PATHWAYS FOR CONSCIENCE PROTECTION IN LAW: GERMAN, AMERICAN AND AUSTRALIAN PERSPECTIVES

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To Peter R. Long and Paul F. L. Stenhouse M.S.C.
("Peter & Paul")

STYLE NOTE

Each of the individual articles, which comprise part of this thesis, is presented in a distinct style. This is because each article, so far as possible, has been drafted in the house style of the journal in which it has been, or will be, published. Likewise, some variations in spelling and footnoting may occur due to country of publication for each article.

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ABSTRACT

This thesis considers various interactions between law, conscience, and religion in three countries: Germany, the United States, and Australia. Looking in detail at recent controversies, including those over headscarves and crucifixes, and sometimes exploring philosophical and theological themes, this thesis makes comparisons across these countries based on case law, existing legislation, and constitutional provisions, as well as proposed legislative reform. The thesis also considers debates that occur inside religious traditions and reflects upon how such discussions impact the well-established sincerity test, which prohibits courts from taking positions on theological questions. Understanding a foreign solution to a familiar problem often leads to a more precise grasp of one's own law. This thesis applies this axiom to inform debate in the future work of Australian federal and state Parliaments as they attempt to protect freedom of conscience and religion in a complex social milieu.

DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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I have received for my research through the provision of an Australian Government Research Training Program Scholarship.

The first paper in this thesis was published in 2018 in the *Tulane Journal of International and Comparative Law:*

> Patrick T. Quirk, *The Undefined Remains Unprotected: Tensions between Conscience and the Law in Germany by Way of Joseph Isensee*, 27 TUL. J. INT'L & COMP. L. 55 (2018).

The second paper in this thesis was published in 2019 in the *Fordham Journal of International Law:*

> Patrick T. Quirk, *Protecting Religious Freedom and Conscience: What Australia Might Learn from Germany*, 43 FORDHAM INTERNATIONAL LAW JOURNAL 163 (2019).

The third paper in this thesis has been accepted for publication, forthcoming FAULKNER LAW REVIEW (Spring 2020):

> Patrick T. Quirk, *When My Opt Out Is Your Trigger: Oderberg's Argument with the Religious Freedom Sincerity Test.*

The fourth paper in this thesis has been submitted for publication in various US law reviews and journals via Scholastica HQ:

> Patrick T. Quirk, *Josef Pieper: A Lawyer's Guide to the Apocalypse.*

Each of these papers contains original research, which I conducted during the period of my Higher Degree by Research candidature, and which is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

Signed:	Date:
	20 January 2020

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CONTEXTUAL STATEMENT

A. INTRODUCTION

> *Conscience is ubiquitous in our law, but it is usually unexamined, functioning as a presumed shared starting point within every citizen's cognitive grasp from which the law can do its work.*[1]

This thesis explores legal complications associated with conscience protection and religious freedom in three countries—Germany, Australia, and the United States. It does so by examining selected recent cases, legislation, and constitutional provisions in a broad comparative context while also aiming to unearth shared presumptions and potential portable solutions that may form the basis of future law reform in Australia.

There can be no doubt that law, authority, and religion are now interacting with increasing frequency and greater variation around the world.[2] Leading Western democracies, including those mentioned above, are at the vanguard of a wave of legal reforms, which are attempting to keep pace with a mass of underlying social and cultural change, religious tension, and prudent accommodation where possible.[3] Questions of conscience protection are also becoming caught up in these changes, and attracting further attention in their own right, quite

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[1] ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 15 (2010).

[2] Report of the Pew Research Center on Religion and Public Life, *A Closer Look at How Religious Restrictions Have Risen Around the World* (July 15, 2019). https://www.pewforum.org/2019/07/15/a-closer-look-at-how-religious-restrictions-have-risen-around-the-world/ (last visited Jan. 14, 2020). This report has appeared for ten consecutive years and notes that "Over the decade from 2007 to 2017, government restrictions on religion – laws, policies and actions by state officials that restrict religious beliefs and practices – increased markedly around the world. And social hostilities involving religion – including violence and harassment by private individuals, organizations or groups – also have risen since 2007, the year Pew Research Center began tracking the issue."

[3] These include Australia's efforts in reforming discrimination laws through the *Religious Discrimination Bill* 2019 (Cth) and the associated legislative package, including the *Religious Discrimination (Consequential Amendments) Bill* 2019 (Cth), and the *Human Rights Legislation Amendment (Freedom of Religion) Bill* 2019 (Cth). In the United States, high profile cases such as *Hobby Lobby v. Sebelius* (2013) and *Burwell v. Hobby Lobby Stores, Inc*. (2014) continue to come before the highest courts. In Germany, an influx of immigrants has fueled contentious debates about religious clothing, freedom of speech, and related issues of "integration." For an overview of ethically motivated disobedience to the law in Germany from 1949 to 1989 see Tobias Schieder, ETHISCH MOTIVIERTER RECHTSUNGEHORSAM: RECHTSDEBATTEN ZU WIDERSTANDSRECHT, GEWISSENSFREIHEIT UND ZIVILEM UNGEHORSAM IN DER BUNDESREPUBLIK DEUTSCHLAND, 1949-1989 [*Ethically motivated disobedience to the law: Legal debates surrounding the right to resistance, freedom of conscience, and civil disobedience in the Federal Republic of Germany, 1949-1989*] (2018).

apart from religious considerations.[4]

In December 2018, the Australian Government published the *Religious Freedom Review*, thereby drawing attention to a "limited understanding in the [Australian] community about the human right to religious freedom, its application, and how it interacts with other human rights."[5] New Australian cases dealing with perennial issues such as those surrounding religious clothing are also coming before the courts with regularity.[6] Earlier in the decade, the Supreme Court of the United States handed down decisions in *Hobby Lobby v. Sebelius* (2013) and *Burwell v. Hobby Lobby* (2014), which fueled a long debate centered upon the extent of the pivotal "sincerity test" in First Amendment jurisprudence of the United States Constitution.[7] Meanwhile, in continental Europe, and Germany in particular, a polarizing immigration debate was developing with religious aspects of democratic pluralism at the forefront.[8] While Germany had already encountered many of the issues that were arising for the first time in Australia, problems continued to appear in both countries in new and unusual forms.[9]

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[4] In the United States, for example, the Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. (2010) gave rise to large amounts of litigation responding to conscientious objections arising from mandated contraceptive/abortifacient coverage. In Germany, the consciences of teachers and civil servants were brought under pressure when German States (*Länder*) such as Bavaria forbade the wearing of religious clothing while on duty. In the United Kingdom, David Oderberg's 2018 book-length consideration of conscientious objection discussed the UK and US situations in great detail; *see* DAVID S. ODERBERG, OPTING OUT: CONSCIENCE AND COOPERATION IN A PLURALISTIC SOCIETY (2018).

[5] Ruddock, Philip, Religious Freedom Review: Report to the Australian Prime Minister of the Expert Panel (2018), https://www.pmc.gov.au/domestic-policy/religious-freedom-review (last visited JAN. 8, 2020).

[6] For example, the case of *Elzahed v State of New South Wales* [2018] NSWCA 103 in the New South Wales Court of Appeal (where the subject refused to give evidence in court other than with a fully covered face) and in the Supreme Court of Victoria case of *The Queen v Chaarani* [2018] VSC 387 (where the wife of an accused husband wished to attend court wearing a full face covering).

[7] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (Tenth Cir. 2013) [hereinafter *Hobby Lobby* (10th Cir.)] was subsequently decided in the US Supreme Court; *see also Burwell v. Hobby Lobby Stores, Inc*., 574 U.S. (2014) [hereinafter *Hobby Lobby* (SC)].

[8] For a recent work on pluralism see MAX CZOLLEK, DESINTEGRIERT EUCH [DE-INTEGRATE YOURSELVES] (2018) where, according to Safronova, he argues that "Germany, eager to shed its past, isn't reckoning with the rise of anti-Semitism, xenophobia and racism. And with the book's title, he is calling on people who have been ostracized or singled out to stop trying to fit in and embrace their "otherness" so Germany can become a truly multicultural, pluralistic society." Valeriya Safronova, *In Germany, a Jewish Millennial Argues That the Past Isn't Past*, N.Y. TIMES, JAN. 16, 2020. https://www.nytimes.com/2020/01/16/books/max-czollek-germany-desintegriert-euch.html (last visited JAN 17, 2020).

[9] The First and Second Headscarf decisions in Germany (BVERFG), 2 BVR 1436/02, 2003, (GER.), and BVERFG, 1 BVR 471/10, Jan. 27, 2015, (GER.), respectively) led to legislative responses in the various States

Important philosophical and theological themes emerge as the thesis progresses. In the first article, *The Undefined Remains Unprotected*,[10] the problems of political pluralism and their interactions with the individual conscience are discussed, along with Professor Isensee's rejection of the solutions offered by Hegel.[11] The significant issues of how to define conscience together with the dangers that can arise when it expands too far, are introduced in this section, and outer limits are considered. This sets up an interplay between secular and religious versions of conscience which Germany's highest court, the *Bundesverfassungsgericht*, has been called upon to adjudicate. The Basic Rights, which inhere in the German Constitution (*Grundgesetz*),[12] provide a formidable example of rights protection *inter privatos*, which allows the Federal Constitutional Court to intervene in creative ways when, for example, claims based on conscience overrun the rights of others.

The German Constitutional Court has devised a series of useful partial-exemptions, which are illustrated in cases such as the Oath Case,[13] which provided a partial exemption to a Pastor who was unwilling to swear an oath, while at the same time protecting the validity of rules of general applicability requiring that oaths be administered.

As Isensee explains, when operating inside this somewhat uncertain border zone:

> the state is well advised not to ask so much what it *must* constitutionally guarantee for the sake of freedom of conscience by way of dispensation, as what it *can guarantee*

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across Germany. Recent unusual iterations in this saga include the case of a trainee lawyer in Bavaria, who wished to wear a head scarf in court—a request denied by the judge and now legislatively forbidden—and the similar situation in relation to judges and prosecutors; *see* Alexander Pearson, *German Court Allows Courtroom Headscarf Ban*, DEUTSCHE WELLE, MAR. 7, 2018, permalink: https://p.dw.com/p/2tpEW (last visited Jan. 11, 2020); *see also Germany: Bavarian Court Upholds Headscarf Ban for Judges, Prosecutors*, DEUTSCHE WELLE (MAR. 18, 2019), permalink: https://p.dw.com/p/3FElI (last visited Jan. 11, 2020).

[10] Patrick Quirk, *The Undefined Remains Unprotected: Tensions between Conscience and the Law in Germany by Way of Joseph Isensee*, 27 TUL. J. INT'L & COMP. L. 55 (2018).

[11] *Id*. at 68.

[12] In English, the BASIC LAW, Germany's Constitution of 1949 with Amendments through 2012, https://www.constituteproject.org/constitution/German_Federal_Republic_2012.pdf (last visited Jan. 11, 2020).

[13] BVerfG, (1972) 2 BvR 75/71, 33, 23 (Ger.) (Oath Refusal Case).

without contradicting the constitution.[14]

This emphasis on what *can* be guaranteed, as opposed to what *must* be guaranteed, is taken up in more practical terms in the second article of this thesis, *Protecting Religious Freedom and Conscience*, which considers recent German and Australian jurisprudence, especially in high profile cases dealing with religious clothing and crucifixes on classroom walls.[15] Without repeating the cases in detail here, some broad patterns of fact and law emerge from them, regardless of where they arise. The principal difference between Germany and Australia, which the article highlights, lies in the legal tools available for superior courts in Australia and Germany to deal with these intricate issues. Germany, it is argued, is much better equipped, because of its lengthy experience with this kind of litigation, and, at a more theoretical level, the riches of its *Professorenrecht*,[16] especially of the kind outlined in *The Undefined Remains Unprotected*.

The third and fourth articles, *When My Opt Out Is Your Trigger*[17] and *Josef Pieper*[18] respectively, place more emphasis on moral philosophy and eventually enter the realm where theology and the law must meet and do business. Thus, *When My Opt Out Is Your Trigger* considers the moral-philosophical problem of cooperation in evil, a difficulty that lies at the heart of many conscience claims.[19] Such cooperation, even when initially considered from the moral standpoint, soon reaches a point of delicate conflict with the state when citizens believe that, from a theological standpoint, they are cooperating in evil, even if others – including the

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[14] Quirk, *supra* note 10, at 89.

[15] Patrick T. Quirk, *Protecting Religious Freedom and Conscience: What Australia Might Learn from Germany*, 43 FORDHAM INT'L L.J. 163 (2019).

[16] Literally the "law of the Professors," a phenomenon of the civil law. This emphasis on Professorial pronouncements and commentaries in countries like Germany, as opposed to the weight given to judge-made law in common law jurisdictions, is a profound and useful difference that can be exploited to the benefit of understanding both systems.

[17] Patrick Quirk, *When My Opt Out Is Your Trigger: Oderberg's Argument with the Religious Freedom Sincerity Test*, FAULKNER L. REV. (forthcoming 2020).

[18] Patrick Quirk, *Josef Pieper: A Lawyer's Guide to the Apocalypse* (submitted for publication, 2020).

[19] *See generally* GERMAIN GRISEZ, DIFFICULT MORAL QUESTIONS (1997).

state itself – might disagree and so see those same citizens' actions as merely neutral, or even as the opposite of cooperation.

Specifically, this difficulty is explored in *When My Opt Out Is Your Trigger*, when it explores in detail what happens when "my opt out" becomes "your trigger" in the context of US the sincerity test as developed by the US Supreme Court. Using examples taken from cases litigated in the wake of the US Affordable Care Act, I consider the Little Sisters of the Poor, who, true to their vocation as Catholic nuns, sought to avoid any involvement with contraception or abortifacient drugs (especially for their employees) by refusing to sign what they saw as a "trigger" document which would allow someone else to supply the requisite insurance cover for those same drugs. The government saw this quite differently by arguing that the document was not a trigger at all, but in fact, an "opt out" absolving the sisters of any moral complicity. The thesis resolves this impasse by agreeing with David S. Oderberg[20] and Hadley Arkes,[21] who opine that in a legal context strictly rational principles of cooperation should outweigh any contrary theological principles, even if that means a slight narrowing of the sincerity test in the short term. This conclusion is not reached lightly, but instead appears to be necessary to preserve the widest possible space for rational, and thus common, arguments about what does and does not amount to cooperation in evil. This approach, it is argued, preserves and even enhances the common good while still respecting core theological principles.[22]

The final article, *Joseph Pieper*, steps into a more abstract space by recounting Pieper's philosophical approach to the Apocalypse.[23] This provides useful counterpoint to some of the

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[20] *See, e.g.*, Oderberg, *supra* note 5.

[21] *See, e.g.*, Hadley Arkes, *Backing into Relativism*, FIRST THINGS (JUNE 2019), https://www.firstthings.com/article/2019/06/backing-into-relativism (last visited JAN. 7, 2020).

[22] This is not to argue for strictly rational solutions in all cases. In the words of Thomas Gilby, "Human truth lies in a balance: on the one side a science, and certainly a philosophical science, should always be severely reasonable; and on the other it should be rooted in the bowels of the earth. Every argument must appeal to rational evidence and yet, and this appears notably in politics, to impose a plan that does not allow for non-rational motives is bound to fail." THOMAS GILBY, PHOENIX AND TURTLE, THE UNITY OF KNOWING AND BEING (1950).

[23] Quirk, *supra* note 18.

more common examples of emergency-based extravagances of conscience, while still giving full play to notions of the end of time and ultimate judgments. The main point of this final part of the thesis is not to argue for a particular theological stance, but to provide a solid example of well-argued limitations on conscience.

Before leaving this Introduction, I wish to note that the key terms "religious freedom" and "conscience protection" are part of the terminology used to frame the debates and so are used frequently throughout the thesis discussion. The differences between them are, however, respected in terms of each legal system's definitional case law and legislative history.

B. LESSONS FOR LAW REFORM

This thesis also suggests possible lessons for law reformers. This aspect is especially relevant for Australia, which is about to embark on a significant and arguably sweeping national legislative initiative in the area of religious freedom and anti-discrimination law.[24] Australian expertise in comparative law, with a focus on religion, is growing stronger, but lags significantly behind that of Germany and the United States as evinced by the number of relevant courses offered in law schools,[25] the type and number of cases brought before courts,[26] as well as other factors, such as the German and US constitutional provisions, which bear directly on religion and conscience.[27]

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[24] See the *Religious Discrimination Bill* 2019 (Cth) and the associated legislative package, including the *Religious Discrimination (Consequential Amendments) Bill* 2019 (Cth), and the *Human Rights Legislation Amendment (Freedom of Religion) Bill* 2019 (Cth).

[25] For a survey of the type and number of such courses available in the United States see John Witte, *The Study of Law and Religion in the United States: An Interim Report*, 14 ECC. L.J. 327–354 (2012).

[26] See the particular examples in articles two and three of the thesis.

[27] For example, the celebrated First Amendment of the Constitution of the United States (U.S. CONST. amend. I.), and various articles of the GERMAN BASIC LAW (*Grundgesetz*), including art. 4 (*Freedom of Faith, Conscience, and Creed*); art. 12a (*Compulsory Military or Alternative Service*); and art. 38 (*Elections*: Elected Members of the Bundestag are to be "representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience"); translation available at https:// www.bundesregierung.de/breg-en/chancellor/basic-law-470510 [https://perma.cc/A53C-K7PG]. (last visited Jan. 15, 2020).

This thesis does not pretend to traverse the entire realm of religious freedom, nor of conscience protection, in any one of the subject countries, let alone all of them. Instead, by delving deep into some key questions and grappling with some recent hard problems, it will open paths for discussion and legal development. Those paths include the direct borrowing of legal solutions, modified borrowing, or rejection for something better suited to the local conditions.

In all of these cases, the process of comparison that offers the critical insight or modification is most useful. For example, the extensive use of federal models in the German approach to religious clothing conflicts, or the stepwise approach of the US sincerity test, neither of which might ever be adopted in whole cloth by Australia, still illuminate the way and reassure law reformers that hard problems will admit of solutions, even if it takes a long time.

Whilst not suggesting that solutions may be easily "borrowed" or applied across jurisdictions, this thesis also identifies some key principles, pressure points, and lines of demarcation, which will remain relevant and important as long as citizens continue to attempt, in good faith, to peacefully sort out the ways in which religion and law interact. Examples include the German Constitutional Court's respect for religious sensibilities in the 1973 Courtroom Crucifix case,[28] and the careful attention paid to the rights of parents in making subsequent decisions about classroom crucifixes.[29]

Thus, the thesis should inform debate in the future work of Australian federal and state Parliaments as they attempt to better protect freedom of conscience and religion within the boundaries of the Commonwealth. This thesis offers no radical suggestions in this regard, but through painstaking comparison and thoughtful distillation, it has added to the corpus of

[28] 35 BVerfGE [Federal Constitutional Court] 366 (1973). (Deciding that crucifix in a Düsseldorf Administrative Court should be taken down out of respect for a Jewish litigant in the instant case, while preserving a general rule about the placement of crucifixes in courts.)

[29] *See* Quirk, *supra* note 15, at 177–178.

knowledge upon which protections can be based. Such additions to knowledge are always worth the effort.

C. MAJOR THEMES OF THIS THESIS: DEFINING THE PROBLEM

The question of conscience protection is often dogged by problems of definition. Hence, the profound insight in Professor Isensee's observation that "the undefined remains unprotected"[30] invites discussion regarding where relevant protective lines should be drawn, or in some cases, redrawn. This demarcation process is a vital characteristic of the thesis and provides a suggested touchstone for readers who wish to make useful comparisons.

As this thesis is not presented in the form of a traditional dissertation, but rather as a series of articles, readers are invited to follow numerous arguments in specific areas of foreign law. Several additional themes can be appreciated throughout. First, the thesis concerns itself with the relationship between conscience (whether religious or otherwise) and the law. These lines of demarcation are considered in *Protecting Religious Freedom and Conscience*[31] which shows Germany's response to the generous human rights provisions of the Basic Law of the Federal Republic, as developed since the time of the Weimar Republic (1919–1933). Germany is also constitutionally unique in the way it provides a form of protection for those objecting to military service.[32] In the United States, as outlined in *When My Opt Out Is Your Trigger*,[33] the lines are considered in the context of a judicial reluctance to decide upon the substantive content of religious belief and instead rely on a broad "sincerity" test which is being tested anew in recent Supreme Court cases. In Australia, the lines of demarcation are only slowly

[30] Quirk, *supra* note 10, at 55.

[31] Quirk, *supra*, note 15.

[32] *Id*. Article 12a (2) of the German Basic Law (*Grundgesetz*) provides that "Any person who, on grounds of conscience, refuses to render military service involving the use of arms may be required to perform alternative service."

[33] Quirk, *supra*, note 17.

become apparent in the wake of a debate surrounding the *Religious Discrimination Bill*[34] and associated legislation mentioned above.

The second major theme relates to the amount of legal material each jurisdiction has available (or, in the case of Australia, does not have available) and which grapples with issues of religious freedom and conscience protection. As demonstrated in the first three articles, both Germany and the United States have vast experience and readily available high-level case law upon which to draw when considering newer demands and tensions calling for judicial adjudication: principles have been distilled and old problems reformulated for more straightforward resolution over time. Australia, by contrast, is somewhat poverty-stricken in this area and so will benefit from the work of this thesis and, hopefully, other work which will flow from it.

The third major theme pursued chiefly in article four, *Josef Pieper*,[35] but also present innately in the other articles, considers conscience in the context of apocalyptic claims and offers some insights from the Judeo-Christian tradition in particular. While conscience is often seen as a form of "self-revelation,"[36] it is also, at least in the more practical world of "conscientious objection," very tightly connected with external events, prophecies, and prognoses – even scientific ones, such as those related to climate change. These personal and group revelations can prompt citizens to act on the edge of or even outside the boundaries of the law, thus requiring executive and judicial intervention.[37] Joseph Pieper's approach to this

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[34] *See supra,* note 3.

[35] *See supra* note 18.

[36] "The claim of conscience as self-revelation is familiar territory in our society, where the recognition of overarching moral absolutes has long since given way to the acknowledgment of deeply personal conceptions of moral truth. But while the personal dimension of conscience may be common knowledge, the content of that dimension is not." VISCHER, *supra* note 2, at 48.

[37] For a recent consideration of the scope of the executive power in a time of crisis see, Ryan Alford, *Is an Inviolable Constitution a Suicide Pact? Historical Perspectives on Executive Power to Protect the Salus Populi*, 58 ST. LOUIS U. L.J. 355 (2014).

is classical, restrained, and invitingly lucid, and so deserves a detailed consideration in the literature on this topic.

A final theme, especially relevant for law reformers, arises from the philosophical standpoint as it manifests by means of legal argument and disputation. Both Germany and the United States readily resort to highly reflective and quasi-philosophical styles of argumentation, thereby more easily unearthing the organic structures of the disputes about line-drawing or re-drawing. Australia may now be entering into this stage of development and, it is submitted, can only benefit from exposure to and comparison with other legal systems and solutions.

D. PRINCIPAL CONTRIBUTIONS AND FIELDS OF KNOWLEDGE

This thesis fills a gap in the research literature in four ways. In the first instance, the thesis provides original translation of some German material, which, until this point, has been unavailable in English, as well as many aspects of comparison between the three systems.

Second, the extraordinary wealth of material has forced a focus on those cases that best exemplify the rights under discussion. By opening up this new material, along with several associated fronts for examination, the thesis shows various routes into the principles and technicalities of relevant and recent foreign law.

Third, various *sub rosa* understandings, conventions, matters of legal etiquette, and sometimes lopsided nuances of the legal systems concerned will also become apparent to the reader.[38] In the words of F.H. Lawson, "to understand a foreign solution to a familiar problem is often rewarded with a clearer grasp of one's own law."[39]

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[38] This list is derived, in part, from C. GRANT ROBERTSON, SELECT STATUTES CASES AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY 1660–1832, xi (1904).

[39] F. H. Lawson, *The Field of Comparative Law*, 61 JURID. REV. 16 (1949).

Fourth, in the case of Australia, there is, more often than not, no solution on offer at all, and the law is only now being debated and written. This makes the work all the more pertinent in the light of current political and legal discussions over these issues.

The fields of knowledge explored in this thesis include comparative law, international law, and the domestic laws of Germany, the United States, and Australia. When considering various local rules, the thesis is most often concerned with the core principles of constitutional law. Those principles include the rule of law, the proper separation of powers, and fundamental human rights discussed in all four articles.

Alongside the aforementioned fields, there are frequent interactions with other realms of the internal legal landscape of each country, such as anti-discrimination laws, criminal laws, free speech jurisprudence, the laws of education, the laws of evidence, and aspects of medicine and law, to name a few. These varied interactions all point to the fact that conscience issues can arise in many varied ways and hopefully adds to the general appeal and usefulness of the work completed.

E. PROBLEMS AND FURTHER DIRECTIONS FOR RESEARCH

The translation of material for article one required considerable effort because of the composite legal and philosophical arguments advanced by Professor Isensee. Other more standard obstacles in the field of comparative law included the need for explanations and approximations when discussing foreign legal concepts that have no precise equivalent in the system under consideration. Such difficulties in translation and understanding can arise equally for systems that already share a common language and legal heritage (Australia and United

States)[40] as for those which do not (Australia/United States and Germany).[41] For this reason, I have sought to avoid any unmediated or merely blunt comparisons of the legal concepts discussed. Legal notions must be met on their own terms, doing their own work, in their own system, and not as half-translated concepts from far-off places.[42]

Further directions for research are both diverse and numerous. A great deal more of Isensee's material lies available for profitable translation and reflection. In particular, his 2009 collection of essays, *Recht als Grenze, Grenze des Rechts —Texte 1979–2009 [Law as Limit, The Limits of Law—A Collection of Texts Covering the Years 1979–2009]*.[43]

Likewise, the work of Josef Pieper warrants further attention from a legal perspective, especially in the rapidly developing areas of human rights, free speech, terrorism law, and even the law of festivity.[44]

Oderberg's work also continues to add to the debates in the area of medical law and conscientious objection, and this material will demand consideration in common law jurisdictions such as Australia.[45]

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[40] Both common law systems.

[41] Common law and civil law systems, respectively.

[42] See the copious and interesting commentary on this topic over several decades, starting in the 1950s in F. F. Stone, *The End to be Served by Comparative Law*, 25 TUL. L. REV. 325 (1951); Roscoe Pound, *Comparative Law in Space and Time*, 4 AM. J. COMP. L. 70 (1955); Max Rheinstein, *Comparative Law - Its Functions, Methods and Usages*, 22 ARK. L. REV. 415 (1968); Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L. J. 457 (1985); Basil Markesinis, *The Destructive and Constructive Role of the Comparative Lawyer*, 57 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 438 (1993).

[43] JOSEF ISENSEE, RECHT ALS GRENZE, GRENZE DES RECHTS —TEXTE 1979–2009 [LAW AS LIMIT, THE LIMITS OF LAW—A COLLECTION OF TEXTS COVERING THE YEARS 1979–2009](Bon Bouvier, 2009).

[44] Josef Pieper has written a book-length defense of festivity and leisure; *see* JOSEF PIEPER, LEISURE, THE BASIS OF CULTURE (1952/1963). His work on the cardinal virtues is also significant for lawyers: JOSEF PIEPER, THE FOUR CARDINAL VIRTUES (1966).

[45] See, for example, the 2019 debates in the state of New South Wales concerning conscientious objection by registered health practitioners in the context of abortion law reform in Howe, J., & Le Mire, S., *Medical Referral for Abortion and Freedom of Conscience in Australian Law*, 34 JOURNAL OF LAW AND RELIGION, 85 (2019). doi:10.1017/jlr.2019.14. (making secular, democratic, arguments in favour of freedom of conscience). The ABORTION LAW REFORM ACT (2019) No 11 (NSW) passed in 2019.

F. CONCLUSION

The protracted business of writing a thesis occasionally leads to the words getting in the way of the ideas. I hope that I have avoided this as far as possible. In sum, the significant ideas I wanted to convey are these three: First, if we pay careful attention to the detail of foreign laws, we will understand our own rules much better. The increase in understanding will be in proportion to the attention paid. For this reason, and second in my conclusion, we can hope with some confidence that solutions can be found for almost all the conceivable problems that religious freedom and conscience protection can throw up. This confidence is, in fact, critical to preserving our courage to pursue them. Finally, such pursuit is predicated on patient and cautious scholarship, which has been my aim from the very beginning of this project.

PAPER ONE: 'THE UNDEFINED REMAINS UNPROTECTED: TENSIONS BETWEEN CONSCIENCE AND THE LAW IN GERMANY BY WAY OF JOSEPH ISENSEE'

Paper One: Statement of Authorship

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This paper, of which I am the sole author, contains original research I conducted during the period of my Higher Degree by Research candidature. It is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

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The Undefined Remains Unprotected: Tensions Between Conscience and the Law in Germany by Way of Joseph Isensee

Patrick T. Quirk*

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* © 2018 Patrick T. Quirk. Associate Professor of Law, St Thomas More Law School, Australian Catholic University, and Scholar-in-Residence, St Mary's College at the University of Melbourne. BA, LLB (Qld), LLM (Tübingen). Thanks to Bernd Irlenborn, Paul Babie, Anne Steinemann, and Elizabeth Boepple for their assistance. Additional thanks to Brother Sebastian Conlan, OP for his suggestions and generous assistance with more difficult aspects of translation, especially those with theological import. All errors remain my own.

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I. INTRODUCTION

Most English-speaking lawyers are unfamiliar with the work of Joseph Isensee,[1] an eminent jurist and sometime contender with Jürgen Habermas,[2] as well as a leading writer on the law of the German Constitution. Isensee's *Handbook of German Constitutional Law* has been a leading text for many years,[3] and his various interventions over

1. Isensee is well known in the field of constitutional law of the Federal Republic of Germany and the author, inter alia, of HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK (J. Isensee & P. Kirchhof eds., 2014), now in thirteen volumes. According to Jo Eric Khushal Murkens, "the statistics are mindboggling. [The *Handbuch*] has involved 132 authors (roughly a third of all constitutional scholars in Germany) in ten volumes (eight are in their third edition) with almost 12,000 pages. It contains the biggest discussion by far of the state." *See* JO ERIC KUSHAL MURKENS, FROM EMPIRE TO UNION: CONCEPTIONS OF GERMAN CONSTITUTIONAL LAW SINCE 1871, at 81 (2013).

As well, his name appears in English databases quite frequently—for example, there are 125 references under "secondary sources" of the Westlaw legal database. The most recent include the following: Stephan Jaggi, *Revolutionary Constitutional Lawmaking in Germany—Rediscovering the German 1989 Revolution*, 17 GERMAN L. J. 579, 581 (2016); Michael Lysander Fremuth, *Patchwork Constitutionalism, Constitutionalism, and Constitutional Litigation in Germany and Beyond the Nation State—A European Perspective*, 49 DUQ. L. REV. 339, 340 (2011). David Currie of Chicago Law School was, according to Peter E. Quint, known to be fond of citing Isensee's *Handbuch des Staatsrechts der Bundesrepublik Deutschland. See* Peter E. Quint, *David Currie and German Constitutional Law*, 9 GERMAN L.J. 2081, 2094 (2008).

2. *See* MATTHEW G. SPECTER, HABERMAS: AN INTELLECTUAL BIOGRAPHY 159-60, 164, 187 (2010) (contrasting Isensee's views with those of Habermas). Habermas's role as a public intellectual includes the following on religious pluralism: Jürgen Habermas, *Religious Tolerance: The Pacemaker for Cultural Rights*, 79 PHILOSOPHY 5, 5-18 (2004).

3. *See* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK, *supra* note 1; MURKENS, *supra* note 1; Fremuth, *supra* note 1; Jaggi, *supra* note 1; Quint, *supra* note 1.

time have led to a number of significant awards, including the Ring of Honour of the Görres-Gesellschaft in 2013.[4]

The aim of this Article is to translate[5] and comment upon some of Isensee's work and the arguments surrounding conscience protection under the German Basic Law (*Grundgesetz*).

Debates in Germany over conscience-protection can take many forms and concern many perennial issues. By way of example, Germany's longest-serving Chancellor,[6] Angela Merkel, has often expressed concern about immigration and the increasing strains placed upon the German Basic Law by competing visions of the democratic state.[7] The recent German federal election of 2017, with its blurred result and half-built coalitions, has only exacerbated these tensions.[8]

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4. Awarded yearly since 1977 to "deserving personalities of scientific and public life." Other recipients include philosopher Josef Pieper (1990) and theologian Walter Cardinal Kasper (2008). *Bearers of the Ring of Honor Since 1977*, GORRES GESELLSCHAFT, https://www.goerres-gesellschaft.de/gesellschaft/ehrening.html (last visited Oct. 25, 2018).

5. According to David Bellos, "The variability of translations is incontrovertible evidence of the limitless flexibility of human minds." DAVID BELLOS, IS THAT A FISH IN YOUR EAR?: TRANSLATION AND THE MEANING OF EVERYTHING 9, (2011). Within reason, I hold with this flexibility.

6. Technically, the noun denoting a female Chancellor is "*Bundeskanzlerin*." Judith Vonberg, *Angela Merkel Sworn in for Fourth Term as German Chancellor*, CNN EUR. (Mar. 14, 2018), https://edition.cnn.com/2018/03/14/europe/merkel-chancellor-fourth-term-germany-intl/index.html.

7. Philip Oltermann, *Angela Merkel Pledges to Cut German Immigration Figures but Rejects Limit*, GUARDIAN (Dec. 14, 2015), https://www.theguardian.com/world/2015/dec/14/Angela-merkel-pledge-cut-german-immigration-figures.

8. No party won an outright majority and, as at the time of writing, negotiations over government formation were ongoing. The rise of the previously unrepresented party known as *Alternativ für Deutschland* (Alternative for Germany) has also complicated matters. Article 21(2) of the Basic Law protects the German constitution and allows for the banning of political parties:

> 21 (2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

Such attempts were successful in 1952 and 1956 (against neo-Nazi and Socialist groups respectively). GRUNDGESETZ [GG] [BASIC LAW], art. 21 § 2 (Ger.), *translation at* https://www.btg-bestellservice.de/pdf/80201000.pdf; *see* Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 854 (1991). In 2017, the Federal Constitutional Court declined to take action against the National Democratic Party (NDP): "Although the National Democratic Party 'pursues aims contrary to the Constitution,' there was a lack of 'concrete supporting evidence' that the neo-Nazi party would be able to successfully achieve its goals and to pose a genuine threat, said Andreas Vosskuhle, the president of the court." Melissa Eddy, *German Court Rejects Effort to Ban Neo-Nazi Party*, N.Y. TIMES (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/world/europe/german-court-far-right.html.

The idea of welcoming immigrants out of compassion—and perhaps at the same time with an eye to continuing economic security—has, for the past fifteen or more years, been tempered with the concept of a *Leitkultur* (dominant culture), in which German-ness plays a central role in binding the country together during stressful or centripetal times.[9] This sets up a debate imbued with a heady mix of law, economics, religion, and fundamental rights.[10] German constitutional cases centered upon Islamic headscarves,[11] witness's oaths,[12] Christian crucifixes on Bavarian classroom walls,[13] ritual slaughter,[14] ceremonies of circumcision,[15] and blood transfusions[16] have all contributed to the legal framework within which the broader debate over *Leitkultur* takes place.[17]

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9. The debate over *Leitkultur* has resurfaced in recent years:

> The concept of a *Leitkultur*—a guiding, dominant or leading culture—is back after the debate had died down somewhat for a while. This controversial term, which has been haunting Germany since the start of the millennium, is now experiencing a renaissance in view of the sharp rise in refugee numbers. Everything revolves around one fundamental question: what is the basis for Germany society?

Pascal Beucker, *Integration Debate: The Leitkultur Renaissance*, GOETHE INSTITUT (Chris Cave, trans., Mar. 2016), https://www.goethe.de/en/kul/ges/20721837.html. The debate became more impassioned following an amendment to German citizenships laws in 2000, in which the *jus sanguinis* principle overtook the principle of *jus soli*.

10. Axel Frhr. von Campenhausen, *The German Headscarf Debate*, 2 BYU L. REV. 665, 665 (2004); Press Release, Bundesverfassungsgericht, Constitutional Court Rules a General Ban on Headscarves for Teachers at State Schools Is Not Compatible with the Constitution (Mar. 13, 2015), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2015/bvg15-014.html.

11. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2015, 1 BvR 471/10, 1 BvR 1181/10, paras. 1-31 (Ger.) ("The protection afforded by the freedom of faith and the freedom to profess a belief (Basic Law art. 4 secs. 1 and 2) guarantees educational staff at interdenominational state schools the freedom to cover their head in compliance with a rule perceived as imperative for religious reasons. This can be the case for an Islamic headscarf."); *see* von Campenhausen, *supra* note 10.

12. BVerfG 1972, 2 BvR 75/71 (23, 33) (Ger.) (holding that the German Constitution should accommodate a Priest who refused to swear an oath because of a prohibition against oath-taking).

13. BVerfG 1987, 11 BvR 1087/91 (Ger.) ("The affixation of a cross or crucifix in the classrooms of a State compulsory school that is not a denominational school infringes art. 4(1) Basic Law.").

14. BVerfG 2002, 1 BvR 1783/99, paras. 1–61 (Ger.) (holding that ritual slaughter is an allowable exception under Article 4 of the Basic Law).

15. *See* Marianne Heimbach-Steins, *Religious Freedom and the German Circumcision Debate* 1-16 (European Univ. Inst., Robert Schuman Ctr. for Advanced Studies, EUI Working Paper RSCAS 2013/18), http://cadmus.eui.eu/handle/1814/26335 (discussing a controversial court ruling in May 2012, which decided that the circumcision of boys was equal to grevious bodily harm; after wide debate, including amongst the Jewish and Muslim communities in Germany, the law was changed to protect the practice on religious grounds).

Often, the United States also focuses on such matters, especially recently, when a new Justice was appointed to the U.S. Supreme Court.[18] So too, in England,[19] Northern Ireland,[20] the European Union (EU),[21] Australia,[22] and in other nations,[23] the strains of accommodating conscience and religious identity are becoming more apparent.[24]

Parts I and II of this Article will introduce and describe the problem in the context of recent German history on the topic. Parts III–IX will outline Isensee's thought, as set out in his 1993 essay, *Gewissen im Recht: Gilt das allgemeine Gesetz nur nach Maßgabe des individuellen*

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16. BVerfG 1971, 1 BvR 387/65 (Ger.) (holding that under Article 4 of the Basic Law, the criminal law of Germany must yield to the right to refuse blood transfusions on the basis of religious belief).

17. For a quick overview of the case law until 2004, *see* Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 TUL. L. REV. 1023, 1030 (2004).

18. *See* Tara Helfman, *Patriotic Gorsuch*, COMMENTARY (Feb. 2017), https://www.commentarymagazine.com/articles/patriotic-gorsuch/ ("In *Hobby Lobby v. Sebelius*, [nominated Justice] Gorsuch sided with the majority of the Tenth Circuit in holding that the Religious Freedom Restoration Act exempted closely held corporations from providing coverage for contraceptives that they viewed as abortifacients on the ground that doing so would violate sincerely held religious beliefs. And in *Little Sisters of the Poor v. Burwell* [794 F. 3d 1151, 1151 (2015)], Gorsuch joined in a blistering dissent that took the majority to task for denying the plaintiffs' appeal from HHS certification requirements for contraceptive coverage."). At the time of writing this article, upcoming cases to be decided by the U.S. Supreme Court include *National Institute of Family & Life Advocates v. Xavier Becerra*, 138 S. Ct. 464 (Nov. 13, 2017), *cert. granted* (on whether the California Reproductive FACT Act violates of the First Amendment) and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 137 S. Ct. 2290 (June 26, 2017), *cert. granted* (on whether Colorado's public accommodations can compel the creation of expression that may violate sincerely held religious beliefs).

19. Bull v. Hall [2013] UKSC 73 (Eng.) (holding that hotel owners had discriminated against a civilly married couple of the same sex).

20. Lee v. Ashers Baking Co. Ltd. [2015] NICty 2 (N. Ir.) (holding that a baking company had unlawfully discriminated against the Plaintiff on the basis of sexual orientation). Upheld on appeal in Lee v. McArthur & Ors [2016] NICA 39 (N. Ir.).

21. Genov v. Bulgaria, 40524/08 Eur. Ct. H.R. 275 (2017) (E.U.) (holding that Bulgaria had violated Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms by refusing to register the "The International Society for Krishna Consciousness (ISKCON)—Sofia, Nadezhda"). Bulgaria has been a member of the EU since 2007.

