevent rise of groups within a group. When one starts from that assumption and "measures" social distance of a particular non-mainstream group, anticipating the legal treatment non-mainstream religious groups can expect to receive does not turn out to be a terribly difficult task. The relation is directly proportional, without unnecessary complications.

Given such strong assumptions and assimilationist aim, it is but expected that in a public and legal space strategic reasons for accommodation cannot be easily supported or argued for nor they are likely to gain wider acceptance, even if they do exist. In other words, the second claim about the influence of social factor I have elaborated in chapter One, holding that the acceptance of some non-mainstream groups follows once the mainstream norms change for strategic reasons that benefit the mainstream and on condition that such change imposes no costs on mainstream and is internalized by the group under scrutiny, is lacking to a great extent in French case.

On an institutional – legal side, as it was argued in chapter one, three institutional legal mechanisms define the limits of toleration and generally follow social developments. *First institutional mechanism* is the level and the nature of the "legalization" of works of religious groups and the (de)centralization of the level of regulatory decision making. *Second institutional mechanism* is the level of judicial influence on decisions regarding status of religious groups, as well as the level of judicial autonomy and discretion in the process. *Third institutional mechanism* is the nature and the socially constructed structure of judicial argumentation and evidence in cases dealing with the non-mainstream religious groups.

As far as these three mechanisms are concerned, their impact on relationship between the French state, mainstream and non-mainstream religious group can be described as follows. The level of and the nature of the legalization of works of religious groups – or better the opposition towards the influence of organized religion, predominantly Catholic Church - has clearly been solidified in a period starting 20th century and has indeed become not only a part and parcel of a legal process and conscious, but also a strong part French public identity which further strengthens the legitimacy of legal decisions, even those who, if taken somewhere else, would have been considered harsh. Yet, the issue of relationship between the French state and the Catholic Church has remained somewhat ambiguous and likely strategically unclear, which is to be expected given the division between “two France”.

As far as the relationship between French state and the non-mainstream groups, things are rather clear. The legal and social heroic push towards turning members of those socially distant groups that have been suspect of creating “groups within groups” or “nation within nation” – i.e. Jews back in 19th century, Muslims today⁵⁹⁹ – was or is marked with clearly stated legal and social control efforts aimed at assimilation and a provision of exit options for group members in return for, to be sure, upstream movement in the social ranking. This process worked in a limited way least in the case of Jews, given that the case of Muslims is more complicated having in mind the history of colonization; the process of what was supposed to be a short-term immigration; and the simple fact that, unlike in case of Jews, they have access to external resources in terms of “compatriots” forming a state(s) or majority elsewhere. In the Muslim case, the social processes

⁵⁹⁹ This is of course not to say that Jews and Muslims are completely same or alike as groups; the claim is simply that process of dealing with such groups by the French mainstream are similar. For comparison and finding of striking similarities of treatment of Muslims and Jews by French authorities and society see William Safran, “Ethnoreligious Politics in France: Jews and Muslims,” *West European Politics*, Vol. 27, Issue 3 (2004), p. 423-451; and Maleiha Malik, Comment, „Muslims Are Now Getting the Same Treatment Jews Had a Century Ago“, *The Guardian* (U.K.), Feb. 2, 2007, p. 35.

of decolonization and what was supposed to be short term immigration probably prevented the assimilation process from functioning properly, though it must be stated that the mainstream was also not interested in it from the beginning, expecting guests to leave. What course events will take in the case of Muslims in France – whether there will be further entrenchment of social distance and indeed conflict with the mainstream or the assimilation will eventually work or whether there some interlocutory governing elite will develop amongst Muslims in France under influence of the French state only time will tell. Much will hinge on a strategic calculation the mainstream makes and the assessment of costs and benefits of each of these measures.

Finally, in the case of “sects” and New Religious Movements, clearly the measures undertaken were rather harsh ones, exemplifying clear social control and a wholesale fight for preservation of a public order with French legal system initiating, from a highest level, protective measures against the “intruders.” The harshness of these measures is indeed difficult if not impossible to understand using some of the concepts I have tried to develop in chapter One – i.e. group size or the costs that a given non-mainstream group imposes on a mainstream – considering that the size and number of New Religious Movements in France is negligible, alongside the amount of “extraordinary problems” they create for public order. This fact implies that peculiar emotional and motivational forces, which require further research, are at work in the case of French law and society dealing with the New Religious Movements and I suspect laïcité is only one part of the story.

As far as the second institutional mechanism (the level of judicial influence on decisions regarding status of religious groups, as well as the level of judicial autonomy and discretion in the process) and the third institutional mechanism (the nature and the socially constructed structure of judicial argumentation and evidence in cases dealing with the non-mainstream

religious groups), it is rather obvious that their influence is rather underdeveloped in the French case. The judicial influence on decisions regarding the status of non-mainstream religious groups or their members is far less frequent than in the German case and especially the US case, given number of cases involving such groups. The reason is likely the concept of the French constitution and the peculiar position of the judiciary, which conducts a review of administrative decisions, while the constitutional review is done *ex ante* by the Constitutional Council. However this may be, the laws and parliamentary decisions in effect take precedence over judiciary.

The same goes for the structure of the judicial argumentation. The case load is not sufficiently well developed or big enough to reach a final conclusion, and as far as we can tell from the limited example of headscarf affair the judicial argumentation draws strongly on well entrenched and traditional concepts of *laïcité*, basically following the lead provided by the Parliament and the Government. Even when judiciary attempted to add some innovative new “twist” to a well entrenched concept such is *laïcité*, the legislation definitely took precedence and sets the judiciary “back on its track”. Further, as the limited available material shows, faced with the unusual and socially distant and foreign practices like headscarf wearing, judiciary’s argumentation turns out to be at loss, mostly second guessing its meaning – as everyone inevitably does, except those wearing it – and judging its meaning from the point of view of the prevalent public and legal opinion.

