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# Tentacles of the Leviathan? Nationalism, Islamophobia, and the Insufficiency-yet- Indispensability of Human Rights for Religious Freedom in Contemporary Europe

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Is the institutionalization of religious freedom through human rights jurisprudence simply a means by which the modern nation-state manufactures and regulates “religion”? Is the discourse of religious freedom principally a technology of state governance? These questions challenge the ways that scholars conceptualize the relation between states, nationalism, human rights, and religious freedom. This article forwards an approach to human rights and methodological nationalism that both counters and explores alternatives to the prevailing conceptions of human rights, nationalism, and state sovereignty in the discourse on the putative impossibility—and, by some accounts, insidiousness—of religious freedom. I first explicate the interpretive and contestatory dimensions of human rights discourse concerning religious freedom. I then explore cross-cutting ambivalences within the nationalisms that states need and cultivate in effort to transmute their monopoly upon coercive force (i.e. power) into legitimated authority. I argue that these provide

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two dimensions in and through which state sovereignty may be opposed, criticized, held accountable, and subject to change.

IN MULTIPLE CASES ACROSS EUROPE, a growing list of rulings by the European Court of Human Rights (ECHR) converges on an apparent consensus: the expanding presence of Islam throughout Europe presents a pronounced challenge to Western conceptions of secular law and human rights. Several analysts have argued that behind this apparent consensus lurk various strains of European nationalism (Asad 2003: chap. 5; Asad 2006; Scott 2007; Bowen 2012). These nationalisms manifest tendencies to reify the identity of an internally distinct yet putatively inassimilable “other.” They then, in effect, scapegoat that other—in the present cases, through the socio-cultural, political, legal, and religious construction of Islamophobia (Springs 2015).

The most conspicuous strains of European nationalisms take form in unapologetically xenophobic, chauvinistic, self-identified nationalist voices. This poses a deceptive complication for understanding and adequately responding to nationalist reactions to Muslims in Europe. It is illusorily straightforward to limit one’s conception of nationalism to its most extreme manifestations, such as abhorrently radical fringe elements (e.g. the case of Anders Breivik in Norway), political groups that clearly deviate from the politics of the mainstream (e.g. Marine Le Pen and the National Front Party in France), self-avowedly less extreme but nonetheless vocally xenophobic public figures (e.g. the legacy of Pim Fortuyn and politics of Geert Wilders in Holland), or those who declare that Islam’s increasingly visible presence in Europe vindicates the inexorability of Samuel Huntington’s “clash of civilizations” thesis (e.g. Ayaan Hirsi Ali). The attention commanded by such pronounced examples draws attention away from forms and effects of nationalism that interpose themselves in the reaction to Muslims in Europe in less conspicuous ways. The latter occur more subtly, at times surreptitiously, as modes of exclusion, inequality, and humiliation. And these may crop up within even the languages and norms that have been developed to protect against nationalism’s more egregious effects.

What options are available for illuminating and protecting against effects of nationalism when, for instance, nationalist strains of Islamophobia become subtly articulated and enforced in the application of human rights norms and institutions? It is this question to which the following paper poses an answer. I examine the 2004 law banning the

wearing of conspicuous religious symbols in contemporary France, taking as a test case the ECHR upholding that ban in 2008 in *Dogru v. France* (ECHR 2008). I argue that international human rights norms and institutions, while insufficient alone, are nonetheless indispensable for protecting against the encroachment of subtle forms of religious nationalism and for the protection of religious freedom in contemporary European contexts. I propose to illuminate and then critically assess the ways that human rights discourse (and recent adjudications by the ECHR, in particular) has come to subtly collude in anti-Muslim currents of European nationalism. At the same time, my critical exposition aims to lead to a refined understanding of the constructive roles that human rights might play in European contexts. I seek to demonstrate that human rights discourse can be, and needs to be, applied in conjunction with analytical tools that guard against its unjust applications.

Part I of this paper places my engagement with the French headscarf law and ECHR ruling within the context of recent debates over human rights and religious freedom. These debates question the viability and/or incapacity for human rights adjudication regarding religious freedom to cut against the influence of Islamophobic tendencies inscribed in European state interests. Yet these debates, I argue, are prone to excessive discursive analytical tendencies. They risk concluding that human rights, and religious freedom more specifically, serve (however tacitly) purely as means by which modern states impose and reinforce the regulatory powers of their sovereignty (as tentacles of the Leviathan, one might say).<sup>1</sup> I unpack the case at hand, examining how the banning of headscarves in French public schools relied upon quite specific conceptions of French national identity and French state sovereignty. I then examine the abortive effort to challenge the headscarf ban on the basis of human rights norms as codified in the “freedom of religious expression clause” of Article Nine of the ECHR (ECHR 2008). Article Nine appears to directly counter the ban’s legal justifiability. On what grounds did the ECHR application of principles of freedom of conscience and religious expression as codified in Article Nine—ultimately justify upholding the ban on religious symbolic dress in public spaces? Answers to this question become available, I argue in part II, only when one includes the influence of national culture, and particularly the impact of the laic ethos of French society as a form of ethno-religious nationalism, in assessing this case. Attending to the subtle dynamics of French religious nationalism

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<sup>1</sup>The language of the state as a Leviathan is not hyperbolic on my part; it is invoked by some among the critics I address (see, e.g., Mahmood and Danchin 2014a: 8).

illuminates tendencies toward a secularist cultural hegemony in the current ECHR ruling. Within this hegemony, the valorization of human rights (and application of the “conscience clause” itself) ultimately comes to perpetuate forms of social exclusions, inequality, and humiliation.

The purpose of my critical analysis, however, is to forward a corrective approach to human rights. Such an approach aims to enrich and alter it as a normative discourse by illuminating its inevitably political and cultural dimensions. Such an approach factors into its analyses the context-specific interests and purposes that inevitably influence adjudication of human rights cases. The results of attending to nationalism, I argue in part III, do not necessitate abandoning or vilifying human rights as inexorable tools of state power dressed in nationalist trappings. I propose, rather, to reconceptualize nationalism as interdependent with, and yet simultaneously distinguishable from, state purposes and interests. This permits recognizing the multiplicity of ways that, in practice, processes of selective cultural and religious negotiation constitute national identities and associations. These might afford multidirectional resources for immanent critical resistance to, and imagining constructive transformation of, state interests and human rights applications.

### WHAT’S WRONG WITH RIGHTS? HOW THE STATE MANUFACTURES AND REGULATES RELIGION THROUGH THE DISCOURSE OF RELIGIOUS FREEDOM, AND THE LIMITS OF CRITIQUE

To maintain the indispensability of human rights by subjecting them to reflexive analysis is to enter squarely into recent debates over the viability of human rights to actually serve the purposes that they purport to serve in the first place. A wave of recent scholars deploying genealogical and power analyses address secularization and religious freedom in contemporary Europe. Several of these analyses help illuminate how nationalism influences the marginalization of Muslims in Europe through state laws and human rights adjudications. At the same time, they tend to diagnose these influences as symptomatic of the intrinsic deficiency of human rights. The influence of nationalism in these cases is symptomatic of the fact that human rights are implements of domination by the modern state.<sup>2</sup>

<sup>2</sup>For one especially influential argument along these lines, see [Asad 2003](#): chaps. 4–5. I engage several scholars whose work is influenced by, or roughly concurs with, Asad’s position throughout the sections that follow. Of course, positions that challenge human rights as a discourse by which nation-states manufacture their power take a wide array of forms. The space of this article is inadequate to consider all of them—or even a representative sampling—nor is that my purpose here.

While these accounts vary in their details, they converge on the claim that human rights provide essential means by which the state consolidates and expands its sovereignty. It does this, in part, through defining basic conceptions of “the human” and “religion.” “Human rights” designate, in the former case, what does and does not qualify for protection as rightfully human. In the latter case, they designate which aspects of religion do and do not qualify for protection by the state (e.g. which practices, identities, and institutions qualify for protection of their “religious freedom,” which must be excluded, and which features of religion are permitted—by the state— to claim some exemption from state interference).