22. See for example, the case of Moutia Elzahed, who refused to stand for a judge in the New South Wales District Court in 2016 and has been charged with "disrespectful behaviour in court." *See* Ursula Malone, *Islamic State Recruiter's Wife Moutia Elzahed Charged for Refusing to Stand in Court*, ABC NEWS (May 8, 2017), http://www.abc.net.au/news/2017-05-08/isis recruiters-wife-charged-for-refusing-to-stand-incourt/8508332; *see also* Daniel Pietrowski, *EXCLUSIVE: Burqa-Wearing Muslim Wife of Terrorist Recruiter Must Cough up $250,000 for Failed Lawsuit—and Faces Jail for "Refusing to Stand for a Judge Because She Only Stands for Allah,"* DAILY MAIL (June 30, 2017), http://www.dailymail.co.uk/news/article-4652992/Moutia Elzahed-ordered-pay-police-250k-legalcosts.html#ixzz54rqmZnHr.

23. For example, France.

24. REINHOLD ZIPPELIUS, ALLGEMEINE STAATSLEHRE: POLITIKWISSENSCHAFT 198-201 (17th ed. 2017).

Gewissens? (*Law and Conscience: Does the General Law Apply Only According to the Measure of Individual Conscience?*).[25] These Parts will emphasize rendering the original work in English as accurately as possible, while providing ease of understanding for non-German speakers and non-lawyers alike. Where appropriate, complexities will be explained and concepts expanded.

Part X will offer some brief suggestions for further investigation.

II. THE PROBLEMS OF PLURALISM

The problems of pluralism (*Pluralismus*) are much discussed in German legal culture. Particular expression of the concept is found in the foundational texts on politics and law. Thus, we find Reinhold Zippelius, in his much cited and widely translated *Allgemeine Staatslehre* (*General Political Science*),[26] devoting considerable space to the idea of *Der pluralistische Staat* (the pluralist state) and the various "opportunities for influence" inside democracy. Zippelius notes at the outset that "pluralism is disruptive"[27] and that Thomas Hobbes was a decisive opponent of associations within the state—which act like "worms in the entrails of a natural man."[28] The solution to this weakness for conflict is centralized power.[29]

But the German Basic Law has pluralism as one of its "constitutive structural principles,"[30] and this means that other solutions must be found. Zippelius notes: "In contrast to [Hobbes], and according to the current understanding of democracy, social and political groupings express influence on the state's decision-making process via the [public] assertion of their interests and opinions."[31]

This expression then leads to a search for "consensual compromises"[32] and a form of "open competition of interests and

25. Josef Isensee, *Gewissen im Recht; Gilt das allgemeine Gesetz nur nach Maßgabe des individuellen Gewissens?* [*Conscience in Law; Does the General Law Only Apply in Accordance with the Individual Conscience?*], in DER STREIT UM DAS GEWISSEN 41, 41 (Gerhard Höver ed., 1993) [hereinafter Isensee, *Conscience in Law*].

26. ZIPPELIUS, *supra* note 24. The work has been translated into Portuguese, Spanish, Latvian, and, in 2011, Chinese.

27. *Id.* at 198.

28. THOMAS HOBBES, LEVIATHAN, OR, THE MATTER FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL ch. 29 (eBooks@Adelaide ed., 2016) (ebook).

29. ZIPPELIUS, *supra* note 24, at 199.

30. *Id.*

31. *Id.*

32. *Id.*

opinions"[33] as well as the formation of coalitions.[34] The ultimate compromise is found at the ballot box.

This multiplicity of views and ideas provides a defense against totalitarianism states and adds to the "trial and error" nature of the democratic process.[35] There are, however, a number of acknowledged disadvantages to this system, including the short-term nature of agreed upon compromises, their potential lack of philosophical coherence, and excessive bureaucracy. Such disadvantages are seen as the price to be paid for keeping totalitarianism at bay.[36] They also allow for a wide range of folkish, economic, religious, and ideological factors to become *politically* engaged, which is only achievable when citizens are prepared to dispose of their own preferences for an ideal state in favor of "the legitimation of a multi-perspective viewpoint."[37] Zippelius quotes Krüger, his intellectual predecessor,[38] to drive home his point:

> Thus the citizen must forego the [fantasy] state that reflects only his own cherished ideals and accept that state power will enforce, even violently, ideas quite contrary to his own. Rather, such a citizen can be sure that the same "fate" will not be extended to others as he originally had in mind for them.[39]

This is not to deny that the admission of such serious divergences can only safely take place within the context of a larger and more fundamental constitutional consensus (*Grundkonsenses*). The first and fundamental "rule of the game" of an open society, however, is that the equal participation and dignity of each is to be constantly respected and maintained.[40] Such equal participation belongs to each individual

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33. *Id.* at 200.

34. *Id.* at 202.

35. *Id.* at 199-201 (mentioning this "trial and error" process [using those English words] multiple times in his exegesis).

36. *Id.* at 200.

37. *Id.* at 119, 201.

38. Kruger is the author of an earlier text on the same theme as Zippelius's. *See* Wilhelm Henke, *Allgemeine Staatslehre. 3. neubearb. Aufl. by Reinhold Zippelius*, 11 DER STAAT 561, 561-63 (1972).

39. ZIPPELIUS, *supra* note 24, at 201 (quoting HERBERT KRUGER, ALLGEMEINE STAATSLEHRE 184 (2d ed. 1964)).

40. *Id.* at 201. There are obvious echoes of KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1954). Popper is, indeed, acknowledged in the beginning of this section along with others such as JOSEPH A. SCHUMPETER, KAPITALISMUS, SOZIALISMUS UND DEMOKRATIE (engl. 1942); JAKOBUS WÖSSNER, DIE ORDNUNGPOLITISCHE BEDEUTUNG DES VERBANDESWESENS (1961); and KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (3d ed. 1966). Popper had a serious influence on post-war Germany. *See* IAN CHARLES JARVIE & SANDRA PRALONG, POPPER'S OPEN SOCIETY AFTER FIFTY YEARS: THE CONTINUING RELEVANCE OF KARL POPPER (1999).

regarding their contributions towards the building up of public opinion (*öffentliche Meinung*) in the political process.[41] Zippelius then ties this into specific provisions of the Basic Law in Articles 1, 18, 20, 21, and 79, sentence 3.[42]

A. *The Problem in the Context of the Law of German Military Service*

The case of German compulsory military service sharply illustrates tensions that can exist between conscience and an individual's duties to the state during times of major conflict or even threats to its existence. Decisions of the *Bundesverfassungsgericht* (Federal Constitutional Court) since World War II[43] are particularly noteworthy[44] owing to two important sections of the Germany Constitution (Basic Law).

In the first place, one considers freedom of faith, conscience, and creed, which are guaranteed by Article 4 of the Basic Law:

(1) Freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviolable.
(2) The undisturbed practice of religion shall be guaranteed.
(3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.[45]

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41. ZIPPELIUS, *supra* note 24, at 201.

42. The Basic Law guarantees human dignity and contains the well-known statement, "Human Dignity shall be inviolable" (*Die Würde des Menschen ist unantastbar*). GG art. 1 (Ger.). These words famously appear on the wall of the Landgericht in Frankfurt am Main. Article 18 threatens a forfeiture of the basic rights set out in earlier Articles for those who work against the "free democratic basic order." *Id.* art. 18. The Basic Law derives all state authority from the people and gives Germans "the right to resist any person seeking to abolish this constitutional order, if no other remedy is available." *Id.* art. 20. It acknowledges political parties but brands as unconstitutional those who "by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany." *Id.* art. 21. Sentence 3 provides, "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible." *Id.* art. 79.

43. The Court was established in 1951. Taylor Cole, *The West German Federal Constitutional Court: An Evaluation After Six Years*, 20 SOUTHERN POL. SCI. ASS'N 278, 278 (1958).

44. *See* Josef Isensee, *Bundesverfassungsgericht quo vadis?*, 51 JURISTENZEITUNG 1085, 1085-93 (1996).

45. Translation taken from the website of the German Federal Government, GG art. 4 (Ger.), *translated at* https://www.btg-bestellservice.de/pdf/80201000.pdf. This section was drafted within the historical context of Section III (comprising Articles 135-141) of the Weimar Constitution, which dealt with religious freedom). *See also* Jan Ginter Deutsch, *Some Problems of Church and State in the Weimar Constitution*, 72 YALE L.J. 457 (1963). *See generally* Gerhard Robbers, *Religious Freedom in Germany*, 2001 BYU L. REV. 643 (2001).

In the second place, there exists a distinctive aspect of the German Constitution, by which citizens may object to participating in a form of national conscription known as *Wehrpflicht*,[46] under which males of a specified age were constitutionally required to participate in military service. Placed in abeyance in 2011,[47] the Basic Law retains Article 12(a)(1) under which: "Men who have attained the age of eighteen may be required to serve in the Armed Forces, in the Federal Border Police, or in a civil defense organization."[48]

This provision is modified by Article 12(a)(2), which provides in part: "Any person who, on grounds of conscience, refuses to render military service involving the use of arms may be required to perform alternative service."[49]

Both of these provisions use the noun "conscience" and so necessitate some judicial consideration of the term.

B. *Conscientious Objection—The Case Law*

In deciding upon the validity of the wording of the modification in Article 12(a), the judges of the German Federal Constitutional Court in the Second Conscientious Objection Judgment of 1985 (BVerfGE 69, 1) recognized directly what was at stake:

> Constitutionally mandated equality as regards civic duty in the form of universal military service . . . gives rise to the duty of the legislature to ensure that only those persons are exempted from military service who have decided to refuse to render military service involving the use of arms on grounds of conscience under Article 4.3 sentence 1 of the Basic Law; this duty represents an obligation of high order towards the community. This means on the one hand that the state, which gives precedence to decisions to refuse to render military service involving the use of arms even in the event of a threat to its existence, must be protected against abusive invocation of this fundamental right. On the other hand, it is also

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46. *See* Wehrpflichtgesetz [WPflG] [Conscription Act], July 21, 1956 (Ger.).

47. *See, e.g.*, Lauren Tucker, The End of the Wehrpflicht: An Exploration of Germany's Delayed Embrace of an All-Volunteer Force (2011) (unpublished M.A. thesis, University of North Carolina at Chapel Hill) (on file with the Carolina Digital Repository), https://cdr.lib.unc.edu/record/uuid:361d39a1-71ec-4381-94cb-d5bc383e201f. There have been recent calls for its reintroduction. *See* Timo Frasch, *Die Aussetzung der Wehrpflicht war ein Fehler* [*Suspension of Military Service Was a Mistake*], FRANKFURTER ALLGEMEINER ZEITUNG (May 11, 2017), http://www.faz.net/aktuell/politik/inland/afd-politikeruwe-junge-im-gespraech-ueber-die-bundeswehr-15010648.html.

48. GG art. 12(a)(1) (Ger.).

49. *Id.* at art. 12(a)(2).

> necessary to protect the freedom of conscience itself, which is threatened precisely when it can be used to avoid fulfillment of general civic duties.[50]

Drawing the line of demarcation between the fundamental freedom of conscience and the state's right to call upon citizens to bear arms in its defense is fraught with uncertainty, as leading authors have only recently attested.[51] The Conscientious Objection Judgment itself was also seen as controversial since (as it has been argued) the case was illogically decided.[52]

Questions of gender discrimination in the area of compulsory military service have also been the subject of debate but lie beyond the scope of this Article, as does the issue of overrepresentation of former East-Germans in the military.[53]

In 1993,[54] Isensee considered the question of conscience, including the *Wehrpflicht* conscience clause, in a discussion that appeared in a book of essays entitled *Der Streit um das Gewissen* (the *Conscience in Controversy*).[55]

Isensee observed that the major issues at stake here include:

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50. Translation by Donna Elliott of the Second Conscientious Objection Judgment—Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*—BVerfGE 69, 1), 60 YEARS GERMAN BASIC LAW: THE GERMAN CONSTITUTION AND ITS COURT LANDMARK DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY IN THE AREA OF FUNDAMENTAL RIGHTS 269 (Jürgen Bröhmer et al. eds., 2d ed. 2012).

51. *See, e.g.*, Kent Greenawalt, *Individual Conscience and How It Should Be Treated*, 31 J.L. & RELIGION 306, 306-20 (2016).

52. *See* JUSTIN COLLINGS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951-2001, at 211-12 (2015) (outlining the case and its contested reasoning that would "redden the cheeks of proverbial Jesuit"). The controversy centered on the court's finding that a twenty-month "alternative" to military service—in opposition to a fifteen-month military service—was not contrary to the exact wording of Article 12 of the Basic Law, which stated that "the duration of the alternative service may not exceed the duration of military service." Justices Böckenförde and Mahrenholz offered strong dissents and *Der Spiegel* responded with a scathing headline, *20=15*, on April 29, 1985.

53. Karen Raible, *Compulsory Military Service and Equal Treatment of Men and Women—Recent Decisions of the Federal Constitutional Court and the European Court of Justice* (Alexander Dory v. Germany), 4 GERMAN L.J. 299 (2003); Alan Cowell, *The Draft Ends in Germany but Questions of Identity Remain*, N.Y. TIMES (July 1, 2011), https://www.nytimes.com/2011/07/01/world/europe/01germany.html ("[G]ender seems to be less of an issue in the German debate than the origin of those who do volunteer.... [W]hile only 16 percent of the German population of 82 million lives in the former East Germany, easterners make up 30 percent of military personnel.").

54. Isensee, *Conscience in Law*, *supra* note 25.

55. My own translation. A more literal translation might be "the dispute(s) surrounding the (legal concept of) conscience" or, more loosely, "conscience in dispute."

- The inherent tensions between individual conscience and the state,[56]
- The diminution of any potential conflict between conscience and the state by employment of a concept of state neutrality,[57]
- Conflicts in the so-called *forum externum*,[58] and
- The juridical problems inherent in declaring a legal definition of conscience.[59]

We turn now to his explication of these issues.

III. THE INHERENT TENSIONS BETWEEN CONSCIENCE AND THE STATE

A. *The Tension Defined*

Like other scholars in the area,[60] Isensee acknowledges the ever-present tension between a law of general application and "the law" inherent in the conscience of the individual human person.[61] In German jurisprudence, this is often expressed as the relationship between a "subjective" conscience and an "objective" law.[62]

Isensee notes that the constitutional lawyer and the moral theologian both stand before these diverging concepts and both must attempt to build a satisfactory intellectual bridge between them.[63] On the one hand, conscience represents a subjective law "inside of me" (*in mir*) while, on the other hand, there exists an acknowledged external or objective parameter that is drawn from both morality[64] (*Sittlichkeit*) and from the publically promulgated law, and which presents itself to the individual as a preexisting measure or boundary of action.[65]

56. Isensee, *Conscience in Law*, *supra* note 25.

57. *Id.*

58. *Id.*

59. *Id.*

60. As one example, see Martha C. Nussbaum, who states, "[i]n the tradition we hear a lot of talk about 'liberty of conscience,' 'equal liberty of conscience,' and so on. I shall argue that the argument for religious liberty and equality in the tradition begins from a special respect for the faculty in human beings with which they search for life's ultimate meaning." *See, e.g.*, MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 19 (2009); *see also* JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE (2011).

61. Isensee, *Conscience in Law*, *supra* note 25, at 41.

62. *Id.*

63. *Id.*

64. *See* HANS REINER, DIE GRUNDLAGEN DER SITTLICHKEIT (1974).

65. Isensee, *Conscience in Law*, *supra* note 25, at 41.

Conscience demands of each individual an absolute moral authenticity; that is to say, an insight into what is "truly moral,"[66] as well as into the "inner justice"[67] of each individual case. Like many commentators, Isensee analyzes this as an individual "court of conscience," in which the individual "I" (*Ich*) functions as both party and judge.[68] Or, in other words, as an individual called upon to act both as an *interpreter* of the law and as the one who *applies* it in each distinct case (*Gesetzesinterpret* and *Gesetzesanwender*, respectively). Notably, the only role that is foreclosed to this individual is that of the "lawgiver" (*Gesetzgeber*).

According to Isensee, this puts the individual conscience in a unique position: it must, in each case, *presuppose* the validity of the (external) law, which it then subsequently interprets.[69] However, since conscience relies upon an (external) moral command, it is not an arbitrary voice, but rather one of moral necessity[70] that, nevertheless, expresses itself subjectively.

Paradoxically, asserts Isensee, this can give rise to a grave tension between "law" and "conscience": there can be no guarantee that the inner-conceived moral command will always coincide with that sourced from the moral law or the legal system. This conflict between the "inner voice" and the external law can arise at any time and is a seminal fault line in their interaction. This fault line can be conveniently named the "Dilemma of Conscience."

B. The Hegelian Solution

The above analysis is preliminary to Isensee's foray into Hegel's twofold nomenclature of the Dilemma of Conscience: the distinction between "authentic" (true) conscience and "formal" conscience.

Hegel recognized the Dilemma of Conscience when he acknowledged a certain "ambiguity" of conscience and differentiated between the idea (*Idee*) of conscience (also called the "authentic" conscience in his terminology *das wahrhafte Gewissen*)[71] and the

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. Hegel's work on conscience is notoriously difficult. According to Moyar,

> [Hegel's] reference to "true conscience" (§ 137) seems to define anyone's conscience as no more than the disposition to respond correctly to the objectively fixed ethical requirements. This appears to make freedom solely a matter of being disposed to

conscience of a particular individual (called the "formal" conscience, again using his terminology).

Authentic conscience is the "disposition [or conviction] to desire what is good, in and of itself."[72] This conviction has fixed foundations in objective rules and duties.[73] For Hegel, the "idea" (*Idee*) of conscience (i.e., authentic conscience) is sacred, and any interference with it amounts to a sacrilege.[74] This, however, only applies to the idea of conscience and not necessarily to the conscience of the particular individual.[75] "Whether what is held to be good is in fact good is only discernible through the content of what is perceived as good" (*Gutseinsollenden*).[76] Thus formal conscience must be measured and tested against the authentic conscience, which itself represents a rule of reason and a generally valid mode of acting. Mere reliance on "the self" (*das Selbst*) is not sufficient to pass this test.[77] As the keeper of the "reality" of morals, the state is built upon the authentic (but not the

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> behave according to the right norms, and not at all a matter of being self-conscious that one is following the right norms.

See DEAN MOYAR, HEGEL'S CONSCIENCE 15 (2011). Moyar's recent summary (and defense) of his own work on Hegel's Conscience (in his book of the same name) is instructive:

> We can formulate the main problem of modern freedom as the problem of how to understand the relation of conscience's authority to the authority of good reasons or objective ethical content. Does conscience in its full authoritative sense reflect (objective) rational content, or does it (subjectively) determine the content? If it just reflects content that is valid on its own, then conscience seems to be a formal requirement merely tacked on to an already given normative landscape. But if an individual determines content through the appeal to conscience, the very idea of stable rational content available to all agents begins to break down. This unpalatable either/or is met by Hegel with his dynamic account that I call performative freedom, in which content is taken up and altered in the very act of expressing it. Conscience is thus largely a site of combination and synthesis, with the judgments of conscience being concrete instances of ethical action.

See also Dean Moyar, *Summary of Hegel's Consience*, 43 OWL MINERVA 101, 101-06 (2011-2012). Some even question whether Hegel had any coherent body of social thought at all. See, for example, Allen Wood, who warns against the pitfalls of reading too much into Hegel's ethical system and the possibility that readers "will humbug [themselves] into thinking there is some esoteric truth in Hegelian dialectical logic which provides a hidden key to his social thought." ALLEN W. WOOD, HEGEL'S ETHICAL THOUGHT 7 (1990).

72. Isensee, *Conscience in Law*, *supra* note 25, at 40.

73. *Id.*

74. WOOD, *supra* note 71.

75. *Id.*

76. *See* IVAN ALEKSANDROVICH IL'IN, THE PHILOSOPHY OF HEGEL AS A DOCTRINE OF THE CONCRETENESS OF GOD AND HUMANITY: THE DOCTRINE OF HUMANITY (Philip T. Grier ed. & trans., Northwestern U. Press, 2011) (1918).

77. GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox trans. Oxford Univ. Press 1967) (1952).

formal) conscience: accordingly, "[T]he state cannot recognize the conscience as subjective knowledge, any more than science can grant validity to subjective opinion, dogmatism, or the appeal to a subjective opinion."[78]

In the end, and according to Hegel's theory of the state, the individual conscience is only compatible with the State when it has imbibed the objective laws of the state.[79] Hegel thus (dis)solves the Dilemma of Conscience in a one-sided way, and in favour of an objective rationality, as pronounced by the State.[80]

IV. Reduction of Conflict Potential in the Constitutional State

A. *Religious Neutrality—No Access to Morality*

At first glance, it would seem as if the constitutional state finds a solution to this Dilemma in favor of complete subjectivity. The constitutional state is open to the conscience of the individual, but this is so only because freedom of conscience, which the state guarantees to every human being as a fundamental right, is not directed to the authentic conscience, which exists as an idea on the Hegelian plateau of morality, but to the unskilled formal conscience of everyone.[81]

Thus, from the outset, the possibility of a legal (constitutional) conflict with an individual's conscience has been reduced to a bare minimum.[82] This is achieved by the particular structural limitations placed upon state power and places no reliance at all upon the (recognition of) a fundamental right to freedom of conscience for the citizen. In this way, the concept of conscience is confined to maintaining an external framework for the realization of its inner-workings. The democratic constitutional state is founded not on integral, ultimate truth but on the practical needs of human coexistence.[83] The religious and moral basis of action lies outside its secular horizon.[84] It also follows

78. Isensee, *Conscience in Law*, *supra* note 25, at 42; *see also* HEGEL, *supra* note 77.

79. HEGEL, *supra* note 77.

80. One possible interpretation of this is that Hegel's theory hereby devours the more traditional concept of conscience, leaving only a state-defined husk. *Id.*

81. Isensee, *Conscience in Law*, *supra* note 25, at 42.

82. WOOD, *supra* note 71.

83. JOSEF ISENSEE, VOM STIL DER VERFASSUNGOSEF: EINE TYPOLOGISCHE STUDIE ZU SPRACHE, THEMATIK UND SINN DES VERFASSUNGSGESETZES [ON CONSTITUTIONAL STYLE: A TYPOLOGICAL STUDY OF THE LANGUAGE, THEMES AND MEANING OF THE CONSTITUTION] 13 (2013) [hereinafter ISENSEE, ON CONSTITUTIONAL STYLE].

84. *Id.*

that the question of God's existence—either the God of revealed religion or the god of the philosophers, including even the world-judge and the moral superego in the internalized tribunal of conscience—lie outside the secular horizon. The secular state thus holds itself aloof from the field of religious conflicts.[85]

The constitutional state also avoids the sphere of moral codes out of which moral conflicts arise: the conscience. Such a state endows legality, not morality. It calls for external obedience to legal norms but never for internal assent. The law is modest in its heteronomic validity and does not touch the inner motivation of the citizen. The state does not get involved with conscience. Nor does the state compel the conscience. In the end, conscience lies outside the constitutional system.[86]

B. Conscience Enjoys a "Negative Freedom" Against State Power

It follows then that *conscience itself* is not the foundation stone of the constitutional state *(Rechtsstaat)*[87] but only the *freedom of* conscience.[88] Only this *freedom* can be regarded as a basic right, and it is only this basic right that the individual enjoys when confronted by state power. In other words, it forms a defense in the form of a *status negativus*[89]: an area of private self-determination, which is shielded from state interference. Thus, the basic right protects the integrity of one's moral personality by limiting the action of the state.[90] The concept of

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85. Isensee, *Conscience in Law*, *supra* note 25.

86. *Id.* at 43.

87. This is a variation of "rule of law" with additional aspects of justice—the opposite of *Obrigkeitsstaat* (a state with arbitrary use of power).

88. Isensee, *Conscience in Law*, *supra* note 25, at 40.

89. The concept of *status negativus* receives considerable space. ZIPPELIUS, *supra* note 24, at 198. It refers to fundamental rights of the citizen as a defense against the power of the state. It is compared with *status positivus* fundamental rights as "performance rights"—where the citizen can demand something of the state. *See* GG art. 6 § 4 (which provides, "Every mother shall be entitled to the protection and care of the community", *status activus*, fundamental rights as "participation rights"); *id.* art. 38 § 1, para. 2 (voting rights); *id.* art. 33 paras. 1-3 (access to public office); *id.* art. 4 para. 3, art. 12(a) para. 2 (deciding between military and alternative service); and *status passivus* (where someone has only duties and no rights at all, e.g., pure military service without a right to object to the same). The different classifications are part of Georg Jellinek's (1851-1911) positivist theory of the *Rechtsstaat* formulated at the time of Wilhelm II. *See* Gustavo Gozzi, *Rechtsstaat and Individual Rights in German Constitutional History*, *in* THE RULE OF LAW 248 (Pietro Costa & Danilo Zolo eds., 2007).

90. ISENSEE, ON CONSTITUTIONAL STYLE, *supra* note 83.

freedom, from which the basic right of liberal observance[91] originates, is determined negatively, as an absence of state compulsion.[92]

From this, it follows that the state is shut out from the religious or ethical aspects of any "decisions of conscience."[93] The state is no moral censor of conscience.[94] Nor does the state care whether the individual conscience makes the (intellectually) correct decisions.[95] Rather, it merely guarantees a "freedom of conscience." Thus, the Basic Law does not protect any eternal truth but only the individual's exercise of their subjective moral autonomy (*Subjektivität des Menschen*).[96] Again, it follows, at least from the perspective of basic rights (*grundrechtlich qualifiziert*), that nobody has a "bad conscience"—or even a "good conscience"; there is simply no room for any concept akin to "erroneous conscience."[97] The "sunshine" of the Basic Law sheds its light on the just and unjust alike, upon the wise and the foolish, the prudent and the impenitent, together.[98]

In addition, there is no requirement that the individual meet any specific criteria to enjoy the benefits of fundamental rights: these rights are conferred independent of any moral maturity or powers of decision-making attributable to the particular individual and refer only to the person as they are in "the here and now."[99] Consequently, this also excludes any reference to the person as they "should" be or become. It also follows that the formal conscience (in the Hegelian sense of the term) need not undertake any inquiry into whatever may be the claims of the authentic conscience, and there is no requirement that these two concepts of conscience cohere, or even communicate.[100]

This shows the practical consequences of the concept of a "negative freedom,[101]" to which freedom of conscience is bound, as indeed are the other classical fundamental rights.[102]

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91. Isensee uses this phrase (in German, *liberaler Observanz*) elsewhere in his writings. *Id.*

92. Isensee, *Conscience in Law*, *supra* note 25, at 43.

93. ZIPPELIUS, *supra* note 24.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. The obvious reference is to *Matthew* 5:45 "for he makes his sun rise on the evil and on the good, and sends rain on the just and on the unjust.." *Matthew* 5:45 (Rev. Std. Version).

99. *Hic et nunc* (Latin).

100. *Matthew*, *supra* note 98.

101. Josef Isensee, *Keine Freiheit für den Irrtum* [*No Freedom for Error*], 104 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE 296, 314 (1987) [hereinafter Isensee, *No Freedom for Error*].

This concept of "freedom" was condemned by the Popes of the nineteenth-century, who accepted only "true" freedom, which was positively defined as freedom to act rightly—"right," that is, from the objective perspective of the Church's Magisterium.[103] Thus, they rejected the claims of subjectivity as encountered in *freedom of* conscience, *freedom of* religion, and *freedom of* expression and teaching. The Popes defended the "rights of truth" against the enlightened and liberalized "rights of freedom."[104] Citing Augustine, they could not accept freedom for error, since "error has no rights."[105]

V. CONFLICT IN THE EXTERNAL FORUM (*FORUM EXTERNUM*)

The potential for conflict between the subjective order of conscience and a law of general application would be almost completely defused if the basic right of freedom of conscience was applied in the *forum internum* (internal forum) alone.[106] That it does so apply is undisputed.[107] The right to "freedom of conscience" is, however, of little practical importance here, since the ability of the state to interfere with the interior person, for example by way of suggestion, narcoanalysis,[108] hypnosis, brainwashing, etc., is also denied by other fundamental rights[109] and objective legal maxims.

102. *Id.*

103. *Id.*

104. *Id.*

105. Isensee, *Conscience in Law*, *supra* note 25, at 44; *see also Matthew*, *supra* note 98; George Weigel, *Are Human Rights Still Universal?*, COMMENTARY, Feb. 1995, at 41 (noting that the concept was overtaken by the Second Vatican Council). Weigel states,

> A bit closer to modern concerns, the contemporary Roman Catholic development of doctrine on the question of religious freedom nicely illustrates the concept of "emergent understanding." Prior to the Second Vatican Council, it was frequently argued in official Catholic circles that there was no such thing as "religious freedom," because, as the phrase had it, "error has no rights." Vatican II's Declaration on Religious Freedom transcended this sterile debate by insisting that persons, whether their religious opinions were erroneous or not, had rights over against coercive state power; and the Council justified this position by an appeal to the very traditional Catholic notion that the act of faith must be freely made if it is to be, in truth, an act of faith.

For earlier formulations, see the German author. *See* Hans Rommen, *Church and State*, 12 REV. POL. 321, 321-40 (1950). He is not to be confused with the Catholic scholar Heinrich Albert Rommen, 1897-1967.

106. Isensee, *No Freedom for Error*, *supra* note 101.

107. *Id.*

108. E.g., "truth serum" drugs.

109. Including important constitutional rights.

However, according to prevailing (judicial) interpretation, freedom of conscience protects not only the internal decisions of the individual but also their implementation by way of active (and external) action.[110] The right of conscience contains the *freedom to act* in accordance with the "commandments" of one's conscience, which commandments are "inwardly experienced and thereby binding and absolutely imperative."[111] The sphere of protection of a fundamental right extends to the *forum externum* (external forum).[112] This leads in turn to the programming of an inevitable conflict between the conscientious action of the citizen-actor and the general law of the democratic legal state.[113]

VI. A Legal Exception: Priority of Conscience Before Compulsory Military Service

In one very special case, a conflict in the *forum externum* is governed by the German Basic Law:[114] No one may be forced into

110. Isensee, *No Freedom for Error*, *supra* note 101.

111. Quoting from BVerfG 1978, 2 BvF 1, 2, 4, 5/77 127 (163) (Ger.) (the Conscientious Objector II case). Isensee also refers to Ernst Wolfgang Böckenförde, *Das Grundrecht der Gewissensfreiheit*, 28 VVDStRL 33, 55 (1970). Ernst Wolfgang Bockenforde was "a Catholic associated with the so-called Ritter School in Munster, who [was] a social democratic judge and legal theorist best known for his attempts to liberalize without wholly abandoning the political-theological insights of Carl Schmitt." Peter E. Gordon, *Between Christian Democracy and Critical Theory: Habermas, Böckenförde, and the Dialectics of Secularization in Postwar Germany*, 80 Soc. Res. 173, 185 (2013). Böckenförde left the Court in May 1996.

112. For a discussion of the differences and overlaps between the forum internum and the forum externum in the context of section 18 and 19 of the International Covenant on Civil and Political Rights (ICCPR), see Human Rights Council, Rep. of the Special Rapporteur on Freedom of Religion or Belief on Its Thirty First Session, U.N. Doc. A/ HRC/31/18 (2015). On the question of overlap between the two fora, the Report states,

> *Forum internum* and *forum externum* should be generally seen as a continuum. Their conceptual distinction should not be misperceived as a clear-cut separation of different spheres of life. Just as freedom in the *forum internum* would be inconceivable without a person's free interaction with his or her social world, freedom within the *forum externum* presupposes respect for the faculty of every individual to come up with new thoughts and ideas and to develop personal convictions, including dissident and provocative positions. While providing unconditional protection to the inner nucleus of each individual against coercion and interference, the legally enhanced status of the *forum internum* at the same time improves the prospects of free communication and manifestation within the *forum externum*. In other words, it strengthens freedom of religion or belief and freedom of opinion and expression in all their dimensions, both internal and external.

113. Isensee, *Conscience in Law*, *supra* note 25, at 44.

114. *Sondertatbestand*. This may also be translated as *delictum sui generis*.

military service ("with the use of arms": *Kriegsdienst mit der Waffe*) against their conscience.[115]

This guarantee of conscience is granted to the individual even in situations of very serious conflict, including those in which the state asks its citizens to secure the state's continued existence.[116]

The protection provided by the Basic Law is anything but self-evident for constitutional states with highly developed culture of "basic rights" (*Grundrechtskultur*).[117] For the democratic constitutional state sacrifices a thing of considerable substance (*Substanz*) when it relieves the individual, who appeals to conscience, from the general obligations of citizenship and defense of the state.[118] In essence, we see here a rupture of the ethical boundaries between protection by the state and obedience to the state, the connection between justice and duty.[119] The duty to perform military service:

> is justified by virtue of the fact that that the state, which recognizes and protects human dignity, life, liberty, and property as fundamental rights, can meet this constitutional protection obligation in favor its citizens only with the help of these citizens and their commitment to the existence of the Federal Republic. In other words, the individual rights claim to protection and the community-related duty of citizens of a democratically constituted state to contribute to the safeguarding of this constitutional order correspond to each other.[120]

Thus, the substance (essential kernel) of democracy is contained in the duty to bear arms to protect the state.[121] For in it, the "legitimate child of democracy,"[122] that is to say, the military assertion of the state, becomes a matter for the people themselves.[123] The army is "incorporated into" the citizenry, and the danger of political alienation (or disengagement) of the citizenry is removed.[124] Put more plainly, compulsory military service is

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115. Article 4: [Freedom of faith and conscience] . . . (3) "No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law." GG art. 4 (Ger.).

116. BVerfG, 2 BvF at 163 (1978) (Ger.).

117. GG art. 4 (Ger.).

118. *Id.*

119. *Id.*

120. BVerfG, 2 BvF at 161 (1978) (Ger.).

121. *Id.*

122. Here Isensee adopts the wording from THEODOR HEUSS, *Rede vor dem Parlamentarischen Rat*, *in* DIE GROßEN REDEN: DER STAATSMANN 72, 72–87 (1965); JöR n. F. 1, S. 77.

123. BVerfG, 2 BvF at 163 (1978) (Ger.).

124. *Id.*

baseline "democratic normality."[125] Thus, in any refusal of universal compulsory military service, the "equal burden" rightly borne by the citizenry—the burden on which the democratic constitutional state is founded—is also at stake.[126] It is, therefore, appropriate that this "inequality" be compensated by the replacement civilian service (*Ersatzdienst*) for conscientious objectors as a "heavy alternative."[127]

Nevertheless, and at the same time, rejection of military service may be well justified by subjective conscience, because military service includes the possibility of killing in case of an emergency, or of at least engaging in potentially deadly actions.[128] No other duty imposed by a democratic constitutional state on the citizen is comparable to this.[129]

The spiritual plight of one who is conscience-bound to avoid killing under any circumstances can go beyond the bounds of the reasonable demands on the citizen. The conflict is typical.[130] A general normative rule to cope with such cases is, therefore, both practical and reasonable.

VII. CONSCIENCE AS A PROBLEM OF JURIDICAL DEFINITION

A. *What Is "Conscience"?*

Even in the face of the fundamental right to freedom of conscience, the fulfillment of military service remains the rule while relief from the obligation is the exception.[131] Such relief, of course, presupposes that the military service in question conflicts with the conscience of the objector. Whether this prerequisite is satisfied can only be ascertained if the meaning of "conscience" is subject to clear definition, at least in the sense of it being a fundamental right. Thus, for quite practical legal reasons, the concept of "the conscience" becomes an important subject for legal consideration and for definition.

"Conscience," however, is not a general concept in the law.[132] In terms of the history of constitutions, as well as that of the various declarations of human rights, the concept derives from the thesaurus of the Christian religion as well as the general philosophy of the West.[133]

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125. *Id.*
126. *Id.*
127. *See* Böckenförde, *supra* note 111, at 61, 77, 84, 86.
128. GG art. 4 (Ger.).
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. Böckenförde, *supra* note 111, at 55.

Despite several thousand years of discourse, neither theology nor philosophy have achieved a consensus on the meaning and conceptual contours of conscience.[134]

The constitution of any neutral state (that includes religious neutrality as a fundamental right) is simply not capable of engaging in the battle of ideas with theologians and philosophers.[135] The state is incapable of deciding these issues, nor does it wish to do so.[136] What the state *can* do is to embrace a uniform understanding of conscience, which is valid for all citizens regardless of their beliefs or views of the world (*Weltanschaungen*).[137] These realities reveal the underlying dilemma, for here, we encounter a genuinely extra-legal concept with no firm conceptual identity or outline. Thus, "conscience" urgently needs a legal definition.[138]

The temptation is to leave conscience as a simply indefinable concept (*definiens indefinibilis*), which presumes that it is too vague or complex for precise definition. Unfortunately, such sidestepping is not satisfactory for anyone required to interpret a constitution. It is only possible for a norm to obtain practical validity when its underlying concepts can be precisely defined and generally applied.

B. The Problem of the Expansion of "Conscience"

The Federal Constitutional Court professes to have found a valid definition for the idea of conscience taken from "common language usage."[139] According to Isensee, this is not the case.[140] Everyday usage is diffuse and inconsistent.[141] In present times, citizens' reliance on a "broad conscience argument" is swift, easy, and all too frequent.[142] Such inflationary use of the term means that conscience has become a cheap currency in daily moral traffic.[143] The concept is stretched and so has become relatively elastic.[144]

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134. *Id.*
135. GG art. 4 (Ger.).
136. Böckenförde, *supra* note 111.
137. BVerfG, 1 BvL 21/60 45 (1960) (Ger.); *see also* Isensee, *Conscience in Law*, *supra* note 25, at 46 n.13.
138. GG art. 4 (Ger.).
139. BVerfG, 1 BvL 21/60 45 (Ger.)
140. GG art. 4 (Ger.).
141. *Id.*
142. Böckenförde, *supra* note 111.
143. *Id.*
144. *Id.*

By way of example, public discussion of unquestioning availability of abortion in all cases is supported by the argument that it is a "decision of conscience" of the mother.[145] This produces a rhetorical effect such that abortion based on the grounds of conscience is drawn into a taboo-zone of subjective morals and is raised to a type of public justification.[146] In the end, questioning the legal and moral permissibility of abortion has become no longer permitted.[147] Indeed, this is so not only in individual cases, but also quite generally.[148]

C. *The Analogy with Art*

The extended concept of art to be found in the sense used by Joseph Beuys[149]—who famously shouted, "[E]verything under the sun is art!"—also finds its parallel in today's public popular ethical touchstone: "Everything is conscience."[150]

For lawyers and those who must find a workable jurisprudence, however, such an expanded terminology is infeasible *per se*, because the conceptual borders of conscience have now melted away and the differences between conscience and mere "subjective arbitrariness" have been lost.[151]

The further this tendency infringes upon the interpretation of basic norms (basic rights), the closer the concept of freedom of conscience comes to a general and unfettered freedom of action and, thus, a "free right" to act out *(ad libitum)* whatever is not formally forbidden through a validly enacted state law.

The general freedom to develop one's personality[152] is the widest of all the freedom rights, at least in terms of its thematic reach, but it is also the most easily curtailed by legal regulation.[153]

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145. BVerfG 1993, 2 BvF 2/90 (Ger.).

146. *Id.*

147. *Id.*

148. Isensee, *Conscience in Law*, *supra* note 25, at 47. The issues surrounding abortion and conscience have been recently debated in the United Kingdom. *See* Abortion Act 1967 § 44, 1 (Eng.) (Section 4 (1) (The Conscience Clause and the role of conscience in healthcare)).

149. Beuys (1921-1986) was a controversial and influential "performance artist" who co-founded the Green Party in Germany in 1980. *See generally* ALLAN ANTLIFF, JOSEPH BEUYS (2014). For a critique of Beuys's work, *see* Benjamin H.D. Buchloh, *Beuys: The Twilight of the Idol*, 5 ARTFORUM 51 (1980). In 2017, Beuys was the subject of a documentary film entitled *Beuys*, under the direction of Andres Veiel. BEUYS (Zero One Films 2017).