Bibliography

Books and Articles

- Abreu, M. "The brand positioning and image of a religious organization: an empirical analysis." *International Journal of Non-Profit and Voluntary Sector Marketing* 11, (2006): 139-146.
- Abitbol, Michel and Alan Astro „The Integration of North African Jews in France.“ *Yale French Studies*, No. 85. 1994.
- Aires Wolf. "Germany's Islamic Minority: Some Remarks on Historical and Legal Developments." In *Regulating Religion around the Globe*, by Richardson T. James. (2003): 103-112.
- Akerlof, George A and Rachel E. Kranton. "Economics and Identity." *The Quarterly Journal of Economics* 115, no. 3 (2000): 715-753.
- Akerlof, George A and Rachel E. Kranton. "Identity and the Economics of Organizations." *Journal of Economic Perspectives* 9, (2005).
- Allport, Gordon. *Individual and his Religions*. New York: Macmillan Co., 1951.
- Anderson, Garry M. "Mr. Smith and the Preachers: The Economics of Religion in the Wealth of Nations." *Journal of Political Economy* 96, no. 5 (1988): 1066-1088.
- Appiah, Anthony K. *The Ethics of Identity*. Princeton University Press, 2005.
- Asad, Talal. *Genealogies of Religion: Discipline and Reason of Power in Christianity and Islam*. Baltimore, MD: John Hopkins University Press, 1993.
- Atran, Scott. *In Gods We Trust: Evolutionary Landscape of Religion*. Oxford University Press, 2002.
- Azzy, Cory and Ronald Ehrenberg. "Household Allocation of Church and Time Attendance." *The Journal of Political Economy* 83, no. 1 (1975): 27-56.
- Baker, Christina A. "French Headscarves and the US Constitution: Parents, Children, and Free Exercise of Religion." *13 Cardozo J.L. & Gender* 341, no. 122 (2004).
- Barringer Gordon, Sarah. *The Spirit of Law: Religious Voices and the Constitution in Modern America*. Harvard University Press, 2010.
- Barringer Gordon, Sarah. "The Liberty of Self-Degradation: Polygamy, Woman Suffrage, and Consent in Nineteenth- Century America." *The Journal of American History* 83, no. 3 (1996).

- Barringer Gordon, Sarah. *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*. Chapel Hill and London: University of North Carolina Press, 2002.
- Barker, Christine. "Church and State Relationship in German "Public Benefit Law." *International Journal for Not-for-Profit Law* 3, no. 2 (2000).
- Bauberot, Jean. "The Secular Principle." Available at <http://ambafrance-us.org/IMG/html/secularism.html> (last accessed July 14th, 2011).
- Bauberot, Jean. *Histoire de la laïcité française*. Paris: PUF, 2000.
- Bauberot, Jean. "La laïcité française et ses mutations." *Social Compass*, Vol. 45, Issue 1, (1998): 175-187.
- Beaman, Lori G. "The Myth of Plurality, Diversity and Vigour: Constitutional Privilege of Protestantism in the United States and Canada." *Journal for the Scientific Study of Religion* 42, no. 3 (2006): 311-325.
- Beckford James. A. "'Laïcité', 'Dystopia' and the Reaction to New Religious Movements in France." In *Regulating Religion Around the Globe*, by Richardson T. James. (2003): 27-40.
- Ben Ner, Avner and Claire A. Hill. "Reducing the Negative Consequences of Identity: A Potential Role for Non-Profit Sector in the Era of Globalization." *Annals of Public and Cooperative Economics* 79, no. 3-4 (2008): 579-600.
- Benbassa, Esther and M. B. DeBevoise. *The Jews of France*. Princeton University Press, 2002.
- Berger Levinson, Rosalie. "First Monday--The Dark Side of Federalism in the Nineties: Restricting Rights of Religious Minorities." *Val. U. L. Rev.* 33.
- Berger, Peter and Thomas Luckmann. *Social Construction of Reality: A Treatise in the Sociology of Knowledge*. New York: Anchor Books, 1966.
- Berger, Peter. *The Sacred Canopy*. New York: Anchor, 1967.
- Beyer, Peter and Lori G. Beaman. *Religion, Globalization and Culture*. Martinus Nijhof Publishers, 2009.
- Bhargava, Rajeev. *Secularism and it's Critics*. Oxford University Press, 2005.
- Black, Donald. *The Behavior of Law*. New York: Academic Press, 1976.
- Black, Donald. *Social Structure of Right and Wrong*. New York: Academic Press, 1997.

- Bloß, Lasia. "European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process." *Jean Monet Working Paper* 13, no. 3 (2003):
- Bockenforde, Ernst-Wolfgang. *Die Entstehung des Staates als Vorgang der Sakularisierung. Recht, Staat, Freiheit*. Frankfurt am Main: 1992.
- Bordieu, Pieere. *The Field of Cultural Production: Essays on Art and Literature*. Columbia University Press, 1984.
- Bornstein, Brian H and Monica K. Miller. *God in the Courtroom: Religion's Role at Trial*. Oxford University Press, 2009.
- Bornstein, Brian H and Monica K. Miller. *Does Judges Religion Influence Decision Making*.
- Bowen, John R. *Why the French Don't Like Headscarves: Islam, the State, and Public State*. Princeton University Press, 2006.
- Boyer, Pascal. *Religion Explained*. New York: 2001.
- Brent, James C. "An Agent and Two Principals: U.S. Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act." *American Political Quarterly* 236, (1999).
- Brintizer, Ron. *Religion – eine institutionen-ökonomische Analyse*. Egon Verlag, 2004.
- Brown, Wendy. *Tolerance in the Age of Identity and Empire*. Princeton University Press, 2006.
- Brugger, Winfried. *Communitarianism as the social and legal theory behind the German Constitution*.
- Brunk Wuerth, Ingrid. "Private Religious Choice in German and American Constitutional Law: Government Funding and Governmental Speech." *Vanderbilt J. of Transnational Law* (1998): 1184-1185.
- Buchanan, James. "An economic theory of clubs." *Economica* 33, (1965): 1-44.
- Caddy, Linell E and Elizabeth Shakman Hurd. *Comparative Secularisms in a Global Age*. Pallgrave MacMillan, 2009.
- Camerer, Collin E. *Behavioral Game Theory: Experiments in Strategic Behavior*. Princeton University Press, 2003.
- Carr, Jack L and Janet T. Landa. "The Economics of Symbols, Clan Names and Religion." *The Journal of Legal Studies* 12, no. 1 (1983): 135-156.