The expanding presence of Islam in Europe presents an especially instructive case study. Among other points of contention, some have argued, the alleged in-assimilability of Islamic conceptions of personhood to a Western conception of persons as self-possessing, self-determining, choosing subjects marginalizes Muslims in Europe. The friction generated between these contrasting conceptions of human personhood unmasks human rights as a manifestation of neo-liberal ideology. On this account, human rights provide a set of terms by which sovereign nation-states and international rights institutions determine when individuals’ freedoms are enforceable and when they may be abrogated.

Human rights present purportedly ethical, even humanitarian, protections of the generically “human.” In reality, however, these are pivotal means by which nation-states both produce and regulate their citizens as subjects. Moreover, some argue, in violence-torn international contexts, when human rights are invoked as protections against, or bases for intervening in, mass atrocity (e.g. ethnic cleansing, genocide, crimes against humanity, war crimes, and so on), human rights claims and institutions actually operate covertly as putatively apolitical humanitarian carriers of what are, in fact, Western state interests. They justify and shroud in benevolence interventions that in reality serve the interests of political, free market, and cultural modes of imperialism (Brown 2004: 453; Zizek 2005: 128; Mamdani 2009: 286–288).

The modern secular state’s interest in “religion” works similarly. The state protects the putatively universal inviolability of religious freedom

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Instead, I focus on a specific discursive current that has emerged in religious studies in recent years that has argued at length for the putative impossibility and/or insidiousness of “religious freedom” as a pristine example of how the modern, secular state deploys “human rights” as means by which to engineer its power. The specific discursive current I take as my focus is most concentrated in a Henry R. Luce initiative in Religion and International Affairs entitled “The Politics of Religious Freedom,” led by primary investigators Saba Mahmood, Elizabeth Shakman Hurd, Winnifred Sullivan, and Peter Danchin. See <http://politics-of-religious-freedom.berkeley.edu/> This discourse has been critically examined in Omer 2015: 27–71.

through processes by which it simultaneously defines and administers acceptable forms and limits of “religion.” The modern secular state justifies the scope of its power, in part, as necessary for attaining peace and sustaining public order in the wake of protracted periods of violent instability, nowhere more clearly exemplified than in the European wars of religion. This narrative portrays the secular state as necessary for perpetuating stable and well-ordered political conditions in the midst of religious pluralism. The fear is that religious pluralism could erupt in conflict in the absence of the secular political framework that the state provides (one that is neutral vis-à-vis religious truth claims). And yet, the argument runs, the claim that the potential dangers of religious violence necessitate secular state sovereignty is actually predicated upon the state’s reification and regulation of “religion” as a key factor in state-building (that is, the transfer of power—the “migration of the holy”—from the Church to the state) (Cavanaugh 2009: 160–177).

The state reifies religion through processes by which it determines what can be permitted as acceptable religion. It also determines those religious forms that must be excluded as threatening to what it determines to be public order and stability. It identifies and delimits the elements of religion that are exempt from state interference. Though purportedly religiously neutral, in fact, this activity implicates the state in political theology. In effect, the state both defines religion and then wields its power in permitting those forms it deems may be accommodated from those forms of religion determined to be impermissible. This work of political theology serves the state’s self-perpetuation by way of domestication and assimilation. Religious forms deemed acceptable are to evince some utility in supporting and legitimating the state’s sovereignty. Perhaps they lend themselves as a resource for (or cohere with) the repertoire of symbols, ritual practices, founding myths, and narratives out of which, for instance, civil religion and religious nationalisms emerge as modes by which the state legitimates its power. At the least, permitted forms of religion will accommodate state sovereignty by leaving it unthreatened: they will not destabilize state-sanctioned public order and social peace.

The lenses of discourse analysis that facilitate such accounts illuminate important insights about operations of power, including tacit operations of imperialism, colonialism, nationalism, and globalized market forces. These come to light when one attends to the complex historical emergence and genealogical formation and application of putatively self-evident concepts such as “the human,” “freedom,” “secularity,” and “religion” (among others). At the same time, these accounts risk falling prey to theoretical excesses that are common to unrestrained discourse analyses. For instance, the inclination to power reductionism risks rendering

such analyses incapable of treating human rights as anything other than manifestations of state ideology. This would reduce them without remainder to instruments of domination by which modern states consolidate and amplify their power.<sup>3</sup>

One such excessive tendency is a deterministic variation of the genetic fallacy. This claims, in effect, that the historicized origins of a concept determine the meaning and significance of the concept in the present and influence how the concept will be applied in present circumstances. For example, certain Christian theological and missionary origins of religious freedom portrayed it as an individual's lack of restriction in exiting or joining a religiously identified group. Genealogical determinism understands these historicized origins to strongly inflect, if not dictate, the meaning and significance that religious freedom norms can have in their contemporary applications. In other words, the Christian origins of the concept might be said to make any contemporary applications ineliminably Christian. It also implicates contemporary applications of religious freedom in a conception of "freedom" that is irreformably predicated upon an unencumbered, essentially self-determining, "choosing" self that is, in reality, valued (and manufactured) by the modern liberal state.

Genealogical analysis of the evolution of the normative basis of religious freedom works similarly. It claims to unmask modern conceptions of individual freedom of conscience as the product of the transvaluation of values from a "collapsed" European Christianity into that of generalized "human dignity." This genealogical evolution then determines how these concepts can be applied, and to what effect, in the present. They entail, for instance, state discrimination against minority religious groups who do not conform to post-Christian, yet still tacitly Christian-ized (because originally Christian), secular ethos that serves the interests of the liberal state. Specifically, these norms serve to manufacture and regulate "religious minorities" through the discourse of religious freedom in the first place (Mahmood 2012: 418–446; Buhta 2014: 9–32). In short, genealogical determinism sees contemporary applications of religious freedom

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<sup>3</sup>Asad bases this portion of his argument on Michel Foucault's account of a state's population as that "limited group within the human family" (the "human family" as designating the jurisdiction to which universal human rights pertain) that is, at once, "the object of the state's care and a means of securing its own power." Specifically, he has in mind Foucault's more extensive account (Foucault 1988: 145–162). It is worth noting that Foucault did not view rights exclusively through the lens of power reductionism. In fact, he pointed to the need to pursue forms of tolerance in terms of human rights as a means of stabilizing, and thus facilitating, processes of self-cultivation and transformation. He makes clear that discourses of human rights and tolerance can, under certain circumstances, provide pivotal tools for strategic possibilities of changing power relations (see Foucault 1989: 383–390).

(and human rights more generally) as, in effect, “poisoned at the root” (Bhuta 2014; Moyn 2014: 63–64, 79–80).<sup>4</sup> Such excesses leave little recourse beyond terminal suspicion—if not outright repudiation—of human rights principles and institutions. Indeed, few constructive counter-proposals follow in the wake of these critiques.

With specific regard to religious freedom, the dynamic sketched above is claimed to be inextricably inscribed in the structure (the “conceptual architecture”) of the right to religious freedom and, therefore, in its adjudications by the ECHR (Mahmood and Danchin 2014a, 2014b: 1–8, 129–159). In this understanding, this form of domination is not a result of misguided interpretation and/or misapplication of the right to religious freedom. Neither can it be attributed to context-specific considerations, such as political and/or cultural influences, interests, or purposes that bear upon these cases (e.g. the “religious personality of certain states”). Rather, the “antimony” of religious freedom by which the state exercises its regulatory powers over religious minorities is claimed to be intrinsic to the historical emergence, philosophical grounding, and conceptual structure of the right to religious freedom itself (Hurd 2010; Mahmood and Danchin 2014a: 130).

This is not a simple refusal to assess and factor in context-specific considerations, thus resulting in a blinkered view. In fact, the analyses in question present themselves with rich jurisprudential detail and attention to case particulars. Yet the details and particulars treated at length are, in each case, forced through the same discursive prism. Each case study is refracted through the putative structural deficiency of the logic and “conceptual architecture” of the right to religious freedom and its service to the protection of an indeterminate public order as a “technology of state governance.” Unsurprisingly, then, the results appear to be conspicuously similar across cases. Thus, analyses that present themselves as careful jurisprudential case studies ultimately terminate in genealogical determinism and power reductionism in which all cases reduce to similar diagnoses (Bowen 2010; Omer 2015). The result eliminates possibilities for a self-reflexive reconceptualization of rights norms and institutions that might be thought of, perhaps at best, as a self-correcting enterprise, or at least as a historically extended, dialectical tradition of discourse. This discourse might be refined and corrected through the complex processes by which the principles are locally contextualized, contested, and applied, and thereby further instructed through those context-specific applications.<sup>5</sup>

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<sup>4</sup>The story by which Moyn re-narrates the emergence of human rights as “[dying] in the process of being born” is challenged rather meticulously by David Little (2015).