150. Isensee, *Conscience in Law*, *supra* note 25, at 47.

151. Böckenförde, *supra* note 111.

152. Article 2 I of the Basic Law provides,

Freedom of conscience is, by contrast, unreservedly guaranteed by the Constitution (Basic Law).[154] It is resistant to restriction by law.[155] These circumstances show that conscience is restricted by its own nature—that necessary boundaries can only lie within the concept of conscience itself.[156]

D. *Who Gets to Define the Concept of Conscience?*

A way out of the dilemma created by any attempt to define "conscience"—as set out in Article 4(1) of the Basic Law—seems to arise when the definition of the basic legal status is left to the respective rights-holder and the latter decides, by way of self-understanding, exactly what conscience is.[157]

This subjective approach is clearly expressed in the special vote of a judge of the Federal Constitutional Court: Freedom of conscience is not subject to a state reservation.[158] The power to define conscience lies with the conscientious objector and not with an authority outside their individual conscience. The exercise of the right to basic rights should not be placed under a "cognitive reserve of others."[159]

At first blush, this seems to be the solution to the precarious problem of definition—a solution both practical and liberating. By it, the possessor of the fundamental freedom also decides on the kind of constitutional right this freedom affords, and the extent to which it is

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> (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
>
> (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

GG art. 2 (Ger.).

153. Böckenförde, *supra* note 111.

154. GG art. 2 (Ger.).

155. *Id.*

156. Böckenförde, *supra* note 111.

157. Isensee, *Conscience in Law*, *supra* note 25, at 48. German courts may not resort to contested U.S. doctrines such as "original intent," which "plays no significant role in German constitutional interpretation." Kommers also notes that while "it might seem that the 'aims and objects' approach of teleological inquiry [denoting a German focus on 'the unity of the text as a whole from whence judges are to ascertain the aims and objects'] differs little from the determination of original intent . . . the German judicial mind distinguishes sharply between these methods." Kommers, *supra* note 8, at 845.

158. Böckenförde, *supra* note 111.

159. *See* BVerfG 1978, 2 BvF 1, 2, 4, 5/77 127 (185, 188, 192) (Ger.); *see also* JOSEPH ISENSEE, WER DEFINIERT DIE FREIHEITSRECHTE? [WHO DEFINES THE LIBERTIES?] 7, 12 (1980) [hereinafter ISENSEE, WHO DEFINES THE LIBERTIES?].

available.[160] The self-determination of the individual seems to be an ultimate purposive end;[161] that individual cannot only exercise freedom of conscience within the given normative framework but can also make a binding decision about the *extent* of this normative framework.

Once a fundamental right becomes dependent on the self-understanding of the rights bearer, it loses its fundamental ability to measure individual's freedom[162]—not to mention its ability to measure the limits of state power. Thereafter, it is up to the individual conscientious objectors to decide whether their objection to military service is merely an opinion or a matter of conscience. In the case of mere opinion, the duty to serve remains; in matters of conscience, refusal becomes a matter of invoking a fundamental right. The adoption of such a "subjectivizing" approach means that the area protected by the "fundamental right" varies from person to person according to each's self-understanding. The basic right no longer guarantees the "freedom of equals," since the measure of individual freedom (as protected by fundamental rights) is now determined by the individual's dexterity in articulating their interests.[163]

As such, any conflict of fundamental rights becomes totally insoluble if the self-understanding of these pretenders to fundamental rights (*Grundrechtspratendenten*) is contrary to—and thus incompatible with—the exercise of the freedom of conscience of another or others. In a battle between subjectivities, only general objective criteria can solve the conflict between the two subjective claims. Thus, the right to freedom of conscience, like the other freedom-based rights, can only exist under the framework conditions supplied by the (legal) state. Subsequently, such a state then has the task of coordinating the freedom of its citizens. In Kantian terms, this can be formulated as follows: the state ensures that the freedom of one can exist with the liberty of the other according to a general law.[164] The law, however, can only be guaranteed by the state, which itself is not partaking in freedom, and not a party in the conflict of interests, and which itself is exclusively

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160. ISENSEE, WHO DEFINES THE LIBERTIES?, *supra* note 159, at 7, 12.

161. *Id.*

162. *Id.*

163. *Id.*

164. For an objective interpretation of "conscience," see Hans Bethge in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK, *supra* note 1, § 137, at 7; *see also* J. ISENSEE, WER DEFINIERT DIE FREIHEITSRECHTE? 26 (1980). *See generally Grundrechtsvoraussetzungen und Verfassungserwartungen an die Grundrechtsausubung*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK, *supra* note 1, §§ 115, 117.

committed to the freedom-determined social welfare and thus capable of determining the scope of basic rights in the event of a conflict. The task of definition power by the state is unavoidable. For what the state cannot define, cannot be protected.[165]

E. The Problem of Quis Iudicabit?

In view of a constitutionally defined concept of conscience, Hobbes's question of sovereignty comes immediately to the fore: *quis iudicabit?*[166] (Who is to judge?) The answer is: the state.[167] Thus, while dispensing with some of the authoritarian contours of the Hobbesian state, the formal basic structures of the modern state as a unit of decision and as a legal unit are retained.[168] This necessarily includes the uniting "interpretative" arm.[169] In the realm of fundamental rights, areas of private self-determination are removed from the state's access and their actions are subject to prescribed legal norms. But the state remains sovereign by interpreting the limits of its actions.[170] Therefore, it has no interpretative monopoly.[171] The interpretation of the concepts of fundamental rights is open to everyone under the conditions of freedom of expression and the freedom of scholarship. Despite all this, however, the state has the right to issue a binding final decision, without which legal unity and legal peace are impossible.[172] The basic right to "freedom of conscience" has a "pre-state" (anterior) foundation as a human right, and as a constituent of constitutional law it is a state right, oriented to the state as an indispensable guarantor, and also as its potential adversary.[173] It is molded by the structures of the modern state.[174]

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165. *See* Adolf Arndt, *Die Kunst im Recht*, 1-2 NJW (NEUE JURISTISCHE WOCHENSCHRIFT) 25, 28 (1966).

166. CARL SCHMITT, POLITICAL THEOLOGY II: THE MYTH OF THE CLOSURE OF ANY POLITICAL THEOLOGY 116-30 (Michael Hoelzl & Graham Ward trans., Polity 2008) (1970).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Isensee, *Conscience in Law*, *supra* note 25.

174. *Id.* at 49. This fits with the objective hierarchy of values in the Basic Law: Kommers notes, in its search for constitutional first principles, the Constitutional Court has seen fit, as noted earlier, to interpret the Basic Law in terms of its overall structural unity. Perhaps "ideological" unity would be the more accurate term here, for the Constitutional Court envisions the Basic Law as a unified structure of substantive values. Kommers, *supra* note 8, at 858-59. The centerpiece of this interpretive strategy is the concept of an "objective order of values," a concept that derives from the gloss the Federal Constitutional Court has put on the text of the

F. *The Secular Concept of Basic Rights of Conscience*

Thus, there remains the difficulty of defining the term "conscience" within the realm of fundamental constitutional rights. This difficulty has been exacerbated by the fact that, according to more recent doctrine, the basic right of freedom of conscience has emancipated itself from the fundamental right of freedom of religion, which was always an integral part of it.[175] In the same context, the Weimar Reich's Constitution (1919-1933) ensured "full freedom of belief and conscience".[176] In the Basic Law of 1949, freedom of conscience is framed by religious guarantees: "Freedom of faith, conscience, and freedom of religious and ideological confession are inviolable".[177] In its origin, freedom of conscience is a derivative of religious freedom.[178] Prototypical is the conflict between the external law of the state and the inner commandment of God, as exemplified by the Christian martyrs through the ages, from the Apostles to St. Thomas More and beyond.[179] The "collision norm" of Christianity

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Basic Law. According to this concept, the Constitution incorporates the "basic value decisions" of the founding fathers, the most basic of which is their choice of a free democratic basic order; i.e., a liberal, representative, federal, parliamentary democracy—buttressed and reinforced by basic rights and liberties. These basic values are objective because they are said to have an independent reality under the Constitution, imposing upon all organs of government an affirmative duty to see that they are realized in practice. Isensee, *Conscience in Law*, *supra* note 25.

175. There has been much discussion in international law circles regarding the link between religious rights and rights of (military) conscientious objection. *See* Leonard Hammer, who states, "Focus on the view that the capacity for military conscientious objection in the international human rights system derives from the right to freedom of religion and conscience." Leonard Hammer, *Selective Conscientious Objection and International Human Rights*, 36 ISR. L. REV. 145, 145 (2002).

176. Article 135 states, "All Reich inhabitants enjoy full freedom of liberty and conscience. Undisturbed practice of religion is guaranteed by the constitution and is placed under the protection of the state. General state laws are not affected hereby." DIE VERFASSUNG DES DEUTSCHEN REICHS [CONSTITUTION OF THE GERMAN REICH] art. 135, Aug 11, 1919, *translation at* http://lawcollections.library.cornell.edu/nuremberg/catalog/nur:01840 (Weimar Constitution).

177. GG art. 4 (Ger.).

178. Ulrich Scheuner, *Die verfassungsmaßige Verbürgung der Gewissensfreiheit* [*The Constitutional Recognition of Freedom of Conscience*], *in* SCHRIFTEN ZUM STAATSKIRCHENRECHT 65, 68, 77 (Axel Frhr. von Campenhausen, Christoph Link & Jörg Winter eds., 1970).

179. The author notes a current iconic display in the Basilica of *San Bartolomeo all'Isola* (St. Bartholomew on the Island) in Rome, commemorating recent Martyrs. *See* Vatican Radio, *Testimonies of Families and Friends of the "New Martyrs,"* ST. JOSEPH ROMAN CATH. CHURCH (Apr. 22, 2017), https://stjoerayne.org/2017/04/22/testimonies-of-family-and-friends-of-the-new-martyrs/.

is the New Testament *clausula Petri*: "We must obey God rather than men."[180]

When, in conscience, the voice of God is heard, the decision of conscience preserves its unconditionality, with which character stands and falls, according to the sacred earnest by which it is obeyed.[181]

It is easy for one who, for the sake of conscience, refers to objectivized religious foundations—for example in the Scriptures, doctrines, and the traditions of a community of faith—to simply make it clear to others that this is the fundamental basis of their decision. This also makes their decision of conscience plausible to others. Such a presupposition cannot apply if the conscience is cut away from its religious roots, as is the case with the current understanding. Thus, the objective specification, which binds even the religious dissenter, is removed. The "religious neutrality" of the constitutional state does not compel this development. For it is not a matter of whether the state identifies itself with religious statements, but whether freedom of conscience—a secular fundamental right—is a component of the freedom of religion, an equally secular fundamental right, or stands independently beside it.

Henceforth, it will become more difficult for the interpreter of fundamental rights to make use of the conscience as an essential legal feature (*Tatbestandsmerkmal*)[182] alongside other fundamental principles such as freedom of expression or freedom of action.[183] Above all else, in praxis, it will become more precarious for relevant state officials to qualify (and prove) that any cognitive act, whether word or deed, is in fact based in conscience, let alone—and for legal purposes—demonstrate conscience-based motivation.[184]

G. *Definition via the Federal Constitutional Court*

The Federal Constitutional Court has had a lot of trouble in attempting to legally construe the concept of conscience.[185] It describes "conscience" as "a [however justified, yet always] truly experienced

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180. *Acts* 5:29 (Rev. Std. Version).

181. Gregory Sullivan, *The Legal and Moral Genius of St. Thomas More*, CATH. WORLD REP. (Mar. 27, 2018), https://www.catholicworldreport.com/2018/03/27/the-legal-and-moral-genius-of-st-thomas-more/.

182. The *Tatabestände* are, in approximate common law terms, the material facts of a case upon which its outcome depends.

183. *See* Scheuner, *supra* note 178.

184. *Id.*

185. BVerfG 1988, 2 BvR 701/86 (Ger.).

spiritual phenomenon" whose "demands, admonitions, and warnings for the one [person] in question are immediately evident commandments of absolute imperative."[186] The decree of conscience, which under Article 4(3) of the Basic Law justifies the refusal of military service, will be heard by the individual as a "purely moral and unconditionally binding determination on the behavior required of him."[187] Decisions to be categorized as decrees of conscience are those which are "serious, morally oriented decision[s] (i.e., [those] that [are] oriented towards the categories of "good" and "evil") which the individual, when in a particular situation, experiences as inwardly binding and absolutely obligatory, such that they cannot act against [it] without precipitating a grave crisis of conscience."[188]

The tautology created by defining a "determination of conscience" by using the definitional "crisis of conscience" shows the *aporia* (impasse) in which the judicial interpretation of the conscience is currently mired.[189]

Nevertheless, the legal definition of conscience, even when translated into a form that is no longer religiously determined, still clearly displays the formal characteristics of religious conscience: necessity, gravity, unconditionality, and moral obligation.

Since the *forum internum* of the human person is impermeable to the constitutional state—not least because of the freedom of conscience—it remains to be seen whether a decision of conscience exists in any particular case.[190] This can be made clearer using a parallel metaphor, that being the treatment of electricity in teaching physics, which, in times past at least, meant that while it was impossible to explain what electricity is, it was, nevertheless, possible to say how electricity actually works. Similarly, conscience can be recognized by its effects.[191] The effect of a serious, unconditional, moral decision, in which the identity of the agent's moral personality is at stake, is the corollary of action.[192] The willingness to bear annoying consequences is

186. BVerfG, 1 BvL 21/60 45 (138) (Ger.); BVerfG, 2 BvR 701/86 at 395.

187. Böckenförde, *supra* note 111, at 55.

188. BVerfG, 1 BvL 21/60 at 55; ZIPPELIUS, *supra* note 24, at 51.

189. Böckenförde, *supra* note 111; BVerfG, 2 BvR 701/86 at 184.

190. Isensee, *Conscience in Law*, *supra* note 25.

191. Compare similar comments with respect to beauty. For example, "Beauty is more easily described by its effects than by its components." *See* THOMAS GILBY, BARBARA CELARENT: A DESCRIPTION OF SCHOLASTIC DIALECTIC 160 (1949) (paraphrasing Aquinas).

192. Isensee, *Conscience in Law*, *supra* note 25.

indicative of such a decision.[193] Thus, willingness to perform non-military substitute service (*Zivildienst*) is a sign of the authenticity of the grounds of conscience advanced.[194] A presupposition, however, is that the burden of the replacement service is generally no lighter than that of the military service; thus, the temporal apportionment of the substitute service has the special function of indicating the conscientious nature of the refusal of a regular civic duty.[195] This function would be even more pronounced if the substitute service were moderate but noticeably longer than the regular service.[196] This variation, however, is denied by the Basic Law, which stipulates that the duration of the substitute service must not exceed that of the military service.[197]

VIII. FROM FREEDOM OF CONSCIENCE AS A SELF-EMPOWERMENT TO DENUNCIATION (DESTRUCTION) OF OBEDIENCE TO THE LAW?

A. *The Phenomenon of an Expanding Concept of Conscience*

In the Federal Republic of Germany, it has become almost a matter of fashion for individuals or groups, spontaneously organized, to renounce the right of legal obedience by citing conscience and "freedom of conscience."[198] Intermittently such groups also rely on this claim to refuse to comply with statutory or other contractual obligations.[199] This inflated appeal to the conscience can be partly explained by the *Vergangenheitsbewältigungssyndrom* (coping with the past) of the German people.[200] This phenomenon is based on a national need to cleanse the country of the national "original sin" by means of a form of "retrospective resistance" and to dispense it from the ominous obligation of "duty" into the inherently good position of the (noble) "deserter."[201] The moralism that corresponds with this state of mind finds a trite vehicle in the arguments associated with freedom of conscience.[202]

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193. *See* Ernst Wolfgang Böckenförde (Arun. 4), *In Niklas Luhmann, Die Gewissensfreiheit und das Gewissen*, 90 AöR 257, 283-86 (1965); *see also* BVerfG 1985, BvF 2, 3 4/83 (Ger.) (the decision of Judge Mahrenholz and Judge Böckenörde).

194. *See* Böckenförde, *supra* note 193, at 283-86.

195. It is, in some sense, "advertising" that this is a conscience-based refusal to participate in military service. *Id.*

196. *See* BVerfGE 69 57, 74 (Ger.) (the decision of Judge Mahrenholz and Judge Böckenörde); *see also* BVerfG 1985, BvF 2, 3, 4/83 and 2/84 (Ger.).

197. GG art. 21 § 2 (Ger.).

198. Scheuner, *supra* note 178.

199. *Id.*

200. *Id.*

201. *Id.*

202. Isensee, *Conscience in Law*, *supra* note 25.

In practice, one also finds a variety of occasions during which the individual makes use of freedom of conscience as a form of self-empowerment and as a means of dispensing oneself of otherwise valid legal obligations. Three variations of this denial of duty, relying on grounds of conscience, can be distinguished:

- where the obligation to perform absolutely contradicts the conscience of the objector, such as the obligation to assist at an abortion, or the statutory duty to take an oath as a witness, or to imbibe an oral vaccination;[203]
- where the questioned obligation indirectly promotes actions that the conscience deplores, for example the payment of charges for electricity from nuclear power plants, health fund contributions which could be used for the financing of "abortions by insurance," or taxes that could be used for armament expenditures;[204]
- where the broken law as such has no relation to the (real or supposed) wrong against which the protest of the conscience is directed; rather the violation of the law is only a means in the struggle against the real or supposed injustice, for example, the blockade of road traffic as a form of civilian or militant resistance to a threat to peace or the environment.[205]

The third case type belongs to the associated field of the "resistance fighter."[206] The first and, in a somewhat weakened sense, the second are, in some respects, comparable with the refusal of military service.[207]

B. *The Exceptions Clause of Article 4 Sentence 3 Basic Law Taken as a General Rule?*

To extend the express conscience exception of Article 4(3) (i.e., to refuse military service) to all legal obligations would seem to be logical.[208] Whether this interpretation is possible depends on whether the fact of the refusal of the military service is a declared subset of the general freedom of conscience or whether it constitutively expands it. It is submitted that the second interpretation is more appropriate. The right of avoiding military service opens a loophole in the case of a crisis of

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203. For example, in the case of a polio vaccination, *see* Naveen Thacker & Niranjan Shendurnikar, *Controversies in Polio Immunization*, 70 INDIAN J. PEDIATRICS 567, 567-71 (2003).

204. Isensee, *Conscience in Law*, *supra* note 25.

205. *Id.*

206. *Id.*

207. *Id.*

208. GG art. 21 § 2 (Ger.).

conscience, which is not generalizable.[209] Only in the case of compulsory military service does the Basic Law provide for the possibility of a substitute service.[210] Whoever denies military service cannot refuse, likewise for conscience, any substitute service.[211] The right to refuse to comply with Article 4(3) Basic Law regulates exclusively the effects of freedom of conscience in the field of compulsory military service.[212] The solution to this dilemma can only be sought within the framework of the general fundamental right of conscience.[213]

C. State Structures as Immanent Limits of Freedom of Conscience

The basic right to freedom of conscience prevails within the framework of the essential structures of the modern state as a monopoly of power and decision making.[214] Its foundations are obedience to the law, which the citizen owes to the Constitution, and to individual acts of administration and exercises of judicial power. The fundamental right of freedom of conscience presupposes obedience to the law. It does not put it in question.[215] The law of the democratic state—based on the rule of law—sets the preconditions for the possibility of effective freedom and equality of all citizens.[216] If freedom of conscience were to give anyone the power to refuse to accept constitutional and objectively valid norms, for merely subjective reasons, it would amount to an anarchical explosion that could destroy the peaceful unity of the nation and its decision-making processes, as well as majority democracy.

Arguably, a monarchy or a feudally constituted state could more generously circumvent the law.[217] It is easier for such a state to make arrangements with outsiders about their duty status than it is for a democracy, which is based on the rule of law, and on foundational principles of universality and equality.[218] To avoid jeopardizing their

209. *Id.*
210. BVerfG 1965, 1 BvR 112/63 135 (139) (Ger.); BVerfG 1968 1 BvR 579/67 127 (132) (Ger.).
211. BverfG, 1 BvR 679/67 at 132.
212. BVerfGE 1 BvR 112/63 at 139.
213. Scheuner, *supra* note 178.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*

legitimacy, democratic states must insist on the enforcement of the law universally.[219]

This does not mean, however, that the fundamental right to freedom of conscience shrinks before any normative obligation whatsoever. This fundamental right is not relativized by its legal limitations, as it may happen, for example, to freedom of expression or freedom to work. The freedom of conscience is, as a fundamental right without exception, limited by conflicting rules and legal objectives at the level of the constitution itself, by the other so-called "intrinsic" fundamental rights which, from the outset, reduce the thematic scope of guaranteed freedoms.[220] These limitations include the existence and basic structures of the constitutional state as an integral unity of liberties, and as a guarantor of security both internally and externally. The state's monopoly of force forms an *a priori* frontier of freedom of conscience. This basic right can only be realized within the framework of the state-pacified polity. It does not provide any right to the private individual to apply physical violence to others or indeed to threaten them. An additional immanent barrier is contained in the commandment *alterum non laedere* (injure nobody).[221] The freedom of conscience, like other fundamental rights, provides a right to defend but not a right to actively attack.

If individuals violate the constitutionally protected legal rights of others, such as the right to life, health, freedom, or property, they trigger the fundamental protection obligation of the state, which must guarantee the integrity of the fundamental rights *inter privatos*. No person can invoke the right to freedom of conscience in cases of interference with the legal rights of others, for example in case of killing or assault, or in cases of willful damage to property.[222] Blocking road traffic, for example, as an act of civil disobedience cannot be based upon the freedom of conscience of those who created the blockade, regardless how ethically pure their aim,[223] because the blockade encroaches directly

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219. *Id.*

220. *Id.*

221. Alternatively expressed, "injure no one." An edict most recognized in the law of torts. This is arguably the legal equivalent of the ancient medical principle of "do no harm."

222. COLLINGS, *supra* note 52, at 214-15.

223. For citation of numerous German works on the topic of civil disobedience, see ZIPPELIUS, *supra* note 24, at 55 n.37. The "blockade cases" refer to *Sitzblockade* ("sit-ins") in protest against military expansion of missile sites. Protesters eventually won their right to blockade based on Article 103(2) of the Basic Law. GG art. 103 § 2 (Ger.) (a ban on retroactivity). For more detail, see COLLINGS, *supra* note 52, at 214.

upon others' basic freedom of movement and, incidentally, its negative concomitant right to freedom of speech.[224] Such an action is also incompatible with the prohibition against violence.[225] Indeed, in such a case, the (Kantian) categorical imperative would be turned upside down; in so doing, the maxim of one's own action is raised to the maxim of general action and then imposed on the general public.

Here the ambition of a minority takes effect in there *being* a conscience, in order to relieve themselves of the burden of having to *have* a conscience, which is the only relevant constitutional point.[226] The result is that actions of civilian or militant disobedience, of nonviolent or violent resistance, lie outside the thematic range of fundamental rights.[227] In the context of state-generated normalcy, there is no room for actions that violate the basic obligations of civility, the duty not to engage in industrial action, or the duty to obey.[228] They can only be justified, if at all, by the right to resist, but this is only enlivened when the basic rules of the normalcy guaranteed by the state are suspended.[229] This appeal to the basic right of freedom of conscience—apart from the right to resistance—is neither necessary nor possible in the context of this "exceptional" exception.[230]

Freedom of conscience as a basic right means only self-determination.[231] It does not encompass determination of the interests of others.[232] Thus, freedom of conscience does not provide any justification for abortion, for example, because it is not a matter solely of the self-determination of the pregnant woman but also, essentially, concerns the right to life of the unborn child, which is independent of the protection of the fundamental rights of the mother.

Nor does freedom of conscience provide access to the concerns of the general public.[233] Thus, a member of a statutory health insurance fund, who considers the use of the contribution to finance "abortion on medical insurance" as fundamentally unlawful, cannot derive from their own basic right any claim to a general omission of the use of funds.

224. *Id.* at 215.
225. *Id.* at 214.
226. *Id.* at 215.
227. Joseph Isensee, *Ein Grundrecht auf Ungehorsam*? [*A Right to Disobedience?*], *in* FRIEDEN IM LANDE: VOM RECHT AUF WIDERSTAND (Heinrich Basilius Streithofen ed., 1979).
228. *Id.*
229. *Id.*
230. *Id.*
231. *See* COLLINGS, *supra* note 52, at 153.
232. *Id.*
233. *Id.* at 254.

They cannot demand that "their firm belief is made the measure of the validity of general legal norms or their application."[234] Similarly, a utilities consumer, whose conscience condemns particular types of power stations (for example, nuclear), cannot refuse to pay their electricity bills by invoking Article 4 of the Basic Law. By their own self-determination, they could abstain from the consumption of nuclear power but not from paying the charges incurred on consumption. They cannot, by virtue of the freedom of conscience, prevent a definite form of energy production. The freedom of conscience does not contain any authority to refuse to surrender taxes. A taxpayer could not even make plausible the basic legal relationship between the tax liability and the conscience of "government spending," of which they disapprove, because the tax liability is free of countermeasures and is not linked to a specific output. The necessary (if not also sufficient) condition for an exemption from a general legal duty to even be discussed is that the pretender claimant can make the impairment of their conscience plausible.

D. *Conflict Resolution through Partial Exemption*

In the literature, a "system of tolerances and partial exemptions" has been called for in order to resolve conflicts of conscience.[235] An example is the case of an evangelical Priest who, as a witness in court, and appealing to his understanding of the Bible,[236] refuses to swear the prescribed witness oath, despite the fact that the oath in question does not involve an obligatory, religiously formulated affirmation. The Federal Constitutional Court sees the fundamental right of Article 4(1) of Basic Law as a thematic infringement and interprets it as a refusal based on a "valid legal reason," in its conformity with the relevant standard of the procedural law.[237]

The exemption from the statutory obligation to swear an oath in a particular case does not imply the general validity of the obligation-based standard. The state, in its enforcement of the guarantee of the

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234. BVerfG 1974, BvF 1, 36 (Ger.); BVerfG 1974, 1 BvF 1, 2, 3, 4, 5, 6/74 (Ger.).

235. *See* Adolf Arndt, 1 *Das Gewissen in der oberlandesgerichtlichen Rechtsprechung*, 2204, 2204–05 NJW (NEUE JURISTISCHE WOCHENSCHRIFT) (1986).

236. *Matthew* 5:33-37 (Rev. Std. Version) ("[33]'Again you have heard that it was said to the men of old, "You shall not swear falsely, but shall perform to the Lord what you have sworn." [34]But I say to you, Do not swear at all, either by heaven, for it is the throne of God, [35]or by the earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. [36]And do not swear by your head, for you cannot make one hair white or black. [37]Let what you say be simply "Yes" or "No"; anything more than this comes from evil. . . .'").

237. GG art. 4 § 1 (70) (Ger.).

fundamental right, is merely proffering an exception "to resolve an inevitable conflict between the state's commandment and the doctrine of faith that affects the person concerned in his intellectual and moral existence."[238] In order to satisfy the public interest in having functional administration of justice—which the witness's oath is designed to serve—there could be entered an equivalent duty, with the same penalties for abuse, which does not contain any religious affiliation or corresponding associations.[239] The state would simply surrender to the individual conflict of conscience without harming the state's ability to administer justice.[240] Thus runs the argument of the Federal Constitutional Court.[241]

However, the democratic constitutional state cannot measure every legal obligation against the "burdensome alternative" in order to counter possible conflicts with the freedom of conscience. This would involve examination of the seriousness of the decision, the ability to preserve the equality of burden imposed, and to prevent the appeal to conscience as a pretext for the "shirker."[242] For practical reasons, these limits have to be imposed.[243] Thus, the state need not develop a second-degree alternative to the alternative obligation, with the result that the fundamental right caused a *progressus in infinitum* (infinite progression).[244]

It is only within a certain range of its obligations that the democratic constitutional state can react flexibly to individual conflicts of conscience, to offer up possibilities of compromise, to activate administrative measures that protect basic rights—such as removing the discretionary powers principle in administrative law and the laws governing police—and to manipulate the means of dispensation in individual cases.[245]

In the uncertain legal border zone, the state is well advised not to ask so much what it *must* constitutionally guarantee for the sake of freedom of conscience by way of dispensation, as what it *can guarantee*

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238. *See Compendium of the Social Doctrine of the Church*, VATICAN, http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html (last visited Dec. 3, 2018).

239. BVerfG 1972, 2 BvR 75/71 (23, 33) (Ger.).

240. *Id.* at 32. On the issue of freedom of belief, see also ISENSEE, *supra* note 164, at 7, 12 (on the issue of freedom of belief).

241. BVerfG, 2 BvR 75/71 at 23, 33.

242. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON (Paul Guyer & Allen W. Wood, trans. & eds., Cambridge Univ. Press 1998) (1781).

243. *Id.*

244. Infinite progression. A term used *inter alia* in Kant's *Critique of Pure Reason*. *Id.*

245. Böckenförde, *supra* note 111.

without contradicting the constitution. The fundamental rights holder is well advised not to become overly excited by the legal standpoint and, where such a standpoint is indeed found, to be content with goodwill where it is to be found.

However, the democratic state based on the rule of law cannot withdraw its norms if rights of third parties or essential interests of the public could potentially be harmed.[246] It is only thus that the one acting on the basis of his "conscience" is prevented from standing free of any possible sanction.[247]

The Federal Constitutional Court derives from the freedom of conscience—not in its function as a defensive right but rather as an evaluative normative principle—a "commandment of good will" with regard to those who claim to be acting on the basis of conscience.[248] However, the same court holds the consequences of that "commandment" to be in abeyance and dependent upon the circumstances of the individual case, according—on the one hand—to the importance to be placed upon the necessary right of the state to inflict punishment in order to ensure the proper ordering of that state and the authority of the settled law and—on the other hand—the strength of the pressure of the conscience and the state of conflict that is thereby created.[249]

The motive of conscience need not always result in a moderating effect upon the assessment.[250] It can be shown in individual cases that the force of moral motivation derived from a perverted conscience—such as in cases of terrorism—can increase the level of danger as well as the degree of contradiction to the legal order when compared against regular, self-interested criminality.[251]

Generally, the democratic constitutional state must ensure that citizens' readiness to adhere to the law and their trust in legal institutions are not destroyed by an imprudent indulgence of or abusive appeals to conscience.[252] However, respect for this fundamental right lends legitimacy to the democratic constitutional state and therefore bolsters its internal stability.[253]

246. *Id.*
247. KANT, *supra* note 242.
248. *Id.*
249. Böckenförde, *supra* note 111.
250. KANT, *supra* note 242.
251. Böckenförde, *supra* note 111.
252. *Id.*
253. *Id.*

IX. RECONCILIATION OF FORMAL AND AUTHENTIC CONSCIENCES IN EVERYDAY LIFE

The proposed ways out of the dilemma of law and conscience do not provide a consistent and integrated solution, which could satisfy the basic dogmatic constitutional as well as practical requirements. Certainly, the community based on freedom of conscience is independent of the moral high plains at which this freedom is realized. As a whole, it is impossible to rule out undesirable constitutional developments. As put by Ernest-Wolfgang Böckenforde, "[I]t is part of the structure of the liberal state that it lives on prerequisites which it itself cannot guarantee without questioning its own freedom."[254]

This shows that the two interpretations of the conscience that Hegel gives cannot stand inconsequentially alongside one another in the constitutional state, as it may prima facie appear.[255] It is true that the basic right, as a defense law, is based on the formal conscience, as it stirs within the individual.[256] Yet the true common good is only established when the conscience in everyday life is predominantly actualized "correctly," in a societal ethos beneficial to the common good, or at least compatible with it.[257]

The formal conscience must in some way approach the authentic one.

In this, however, there is no enforceable legal obligation but only a meta-legal constitutional expectation.[258] The state is denied jurisdiction here. Nevertheless, it is not condemned to resignation.

Rather, the state has had to work outside the realm of command (*Befehl*) and compulsion (*Zwang*) to work towards the citizens' fulfillment of what can be constitutionally expected of them. Its means are the academic education of the young, exemplary role models offered by state officials, and the co-operation with the forces of society—at least those not subjected to the neutrality and distance obligations of the constitutional state—which a holistic ethos can mediate.[259]

Here, expectations are raised of the Church, whose very *raison d'etre* is not the "freedom of belief" protected by the state, but faith itself,

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254. *Id.*; ERNST WOLFGANG BÖCKENFORDE, DER STAAT ALS SITTLICHER STAAT [THE STATE AS MORAL STATE] 36 (1978).

255. Böckenförde, *supra* note 111.

256. KANT, *supra* note 242.

257. ISENSEE, *supra* note 164, at 7, 12.

258. In addition, *see id.* § 115, at 163, 233.

259. Böckenförde, *supra* note 111.

not "freedom of conscience," but the doctrine of the proper use of conscience.

The Church would deprive the secular constitutional state of an essential service if she were to expend herself out of respect for the freedom of conscience; that is, if she were to remain static on the standpoint of the formal conscience.

That which signifies the inner necessity of the constitutional state would, for the Church, be a waste of its mission; what is a constitutional virtue for the state is permissiveness for the Church.

The Church ought principally to align with the authentic conscience, "authentic" not in the statist Hegelian sense, but in a Christian sense, which is compatible with the meaning of the constitutional state.

The role of the Church is to train and sharpen the conscience of the individual in the truth of Christianity.[260] In doing so, it is not necessarily its intention to strengthen the functional requirements of the modern legal state.[261] Yet this effect can be the objective incidental-benefit of its service to humankind.[262] At this point, of course, the constitutionalist can refer the mandate on the matter of conscience to the moral theologian.

X. FURTHER INVESTIGATIONS

Isensee's rich exegesis on conscience and law strikes a number of targets, which few other analyses have attempted.[263] In the first place, it gives breathing room to state and non-state institutions in a way that preserves the dignity of both.[264] Second, it provides serious counterweight to the Hegelian analysis, which labors under difficult contradictions.[265] Third, it highlights the problems inherent in separating the concept of conscience from its religious roots.[266] Finally, it indirectly raises the extraordinary "Böckenförde dilemma" for constitutional analysis.[267] These matters deserve further exploration.

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260. *Id.*
261. *Id.*
262. Isensee, *Conscience in Law*, *supra* note 25.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*

PAPER TWO: 'PROTECTING RELIGIOUS FREEDOM AND CONSCIENCE: WHAT AUSTRALIA MIGHT LEARN FROM GERMANY'

Paper Two: Statement of Authorship

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This paper, of which I am the sole author, contains original research I conducted during the period of my Higher Degree by Research candidature. It is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

Signed: Date:

20 January 2020

ARTICLE

PROTECTING RELIGIOUS FREEDOM AND CONSCIENCE:

WHAT AUSTRALIA MIGHT LEARN FROM GERMANY

by Patrick T. Quirk[*]

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I. INTRODUCTION

The recently published Australian Government's *Religious Freedom Review*,[1] of December 2018, drew attention to a perceived "limited understanding in the general [Australian] community about the human right to religious freedom, its application, and how it interacts with other human rights."[2] This is particularly apparent in the understanding of, and legal implications surrounding, conscience protection.[3] Countries other than Australia have wrestled with this problem over extended periods and under diverse circumstances.[4]

Australia's founding fathers borrowed heavily from the United States in drafting the Australian Constitution.[5] The constitutions of other countries also have much to offer as Australia now considers how to protect freedom of conscience and religious practice in a globalized world.[6] One such country is the Federal Republic of Germany.

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1. THE HON. PHILIP RUDDOCK (EXPERT PANEL CHAIR), RELIGIOUS FREEDOM REVIEW: REPORT OF THE EXPERT PANEL (2018), https://www.pmc.gov.au/domestic-policy/religious-freedom-review [https://perma.cc/627X-34KD] [hereinafter Ruddock Review].

2. *Id*. ¶ 1.410.

3. The meanings and history of "freedom of conscience" are much-disputed. For example, Nehal Bhuta argues, "its contemporary meanings are an unstable mixture of values and preoccupations derived from distinct political problems—the management of sectarian strife and the constitution of sovereign power, the bourgeois revolt against the absolutist *Polizeistaat*, and finally, a postwar attempt to refound Western European political culture on a politics of human dignity. This unstable mixture is the foundation for the European Court's circumstantial casuistry in the headscarf cases." *See* Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 SOUTH ATLANTIC QUARTERLY 9, 11 (2014).

4. See, for example, the reports published by the United States Commission on International Religious Freedom and the materials available at the Pew Research Center (www.pewforum.org). In Europe, see Martina Prpic, *Religion and Human Rights*, EUROPEAN PARLIAMENT (2018), http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630290/EPRS_BRI(2018)630290_EN.pdf [https://perma.cc/FT4D-ZRQ2].

5. This intellectual plundering was, as a rule, quite carefully done. In the words of Clifford L. Pannam, it was a "very discriminating" exercise; at other times, slavish or even "completely senseless copying" was arguably the order of the day. Pannam, *Travelling Section 116 with a U.S. Roadmap*, 4 MELB. U. L. REV. 41, 41 (1963).

6. For a brief history of conscientious objection at the constitutional level across many countries, including Germany, see Hon. José de Sousa e Brito, *Political Minorities and the Right*

Germany is a leading candidate for comparison because it has a comprehensive and detailed constitutional guarantee of freedom of conscience inside a federal structure. In contrast, Australia has (effectively) no such guarantee and this absence is becoming starker under the glaring lamps of legal opinion and ensuing legislative activity.[7] The lack of unity in Australian law has left academics scratching their heads and has left the Australian polity in an awkward situation of legal and conceptual disunity. This Article outlines further reasons for comparison based on the work already done in the realm of German-American comparison conducted by Edward Eberle.

Thus, this Article explores recent cases regarding conscience and religious liberty in the German and Australian legal systems and offers commentary on the context of those cases and the possible implications for both countries. This Article also follows from this author's prior discussion of the approach to conscience protection in Germany taken by leading constitutional scholar Josef Isensee, as discussed in his seminal article, "Conscience in Law: Does the General Law Only Apply in Accordance with the Individual Conscience?"[8] In this and other work, Isensee highlights, *inter alia*, the difficulties associated with a legal definition of conscience in a secular context, the religious roots of the concept, the difficulties of ever-expanding protection, the

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to Tolerance: The Development of a Right to Conscientious Objection in Constitutional Law, BYU L. REV. 607, 611–16 (1999). (Brito was a Justice of the Constitutional Court of Portugal from 1989–2002. He perceptively notes, "conscientious objection represents the transformation of the principle of tolerance, previous to the constitutional state in a human right," at 608).

7. On August 29, 2019, Christian Porter, the Australian Attorney-General, released an "exposure draft" Religious Discrimination Bill together with two associated Bills for consultation and discussion. While the Bill "would make it unlawful to discriminate on the basis of religious belief or activity in key areas of public life…[t]he Bill does not create a positive right to freedom of religion." *See* Media Release, Thursday, August 29, 2019, Morrison Government delivers on religious reforms, available at https://www.attorneygeneral.gov.au/Media/Pages/morrison-government-delivers-on-religious-reforms-29-august-2019.aspx [https://perma.cc/BPW4-CH7W]. This Bill contains 68 sections in nine parts and seeks to implement many of the recommendation of the Ruddock Report. A complete consideration of the Bill remains beyond the scope of this Article.

8. Josef Isensee, *Gewissen im Recht; Gilt das allgemeine Gesetz nur nach Maßgabe des individuellen Gewissens?* [*Conscience in Law; Does the General Law Only Apply in Accordance with the Individual Conscience?*], *in* DER STREIT UM DAS GEWISSEN [THE DISPUTE OVER CONSCIENCE] 41, 41 (Gerhard Höver ed., 1993), discussed in Patrick Quirk's, *The Undefined Remains Unprotected: Tensions between Conscience and the Law in Germany by Way of Joseph Isensee*, 27 TUL. J. INT'L & COMP. L. 55, 92 (2018).

problem of *quis iudicabit?* [*who decides?*] and conflict resolution through partial exemptions.[9]

The concept of conscience also has a critical role to play in the formation of a common culture (*Leitkultur*). Recent German constitutional cases appear in a variety of contemporary settings, such as those related to taking witness oaths,[10] wearing religious clothing (Islamic headscarves),[11] circumcision ceremonies,[12] acts of ritual slaughter,[13] displaying Christian crucifixes in classrooms,[14] and refusal of blood transfusions based on religious beliefs.[15] These significant cases have contributed to the legal framework inside which the broader debate over *Leitkultur* takes place.[16] To some degree, German identity

9. See where Isensee discusses "Konfliktlösung durch partielle Entpflichtung" (resolution of conflict through partial exemptions).

10. *Bundesverfassungsgericht* [BVerfGE] [Federal Constitutional Court] 33 BVerfGE 26 (1972), 2 BvR 75/71 (23, 33) (Ger.) (deciding that the state should accommodate an evangelical pastor who refused to swear an oath in a Düsseldorf criminal case based on an interpretation of the Sermon on the Mount Matthew 5:33-37). The dissent of Justice Von Schlabrendorff is notable in the way it incorporates the notion of God into the Basic Law: "The preamble of our Basic Law states that the German people have chosen a new system in the awareness of their responsibility to God and mankind." *See* DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY: THIRD EDITION, REVISED AND EXPANDED 546 (2012) [hereinafter KOMMERS]. Before his elevation to the Federal Constitutional Court, Judge von Schlabrendorff was one of those tried before the Nazi People's Court in 1945 for being part of the plot against Hitler.