- Carvalho, Jean Paul. "A Theory of Islamic Revival." *Oxford University Department of Economics Discussion Paper* (2009).
- Casanova, Jose. *Civil Society and Religion: Retrospective Reflections on Catholicism and Prospective Reflections on Islam*.
- Chaves, Mark and Philip S. Gorski. "Religious Pluralism and Religious Participation." *Review of Sociology* 27, (2001): 261-281.
- Cohen, Arthur A. *The Myth of Judeo-Christian Tradition*. 1970.
- Cooney, Mark. "Evidence as Partisanship." *Law & Society Review* 28, (1994): 833-858.
- Corrigan, John. *Oxford Handbook of Religion and Emotions*. Oxford University Press, 2008.
- Currie, David. *The Constitution of the Federal Republic of Germany*. University of Chicago Press, 1994.
- Curtis, Edward E. *Islam in Black America: Identity, Liberation, and Difference in African-American Islamic Thought*. SUNY Press, 2002.
- Davie, Grace. *Europe: The Exceptional Case*. Darton, Longman and Todd, 2002.
- Denzau, Arthur and Douglas C. North. "Shared Mental Models: Ideologies and Institutions." *Kyklos* 47, no. 1 (1994): 4.
- De Cremer, David, Marcel Zeelenberg, and Keith J. Murnighan. *Social Psychology and Economics*. Lawrence Erlbaum Associates, 2006.
- Dillon, Michelle. *Handbook of the Sociology of Religion*. Cambridge University Press, 2003.
- Douglas, Mary. *How Institutions Think*. Syracuse University Press, 1986.
- Douglas, Mary. *Purity and Danger*. London: Routledge and Kegan Paul, 1966.
- Driggs, Ken. "After the Manifesto: Modern Polygamy and Fundamentalist Mormons." *Journal of Church and State* 32, (1990).
- Duvert Cyrille.. "Anti-Cultism in French Parliament: Desperate Last Stand or an Opportune Leap Forward? A Critical Analysis of the 12 June 2001 Act." In *Regulating Religion Around the Globe*, by Richardson T. James. (2003): 41-52.
- Dworetz, Steven M. *The Unvarnished Doctrine: Locke, Liberalism and the American Revolution*. Durham and London: Duke University Press, 1990.

- Eberle, Edward J. "Free Exercise of Religion in Germany and the United States." 78 *Tulsa L. Rev* 1023, (2004): 7.
- Eilinghoff, Christian. "Religious Information and Credibility." *German Working Papers in Law and Economics* 1, (2008).
- Eisenberg, Avigail. *Reasons of Identity*. Oxford University Press, 2009.
- Ekelund, Robert B, Robert F. Hébert, and Robert D. Tollison. "Adam Smith on Religion and Market Structure." *History of Political Economy* 37, no. 4 (2005): 647-660.
- Ekkehart, Schlicht. "Economic Analysis and Organized Religion." *Survival and Religion, Chichester* (1995): 111-162.
- Engel, Christoph. *Causes and Management of Conflicts*. 2003.
- Engel, Christoph and Gerd Gigerenzer. *Heuristics and the Law*. Cambridge University Press, 2007.
- Epstein, Steven B. "Rethinking the Constitutionality of Ceremonial Deism." *Columbia Law Review* 96, no. 2083 (1996).
- Ertman, Marth M. "Race Treason: The Untold Story of America's Ban on Polygamy." *Columbia Journal of Gender and Law* 19, (2010):
- Ertman, Martha M. "The Story of Reynolds v. United States: Federal 'Hell Hounds' Punishing Mormon Treason." *Family Law Stories* (2008).
- Esbeck, Carl H. "Dissent and Disestablishment: The Church-State Settlement in the Early American Republic." *1415 B.Y.U. Law Review* 30, (2004).
- Etzioni, Amitai. *The Moral Dimension: Toward a New Economics*. Free Press, 1988.
- Feldman, Noah. *Divided by God*. Farrar, Strauss and Giroux, 2005.
- Feldman, Stephen. "Empiricism, Religion and Judicial Decision Making." *15 William and Mary Bill of Rights Journal* 42, (2006).
- Fehr, Ernst and Simon Gächter. "Punishments in Humans." *Nature* no. 10 (2002).
- Fetzer, Joel S. and Christopher Soper. *Muslims and the State in Britain, France, and Germany*. Cambridge University Press, 2005.
- Fieldman, Stephen. "Empiricism, Religion and Judicial Decision Making." *15 William and Mary Bill of Rights Journal* 42, (2006).
- Firmage, Edwin Brown and R. Collin Mangrum. *Zion in Courts: a Legal History of the Church*

of Jesus Christ of Latter Days Saints, 1830-1900. University of Illinois Press, 2001.

Fish, Stanley. *The Trouble With Principle*. Harvard University Press, 1999.

Frank, Robert. *Passions within Reason: The Strategic Role of Emotions*. New York: W.W. Norton, 1988.

Frank, Robert H. *Choosing the Right Pond: Human Behavior and the Quest for Status*. New York: Oxford University Press, 1985.

Freiher von Campenhausen, Axel. *Staatskirchenrecht*. Munchen: C.H. Beck'sche, 1996.

Freiher von Campenhausen, Axel. "German Headscarf Debate," International Law and Religion Symposium Article." *Brigham Young University Law Review* (2004).