<sup>5</sup>The approach to human rights discourse that I can only gesture toward here is consistent with the highly historicized and contextualized account that Atalia Omer (2011) describes.



Excesses to which genealogical analyses are tempted do not merely risk “throwing out the baby with the bath water” by totally jettisoning rights. More specifically for my purposes, genealogical analyses risk becoming tone deaf to the array of specific modes by which the power and impact of nationalism subtly influence human rights adjudications by the ECHR. This limits opportunities to critically illuminate, challenge, and counter those influences. For, on the view sketched above, the influence of nationalism (even as manifest in seemingly banal forms of civil religion) shows up as a ligament by which the Leviathan spreads and contracts the tentacles of its sovereignty. As a result, the nuances and ambivalences of nationalist dimensions are rearticulated as minority versus majority claims and identities that the state employs human rights discourse to regulate. According to the genealogical view, the notion of “national minority” permitted the nation-state to confer membership upon its subjects, but in a way that illuminated and regulated groups whose presence was intrinsically challenging—if not threatening—to the national unity (“shared history, culture, territory”) that the nation-state seeks to cultivate and sustain (Mahmood 2012: 424). The result, it is said, is inexorably discriminatory toward minority identities.

In the haste with which these analyses identify the terminal deficiency intrinsic to the conceptual structure of the right to religious freedom, they efface the internal tensions and ambivalent intricacies present in the articulation of the right to religious freedom itself. And yet, these ambivalences provide a location at which the articulation might be leveraged correctively against misinterpretations and discriminatory applications of the principle. Another location for contesting and correcting rights applications is found in identifying and critically assessing the sometimes subtle means by which application of human rights principles reflect hegemonic nationalist purposes and narratives. These both present potential points at which human rights application and adjudication might be challenged and corrected and from which further such unjust appropriations may be fought against, as opposed to altogether vilifying rights discourse.

### WAS HUMAN RIGHTS INTERVENTION BOUND TO FAIL?: *DOGRU V. FRANCE*, THE STASI COMMISSION, AND LAW NO. 2004–228 “ON SECULARISM”

The French law “On Secularism” purports to restrain religious practice and expression to their allegedly proper location and role within a secular nation-state. And yet, to examine such laws solely in terms of a state’s effort to construct, sustain, and defend its sovereignty (its defense of what it deems to be public order) obscures the specific ways that such

uses of human rights and secularity participate in ethno-cultural—and even religious—nationalist dynamics specific to the contexts in question. In the case of the French headscarf ban, such laws—and more significantly, their vindication in human rights adjudications by the ECHR—manifest and perpetuate subtle forms of European nationalism. Closer inspection reveals how laws prohibiting religious practice have been justified by appeal to the authority of national-cultural identities and historical legacies. These laws function in ways that seek to safeguard those identities. They reflect nationalist dynamics with which those identities are interspersed. This implicates such laws in forms of “religious nationalism,” despite their efforts to make religion the object of privatization, legally excluded from public, political life. It is by attending to the details of these dynamics and processes that analysts might begin to identify and correct misapplications and misinterpretations of the right to religious freedom.

In 2003, France’s Committee of Reflection on the Application of the Principle of Secularity in the Republic filed the result of its year-long assessment to then French President Jacques Chirac. What came to be called the Stasi Commission Report (2003) established a mandate for the 2004 law that banned the wearing of religious and symbolic dress identifiable as “ostentatious,” “assertive,” and “proselytizing” in public and state-affiliated settings. The ban included large Christian crosses, Jewish yarmulkes, prominently worn Stars of David, and Sikh turbans, among other conspicuous symbols. The symbol most broadly affected by the law was the Muslim headscarf worn by school-aged young women in French public school settings. It was also most consistently the focus of the debates and controversy surrounding the law.

The ban was forwarded and passed into law under the auspices of adhering to the constitutional secularity of the French state (est. 1905), defending public order, protecting individual freedom of conscience, and shielding Muslim public school-aged girls and young women from coercive pressure (either direct or cultural) to wear religious dress (O’Brien 2005: 16–17). The Stasi Commission further cited the need for the law to formally consolidate the processes by which wearing Muslim headscarves would be dealt with in public schools across France. The passage of the law set the stage for a clash between state law and the right to manifest one’s religious identity. This found arguably its most high-profile occurrence in the case of a young French Muslim school girl, Belgin Dogru.

In January 1999, half-way through her first year in state secondary school, eleven-year-old Belgin Dogru assumed the practice of wearing hijab. On seven occasions over the course of that January, Belgin Dogru’s physical education teacher instructed her to remove her headscarf for class. On each occasion she refused. Insofar as the particular form of her

head covering posed a safety hazard for class activities, she offered to replace her headscarf with a hat or balaclava (ECHR 2008, para. 13 cf.). However, she declined to leave her head uncovered.

By the second week of February, Belgin Dogru's case had gone before a school disciplinary committee. The committee expelled Dogru for failure to participate actively in physical education classes. After this, Dogru continued her education by correspondence. Her parents filed for consideration of a breach of rights at the regional and state levels, but at each level this was declared inadmissible. In 2005, the parents submitted an application to the ECHR, alleging that their child's freedom of religious expression and right to education had been violated by her expulsion from public school.

The European Court appeared to be a particularly promising venue for this case. The European Convention of Human Rights was put into force by the Council of Europe in 1953 when it established the ECHR (1954). This court (ECHR) remains the highest international venue in which individual persons can file cases regarding the violation of their rights by states and state actors. In international law, such actions are typically reserved for state entities alone (ECHR 1950, Articles 34–35).

The first part of Article Nine of the European Convention on Human Rights restates verbatim Article 18 of the Universal Declaration of Human Rights (1948). Both declare the freedom of "thought, conscience and religion," including freedom "either alone or in community with others and in public or private, to manifest [one's] religion or belief, in teaching, practice, worship and observance." Prima facie, this article appears to challenge the treatment of Dogru by state school and legal authorities. It also appears to challenge the French law banning the manifestation of visible religious symbols in public schools as a clear infringement upon the right to publicly manifest one's religion.<sup>6</sup> The European Convention protects the manifestation of religious observance and practice as constituents of freedom of thought, conscience, and religion, while the French law proscribes such manifestation of religious identity in public schools. Surely this is a case where human rights principles provide a clear, superordinate groundwork for the freedom to manifest religious identity. The European Court, however, upheld the French headscarf ban.

On what bases did the court's application of principles of freedom of conscience and religious expression as codified in Article Nine ultimately justify upholding the ban on religious dress in public spaces? A pivotal

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<sup>6</sup>The text of the law read: "In public primary and secondary schools, wearing signs or clothes by which pupils clearly display a religious affiliation is forbidden." For a detailed, observational account of the legislative process by which the law emerged see Bowen 2008: 136.

component in answering this question is found in Article Nine's second part. This part stipulates the conditions under which freedom to manifest one's religion or belief can be abridged by state law. Abridgement is justified as deemed necessary by the state for purposes of "maintaining public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." This addendum may exert particularly strong limits upon freedom of conscience and manifesting one's religion in public, depending upon how the clause is interpreted and applied. The ECHR interpreted it in accord with the orientation of cultural and constitutional European secularisms more broadly. In the *Dogru* case, it oriented its interpretation to accord with what the court described as French *laicite* more specifically. The result was a reading of Article 9 that purports to be fully consistent with prohibiting young Muslim women from wearing their headscarves in public schools.

One prevailing explanation for the ECHR's decision sees a deficiency in the conceptual architecture of the right to religious freedom. These arguments point to the structure of Article 9, citing specifically the distinction between the "forum internum" and the "forum externum," which correlate with parts 1 and 2 of Article 9, respectively (Mahmood and Danchin 2014a and 2014b; Hunter 2014: 37–62).