11. BVerfGE 2015, 1 BvR 471/10, 1 BvR 1181/10, ¶¶ 1-31 (Ger.) ("The protection afforded by the freedom of faith and the freedom to profess a belief (Basic Law Article 4, §§1 and 2) guarantees educational staff at interdenominational state schools the freedom to cover their head in compliance with a rule perceived as imperative for religious reasons. This can be the case for an Islamic headscarf"); *see* Axel Frhr. von Campenhausen, *The German Headscarf Debate,* 2 BYU L. REV. 665, 66 (2004).

12. *See* Marianne Heimbach-Steins (European Univ. Inst., Robert Schuman Ctr. for Advanced Studies [hereinafter RACAS]), *Religious Freedom and the German Circumcision Debate* 1, 1-16, EUI Working Paper RSCAS 2013/18 addressing a court decision in 2012, which held that the circumcision of boys amounted to grievous bodily harm; following wide discussion in Germany, including amongst the Muslim and Jewish groups, the relevant law was updated to afford the practice protection on religious grounds.

13. BVerfGE 2002, 1 BvR 1783/99, ¶¶ 1-61 (holding ritual slaughter to be an exception under the Basic Law, Article 4).

14. BVerfGE 1987, 11 BvR 1087/91 (holding, "The affixation of a cross or crucifix in the classrooms of a State compulsory school that is not a denominational school infringes art; 4(1) Basic Law").

15. BVerfGE 1971, 1 BvR 387/65 (deciding that under Article 4 of the Basic Law, blood transfusions may be refused based on religious belief).

16. For an overview of the German case law until 2004, *see* Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 TUL. L. REV. 1023, 1030 (2004). For a remarkable overview in English—running to 178 pages—of legal provisions affecting religion

is arguably played out inside these formative legal frameworks.[17] This article suggests that a comparative reflection of these issues could helpfully inform constitutional debate in Australia and, to some degree, Germany at both federal and state levels.

This Article does not consider all of the available 'conscience cases,' but focuses on the German constitutional cases dealing with headscarves and classroom crucifixes, and two very recent Australian cases concerning religious headwear in Australian courtrooms. In broad terms, it considers elements of comparative law, constitutional law, with the occasional foray into the realm of public reason. Part I sets out the case for German-Australian comparison. Part II introduces the problem of defining conscience in a legal context and prepares the way for a discussion of the law of conscience protection in Germany and Australia in two key areas: crucifixes and religious clothing.[18] Part III outlines the German constitutional guarantee while Part IV looks at the pivotal German crucifix and headscarf cases decided by the Federal Constitutional Court. Part V will allow for some comparative observations while discussing in detail several recent Australian court cases and trends in religious conscience protection which these cases have presented. In due course, this Article will draw conclusions about what each country might learn from the other while highlighting what the Commonwealth of Australia might learn from the Federal Republic of Germany.

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in Germany, see Gerhard Robbers et al., *German Legal Provisions Related to Religion in the Federal Republic of Germany*, UNIVERSITY OF TRIER (Aug. 2002), https://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Deutschland/Religionsnormen/German_Legal_Provisions/German_Legal_Provisions_Relating_to_Religion_March_2002.pdf [https://perma.cc/4TMS-EHXY]. This study runs a wide range of possible legislative norms including those at Federal and State levels, laws on education, assembly, media, monuments, burial codes, funding, labor law, data protection, Church-State treaties, and much more; see, e.g., herein is found an English translation of the Treaty between the Holy See and the Free State of Thuringia (Staatsvertrag zwischen dem Heiligen Stuhl und dem Freistaat Thüringen), LAW AND ORDINANCE GAZETTE OF THURINGIA [GVBl] June 11, 1997 at 266 (Eng.). This Treaty is also available on the Vatican website (Ger.), http://www.vatican.va/roman_curia/secretariat_state/1997/documents/rc_seg-st_19970611_s-sede-turingia_ge.html [https://perma.cc/EWN4-ZJ3B] (last visited Apr. 27, 2019).

17. *Culture War Over German Identity: Religious Symbols Take Center Stage*, SPIEGEL ONLINE (May 3, 2018), https://www.spiegel.de/international/germany/religious-symbols-at-heart-of-german-search-for-identity-a-1205572.html [https://perma.cc/64M3-ARXT].

18. Other areas of conflict in the realm of religious freedom and "conscientious objection" such as cooperation in abortion, euthanasia or any number of other morally charged scenarios lie beyond the scope of this article.

II. THE ARGUMENTS FOR GERMAN-AUSTRALIAN COMPARISON

Edward J. Eberle persuasively argues the benefits of comparing the US and German jurisprudence on religion and religious freedom.[19] His arguments, it is submitted, are equally coherent in comparing Australia with Germany, at least over the past several decades.[20] He notes significant developments in the law in recent years, especially in the United States, under the guidance of US Chief Justice William Rehnquist.[21] The brisk pace of these developments has not been matched in Australia. The unhurried, or even dawdling development of religious freedom laws in Australia supports an inquiry into the reasons for the lack of improvement.[22] In addition, the few recent but significant Australian court cases that have been handed down bear serious consideration, including one concerning the issue of religious freedom in a corporate context.[23] Other comparative studies also merit discussion but will not be the focus of this article.[24]

Eberle asserts that "German law accords wider scope to individual free exercise freedoms than American law."[25] This greater latitude is

19. Eberle, *supra* note 16, at 1023.

20. While going back further might allow an opportunity for consideration of larger forces at work (*e.g.*, the rise of National Socialism or the fall of the Weimar Republic), doing so is beyond the scope of this study.

21. Eberle, *supra* note 16, at 1025 (referring generally to the change of emphasis from that under *Sherbert v. Verner*, 374 U.S. 398 (1963) to that of *Emp't Division, Department of Human Resources. v. Smith*, 494 U.S. 872 (1990)).

22. *See* Denise Meyerson, *The Protection of Religious Rights under Australian Law*, BYU L. REV. 529, 552 (2009) (concluding that there are "significant gaps in the *de iure* protection afforded religion. Legal protection for religious rights in Australia is not only limited but also affected by arbitrary factors such as where a person lives and whether the religious group to which he/she belongs can be categorized as an 'ethnic' group").

23. *Christian Youth Camps Ltd v. Cobaw Community Health Services Ltd* ("Cobaw") (2014) 308 ALR 615, 617 (Court of Appeal) (Austl.) (Victorian Court of Appeal holding, inter alia, that a corporation could not claim "personhood" for the purposes of a religious exemption). For commentary, *see generally* Shawn Rajanayagam & Carolyn M., Evans, *Corporations and Freedom of Religion: Australia and the United States Compared*, 37 SYDNEY LAW REVIEW 329 (2015) (arguing that corporations should not possess a right to religious freedom). This is such a large area for discussion that it must be left for another day.

24. *See* Iain T. Benson, *Religious Liberty in Australia: Some Suggestions and Proposals for Reframing Traditional Categorisations*, 139 ZADOK PERSPECTIVES 10, 17 (2018) (an evaluative review of religious freedom laws in Australia, Canada, and South Africa). *See generally* STEPHEN V. MANSMA & J. CHRISTOPHER SOPER, THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN SIX DEMOCRACIES (2017) [hereafter Mansma & Soper].

25. EBERLE, *supra* note 16, at 1026.

arguably also the case in any Australia-Germany comparison, especially since the so-called 'religion clause' in the Australian Constitution (section 116) has been narrowly construed by the courts, despite its similarity with parts of the US First Amendment.[26] Further, Eberle views Germany as "a highly developed, industrial, democratic society committed to constitutional government and situated within the Western cultural tradition."[27] So too may Australia easily lay claim to such a description and even assert democratic traditions that antedate those of the Weimar Republic.[28] Eberle argues, "German freedoms are roughly comparable to American freedoms as a matter of text, historical understanding, and constitutional design."[29] This claim is also worth exploring at various levels of a German-Australian comparison, despite the constitutional and historical divergences apparent between Australia and Germany.[30]

Beyond Eberle's comparative model, other cogent reasons for embarking on a comparison between Germany and Australia exist, including the multicultural social environment of both countries, their recent, sometimes fraught, immigration histories,[31] their activities in

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26. *See generally* CAROLINE MAREE EVANS, LEGAL PROTECTION OF RELIGIOUS FREEDOM IN AUSTRALIA 71 (1st ed. 2012) (on the limited scope of Section 116 of the Australian Constitution). For a discussion of section 116 in the context of a proposed Australian Bill of Rights, see Paul Babie & Neville Rochow, *Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom*, 2010 BYU L. REV. 821, 825 (2010).

27. Eberle, *supra* note 16, at 1026.

28. Germany was declared a federal republic at the beginning of the German Revolution in November 1918. On August 11, 1919, President Friedrich Ebert signed the democratic Weimar Constitution.

29. Eberle, *supra* note 16, at 1027.

30. Despite a justifiable bias in favor of highlighting the Anglo-centric origins of the Australian Constitution, German and Swiss ideas, mediated through the work of Johann Caspar Bluntschli (1808–1881) and Georg Jellinek (1851–1911), also played a significant role. *see* Nicholas Aroney, *The Influence of German State-Theory on the Design of the Australian Constitution*, 59 (3) INT'L & COMP. L.Q. 669, 669–99 (2010) (drawing attention to a critical but neglected story about the dissemination of German and Swiss state-theories among English-speaking scholars in the second half of the 19th century and the influence of these ideas on those who designed and drafted the Australian constitution).

31. The immigration debate in both countries has been long and sometimes painful. The German Basic Law is rare amongst world constitutions in that it provides a constitutional right to asylum (Article 16a). In 2015, German Minister of State Maria Böhmer stated, "Germany is new to acknowledge that it is an immigrant country. . . Australia has a lot of experience in this area [of diversity]." *See* Latika Bourke, *Germany Is Looking to Australia's Success as an Immigration Nation*, SYDNEY MORNING HERALD (Dec. 10, 2015) https://www.smh.com.au/politics/federal/germany-is-looking-to-australias-success-as-an-immigration-nation-20151210-gljuhu.html [https://perma.cc/KEZ8-NWBU].

defending religious freedom at the international level, and their complex church-state relations in such areas as school funding and general welfare provision. [32] One may also consider that even though Germany, like England, is perhaps (at least historically) more familiar with the idea of a confessional state, Australia shares enough English legal history to be considered a distant but legal part of that tradition.[33]

Finally, looking into the future, the classical problems of conscience, such as those arising in the military and medical contexts, are also now being aggravated and even overtaken by advances in technology with implications that regularly extend beyond national borders. [34] Recent examples of this lie in the questions raised by "moral machines,"[35] autonomous cars,[36] and a remarkable "digital case study,"

32. For a discussion of Church-State relations and in the areas of welfare and education in Australia and Germany in particular, see chapters 5 (Australia) and 7 (Germany) see generally MANSMA AND SOPER, *supra* note 24.

33. Soper would disagree, assigning Australia to the category of "pragmatic pluralist" (along with The Netherlands, a "principled pluralist" country); see MANSMA & SOPER, *supra* note 24, at 85ff. Germany and England are each assigned a category closer to that of the confessionalized state.

34. For example, consider the "actions" of autonomous weapons systems across national borders and the extent to which their activities may be sheeted home to human actors. *See* Duncan B. Hollis, *Setting the Stage: Autonomous Legal Reasoning in International Humanitarian Law*, 30 TEMP. INT'L & COMP. L.J. 1, 15 (2016) (setting the stage for a symposium on the issues surrounding autonomous weapons systems in the context of Saint Thomas Aquinas' classic analysis of human acts). In the medico-military context see generally Christopher E. Sawin, *Creating Super Soldiers for Warfare: A Look into the Laws of War*, 17 J. HIGH TECH. L. 105 (2016) (arguing that the use of technology to create superior soldiers is not currently prohibited under humanitarian laws of war). This raises the question as to whether super-soldiers, bred for battle and with genetic or drug-induced limitations on their power to empathize, are even human and thus capable of conscientious objection. Other areas of concern for conscience in the non-military medical context could include extreme cosmetic surgery, or other forms of advanced but unnecessary treatment.

35. *See* Mass. Inst. of Tech. (MIT), *About Moral Machine,* MORAL MACHINE, http://moralmachine.mit.edu/ [https://perma.cc/T9GQ-8FVG] (last visited Apr. 27, 2019). About machine intelligence overtaking human decision making, Iyad Rahwan, Edmond Awad, & Sohan Dsouza stated, "[f]rom self-driving cars on public roads to self-piloting reusable rockets landing on self-sailing ships, machine intelligence is supporting or entirely taking over ever more complex human activities at an ever-increasing pace. The greater autonomy given machine intelligence in these roles can result in situations where they have to make autonomous choices involving human life and limb. This calls for not just a clearer understanding of how humans make such choices, but also a clearer understanding of how humans perceive machine intelligence making such choices"). *See Ethics of Autonomous Vehicles*, WINBROOK, http://www.rri-tools.eu:8080/-/moral-machine [https://perma.cc/8HGX-ZT8A].

36. *Can Autonomous Cars Have a Moral Conscience? Views from DW's science desk*, DW (Dec. 10, 2018), https://www.dw.com/en/can-autonomous-cars-have-a-moral-conscience-

in which Google engineers claimed conscientious objection against participation in software manufacture designed to improve international military drone targeting.[37] Although these topics are beyond the scope of this Article, they demonstrate that the defense of conscience, and the associated freedom of religion will remain firmly on the social and legal agendas for the foreseeable future.

III. DEFINING 'CONSCIENCE' FOR LEGAL PURPOSES

Definitions of the notion of conscience usually belong in the realms of theology and moral philosophy. Both areas typically draw deeply on religious origins, but now also find some forms of secular definition. [38] An example of the former is to be discovered in the work of John Henry Newman, who speaks of conscience as the voice of

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views-from-dws-science-desk/a-46056690 [https://perma.cc/CP5K-LXDU] (last visited Apr. 26, 2019).

37. Shane Scott & Wakabayashi Daisuke, *'The Business of War': Google Employees Protest Work for the Pentagon*, N.Y. TIMES (Apr. 4, 2018) https://www.nytimes.com/2018/04/04/technology/google-letter-ceo-pentagon-project.html [https://perma.cc/6J83-TT5M] (last visited Apr. 26, 2019) ("Thousands of Google employees, including dozens of senior engineers, have signed a letter protesting the company's involvement in a Pentagon program that uses artificial intelligence to interpret video imagery and could be used to improve the targeting of drone strikes"). Google reportedly disengaged from this work at a later date. *See* Shane Scott & Wakabayashi Daisuke, *Google Will Not Renew Pentagon Contract that Upset Employees*, N.Y. TIMES (June 1, 2018) http://www.nytimes.com/2018/06/01/technology/google-pentagon-project-maven.html [https://perma.cc/UB63-4GL7] (last visited Apr. 26, 2019). Google later produced a set of AI objectives precluding its use in weapons and human rights violations; see Devin Coldeway, *Google's New 'AI Principles' Forbid Its Use in Weapons and Human Rights Violations*, TECHCRUNCH (June 7, 2018) http://social.techcrunch.com/2018/06/07/googles-new-ai-principles-forbid-its-use-in-weapons-and-human-rights-violations/ [https://perma.cc/3HMY-8SFX] (last visited Apr. 26, 2019). For Al's seven objectives, see Sundar Puchai, *Al at Google: Our Principles,* GOOGLE (June 7, 2018), https://www.blog.google/technology/ai/ai-principles/ [https://perma.cc/M58Y-STH9] (last visited Apr. 26, 2019).

38. *See* JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 13 (Jane Marie Todd, trans., 2011) ("Core beliefs and commitments, which we will also call 'convictions of conscience,' include both deeply held religious and secular beliefs and are distinguished from the legitimate but less fundamental 'preferences' we display as individuals") [hereafter MACLURE & TAYLOR]. This is an English translation of DOMINIQUE LEYDET, LAÏCITÉ ET LIBERTÉ DE CONSCIENCE LES ÉDITIONS DU BORÉAL (2010). For a critical review of Maclure and Taylor, *see generally* Jude P. Dougherty et al., *Secularism and Freedom of Conscience*, 65 REV. OF METAPHYS. 434 (2011). For a review of SORABJI, *see* Margaret Atkins, *MORAL CONSCIENCE THROUGH THE AGES by Richard Sorabji*, NEW BLACKFRIARS 736-38 (Oct. 5, 2016), https://onlinelibrary.wiley.com/doi/epdf/10.1111/nbfr.3_12239 [https://perma.cc/JT64-G58D].

God.[39] The more secular manifestation may be found, for example, in the work of Jocelyn Maclure and Charles Taylor, where conscience is discussed not only on a religious basis but also in the context of deeply held secular convictions.[40] However, conscience, as defined by theologians or philosophers, is not something necessarily (or easily) translatable into a *legal* definition interpretable by citizens and, ultimately, by the courts.[41] Isensee has labeled this the ultimate legal problem of defining conscience (the "definitions problem");[42] this is a problem that cannot be avoided by courts or lawyers when the word is used in a piece of legislation, or, indeed, in an elemental document like a national constitution. The Federal Republic of Germany exemplifies just such a case because the foundational document of the *Rechtstaat,*[43] the German Basic Law (Constitution), uses the word 'conscience' five times in three different Articles.[44] The term must, then, be given a meaning that is legally stable and able to be used over time, in cases that concern different and diverse facts (*Tatbestände*). Once established, such a definition must also be applied in order to decide cases between parties with mixed and often contrary interests. We now turn to explore more precisely what the Basic Law guarantees its citizens in this area.

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39. John Henry Newman asserts, "conscience is the voice of God, whereas it is fashionable on all hands now to consider it in one way or another a creation of man"; *see* Letter from John Henry Newman to the Duke of Norfolk, in THE GENIUS OF JOHN HENRY NEWMAN: SELECTIONS FROM HIS WRITINGS 262-263 (Ian T. Ker ed., 1989).

40. *See generally* MACLURE & TAYLOR, *supra* note 38.

41. The discussion surrounding what lawyers and judges actually do when they interpret words and the rules that contain them is an interesting one; *see generally* DAVID MIERS & WILLIAM TWINING, HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION (5th ed. 2010). This discussion sometimes lapses into a "rivalry of emphasis" between interpretive approaches to statute law and common law case law; *see* Janet S. Lindgren & John Henry Schlegel, *Review: Thinking about Statutes: Hurst, Calabresi, Twining and Miers*, 9 AM. BAR FOUND. J. 458, 458-68 (1984).

42. Isensee, *supra* note 8, at 46.

43. In German, this *Rechtsstaat* is sometimes contrasted with the *Polizeistaat (police state)*. For a recent book-length treatment of the concept of the *Rechsstaat*, see generally STEPHAN KRISTE, THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT) (James R. Silkenat et al. eds., 2014).

44. *See* GRUNDGESETZ (GG) [BASIC LAW] and in particular, art. 4 (Freedom of Faith, Conscience, and Creed); art. 12a (Compulsory Military or Alternative Service); and art. 38 (Elections: Elected Members of the Bundestag are to be "representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience"); translation available at https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510 [https://perma.cc/A53C-K7PG].

IV. THE GERMAN CONSTITUTIONAL GUARANTEE

Freedom of conscience is guaranteed in broad terms by Article 4 [Freedom of Faith, Conscience, and Creed] of the German Basic Law:

> (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
>
> (2) The undisturbed practice of religion shall be guaranteed.
>
> (3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.[45]

The guarantees in sections (1) and (2) are notably free from qualification or limitation while, due to associated "federal regulations," section (3) is not. Collectively, these serious and comprehensive guarantees were forged in the aftermath of World War II, as well as in the rooms of the Royal Palace of Herrenchiemsee in August of 1948.[46] Intended at the time as a merely transitional document, the Basic Law was broadly interpreted by the newly-formed Federal Constitutional Court during the 1950s as a bulwark of fundamental rights. Cases like *Elfes*[47] and *Lüth*[48] and their progeny made the Court, and by implication the Constitution, "a moral success story to match the economic miracle."[49] The document has shown remarkable endurance despite some democratic alterations and updates along the way.[50]

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45. *Id*. art. 4.

46. On the processes and outcomes of drafting three German Constitutions, including the successful Basic Law of 1949, see Inga Markovitz, *Constitution Making after National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1307-46 (2007).

47. BVerfGE 3, 58. "In Elfes, the Court developed the famous concept of a 'general' fundamental right, which can be invoked against any act of public authority to vindicate freedoms not explicitly guaranteed by the constitutional text." Florian Meinel, *The Constitutional Miracle on the Rhine: Towards a History of West German Constitutionalism and the Federal Constitutional Court*, 14 INT'L J. CONST. LAW 261, 284 (2016).

48. BVerfGE 7, 198 (extending constitutional oversight even into the area of private law); Meinel, *supra* note 47, at 284.

49. JUSTIN COLLINGS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 1951–2001 61 (2015); Meinel, *supra* note 47, at 261. For a discussion in English of the theories of fundamental rights under the German Basic Law, see generally KOMMERS, *supra* note 10. For a less glowing assessment of German moral and economic success, *see* Paul Hockenos, *Germany has an Arrogance Problem*, FOREIGN POLICY (MAY 6, 2019) https://foreignpolicy.com/2017/04/27/germany-is-getting-too-arrogant-merkel [https://perma.cc/M2BZ-2YCP].

50. The Basic Law has been updated sixty-two times since 1949.

The guarantee in Article 4 must be seen in the light of other provisions of the Basic Law, which deal with relations between church and state more generally. These include Article 140, which sweeps up five articles of the Weimar Constitution,[51] including a particularly German form of the non-establishment clause,[52] and incorporates them into the Basic Law. These five articles (sixteen paragraphs in total) deal generally with religion and religious associations, including such matters of "status, powers, and duties of religious associations."[53] There are also important far-reaching economic ties between churches and the German state in the form of the *Kirchensteuer* (the church tax, authorized under the above provisions of the Weimar Constitution),[54] indexed endowment payments (compensation for historical confiscations of Church property),[55] and other welfare provisions.[56]

Other provisions scattered throughout the Basic Law also protect religious belief (and thereby conscience) more indirectly. These appear

51. Arts. 136-40.

52. Article 137(1) provides, somewhat bluntly, "There shall be no state church." As Kommers notes, this is quite different from the US version of non-establishment. "Rather than the "separationist approach taken in the United States, Germany's system may be described as cooperative, anticipating a limited partnership between church and state." KOMMERS, *supra* note 10, at 539. As discussed below, when compared to the United States, the situation in Germany is far more similar to that of Australia.

53. KOMMERS, *supra* note 10, at 538.

54. Specifically, article 137(6), which provides "Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with *Land* (State) law." THE CONSTITUTION OF THE GERMAN REICH, Aug. 11, 1919, art. 137(6).

55. The 100th anniversary of the decision to cease such payments occurred in 2019. To date, these payments continue since—it has been alleged—it would cost the government far too much to retire them. Not all states are affected (*e.g.*, Bremen and Hamburg). The Religion News Service reports, "[o]fficially, the historical payments known as "endowments," fork out taxpayer funds to compensate the churches for valuable farmlands and buildings that secular rulers have taken from them over the centuries. Some were seized by the French after Napoleon annexed lands up to the western banks of the Rhine River two centuries ago; other confiscations go back to the Reformation." Tom Heneghan, *Germany Continues Payments to Churches a Century after Deciding to Stop*, RELIGION NEWS SERVICE (Feb. 13, 2019), https://religionnews.com/2019/02/13/germany-continues-payments-to-churches-a-century-after-deciding-to-stop/?utm_source=Pew+Research+Center&utm_campaign=05db11d2c3-EMAIL_CAMPAIGN_2019_02_14_02_52&utm_medium=email&utm_term=0_3e953b9b70-05db11d2c3-399905589 [https://perma.cc/X3NY-3ZFU].

56. For example, Caritas, an organization of the Catholic Bishops Conference of Germany, has more than half a million staff working in Germany and about half a million volunteers. The international department of Caritas Germany is working with a staff of about 100. *See Germany*, https://www.caritas.org/where-caritas-work-europe/germany/ [https://perma.cc/5ND9-RWQ2] (last visited Apr. 26, 2019).

in provisions on equality,[57] suitability for public office,[58] freedom from compelled religious exercise or disclosure,[59] including oath-taking and use of an affirmation by citizens or the President taking office.[60] Even less direct, but significant, protection is found in rights of parents to decide whether children receive religious instruction in state schools.[61] It should also be noted that the European Convention of Human Rights offers a more qualified guarantee of some of these rights.[62]

V. CRUCIFIXES, CLOTHING, AND GERMAN CONSCIENCE CASES

A. The German Crucifix Cases

The display of crosses or crucifixes has been the subject of litigation in European courts at different times over the last few

57. "No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability." BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, May 23, 1949, art. 3(3).

58. "Neither the enjoyment of civil and political rights nor eligibility for public office nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed." BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, May 23, 1949, art 33(3).

59. "No person shall be required to disclose his religious convictions. The authorities shall have the right to inquire into a person's membership of a religious society only to the extent that rights or duties depend upon it or that a statistical survey mandated by a law so requires." THE CONSTITUTION OF THE GERMAN REICH, Aug. 11, 1919, art 136(3) (incorporated by article 140 of the Basic Law).

60. Article 136(4) of the Weimer Constitution provides "No person may be compelled to perform any religious act or ceremony, to participate in religious exercises or to take a religious form of oath." After providing the form of the Oath of Office, the final sentence of Article 56 provides: "The oath may also be taken without religious affirmation." THE CONSTITUTION OF THE GERMAN REICH, Aug. 11, 1919, art 136(4). *See generally* KOMMERS, *supra* note 10, at 538.

61. "(1) The entire school system shall be under the supervision of the state. (2) Parents and guardians shall have the right to decide whether children shall receive religious instruction. (3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction." BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, May 23, 1949, art. 7(1)-(3).

62. A. H. ROBERTSON, HUMAN RIGHTS IN EUROPE 144-47 (Manchester Uni. Press ed., Oceana Publications, 1963) (1964).

decades, most notably in Germany and Italy.[63] The topic continues to generate controversy as evidenced by a 2018 Bavarian mandate to affix crucifixes in the entrances of public buildings.[64]

In Germany, two major constitutional cases are essential to consider. First, in the 1973 *Courtroom Crucifix Case*,[65] the question was whether a Düsseldorf Administrative Court may display a crucifix over the objections of a Jewish litigant.[66] The result, on appeal to the Federal Constitutional Court, saw the crucifix taken down, but without a general prohibition on their placement in a courtroom.[67] In doing so, the Court was careful to reiterate the principle of state neutrality.[68]

In the second case, the *Classroom Crucifix Case* II (1995)[69] the Federal Constitutional Court held that a Bavarian law requiring crucifixes be placed on the wall of state classrooms was a violation of the German Federal Constitution (Basic Law).[70] This case, and its preceding litigation created a firestorm of public protest and

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63. Aside from Germany, the Italian case of *Lautsi v. Italy* (2011) holding that an Italian law mandating the display of crucifixes in classrooms does not violate the European Convention on Human Rights. *See generally* Grégor Puppinck, *The Case of Lautsi v. Italy: A Synthesis*, 3 BYU L. REV. 873 (2012).

64. Guy Chazan, *Bavaria Imposes Law on Displaying Cross in State Buildings, Financial Times* (June 1, 2018), https://www.ft.com/content/1e2bec76-6572-11e8-a39d-4df188287fff [https://perma.cc/NP6K-4LBT] (last visited Mar. 25, 2019).

65. 35 BVerfGE [Federal Constitutional Court] 366 (1973).

66. The court held that such a display was lawful and "the mere presence of a crucifix in a courtroom does not demand any identification with the ideas and institutions symbolically embodies therein or compel any specific behavior in accordance thereof." *Id*. KOMMERS, *supra* note 10, at 545.

67. *See* Ingrid Brunk Wuerth, *Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech*, 31 V AND J. TRANSNAT'L L. 1127, 1129 (1998). *See also* KOMMERS, *supra* note 10, at 545.

68. 35 BVerfGE [Federal Constitutional Court] 366, 375 (1973).

69. *See* KOMMERS, *supra* note 10, at 577-83. Note that the preceding case from 1991, known as Classroom Crucifix I Case, the Federal Constitutional Court considered—and rejected—a request for an injunction to take down the crucifix. *See* 85 BVerfGE 94 (1991). BVerfGE 93, 11 BVR 1087/91 Kruzifix-decision ("Classroom Crucifix Case") (Ger.), May 12, 1987, *translated in* https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=615#top [https://perma.cc/H78Y-XJNH]. Classroom Crucifix II went beyond the procedural issues associated with an injunction and dealt with the substantive arguments.

70. BVerfGE 1987, 11 BvR 1087/91 (Ger.), May 12, 1987, *translated in* https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=615#top [https://perma.cc/H78Y-XJNH] (holding that "the affixation of a cross or crucifix in the classrooms of a State compulsory school that is not a denominational school infringes art. 4(1) of the Basic Law").

discussion.[71] Bavaria's pragmatic response was to draft a new law (in 1995), which was later confirmed as constitutional in Bavaria and Berlin in 1997.[72] As summarized by Ingrid Brunk Weurth:

> The new [1995] law draws substantially from a report commissioned by the state of Bavaria and written by Peter Badura, former president of the Federal Constitutional Court. Like the old law, the new one provides for crosses in Bavarian classrooms. Under the new law, however, if parents object to the cross based on honest and "visible" or expressible principles of their faith or world view, then the school must seek a compromise. If it finds no compromise, then the school must create a rule for each individual case that respects the freedom of the complainant and the religious views of everyone in the class. In that decision the school must consider, to the greatest degree possible, the desires of the majority. The new law, according to Badura, stays within the "Spielraum" or "room for play" afforded to the states by the Basic Law and Constitutional Court's 1995 decision (citations omitted).[73]

The cultural impacts and debates were significant across Germany but more so in the south than in the north.[74] Citizens of the former German Democratic Republic (GDR) were perhaps less interested in such disputes.[75] Some commentators have criticized the final decision as one that generated more conflict than it resolved and that might lead to a legitimate "questioning of the constitutionalists monopoly of virtue."[76]

The nature of the alleged affront to the conscience of the litigant in the *Courtroom Crucifix Case* and to the child and parents in the *Classroom Crucifix* case(s) bears some discussion in the context of conscience protection in schools. Here, noticeable differences exist between the majority and dissenting judgments. After a discussion of the principle of tolerance, the minority decided that no unacceptable

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71. Stephen Kinzer, *Crucifix Ruling Angers Bavarians*, N.Y. TIMES (Aug. 23, 1995), https://www.nytimes.com/1995/08/23/world/crucifix-ruling-angers-bavarians.html [https://perma.cc/FB6E-8A64].

72. Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 GA J. INT'L & COMP. L. 405, 491 (1999). *See* James Arthur, *Learning under the Cross: Legal Challenges to 'Cultural-Religious Symbolism' in Public Schools*, 20 EDUCATION & THE LAW 337, 341 (2008).

73. Wuerth, *supra* note 67.

74. *See* Peter C. Caldwell, *The Crucifix and German Constitutional Culture*, 11 CULT. ANTHROPOL. 259, 272 (1996).

75. *Id*.

76. Howard Cagill & Alan Scott, *The Basic Law versus the Basic Norm? The Case of the Bavarian Crucifix Order,* 44 POL. STUD. 413, 506-16 (1996).

burden was imposed on the conscience of students exposed to the classroom crucifix, nor by implication to their parents. They noted:

> In view of the cross's symbolic character, non-Christian pupils and their parents are obligated to accept its presence in the classroom. The principal of tolerance requires as much, and the display of the cross does not constitute an unacceptable burden on the religious conscience of non-Christian pupils.
>
> The psychological effect that exposure to the cross has on non-Christian pupils is relatively mild. The mental burden here is minimal, for pupils are not required to behave in a given way or to participate in religious practices before the cross. In contrast to compulsory school prayer, pupils are not forced to reveal the ideological or religious convictions through nonparticipation. This precludes any discrimination against them.[77]

Terms such as "psychological effect" (upon students) or "mental burden" due to exposure to religious symbols are, the court appears to argue, a lesser form of interference with conscience than a requirement forcing one to act, behave, or participate in a religious ceremony or activity (e.g., prayer). This is in keeping with the earlier decision affirming positive religious freedom in cases concerning school prayer decided in 1979.[78]

The majority dealt with the issue quite differently, finding that such a burden did exist and that the crucifix could not be left on the wall, but must be removed as constitutionally inappropriate. The court made a number of points in reaching this conclusion, the following of which touch directly or indirectly upon the question of the burdens of conscience:

- In a society that tolerates a wide variety of faith commitments, the individual clearly has no right to be spared exposure to

77. KOMMERS, *supra* note 10, at 583.

78. *Id.* at 567-71; Wuerth summarizes: "Rejecting the lower court's conclusion that the prayers were coercive, the court reasoned that the right to not reveal one's religious convictions did not take precedence over the rights of others to practice their religious beliefs. Moreover, the court pointed out, the Basic Law itself created situations, particularly the refusal to bear arms, in which those who seek exemptions must similarly reveal something of their religious convictions. The court went on to note that in exceptional cases particularly sensitive students in unsympathetic schools might mean that the school must forego the prayers, but this did not justify the lower court's conclusion that any and all such prayers were unconstitutional. The court made clear that the positive freedoms involved did not compel schools to institute prayers." Wuerth *supra* note 10, at 1180-81.

quaint religious manifestation, sectarian activities, or religious symbols.[79]

- Given the context of compulsory education, the presence of crosses in classrooms amounts to state-enforced "learning under the cross," with no possibility to avoid seeing the symbol. This constitutes the critical difference between the display of the cross in a classroom and the religious symbols people frequently encounter in their daily lives.[80]
- The cross, now as before, represents a specific tenet of Christianity; it constitutes its most significant faith symbol. It symbolizes human redemption from original sin through Christ's sacrifice just as it represents Christ's victory over Satan and death and his power over the world. Accordingly, the cross symbolizes both suffering and triumph . . . to this day, the presence of a cross in a home or room is understood as an expression of the dweller's Christian faith.[81]
- On the other hand, because of the significance Christianity attributes to the cross, non-Christians and atheists perceive it to be the symbolic expression of certain faith convictions and a symbol of missionary zeal. To see the cross as nothing more than a cultural artifact of the Western tradition without any particular religious meaning would amount to a profanation contrary to the self-understanding of Christians and the Christian church.[82]
- Coercion is to be reduced to an indispensable minimum. In particular, the school must not proselytize on behalf of a particular religious doctrine or actively promote the tenets of the Christian faith.[83]

And finally:

- Christianity's influence on culture and education may be affirmed and recognized, but not particular articles of faith. Christianity as a cultural force incorporates in particular the idea of tolerance toward people of different persuasions.

79. KOMMERS, *supra* note 10, at 578.
80. *Id.* at 579.
81. *Id*. at 579-80.
82. *Id*. at 580.
83. *Id*. at 581.

> Confrontation with a Christian worldview will not lead to discrimination or devaluation of a non-Christian ideology so long as the state does not impose the values of the Christian faith on non-Christians; indeed, the state must foster the autonomous thinking that Article 4 of the Basic Law secures within the religious and ideological realms.[84]

While difficult to summarize, the above approach takes the claims of Christianity seriously ('Christ's victory'), and at the same time, takes a 'hands-off' approach to the imposition of values. This approach, arguably, is a strong endorsement of the freedom of conscience policy sought to be promoted by Article 4. On the other hand, the "mild psychological effect" of being required to study under the cross claimed by the dissenting judges would seem to agree in substance with the majority about protecting the individual's conscience but differ on the degree of exposure that is burdensome. Unlike the majority, the dissent also makes clear that the cross does not "imply any kind of missionary activity."[85] Based on these arguments, the difference between the majority and minority opinions seems to be more one of degree than substance.

B. Major German Headscarf Decisions

The so-called headscarf debate (*Kofptuchdebatte*) in Germany has been raging for years and been the subject of multiple cases, including two at the level of the Federal Constitutional Court.[86] Both of these cases related to headscarves worn by teachers in state schools, but headscarves in courtrooms have also been much-disputed, even as

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84. *Id*. at 581.

85. *Id*. at 583.

86. These cases were decided in 2003 and 2015. *Bundesverfassungsgericht* [BVerfGE] [Federal Constitutional Court], 24, 2003, 2 BvR 1436/02 [hereinafter *First Headscarf Decision*]. While only the German version is authoritative, an English translation is available on the German Federal Constitutional Court website at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs200309 24_2bvr143602en.html [https://perma.cc/7FFD-VNE7] (last visited Apr. 26, 2019); *Bundesverfassungsgericht* [BVerfGE] [Federal Constitutional Court], January 27, 2015, 1 BvR 471/10, (Ger.) [hereafter *Second Headscarf Decision*]. *See* the copious references in Kerstin Braun, *How Much Veil Is Too Much Veil: On the Constitutionality and Advisability of Face Bans for German Public School Students*, 18 GERMAN L. J. 1331, 1331–58 (2017).

recently as 2013,[87] and a 2019 Bavarian case confirming that headscarves are not to be worn by judges or prosecutors.[88]

The link between conscience and the wearing of items of clothing deserves some preliminary discussion. By way of introduction, it is important to note that the headscarf debate covers a wide range of issues and is extremely complex, touching upon many questions, including intra-religious expression. These intra-religious expressions and expectations of dress codes are based on differing interpretations of the Qur'an,[89] inter-religious relations and the singling-out of particular religions for special treatment,[90] the equal treatment of men and women,[91] psychological effects on students,[92] parental rights, and workplace clothing codes and the associated labor laws, especially in public service.[93] Further, the legal issues as they relate specifically to conscience protection are also complex.

1. The First Headscarf Decision

The *First Headscarf Decision* concerned a German citizen, who applied to teach in state primary and secondary schools,[94] in the Land (Federal state) of Baden-Württemberg.[95] In addition to implicating

87. *See* Joachim Wagner, *Legal Limbo: Lawyers Seek Clarity on Headscarves in Court*, SPIEGEL ONLINE (Sept. 17, 2013), https://www.spiegel.de/international/germany/muslim-lawyers-seek-clarity-on-allowance-of-headscarf-in-court-a-922522.html [https://perma.cc/K43E-FCMA].

88. *Germany: Bavarian Court Upholds Headscarf Ban for Judges, Prosecutors*, DW (Mar. 18, 2019), https://www.dw.com/en/germany-bavarian-court-upholds-headscarf-ban-for-judges-prosecutors/a-47960676 [https://perma.cc/3P5L-ZQYN].

89. *See generally* Heiner Bielefeldt, *Zur aktuellen Kopftuchdebatte in Deutschland—Anmerkungen aus der Perspektive der Menschenrechte* [*On the Current Headscarf Debate in Germany—Observation from the Human Rights Perspective*], DEUTSCHES INSTITUT FÜR MENSCHENRECHTE [GERMAN INSTITUTE FOR HUMAN RIGHTS] https://www.ssoar.info/ssoar/bitstream/handle/document/31669/ssoar-2004-bielefeldt-Zur_aktuellen_Kopftuchdebatte_in_Deutschland.pdf [https://perma.cc/3QZ6-3SNE].

90. *Id*.

91. Basic Law for the Federal Republic of Germany art. 3(2) provides that "[m]en and women shall have equal rights."

92. Bielefeldt, *supra* note 89, at 5.

93. *See* Achim Seifert, *Religious Expression in the Workplace: The Case of the Federal Republic of Germany*, 30 COMP. LAB. L. & POL'Y J. 529, 568 (2009).

94. The Stuttgart Higher School Authority was responsible for teachers at both primary (*Grundschule*) and non-selective secondary (*Hauptschule*) schools.

95. The main protagonist has since written a book on the case and other matters; *see generally* Fereshta Ludin, ENTHÜLLUNG DER FERESHTA LUDIN. DIE MIT DEM KOPFTUCH [THE UNVEILING OF FERESHTA LUDIN: THE ONE WITH THE HEADSCARF] (2015).