Focus. Edited by John Horton and Susan Mendus. London: 1991.

Frey, Bruno S. *Not Just for the Money: An Economic Theory of Personal Motivation*. Edward Elgar, 1997.

Frey, Bruno. "Comments on the Economics of Religious Belief." *Journal of Institution and Theoretical Economics* 153, (1997).

Garvey, John. "Another Way of Looking at School Aid." *S. Ct. Rev* 61, (1985).

Gatowski, S. S, S. A. Dobbin, J. T. Richardson, and G. Ginsburg. "The globalization of behavioral science evidence about battered women: A theory of production and diffusion." *Behavioral Sciences & the Law* 15, (1997): 285-306.

Gedicks, Fredrick M and Roger Hendrix. "Uncivil Religion: Judeo-Christianity and the Ten Commandments." *West. V. L. Rev.* no. 273 (2007).

Gedicks, Fredrick Mark. "Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason." *Alabama Law Review* 61, no. 2 (2010): 357.

Geertz, Clifford. *Interpretation of Cultures*. Basic Books, 1973.

Gellner, Ernest. *Postmodernism, Reason and Religion*. London and New York: Routledge, 1992.

Gely, Rafael. "Law and Economics of Identity." *Duke Journal of Gender Law & Policy* 14, (2008).

Ginsburg, G. and James T. Richardson. "Brainwashing' evidence in light of Daubert." *Law and Science* (1998): 265-288.

- Glaeser, Edward L. "Political Economy of Hatred." *Quarterly Journal of Economics* 120, no. 1 (2005): 45-86.
- Glimcher, Paul W, Collin F. Camerer, Ernst Fehr, and Russel Poldrack. *Neuroeconomics: Decision Making and the Brain*. Elsevier Publishing, 2009, 303-319.
- Goffman, Ervin. *Stigma: Notes on the Management of Spoiled Identity*. Prentice Hall, 1963.
- Goodenough, Oliver R and Kristin Prehn. "A Neuroscientific Approach to Normative Judgment in Law and Justice." *Philosophical Transactions: Biological Sciences* 359, no. 1451 (2004): 1709-1726.
- Great Political Thinkers*. Oxford University Press, 1992.
- Green, Ruth. *John Locke's Liberalism*. Chicago: University of Chicago Press, 1987.
- Greene, Edie and Lawrence S. Wrightsman. "Decision Making by Juries and Judges: International Perspectives." *Handbook of Psychology in Legal Contexts* (2003).
- Greenwalt, Kent. *Religion and the Constitution: Free Exercise and Fairness*. Harvard University Press.
- Grégoire, Abbé H. *An essay on the physical, moral, and political reformation of the Jews*. London, C. Forster, 1791.
- Gunn, T. J. "Religious Freedom and Laicite: A Comparison of the United States and France." *B.Y.U. L. Rev.* 419, (2004): 456.
- Gunn, T.J. "Religious Freedom and Laicite: Comparison of United States and France." *BYU. L. Rev* 419, (2004).
- Haack, Susan. "The Growth of Meaning and the Limits of Formalism: in Science and in Law." *Analisis Filosofico* 29, no. 1 (2009).
- Habermas, Jurgen. *Religion and Rationality: Essays on Reason, God and Modernity*. MIT Press, 2002.
- Hadaway, C. K, Penny Long Marler, and Mark Chaves. "What the Polls Don't Show: A Closer Look at U.S. Church Attendance." *American Sociological Review* 58, no. 6 (1993): 741-752.
- Hampton, Jean. *Hobbes and the Social Contract Tradition*. Cambridge University Press, 1986.
- Hardin, Russell. *How do You Know*. Princeton University Press, 2009.

- Hargreaves Heap, Shaun and Yanis Varoufakis. *Game Theory: a Critical Introduction*. Routledge, 1991.
- Harrison, Ross. *Hobbes, Locke, and Confusions Masterpiece*. Cambridge University Press, 2003.
- Harwell Wells, C A. "The End of an Affair? Anti-Dueling Laws and Social Norms in Antebellum America." *Vanderbilt Law Review* 54, (2001).
- Hill, Clair. "Law and Economics of Identity." *Queens Law Journal* 32, no. 2 (2007).
- Hirschman, Albert O. *Exit, Voice and Loyalty*. Harvard University Press, 1970.
- Hobbes, Thomas. *Leviathan*. Columbia University Press, 1993.
- Huang, Yong. "Foundations of Religious Beliefs after Foundationalism." *Religious Studies* 31, (1995): 251-267.
- Huang, Yong. "Religious Epistemology." *Religious Studies* 34, (1998): 81-89.
- Hume, David. *The Natural History of Religion*. New York: Macmillan Co., 1992.
- Iannaccone, L. R. "Introduction to the economics of religion." *Journal of Economic Literature* 36, (1998): 1465-1496.
- Iannaccone, Laurence R. "Sacrifice and Stigma: Reducing Free-riding in Cults, Communes, and Other Collectives." *The Journal of Political Economy* 100, no. 2 (1992): 271-291.
- Ignagni, Joseph A. "U.S. Supreme Court Decision-Making and the Free Exercise Clause." 55 *Review of Politics* 511, (1993).
- Inboden, William III. *Religion and American Foreign Policy: the Soul of Containment*. Cambridge University Press, 2008.
- Janssen, Esther. "Limits to Expression on Religion in France" in "Agama & Religiusitas di Europa." *Journal of European Studies* 5, no. 1 (2009): 22-45.
- Jasch, Hans Christian. "State-Dialogue with Muslim communities in Italy and Germany - the political Context and the legal frameworks for dialogue with Islamic Faith communities in both countries." 8 *GLJ* 342, no. 114 (2007).
- Jaher, Frederic Cople. *The Jews and the Nation*. Princeton University Press, 2002.
- Johnson Everett, William. *Religion, Federalism, And The Struggle For Public Life: Cases From Germany, India, And America*. Oxford University Press, 1997.
- Jurgensmeyer, Mark. *The New Religious War: Religious Nationalism Confronts the Secular*