Part 1 of Article 9 states that "everyone has the right to freedom of thought, conscience and religion." This is the "forum internum," because it specifies the internal location of that which is protected ("thought, conscience and religion"). In contrast, part 2 of Article 9 addresses the "forum externum" that reserves the right of the state to curtail the outward expression of religious freedom over concerns for public order, safety, and the freedom of others. Viewing both parts of Article 9 together, one can see that the conception of religion here is putatively intrinsically internal. It is confined to a "religious core" of belief understood as personal faith and/or the deliverances of individual conscience. The state's power of explicit regulation, by contrast, is external. It pertains to any and all outward expressions of belief and conscience. In its proper location (the forum internum), religious belief is licensed to operate without interference from the state by virtue of a self-limiting renunciation of state power by the state. At the same time, the state asserts its capacity to regulate the outward manifestation of religious belief.

Upon closer inspection of Article 9, however, this account of its conceptual architecture depends upon on a subtle textual sleight of hand. To characterize the domain of part I as strictly that of "thought, conscience and religion" recognizes the first clause of part 1 of Article 9, but elides the important exposition of the first clause that is introduced by the

remainder of part 1.<sup>7</sup> The remainder of part 1 explicates the preceding clause in terms of the many forms in which “freedom of thought, conscience and religion” may be manifest and, indeed, embodied. The “freedom of thought, conscience and religion” delineated in part 1 of Article 9 explicitly “includes freedom to change [one’s] religion or belief, and freedom, either alone or in community with others and in public or private, to manifest [one’s] religion or belief in teaching, practice, worship and observance.” In other words, the full articulation of the right to religious freedom includes private “thought, conscience and religion,” but also “teaching, practice, worship, observance” alone or in community with others, in public or in private.

It is false then (or at least it is a partial account) to claim that the structure of the right to religious freedom in Article 9 spirits religion away into a sanctum of the inner self by defining it as pure belief and/or the unadulterated urgings of conscience. Still, we find ourselves confronted by the question: What difference does the exact text of part 1 make in the actual Article 9 jurisprudential ruling of the ECHR? Clearly, the ECHR has consistently ruled as if the conceptual architecture of Article 9 dictated that religious freedom be unregulated by the state only “internally,” and that outward manifestation is fair game for regulation and exclusion. But this does not endorse the one-sidedness of the claim that Article 9 is intrinsically flawed in its conceptual architecture. When we attend to Article 9 in its entirety, we find that the principle of religious freedom it claims admits of internal complexity and even a degree of ambivalence. And this, at least potentially, provides leverage by which to contest and expand the account of the conceptual architecture from Danchin and Mahmood’s reductive account, which then dictates the terms through which they read each case.

One might counter that the terms in which the meaning of “freedom of thought, conscience and religion” are explicated in the latter phrases of Article 9, part 1, reflect a conception of the individual as a self-possessing and self-determining agent. Such an agent chooses whether or not he or she will “be religious,” in what senses, and with what group (if not in isolation). An individual, so conceived, decides if, when, and how he or she prefers to cast off that identity and exit the group. However, this reading is by no means the only possible one. Nor is it a reading that is necessary. An alternative reading makes it possible to conceive of the social

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<sup>7</sup>This account is set forth most forcefully by Mahmood and Danchin, who identify part 1 exclusively with the phrase “freedom of thought, conscience and religion,” and part 2 exclusively with reference to manifestation. This dichotomous characterization recurs repeatedly throughout their contributions to the volume, and each time without reference to the multiple qualifying features of part 1 (see 2014a and 2014b: 3, 129, 145, 146, 148).

constitution of personhood and of freedom made possible through relationally normative constraints. This conception contrasts with individual agency conceived as the absence of constraints upon self-determination, and with belief conceived as a cognitively intentional assent/choice. Social constitution of personhood is entirely compatible with—indeed, can and has been integrated into—accounts that retain conceptions of individual agency and intentional action, and even revised and repositioned accounts of autonomy.<sup>8</sup> On such accounts, insofar as internal “belief” (as cognitive assent or affective inclination) remains a germane descriptor, it is interwoven with, and dependent upon, more basic enculturation into cultural and linguistic social practices and institutions.

A comparable interpretive flexibility applies to arguments against the viability of religious freedom based upon the capacity of state power to determine what counts as public order. In defining public order, the argument runs, states determine what exceptions can be made to religious freedom in the name of protecting public order. Yet the reasons that a state might make exceptions to religious freedom in the name of defending public order are underdetermined. They require interpretation and application within concrete considerations and constraints. They are not (pace Mahmood and Danchin) essentially indeterminate (Mahmood and Danchin 2014b, 147–1148ff.; Agrama 2010, 504–515). In other words, the right to religious freedom so constituted may be misadjudicated in discriminatory ways—recent Article 9 jurisprudence is predominantly, if not intentionally, exclusionary toward Muslim conceptions of religious practice. And yet, such adjudications can be assessed as just that: misadjudications. The adjudications are not locked into ironclad predetermination by the conceptual architecture of the right to religious freedom. At the same time, these adjudications cannot be justified in virtue of whatever a state determines public order to be. Rather, the adjudications depend on the exchange of reasons and contextual specifics (including the articulation of power) that may be made explicit and subject to analysis and criticism, and challenged on a context-specific basis.

For instance, ECHR Article 9 jurisprudence may be (and largely is, some have argued) predicated upon an inadequate conception of

<sup>8</sup>See, for example, Nedelsky 2012 and Mackenzie and Stoljar 2000. For another account of embodied agential individuality that takes its starting point from Asad’s account of individuality as “self-governing, but not autonomous,” but then moves importantly beyond it in the examples she offers, see Scott (2007: 141–148). The kind of agency Scott describes is not dichotomously opposed to the language of individual rights and responsibilities. I have developed and defended accounts that integrate socially constituted personhood and individual freedom in greater detail in both philosophical and theological quarters (Springs 2009, 2012).

“religious practice” on the part of the court.<sup>9</sup> And this, among other things, contributes to an identifiably discriminatory trajectory vis-à-vis practice-oriented conceptions of religious identity. But again, if we recognize this as an interpretive deficiency, it is conceivable that this jurisprudential trajectory could be subject to change. Its causes and conditions could be historicized and made explicit, interrogated, challenged, and, over time, altered.

As such, Article 9 is not intrinsically deficient or “poisoned at the root.” If the textual constitution of Article 9 evades the charge of structural determinism, does this mean that the series of bad applications of the principle by the ECHR came about purely “by accident” (Moyn 2014, 63)? Not at all. In fact, examining the triangulated textual relations between the arguments constructed to support the French Law on Secularism in the Stasi Commission Report of 2003, the process of drafting the law banning hijab in 2004, and the text of the ECHR ruling illuminate specific influences and concrete dynamics of the decision process. For instance, these documents develop their case in terms of uniquely French (but also more broadly European) conceptions of secularism. They identify this in the form of principles that are construed as fundamental, and arguably nonnegotiable, features of the nation’s identity. As such, they reflect a certain form of nationalism. This means that these developments are political as much as they are socio-culturally embedded and inflected. Moreover, they cannot be fully understood, nor adequately evaluated, without attending to the nationalist influences that affect the context of application, justifications, and aims of, for example, the ECHR itself. But this requires illuminating the ways that ethno-religious and ethno-cultural nationalism inform how the ECHR adjudicates human rights cases. Illuminating these operations is a crucial step in thinking correctively and constructively about the processes and practices of human rights applications and adjudications in various contexts and circumstances.

### “A FEW METERS OF CHIFFON”: THICKLY DESCRIBING THE INFLUENCES OF NATIONALISM IN *DOGRU V. FRANCE*

The Articles on freedom of religious expression in the ECHR present themselves as regulatory principles that stand as potential correctives to

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<sup>9</sup>See, for example, a particularly powerful article by Lourdes Peroni (2014). I consider Peroni’s work an example of critically yet correctively engaging contemporary human rights discourse in the spirit of the approach I propose in this article, rather than a simple deconstructionist repudiation of rights discourse. For comparable arguments about the risks of overly narrow and outdated legal definitions of “religion” and “belief”—and the need for the ECHR to be open to new developments regarding these terms—see Gunn 2003: 195 and Vickers 2006: 27.