Article 4 of the Basic Law, the case also required analysis of Articles 33(1) and 33(2), which guarantee equal political status in the areas of eligibility for and performance in public service.[96]

The complainant's application was progressively rejected by the Stuttgart Higher School Authority, the Stuttgart Administrative Court, the Stuttgart Administrative Court, the Baden-Wurttemberg Higher Administrative Court, and the Federal Administrative Court.[97] The various stages of appeal allowed for lengthy public as well as legal debates, and, as illustrated below, full consideration of the many arguments both for and against the state's refusal to grant accreditation. These included discussions of religious identity;[98] state neutrality in the presence of religious symbolism, as well as the various degrees of such symbolism;[99] the extent of students' rights to "negative religious freedom;"[100] parents natural rights to the care and upbringing of children under Article 6.2 of the Basic Law;[101] state neutrality;[102] students' rights when confronted with an ongoing "expression of faith;"[103] the effects of a teaching wearing a headscarf on "schoolgirls

96. Article 33 provides, inter alia, (1) Every German shall have in every Land the same political rights and duties. (2) Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements. (3) Neither the enjoyment of civil and political rights, nor eligibility for public office, nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.

97. *First Headscarf Decision*, *supra* note 86, ¶¶ 1–15. For ease of reference, references point to paragraph numbers found in the right-hand margin of the translation provided by the Federal Constitutional Court (Bundesverfassungsgericht), however, as noted above, only the German version is authoritative.

98. *Id.* ¶ 4.

99. In the course of its discussion, the Federal Constitutional Court noted, "Unlike the crucifix, the headscarf was a not [an inherent] symbol of religion." *Id.*

100. "Negative religious freedom" denotes the right to be free from any religious influence in a state context. *See id*. ¶ 4. For example, see the Interdenominational School Case of 1975 (BVerfGE 41, BVerfGE 29) (upholding the constitutional validity of a Christian interdenominational school in Baden-Würtemberg in the face of the argument put by parents that their children should be protected from all religious influence at such a school. The courts noted that the legislature must "choose a type of school which, insofar as it can influence children's decisions concerning faith and conscience, contains only a minimum of coercive elements"); at 575.

102. *Second Headscarf Decision*, *supra* note 86, ¶¶ 2–6.

103. *Id*.

of the Muslim faith;"[104] the potential teacher's "aptitude" for teaching under the relevant law;[105] students' inability to select teachers or to avoid exposure to religious symbols of their own accord;[106] the state's duty to provide education under Article 7(1) of the Basic Law;[107] the need to balance the interests of teachers and students in a practical way ("practical concordance");[108] the importance of "respectful [state] neutrality;"[109] the irrelevance of any teacher-declaration of the intention to avoid recruiting or proselytism;[110] the inability of primary school pupils to "intellectually assimilate the religious motivation" of a teacher's actions;[111] and the role of the "class teacher" and the inability for students to easily change classes or schools.[112]

After numerous preliminary appeals, the Federal Administrative Court decided,[113] "[t]he teacher's right to conduct herself in accordance with her religious conviction must have lower priority than the conflicting freedom of faith of the pupils and parents during

104. The Federal Constitution Court noted, "considerable pressure to conform might arise here; this would contradict the school's pedagogical duty to work towards the integration of the Muslim pupils." *Id.* ¶ 5.

105. Specifically, §11.1 of the Baden-Württemberg Land Civil Service Act (Landesbeamtengesetz Baden-Württemberg–LBG). In discussing aptitude, the Federal Constitutional Court noted, "[t]he personal aptitude of teachers was in part to be determined on the basis of how far they were in the position to put into practice the educational objectives laid down under Article 7.1 of the Basic Law and to fulfill the state's duty to provide education." *Id. Second Headscarf Decision*, *supra* note 86, ¶ 85.

106. *Id.* ¶ 7.

107. Article 7(1) of the Basic Law provides: "The entire school system shall be under the supervision of the state." GRUNDGESETZ [GG] [BASIC LAW], art. 7(1).

108. *Second Headscarf Decision*, *supra* note 86, ¶ 9. Practical concordance (*praktische Konkordanz*) represents a form of practical balancing when rights are in conflict.

109. "The duty of neutrality in ideology and religion imposed on the state by the Basic Law was not a distancing and rejecting neutrality of the nature of laicist non-identification with religions and ideologies, but a respectful neutrality, taking precautions for the future, which imposed on the state a duty to safeguard a sphere of activity both for the individual and for religious and ideological communities." *Id.* ¶ 10. The court goes on to discuss the role of "precautionary neutrality." *Id.* ¶ 10.

110. *Id.* ¶ 11.

111. *Id.*

112. "An acceptable pragmatic solution of the conflict that allowed the complainant's freedom of belief to be taken more extensively into account was not possible in view of the principle of the class teacher, which was predominant at the primary school and the non-selective secondary school, and because of organisational difficulties with regard to moving from one school or class to another." *Id.* ¶ 11.

113. For instance, immediately prior to the appeal to and consideration by the Federal Constitutional Court. *Id.* ¶ 8.

lessons."[114] The court noted, "freedom of faith was not guaranteed without restriction"[115] and held:

> In the context of secular compulsory schools, organized and structured by the state, Article 4.1 of the Basic Law as a guarantee of freedom benefited above all children required to attend school and their parents. Here, the state was also obliged to take account of the freedom of religion of the parents and the right of education guaranteed to them under Article 6.2 sentence 1 of the Basic Law. Children must be taught and educated in state compulsory schools without any partiality on the part of the state and of the teachers representing it in favor of Christian beliefs or of other religious and ideological convictions.[116]

The Federal Administrative Court also noted a change in Germany's religious and denominational landscape as follows:

> With growing cultural and religious variety, where a growing proportion of schoolchildren were uncommitted to any religious denomination, the requirement of neutrality was becoming more and more important, and it should not, for example, be relaxed on the basis that the cultural, ethnic and religious variety in Germany now characterized life at school too.[117]

Both the Federal Government and the state of Baden-Württemberg presented arguments. The former argued that there is no 'right' to hold public office,[118] and that decisions on employment were made on the basis of the requirements of the post and the personality of the applicant. In the case of a teacher, this included "the ability and the readiness of the teacher to comply with the official duties arising from the status of a civil servant under the concrete conditions of working at school."[119] In discussing this argument, the Court also noted Article 33(5) of the Basic Law, which allows for some limitations on basic rights of those who are engaged as civil servants, and in particular, that they carry out their duties neutrally and with

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114. *Second Headscarf Decision*, *supra* note 86, ¶ 15.

115. *Id*. ¶ 13.

116. *Id*.

117. Federal Administrative Court as characterized by the Federal Constitutional Court in the *Second Headscarf Decision*. *Id*. ¶ 13.

118. *I.e.*, no right could be grounded on the wording of Article 33(2) of the Basic Law. *Id.* ¶ 21.

119. *Id.*

objectivity.[120] The Federal Government also referred to the possibility that "the teacher's conspicuous outer appearance might have a long-term detrimental influence on the peace at the school."[121] This reasoning relied on the *Crucifix Case* by contending that the ubiquity and longevity of the exposure to the symbolic headwear was a "decisive factor."[122] Like the crucifix, the headscarf could not be avoided and exposure to it was permanent and unavoidable. The complainant's symbolic act (of wearing) was also to be attributed not only to her but to the state that she represented. The Federal Government was, however, careful to avoid a secular understanding of such a line of argument, insisting rather, "consideration was merely being given to the growing importance of state neutrality in view of an increasing number of religions in society."[123]

The arguments of the state of Baden-Württemberg centered on the non-arbitrary nature of the decision of the Federal Administrative Court. In doing so, they emphasized the rights of parents. Specifically:

> account had to be taken of the fact that schoolchildren's personalities were not yet fully developed, and as a result school children were particularly open to mental influences by persons in authority, and in their developmental phase they learned in the first instance by imitating the behavior of adults. In addition, in particular in the case of children who have not reached the age at which they can decide on religious matters themselves, the parents' right of education applies.[124]

The court also drew on the concept of practical concordance between the state duty to provide education and the rights of parents. This, it was argued, is best achieved by "the state's conducting itself

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120. "The traditional fundamental principles of the permanent civil service laid down in Article 33.5 of the Basic Law, which restricted the fundamental rights of civil servants, included the obligation of teachers, who were civil servants, to carry out their duties objectively and neutrally. This official duty also comprised the duty to carry out one's duties neutrally from the point of view of religion and ideology, respecting the viewpoints of pupils and parents." *Id.* ¶ 21.

121. *Id.* ¶ 22.

122. "Just as in the case of the crucifix in the classroom, the decisive factor with regard to the Muslim headscarf was the fact that because of compulsory school attendance for all children—unlike in the case of a brief encounter in everyday life—continuous confrontation with a religious symbol could not be avoided." *Id.* ¶ 23.

123. *Id.* ¶ 23.

124. *Id.* ¶ 25.

neutrally in religious and ideological matters."[125] This "attained all the more importance the more diverse the religions in society," and "[t]he state's neutrality must be shown in the person of the teacher."[126] Furthermore, "[t]he Federal Administrative Court had not introduced an altered concept of neutrality, but merely accorded a growing importance to the requirement of neutrality in a society that was pluralist from the point of view of religion."[127]

The Federal Constitutional Court took up the matter in 2003, deciding that the teacher's "constitutional complaint is admissible and is well-founded."[128] In the course of the Court's judgment, several important principles were stated:

- Article 4 of the Basic Law "extends not only to the inner freedom to believe or not to believe but also to the outer freedom to express and disseminate the belief."[129]
- Such right "includes the individual's right to orientate his or her whole conduct to the teachings of his or her faith and to act in accordance with his or her inner religious convictions."[130]
- Also, "[t]his relates not only to imperative religious doctrines, but also to religious convictions according to which a way of behavior is the correct one to deal with a situation in life."[131]
- In addition, "[t]he freedom of faith guaranteed in Article 4.1 and 4.2 of the Basic Law is guaranteed unconditionally. Restrictions must therefore be contained in the constitution itself."[132]

The School Board's decision to reject the complainant's application to teach was held contrary to the Basic Law. [133] It was deemed unconstitutional. [134] In practical terms, however, her "success" was tempered by the reasoning that surrounded the state legislative powers over school clothing. Essentially, while the German states (*Länder*) have broad powers over schools, the state's civil service law

125. *Id.* ¶ 26.
126. *Id*.
127. *Id.*
128. *Id.* ¶ 29.
129. *Id.* ¶ 37.
130. *Id.*
131. *Id.*
132. *Id.* ¶ 38.
133. BvR 1436/02, at 1.
134. *Id*.

(*Landesbeamtengesetz*) contained no provision that could reasonably justify a ban on headscarves. This lacuna led to a rapid revision of state laws. By June 2006, eight of the sixteen German states had opened the way for an effective ban on wearing the headscarf in state schools.[135] Some commentators have noted that this was an effective transfer of the final decision from the judiciary to the legislature.[136]

2. The Second Headscarf Decision

The *Second Headscarf Decision* extended the jurisprudence of the *First Headscarf Decision*. In the words of Matthias Mahlmann, "[i]t decided that an abstract ban on headscarves and other visible religious symbols for teachers at a state school is not compatible with the Constitution because it is disproportionate."[137] The Court left open the possibility of a ban in cases where there was a "sufficiently specific danger" to the peace of the school or the neutrality of the state.[138] The Court also noted that such a ban was possible, saying, "over a region or possibly even over an entire Land (state) . . . with regard to interdenominational state schools, [but] only if there is a sufficiently specific danger to the aforementioned legal interests throughout the area to which the prohibition applies."[139] The case also raises serious issues of process, as well as questions about the rights of students as measured against those of teachers.[140]

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135. Some authors have divided this into three models: "exclusive Christian," "strict neutrality," and "open neutrality." *See* Christian Henkes & Sascha Kneip, *Die Plenardebatten um das Kopftuch in den Deutschen Landesparlamenten* [Plenary Debates in the German State Parliments], *in* DER STOFF AUS DEM KONFLIKTE SIND: DEBATTEN UM DAS KOPFTUCH IN DEUTSCHLAND, ÖSTERREICH UND DER SCHWEIZ [THE STUFF OF CONFLICT: HEADSCARF DEBATES IN GERMANY, AUSTRIA AND SWITZERLAND] 249–74 (Sabine Berghahn & Petra Rostock eds., 2015). See also the 2009 Bielefeldt Transcript, *cited in* Stephanie Sinclair, *More Than Just a Piece of Cloth: The German "Headscarf" Debate*, 16 IMPLICIT RELIGION 483, 486 (2013).

136. *See* Seyla Benhabib et al., *The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany and Turkey*, 36 PHIL. & SOC. CRITICISM 451, 460 (2010).

137. Matthias Mahlmann, *Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court's Second Headscarf Decision*, 16 GERMAN L. J. 887, 891-92 (2015).

138. *Second Headscarf Decision*, *supra* note 86, ¶ 80.

139. *Id*.

140. G. Taylor, *Teachers' Religious Headscarves in German Constitutional Law*, 6 OX. J. LAW RELIGION 10, 93 (2017) (arguing, *inter alia*, that "[m]uch more attention needed to be paid to the needs of the pupils in the specific context in which they find themselves: people in a very vulnerable stage of life compelled by law regularly to attend an institution which is crucial for

Seminal to the *Second Headscarf Decision*, the Federal Constitutional Court interpreted the right to religious freedom and conscience as follows:

> In its section 1, Art. 4 GG guarantees the freedom of faith and of conscience, and freedom to profess a religious or ideological belief; in section 2 it guarantees the right to the undisturbed practice of religion. The two sections of Art. 4 GG contain a single fundamental right that is to be understood as all-encompassing (citation omitted). It extends not only to the inner freedom to believe or not to believe—i.e., to have a faith, to keep it secret, to renounce a former faith, and to turn to a new one—but also the outer freedom to profess and disseminate one's faith, to promote one's faith and to proselytise (citation omitted). Therefore, it includes not only acts of worship and the practice and observance of religious customs, but also religious instruction and other forms of expression of religious and ideological life (citation omitted). This also includes the right of individuals to align their entire conduct with the teachings of their faith, and to act in accordance with this conviction, and thus to live a life guided by faith; and this applies to more than just imperative religious doctrines (citation omitted)."[141]

This is a comprehensive definition, and notably includes a right for the religion/person to proselytize, and to align one's "entire conduct with the teachings of their faith." The court continues:

> When assessing what qualifies as an act of practising a religion or an ideological belief in a given case, one must not disregard what conception the religious or ideological communities concerned, and the individual holder of the fundamental right, have of themselves (citation omitted). However, this does not mean that all conduct by a person must be viewed as an expression of freedom of faith in the same way that the person views it subjectively. The authorities may analyse and decide whether it has been sufficiently substantiated, both in terms of its spiritual content and its outer appearance, that the conduct can in fact plausibly be attributed to the scope of application of Art. 4 GG; in other words, that it does in fact have a motivation that is to be

their personal and psychological as well as intellectual development. This is particularly so when we are talking about Muslim girls, who constitute a minority that faces challenges with adapting to its societal surroundings").

141. *Second Headscarf Decision*, *supra* note 86, ¶ 85.

> viewed as religious. However, the state may not judge its citizens' religious convictions, let alone designate them as "right" or "wrong." This is especially the case when divergent views on such points are advanced within a religion (citation omitted).[142]

The court noted that the female Muslim complainants in the case maintained a religious reason for wearing their headwear and concluded they were doing so as an "imperative religious duty, and as a fundamental component of an [Islamic] lifestyle."[143] This was held to be so despite the fact that "the exact content of the rules of female clothing is indeed in dispute among Islamic scholars."[144] The court next held that the prohibition on wearing headscarves was "a serious interference with [the complainants'] fundamental right of freedom of faith and freedom to profess a belief."[145] It also notes that a "headscarf, specifically, is not as such a religious symbol,"[146] and goes on to make a comparison with the Christian cross, which is more inherently representative of Christianity than is the headscarf of Islam. It is useful to quote this section in its entirety:

> A headscarf, specifically, is not as such a religious symbol. It can exert a comparable effect only in combination with other factors (citation omitted) To that extent, for example, it differs from the Christian cross (citation omitted). Even if an Islamic headscarf serves only to fulfil a religious requirement and the wearer does not attribute symbolic character to it, and merely views it as an article of clothing prescribed by her religion, this does not change the fact that, depending on social context, it is widely interpreted as a reference to the wearer's adherence to the Muslim faith. In that sense, it is an article of clothing with religious connotations. If it is understood as an outer indication of religious identity, it has the effect of an expression of a religious conviction without any need for a specific intent to make this known or any additional conduct to reinforce such an effect. The wearer of a headscarf tied in a typical way will usually also be aware of this. Depending on the circumstances of the individual case, this effect may also occur for other forms of coverings for the head and neck.[147]

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142. *Id*. ¶ 86.
143. *Id*. ¶ 88.
144. *Id*. ¶ 89.
145. *Id.* ¶ 90.
146. *Id*. ¶ 94.
147. *Id*.

The unique nature of 'symbolic meaning' for the religious observer is well-highlighted in this passage. Such symbolic meanings are usually assumed to be protected in broad terms in some form of constitutional guarantee in most democracies. In Australia, this turns out to be much more honored in political rhetoric than in law. In the startling assessment of Paul Babie and James Krumrey-Quinn:

> In Australia, citizens may believe that they too enjoy limitations on the ability of government to infringe upon their exercise of religious autonomy or right to display symbols of those connections that matter deeply to them. Such a belief is erroneous. In fact, Australia remains the only western liberal democracy without a constitutional or legislative protection of fundamental rights and freedoms.[148]

We now turn to these issues in more detail. It is convenient to begin with an overview of conscience protection afforded citizens in Australia. Thereafter follows an analysis of the laws surrounding crucifixes and religious clothing.

VI. CONSCIENCE PROTECTION IN AUSTRALIA—SOME COMPARATIVE OBSERVATIONS

According to Christopher Soper's work on pluralism in six democracies,[149] Germany is to be grouped with England as a country that applies an 'establishment' model to church-state relations.[150] Meanwhile, Australia is grouped with the Netherlands as applying a pluralist model, and the United States and France are held up as models of "separation."[151] Australia and the Netherlands are further divided on

148. Paul Babie & James Krumrey-Quinn, *The Protection of Religious Freedom in Australia: A Comparative Assessment of Autonomy and Symbols*, *in* REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 259, 278 (Liora Lazarus et al. eds., 2014). Babie and Krumrey-Quinn do acknowledge, however, a "minimal patchwork of constitutional, legislative and common law provisions differing not only in their applications to the Commonwealth, State and Territory governments in the Australian federation, but also in the scope and strength of protection afforded," at 259.

149. MANSMA & SOPER, *supra* note 24.

150. *Id*. Under Part III: *Models of Establishment*, Chapter 6 is devoted to England and Chapter 7 is devoted to Germany.

151. *Id*. Under Part II: *Models of Pluralism*, Chapter 4 is devoted to the Netherlands and Chapter 5 is devoted to Australia. Under Part I: *Models of Separation*, Chapter 2 is devoted to the United States and chapter 3 is devoted to France.

the basis that the Netherlands brand of pluralism is "principled" and that of Australia is "pragmatic."[152]

As previously stated, Australia has more limited case law on the question of religious freedom, and likewise, on the more focused topic of conscience protection. Major cases decided at the highest level of consideration, the High Court of Australia, are rare. This is probably in keeping with the politically pragmatic approach to such issues,[153] as well as a less active resort to rights protection via litigation,[154] and the already narrow approach to section 116 of the Australian Constitution.

Section 116 provides as follows:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[155]

The Ruddock Review notes the following limitations on this section:

> First, it is a limitation on the legislative power of the Commonwealth only. The States are not limited by its terms. Whether the Territories are restricted by section 116 has been considered by the High Court on a number of occasions but the position remains unclear. Second, section 116 is a limitation on Commonwealth legislative power; it does not create a 'right' for individuals to hold or manifest their faith. Nor does it create a positive obligation on the Commonwealth to do anything to ensure freedom of religion.[156]

These limitations have been narrowly interpreted such that "[a] law will only fall foul of the 'free exercise' limb of section 116, for example, if its purpose is to restrict religious practice, even if its effect is to burden

152. Soper asserts, "the most important principles in church-state relations in Australia are pragmatism and tolerance." He goes on to argue that this had changed over time, stating, "Australia has vacillated among four different church-state models in its two-hundred-year history: establishment, plural establishment, liberal separationism, and pragmatic pluralism." *Id.* at 121.

153. *Id*.

154. The fewer constitutional rights available to litigate may mean few lawsuits but suits filed does not necessarily reflect the level of concern in the community, especially when the rights of minorities are in issue.

155. *Australian Constitution* s 116.

156. Ruddock Review, *supra* note 1, ¶ 1.90.

disproportionately the practices of a particular religion."[157] Only one Australian State Constitution–that of Tasmania–contains constitutional protection for religion and conscience,[158] and this provision has also been narrowly construed.[159] There is little else at the federal,[160] and little at the constitutional level of any Australian State or Territory, that is protective of conscience or religion.[161] There are, however, a large number of lower-level (i.e. ordinary) statutes which deal, in a fragmentary fashion, with vilification, discrimination, and in some

157. *Id*. at 1.91.

158. *See* section 46 of the *Constitution Act 1934* (Tasmania) which provides: "(1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office."

159. *Id*. *See* Ruddock Review, *supra* note 1, ¶ 1.94-95 (noting that section 46 of the *Constitutional Act 1934* (Tasmania) has not been subject of judicial consideration and that recent comments of Tracey J. in the case of *Corneloup v Launceston City Council* [2016] FCA 974 suggest it section 46 may be of limited scope and "does not, in terms, confer any personal rights or freedoms on citizens." *Corneloup v Launceston City Council* [2016] FCA 974, 38.

160. *Defence Act 1903* s 61A provides that the following persons are exempt from service in the Defence Force in time of war:

…

(d) ministers of religion;

(e) members of a religious order who devote the whole of their time to the duties of the order;

(f) persons who are students at a college maintained solely for training persons to become members of a religious order;

(g) persons who are students at a theological college as defined by the regulations or are theological students as prescribed;

(h) persons whose conscientious beliefs do not allow them to participate in war or warlike operations;

(i) persons whose conscientious beliefs do not allow them to participate in a particular war or particular warlike operations; and

(1A) Persons whose conscientious beliefs do not allow them to engage in duties of a combatant nature (either generally or during a particular war or particular warlike operations) are not exempt from liability to serve in the Defense Force in time of war but are exempt from such duties while members of the Defense Force as long as those beliefs continue.

Defence Act 1903 s 61A, *available at* http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/da190356/s61a.html [https://perma.cc/2EUJ-JZD3].

161. *See, e.g.*, *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic) as discussed in EVANS, *supra* note 26, at 98ff.

cases the education of children.[162] These statutes lie beyond the scope of this study.[163]

A. Crucifix Laws in Australia

Religious objects (e.g., a crucifix) are regularly placed in classrooms in religious schools in Australia.[164] There is usually no such placement in government (public) schools, and to the author's knowledge, there are no decided cases on the issue.

In comparing the situation in Australia with that in Italy (as decided in the *Lautsi* decision),[165] Babie and Krumrey-Quinn have argued and concluded that "[a]s in *Lautsi*, crucifixes would also be left to hang in Australian public schools."[166] As has been demonstrated, the situation in Germany is quite different and gives highlight to a number of comparative points.

First, the German analysis relies on constitutionalized freedom of religion, for which there is no equivalent in Australia or at least none that has been interpreted in the same way as Germany's. Second, the Australian courts may consider the hung crucifix as a religious custom (observance), thus falling directly within the scope of Section 116 of the Australian Constitution. This, however, is not irrefutably certain since, as Babie and Krumrey-Quinn also note:

> the mere presence of the students in the classroom is unlikely to constitute a religious observance carried out by the students as

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162. *See, e.g.*, *Education Act 1990* (NSW) s 32 ("Section 32 Special religious education: (1) In every government school, time is to be allowed for the religious education of children of any religious persuasion, but the total number of hours so allowed in a year is not to exceed, for each child, the number of school weeks in the year"). According to s 32(2) special religious education "is to be given by a member of the clergy or other religious teacher of that persuasion authorised by the religious body to which the member of the clergy or other religious teacher belongs." *Education Act 1990* (NSW) s 32, *available at* http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/ea1990104/s32.html [https://perma.cc/9J62-QKUT].

163. *See* the comprehensive lists in Appendix C of the Ruddock Review, *supra* note 1, at 128-29. *See generally* chapters 6 and 7 of EVANS, *supra* note 26.

164. *See, e.g.*, Bishops of N.S.W. & the Austl. Cap. Terr., *Catholic Schools at a Crossroads: Pastoral Letter of the Bishops of NSW and the ACT,* CATHOLIC SCHOOLS NSW 10 (Aug. 8, 2007), https://www.csnsw.catholic.edu.au/wp-content/uploads/2018/03/catholic-schools-at-a-crossroads.pdf [https://perma.cc/6TWY-B9M8] (affirming that Catholic schools "are places cultivating a Catholic imagination, where prayer and liturgy are supported by a Catholic visual culture, including crucifixes and pictures of Our Lady and the saints").

165. Lautsi v. Italy, App. No. 30814/06, 2011-III Eur. Ct. H.R. 18, 63 (2011).

166. Babie & Krumrey-Quinn, *supra* note 148, at 272.

> there is no custom associated with this action. That there is, for example, no required veneration of the symbol by the members of the class upon entrance to the classroom, leaves application of the clause ambiguous.[167]

In Germany, the (successful) arguments about "learning under the cross" are relevant here. Australian courtrooms do not contain crucifixes,[168] although witnesses typically swear on a Bible, and oaths of affirmation are also legally available.[169] Some aspects of the Bible oath are regulated in a positive and negative way (e.g., holding in the hand is required—if feasible—but kissing is not required).[170] This includes the form of words used,[171] and the placement of the swearing hand,[172] amongst other things.

There has been a recent call by a Magistrate in the State of Victoria for Bibles to be removed from all courtrooms in Victoria on the basis that they are "relics from another time and like the gavel, the wig, and the quill and ink, they belong in a museum, not a modern court."[173] Given Bibles may be, and often are used by witnesses in oath-taking, it is not clear exactly what was being requested and the suggestion that they be entirely removed remains a curious one.

Because the placing of crucifixes on walls of Australian public schools has never been a political issue, and those in religious schools

167. *Id*.

168. The author has not been able to uncover any examples of this, although the written and pictorial record remains open.

169. *See, e.g.*, in the state of NSW, *Oaths Act 1900 No 20* (NSW) s 11A.

170. *See id*. Section 11A(1) provides, "Any person taking any oath on the Bible or on the New Testament, or the Old Testament, for any purpose whatsoever, whether in judicial proceedings or otherwise, shall, if physically capable of doing so, hold a copy of the Bible or Testament in his or her hand, but it shall not be necessary for the person to kiss such copy by way of assent." *Id*.

171. *See id*. Section 11A(2) provides, "The officer administering the oath may repeat the appropriate form of adjuration, and the person taking the oath shall thereupon, while holding in his or her hand a copy of the Bible, New Testament, or Old Testament, indicate his or her assent to the oath so administered by uttering the words 'So help me, God[.]'" *Id.* Section 11A(3) provides, "The person taking the oath may, while holding in his or her hand a copy of the Bible, New Testament, or Old Testament, repeat the words of the oath as prescribed or allowed by law." *Id.*

172. *See id*. Section 11A(5) provides, "Provided that any witness in any judicial proceeding may swear with up-lifted hand in the following manner and form: The witness with uplifted hand says—I swear by Almighty God as I shall answer to God at the Great Day of Judgment that I will speak the truth, the whole truth, and nothing but the truth." *Id.*

173. *See* Genevieve Alison, *Call to Cut Bibles Out of Court*, DAILY TELEGRAPH, Apr. 23, 2019, at 9.

are placed regularly and without comment, there would appear to be no case law that may offer a ready comparison with the German saga that has unfolded there in recent decades. Religious clothing in the Australian courtroom, however, is increasingly an issue and has been prominent in recent cases, to which we now turn.

B. Religious Clothing in Australia

Cases on wearing religious clothing in Australia, including schools and courtrooms, are rare. Several cases have been decided based on one-off regulations in schools as well as courtrooms.[174] There has also been some confected controversy over the wearing of the Burka in the Federal Parliament,[175] but this was resolved in favor of a "no dress code" approach.[176]

In the school context, David Furse-Roberts has argued that any such regulation should take careful note of Australia's common law traditions as well as international obligations, but that the most critical factor is the avoidance of "a 'one-size-fits-all' approach to both government and non-governments schools [which] could actually militate against religious freedom, particularly in circumstances where faith-based schools wish to enact their own uniform policies pursuant to their religious convictions."[177] An example of the legal problems raised by a one-size-fits-all approach occurred in a 2017 case from the

174. *See Arora v. Melton Christian College* (Human Rights) [2017] VCAT 1507. *See also Elzahed v. State of New South Wales* [2018] NSWCA 103 (18 May 2018), both discussed below.

175. *See* Avi Selk, *An Australian Senator Wore a Burqa in Parliament—Then Called for a Ban on Muslim Immigrants*, WASH. POST: WORLDVIEWS (Aug. 17, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/08/17/an-australian-senator-wore-a-burqa-in-parliament-then-called-for-a-ban-on-muslim-immigrants/?utm_term=.90d95efa26dd [https://perma.cc/U88Q-M4W8].

176. *See Guides to Senate Procedure, No. 23 - Provisions governing the conduct of senators in debate*, PARLIAMENT OF AUSTL., https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Brief_Guides_to_Senate_Procedure/No_23 [https://perma.cc/4MLJ-QDR4] (last visited Mar. 27, 2019) ("15. Dress. There are no formal dress rules in the standing orders and the matter of dress is left to the judgment of senators, subject to any ruling by the President. Advisers are also expected to maintain appropriate standards of dress, but a resolution of the Senate indicates that advisers and media representatives are no longer required to wear coats").

177. *See* David Furse-Roberts, *Religious Freedom in the Playground: Public Policy and the Wearing of Religious Attire in Australian Schools*, AUSTRALIAN POL'Y & HIST. (Nov. 12, 2017), http://aph.org.au/religious-freedom-in-the-playground-public-policy-and-the-wearing-of-religious-attire-in-australian-schools/ [https://perma.cc/2J6L-W8HB] (last visited Apr. 24, 2019).

state of Victoria, which concerned the wearing of a patka[178] by a Sikh boy.[179] A Christian school banned the clothing on the basis of a declared uniform policy, which sought to promote, amongst other things, "uniformity, inclusivity, and protection from inadvertent discrimination."[180] This was held to be a breach of the state's Equal Opportunity Act (2010).[181] In commenting on the case, Barker has noted the similarity with the notable UK House of Lords decision of *Begum, R (on the application of) v. Denbigh High School* in 2006,[182] and "[t]he problem with neutrality is that it tends only to in fact be neutral for the majority. It is only those from minority groups that are asked to compromise. Equality does not always equal equity."[183]

At least one state government, New South Wales, ("NSW") has indicated that students have positive rights to wear religious clothing and "ruled that students could not be suspended for doing so."[184] The fact that most Australian schools already regulate clothing in the form of an official 'school uniform' may weigh against any further legislation in this area.[185]

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178. *See generally* Renae Barker, *School Uniform Policies Need to Accommodate Students' Cultural Practices*, Topics, SBS NEWS: VOICES (July 27, 2017), https://www.sbs.com.au/topics/life/culture/article/2017/07/27/school-uniform-policies-need-accommodate-students-cultural-practices [https://perma.cc/TJ5B-ZBTM] ("The patka is a smaller version of the turban, or dastar, worn by most Sikh men. It is an important article of faith. It therefore forms an important part of a Sikh child's identity. It is not simply a piece of clothing").

179. *Arora v Melton Christian College* [2017] VCAT 1507 (Austl.).

180. *Id.* at 59, 66, 84, 86, 97.

181. Section 38(1), of the *Equal Opportunity Act 2010* (Vic) (the "EO Act") provides, "An educational authority must not discriminate against a person—(a) in deciding who should be admitted as a student; or (b) by refusing, or failing to accept, the person's application for admission as a student; or (c) in the terms on which the authority admits the person as a student."

182. *Begum, R (on the application of) v Denbigh High School* [2006] UKHL 15 (appeal taken from EWCA Civ) (UK) (concerning alternative forms of dress available to female students in a Muslim school).

183. Barker, *supra* note 178; s*ee* the suggestions of Benson, *supra* note 24, at 11 (referring to the need to focus on "unjust discrimination" not just "discrimination" together with "a presumption in favour of diversity").

184. David Furse-Roberts, *Religious Freedom in the Playground: Public Policy and the Wearing of Religious Attire in Australian Schools*, APH ESSAYS (NOV. 12, 2017), http://aph.org.au/religious-freedom-in-the-playground-public-policy-and-the-wearing-of-religious-attire-in-australian-schools/ [https://perma.cc/MZE7-Y7K9].

185. This regulation derives its authority from the relevant State education department or–in the case of a private school–the school itself. Consequences for failure to wear the required uniform vary. For a discussion of the recent history of uniforms, see William McKeith, *School uniforms: who needs them?*, SYDNEY MORNING HERALD (Sept. 13, 2017),

In the area of general law enforcement, at least two Australian states have made changes to the laws of personal identification (mainly for the purposes of police patrols). Thus, in 2011, NSW introduced changes to the Law Enforcement (Powers and Responsibilities) Act 2002, which made it easier for police to identify persons in, for example, routine traffic stops, or for the purpose of driver's license production during a random breath test for alcohol.[186] In a lengthy report given in August 2013 by the NSW Ombudsman,[187] the changes were seen as mostly successful but with the recommendation that, in deference to cultural sensitivities, such identification would run more smoothly if female police officers were available for such activities.[188]

Identification laws raise other issues, one of which is worth pursuing briefly here. The NSW law discussed above also stipulated that failing to comply with a request for identification carried possible

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https://www.smh.com.au/opinion/the-case-for-dropping-school-uniforms-altogether-20170913-gygmt8.html [https://perma.cc/PVC4-FAMF].

186. *See Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 3 div 4 (Austl.) [hereinafter LEPRA].

187. A position authorized by Statute, the NSW Ombudsman describes his role as "to safeguard the community in their dealings with government and non-government agencies that fall within the Ombudsman's jurisdiction. This is done in many ways—by responding to enquiries, investigating complaints, initiating investigations, monitoring compliance with the law, auditing administrative conduct, monitoring how organizations handle issues that have been notified or referred to the office, and promoting good administration, transparency, and responsive complaint handling. The Ombudsman is independent of the government agencies and persons it deals with and investigates." Michael Barnes, *Ombudsman's Message*, OMBUDSMAN NEW SOUTH WALES, https://www.ombo.nsw.gov.au/what-we-do/about-us/ombudsmans-message [https://perma.cc/F3LN-TZTZ] (last visited Apr. 27, 2019).

188. Bruce Barbour & New South Wales Office of the Ombudsman, *Review of Division 4, Part 3, of the Law Enforcement (Powers and Responsibilities) Act 2002: face coverings and identification,* OBMUDSMAN NEW SOUTH WALES (Aug. 2013), http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0014/11372/Review-of-Divison-4,-Part-3-of-the-Law-Enforcement-Powers-and-Responsbilities-Act-2002-face-coverings-and-identification.pdf [https://perma.cc/D9G2-5YCA]. In summary, the Ombudsman opined, "the recommendations we have made centre on making it a lawful requirement that a female officer be made available, only where requested and where practicable, to look at the face of any woman wearing a face covering for religious reasons. We also recommend that police be given further guidance to help them handle situations where they need to identify a person whose face is covered. In particular, practical information about how privacy can be afforded in the situations where the law is currently most commonly used—identifying female drivers in traffic matters—would be most useful for traffic and general duties officers who patrol in key locations in metropolitan Sydney. Focusing on police officers is not enough, however, particularly as individual officers may only need to use the powers occasionally. It is also important that women who wear a niqab and the wider Muslim community have a greater understanding about the new law." *Id.* at iii.

punishment, but this is itself fraught with the same identification problem. In the words of the NSW Ombudsman:

> [I]f the officer decides to penalise the person for committing the offence of refusing to comply with the requirement, the officer will then be faced with a somewhat circular dilemma, as they need to issue an infringement or court attendance notice but cannot confirm to whom they should address the notice. In practice, if the person has given them a driver licence, the officer could address the notice to the licence holder. However, this does carry the possibility that the penalty could be successfully challenged, on the basis that the person who committed the offence was not the licence holder . . . Because of this, the only option at this point may be to arrest the person, even though he or she may not have committed any other offence, or the other offence is minor (for example, to do with a traffic matter).[189]

This issue would rarely arise. It does, however, show the complexities that can arise in identification scenarios where cultural expertise is deficient, and both sides are struggling to understand one another. In the end, the law must address such problems as best it can.[190]

In the employment context, there is generally no specific law at federal or state levels dealing with religious clothing in the workplace.[191] However, a variegated web of federal and state laws and regulations covers a range of potential conscience issues.[192] There have

189. *Id*. at 33.

190. For example, by additional warnings (although this may add even more impractical complication), education of the religious rights of those wearing religious clothing, and cultural education of law enforcement. The Ombudsman's Report also discusses the question of perceived differences between a police officer viewing the picture of a face on a driver's license, and viewing the face itself; *see id*. at 37.

191. There is, however, a general provision in the laws of the state of South Australia which allows for an exemption to non-discrimination laws in circumstances where reasonable face recognition is required. "This Part does not apply to discrimination on the ground of religious appearance or dress if the discrimination arises as a consequence of a person refusing to reveal his or her face in circumstances in which the person has been requested to do so for the purpose of verifying the identity of the person, and the request was reasonable in the circumstances." *South Australia Equal Opportunity Act 1984* (SA) s 85ZN (Austl.), *available at* https://www.legislation.sa.gov.au/LZ/C/A/EQUAL%20OPPORTUNITY%20ACT%201984/CURRENT/1984.95.AUTH.PDF [https://perma.cc/5XAX-GXWY] (last visited Apr. 27, 2019).

192. *See* Joan Squelch, *Religious Symbols and Clothing in the Workplace: Balancing the Respective Rights of Employees and Employers*, 20 MURDOCH U. L. REV. 38–57 (2013).

been two superior court cases, albeit none at the highest level,[193] dealing with religious clothing worn in an Australian courtroom, to which we now turn.[194]

1. The Elzahed Case—The Case of the Plaintiff/Witness

The highest-level reported case dealing with religious headscarves in Australia is the New South Wales Court of Appeal decision in *Elzahed v. State of New South Wales*.[195] Despite its narrow focus, the decision is an interesting one and worth detailed consideration.

Moutia Elzahed ("Elzahed)" was the subject of a police raid during 2014, in which she alleged assault and battery by the police.[196] This allegation resulted in a trial, in which Elzahed would only give evidence "with her entire face, other than her eyes, covered by a veil known as a niqab."[197] The decision on whether to permit evidence to be given in such a way was entirely a matter for the judge and was governed by the laws relating to judicial discretion under the well-known case of *House v. The King*.[198] The district court judge took the arguments of both sides into account and "accepted the need to take into account the appellant's religious beliefs," [and] stated, "[o]n the other hand, I must take into account whether I would be impeded in my ability to fully assess the reliability and credibility of the evidence . . .

193. The highest appellate court in Australia is the High Court of Australia. *Australian Constitution* s 71.

194. While not specifically religious in nature, the case of *Ellenbogen v. Cullen* is worth noting in the context of courtroom clothing (where the court held that wearing a headband, which bore the colors of the Aboriginal flag, does not amount to contempt of court). *Ellenbogen v Cullen* (Unreported, Supreme Court of New South Wales, Smart J, 30 July 1990) (Austl.), available at http://www.supremecourt.nt.gov.au/doc/judgements/2002/0/20020206NTSC10.htm [https://perma.cc/HKM9-X3Z5].

195. *Elzahed v State of New South Wales* [2018] NSWCA 103 (Austl.), *available at* https://www.caselaw.nsw.gov.au/decision/5afb85c7e4b074a7c6e1f411 [https://perma.cc/PR5G-92ZC] [hereinafter *Elzahed Appeal*]. This case was an appeal from the decision of Balla DCJ in *Moutia Elzahed & Ors v Commonwealth of Australia and State of New South Wales* [2016] NSWSC 327; *see also* the decision of *Moutia Elzahed & Ors v Commonwealth of Australia and State of NSW* [2017] NSWDC 160 (dealing with the question of court costs).

196. *Elzahed Appeal*, NSWCA 103 ¶ 10.

197. *Id.* ¶ 1.