- State. University of California Berkeley Press, 1993.
- Jurina, Josef. "The Religious Communities with Private Right Status." *Federal Republic of Germany's Handbook on Church-State Rights* 2, (1994).
- Jusic, Asim. "Economic Analysis of the Legal Regulation of Religion in the US and Germany." LLM thesis, Central European University, (2007).
- Jusic, Asim. "The Weimar Intellectual Baggage in Leo Strauss' *Natural Right and History*." M.A. thesis, University of Heidelberg (2005).
- Kahneman, Daniel and Amos Tversky. "Prospect theory: An analysis of decision under risk." *Econometrica* 47 2, (1979): 263-291.
- Kaplin, William A. *Constitutional Law: An Overview, Analysis and Integration*. Durham, NC: Carolina Academic Press, 2004.
- Keller, K. L. "Memory factors in advertising: The effect of advertising cues on brand evaluations." *Journal of Consumer Research* 14, (1986): 316-333.
- Kent Brown II, Scott. "Jehovah's Witnesses v. Land of Berlin: Requiring Religious Communities seeking Public Corporation Status in Germany to satisfy „Meaning and Purpose of Corporation Status“ Test," International Church-State Symposium." *Brigham Young University Law Review* (1999).
- Knight, Frank H. *Risk, Uncertainty and Profit*. Signalman Publishing, 2009.
- Kommers, Donald P. "German Constitutionalism: A Prolegomenon." *40 Emory Law Journal* (1991):
- Kommers, Donald. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Vol. 2, Duke University Press, 1997.
- Koszegi, B. B and Matthey M. Rabin. "A model of reference-dependent preferences." *Quarterly Journal of Economics* 4, (2006): 1133-1165.
- Kuran, Timur. "Ethnic norms and their transformation through reputational cascade." *Journal of Legal Studies* 27, no. 2 (1998): 623-659.
- Kuru, Ahmet T. "Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies towards Religion." *World Politics* 59, no. 4 (2007): 586-587.
- Kuru, Ahmet T. "Secularism, State Policies, and Muslims in Europe: Analyzing French 1 Exceptionalism." *Comparative Politics* 41, no. 1 (2008): 1-20.
- Laycock, Douglas. "Church and State in the United States: Competing Conceptions and Historic

- Changes.” *Ind. J. Global Legal Stud* 13, (2006).
- Leathers, Charles G and Patrick J. Raines. “Adam Smith on Religion and Market Structure: The Search for Consistency.” *History of Political Economy* 40, no. 2 (2008): 345-363.
- Lessig, Lawrence. “The New Chicago School.” *Journal of Legal Studies* 27, (1998).
- Lecestre, L. *Lettres inédites de Napoléon I*, Vol. 1. Paris, 1897.
- Lewis, Bernard. *The Political Language of Islam*. Chicago: University of Chicago Press, 1991.
- Lewis, James R. *The Oxford Handbook of New Religious Movements*. Oxford University Press, 2003.
- Lindholm, T., W. C. Durham, and Tahzib Lie. *Facilitating Freedom of Religion or Belief: a Deskbook*. Martinus Nijhof Publishers, 2004.
- Locke, John. *A Letter Concerning Toleration, in Focus*. Edited by John Horton and Susan Mendus. London: Routledge, 1991.
- Lowenstein, George. *Preferences: Behavioral Economics and Human Motivation*. Oxford University Press, 2007.
- Luca Nathalie. “Is There a Unique French Policy of Cults? A European Perspective.” In *Regulating Religion Around the Globe*, by Richardson T. James. (2003): 41-52.
- Luckman, Thomas. *Invisible Religion: The Problem of Religion in Modern Society*. New York: Macmillan Publishing Co., 1967.
- Luhmann, Niklas. *Religious Dogmatics and the Evolution of Societies*. New York: Edwin Mellen Press, 1984.
- Maffesoli, Michel. *The Time of Tribes*. Beverly Hills: Sage Press, 1995.
- Mahlmann, Matthias. “Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court’s Decision in the Headscarf Case.” *4 GLJ* 1099, (2003).
- Marré, Heiner. “Church Taxation Law.” *Handbook of Civil Eccles-iastical Law in Germany* 2, (1994).
- Maslow, Abraham. *Religions, Values and Peak Experiences*. Penguin Books, 1964.
- McConnell, Michael W. “Political and Religious Disestablishment.” *BYU. L. Rev* 405, (1986).
- McConnell, Michael W. “The Supreme Court Earliest Church – State Cases : Windows on Religious-Cultural – Political conflict in the Early Republic.” *Tulsa Law Review* 37, no. 7

(2001).

McConnell, Michael W. "Why is the Religious Liberty the 'First Freedom.'" *Cardozo Law Review* 21, (2000).

McConnell, Michael W. "The Origins and the Historical Understanding of Free Exercise of Religion." 1409 *Harvard Law Review* 127 (1990).

McConnell, Michael W and Richard A. Posner. "An Economic Approach to Issues or Religious Freedom." *University of Chicago Law Review* 56, no. 1 (1989).

Medding, Peter Y. *Coping with Life and Death: Jewish Families in the Twentieth Century*. Oxford University Press, 1998.

Miller, Monika K, Alayna Jehle, and Alicia Summers. "From Kobe Bryant to Saddam Hussein: A Descriptive Examination of How Religion Likely Affected Twenty-Five Recent High Profile Trials." *Florida Coastal Law Review* 9, (2007): 24-33.

Moore, Kathleen M. *Muslims in America*. University Press, 1998.

Moore, Kathleen M. *Al Mughtaribun: American Law and the Transformation of Muslim Life in the United States*. SUNY Press, 1995.

Moisi, Dominique. *The Geopolitics of Emotion*. Doubleday, 2009.