European states' laws. As such, one might expect the European Court to rule against the French state and vindicate Belgin Dogru's right to freedom of religious expression. How, then, to reconcile the ECHR's vindication of the ban?

If we examine the context, historical background, and national culture, several factors surface that are particularly relevant to this question. First, French legislators worded and passed the law on secularism with the explicit intent of side-stepping potential challenge by the ECHR. They did so, moreover, under direct instruction from a vice-president of the European Court at the time, Jean-Paul Costa, who was also a member of France's state council (Bowen 2008: 137–140). If we thickly describe these circumstances, we find that the conception of public order in which the French law was embedded was anything but indeterminate. In fact, there was considerable political wrangling with Costa over the exact wording, force, and scope of the law to maximize its chances of passing ECHR scrutiny.

Costa strongly advised that the law would need to delineate institutional settings and set limits. He argued that the wording of the law must exclusively target signs that “conspicuously display” and/or “draw attention to” the religious identity of the student. He advised against any attempt to ban all “visible” symbols, as numerous legislators in the French National Assembly had initially proposed (Bowen 2008: 137–140). The law would have to permit so-called “discreet” signs. Wording any more ambitious or less precise, Costa insisted, would almost certainly be viewed by the ECHR as disproportionate restriction, even if it were justified as a threat to public order. The ECHR would assuredly strike it down, despite the fact that numerous French legislators argued that the laic identity of French public life and the state should mean that any visible signs of particular religious identity disrupted public order with “communitarian signaling.”

Second, the conceptions of “gender equality” and “freedom,” understood to be central to French national identity, were similarly shared by the ECHR and visible in court precedents. Because these values were so carefully calibrated, the ECHR could follow the Stasi Commission Report in ascribing the symbol's principal significance—and one of its primary dangers—as a practice that is “imposed upon women by a religious precept [which is hard to square with the principle of gender equality]” (ECHR 2008, para. 64; cf. O'Brien 2005: 54). This positions veiling as a practice that intrinsically subjugates women.

Clearly, hijab is a practice that distinguishes women from men. It can be perceived as treatment of women that is self-evidently unequal when equality is conceived to be identical treatment and/or obligations regardless of one's gender, ethnicity, and so forth. From this perspective,



religious commitments that distinguish duties and/or status based upon differences of gender (in Islam, women's veils, men's beards) reflect a form of religion that is intrinsically unequal. The Stasi Commission forwarded this view. Indeed, it claimed that in so far as hijab is a compulsory act of obedience, it is ostensibly coercive or pressured (especially with regard to school-aged girls). Moreover, the commission considered the visibility and assertiveness of these identities particularly harmful in public schools. France's public schools are widely (and historically) perceived as places in which pupils are cultivated into French citizenship; where "new French citizens are made" (Scott 2007: 107). The Stasi Commission portrays a conception of subordination-by-hijab to which counter-examples are not permitted. However Muslim women described their having received, embodied, and embraced the practice of wearing hijab,<sup>10</sup> proponents of the law argued that those women had, in effect, internalized their own oppression, implicating women in "self-discrimination" (O'Brien 2005: 42). They stigmatize self-reflective and purposeful—even self-described deliberate—participation on the basis of first having determined uncoerced participation to be, in effect, impossible.

The ECHR further followed the Stasi Commission in portraying the French law as a necessary case of limiting the freedom to publicly manifest one's religious identity as a collateral consequence of protecting public order and safety. For instance, the court cited as precedent a 1978 case in Britain (also ruled upon by the court) in which the state compelled a motorcyclist, a practicing Sikh, to remove his turban in order to wear protective headgear. Likewise, the court cited precedents to justify the compulsory removal of religious garb for the purposes of security checks at airports or consulate entryways (ECHR 2008, para. 64, citing *X v. the United Kingdom*, no. 7992/77, commission decision of 12 July 1978). In such cases, the court considered limiting the individual's freedom to manifest his religious identity to be an indirect effect of enforcing a safety measure deemed necessary by the state. The court treated these precedents of public health and public order as parallel cases to, for instance, a public school teacher who might manifest her religious identity by wearing an Islamic headscarf while teaching and thereby (putatively) unduly influence her students. The court further found these precedents comparable to a public school student who wears a headscarf while attending and participating in class. Clearly in the latter cases it is

<sup>10</sup>"[M]y headscarf is part of me. I won't take it off. We have to educate the state about why the scarf is so important and why there should be no fear of it," Karima Debza, an Algerian-born French Muslim woman, stated while casting her vote in support of the creation of an official organization to represent French Muslims (Sciolino 2003).

not the interest of public safety that compels delimitation of individual freedom. It is, rather, concern about the impact of the symbol upon the freedom and formation of others. Such a “powerful external symbol,” said the court, might well exert a “proselytizing effect” (ECHR 2008, para. 64).

Finally, the ECHR followed the Stasi Commission in treating the case in terms of compliance with the rules: consistent and uniform articulation and application of French law. The prevailing view of secularism provided the parameters for determining rule violations. It is here that the ECHR ruling demonstrates its most forthright deference to French *laïcité*. It construed *laïcité* not only in terms of a constitutional principle but (however inadvertently) as a cultural ethos. The pivotal passage from the court’s ruling on this point reads:

In France, as in Turkey and Switzerland, secularism is a constitutional principle, and a founding principle of the Republic to which the entire population adheres, and the protection of which appears to be of prime importance, in particular in schools. The Court reiterates that an attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention (see: *Refah Partisi and others v. Turkey*) (ECHR 2008, para. 72).

Note how the language of the ECHR here moves from invoking *laïcité* as a constitutional principle to the claim “that the entire population adheres to it.” These two claims then contribute, in tandem, to the “prime importance” ascribed to defending that principle—and this, especially in public schools. Note also that this defense goes so far as to protect against an “attitude which fails to respect that principle.”<sup>11</sup>

With the above passage we find what is actually a threefold warrant in play. The first appeals to the sovereignty of the state with reference to the status of *laïcité* as a constitutional principle. The second appeals to the history and character of the state’s identity. This claim is, in effect, that the constitutional principle of *laïcité*—with its attendant ideals of gender equality and freedom as self-determination—has been fundamental to

<sup>11</sup>It is important to note that the ECHR recognized that the 2004 law was passed several years after the events that led to Belgin Dogru’s expulsion from school. Technically, the ECHR distinguishes its legal basis as the 1989 ruling of the Conseil d’Etat. And yet, it reflects far more directly the spirit of the 2004 law, and its justification by the Stasi Commission, than the 1989 ruling. In fact, the 1989 ruling by the French Supreme Court stated that “the Muslim headscarf is not in itself an ostentatious symbol that could be banned from schools; it could only be forbidden if it were used as an instrument of pressure on girls who were reluctant to wear it.” This left considerable leeway for case-specific interpretation and flexibility in enforcement. A primary purpose of the 2004 law was to alleviate the need for case-by-case assessment by putting a formal law in place.

the Republic since its inception. Third, the court appeals to a form of authority it finds reflected in popular consent (“that the entire population adheres to it”). Taken all together, the interests of not only the state, but also central features of the nation (“peoplehood” embodied in shared national culture, history, and identity of the Republic), exert a fundamental influence in the ECHR ruling. Arguably, this is the interpretive influence of “the religious personality of the state” upon the ECHR adjudication.

Note the important points of contrast between how Mahmood and Danchin describe the indeterminacy of the public order that is dictated by the state and the underdeterminacy that is visible when paying close attention to the actual justifications for the ban. If the concept of public order is intrinsically indeterminate, then the state’s role in determining its significance and scope should be absolute: it is described as “indissolubly linked to the sovereign power of the modern state” (Agrama 2010: 500). The state determines the content and character of the concept “public order” as a framework within which it then determines what counts as permissibly religious as opposed to disruptively and/or threateningly religious. Through such determinations—and through enforcing them—it vindicates its sovereignty and reinforces its authority. This is a process central to the so-called “technology of state governance.”

Such a position begins with the pivotal insight that public space, and its putative stability and order, is unavoidably articulated by power. However, it turns that insight into a reductionist contention, according to which power manifest in terms of state interests defines and enforces the nature and limits of public order. On that basis, further, the state defines and domesticates acceptable forms of religion. This is the state as Leviathan, and the putative “freedom of religion” is one of its tentacles.