198. *House v The King* (1936) 55 CLR 499; [1936] HCA 40 (Austl.).

if I am not afforded the opportunity of being able to see her face when she gives evidence."[199]

The appeal court upheld the decision of the trial judge to refuse the giving of evidence wearing a full veil.[200] In the course of the judgment, the court of appeal discussed an *Explanatory Note on the Judicial Process and Participation of Muslims*,[201] which stated that "it is not contrary to Sharia law for a woman to uncover her face when giving evidence in court."[202]

Cases from other countries, in which the wearing of a niqab was considered and treated "a little differently," were cited but not considered persuasive by NSW the appeals court.[203] While Australia's highest court had not considered this specific issue, it had issued clear statements about "witness demeanor" and in a 2003 decision had noted:

> [I]n recent years judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of demeanor. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the "established principles about witness credibility"; but it tends to reduce the occasions where those principles are seen as critical.[204]

The "established principles about witness credibility" included, by implication, the ability to see the witness' face free of clothing in the interests of trial that is fair to both parties. The Court of Appeal also made clear that in deciding to uphold the trial judge's ruling on giving evidence with an uncovered face, they were not making a general ruling with "wider implications for a group of women in Australia of Islamic

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199. *Elzahed Appeal*, NSWCA 103, ¶ 32.

200. *Id.* ¶ 70.

201. Australian National Imams Council, *Explanatory Note on the Judicial Process and Participation of Muslims*, DISPUTES CENTRE (Dec. 12, 2017), https://disputescentre.com.au/wp-content/uploads/2017/12/PUBLIC-STATEMENT-Explanatory-Note-on-the-Judicial-Process-and-Participation-of-Muslims.pdf [https://perma.cc/9MNY-65ZA].

202. *See Elzahed Appeal*, NSWCA 103.

203. *Id.* ¶ 44. The cited cases were: *Police v. Razamjoo* [2005] DCR 408 (N.Z.); *R v. NS* [2012] 3 SCR 726 (Can.) and *The Queen v. D (R)* [2013] EW Misc 13 (CC) (Eng.).

204. *Elzahed Appeal*, NSWCA 103, ¶ 46 (citing the High Court of Australia (HCA) in *Fox v. Percy* (2003) 214 CLR 118).

faith."[205] The court also quoted with approval a recent article on this topic, which stated, "while . . . there are circumstances where a woman may appear in court with her face covered, in all of the cases considered in this article the witness has ultimately been ordered to remove her veil in order to give evidence."[206] Scholarly work covering five common law jurisdictions has confirmed this now appears to be the general approach.[207] This is borne out somewhat in the next case.

2. The Chaarani Case—The Case of the Courtroom Spectator

The second case concerning courtroom clothing, *The Queen v. Chaarani*,[208] was heard before a single judge in the Supreme Court of Victoria. That case concerned the trial of the husband of Aisha Al Qattan (hereafter "Ms. Al Qattan") on charges related to the preparation of a terrorist attack. [209] Ms. Al Qattan wished to be present in the courtroom's public gallery to support her husband and was required to remove her religious clothing, a nikab,[210] for that purpose. The written judgment records nine arguments in favor of wearing the nikab in the gallery, all of which were rejected. [211] The first argument centered upon religious freedom asserting, "Ms. Al Qattan has a strong religious belief that she should wear the nikab in public. It is a 'fundamental way in which she observes her faith.'"[212] While conceding that Ms. Al Qattan's beliefs were religious and were strongly held, the judge was persuaded that security concerns, including the possibility that a spectator might do (rare) or say (less rare) inappropriate things in the courtroom, should prevail.[213] The possibility was also canvassed that

205. *Id.* ¶ 63.

206. *Id.* ¶ 65 citing Renae Barker, *Burqas and Niqabs in the Courtroom: Finding Practical Solutions*, 91 AUSTRALIAN L. J. 225, 226 (2017).

207. Barker, *supra* note 178, at 40 (on religious apparel and appearance in court in Australia). *See* EVANS, *supra* note 26, at 202–08.

208. *The Queen v. Chaarani (Ruling 1)* [2018] VSC 387 (Austl.), *available at* http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2018/387.html?context=1;query=chaarani;mask_path=au/cases/vic/VSC [https://perma.cc/RS9Z-DDPW] (last visited Apr. 27, 2019).

209. *Id.* ¶ 1.

210. There was some discussion of the correct spelling of this term. The Judge commented on his use of the spelling as 'nikab' rather than 'niqab' as follows: "'Nikab' is sometimes spelt 'niqab.' I have taken the former spelling from the *Explanatory Note on the Judicial Process and Participation of Muslims.*" *Elzahed Appeal*, NSWCA 103, ¶ 44.

211. *Id.* ¶ 27.

212. *Chaarani*, VSC 387, ¶ 3.

213. *Id.*

more than one person could wear such clothing and that security officials would thereby find it harder to identify an individual in the gallery with multiple spectators, and to deter any possible future offense. His honor explained

> It is not good court management, in my view, to adopt a reactive approach, that is, to allow spectators to have their faces covered but eject them, and refuse them re-entry, if they are detected misbehaving. First, prevention is better than cure. Second, it is naïve to think that misbehavior will always be immediately detected by court security staff. A person to whom something improper is said or done may be too stunned or frightened to raise the alarm immediately, enabling the culprit to get away. Or there may not be sufficient court security staff on hand. Court security resources are limited and one cannot always predict which cases will generate problems in the public gallery.[214]

The court also made several unambiguous references to religious freedom. These included the following: "Open justice, religious freedom and the right to participate in public life are fundamental values that must be accorded full respect in our society and in this court. But no one could sensibly claim that these principles and rights brook no limitations."[215]

The court also referred to the state *Charter of Human Rights and Responsibilities Act 2006* (the "Charter") which plainly recognizes the rights of persons[216] to "religious freedom,"[217] and to "participation in public life."[218] Even though no evidence was put forward by the

214. *Id.* ¶ 23.

215. *Id.* ¶ 25.

216. "Person" is defined as "a human being." See *Charter of Human Rights and Responsibilities Act 2006* (Vic.) s 3 (Austl.).

217. *Id.* s 14 (Freedom of thought, conscience, religion and belief: (1) Every person has the right to freedom of thought, conscience, religion and belief, including (a) the freedom to have or to adopt a religion or belief of his or her choice; and (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private. (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching).

218. *Id.* s 18 (Taking part in public life: (1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives. (2) Every eligible person has the right, and is to have the opportunity, without discrimination—(a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and (b) to have access, on general terms of equality, to the Victorian public service and public office).

lawyers for Ms. Al Qattan as to the religious motivations for her desire to wear the nikab,[219] the court was prepared to assume this was the case. The judge declared:

> I have assumed for the purpose of this ruling that Ms. Al Qattan wants to wear the nikab in court for religious reasons, and that her religious beliefs are strongly held. In other words, I accept that the right of religious freedom is engaged. I also accept that it is a very important right, which may go to the core of a person's identity. Likewise, I accept that the right to participate in public life is engaged and that it is an important right.[220]

The law of courtroom behavior in Australia prohibits wearing anything that might indicate disrespect or offense towards the justice system,[221] so the ruling was explicit in noting that this was not a factor in the outcome. The Judge confirmed this, asserting, "I do not consider the wearing of nikabs in court for religious reasons to be disrespectful, offensive or threatening, although, as I will explain shortly, I do consider it to be an impediment to the deterrence and punishment of misbehavior by spectators in the public gallery."[222] The desire to wear religious dress in court should, the court noted, be allowed "as much as possible" but not without limit:

> Australia is obviously a multicultural society and I agree that religious dress should be accommodated as much as possible, but the right of religious freedom and the right to participate in public life are not absolutes. As s[ection] 7 of the Charter recognizes, these rights may be subject to limitations which can be "demonstrably justified in a free and democratic society based on human dignity, equality and freedom.[223]

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219. *Chaarani*, VSC 387, ¶ 5.

220. *Id*.

221. *See*, *e.g.*, *Court Etiquette,* HIGH COURT OF AUSTRALIA, http://www.hcourt.gov.au/about/court-etiquette [https://perma.cc/62CZ-M6BG] (last visited Apr. 25, 2019) (stating that "inappropriate clothing may not be worn" You should be adequately and neatly dressed, including footwear").

222. *Chaarani*, VSC 387, ¶ 6.

223. *Id.* ¶ 18; *Charter of Human Rights and Responsibilities Act 2006* (Vic.) s 7(2) (Austl.) ("A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—(a)the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve).

The question of modesty in appearance was also raised. The court quoted the following from an Explanatory Note issued by the Australian National Imams Council ("ANIC"):

> Muslim women commonly wear a headscarf referred to as a Hijab to cover their head and hair. On fewer occasions, women may wear a Burka or Nikab, which also covers their face. The Hijab and Burka or Nikab *are seen as a sign of modesty*, and a symbol of religious faith. [Italics added by the court].[224]

The court responded in the following terms:

> A requirement that spectators have their faces uncovered is not to force anyone to act immodestly. First, the exposure of one's face in a courtroom cannot reasonably be viewed as an immodest act: subjective views to the contrary cannot rule the day, or the management of a courtroom. Second, if someone feels strongly that it would be improper for them to uncover their face in court, they can choose not to attend. If that is Ms. Al Qattan's choice, arrangements will be made for live streaming of the proceedings to a remote facility within the court building so that she can still view the trial.[225]

It is not known whether the opportunity that Ms. Al Qattan might view the proceedings from a remote location was taken up. The Australian case of Elzahed was also cited as supporting Ms. Al Qattan's argument in favor of wearing the nikab, as were three foreign-jurisdiction cases: *Police v. Razamjoo* (New Zealand),[226] *R v. D* (England),[227] and *NS v. The Queen* (Canada).[228] The submission was that all of these cases supported wearing the nikab in court in some circumstances and so should be extended to wearing them in all circumstances.

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224. Australian National Imams Council, *supra* note 202; *see Court Etiquette, supra* note 222. Police v. Razamjoo, [2005] D.C.R. 408, 441.

225. *Chaarani*, VSC 387, ¶ 24

226. *Police v. Razamjoo* [2005] DCR 408, 441. For a valuable discussion of the case and its surrounding issues, see Rex J. Ahdar, *Religious Liberty in a Temperate Zone: A Report from New Zealand*, 21 EMORY INT'L L. REV. 205, 225-227 (2007).

227. *R v. D(R)* [2013] UKSC (unreported, Crown Court at Blackfriars, Murphy J), Judge Peter Murphy, 16 September 2013), *available at* https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/The+Queen+-v-+D+(R).pdf [https://perma.cc/YD2M-TUTM].

228. *NS v. The Queen* [2012] 3 S.C.R. 726; [2012] SCC 72.

In *Razamjoo*, two witnesses for the prosecution wanted to wear the nikab but were ultimately ordered to remove them while giving evidence.[229] They were, however, allowed to give evidence from behind a screen thus limiting their exposure to women court officials, the judge, and counsel.[230] In *NS v. The Queen*, the Supreme Court of Canada affirmed a lower court ruling requiring that a nikab be removed while evidence was given, but refused to make this an absolute rule.[231] In *R v. D*, a person charged with intimidating a witness requested to wear a nikab during their trial.[232] This request was granted except for the times when the accused was giving evidence.[233] While finding these cases somewhat persuasive, Beale J distinguished them because:

> these cases suggest that witnesses may wear a nikab if they are not giving contested evidence and that an accused, where identity is not in issue, may wear a nikab except when testifying. If participants in court proceedings may wear nikabs in certain circumstances, then it follows, so the argument goes, that spectators in the public gallery may do so. But there is at least one point of distinction. An accused is compelled to be present in court and, more often than not, witnesses for the prosecution are subpoenaed to attend court. Ms. Al Qattan is under no legal compulsion to attend court.[234]

The case of *R v. Chaarani* has been criticized as disappointing for those desiring to exercise their right to religious freedom in the State of Victoria.[235] Despite this criticism, the issue of court security, the

229. Police v. Razamjoo, [2005] D.C.R. 408

230. *Id*.

231. In Justice Beale's summary, he noted, "McLachlin CJ, Deschamps, Fish and Cromwell JJ [of the Supreme Court of Canada] dismissed the complainant's appeal but indicated that, what they called an extreme approach—never allowing a witness to testify in a nikab or always permitting it—was unsustainable and that it may be permissible for a witness to testify in a nikab if their evidence is uncontested. Le Bel and Rothstein JJ, who agreed in the result, preferred a clear rule that nikabs not be worn by witnesses at any stage of a criminal trial." *Chaarani*, VSC 387, ¶ 14.

232. R v. D(R) [2013] UKSC (unreported, Crown Court at Blackfriars, Murphy J).

233. *Id*.

234. The Queen v Chaarani (Ruling 1) [2018] VSC 387 (16 July 2018).

235. Sarah Hort, *Victorian Supreme Court Finds Charter Does Not Protect Right to Wear Nikab in Court*, HUMAN RIGHTS LAW CENTRE (July 16, 2018), https://www.hrlc.org.au/human-rights-case-summaries/2018/12/17/victorian-supreme-court-finds-charter-does-not-protect-right-to-wear-nikab-in-court [https://perma.cc/E8J8-ZVBL].

possibility of a mistrial,[236] and the proper ordering and regulation of witnesses seem to be entirely legitimate reasons for the limitation imposed in this case.[237] The individual judge has power over the courtroom, and this extends, on the whole, not only to members of the public and the accused but also to the lawyers and other officials.[238]

3. Lessons from Elzahed and Chaarani

These two cases (*Elzahed v. NSW* and *R v. Chaarani*) show Australian superior courts grappling with questions of evidence law, courtroom demeanor, and to some degree, conscience or religious-based desires to dress in a certain way while participating in the court process. In neither case is the main protagonist a simple witness. In Elzahed, they are a plaintiff/witness, and in Chaarani, they are a mere courtroom spectator, albeit one tied closely to the defendant.[239]

It would be a mistake to draw too many parallels between these cases and the major German constitutional cases already discussed. They are different in many significant ways: the courtroom is not the schoolroom, and the plaintiff/witness problems bear little resemblance to the teacher (or student) seeking to wear religious dress in the classroom or school, while in the employ of the government.

Thus, it may be reasonably argued that while the Australian cases may be of mild interest to a German lawyer, and the German cases likewise for an Australian (or common) lawyer, they are vastly different and not comparable in any meaningful way, save for the fact that they involve the legal permission to wear (or not wear) female

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236. The judge noted, "In some cases, things said or done by spectators may necessitate the discharge of a jury, which may cause great distress to participants in the trial, not to mention the cost to the community." *Chaarani*, VSC 387, ¶ 21.

237. "Deterrence, identification and proof are all served by a requirement that spectators in the public gallery have their faces uncovered. The efficacy of an order for witnesses out of court is also facilitated by such a requirement." *Id.* ¶ 19. The court provided a footnote explanation to this reasoning in the following terms: "To preserve the integrity of the court process, it is commonplace for witnesses to be ordered to remain out of court until they have given their evidence. But if spectators can wear face coverings in court, a witness may be able to circumvent such an order." *Id.* ¶ 19 n.10.

238. *But see,* for example, the Australian High Court case of *MacGroarty v. Clauson* [1989] HCA 34, holding that a charge of contempt against a barrister was not sufficiently delineated by the judge in accordance with the relevant section of the District Courts Act (1967) (Qld), and so the conviction was overturned.

239. *See generally Moutia Elzahed & Anors v Commonwealth of Australia and State of NSW* [2016] NSWDC 353. *See generally Queen v. Chaarani* [2018] VSC 387.

headwear in both fact scenarios. Thus both engage primary human rights relating to religion. Moreover, the German cases concern headwear that still shows the full face whereas both Australian cases concern clothing that obscures the face almost entirely. There is one serious caveat to the above lessons, and this relates to the lack of comprehensive religious freedom laws in Australia discussed above. For as long as there is no such Australian guarantee of this fundamental right at a constitutional level, the Australian approach will remain piecemeal and potentially incoherent.

VII. CONCLUSION

As Denise Meyerson has noted, "the formal protections afforded religious freedom under Australian law are relatively weak—particularly when compared to many other liberal democracies."[240] By contrast, Germany has constitutionalized protections for religion and conscience, which have been litigated seriously and at length over many decades since the end of World War II and most recently in the crucifix and headscarf cases. The recent Australian court cases dealing with these issues are grounded in the law of process, evidence, and courtroom demeanor and are bubbling up toward an as yet non-existent all-encompassing set of principles, upon which coherent judicial norms for freedom of conscience at a constitutional - or at least a national - level can be based. These principles will not appear out of thin air but must be deliberated and decided in the light of present irregularities. The German constitutional guarantees, together with their judicial interpretations, provide a valuable model for this and will repay thoughtful and disciplined consideration by Australian policymakers and judges alike.

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240. Meyerson, *supra* note 22, at 552.

Paper Three: 'When My Opt-Out is Your Trigger: Oderberg's Argument with the Religious Freedom Sincerity Test'

Paper Three: Statement of Authorship

This paper will be published in 2020 in the *Faulkner Law Review (Spring edition)* as Patrick T. Quirk*, When My Opt Out is Your Trigger: Oderberg's Argument with the Religious Freedom Sincerity Test.*

This paper, of which I am the sole author, contains original research I conducted during the period of my Higher Degree by Research candidature. It is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

Signed: Date:

20 January 2020

WHEN MY OPT OUT IS YOUR TRIGGER: ODERBERG'S ARGUMENT WITH THE RELIGIOUS FREEDOM SINCERITY TEST

Patrick Quirk[*]

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I. Introduction

> Filling out a form may not seem like much to ask. . . . But that depends on the form: ask anyone who has signed a mortgage application, a wedding license, a tax return, or a death warrant.
> —Eternal Word Television Network [1]

In Arthur Miller's 1953 play, *The Crucible*, the character, John Proctor, under pressure, admits guilt when he should not have, after which he is asked to sign his name to a written statement of his false confession. He refuses. The impending publication of false guilt is, for him, a step too far and triggers his now famous declaration of disgust against his own false confession. Why can he admit guilt under pressure but not sign his name to the statement? The very thought of signing his name triggered an existential crisis:

> Because it is my name! Because I cannot have another in my life! Because I lie and sign myself to lies! Because I am not worth the dust on the feet of them that hang! How may I live without my name? I have given you my soul; leave me my name!

Such reactions to the publication of "signed confessions," which have been made under compulsion, are not uncommon. A signature seems to carry some psychological weight that an unadorned, oral assertion does not. In the legal context, signatures figure highly in an evidential setting, for example, in the signing of a will, or the execution of a bill of exchange.

In the context of the recent Tenth Circuit religious freedom case of *Little Sisters of the Poor Home for the Aged v. Sylvia Burwell* (2015),[2] the requirement of a representative's signature on behalf of a group of professed Roman Catholic Sisters on a US government form (Form 700)[3] If

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[1] Brief amicus curiae of Eternal Word Television Network (EWTN), Zubik v. Burwell, 578 U.S._(2016) [hereinafter *EWTN Brief*].

[2] Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sylvia Matthews Burwell, 794 F.3d 1151, at 1163 (2015) [hereinafter *Little Sisters*].

[3] Employee Benefits Security Administration's (EBSA) Form 700 was issued by the Department of Labor. According to the Tenth Circuit Court (*see* Appendix herein). "The Form notifies the health insurance issuer or TPA (Third Party Insurer) that the organization self-certifies as exempt from the [contraceptive] Mandate because it has a religious objection to providing coverage for some or all contraceptive services to its employees, and identifies the relevant federal regulations under which the organization is permitted to opt

signed, that Form, reproduced in the Appendix, would become the government-inspired means by which the Sisters could remove themselves from the process of providing access by their employees to various forms of contraception. The Sisters refused to sign on the grounds of conscience and that refusal became the subject of legal scrutiny, public commentary, and much debate.

As late as June 2019, a number of US States Attorneys General had sued to remove religious exceptions, which were seen by many as a way around the impasse caused by the issues surrounding an unwillingness to merely "sign a form" on the grounds of religious conscience. Later, the US Supreme Court consolidated a number of cases, including that of the *Little Sisters* in *Zubik v. Burwell* (2016),[4] and sent them back to various Courts of Appeal for reexamination. Commentators and amici have said much about these cases, all of which have convoluted histories,[5] and about the originating cases of *Hobby Lobby v. Sebelius* (2013) and *Burwell v. Hobby Lobby* (2014), which began the entire saga.[6]

Sitting behind these cases and the surrounding discussion, there exists an unresolved and difficult question as to the scope of the reigning "sincerity test" for religious claim under the First Amendment. The Supreme Court itself opened this discussion when it cited a well-known moral philosopher, David S. Oderberg (Oderberg), who is an expert in the ethics of what amounts to cooperation in the action of another.[7] In the cases mentioned here, the cooperation was that of the signing of a Form by the sisters, and whether they could, or could not, as a matter of conscience, perform that act of signing. For the sisters to sign would, as a religious matter, be the wrong thing to do and so they objected. For the court, the

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out of that obligation"; *see Little Sisters*, *supra* note 2, at 1163. The Form had to be *signed* by the Sisters and *delivered* to the relevant authority.

[4] Zubik v. Burwell, 578 U.S. (2016) [hereinafter *Zubik*].

[5] In the words of one commentator, "the first thing to know about these cases is that they are incredibly complicated. The Court granted cert in seven different cases related to this topic, which means they've agreed to hear the questions in those seven cases. All of them have come through different circuit courts in the past months, where they've mostly lost. But, these cases are a big deal: They are the latest in a long series of challenges to this portion of the law, the most notable of which was last summer's *Hobby Lobby* case, which involved for-profit employers"; *see* Emma Green, *The Little Sisters of the Poor Are Headed to the Supreme Court*, THE ATLANTIC (Nov. 6, 2015), http://www.theatlantic.com/politics/archive/2015/11/the-little-sisters-of-the-poor-are-headed-to-the-supreme-court/414729.

[6] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (Tenth Cir. 2013) [hereinafter *Hobby Lobby* (10th Cir.)] was subsequently decided in the US Supreme Court; *see* Burwell v. Hobby Lobby Stores, Inc., 574 U.S. (2014) [hereinafter *Hobby Lobby* (SC)].

[7] "The Ethics of Co-operation in Wrongdoing," MODERN MORAL PHILOSOPHY 203–228 (A. O'Hear ed. 2004).

issue was whether it would simply take the sisters word for it, or whether they would weigh in on that issue, and make a judgment about the sisters own (avowedly religious) claim about cooperation. The Court declined and the world moved on. But the difficult question remains: What is the scope of a religious objection when the claim is made that the analysis of "cooperation" is itself a religious question? Is this asking a court to abandon its wits and go along with any religious accommodation claim whatsoever? Or is there a safe course that saves the court from having to make "religious judgments" that are fraught with difficulty and open to the accusation that the court is "playing theologian" and should back off? This Article will grapple with these issues. In doing so, I shall explore a number of related questions about "triggers" and "opt-outs," about different kinds of analysis of what amounts to "cooperation" in law and cooperation according to moral philosophers, about the way theologians (who file amicus briefs) analyse these issues, about the significance of signatures (as opposed to other types of consent), and about the problems that may arise in a thought experiment where a court encounters a hypothetical religious tradition which has "insincerity" at its core. All of these factors make for a strong brew of contested topics so I will try to narrow these as far as possible without sacrificing any essential detail.

For those purposes, I note that an important difference between the *Hobby Lobby* cases and the later cases has to do with the difference between what has been called, on the one hand, an "opt-out"[8] and on the other hand, a causal "trigger"[9] as identified by Oderberg, who, to give him his proper title, is a professional moral philosopher and whose "The Ethics of Co-operation in Wrongdoing" [10] was cited in *Hobby Lobby* (SC) and who has, in clear and interesting ways, responded in writing to the problems raised by that difference.

Indeed, Oderberg's own short analysis will serve well to help us come to grips with the major points at stake. After a discussion of the *Little Sisters* case, he elaborates the following key distinction:

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[8] For the sake of clarity in terminology, according to the NEW OXFORD AMERICAN DICTIONARY (NOAD) (Angus Stevenson, Christine A Lindberg, eds., 3 ed. 2010) "opt" is a verb [which takes no object] meaning to "make a choice from a range of possibilities." The associated phrasal verb is "opt out," meaning to "choose not to participate in or carry on with something." These originate from the late nineteenth century French *opter*, and from Latin *optar* "to choose; to wish." "Opt-out" is also listed in the NOAD as a noun meaning "an instance of choosing not to participate in something" as in "opt-outs from key parts of the treaty."

[9] "Trigger" here means an action that causes or permits another event to occur. In the cases under discussion the signing of the Form (the triggering action) was what allegedly gave access to morally objectionable abortion or contraceptive services.

[10] *In* MODERN MORAL PHILOSOPHY 203–228 (A. O'Hear ed. 2004).

> The difference [between *Hobby Lobby* and the situation in the *Little Sisters*/*Zubik* cases] however, is crucial: in *Hobby Lobby*, the Supreme Court held that the objectors (owners of closely held, for-profit corporations) were entitled to what they requested, namely the same accommodation granted to religious non-profits, allowing them to opt out of providing the relevant insurance coverage. The objectors in *Little Sisters of the Poor* and then in *Zubik*, however, objected to *the very accommodation itself*.
>
> The accommodation provided by the government required a conscientious objector to notify either the government or the objector's insurance company (we can leave aside the complexities) that they opted out of the mandate and would not provide contraceptive coverage. It was then up to the government or the insurance company to step in and fill the gap. But the objectors in *Little Sisters* and related cases, and then in *Zubik*, considered the very act of *opting out* to be illicit cooperation, relying precisely on *Hobby Lobby* for their argument.[11]

This difference will figure heavily in the following discussions and, in particular, the consideration of some aspects of how moral philosophy interacts with the law. Thus, Part III examines the unusual situation in which a court refers to moral philosophy and so points to larger issues lying beneath the surface of the case.

Part IV unpacks these problems further by noting first that cooperation claims in law can occur before or after the *actus reus*,[12] but that in cases of conscience, the claim to exemption must always come prior in time to that act. I go on to consider types of cooperation and explain the different kinds of cooperation and introduce Oderberg's borrowed "principles of cooperation" as well as their application in hard cases.

Part V then narrows the focus to the significance of the required signature in these cases, while Part VI will reflect on problems raised by the Supreme Court's sincerity test when it is tested against a religion that has insincerity at its core.

The Article concludes by offering a possible solution to an apparent impasse in analysis. Before considering these deeper issues, I will set out the background needed to position the arguments in relation the sincerity test.

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[11] DAVID S. ODERBERG, OPTING OUT: CONSCIENCE AND COOPERATION IN A PLURALISTIC SOCIETY (2018) (emphasis in the original) [hereinafter *Opting Out*].

[12] I use the term broadly to refer to the act at the center of the dispute.

II. SINCERITY: ONE TEST TO RULE THEM ALL

The role of the sincerity test requires some explanation. For those unfamiliar with the prior Supreme Court jurisprudence, the sincerity test outlined by US Supreme Court Justice Alito in *Hobby Lobby* (SC) drew careful attention to the claim by the Little Sisters of the Poor that signing form 700 (an opt-out) actually amounted to an opt-in, but that he was not in a position to pronounce whether that was, in fact, the case. Alito asserted:

> The Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," . . . , and there is no dispute that it does.[13]

Thus, for the US Supreme Court, sincerity ruled the day. To sharpen his point of engagement with Justice Alito, Oderberg drew attention to the formulation of this test as previously expressed by Justice Gorsuch, who while sitting on the US Court of Appeals for the Tenth Circuit, opined in *Hobby Lobby* (10th Cir.): "As [the company owners] understand it, ordering their companies to provide insurance coverage for drugs or devices whose use is inconsistent with their faith *itself* violates their faith, representing a degree of complicity their religion disallows."[14]

For Oderberg, the problem with the approach taken by Justices Gorsuch and Alito is that "[Gorsuch for the Tenth Circuit] treated—as did the Supreme Court [Alito]—the very question of whether the plaintiffs were illicit cooperators as *itself* purely a matter of religious faith."[15] Oderberg goes on to ask (rhetorically) why this is important and answers as follows:

> The problem derives from the fact that American courts, as with most Western courts, do not as a matter of legal principle *question* the religious beliefs of a litigant seeking to protect their religious freedom (see, for example, Thomas 1981; Hernandez 1989). That is,

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[13] *Hobby Lobby* (SC), *supra* note 6, at 37, *citing* Thomas v. Review Bd. of Indiana Employment Security Div., 450 U. S. 707 (1981) 716.

[14], Opinion written by Gorsuch joined by Senior Judge Paul Joseph Kelly Jr. and Judge Timothy M. Tymkovich of the Tenth Circuit Court of Appeals concurring, in *Hobby Lobby* (10th Cir.), *supra* note 6, at 1152.

[15] *Opting Out*, *supra* note 11, at 71 (emphasis in original).

> they do not look behind the *sincerity* of the belief to question its *reasonableness*. This means that if a plaintiff complains that a certain law or regulation makes them a cooperator in wrongdoing, the court does not question whether this belief is reasonable or not. The only question, for American courts, is whether the law or regulation violates RFRA[16] by imposing a substantial burden" on religious freedom.[17]

Thus, sincerity is the only governing factor for the court and will block the way to any examination of the *reasonableness* of the (religious) belief. For a philosopher, as for others, this is understandably a problem deserving serious attention.

By contrast, Justice Ruth Bader Ginsburg argued forcefully for "keeping the courts 'out of the business of evaluating'. . . the sincerity with which an asserted religious belief is held."[18] These differences, amongst others, will be taken up again in Part V.

While the US Supreme Court needs little introduction, the reader deserves some introduction to Oderberg's works. As outlined above, in both books[19] and articles,[20] Oderberg has argued generally that mere sincerity is *not* enough to ground a claim for a religious freedom exemption. His recent work comments in particular on health care ethics and runs across range of jurisdictions including in particular the United Kingdom, the United States and Canada. As discussed above, he was cited by Justice Alito (for the majority) in footnote thirty-four of *Hobby Lobby* (SC). Philosophy texts are not often cited in the Supreme Court, a topic to which I now turn.

III. SCOTUS CITES A PHILOSOPHER

Courts—and especially Courts of Appeal—sometimes make use of non-legal materials in their public reasons for their decisions. All the world of learning and literature is available to the Supreme Court at any time.[21] Yet,

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[16] The Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4, is United States federal law that "ensures that interests in religious freedom are protected."

[17] *Opting Out*, *supra* note 11, at 71–72 (emphasis in original).

[18] Hobby Lobby, 134 S. Ct. 2805 (Ginsburg, J., dissenting), *quoting* United States v. Lee, 455 US 252, 263 n2 (1981) (Stevens, J., concurring in the judgment).

[19] *Opting Out*, *supra* note 11, at note 5.

[20] David S. Oderberg, *Co-Operation in the Age of Hobby Lobby: When Sincerity is Not Enough*, 11 EXPOSITIONS: INTERDISCIPLINARY STUDIES IN THE HUMANITIES 15–30 (2017).

[21] Like juries, however, courts are not supposed to go off on a frolic of their own to conduct experiments or independent investigations outside of the court setting. As to juries see, for example, the jury instructions in Kathy Tooze-Aguirre v. Rachel Roxanne Wilks,

such reliance is not their stock-in-trade. Lawyers and courts are practical problem solvers and their primary materials are the laws and regulations of the jurisdiction in which they operate.[22]

Thus, the citation of philosophical work in a court decision full of case law and judicial reasoning comes as somewhat of a surprise. It “draws the eye,” as they say. In *Hobby Lobby* (SC), the Court’s mention of several moral philosophers has focused attention on a kind of philosophical reasoning that can lie beneath the law, which in turn has opened a wider range of public arguments, and which may serve justice and the advancement of “reasons for decision” that are part of the democratic (i.e. open to the *demos*) court system.[23] Such public (philosophical) reasons are arguably “prior to” the law and yet form part of its footings and groundworks. In the alternative, such influences can be seen as mere “policy arguments.” Either way, when they form part of the court’s reasoning, they are worthy of pursuit and examination. In the body of the opinion, Alito wrote:

> The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act

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2006 WL 814731 (D.Hawai'i) United States District Court, D. Hawai'i, which stated in Instruction No 6 “You must not use any source outside the courtroom to assist you in deciding any question of fact. This means that you must not make an independent investigation of the facts or the law. For example, you must not visit the scene on your own, conduct experiments, or consult dictionaries, encyclopedias, textbooks, or other reference materials for additional information."

[22] As expressed by Justice Posner in University of Notre Dame v. Kathleen Sibelius 743 F.3d 547 at 566 (7th Cir.) "Yet we are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith. Notre Dame tells us that Catholic doctrine prohibits the action that the government requires it to take. So long as that belief is sincerely held, I believe we should defer to Notre Dame's understanding."

[23] "While tenure and pay for judges are often said to preserve judicial independence, the more directly effective feature of court practice that maintains independence is the constant duty of the judge to give reasons for decisions. This restrains arbitrary decisions and those motivated by improper reasons. Decisions must be made to appear as an application of the law, properly identified, and using legal reasoning where appropriate, to the true facts of a case. Of course, the artful judge can make a decision appear a legally compelled one when in reality it was not, and hidden motivations might apply. But this can only go so far; legal reasoning is not nearly so radically indeterminate as has been claimed. Close analysis by outsiders, as will be suggested, can cut through spurious window dressing in judgments." David Prendergast, *The Judicial Role in Protecting Democracy from Populism*, 20 GERMAN L.J. 245, 258 (2019).

> that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.[24]

Alito affixed a footnote (n34) to this passage, which reads:

> See, e.g., *Oderberg*, *The Ethics of Co-operation in Wrongdoing*, *in* Modern Moral Philosophy 203–228 (A. O'Hear ed. 2004); T. *Higgins*, Man as Man: The Science and Art of Ethics 353, 355 (1949) ("The general principles governing cooperation" in wrongdoing—i.e., "physical activity (or its omission) by which a person assists in the evil act of another who is the principal agent"—"present troublesome difficulties in application"); H. *Davis*, Moral and Pastoral Theology 341 (1935) (Cooperation occurs "when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does").[25]

The three named authors (Oderberg, Higgins, Davis), wrote in the years 2004, 1949, and 1935 respectively. Nevertheless, their approaches are consistent and form a discernable line of reasoning. For now, we will note that the footnoted quotation from Higgins and Davis each present a one-line, and necessarily incomplete, introduction to the classical principals regulating personal "cooperation in wrongful actions" taken from Catholic moral theology,[26] and that Oderberg himself takes up the argument in favor of this theory and its potential for assisting in judicial reasoning in his 2018 book *Opting Out*.[27]

The principles of cooperation will be further discussed in Part IV below. Before doing so, a number of considerations should be borne in mind. First, the law already employs its own methods for connecting (and—importantly—disconnecting) actors with (and from) their actions.[28] Thus, in the law of torts, for example, specifically in the law of negligence, there is

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[24] *Hobby Lobby* (SC), *supra* note 6, at 724n19.

[25] Emphasis added.

[26] To debate whether there is a pertinent difference between moral theory and moral theology inside the Catholic Tradition is beyond the scope of this paper. For a discussion of moral theology, *see* Lehmkuhl, Augustinus, "Moral Theology" in THE CATHOLIC ENCYCLOPEDIA, vol. 14. (New York: Appleton 1912), http://www.newadvent.org/cathen/14601a.htm.

[27] *Opting Out*, *supra* note 11, at 43.

[28] Moral philosophers may tend to use the word "agent" and "agency" more frequently when discussing persons who "act with moral intent," but since the word "agent" has quite a separate meaning – for example, in the realm of commercial law (i.e. one who acts in a legal way to bind another person - usually named a *principal* - in contractual and sometimes other situations) I have chosen to use the word "actor."

case law dealing with issues of "proximate causation."[29] Also, in the criminal law, there are acute questions raised by the law of the "accomplice" or the "accessory," who assists someone in the process of committing a crime.[30] Second, these pre-established methods of measuring culpability are, to some degree, already doing the job of the proposed principles of cooperation championed by Oderberg. Finally, and importantly, the principles of cooperation, while in one sense "obvious" in the general law and already in use to some degree, are at the same time ignored or neglected in the very context in which they appear most needed: the laws surrounding conscience protection. The reasons for this neglect will be reflected upon in Part IV's discussion of triggers and optouts, to which I now turn.

IV. WHOSE TRIGGER? WHICH OPT-OUT?

In this Part, I will delve more deeply into the issues of triggers as compared with opt-outs, as well as Oderberg's advocacy for classical cooperation principles. Bridging the gap between philosophy and law is never easy. The language in each discipline is specialized, despite much overlap, and lawyers are more inclined to the practical art of peacemaking[31] rather than the science of speculation. Before outlining the principles of moral cooperation in detail, one strange but often overlooked factor should be considered: any objection to cooperation, whether grounded in conscience or something else, must, of necessity, be expressed prior to the (wrongful) act itself. Anything occurring after the wrongful act is best described as history and cannot form the basis of a conscience claim. To this, we now turn with the assistance of some examples suggested by a moral philosopher other than Oderberg.

A. Brief Excursus on Timing

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[29] For example, "[In Washington State,] proximate causation has two elements: cause-in-fact and legal causation .. . Cause-in-fact "refers to the 'but for' consequences of an act—the physical connection between an act and an injury." . . . Legal causation depends on "policy determinations as to how far the consequences of a defendant's acts should extend." City of Seattle v. Monsanto Co., 237 F. Supp. 3d 1096, 1106 (W.D. Wash. 2017)(citations omitted).

[30] *See*, e.g. discussion in United States v. Dinkins, 928 F.3d 349 (4th Cir. 2019).

[31] MARY ANN GLENDON, A NATION UNDER LAWYERS 103 (1994). Noting that lawyers need "practise in discerning the precise issues in controversy, whether the disagreement is about means or about ends themselves. A trained eye for the issue enables lawyers to constructively disagree with their own clients as well as to narrow the scope of conflict between antagonists."

The principles of moral culpability are regularly debated among moral philosophers.[32] To illustrate the concept, for the next few paragraphs, I will take up the work of another moral philosopher, George Sher, who sets up a number of fact scenarios in his work exploring ideas in moral responsibility, particularly, its epistemic preconditions.[33] For ease of reference, two of these scenarios are set out below. Their significance lies in helping the reader to consider who should be culpable in the situations outlined, and how (and why or whether) liability should be measured and doled out. Lawyers would consider such scenarios in their everyday practice and arrive at conclusions based on the law in their jurisdiction. It is not a leap to suggest that some lawyers in the world of common law would consider a tort, contract or criminal law theory "solution" for these scenarios but for our purposes this is not critical.[34]

The scenarios not only explore the degree to which main protagonists are responsible for their actions, but also what *reasoning* might be used to justify conclusions of responsibility.[35] In the case where responsibility is certain, the reader may be invited to prescribe a punishment, if any.

The first two of Sher's disarming scenarios are as follows:

> *Children at their primary school*. As usual, Alessandra is accompanied by the family's border collie, Bathsheba, who rides in the back of the van. Although it is very hot, the pick-up has never taken long, so Alessandra leaves Sheba in the van while she goes to gather her children. This time, however, Alessandra is greeted by a tangled tale of misbehavior, ill-considered punishment, and administrative bungling which requires several hours of indignant sorting out. During that time, Sheba languishes, forgotten, in the locked car. When Alessandra and her children finally make it to the parking lot, they find Sheba unconscious from heat prostration.[36]
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> *On the Rocks.* Julian, a ferry pilot, is nearing the end of a forty-minute trip that he has made hundreds of times before. The only challenge in this segment of the trip is to avoid some submerged rocks that jut out irregularly from the mainland. However, just

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[32] Lawyers are, of course, equally engaged in the quest, but from their own perspective.
[33] GEORGE SHER, WHO KNEW? RESPONSIBILITY WITHOUT AWARENESS 1 (2009); [hereinafter *Who Knew?*].
[34] Various statutory duties would also likely play a role.
[35] In most common law jurisdictions, judges must issue reasons for their decision. Unsurprisingly, these are typically called "reasons for decision."
[36] *Who Knew?*, at 24.

> because the trip is so routine, Julian's thoughts have wandered to the previous evening's pleasant romantic encounter. Too late, he realizes that he no longer has time to maneuver the ferry.[37]

Other scenarios include *Caught off Guard* (in which a soldier on guard duty in a combat zone falls asleep), *Home for the Holidays* (in which a woman shoots her son having mistaken him for a burglar), *Colicky Baby* (in which an inexperienced baby-sitter uses alcohol to calm a distressed baby, and finally *Bad Joke* (in which a self-absorbed but non-malicious person tells jokes in poor taste thus causing unnecessary offense.[38] Sher argues [39]:

> An agent's responsibility extends only as far as his awareness of what he is doing. He is responsible only for those acts he consciously chooses to perform, only for those omissions he consciously chooses to allow, and only for those outcomes he consciously chooses to bring about.[40]

The point of the above brief foray into a world of moral theory is to pull back the curtain on the kinds of reasoning discussions that philosophers regularly use to explore the trickier issues of moral responsibility. For our purposes, it serves to unlock a realm of philosophical scrutiny of human actions that are the regular grist for the philosophers' (and lawyers') mill.