Mol, Hans. *Identity and the Sacred: A Sketch for a New Social-Scientific Theory of Religion*. Oxford University Press, 1976.

Montgomery, James D. "Contemplations on the Economic Approach to Religious Behavior." *American Economic Review, Papers and Proceedings* (1996).

Mosley, Emily. "Defining Religious Tolerance: German Policy Toward the Church of Scientology." *Vanderbilt J. of Trans. Law* 1162, (1997).

Mostefai, Ourida and John T. Scott, eds. *Rousseau and L'Infame: Religion, Toleration and Fanaticism in the Age of Enlightenment*. Amsterdam/New York, 2009.

Norenzayan, A. and A. Shariff. "God is watching you: priming God concepts increases prosocial behavior in an anonymous economic game." *Psychological Science* 18, (2007): 803-809.

North, Douglas C. *Institutions, Institutional Change and Economic Performance*. Vol. 4, Cambridge University Press, 1990.

Nussbaum, Martha C. *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*. Cambridge University Press, 2008.

- Oman, Nathan B. "Natural Law and the Rhetoric of Empire: Reynolds v. United States, Polygamy, and Imperialism."
- Pals, Daniel. *Eight Theories of Religion*. Oxford University Press, 2006, 229-259.
- Pfeifer, J. "Perceptual biases and mock juror decision making: Minority religions in court." *Social Justice Research* 12, no. 4 (1999): 409-420.
- Pfeifer, J. "The psychological framing of cults: Schematic representations and cult evaluation." *Journal of Applied Social Psychology* 22, (1995): 531-544.
- Pieters, Rick, G. M., and Fred Van Raaij. "The Role of Affect in Economic Behavior." *Handbook of Economic Psychology* (1987).
- Polanyi, Karl. *Great Transformation: The Political and Economic Origins of Our Time*. Vol. 2, Beacon Press, 2001.
- Posner, Eric. "Legal Regulation of Religious Groups." *Legal Theory* 2 (1996).
- Posner, Richard. "A Theory of Primitive Societies, with special reference to Primitive Law." *Journal of Law and Economy* 23, (1980):
- Pysaiennen, Ilkka. *On How Religion Works: Towards a New Cognitive Science: Cognition and Culture*. The Netherlands: Brill Academic Publishes, 2001.
- Rappaport, Richard. "The Sacred in Human Evolution." *Annual Review of Ecology and Systematics* no. 2 (1971): 23-24.
- Rappaport, Roy. *Ritual and Religion in the Making of Humanity*. Cambridge University Press, 1999.
- Rawls, John. *Political Liberalism*. Columbia University Press, 1993.
- Richardson, James T. *Regulating Religion Around the Globe*. Kluwer Academic Publishers, 2003.
- Richardson James. T. "Religion, Law and Human Rights." Review of *Religion, Globalization and Culture*, by Peter Beyer. (2009): 407-423.
- Richardson, James T. *Money and Power in the New Religions*. The Edwin Mellen Press, 1988.
- Richardson, James T. "Cult/brainwashing cases and freedom of religion." *Journal of Church and State* 33, (1991): 55-74.
- Richardson, James T. "Discretion and Discrimination in Legal Cases involving Controversial Religious Groups and Allegations of Ritual Abuse." *Law and Religion* (2000): 111-132.

- Richardson, James T. "Law, Social Control, and Minority Religions." *Frontier Religions in Public Space* (2001): 139-168.
- Richardson, James T. "Sociology of Religious Freedom: A Structural and Socio-Legal Analysis." *Sociology of Religion* 67, no. 3 (2006): 271-294.
- Richardson, James T and Tom Robbins. "Monitoring and Surveillance of Religious Groups in the United States." 16.
- Robbers, Gerhard. "The Permissible Scope of Legal Limitations on the Freedom of Religion and Belief in Germany." *19 Emory Int'l L. Rev* 841 (2004).
- Roggeven, Anne and Gita Johar. "Perceived Source Variability versus Familiarity: Testing Competing Explanation of Truth Effects." *Journal of Consumer Psychology* 12, no. 2 (2002): 81-91.
- Rozin, P., L. Lowery, S. Imada, and J. Haidt. "The CAD triad hypothesis: A mapping between three moral emotions (contempt, anger and disgust) and three moral codes (community, autonomy, divinity)." *Journal of Personality and Social Psychology* 76, (1999): 574-586.
- Segal, Jeffrey A and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. Harvard University Press, 2002.
- Seiwert Hubert. "The German Enquete Commission on Sects: Political Conflicts and Compromises." In *Regulating Religion Around the Globe*, by Richardson T. James. (2003): 85-102.
- Sen, Amartya. "Adam Smith and the Contemporary World." *Erasmus Journal for Philosophy and Economics* 3, no. 1 (2010): 50-67.
- Seul, Jeffrey R. "Ours is the Way of God: Religion, Identity and Intergroup Conflict." *Journal of Peace Research* 1, no. 36 (1999).
- Shawchuck, N., P. Kotler, B. Wrenn, and G. Rath. *Marketing for Congregations*. Nashville: Abingdon Press, 1992.
- Sheerkat, Daren. "Tracking the "other": Dynamics and composition of "other" religions in the General Social Survey, 1972-1996." *Journal for the Scientific Study of Religion* 38, no. 4 (1999): 551-560.
- Sheehan, Bernard. *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian*. Chapel Hill, 1973.
- Shepard, Todd. *The Invention of Decolonization: The Algerian War and the Remaking of France*. Ithaca: Cornell University Press, 2006.