What difference does it make to think of the concept of public order as underdetermined? Recognizing the flexibility of any conception of public order is likewise attuned to the claim that what can count as public order at a given point is context specific and that the role of power in articulating that concept remains unavoidable, but not reductionistically so. Rather, power plays out in the interpretive justifications and arguments (and what is recognized as justification and argument) by which such claims are conceptualized, articulated, justified, ultimately adjudicated, and then enforced. Power manifests, further, in the institutional structures and arrangements that such conceptualizations enter into. But this fact makes it all the more pressing to explicate those dynamics of power in order to scrutinize the particular details of the arguments and claims and the contextual histories and sociological formations in place.

In the present case, to explicate and critically assess the processes by which the operative concept of “public order” was formed and deployed

to uphold the headscarf ban in France, we must attend to the construction of the Stasi report and the nature and basis of the arguments it forwarded. We must examine the constraints and limitations that the commission and French legislators avoided reaching beyond and why. In other words, if the conception of “public order” is interpretively underdetermined, then the claims, arguments, and histories of the concept in this context matter. They are still recognized as embedded within and inflected by socio-cultural, historical, and legal background. The claims and arguments are the very substance of political contest. However, ostensibly, the outcomes of the arguments (their success or failure) could be different. If, by contrast, public order is ultimately indeterminate, then the arguments and justifications are always conceptual and legal camouflage for the arbitrariness of the state’s sovereign power.

The French state representatives had to make the case with great precision that their accounts of public order and concern for the freedom of others fell within the limits of what the ECHR could recognize as within the so-called “margin of appreciation.” This included the possibility that their arguments concerning the protection of public order might be rejected. Indeed, the ECHR was already inclined to be suspicious of overreach by the French state due to its previous aggressiveness regarding Article 9 cases. In short, the conception of public order was anything but indeterminate. It was, rather, contested, negotiated, and strategized about in terms quite specific and concrete. It was the subject of interpretive possibilities and considerable political wrangling that were enabled, but also constrained, by a range of historical, social, and political considerations.

To sharpen this interpretive and contestatory dimension, compare the more recent ECHR ruling in *Ahmet Arslan and Others v. Turkey* (no. 41135/98). In this case, members of a religious group identifying themselves as the Aczimendi tarikaty (founded in 1986) refused to remove their turbans while on trial at Turkish State Security Court under Turkey’s antiterrorism laws, as is required by law in Turkish courts.<sup>12</sup> They were charged, convicted, and fined for violating Turkey’s law (2596) that prohibits wearing forms of religious dress in public spaces unless specified for religious ceremonies. All their appeals failed (Id. at §§ 10–

<sup>12</sup>“The applicants, 127 Turkish nationals, belong to a religious group they referred to as *Aczimendi tarikaty*, founded in 1986. (Id. at § 6.) On October 20, 1996, the applicants, coming from various parts of Turkey, met in Ankara to participate in a religious ceremony organized at the Kocatepe Mosque. They were wearing the distinctive clothing of their group, a turban, *salvar* (traditional baggy trousers), and a tunic, all of them black, and each man carried a stick. They toured the town, and following various incidents, were arrested on October 20, 1996, and placed in preventive detention. (Id. at § 7.)” The charges under which they were first detained were dismissed several years later. (Id. at §§ 8 & 18.) (Atwill 2014).

17). The group brought their case before the ECHR, which ruled that the Turkish government violated Article 9. The ECHR did not question the legality of the Turkish law that restricts wearing religious garb and headgear in public spaces. The ECHR ruled, however, that Turkey's appeal to its law as vindication for its treatment of this religious group was deficient. The burden was on the Turkish government to make a compelling case that the group's religious apparel presented a threat to public safety, public order, and/or protection of the freedoms and rights of others.

The primary point of this case for my purposes is that arguably the ECHR found Turkey in violation of Article 9, because its case lacked adequate justification for its claims about alleged threats to public order and the freedom and rights of others. Turkey relied on the integrity and sovereignty of its laws (Law 2596 and Law 671). It did this, moreover, with reference to the centrality of the principle of secularism in Turkey's democratic system. The ECHR found these insufficient grounds on which to prohibit the public manifestation of religious identity in this case. Of course, it is conceivable that a more shrewd and calculated argument would have passed the scrutiny of the ECHR, much as France's did. And yet, the central point illuminated in this example is that the state cannot make whatever claims it wants to regarding the nature, basis, and significance of public religious practice, public order, and the freedoms of others. An array of constraints interposes a degree of answerability, and thus, the risk that state arguments and efforts might fail. Interpretive flexibility, and thus contestability, of concepts such as "public order" and "the freedom of others" by no means amounts to indeterminacy.

### RELIGIOUS PERSONALITY OF THE STATE: CIVIC VERSUS RELIGIOUS NATIONALISM

The results of my analysis ought not be read as questioning the indispensability of human rights understood as a discourse that might provide normative thrust against the discriminatory tendencies of nationalism. Human rights provide a powerful set of normative terms. They aid in illuminating conflict, discrimination, and repression across international contexts. But given the dispersed and subtle nationalism that supported the French law "On Secularism," can human rights language serve as terms of moral (and international legal) criticism and resistance that would oppose and counter the religious nationalist restrictions under which French Muslim students are forced to work? I suggest that it can. What does this require? It might look like a form of immanent criticism in which voices on all sides call for recognition of the religious character of French nationalism as one reason for its discrimination against its Muslim population.

The fact that attending to the operations of state power implicates concerns about the nation comes as no surprise. In most of its modern (i.e. post-Westphalian) conceptualizations, the state is the legal and institutional means by which a people consolidates and administers political self-determination. This conception renders the terms not only inter-linked (e.g. “nation-state”), but effectively coterminous, simply as a “qualitatively novel” development of the modern era (Smith 2003: 46–49; Anderson 1991; Gellner 1997). And yet, what is conceptualized as a de facto coterminous relation of state and nation results from an unreflective—indeed, unnecessary and perhaps detrimental—conflation of the two (Jakelic 2010; Omer 2015). It is precisely such a conflation that subtly unfolds in the passage from that ECHR ruling above. As a result, concerns to preserve and protect a national identity as a basis for the ECHR ruling are as understated in the ruling itself (and underattended to in the legal literature) as they are influential upon its outcome. Recognition of this wrinkle in the ECHR vindicating the ban opens onto a wide vista of critical concerns that remain occluded so long as state and individual are the primary terms of analysis.

The case of *Dogru v. France* helps highlight a seminal, and yet frequently overlooked, wrinkle in human rights discourse. Rights principles will inevitably be applied in the midst of specific contexts. These contexts will be shot through with political interests and cultural presuppositions and freighted by historical baggage, all of which bear upon the construal and application of human rights principles. The articles and protocols of the European Convention of Human Rights—just as those of the Universal Declaration—do not interpret and apply themselves. If rights norms and institutions are indispensable, they must not be perceived as an arrival at a final destination, but rather as a point of departure into a persistently unfolding tradition of discourse. The internal currents of this discourse proliferate and become more complex even as they at times double back on themselves, in ways that might admit of fallibilism, and the effort to be self-correcting.

Human rights discourse faces the challenge of overcoming repressive structures and customs, precisely because the latter may frame, fill-out, and deflect the ethos that informs the application of human rights principles. The implication, then, is that human rights discourse must be accompanied by sustained attention to, and reflection upon, the background, interests, and purposes of the contexts and circumstances of application. This requires making explicit and contending with the (often tacit) exertion of biases, prejudices, and repressive histories of the circumstances in question. It requires intentional search and sometimes distressing illumination. It is almost certain to meet with resistance.

In the French case, this requires critical reflection upon orienting conceptions of gender equality, religious tolerance, and freedom that have difficulty recognizing, much less making sense of, accounts different from their own. Indeed, these conceptions turn out to be noticeably intolerant of what they do not recognize as of their own kind. The irony to be illuminated and grappled with through critique is that the French cultural orientation and ethos is very much of the same kind as the Islamic aggressiveness and intolerance that the Stasi Commission Report proclaims to be endangering and vies for legislation against.