These scenarios also point to a very important *differences* between the problem of morally culpable *causation* and the "opt-out" problems that are the main subject matter of this article and which we will consider below. The differences are these: In the first place, opt-outs are claimed and debated (and sought by a conscientious objector) only *prior to* the objectionable event/action in question. In contrast, causation is generally argued about (and decided upon) only *after* the damage has been done. This is a serious temporal difference and may well explain why lawyers appear to be missing the necessary toolbox of concepts to deal the problems on conscientious objection and opting out. Lawyers seem to be good at arguing about causation (they do it every day) but much less familiar with problems related to a prior request to opt out of cooperation with a particular action. The cooperation principles below, it is argued, are designed to fill this gap.

In the second place, Sher's focus on culpability being linked to the

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[37] *Id.*, at 24.
[38] For the full list of intriguing scenarios *see Who Knew?*, *supra* note 33, at 24–28.
[39] His book-length argument is not easily summarized and the full argument is beyond the scope of this discussion.
[40] *Id.*, *supra* note 33, at 4.

moral agent's *awareness* of what they are doing is also significant. Such awareness must be present in the case of a conscientious objection otherwise the objection is meaningless: One simply cannot argue a conscientious objection on the basis of something that one is unaware of being wrong in the first place. A conscientious objector "knows that X is wrong" and that knowing is critical.[41]

B. The Cooperation Principles Considered

In acknowledging that the US Supreme Court took notice of his research work in the area of the "ethics of cooperation in wrongdoing,"[42] Oderberg referred to an area of Catholic moral theology that had been around for a long time and yet remains relatively unknown outside the circles of theologians and philosophers. In his words:

> My [*Opting Out*] drew on a tradition of Catholic moral theology in which theologians—acting more as philosophers than as spokesmen for the Catholic religion—have developed a theory of the ethics of cooperation that is plausible in its own right and can be applied fruitfully to difficult cases. The theory itself has nothing particularly religious about it: it stands as a piece of moral philosophy.[43]

Oderberg's thoughts on the use of the ethics of cooperation are developed further in a full chapter of his book, *Opting Out*, which runs to nearly thirty pages of text.[44] The Chapter is entitled: "Law Needs Philosophy: Principles of Cooperation."[45] The list of possibilities for cooperation apart from direct participation can be summarized as follows:

- By advising (the wrongful act)
- By ordering (the wrongful act)
- By agreeing (to the wrongful act)
- By provoking (the wrongful act)
- By silence (in face of the wrongful act)

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[41] The objector could, of course, be wrong about whether the action in question is, in fact wrong – for example by holding a mistaken view about a moral principle – but that is not fatal to the argument being made.
[42] *Opting Out*, *supra* note 11, at 10–11.
[43] *Id.*, at 11.
[44] *Id.*, at 40–68.
[45] The disquieting subtitle is: HOW MIGHT YOU ACT WRONGLY? LET ME COUNT THE WAYS.

- By defending the wrong done[46]

All of these acts, to some degree, *compound*[47] the primary act of wrongdoing by adding yet another wrongful act into the mix. They are an *additional* wrong and they all *implicate* a person “in another person’s (or you own) wrongful primary act.”[48] Such lists can, on the one hand, lead to scruples and over-thinking,[49] and on the other hand, to appropriate caution and the possible avoidance of serious harm.[50]

Cooperating in perfectly licit acts is not problematic. But once one crosses the line into morally questionable acts, any person who assists is implicated as well and this can lead not only to joint responsibility but also to requests to opt out. In a pluralistic society, the opportunities for conflict are many.

1. Different Kinds of Cooperation

Oderberg’s first distinction is between different *kinds* of cooperation and centers upon the distinction between what is known as “formal and material cooperation.” Formal cooperation, in its essence, involves a shared intention between the primary actor and the (willing) assistant.[51] Material

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[46] *Opting Out*, *supra* note 11, at 40. For an example of a similar and relatively recent list in a Catholic pastoral context, *see* the JAMES D. WATKINS, MANUAL OF PRAYERS 48 (3 ed., 1998): “*Nine Ways of Assisting in Another’s Sin*: By counsel, By command, By consent, By provocation, By praise or flattery, By concealment, By partaking, By silence, By defense of the ill done.” Many of these, for example, flattery, are the subject of considerable (but nowadays neglected) moral and theological reflection, which lies beyond the scope of this article.

[47] *Opting Out*, *supra* note 11, at 40–41 (emphasis in original).

[48] *Id.*, at 40.

[49] Scrupulosity is a well-known spiritual/psychological disposition; s*ee* DERMOT CASEY, THE NATURE AND TREATMENT OF SCRUPLES (1950). For more recent work, *see* J. ABRAMOWITZ, D. MCKAY, & S. TAYLOR, CLINICAL HANDBOOK OF OBSESSIVE-COMPULSIVE DISORDER AND RELATED PROBLEMS (2007).

[50] “Scruples” can cut both ways. One may think, for example, of the caution displayed by the lone juror in the play *Twelve Angry Men* (Reginald Rose, 1954) where a single juror rightfully holds out for a verdict of “not guilty” in the light of overwhelming pressure to convict. The single juror’s scruples turn out to be the source of justice for an innocent accused.

[51] Oderberg notes, “formal cooperation involves a clear (explicit or maybe implicit) *intent* to share in the responsibility (or guilt) of the primary agent—the person whose initial act is the one with which cooperation can occur. If you assist someone to rob a bank with the intention that the bank be robbed, you are a formal cooperator. We should agree that this kind of purposive cooperation in wrongdoing is morally wrong and, when the primary act is criminal, it is usually an illegal act of aiding and abetting”; *Opting Out*, *supra* note 11, at 44.

cooperation, on the other hand, involves a situation where the assistant is induced into helping the principal actor, but such assistant does not share their intention(s) or will to perform the act. Once the assistant begins objecting to the course of action, they immediately move from being merely "unwilling cooperators" into the realm of the "conscientious objector." Formal cooperators are not objecting (they are intending the same as the principal actor) and so, we leave them to one side.

In the case of material cooperators, another question immediately presents itself: how will material cooperators know whether *their* actions are morally permissible? If we assume that the principal act is wrong, how can we tell if the "assisting actions" (the cooperator's "means of helping") are also wrong? One way to find out is to ask whether their actions are "morally neutral" or "indifferent."[52] If so, then it could be (impermissible) material cooperation.[53] But this is not the end of the matter. Another critical challenge is to decide whether the help offered is "*mediate* or *immediate*." As Oderberg notes, this can be a subtle issue. He notes:

> What needs to be ascertained is whether the cooperator is *sharing* in the primary act *as if* they were an accomplice without being an accomplice. In other words, had the cooperator not been unwilling, would their act have been one of *joint participation*, whether in whole or in part, with the primary act? Helping someone carry away stolen goods is therefore immediate cooperation, whereas locating the target or driving the getaway care is mediate cooperation.[54]

Obviously, the more immediate is the cooperation, the more moral guilt the actor will bear—despite any objection to participating in the first place or at all.[55]

2. Layers of Analysis

Beyond immediacy (as against mediacy) lie yet further layers of analysis: (1) dispensability, (2) proximity, and (3) the "balancing [of] goods and bads."[56] These classifications take up much space in Oderberg's analysis, so only a brief discussion is needed here. An overarching consideration is the

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[52] *Id*., at 45.
[53] Oderberg uses the example of handing over a set of keys: "Handing over one's own keys is itself morally, so is passing on public information. If either act assists another to enter a house for the purpose of theft, it can be impermissible material cooperation"; *id*.
[54] *Id.,* at 45–46.
[55] As we will see below, a higher level of objection may then become appropriate.
[56] *Id.,* at 50.

fact that we cannot avoid all evil in this world. Regardless of what we do, we will, in some way, "participate" in others' actions and some of those actions will be evil. Still, the more analytic tools that are available, the sharper our analysis can be in difficult cases. It is to the discussion of such extended tools that we now turn.

*1. Dispensability***.** In the case of dispensability versus indispensability, we must ask about the dependency of the primary agent on the assistance of the cooperator. This is a practical issue by which we learn whether "practically speaking, [the primary act] cannot be performed . . . without . . . cooperation."[57] For example, "[p]roviding a burglar with the code to a safe that only you know is as indispensable as can be, assuming no other means of success. Handing the burglar the keys to your car is dispensable, assuming the burglar could threaten anyone else to do the same with their car."[58]

2. Proximity. In the case of proximity (as against remoteness) of the assistance the question is to "measure" the distance between "the cooperative act [and] . . . the primary act, primarily but not solely in space and time."[59] This is a matter of investigating the cooperator's causal role in the primary act.[60] By way of example, "we can see that selling petrol to a driver on the way to a burglary, even if the seller knows what the driver is up to, is quite remote. Giving specific directions to the house is more proximate." [61] Oderberg argues that we should ask, "how many key causal steps were there from the assistance to the primary act? The more steps involved, the more there is that can go wrong, or the more events can intervene to prevent the assistance from being *effective*."[62]

3. Balancing Goods and Bads. The issues of causation are now put to one side and the focus is upon "what *reasons* the cooperator might have for

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[57] *Id.,* at 47.
[58] *Id*.
[59] *Id.,* at 48.
[60] *Id*.
[61] *Id.,* at 48. The example continues: "It is a question of what we might call executive character": is what the cooperator is doing so close, causally, to the primary act that it is a small step away from doing it themselves? Or, at the other extreme, is the cooperator so far removed from the main act that they are hardly more of an assistant than anyone else who is not involved at all? Between these extremes lies a broad spectrum, and it takes much subtlety of judgment and attention to detail—something at which judges are expert—to come to a reasonable conclusion about where a cooperator stands in the circumstances of the case"; *id*.
[62] *Id.,* at 49. A longer discussion of proximity follows.

assisting the primary agent, and whether those reasons are *sufficient to justify* the particular kind of cooperation they perform."[63] This analysis seeks to balance "the badness of the act with which the person is cooperating against the bad outcome that they are seeking to *avoid* by cooperating."[64]

3. Refining "Reasonable Principles"

After considering the above three general principles, Oderberg segues into a discussion of their application and practical aspects of the above analytic tools. He also adds a number of refining "reasonable principles," which we must we apply if we are to live without the constant worry of cooperating in the wrongs of others. After noting that conscientious objection cases involve establishing that the objector "*sincerely believes* the primary act, concerning which cooperation is an issue, is wrong on religious or broadly ethical grounds,"[65] the following "reasonable principles" are suggested:

- Formal cooperation and immediate material cooperation (mostly) are morally off limits[66]
- Cooperation can involve omissions to act, as well as their commission[67]
- A proportionality assessment is available in cases of mediate cooperation.[68]
- The more serious the wrong with which you are potentially cooperating, the greater must be the avoidance of loss that cooperation procures.[69]
- Balancing "goods and bads" is not a mere mathematical exercise. We have to look at the situation in front of us, the competing goods and bads, their levels of seriousness or importance and come to

[63] *Id.,* at 50–51.
[64] *Id.,* at 51.
[65] *Id.,* at 52.
[66] In the case of the latter, this is because "this involves joint performance of all or part of the primary act, so it should be ruled out on conscience grounds—at least in situations where the act the cooperator is performing, by its very nature or its unavoidable circumstances, is also wrong"; *id.,* at 53 (bottom).
[67] *Id.,* at 54.
[68] *Id.,* at 55. Examples given include the (moderate) pain caused by a dentist in treating a patient, or short car trips for minor reasons (e.g. milk purchase) which cause pollution but are not justified.
[69] *Id*.

reasonable judgments.[70]

- Burdens imposed on those who object (e.g. those inflicted by governments) should reasonably reflect the importance of the objecting and not be a mere exercise in "compliance."[71] This should minimize the extent to which [the government's] promotion of the [compelling] interest captures conscientious objectors within its net.[72]
- [T]he more the cooperator is implicated in the primary act (using proximity and dispensability as guides), and the more serious the primary act itself, the more serious the reason they need in order to be morally justified in cooperating.[73]
- The more indispensable the cooperation, the greater the reason must be for assisting.[74]
- The more proximate the cooperation, the greater the reason needed.[75]
- In general, highly proximate, indispensable cooperation in a very serious wrong . . . could only ever be justified by a very grave risk to the cooperator (e.g. a gun to the head)[76]
- If the cooperation is dispensable, or not highly proximate, the justification bar is lowered; not mathematically but according to reasonable judgment[77]
- When the seriousness of the wrong is decreased, the seriousness of the reason is reduced as well.[78]

In closing the section, Oderberg argues that judges are typically very good at dealing with these kinds and models of reasoning. Therefore, he advocates a common law approach. He asks, "[w]hy not allow, perhaps over a period of years or decades, a *common law of cooperation* to evolve in response to cases of conscience that come before the courts?"[79]

The closing pages of Chapter Four of *Opting Out* ask *Should you*

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[70]*Id.,* at 56. This involves a hierarchy: "Losses to life and limb are more important than financial losses; serious public harm is worse than serious private harm; certain harms are worse than merely probably or barely possible harms"; *id.*
[71] *Id.,* at 57–58. Oderberg suggests using the "strict scrutiny" standard adopted in the US Religious Freedom Restoration Act.
[72] *Id.,* at 57.
[73] *Id.,* at 58.
[74] *Id.,* at 61.
[75] *Id.*
[76] *Id.,* at 62.
[77] *Id.,* at 63.
[78] *Id.*
[79] *Id.,* at 64 (emphasis in original).

sign? Oderberg's answer is, "It depends."[80] For the sake of convenience, this will be considered in greater detail below in Part IV. Before that, the practical application of the "cooperation principles" to hard cases are deliberated upon in Chapter 5, to which we now turn.

C. Cooperation Principles in "Hard Cases"

Oderberg considers a number of major cases from the United States and United Kingdom (principally *Hobby Lobby*, *Zubik*, *Doogan and Wood*),[81] including those generated by statutory rights in laws like the UK Equality Acts, to illustrate his position on the cooperation principles. In arguing for an "objective theory"[82] of cooperation, he confronts the tendency in Western courts to avoid questions of the reasonableness of religious belief and to focus solely on the *sincerity* of that belief. This preference by courts lies at the heart of the argument in favor of using principles like those he advocates because the current tendency, he argues, wrongly considers "their belief about whether they are cooperating illicitly [in a wrongful action] as *itself* as matter of religion, when it is not."[83]

If I have understood the argument correctly, it is important here to draw a careful line about what Oderberg is *not* saying: he is not saying that all (or any) questions of religious belief are to be measured and judged by courts under the lens of "reasonableness." Clearly, that would lie outside the area of expertise of the judiciary and is best left to theologians and philosophers. What he is saying, however, is that on the sole question of whether someone is cooperating with someone else in a wrongful act is a question that courts can and should deliberate and decide. We will return to the reasons for this below.

Before doing so, it is prudent to take a short detour and to consider an important case in which a court has done the "right thing" by leaving religious questions to one side. The case—cited in passing by Oderberg[84]—is that of Thomas (1981)[85] and concerns a Jehovah's Witness who refused to work on gun turrets but would, he averred, be happy to work in the foundry that made the steel which was used in making those same turrets. The Free Exercise claim in that case was based on the following (as explained by the US Tenth Circuit Court of Appeals):

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[80] *Id*.
[81] Doogan and Wood v. NHS Greater Glasgow and Clyde Health Board (2013) CSIH 36.
[82] *Opting Out*, *supra* note 11, at 71.
[83] *Id.,* at 75 (emphasis in original).
[84] *Id.,* at 71.
[85] Thomas v. Review Bd., *supra* note 68.

> The [**55] plaintiff in Thomas was a Jehovah's Witness who had worked for a company that owned both a foundry and factory. The foundry processed sheet steel for a variety of industrial purposes. The factory manufactured turrets for military tanks. The plaintiff started working at the foundry but was transferred to the factory. Although he had no objection to working in the foundry, he raised a religious objection to his factory job, claiming that "he could not work on weapons without violating the principles of his religion." Thomas, 450 US at 710. He quit his job and was eventually denied unemployment benefits. He then challenged this decision as improperly burdening his right to exercise his religion, a claim which ultimately reached the Supreme Court.[86]

For our purposes, and knowing what we now know about the principles of cooperation, this seems like a classic case just begging for the court to apply them to resolve the issue. In this case, it was a clear question of proximity to the weapons for war and the distinction between making guns and making steel was the relevant difference. But the Supreme Court did not see it that way. Instead, the Court kept away from such issues and stated instead (again I am using the Tenth Circuit Court's analysis of the case):

> As to the distinction between factory and foundry work, the Court reasoned that "[the plaintiff's] statements reveal no more than that he found work in the . . . foundry sufficiently insulated from producing **[*1139]** weapons of war. We see, therefore, that [the plaintiff] drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id. at 715*. In other words, the distinction that the plaintiff drew was not as important as the fact that he made it based upon his religious beliefs. Once the plaintiff drew this line, it did not matter whether the line was "acceptable, logical, consistent, or comprehensible to others in order to merit *First Amendment* protection.[87]

For the cooperation principles, such reasoning is a death knell. Courts must retreat from *any* analysis of the reasonableness of cooperation claims and take them at their face value. No doubt such an approach gives the court (any court) a chance to show clean hands in the light of bias allegations or the hint of interference with the work of the theologian or minister. The question is whether this abrogation is worth the result.

Turning to practical application in the major cases mentioned above,

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[86] *Hobby Lobby* (10th Cir.), *supra* note 6, at 1138.
[87] *Id.,* at 1138–1139.

Oderberg's analysis presents a serious challenge to the Supreme Court's reasoning in *Hobby Lobby* (SC), and by extension, in *Zubik*. While the Court took notice of the cooperation principles in *Hobby Lobby* (SC) (hence, the footnote to the work of Oderberg and others),[88] it refused to look at the reasonableness of the belief and so excluded any recourse to cooperation principles. In following up in *Zubik*, the Court effectively doubled-down on the alleged error, because in that case (so the argument goes), the Little Sisters of the Poor (who refused to sign the opt-out Form) mistakenly saw their opt-out as a trigger for cooperation. If the Court had employed cooperation principles in that case, then this supposed error would not have arisen.

This is an especially interesting issue, since the amicus brief from 67 Catholic theologians in *Hobby Lobby* (10th Cir.)[89] also applied the cooperation principles and concluded that under those principles the Plaintiffs would in fact cooperating. In a later, and separate, amicus brief from 50 Catholic Theologians and Ethicists in *Zubik*, the same principles were again rehearsed. Critically, they concluded that even signing the "opt-out" Form 700 would have involved cooperation and so was morally proscribed. Oderberg sees a serious problem with this approach when he states, "the objectors in *Little Sisters of the Poor* and then in *Zubik*, however, objected to *the very accommodation itself*. . . . The objectors . . . considered the very act of opting out to be illicit cooperation, relying precisely on *Hobby Lobby* for their argument."[90]

Whether this apparent contradiction creates a problem for those arguing for the use of cooperation principles is an interesting question. The 50 theologians make numerous arguments and even go so far as to state that any signature on Form 700 would amount to formal cooperation. A fuller analysis of their brief and the earlier one (discussed immediately above) appears in the next section.

D. The Theologians' Briefs in Light of Oderberg's Analysis

At least two major amicus briefs were submitted to the US Supreme Court, both of which bore on the question of cooperation in the sense discussed by Oderberg. The first was given in *Hobby Lobby* (SC), signed by "67 Catholic Theologians and Ethicists" in support of the petitioners,[91] and the second

[88] *Hobby Lobby* (SC), *supra* note 6, at n34.
[89] Brief for the 67 Catholic Theologians and Ethicists as Amicus Curiae, footnote, *Hobby Lobby* (10th Cir.) [hereinafter 67 Theologians].
[90] *Opting Out*, *supra* note 11, at 73–74.
[91] 67 Theologians, *supra* note 89, at 19.

was signed by "50 Catholic Theologians and Ethicists" given in *Zubik*.[92] There is considerable overlap in the identities and qualifications of those signing in both cases.

4. The 67 Theologians

The 67 Theologians put forward at least six arguments against the Mandate, all of which claimed that to comply with it would make the petitioners "complicit in religiously forbidden actions."[93] In summary, these were:

> (1) The mandate forces employers to cooperate in at least two distinct activities that are gravely objectionable under Catholic doctrine viz: (i) The mandate requires employers to finance the use of abortifacients, contraceptives, and sterilizations, which are gravely objectionable to Catholics and (ii) The Mandate requires employers to finance "education and counseling" that will instruct and encourage persons to use abortifacients and contraceptives.[94] Any increase in gravity (of the wrong) will result in a need to show "more significant . . . good . . . to justify cooperation."[95] Any harm to third parties, especially to the innocent is especially problematic.[96] Financing the use of use of abortifacients, contraceptives, and sterilization is treated separately from the financing of "education and counseling" on their use. Financing is considered to be "very substantial and direct participation by employers in actions forbidden by their religious principles."[97] Likewise "[t]he employers' involvement in these objectionable actions is triggered by only one intervening cause, namely the decision of the employee who seeks the objectionable services."[98]

[92] Brief for the 50 Catholic Theologians and Ethicists as Amicus Curiae, p. 19, *Zubik* [hereinafter 50 Theologians].
[93] 67 Theologians, *supra* note 89, at 6.
[94] *Id*., at 9–14.
[95] *Id*., at 9, *citing* GARY ATKINSON ET AL., A MORAL EVALUATION OF CONTRACEPTION AND STERILIZATION 79–80 (1979). This is not to be confused with Bentham's well-known felicific calculus which seeks to balance pleasure against pain; *see also* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).
[96] "the graver . . . the evil of the principal agent's act in itself," and "the graver . . . is the harm which may be causes to third parties, especially the innocent," by the objectional action"; 67 Theologians, *supra* note 89, at 9, *citing* Anthony Fisher, *Cooperation in Evil*, *in* COOPERATION, COMPLICITY & CONSCIENCE 27, 54 (Helen Watt ed., 2005).
[97] 67 Theologians, *supra* note 89, at 4. The brief continues by noting, "[the Mandate] requires them to finance a large proportion of the cost—both of the services themselves, and of the education and counseling designed to promote such services."
[98] *Id*., at 4.

This is contrasted with the "casual contribution" a taxpayer an objectionable government program which is "less substantial and direct" form of cooperation.[99] A significant problem with the "education and counseling" prohibition is that it causes scandal which is an independent wrong (sin) that encourages or exhorts another person to engage in wrongdoing.[100] This is dealt with further below.

(2) The mandate requires employers to make substantial and direct contributions to morally objectionable actions.[101]There follows a discussion of the "proximity vs. remoteness" criteria in the context of cooperation.[102] Here, use is made of the death penalty example which poses the question of the taxpayer who "pays her federal taxes, knowing that a portion . . . may ultimately be used . . . to finance the federal death penalty."[103] The hypothetical taxpayer would have few qualms making such payments but if the government were to command here to "personally finance a large portion of the cost of the drugs for a lethal injection, instead of paying her taxes"[104] she may well become very reluctant because she would sense that her participation in the objected-to activity (the imposition of the death penalty) had greatly increased. Her participation would in the latter case be more substantial and more direct. Analogies are then drawn with the worker in *Thomas* (discussed above) who refused to work in a foundry that made weapons but was able to help make steel that "might" be so used at a later point in time.[105] Proximity would also be increased because the Mandate does not allow for costing sharing at the time of purchase.[106] This fact rounds out the death penalty example since the employer contributions in the case of the Mandate would be "many orders of magnitude greater than the contribution of an objecting

[99] *Id*.
[100] *Id*., at 14.
[101] *Id*., at 15.
[102] *Id*., at 15–19.
[103] *Id*., at 16.
[104]*Id*.
[105] *Id*., 16-17, *citing* Thomas v. Review Bd., *supra* note 68, at 711.
[106] 67 Theologians, *supra* note 89, at 17, noting that under "42 USC. § 300gg-13(a), the proportion of the cost financed by the employer is the proportion of the insurance premiums paid by the employer—on average, 82 percent of the premiums for employees with individual coverage, and 72 percent of the premiums for employees with family coverage," *citing* The Kaiser Family Foundation, *Employer Health Benefits 2012 Annual Survey* 1 (2012), https://www.kff.org/wp-content/uploads/2013/03/8345-employer-health-benefits-annual-survey-full-report-0912.pdf (last visited Sept. 22, 2019).

Catholic taxpayer to any particular federal execution."[107]

(3) The mandate may require employers to become "necessary" or "essential" causes of objectionable actions.[108] In colloquial terms, this is to ask whether the immoral action would have happened anyway—with or without the helper's cooperation. Again, there is a graded approach since "[t]he more difficult it would be for the principal agent to proceed without the cooperator's involvement, the more serious the justification required to cooperate."[109]

(4) The mandate requires employers to provide funding earmarked in advance to be used for objectionable purposes.[110] Again this highlights the "essential tie" between the employers actions and the objectionable conduct with added emphasis on the provision by the employer of a "certificate" which proves that link. The amici use a "steakhouse example" which is worth quoting in full:

[P]aying a salary and providing insurance coverage for certain services are far from equivalent. The difference is analogous to the difference between giving cash to someone, and giving, say, a gift certificate to a steakhouse. In the former case, the money you give could be used to buy steak, but there is no essential tie between your gift and that particular use of it. In the latter case, you are giving a voucher for the procurement of a specific and limited range of goods and services; there is an intelligible link between your gift and the use to which the recipient might put it."[111]

Thus, complicity[112] is potentially greater in the case where there is provision of a "voucher" or "certificate" than when there is no such provision. This was a major issue for Catholics in the Federal Republic of Germany during the 1990s controversy over abortion counseling by Catholics—even requiring intervention by Pope (now Saint) John Paul II, who urged the cessation of such certification. Two other matters are relevant here:

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[107] 67 Theologians, *supra* note 89, at 17.
[108] *Id*., at 19–21.
[109] *Id*., at 19-20 *citing* Fisher, *Cooperation in Evil*, *supra* note 96, at 55.
[110] 67 Theologians, *supra* note 89, at 21–24.
[111] *Id*., at 21–22, *citing* Melissa Moschella, *The HHS Mandate and Judicial Theocracy*, THE PUBLIC DISCOURSE (Jan 3, 2013), https://www.thepublicdiscourse.com/2013/01/7403/.
[112] I mean here moral complicity. From the standpoint of the laws of evidence, the presence of a signed form obviously increases legal complicity as well, or at the least it increases the potential for such complicity via court-presented evidence.

> (1) Providing the objectionable insurance coverage would require Catholic employers to disregard guidance of the Catholic Bishops.[113] Such guidance is entitled to "deference, respect and obedience"[114] and makes up a vital part of the process of conscience formation for the faithful.[115] Moreover, the US Conference of Catholic Bishops (USCCB) has spoken directly on the precise issues in play.[116]
>
> (2) One may reasonably conclude that no proportionate reason justifies the substantial, direct, and necessary cooperation in grave moral wrongs required by the mandate.[117] Once again, the brief refers to the situation in Germany (see below) and to Directives of the USBBC forbidding "immediate material cooperation in abortion procedures."[118]

The 67 Theologians round off their arguments by noting that in consideration of all of the above, Catholic employers are confronted with "a perfect storm of moral complicity"[119] and conclude that "the Mandate substantially burdens their religious freedom [and] reflects an eminently reasonable application of theological principles."[120]

5. The 50 Theologians

The 50 Theologians divide their arguments into three major sections: those implicating formal cooperation, those implicating unjustified material

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[113] 67 Theologians, *supra* note 89, at 24–25.
[114] *Id.*, at 24.
[115] *See generally* Anthony Fisher, *Conscience in Ethics and the Contemporary Crisis of Authority*, *in* CHRISTIAN CONSCIENCE IN SUPPORT OF THE RIGHT TO LIFE 37–70 (E. Sgreccia and J. Laffitte eds., 2008).
[116] 67 Theologians, *supra* note 89, at 24–25, *citing* United States Conference of Catholic Bishops Ad Hoc Committee for Religious Liberty, *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, USCB ISSUES AND ACTION (2019) http://www.usccb.org/issues-and-action/religious-liberty/our-first-most-cherished-liberty.cfm and United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* at ¶45. An updated version (6th ed. 2018) of the latter is available at http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf.
[117] 67 Theologians, *supra* note 89, at 25–27.
[118] *Id.*, at 26.
[119] *Id.*
[120] *Id.*, at 27.

cooperation, and those related to scandal. The material cooperation arguments encompass a further four sub-arguments, which will be considered in more detail below.

The arguments based on formal cooperation[121] begin by outlining the following conscience-violating activities:

- To arrange for or make payments for contraceptives, sterilization, and abortifacients;
- To take action that triggers the provision of such coverage;
- To maintain a health plan or ongoing insurance relationship through which the Government arranges to provide such coverage;
- Or to participate in a scheme, the sole purpose of which is to provide such products.[122]

To engage in any of these actions would amount to a grave violation in light of "a reasonable interpretation of the Catholic faith."[123] Moreover, such action may also amount to formal cooperation, which involves the sharing of an intention to commit the wrong action. The classic hypothetical case, which is discussed at length, is that of the servant who holds a ladder for their master who is determined to commit a burglary, or, on another scenario, adultery. A discussion of this hypothetical by the well-known twentieth-century philosopher G.E.M. Anscombe[124] in the context of the morality of nuclear weapons is brought forward in support, as is her reliance upon a papal bull issued by Pope Innocent XI in 1679.[125] Such acts of

[121] 50 Theologians, *supra* note 92, at 8–15.
[122] *Id*., at 9.
[123] *Id*. Note that the operative verbs are: to arrange, to take action (to act), to maintain, and to participate.
[124] Anscombe (1919–2001) is noted especially for her works INTENTION (1957) and MODERN MORAL PHILOSOPHY (1958). She was a student of Wittgenstein and was named as one of his literary executors after his death. Anscombe was a major intellectual opponent to the use of nuclear weapons and refused to participate in the 1956 Oxford ceremony to award an honorary degree to US President Harry Truman; s*ee* Michael Wee, *The Catholic Philosopher Who Clashed with a US President Over Nuclear War*, THE CATHOLIC HERALD (Aug. 17, 2017), https://catholicherald.co.uk/commentandblogs/2017/08/17/the-catholic-philosopher-who-clashed-with-a-us-president-over-nuclear-war/.
[125] 50 Theologians, *supra* note 92, at 10, *citing* G.E.M. ANSCOMBE, WAR AND MURDER, IN NUCLEAR WEAPONS AND THE CHRISTIAN CONSCIENCE 58 (Walter Stein ed. 1981). The papal bull is available in translation in Charles F. Capps, *Formal and Material Cooperation with Evil*, 89 AMERICAN CATHOLIC PHILOSOPHICAL QUARTERLY, 681, 690 (2015), *cited in* 50 Theologians, *supra* note 92, at 10.

cooperation are illicit even if (1) they are performed under duress[126]and (2) even if the "master" ultimately fails in their wicked scheme.[127]

Applying this reasoning to the case at hand, the government is cast in the role of "criminous master"[128] and the employers are seen as "servants" who are being forced to act against their wills. And since the government's plan is clearly to "promote the availability and usage of contraceptives, abortifacients, and elective sterilization,"[129] employers who participate would be engaged in formal cooperation with those ends.

To round off this argument, the 50 Theologians reprise the well-known "the end does not justify the means" argument by pointing out that even if the Petitioners were to act only to avoid "crippling financial penalties," they would still be in breach of the moral norm of their faith.[130] In their own words, this is because, "compliance with the Mandate would involve choosing an objectively immoral means (formally cooperating with wrongdoing) to achieve an otherwise acceptable end (avoiding the Act's financial penalties), which is never permissible under Catholic doctrine."[131]

The Petitioners actions would thus rise to the level of a "shared intention" because compliance "with knowledge" of the Government's (published and publicly known) intention would mean that such an intention was undeniable.[132]

The objectionable action required in this case was the submission of a Form 700 or of an "HHS Notice" both of which were "specifically designed to enable the Government to authorize or obligate others to engage in gravely wrongful actions, regardless of whether the others actually perform those actions."[133] The implications of a signature are dealt with below, as is the 50 Theologians' reliance on the 1995 case of Pope John Paul II's intervention in the German abortion counseling cases. Analogies with "a gift certificate for a specific product, a gadget designed for a unique

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[126] For a discussion on the limits of duress, *see* ANTHONY FISHER, CATHOLIC BIOETHICS FOR A NEW MILLENIUM (2012), at 75–76.

[127] This is confirmed a little further on in the brief; *see* 50 Theologians, *supra* note 82, at 12, *citing* Roman Catholic Archdiocese of New York v. Sebelius, 987 F.Supp.2d 232, 243 (E.D.N.Y. 2013): "This alleged spiritual complicity is independent of whether the scheme actually succeeds in providing contraceptive coverage."

[128] Anscombe, *supra* note 113, at 58, *cited in* 50 Theologians, *supra* note 92, at 10.

[129] 50 Theologians, *supra* note 92, at 10, *citing* US Dep't of Health and Human Services, Health Resources and Services Administration, *Women's Preventive Services Guidelines*. Updated version (Oct. 2017) available at https://www.hrsa.gov/womens-guidelines-2016/index.html.

[130] *Id*., at 11.

[131] 50 Theologians, *supra* note 92, at 11–12, *citing* CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH ¶1753 (1994); [hereinafter *Catechism*].

[132] 50 Theologians, *supra* note 92, at 12.

[133] *Id*., at 13.

use, or a form that authorizes a specific act"[134] will be addressed later in this discussion.

The second set of considerations offered by the 50 Theologians relate to material (not formal) cooperation and comprise four main sub-arguments:

- Compliance with the Mandate requires cooperation in actions that are gravely wrongful under Catholic doctrine
- Compliance with the Mandate could cause Petitioners to become necessary or "but-for" causes of gravely wrongful actions
- Petitioners can reasonably conclude that the Catholic bishops have counseled against complying with the Mandate
- Petitioners may reasonably conclude that no proportionate reason justifies material cooperation in grave wrongdoing, including the taking of innocent human life.[135]

These will be dealt with in order. First, as to the question of gravity, the 50 Theologians emphasize that "the graver the wrongdoing, the more problematic is cooperation in that wrongdoing."[136] Accordingly, a greater justification is needed "the graver . . . the evil of the principal agent's act in itself," and "the graver . . . is the harm which may be caused to third parties, especially the innocent," by the objectionable action.[137] In other words, the wrong and its justification must bear some sort of proportionate relationship. Since abortion,[138] contraception,[139] and elective sterilization[140] are seriously wrong under Catholic teaching, any cooperation with the Mandate would be gravely wrongful. In none of these cases is there a relevant offsetting justification available.[141] Since the Government was also requiring "patient education and counseling" in relation to the wrongful act,

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[134] *Id*.
[135] *Id*., at 17, 20, 22, and 24, respectively.
[136] *Id*., at 17.
[137] *Id*., *citing* Fisher, *Cooperation in Evil*, *supra* note 96, at 27, 54.
[138] 50 Theologians, *supra* note 92, at 17–18, *citing Catechism*, *supra* note 131, at ¶2270.
[139] 50 Theologians, *supra* note 92, at 18–19, *citing Catechism*, *supra* note 131, at ¶2370.
[140] 50 Theologians, *supra* note 92, at 19, *citing* Sacred Congregation for the Doctrine of the Faith, *Responses to Questions Concerning Sterilization in Catholic Hospitals* ¶1 (Mar. 13, 1975), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19750313_quaecumque-sterilizatio_en.html.
[141] Full discussion of the pastoral, philosophical and theological intricacies of these positions is beyond the scope of this paper. *See further*, WHY HUMANAE VITAE IS STILL RIGHT (Janet E. Smith ed., 2018) and JANET E. SMITH AND CHRISTOPHER KACZOR, LIFE ISSUES, MEDICAL CHOICES (2016), and the works there cited.

such education and counseling would also be considered wrongful.[142] Brief mention is made of the problems of scandal, as to which see Part VI.

Second, the 50 Theologians consider the problem of "but-for" causation in any participation in the Mandate by the Petitioners. Causation is a known and much-discussed concept for lawyers,[143] especially in areas such a tortious liability and damages but must here be considered in a more theological/philosophical sense. In their own words, "one considers whether the believer is a "necessary" or "essential" contributor to the objectionable action."[144] There are several factors to consider, including indispensability and foreseeability. Citing Benedict Ashley, indispensability is:

> particularly problematic when one "participate[s] in the evil act by doing something necessary for the actual performance of the evil act," such that "one's action contributes to the active performance of the evil action so much so that the evil action could not be performed without the help of the cooperator.[145]

As with formal cooperation discussed above, justification must be proportionate to the wrong contemplated, and stronger justification will be required "[i]forgoing the [cooperation] certainly or probably would prevent the wrongdoing or impede it and greatly mitigate its bad effects."[146] Put another way, ""the more difficult it would be for the principal agent to proceed without the cooperator's involvement," the more serious the justification required to cooperate."[147]

Reasonable foreseeability also plays a role here since if Petitioner's choose to submit the relevant Form "it is reasonably foreseeable that their actions will contribute to the use of abortifacients, contraception, and

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[142] 50 Theologians, *supra* note 92, at 19–20, *noting*, "In the report upon which the Mandate's contraceptive requirements are based, the Institute of Medicine made clear that the intended purpose of the contraceptive education and counseling requirement is to increase the use of contraceptives, including those that function as abortifacients. . . . There can be no doubt that such "education and counseling" programs will instruct and encourage women to use abortifacients and contraceptives, and thus tend to increase such wrongful actions."

[143] *See* Honoré, Antony, & Gardner, John "Causation in the law", THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed. Winter 2010), https://plato.stanford.edu/archives/win2010/entries/causation-law/.

[144] *Id.*, 20.

[145] *Id.*, at 21, *citing* BENEDICT M. ASHLEY, JEAN BLOIS, & KEVIN D. O'ROURKE, HEALTH CARE ETHICS 56 (5th ed. 2006).

[146] 50 Theologians, *supra* note 92, at 21, *citing* GERMAIN GRISEZ, DIFFICULT MORAL QUESTIONS, 882–883 (1997).

[147] 50 Theologians, *supra* note 92, at 51, *citing* Fisher, *Cooperation in Evil*, *supra* note 96, at 55.

sterilization that otherwise would not have happened."[148] This is confirmed by "the fact that the Government, by enforcing the Mandate, evidently intends to increase the incidence of the forbidden actions."[149]

But-for causation also raises issues surrounding the "trigger effect" of a signature, as to which see Part IV.

The third sub-argument relates to the fact that the Catholic bishops have counseled against complying with the Mandate and this was well-known to the Petitioners.[150] The "deference, respect, and obedience" owed to the Bishops is grounded in the Catholic Catechism.[151] The individual conscience must also take this into account.[152]

The fourth sub-argument reiterates that there is no proportionate reason which would justify cooperation in such grave matters, including the taking of innocent human life.[153] The arguments related to scandal are dealt with in detail in Part VI.

To recap, The 50 Theologians three major sections: those implicating formal cooperation, those implicating unjustified material cooperation, and those related to scandal all prohibit Catholic employers from participation in the Mandate, all converge to a point where participation is morally fraught. As foreshadowed, the particular issues of signature and the associated trigger it provides will be discussed below.

In terminology and reasoning, the reader will note the similarities between the briefs of the 67 Theologians, the 50 Theologians and that of Oderberg. There are also some significant similarities between these arguments and their concomitant reasoning about cooperation, and those put forward by Oderberg. Given their common origins, this should come as no surprise. The points of difference, however, invite some serious reflection and comparison: why does Oderberg consider the question of belief about cooperation differently from that of the Supreme Court, and by implication, from that of the 67 and the 50? Why does Oderberg not see signature of Form 700 as problematic, when the amici in both of those briefs are clearly are so trenchantly against such a signature? And, what are the implications for the use of the cooperation principles in the way Oderberg suggests as

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[148] 50 Theologians, *supra* note 92, at 22.
[149] *Id*.
[150] *Id*., at 22–23.
[151] *Id*., at 22, *noting*, "[t]he bishops are viewed as "authentic teachers, that is, teachers endowed with the authority of Christ, who preach the faith to the people entrusted to them, the faith to be believed and put into practice."; *Catechism*, *supra* note 131, at ¶2034."
[152] 50 Theologians, *supra* note 82, at 23, *noting*, "The Catholic's individual conscience "should take account of … the authoritative teaching of the Magisterium on moral questions," and "[p]ersonal conscience and reason should not be set in opposition to the moral law or the Magisterium of the Church." *Catechism*, *supra* note 131, at ¶2039."
[153] 50 Theologians, *supra* note 82, at 24.

part of an "opting out" possibility which is enshrined by statute? Other questions of scandal and sincerity also flow out of these questions to which I now turn in greater detail.