- Sisk, Gregory C. "Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions." *65 Ohio State Law Journal* 491, (2004).
- Smith, Adam. *The Wealth of Nations*. Vol. 1, Chicago: University of Chicago Press, 1976.
- Smith, Adam. *The theory of moral sentiments*. Oxford Clarendon Press, 1975.
- Songer, Donald R and Susan J. Tabrizi. "The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts." *61 Journal of Politics* 507, (1999):
- Sonntag Bradley, Martha. *Kidnapped from That Land: The Government Raids on the Short Creek Polygamists*. Salt Lake City: University of Utah Press, 1993.
- Sorrel, Tom. *The Cambridge Companion to Hobbes*. Cambridge University Press, 1996.
- Sosis Richard. "Religious Behaviors, Badges, and Bans: Signaling Theory and the Evolution of Religion." Review of *Where God and Science Meet: How Brain and Evolutionary Studies Alter Our Understanding of Religion*, by McNamara Patrick. *Evolution, Genes, and the Religious Brain* 1 (2006).
- Sosis, Richard and Candace Alcorta. "Ritual, Emotion, and Sacred Symbols: The Evolution of Religion as an Adaptive Complex." *Human Nature* no. 16 (2005): 323-359.
- Sosis, Richard and Candace Alcorta. "Signaling, Solidarity, and the Sacred: The Evolution of Religious Behavior." *Evolutionary Anthropology* no. 12 (2003): 264-274.
- Sosis, Richard. "Does Religion Promote Trust? The Role of Signaling, Reputation and Punishment." *Interdisciplinary Journal of Research on Religion* 1, (2005): 1-30.
- Spivak, Gavatri. *In Other Worlds: Essays in Cultural Politics*. London: Routledge, 1988.
- Spotts, Frederic K. *The Churches and Politics in Germany*, 1973.
- Stark, Rodney and Phillip Bainbridge. *The Future of Religion: Secularization, Revival, and Culture Formation*. Berkeley: University of California Press, 1985.
- Steve, Bruce. *God is Dead: Secularisation in the West*. Blackwell Publishers, 2002.
- Strauss, Leo. *Natural Right and History*. Chicago: University of Chicago Press, 1953.
- Sunstein, Cass. *Behavioral Law and Economics*. New York: Cambridge University Press, 2000.
- Sunstein, Cass. *Why Groups go to Extremes*. New York: Basic Books, 2008.
- Taieb, Julien. "From Maimonides to Napoleon: the True and the Normative." *Global Jurist*, Vol. 7, Iss. 1 (Topics), Article 8. 2007.

- Taylor, Charles A. *A Secular Age*. Harvard University Press, 2007.
- Taylor, Charles. *Multiculturalism and the 'Politics of Recognition'*. Princeton University Press, 1994.
- Tayob, Abdulkader. *Islam in South Africa: Mosques, Imams, and Sermons*. Gainesville, FL: University Press of Florida, 1999.
- Tushnet, Mark V. "The Conception of Tradition in Constitutional Historiography." *William and Marry Law Review* 29, (1987).
- Tyler, T. and P. Degoe. "Collective Restraint in social dilemmas: Procedural justice and social identification effects on support for authorities." *Journal of Personality and Social Psychology* 69, (1995): 482-496.
- Tyler, Tom R. *Why People Obey the Law*. Yale University Press, 1990.
- Uitz, Renata. *Freedom of Religion in European and International Case Law*. Council of Europe Publishing, 2007.
- Vanberg, Georg. *Politics of Constitutional Review in Germany*. 2008.
- Way, Frank and Barbara J. Burt. "Religious Marginality and the Free Exercise Clause." 77 *American Political Science Review* 652 (1983).
- Way, Frank and Barbara J. Burt. "Religious Marginality and the Free Exercise Clause." *American Political Science Review* 77, no. 3 (1983).
- Wheatley, Christopher J. "Polemical Aspects of Hume's Natural History of Religion." *Eighteenth-Century Studies* 18, no. 4 (1986): 502-514.
- Williamson, Oliver E. "The New Institutional Economics: Taking Stock, Looking Ahead." *Journal of Economic Literature* 38, (2000).
- Wittgenstein, Ludwig. *On Certainty*. Edited by G.E.M Anscombe and G. H. Wright. New York: Harper, 1969.
- Worchel, Stephen and William G. Austin. *Psychology of Intergroup Relations*. Monterey, CA: Brooks Cole, 1986.
- Yonan, Gabriel. "Spiritual resistance of Christian conviction in Nazi Germany: the case of the Jehovah's Witnesses." *Journal of Church and State*, Vol. 41, Issue 2. 1999.
- Yoshino, Kenji. "Assimilationist Bias in Equal Protection: the Visibility Presumption and the Case of "Don't Ask Don't Tell." 108 *Yale Law Journal* 487 (1998).

Yoshino, Kenji. "Covering." 111 *Yale Law Journal* 769 (2002).

Zak, Paul J, Robert Kurzban, and William T. Matzner. "Oxytocin is Associated with Human Trustworthiness." *Hormones and Behavior* 48, (2005): 522-527.

Zak, Paul J, Robert Kurzban, and William T. Matzner. "The Neurobiology of Trust." *Annals of the New York Academy of Sciences* (2004): 224-227.

Zanna, M P. *Advances in experimental and Social Psychology*. Vol. 29, New York: Academic Press, 1997.

Online Sources

"Assemblée Générale." no.346.893 (1989): *Conseil d'Etat*,
<http://www.conseil-etat.fr/ce-data/aquoi/avis7.html>

Bilgrami, Akeel. "Secular Liberalism and Relativism." n.d.
<http://www.columbia.edu/cu/philosophy/word-files/secular.doc> (8 Feb. 2010).

Durham, Cole W and Nathan B. Oman. "Century of Mormon Theory and Practice in Church State Relations: Constancy Amidst Change." n.d.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942567 (1 Nov. 2010).

"European Convention of Human Rights." [http:// www.echr.coe.int/](http://www.echr.coe.int/)

French Constitution of Octobre 4, 1958.
http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constiution_anglais_juillet2008.pdf

Frey, Bruno and Reto Jegen. "Motivation crowding theory: a survey of empirical evidence." *Zurich: Institute for Empirical Research in Economics*, (Mar. 4, 2009).