Joan Scott has illuminated the racialized dimensions of this discourse (2007: chap. 2).<sup>13</sup> If, however, we introduce the lens of ethnicity as an angle by which to approach the ethnocentric dimensions in this case, then we can draw upon what Max Weber argued were the “elective affinities” evinced between ethnic, religious, and national identities and modes of association (Weber 1968: 378–398).<sup>14</sup> Doing this helps us to recognize that the ethnocentric sensibilities of French laws, institutions, and people toward Muslim residents is not a preconception and prejudice that can be corrected simply by recognizing the equal rights of fellow citizens. Rather, such ethnocentricity may be interwoven with, and to some degree constitutive of, national identities and histories. These are received, articulated, embodied, lived out, perpetuated, and legitimized in forms of mythical national stories and self-conceptions, symbolic and ritual practices, and the seemingly banal and perhaps inconspicuous forms of everyday civil religion. In the French case, this civil religious nationalism presents itself in conceptions of gender equality, republican commitments to pluralism and mutual toleration, and freedom of conscience that are vindicated in terms of protection of human rights. Yet these terms are invoked and deployed in ways that render them means by which inequalities, marginalization, and humiliation are produced. This presses the analysis to a deeper level—namely, to the ways that forms of power dynamics and differentials mark out and inflect the public life within which manifestations and expressions of identity will be adjudicated as acceptable or unacceptable.

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<sup>13</sup>Scott makes the case that ethno-cultural dimensions have morphed into pervasive forms of racism toward Muslims in France. Differences of culture, religion, and ethnicity become reified and are then taken to be “innate, indelible, unchangeable” (2007: 45).

<sup>14</sup>Elective affinities are not the assimilation or reduction of one concept to the other but the highlighting of resemblances, thus avoiding the claim, for example, that nationalism is a religion. Weber identified ethnicity as “subjective belief in a common descent” (Weber 1968: 389). From this perspective, “ethnonationalism” names forms of nationalism in which “ethnicity or ethnic features of identity are used to forge national ties or determine membership in the group. Such ethnic features may include a shared language, belief in a common ancestry, as well as inherited cultural practices, customs, manners, attitudes, and sensibilities shared by (and constitutive of) a particular group” (Omer and Springs 2013: 14–15).

On a thickly descriptive account, we find these power dynamics exerting themselves through protection and enforcement of norms into which French citizens must putatively be enculturated. For instance, Muslim residents and Muslim citizens of France demonstrate that they are “the good kind of Muslim” for France by demonstrating that they are “bad” or “indifferent” practitioners of Islam. They do this by not practicing, or practicing sporadically and without apparent dedication or passion. They thereby demonstrate that their Muslim identity is sufficiently (or wholly) subordinate to their commitments to, and identification with, superordinate identities of state, nation, and national culture.

To construe this as the aggressive segregation of religious practice and identity markers into nonpublic spaces of personal life and, thereby, as state encroachment upon individual freedom of religious expression is to miss the substance of the situation. Addressing this in terms of ethno-religious nationalism instead illuminates features of hegemonic processes of enculturation that some refer to as the “laicization of behavior” (Bowen 2008: 82–85). This “laicization” operates bidirectionally. On the one hand, French Muslim citizens and residents strive to prove that they can become, and in fact are, authentically “French.” Conversely, the “laicization of behavior” is used by state actors and representatives as metrics to determine which Muslims are insufficiently assimilated and therefore which are candidates for profiling and suspicion of fanatical or potentially terrorist behavior. These metrics are also used by immigration officers to determine whether those applying for citizenship have demonstrated “sufficient assimilation” (Bennhold 2008).

In short, when situated within the context of French religious nationalism, *laïcité* is not simply a policy, or principle, or general orientation toward religion. It is a set of commitments and dispositions, articulated through national narratives and histories, and cultivated in ritualized practices and institutional spaces that are especially “set apart” for the acculturation of citizens into these norms and dispositions. To examine these dynamics as features of religious nationalism illuminates how the dynamics of exclusion and humiliation cast in the form of law—and vindicated through the application of human rights norms and institutions—are actually more culturally and socially diffuse than a simple majority versus minority configuration permits. For it is through these historical and cultural modes that state power becomes legitimated power, that is, becomes right authority. This authority presents itself as normalized, persuasively formative, culturally “taken for granted,” and thus enforceable through various forms of social pressure. In the present case, it is enforceable by law and even by human rights judgments (down to the very “attitude which fails to respect the principle” of *laïcité*). Indeed, the



recognition of—and assent to—formation in accord with this authority presents itself as constitutive of citizenship itself. Once this diagnosis has been rendered, what are the means of responding? Is there a role for “rights” in this context?

### SYMBOLIC GUERRILLA WARFARE OR ETHICAL PRACTICE?

Arguably, the ban on headscarves in French schools generates the very phenomenon that it aims to prohibit (Roy 2007: 98–102). It has the effect of reifying the meaning of the symbolic practice. This rigidity facilitates a potential counter-thrust for the practice—facilitating novel, even innovative applications of the symbol. Both religious and national identities may change in multiple directions. Innovation may occur as fortified and enriched forms of piety and obedience. Through such processes, normative structures and justifications of the practice can be brought to explicit attention and assessed. In this framing, the practice might be debated and (ostensibly) adjusted, even as a part of pursuing a revival of and/or preserving cultural heritage and identity. To call these dynamics “conservative” is already to have misnamed them. They may be more adequately termed “traditionalist,” but via a conception of tradition that is not intrinsically reactionary and retrograde.<sup>15</sup>

At the same time, there are more forthright and perhaps radical forms of innovation in which the hijab is used in novel ways. Here one thinks of Frantz Fanon’s description of the tactical uses of the veil in French Algeria. It was precisely because the French viewed the eradication of the veil as one of the ways they could accomplish their civilizing mission in Algeria that Fanon could claim so effectively that the veil must be worn as an act of solidarity and resistance. In Fanon’s estimation, the veil was an implement of religious and cultural tradition that would instrumentalize itself out of existence. To dissolve the colonialist subjugation of the Algerians by the French would permit them to move into forms of equality that were neither dictated by the colonialist occupiers, nor were a cheap imitation of French *égalité* (seemingly freely chosen, but in fact driven by the internalized self-subjugation of the colonized subject) (Fanon 1965: 61–63).

However, if taken as an exhaustive account of what critique and resistance look like, this is too thin and one-dimensional to capture the

<sup>15</sup>For accounts of this drawn from interviews with French Muslim women, many of whom adopted the practice of hijab at an older age, see Joan Scott’s treatment of Dounia Bouzar and Saida Kada (2003). For further elaboration of the relation of novelty (and thus, freedom) through constraints of ethical practice and how this opens avenues of innovation within the broader constraints of a tradition, see Springs 2009.

complicated realities in contexts of contemporary France. It is true that many young French Muslim women have adopted the practice of wearing hijab as acts of resistance or markers of defiance. In some cases, it represents a refusal to consent (however tacitly) to subject themselves to the promise of full-fledged assimilation into, and thereby the promise of acceptance by, French society. And yet, this subversive instrumental use of the veil for defiance and resistance is the converse of the French conceptualization of it as exclusively a means of subjugation. As the Stasi Commission reported, even in its inescapable subjugation of women, persistent veil wearing became a form of “symbolic guerilla warfare” against French culture and the French state. In short, this instrumentalization for subversive and resistant purposes fails to capture the multiple and conflicting motivations for the practice that are ambivalent and messy.<sup>16</sup>

Comparably, the currents of change and innovation also are not unidirectional. This has implications for conceptualizing French nationalism and the public manifestation of religious identities in France. The multiplicity permits moving beyond the dead-locked conception of “religious freedom” and “human rights” as the instruments by which the nation-state manufactures “religion,” in both its acceptable (i.e. state-sanctioned and reinforcing varieties) and unacceptable forms (e.g. forms and features of “political Islam”). Both forms of agency may effect innovation that ventilates and alters the more confining and subjugating forms of the tradition. Indeed, they may have an altering and even transforming effect. In fact, innovation embedded in instances of the practice may produce more lasting changes than a formal effort to challenge and reform it.