Heinrich, Joseph. "The evolution of costly displays, cooperation and religion. Inferentially potent displays and their implications for cultural evolution." *Max Planck Institute for Economics Papers on Economics and Evolution*, (Sept. 18, 2008).

Herrgott, Jean. "*Le rapport Stasi ou l'invention de la commission réalité.*"
<http://www.islamlaicite.org/article183.html> (accessed May 13, 2011).

"Islamic Teacher's Head Scarf, 2 BvR 1436/02." n.d.
http://bverfg.de/entscheidungen/rs20030603_2bvr143602.html . (3 Sept. 2010).

Iyer, Sriya, Chander Velu, and Abdul Mumit. "Communication and Marketing for Services by Religious Organizations in India." n.d.

<http://www.econ.cam.ac.uk/faculty/iyer/IndiaManuscript.pdf> (23 Nov. 2009).

Kant, Immanuel. "Religion within the limits of Reason Alone." n.d.

<http://www.hkbu.edu.hk/~ppp/rbbr/toc.html> (20 July 2009).

Kumar, Vikas. "Critical Overview of Economic Analyses of Religion." n.d.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1193862 (27 Nov. 2008).

Leiter, Brian. "Why Tolerate Religion?." Constitutional Commentary (Oct. 13, 2009).

Miller, Monica K, M K, J A. Singer, and J A. Jehle. "Identification of circumstances under which religion affects each stage of the trial process." *Applied Psychology in Criminal Justice* 4, no. 1 (2008): 135-171.

"Official data on church taxes of the Deutsche Bischofskonferenz." n.d.

http://dbk.de/imperia/md/content/kirchlichestatistik/kirchensteuer/diagramm___kirchensteuer1991_2006_engl.pdf (12 Oct. 2007).

"Official statistics of the Evengelical Church in Germany."

http://www.ekd.de/kirchensteuern_und_finanzen.pdf (13 Oct. 2007).

"*Rapport à Monsieur le Président de la République par la Commission de réflexion sur l'application du principe de laïcité dans la République.*" 2003.

<http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf> (accessed Apr. 30, 2011).

Savaugue, Timothy. "Europe and Islam: Crescent Waxing, Cultures Clashing'." *The Washington Quarterly* 27, no. 3 (2004): 25-50.

http://www.twq.com/04summer/docs/04summer_savage.pdf

Sciolino, Ellen. "Ban Religious Attire in School, French Panel Says." *New York Times* (2003).

<http://www.nytimes.com/2003/12/12/world/ban-religious-attire-in-school-french-panel-says.html>

Smith, Vernon L. "The Two Faces of Adam Smith." n.d.

<http://pages.towson.edu/jpomy/behavioralecon/twofaces.pdf> (2 Mar. 2010).

"Statement of Deutsche Bischofskonferenz on church taxes." n.d.

http://dbk.de/zahlen_fakten/kirchensteuer/index_en.html (11 Oct. 2007).

Waldron, Jeremy. "Toleration and Calumny." n.d.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699895 (1 Nov. 2010).

Cases

US Cases

Board of Education of Kiryas Joel Village School District v. Grumet,. 512 U.S. 687. 1994.
Brownfeld v. Brown 366 U.S. 599. 1961.
Cantwell v. Connecticut. 310 U.S. 296. 1940.
Church of Lukumi Babalu Aye v. City of Hialeah 508 U.S. 520. 1993.
City of Boerne v. Flores 521 U.S. 527. 1997.
County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter 492 U.S.
Employment Division v. Smith 494 U.S. 872. 1990.
Everson v. Board of Education of Ewing Tp. 330 U.S. 1947.
Grand Rapids School District v Ball. 473 US 373. 1985.
Illinois ex rel. McCollum v. Board of Education. 333 U.S. 203. 1948.
Larson v. Valente 456 U.S. 228. 1982.
Lee v. Weisman 505 U.S. 577. 1992.
Lemon v. Kurtzman 403 U.S. 602. 1971.
Lynch v. Donnelly 465 U.S. 668. 1984.
Marsh v. Chambers 463 U.S. 783. 1983.
McGowan v. Maryland 366 U.S. 420. 1961.
Minersville School District v. Gobitis 310 U.S. 586. 1940.
Newdow v. U.S. Congress, 292 F.3d 597, 609 (9th Cir.). 2002.
School District Abington Township v. Schempp 374 U.S. 203. 1963.
Sherbert v. Verner 374 U.S. 398. 1963.
Torcaso v. Watkins 367 U.S. 488. 1961.
West Virginia State Board of Education v. Barnette 319 U.S. 624. 1943.
Wisconsin v. Yoder 406 U.S. 205. 1972.
Zorach v. Clauson 343 U.S. 306. 1952.

German Cases

18 BVerfGE 386. 1965.
 19 BVerfGE 217. 1966.
 19 BVerfGE 226. 1965.
 24 BVerfGE 236. 1968.
 32 BVerfGE 98. 1971.
 33 BVerfGE 23. 1972.
 35 BVerfGE 366. 1973.
 41 BVerfGE 29. 1975.
 44 BVerfGE 37. 1977.
 Decision of the Bavarian Constitutional Court. 50 NJW 3157. 1 Aug. 1997.

Statutes

The US

18 Pa. Cons. Stat. s 7363. 1996.
Ala. Code s 13A-12-1. 1996
Ky. Rev. Stat. Ann. s 436.160. 1996.
Conn. Gen. Stat. s 53-302A. 1996.
R.I. Gen. Laws s 11-40-1. 1996.
S.C. Code Ann. s 53-1-40. 1996.
Mass. Gen. Laws ch. 136, s 5. 1996.
Me. Rev. Stat. Ann. tit. 17, s 3204. 1996.
N.D. Cent. Code s 12.1-30-01. 1996.
N.H. Rev. Stat. Ann. s 332-D:1. 1996.
N.Y. Gen. Bus. Law s 5. 1996.