Attunement to the array of significances and roles that hijab may convey makes it possible to ask how that practice might innovatively inform and inflect French national identity. This framing recognizes national identities as contestable and multi-variant. What might it mean for hijab in France to be, at once, a distinctive practice (recognized as reflecting multiple religious and cultural inflections of significance and purposes) that also refuses to simply “be accommodated” (i.e. domesticated) insofar as its forms are deemed acceptable by the French state? How might it look for such a conception of the practice to, at the same time, find a role as a public practice that coheres with an expanding French

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<sup>16</sup>For first-person accounts of this, see [Islamic Human Rights Commission 2009](#). Seyla Benhabib also identifies possibilities of religious innovation in veil-wearing in the French context. She construes this as a “private act of faith and conscience rather than as a communal act of faith and belonging” (and as such, the “Protestantization” of the practice) (2006: 58). My claim, by contrast, is that innovation occurs through participation in social practices understood to be most basically public and relational (though they do not preclude conceptualization of individual agency and intention).

republic and culture? In fact, there are powerful examples of events very much like this having happened. However, they are not recognized as potential examples of “French Islam.”

The laws against public manifestation of religious identity in the form of headscarves, in effect, create what they aim to combat. They do this, on one hand, by reifying the alleged meaning and significance of the symbol. At the same time, in so doing, they alienate—and ostensibly humiliate—many Muslim people. This is an effect of exclusion (as opposed to outright assimilation, or domestication through conditional accommodation by the state). Arguably, one way to consolidate and spawn solidarity among a population (in this case, a largely immigrant, economically disadvantaged, and vulnerable population to begin with) is to identify and deal with that population as an “out group” in custom and law. And indeed, as this occurred in response to the French headscarf ban, cohesion resulted among those groups. This was then taken to further verify their opposition to integration and their communalist intentions. On this basis, it is further identified as an especially hazardous breeding ground for the Stasi Commission’s most emphatic concern: political Islam.

Opposition to the law indeed generated solidarity among Muslims, and Muslim women in particular. In fact, Muslim women and Muslim groups organized an array of protests and demonstrations in the weeks leading up to the enactment of the law “on secularism.” These protests, however, never took place; or rather, they did not take place as public actions simply opposing the law banning headscarves. In the days leading up to the law taking effect in late August 2004, a group identified as the “Islamic Army in Iraq” took two French journalists in Iraq hostage. They demanded that France reverse its headscarf ban in exchange for the journalists’ release. French Muslim communities quite outspokenly, and uniformly, rejected these efforts. In fact, they transformed what had been scheduled as protest rallies against the law banning the wearing of hijab into solidarity with France rallies throughout the country. Muslim women in their headscarves publicly declared: “We will not allow our headscarves to be soiled with blood” (Leick 2004).<sup>17</sup>

<sup>17</sup>“The Muslim faithful and clerics came together to pray at the Great Mosque of Paris, built in 1924 in honor of Muslim colonial troops who had perished for France in World War II. The service was also attended by Interior Minister Dominique de Villepin and Paris’ socialist mayor, Bertrand Delanoë. The rector of the mosque, Dalil Boubakeur, also chairman of the French Council of the Muslim Faith, solemnly declared the ‘solidarity of Muslims with the entire French nation, to which we fully and completely belong.’ . . . Solidarity rallies with active Muslim participation were held throughout the country, in Marseilles, Montpellier, Lille, La Rochelle, Besançon and Lyon. Veiled Muslim women proclaimed: ‘We will not allow our headscarves to be soiled with blood’” (Leick 2004).

It is important to examine the nuance of what transpired in these circumstances. This was not a plea for the French state to simply accommodate Muslim headscarf practices. Nor was this assimilationist behavior on the part of the protesting Muslim women. In fact, the women persisted in their stated opposition to the law. They persisted in their opposition to the portrayal of the veil as a symbol of communalist opposition interlaced with the subordination of women. And yet, in precisely this “counter-accommodationist” capacity, hijab became a cause and occasion for solidarity with French national culture and the state. Hijab became a mode of resistance to precisely the forms of violent extremism and terrorism that the Stasi Commission Report, the French law “On Secularism,” and, in effect, the ECHR ruling in *Dogru v. France*, project upon scarf-wearing itself. In these circumstances, the wearing of hijab was, at once, defiance and solidarity in tandem with the protesters’ insistence of their full belonging to French national culture.

This example further illuminates the pliability of the symbolic practice. It gestures toward the capacity of its orienting norms to be deployed in ways that defy an either/or positioning in the national context in question—either accommodating/assimilating to declared (if not mandated) norms of the nation-state, or categorical opposition of hijab practices to the national-legal culture of French *laïcité*. The impact is multi-directional—innovatively inflecting both Muslim identities with an insistence upon inclusion in French national culture on their own terms—and, conversely, altering the potential modes of French national variations by way of the presentation of religious particularity.

## CONCLUSION

Clearly, the modern state consists of—and exerts itself by way of—coercive power structures. And this reality must be vigilantly and persistently illuminated, assessed, and subjected to critique. Where necessary, it must be resisted. But the state is not a god. The democratic constitutional state can be held accountable to the democratic ethos that it was conceived to enable. States can be challenged. Potentially, they can be altered. The interpretive and contestatory dimensions of human rights, and the cross-cutting ambivalences of the nationalisms that states need and frequently cultivate to transmute their monopoly upon the coercive use of force into legitimated authority provide two dimensions through which they may be held accountable, resisted, and subjected to change.

The case of *Dogru v. France* (along with other cases of ECHR Article 9 jurisprudence) makes clear that there can be no simple appeal to human rights as a groundwork for religious freedom: not, at least, without

analysis and critical interrogation of the social and cultural contexts within which human rights are applied. In short, there will have to be more than human rights casuistry, in which cases are subsumed under principles, to defend religious freedom in contemporary Europe.

Of course, at the same time, power reductionism and genealogical determinism that view the right to religious freedom as intrinsically deficient and bound to be always and already an instrument colluding in the very dynamics of power it purports to resist are, I have argued, equally misguided. Such analyses are predicated upon an unnecessary and detrimental conflation of nation and state, which positions the two as coterminous. By contrast, recognizing the pliability, multi-valence, and internal ambivalences of national identities and religious practices may illuminate resources for resisting and correcting state power and, similarly, for conceptualizing the constructive potential of human rights discourse and institutions. This account permits internal contestation that is multi-directional, resulting in diversification—and even innovation—within national identities. In this context, human rights implements have served as valuable instruments of resistance to injustice.

Reconceiving nationalism in this way means that human rights implements and institutions are not fated to reflect the influence of a nationalist interest that is subsumed within and subject to iron-clad determination by the power interests and (putatively) ever-expanding regulatory capacities of the state (especially with regard to minority groups internal to the state). Moreover, it becomes possible to recognize the state as not simply an amorphous wielder of absolute power exercised in the interest of protecting and perpetuating that power (e.g. the Leviathan's expansion of its regulatory powers). State interests, institutions, and objectives rely upon dimensions of nationalism for purposes of legitimation—as means, for instance, by which state power may come to be perceived as legitimate authority in the eyes of its citizenry. And yet, the multi-valence of national identities means that state authority admits of internal ambivalences and the potential to be contested and changed. Authoritative purposes of a state might be critically illuminated and guarded against, resisted, and redirected by its citizenry. The multi-valence and elasticity of nationalisms provide one means for critique and resistance, and the interpretive and contestatory character of human rights principles and adjudications provide another.

What would be entailed in repositioning human rights from abstract universals to a tradition of discourse that is recognized as historically immanent, intrinsically interpretive and contestable, and thus, subject to the interests, purposes, and background contexts in which they are invoked and applied? I have argued that such repositioning means that illuminating,

critically assessing, and responding to contextual particulars (e.g. political, cultural, and religious motivations and background influences, among others), and attending reflexively to ambivalences and tensions internal to how rights principles are codified, articulated, interpreted, and applied permit distinguishing between better and worse, right and wrong applications of rights norms.

Reframed in the above ways, human rights applications can be subject to correction, revision, and enrichment by way of thick description, reflexive analysis, normative argument, and concrete practices of social and political change. This opens an alternative to the argument that rights norms (and the right to religious freedom in particular) should be terminally suspect on the grounds that they are implements by which the state asserts its ever-expanding regulatory capacities, that is, as tentacles of the Leviathan.

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