V. THE SIGNIFICANCE OF THE FORM 700 SIGNATURE

A. Signatures as a Sign of Assent

According to Fuller's classic exposition, a signature will normally indicate three important things:[154] First, the assent of the signer to that which is signed. In a legal context, this satisfies the requirement of consent to, for example, a contract or a testamentary statement like a will. Consent is, of course, the bedrock concept of contract[155] (and, to a lesser degree) tort theory in most western legal systems.[156] Second, a signature affirms the identity of the person who is signing. In simplest terms, that identity is summarized via a unique human identifier—a person's name—and it is "their name" that is here set out and also affirmed. Finally, a signature links a particular person (the signer) with the document that is signed. Lawyers will sometimes refer to this aspect as "attribution." All three aspects normally occur simultaneously and are part of an entire process known collectively by terms such as legal attestation, autograph or simply "signature."[157] There are other variations and additions on this overall theme—such as witnessing, swearing, sealing and delivering—but these can be laid to one side for now.

In lay terms, signing indicates the serious (legal) nature of what we are doing. Usually, the more serious the task, the more formalities the law will require. The purchase of a newspaper subscription (which may or may not need a signature) is not an especially formal transaction compared to, say, the purchase of a house, or the execution of a will.

The quote from Miller's play *The Crucible* at the beginning of this

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[154] Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). For a recent reconsideration of Fuller in the context of the different theories of contractual liability see Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94 (2000).

[155] WILLISTON ON CONTRACTS (2019)(4th ed.) § 71:12. Loss of "free will" or similar expressions—Coerced consent.

[156] See WARD FARNSWORTH, MARK F. GRADY, TORTS: CASES AND QUESTIONS (2019), 14ff (Consent and Its Limits). See also 57B AM. JUR. 2D Negligence § 767 American Jurisprudence (2019) discussing the principle *volenti non fit injuria*, [which] "means that a person is not legally injured if he or she has consented to the act complained of or was willing that it should occur." At § 767.

[157] Traditionally this is done by hand—a holographic signature. 'Digital' signatures are now also available.

Article indicates a human sensitivity to the issues of "signing away my name" in circumstances of extreme provocation or where judgments about guilt and innocence are hanging in the balance.

In that context, it is appropriate to turn to the amicus brief of another Catholic interlocuter in the saga of the HSS Mandate, that of the Eternal Television Network in *Zubik,* which was quoted above. According to the amici:

> "For a Catholic organization like EWTN, it is ironic that its conscience hinges on its inability to sign a piece of paper. The best-known Catholic martyr for conscience, St. Thomas More, "went to the scaffold rather than sign a little paper for the King." ETBU II, 807 F.3d at 635 (Jones, J., dissenting). Admittedly, the penalties for not signing the Oath of Supremacy were more stringent than those for not signing Form 700. *See* Treason Act, 1351, 25 Edw. 3 Stat. 5 (Eng.) (prescribing hanging, drawing, and quartering). But the risk of signing—that is, the risk to one's conscience of doing what one knows to be wrong—is the same. EWTN therefore cannot sign."[158]

These are high stakes, indeed, and which can be immediately contrasted with the views of Oderberg who, though advocating similar cooperation principles, sees this particular problem from a different angle. Under the heading, "*Should I sign? It depends*" he states:

> Signing a document looks like a trivial matter. In one sense it is—no effort required. But it can be momentous. It could be signing someone's death warrant, signing away your lifesavings, authorizing a fraud, deceiving a law enforcement official, approving a dangerous or unethical experiment, and so on. The mere act of signing may or may not make you a cooperator. If committee members sign a policy paper advising the government to do such and such, they will not be actual assistants in the government's execution of the policy.[159]

This prompts us to ask when a signature will in fact amount to cooperation in the primary act. Oderberg opines:

> "Signing, in order to amount to cooperation, needs to supply means or conditions for the primary act to be performed. If Mike's signature is required for the imprisonment of an innocent man unfairly convicted, his cooperation will be dispensable if any of a

[158] EWTN Brief, *supra* note 1, at 16.
[159] *Opting Out*, *supra* note 11, at 64–65.

> number of people could have signed and Mike just happened to be the first available person. If he is the prison governor and only his signature will do, his cooperation is indispensable, and he is more closely implicated as a result. If no more hurdles have to be cleared between signing and incarceration, the governor's cooperation is highly proximate."[160]

Thus, the dispensability of the signature becomes a point of contention, and one means by which the level of cooperation may be estimated. For EWTN, however, the signature in question was clearly a "trigger" rather than a mere contributing factor, and so impermissible:

> [W]hy *must* [EWTN] provide Form 700 to its administrator? Because without the form, the administrator has no legal authority to step into the shoes of the Network and provide contraceptive coverage to the employees and beneficiaries of the Network." EWTN II, 756 F.3d at 1347 (Pryor, J., concurring) (*citing* 78 Fed. Reg. at 39,879-80) (emphasis in original).[161]

The 67 Theologians appear to be of the same view on this question, although they frame it in terms of the provision of a "certificate" or "coupon"; the 67 Theologians saying, "[p]roviding another person with certificates or coupons to authorize the performance of a morally objectionable action typically makes one morally complicit in that action."[162]

Likewise, the 50 Theologians rely on various arguments, including their assertion that there is an "intelligible link" or "essential tie" between "the cooperator's action and the wrongdoing."[163] They are thus of the view that there is:

> such an "essential tie" or "intelligible link" between complying with Mandate via the "accommodation" and the forbidden action, because the sole function of the required information in the Government's regulatory scheme is to designate and authorize another to perform the forbidden action.[164]

On this point, Oderberg seems to have a different opinion and

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[160] *Id.*, at 65.
[161] EWTN Brief, *supra* note 1, at 15.
[162] 67 Theologians, *supra* note 89, at 5.
[163] 50 Theologians, *supra* note 92, at 15, relying upon Moschella, *supra* note 100.
[164] 50 Theologians, *supra* note 92, at 15.

diverges somewhat from the views set out above. He believes that Judge Baldock, in fact, "put his finger on the problem . . . without recognizing it as a problem."[165] Oderberg continues:

> Quoting Judge Kavanaugh in a similar case, Baldock said: 'But what if the religious organizations are misguided in thinking that this scheme . . . makes them complicit in facilitating contraception or abortion? That is not our call to make under the first prong of RFRA' (Priests for Life 2015: 8). Baldock added: 'And *Hobby Lobby* supports this position well, as questioning a religious adherent's understanding of the significance of a compelled action comes dangerously close to questioning "whether the religious belief asserted in a RFRA case is reasonable"—a "question that the federal courts have no business addressing.".[166]

Such "misguided thinking" about the scheme of cooperation—which one might label the mechanics of the process by which cooperation is achieved or not achieved—is a controversial and debatable area and will be so in every situation in which conscientious objection arises—possibly even more so when there is an active and extensive bureaucracy and associated paperwork involved in the process of opting out. The question, "what is a reasonable assessment of what amounts to cooperation?" will become critical. Oderberg is acutely alive to this problem and continues:

> Strictly, then, if a conscientious objector sincerely believes he is cooperating impermissibly, and if that belief is not subject to any test of reasonableness, it must be protected under law—no matter how unreasonable it is. All things being equal, to believe that opting out is just such a case of cooperation is unreasonable—as unreasonable as thinking that by running away from a riot you are cooperating with the rioters. Now, running away might in the circumstances be an act of cowardice, or in some other way undesirable. Similarly, one might protest against having to opt out of the contraceptive mandate because one objected to the entire Obamacare scheme, with its use of private insurers to carry out the government's 'dirty work', as it were. But the way to combat that is not by preventing an objective assessment of whether one is cooperating illicitly. It is by the usual means for trying to overturn objectionable laws—the ballot box, parliamentary process, protest;

[165] *Opting Out*, *supra* note 11, at 75.
[166] *Id.*, at 75–76, *citing Little Sisters*, *supra* note 2, at 111.

perhaps even civil disobedience.[167]

Several problems emerge in light of this analysis. First, whether it is possible and if so, how to distinguish a sincerely held belief that one is cooperating with the primary act from a religious belief, *simpliciter*. Second, the nature and scope of any reasonableness standard that might be employed as a solution to an impasse between a "sincerely held belief" and an objective "reasonable cooperation" standard. Third, the public policy and democratic implications of Oderberg's other methods of protest against the alleged cooperation, including the issue of civil disobedience.

The first issue has been considered somewhat tangentially but for our purposes in a useful manner by Adams and Barmore, who note the essential difference between "sincerity" (of belief) and "verity" (of belief).[168] The former is always open to judicial assessment while the latter remains entirely exempt.[169] While Oderberg may not use the same terms, he is at least opening a conversation along similar lines but with "cooperation" as the object of his attention and an argument that judicial utensils (like extrinsic evidence and objective facts) can and should be brought to bear on the question.[170] Here we are looking at factors like non-religious self-interest and whether the claimant's actual behavior is congruent with the claimed belief.[171]

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[167] *Opting Out*, *supra* note 11, at 76.

[168] Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59-60 find a way out: "Fortunately, courts historically have demonstrated that they are able to ferret out insincere religious claims. There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity." They continue: "The difference is this: Suppose someone claims a religious objection to eating broccoli, but that same person knowingly eats broccoli each week. A court, without asking whether there is any moral truth behind a religious objection to broccoli consumption, may nonetheless ask whether the claimant actually holds that religious belief. The former, spiritual question is one no court should ever ask. The latter, factual inquiry into fraud is something courts are well equipped to do by examining objective criteria. As courts face future RFRA claims from for-profit corporate litigants, they can continue to use objective criteria to give teeth to RFRA's "sincere belief" requirement." *Id*. at 60.

[169] "While there is a risk that sincerity may be used as a proxy for verity, openly questioning the underlying truth of a religious claim surely would be worse. And were courts to examine the importance of an asserted belief, not only would they move closer to scriptural interpretation, but that test would run counter to Congress's intent to protect religious beliefs regardless of their centrality to a religious system." *Id.* at 64.

[170] *Id*., at 62, *relying on* Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).

[171] Adams & Barmore, *Questioning Sincerity*, *supra* note 168, at 62–63, *relying on* cases like United States v. Quaintance, 608 F.3d 717, 718–719 10th Cir. (2010) and Dobkin v. District of Columbia, 194 A.2d 657, 659 D.C. (1963).

The second issue—concerning the nature and scope of any reasonableness standard—is more nuanced. One difficulty here is that if, in the mind of the religious believer, "opting out is, in reality, opting in"[172] what should be the appropriate standard applied by the court in assessing such a claim? Should the standard be to "read outwards" from the believer's understanding of their own creed? In other words, is it best to interpret the "words or actions of cooperation" in light of the believer's stated religious belief? The danger here is that the court makes mistakes about what that belief really is. Or, alternatively, is the evaluation to be done in light of the court's own interpretation of what is being said and done, yet still being careful not to read outwards from the court's *own beliefs* about the meaning? One solution is to agree that the starting point for any evaluation of the "words or actions of cooperation" is always the mind of the conscientious objector (*exegesis*), rather than the mind of the court (*eisegesis*), but that thereafter the court should apply an "objective standard."

These are fine distinctions that will be considered further below in relation to the nominalist problem. There can be no doubt at this stage of the analysis, however, that the court will find itself in a strange, non-mechanical and somewhat ethereal corner of the world of causation. Literature associated with the issues surrounding "cause-in-fact" and "legal causation" in torts claims may be somewhat helpful here, especially since they have been carefully thought through over many decades.[173] But their application is also limited since the "damage" caused in a case of conscience is arguably entirely internal to the conscience of the believer afflicted: "If required to do this, I am, according to my beliefs, guilty, and will suffer consequent damage to my conscience because of it." Such damage is very difficult to quantify, and the tort concepts may in the last analysis be ill-equipped to help in deciphering the cause of the claimed affliction.

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[172] To be clear, I have in mind here the scenario where the conscientious objector is signing a piece of paper with "Opt-Out Form" or "Sign here to Opt Out" at the top or bottom of the page and yet is claiming this to be, in fact, an act of cooperation. This is discussed more thoroughly below.

[173] See the decades-long discussion begun in 1959 with the seminal H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW (1st ed. 1959). An insightful window into subsequent developments is found in Jane Stapleton, *Choosing what We Mean by "Causation in the Law,"* 73 MO. L. REV. 433 (2008). Stapleton notes in her introduction that "[l]awyers have used the term [causation] to refer to more than one type of enquiry, and philosophers often do not specify an inquiry. The most useful inquiry for legal purposes is one that compares the actual world of a particular phenomenon with a hypothetical world and thereby determines, in the context of that comparison, the role that a specified factor played, if any, in the existence of the actual phenomenon," at 433.

The third issue, civil disobedience, raises its own subset of problems. The deliberate violation of laws is a source of great stress on a democracy since it involves not only deliberate law-breaking, but also the flouting of associated laws such as trespass, traffic or civil order regulations.[174] Those involved often acceptance of the likelihood of punishment from the very outset (*ab initio*) of their actions, and their disobedience can have multiple aims, including:

> to publicize an unjust law or a just cause, to appeal to the conscience of the public, to force negotiation with recalcitrant officials, to "clog the machine" (in Henry David Thoreau's phrase) with political prisoners, to get into court where one can challenge the constitutionality of a law, to exculpate oneself or to put an end to one's personal complicity in the injustice which flows from obedience to unjust law—or some combination of these.[175]

Weighty threads of recent history support these purposes, including the contributions of Mohandas Gandhi,[176] Martin Luther King,[177] and the Nuremberg Principles.[178]

Another consideration may be found in the work of J.L. Austin's speech-act theory, popular during the 1960s.[179] Austin makes the philosophical (epistemological) claim that we can usefully understand words and signs as "performative utterances" or "speech-acts" and that such things accomplish something in the real world (for example, a bet, a

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[174] Such breaches were not uncommon during the protests surrounding the Vietnam War; *see* Frank Lawrence, Note, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397 (1989).

[175] THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA (Christopher B. Gray, ed. 1999), s. v. "Civil Disobedience."

[176] MOHANDAS GANDHI, SATYAGRAHA IN SOUTH AFRICA (Valji Govindji Desai trans. 1928). This book outlines Gandhi's growth as an organizer over many years. *See also* the works of Paromita Goswami, who notes, "[p]erhaps the most fascinating aspect of the story of Satyagraha is Gandhiji's success in creating an atmosphere where physical suffering is not just borne and overcome but actually welcomed and celebrated by the community. He describes the celebration of the first incarceration and the readiness of young and old to even die in prison for the cause. His ability to remove the fear of hardship, imprisonment and even death was the key to his leadership. This was the basis of his non-violence - overcoming the fear of violence and death thereby overcoming the fear of the "Other," the "Enemy""; Paromita Goswami, *A Re-Reading of Gandhi's 'Satyagraha in South Africa' for Contemporary Community Organizing*, 44 COM. DEV. J. 393, 401 (2009).

[177] MARTIN LUTHER KING JR., WHY WE CAN'T WAIT 76–95 (1964).

[178] Frank Lawrence, Note, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397 (1989).

[179] Flesch, W., *J.L. Austin and Speech-Act Theory*, *in* MODERN BRITISH AND IRISH CRITICISM AND THEORY 61–67 (Julian Wolfreys ed. 2006).

marriage, a naming ceremony, a testamentary gift).[180] If that is so, then a signature or an affirmation can amount to an "act of cooperation" in the context of something like the *Hobby Lobby* and *Zubik* controversies, and many other scenarios besides. This leads into a brief discussion of the legal effects of a signature, followed by what we shall call "the nominalist problem."

B. Signatures: Legal Effects

Atkinson's classically lucid *Handbook of the Law of Wills*[181] describes the necessary procedures for signing a will.[182] Variations on an unadorned signature, both small and large, seem to be quite acceptable. Thus, the law will accommodate illegibility, misspelling, nicknames, initials, pencils, rubber stamping, cutting and pasting, sealing, fingerprinting, typing, and crossing.[183] The overarching issue is whether the signer *intended* to sign: "In order to have a valid signature the mark or other writing by the testator must have been intended as his signature, and moreover it must be the whole act which he contemplated."[184] Considered through the lens of moral philosophy, this necessary intentional aspect of affixing a signature aids us in understanding the idea of formal cooperation discussed above, specifically, that the cooperator wishes to align their will with the will of the principal actor. In other words, they intend what the principal actor intends—their two wills are aligned.

Other legal inventions like mortgages, tax returns, and negotiable instruments (bills of exchange) often also have elaborate requirements for signature verification and validity, and they too all share, to greater and

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[180] *Id.*, at 63.

[181] THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION (2nd ed. 1953).

[182] *Id.*, at 297 ff. In summary form: "64.1 A will must be signed by the testator, but he need not write his full or correct name, and even a mark or stamp is sufficient if that was the complete act with which testator intended to authenticate the instrument. 64.2 Most states permit the testator to sign by proxy, and if so, the testator's name written by another at this direction and in his presence is sufficient signature. 64.3 Most states do not require that the will be signed at the end, so that the writing of the testator's name anywhere on the instrument is sufficient if he intended it to operate as his signature. 63.4 The statutes in a number of jurisdictions require that the will be signed at the end or subscribed by the testator. In such case if any dispositive portion of the will is below or after the signature at the time of execution the entire will is invalid."

[183] *Id.*, at 298–299.

[184] *Id.*, at 299. Thus, according to the case law cited by Atkinson, the scenario where the signer fails to complete a half-signature due to failing strength is excluded from being designated a proper "signature"; *see* Knapp v. Reilly, 3 Dem.(N.Y.) 427, 1885 (where the testator wrote only part of his name—"Pat"—but failed to complete "Patrick").

lesser degrees, this same fundamental concern with intention.[185] In the context of an administrative form (not given under oath), such a signature may indicate varying degrees of intention on the part of the signatory: from "mere formality" to "serious indication of assent." It all depends on the words on the document that is being signed, and the surrounding circumstances.

This takes us directly back to the discussions in Part III above, and Oderberg's answer to the question, "*Should you sign?*" As discussed, the given answer is, "It depends."[186] But it is now important to distinguish legal and moral perspectives. While something may be legally binding, and the law has indeed worked out various rules for determining this, how are we to determine whether a signature is morally binding (on the signer) in the context of our discussion of cooperation in evil? Moreover, how might a court make such a determination for the purposes of deciding whether this alleged cooperation is capable of giving rise to a defensive conscientious objection? These questions can be brought closer to an answer, it is argued, by considering yet another aspect of the signature scenario; what I shall call the "nominalist problem."

C. The Nominalist Problem

The relevant part of Form 700 reads, "I certify the organization is an eligible organization . . . that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered."[187] This certification claims a "religious objection" and thereby paves the way for an opt-out of the system of coverage. Oderberg's analysis[188] considers various ways in which such an objection may be considered: it may be analogous to a conscientious objector in wartime, where names are taken and there may be a requirement to enroll for substitute service; or it may be analogous with the case of the

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[185] *See, e.g.*, Uniform Commercial Code §3–204(a), which defines "indorsement" in terms of the "purpose" of the signature, including its ability to settle liability on the signatory: "§3–204(a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument."

[186] *Opting Out*, *supra* note 11, at 64.

[187] EBSA Form 700, *supra* note 3.

[188] *Opting Out*, *supra* note 11, at 65.

concentration camp prisoner, who refuses to work in the crematorium, and instead asks for assignment to the camp hospital; or (a variation) it may be like the Enrollment Act (also known as the Civil War Military Draft Act, 1863)[189] by which the objector either found a substitute soldier or paid the sum of $300 in lieu.[190] In the latter case "[a]s a result of numerous abuses the three-hundred-dollar clause was limited to conscientious objectors in 1864."[191]

While nominalism is a complex metaphysical problem, usually divided into two parts,[192] for our purpose, a simple definition will suffice, namely, "nominalism" is "the proposition that there are no real entities or universals beyond the individual."[193] To take a simple example we may consider the following statement: "there are no Studebaker cars, there is only this Studebaker." But what if a mechanic were to put a new Crosley Crosmobile badge on a Studebaker car bonnet and thus attempt to rename it a Crosmobile: would such an act make the car anything but a Studebaker? Is it possible to rename (rebadge) a thing and thereby change its fundamental character? Drawing this string along further into our domain of conscientious objection, we may ask whether it is possible for a bureaucratic form, which declares itself to be an instrument for "opting out," to in fact become one that is doing the real work of "opting in"?

Oderberg seems attuned to this problem when he writes about the unreasonableness of "thinking that by running away from a riot you are cooperating with the rioters."[194] He is seeking to preserve an area of objectivity surrounding the concept of cooperation, and advocates this as something that good judges should seek to do where possible. The consequences of not doing so are, he says, significant and are already being played out. He writes:

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[189] *Cited in* Dr. James C. Dobson and Family Talk, Plaintiffs, v. Kathleen Sebelius, Plaintiffs' Motion for Preliminary Injunction and Certificate of Compliance Re: Consultation on Motion, 2014 WL 12771149 (USDC Colo.) , Civil Action No. 1:13-cv-03326-REB-CBS, at 6.

[190] *See* EUGENE CONVERSE MURDOCK, PATRIOTISM LIMITED, 1862–1865: THE CIVIL WAR DRAFT AND THE BOUNTY SYSTEM (1967). *See also* the insightful review of same by Basil Leo Lee in 74 THE AM. HIST. REV. 299, 299–300 (1968).

[191] Lee, AM. HIST. REV., *supra* note 191, at 299.

[192] Rodriguez-Pereyra, Gonzalo, "Nominalism in Metaphysics." In *Stanford Encyclopedia of Philosophy* (Edward N. Zalta, ed. Summer 2019), https://plato.stanford.edu/archives/sum2019/entries/nominalism-metaphysics/.

[193] Geoffrey P. Miller, *The Glittering Eye of Law* 84 MICH. L. REV. 880, 886–887 (1986) (A review of Joseph Vining, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986).)

[194] *Opting Out*, *supra* note 11, at 76. Of course, running away is not the very same action as signing, although it may arguable be the same *kind* of action. If they are completely *different* kinds of action, then his analogy would appear to fail.

> By acknowledging the existence of a theory of cooperation, as the Supreme Court did in *Hobby Lobby*, but refusing to use it in fear of 'second-guessing' the plaintiffs' religious beliefs, the court effectively set the stage for a possible judicial backlash against the very conscientious objectors they were trying to accommodate. In fact, the *Little Sisters* case, along with related cases, made it to the Supreme Court—only for the court to *vacate* all previous judgments, including the fair and reasonable one discussed above, and send the whole issue back to the parties and lower courts for yet further negotiation and resolution.[195]

Allowing Oderberg to state his case in the fullest terms possible, he is fearful that:

> the courts, worried that the 'mere sincerity' test of *Hobby Lobby* will open the floodgates to even the most far-fetched conscience cases, will find ways around that test and thereby undermine the very freedoms the test was supposed to protect. Adopting a plausible, relatively well worked-out theory of cooperation along the lines I have defended could prevent just such a backlash."[196]

Perhaps now that matters are restated in terms that are both philosophical as well as focused on potential legal consequences, we can see more clearly what is at stake. Such problems are not new and have been discussed in other jurisdictions such as Germany. Something akin to the *Zubik* "signature problem" arose in Germany in the area of counseling certificates for abortion services. Following debates in the German *Bundestag* (Parliament) in 1994–1995, the abortion laws were altered to allow abortion during the first trimester (the first twelve weeks of pregnancy), provided there was mandatory counseling (*Schwangerschaftskonfliktberatung*)[197] and a certificate of proof that this

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[195] *Id*., at 76–77.
[196] *Id*., at 77. Oderberg notes later in his book that "Where sincerity is not enough, however, is in the determination of how involved a conscientious objector may be in the actions of others, given the objector's sincere beliefs. This, I claim, is a matter for reasonable judgment using philosophical principles of cooperation. An objector's mere claim that they are illicitly involved, or compromised, by assisting however remotely with some primary act to which they object cannot be taken at face value. This can no more be a matter of mere sincerity than a litigant's belief that they were treated by some other party negligently, unjustly or unreasonably. These are matters for courts to determine, and involvement by cooperation is in the same category." *Opting out*, *supra* note 11, at 126.
[197] Pregnancy-conflict counseling. The issue of counseling played an important role in the lengthy German political and legal debates. For a comparative assessment of the

had occurred (*Beratungsschein*).[198] This certificate was to be provided through a government-approved agency (*Schwangerschaftsberatungsstelle*)[199] and a number of Catholic dioceses provided this counseling on the basis that women might thereby be dissuaded from the procedure by attending a Catholic counselor.[200] A four-years-long discussion then took place between the German Bishops and the Vatican, resulting in a January 1998 letter from Pope John Paul II,[201] which set out the dilemma of these certificates. The counseling certificate was a difficult issue, especially with regard to its *legal* meaning and implications.

These issues are also considered in the briefs of the 67 Theologians[202] and of the 50 Theologians.[203] The EWTN brief went on to make a critical distinction between the *intention* and *effect* of what they were doing (at page 14):

> This analogous situation helped EWTN judge whether it could participate in the "accommodation" scheme. By signing the form, EWTN would not *intend* to facilitate immoral practices. Indeed, EWTN could simultaneously declare that it continues to object to each and every one of those practices. The overriding consideration, however, was the effect of EWTN's actions in executing the form, and that *effect* was plain: EWTN would thereby authorize and incentivize a third party to provide the same objectionable services—and not just any third party, but the party selected and retained by EWTN to administer EWTN's plan. By this action, EWTN would become "guilty of immoral cooperation with evil."

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development of the law regulating abortion in Germany, including the importance of counseling and waiting periods in overcoming differences between East Germany (former DDR) and West Germany (FRG), *see* Richard E. Levy and Alexander Somek, *Paradoxical Parallels in the American and German Abortion Decisions*, 9 TUL. J. INT'L & COMP. L. 109 (2001). *See also* Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 10 (1994).

[198] Certificate of counseling.

[199] Pregnancy-counseling center.

[200] In commenting on these events, Fisher notes, "[i]n September . . . [1995] . . . the German Bishops' Conference criticized the law but agreed to take part in Church-state abortion counseling boards. The bishops clearly believed that Church involvement would be at most material cooperation in the evil of abortion and that many women would be dissuaded from having an abortion by Church-sponsored counseling agencies"; *see* CATHOLIC BIOETHICS FOR A NEW MILLENNIUM 84 (2012).

[201] Letter of His Holiness Pope John Paul II to the Bishops of the German Episcopal Conference (Jan. 11, 1998), http://w2.vatican.va/content/john-paul-ii/en/letters/1998/documents/hf_jp-ii_let_19980111_bishop-germany.html.

[202] 67 Theologians, *supra* note 89, at 22–24.

[203] 50 Theologians, *supra* note 92, at 13–15.

EWTN II, 756 F.3d at 1343 (Pryor, J., concurring)."[204]

The question remains: Do the above arguments mean that the conscientious objectors (in this case, EWTN) are in fact "preventing an objective assessment of whether one is cooperating illicitly"?[205] At the core of Oderberg's concern, we must address what he sees as a fundamental mistake in EWTN's argument. In his own words, this error is about the boundaries of religious belief. He asks, "[w]hy is this mistaken argument by the plaintiffs a problem? Because it treats their belief about whether they are cooperating illicitly as itself a matter of religion, when it is not."[206]

VI. The Problem of the 'Religion of Insincerity'

Finding ways out of the above conundrums is not an easy task. Hadley Arkes has asked a very simple question which may shed some light towards an exit:

> "Our friends on the courts and in law schools invoke the test of "sincerity" precisely for the purpose of avoiding any moral judgment on the substance of what a religion teaches. And yet, what is the test of "sincerity" *other than* a moral test? We could readily imagine the characters gathered in the Church of the Flying Spaghetti Monster asking, "Why is it necessary or legitimate to be 'sincere'? Why can't we have, after all, a 'Religion of Insincerity'?" To insist on "sincerity" is to make nothing less than a back-door moral judgment on what counts as legitimate or illegitimate religion."[207]

There is an echo of Oderberg's approach here, since Oderberg's problem arises when "sincerity is not enough"[208] and then opens the door to a

[204] EWTN, *supra* note 1 (emphasis in original).
[205] *Opting Out*, *supra* note 11, at 76.
[206] *Id*., at 75.
[207] Hadley Arkes, *Backing into Relativism*, FIRST THINGS (June 2019), https://www.firstthings.com/article/2019/06/backing-into-relativism
[208] This has been discussed above. In Oderberg's own words: "In a liberal, pluralistic society, courts do not second-guess religious or ethical beliefs. They do not subject them to a test of reasonableness. As long as a belief is sincerely held (rather than seeming to be held as a pretext for avoiding the force of some general law, or for some other ulterior motive), the courts take it at face value. This may have inherent problems of its own, since beliefs can be outlandish and risible by any reasonable standard, and they can have a direct impact on non-adherents to the particular code or system from which they derive. But that is a discussion for another occasion. Working within the framework we currently have in most Western countries for protecting religious freedom, we have to accept that sincerity is

"reasonable cooperation" test (outlined above) which, he claims, preserves more religious freedom because it will prevent, amongst other things, a judicial backlash and an unwise judicial submission to even the most bizarre religious claims. Arkes merely sharpens the point by imagining a religion that is itself devoted to 'insincerity' and so the problem can never be solved under the current jurisprudence. What then, is really needed? Do both of these exit doors open into the same space? The answer will undoubtedly lie in emerging case law in which the "religion of insincerity" or its equivalent is argued. Examples of an equivalent scenario will likely arise whenever there is a disagreement internal to a religious group about the meaning of that religion's actual on a particular issue.

Examples may include arguments over idiosyncratic interpretations of doctrine in any number of contexts: schools, non-religious workplaces, or any situation that calls for adjudication in relation to a conscientious objection. Novel technologies (e.g. involving supposedly autonomous technologies) may also raise these issues. In each of these situations, all that is needed is for one party to frame the argument in terms of their "sincere" interpretation of an otherwise settled consensus on the implications of an article of faith or essential dogma. The danger, as Arkes indicates, is a reverse move into a cul-de-sac of relativism from which there is no exit. In such circumstances the attraction of Oderberg's advocacy for "cooperation principles" is strong. Such an approach offers at least a partial brake on unlimited "sincerity" at the expense of any objective judicial restraint on such claims.

VII. CONCLUSION

The implications surrounding who gets to decide between triggers and optouts are potentially profound. If courts are not able to make reasoned judgements about cooperation claims because any such claim can be shielded by being labelled a "religious belief," then, as Oderberg predicts, the backlash could be severe.[209] As he states:

> By acknowledging the existence of a theory of cooperation, as the Supreme Court did in *Hobby Lobby*, but refusing to use it in fear of 'second-guessing' the plaintiffs' religious beliefs, the court effectively set the stage for a possible judicial *backlash* against the very conscientious objectors they were trying to accommodate."[210]

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enough when it comes to religious and ethical beliefs." *Opting Out*, *supra* note 11, at 125–126.

[209] *Opting Out*, *supra* note 11, at 11, 76, 77.

[210] *Id*., at 76 (emphasis in original).

This Article has considered the sincerity test in light of the work of Professor Oderberg and suggests arguments favor of his “cooperation principles.” The strongest of these is that when judges vacate the field of rationality, they are refusing to do a job that they, of all arms of government, are best equipped to perform, namely, to make judgments about facts and to seek out and squash insincerity. To grant them this role is not to increase their power unnecessarily, rather it is to guarantee their ability to continue to allow the flourishing a religious freedom within the relatively large confines of “sincerity” that would remain after adoption of Oderberg’s approach.

APPENDIX – EBSA FORM 700 CERTIFICATION

OMB Control No. 1210-0150
Expiration Date: 11/30/2021

EBSA FORM 700-- CERTIFICATION
(revised September 2017)

Public Health Service Act section 2713 requires, among other things, that certain group health plans and issuers provide benefits for women's preventive services without cost sharing as provided for in comprehensive guidelines supported by the Health Resources Services Administration (HRSA). The HRSA Guidelines provide an exemption for group health plans and student health insurance coverage established or maintained by entities that object to providing coverage for all or a subset of contraceptive services based on religious beliefs or moral convictions. However, an **optional** accommodation process is available for objecting entities that are exempt but choose to shift the otherwise applicable obligation to provide benefits for contraceptive services to its issuer or third party administrator. Objecting entities should note that if their issuer has their own religious or moral objection to providing contraception services, an issuer may also avail themselves of the exemption. Separately, third party administrators with an objection may also decline to enter or continue contracts as a third party administrator of the plan.

This form may, but is not required to, be used by an objecting entity to provide notice to its issuer or third party administrator that that the objecting entity has a sincerely held religious or moral objection to coverage of all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an objecting entity may also provide notice to the Secretary of Health and Human Services. A model notice is available at - http://www.cms.gov/cciio/resources/Regulations-and-Guida nce/index.html#Prevention.

An organization may revoke its use of the accommodation process at a later date if it chooses to do so provided that written notice of any such revocation is given to participants and beneficiaries consistent with guidance issued by the Secretaries of Labor and Health and Human Services.

If you intend to utilize the optional accommodation process, please fill out this form completely and provide it to your plan's health insurance issuers (for insured coverage) or third party administrators (for self-insured coverage). This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting entity	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the entity	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an objecting entity (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(c)) that has a sincerely held religious or moral objection to providing coverage for some or all of any contraceptive services.

I declare that I have made this certification, and that, to the best of my knowledge and belief it is true and correct. I also declare that this certification is complete.

____

Signature of the individual listed above

____

Date

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This form or a notice to the Secretary is an instrument under which the plan is operated.

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Paper Four: 'Josef Pieper: A Lawyer's Guide to the Apocalypse'

PAPER FOUR: STATEMENT OF AUTHORSHIP

This paper has been submitted for publication with U.S. Law Reviews in 2020. The working title is *Josef Pieper: A Lawyer's Guide to the Apocalypse*.

This paper, of which I am the sole author, contains original research I conducted during the period of my Higher Degree by Research candidature. It is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

Signed: Date:

20 January 2020

Josef Pieper: A Lawyer's Guide to the Apocalypse

Patrick Quirk[*]

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I. INTRODUCTION

> History is always inwardly directed toward its end. This, of course, is inseparable from the revealed prophecy of the End: that it will happen not (or not exclusively) as a cosmic catastrophe, as the destruction of the . . .. Earth, but as an event historical in itself, engendered by the historical process itself, in the accomplishment of history itself. If the End were exclusively a fact of the world of heavenly bodies, it could have no specific connection with history. . . . The object of the prophecy of the End is, however, explicitly and formally a historical event or, rather, a series of historical events.
>
> —Josef Pieper[1]

This work considers the apocalyptic refrain that has overshadowed the world for the past few decades. As Steve Almond has noted, in movies and books, "the apocalypse market is booming."[2] Atomic war and post-war scenarios,[3] alien invasions,[4] climate change,[5] the rise and decline of Islamic

[1] Josef Pieper, THE END OF TIME: A MEDITATION ON THE PHILOSOPHY OF HISTORY 50 (1954/1999). References are to the Ignatius Press edition (San Francisco, 1999). Original German title: *Uber das Ende der Zeit: Eine geschichts philosophische Betrachtung*. [hereinafter END OF TIME].

[2] Steve Almond, *The Apocalypse Market Is Booming*, N.Y. TIMES, September 27, 2013, https://www.nytimes.com/2013/09/29/magazine/the-apocalypse-market-is-booming.html. Almond notes that these forms of entertainment "allow us to safely fantasize about what might be required of us to survive," and yet we must be cautious about their consumption since a hard hitting movie (*e.g., The Day After*, 1983) also "confronts the viewer with far too authentic a portrayal of the sorrows that loom over us and [makes] far too explicit an appeal to our conscience." Almond also observes the gradual transition to the main character "child hero"; *e.g.*, Katniss Everdeen in *The Hunger Games*.

[3] The list of books, movies, video games, and television shows is lengthy; *see*, *e.g.*, the lists on the website of Paul Brians of Washington State University, https://brians.wsu.edu/nuclear-war-related-materials/. An early 20th century dystopian novel of note here is Robert Hugh Benson's LORD OF THE WORLD (1907), which was cited by Pope Francis in a homily of November 18, 2013. According to the Vatican website, "The Pope opined that "Negotiating one's fidelity to God is like negotiating one's identity, ... He then made reference to the 20th century novel *Lord of the World* by Robert Hugh Benson, son of the Archbishop of Canterbury Edward White Benson, in which the author speaks of the spirit of the world that leads to apostasy "almost as though it were a prophecy, as though he envisioned what would happen." Benson converted to Catholicism and was ordained a Catholic priest in 1904, before the novel was published," http://w2.vatican.va/content/francesco/en/cotidie/2013/documents/papa-francesco-cotidie_20131118_fidelity-god.html.

[4] *See*, *e.g.*, the American science fiction blockbuster film series, *Independence Day* (1996, 2016).

[5] *See*, *e.g.*, the climate-change apocalypse film, *The Day after Tomorrow* (2004 based

State (ISIS),[6] and even Brexit,[7] all appear as expressions of this obsession. Even "zombie lawyers" rate a mention.[8] Apocalyptic books and novels are now often made into apocalyptic films or series for TV.[9] For example, Cormac McCarthy's 2006 Pulitzer Prize winning post-apocalyptic novel, *The Road* was adapted into a film by the same title in 2009.[10] The BBC even featured an "apocalypse week" on its website during 2017 to coincide with a solar eclipse.[11]

Intriguingly, it would seem that an appeal to personal conscience[12] is implied in at least some areas of this obsession—modify your choices or the result will be unbearable—both by way of externally imposed penalty and/or an unendurable internal guilt. This appeal to conscience raises the problem of individuals and their approach to ultimate questions of moral behavior, the meaning of life, and the ultimate purpose of human existence. It also has very practical consequences when considering either granting or denying conscience-based exemptions to rules of general applicability.[13]

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on Art Bell & Whitley Strieber's THE COMING GLOBAL SUPERSTORM (2000).

[6] Also known as Daesh; *see further*, Ishaan Tharoor, *ISIS or ISIL? The Debate over What to Call Iraq's Terror Group*, THE WASHINGTON POST, June 18, 2014, https://www.washingtonpost.com/news/worldviews/wp/2014/06/18/isis-or-isil-the-debate-over-what-to-call-iraqs-terror-group/?arc404=true

[7] Isobel Thompson, *Britain Begins Stockpiling for the Brexit Apocalypse*, VANITY FAIR, January 24, 2019, https://www.vanityfair.com/news/2019/01/britain-begins-stockpiling-for-the-brexit-apocalypse.

[8] *See* Peter H. Huang & Corie Rosen Felder, *The Zombie Lawyer Apocalypse*, 42 PEPP. L. REV. 727 (discussing "the near epidemic levels of depression, decision-making errors, and professional dissatisfaction that studies have documented are prevalent among law students and lawyers today." The authors offer solutions based on the literature of "positive psychology").

[9] According to one website "Netflix currently has 29 different post-apocalyptic TV shows you can watch right now on instant streaming." *See The Top 10 Post-Apocalyptic TV Shows on Netflix – 2019 Edition*, https://www.postapocalypticmedia.com/the-top-10-post-apocalyptic-tv-shows-on-netflix-2019-edition/

[10] Such adaptations are not always successful; *see* Stacey Peebles, *On Being Between: Apocalypse*, *Adaptation*, *McCarthy*, Special Issue of the European Journal of American Studies, Cormac McCarthy Between Worlds, http://journals.openedition.org/ejas/12283.

[11] *See* articles at https://www.bbc.com/future/columns/apocalypse-week.

[12] I will exclude the debate about conscience and religious freedom for groups (as opposed to individuals), as it is beyond the scope of this paper.

[13] Kent Greenawalt has suggested seven current 'pressure points' in the law of conscience-based exemptions. These are: (1) If a claim for an exemption is to be granted, should it be limited to religious convictions or cast more broadly? (2) What degree of impairment of conscience should be needed, and how can that be assessed? (3) Are others disadvantaged if one does not perform, and how much should that count? (4) What is the basis for one's objection to helping others? (5) How direct is one's involvement in the activity to which one objects? (6) What position does one occupy? (7) What is the strength of the competing public interest that could justify denial of an exemption?; *see* Kent Greenawalt,

The Apocalypse (also known as the Book of Revelation), which is the final book of the New Testament of the Bible, is one source of literature upon which the above trend has drawn.[14] I will return to this in detail below. Extremist movements have also contributed to a wider discussion of the relationship between the End Times and present legal and political problems, most notably in the Middle East. In such cases, the job of the law is first to fully apprehend the facts, and then act prudently, according to those same facts. But, as Ali Rod Khadem has argued, "inadequate comprehension of extremist doctrines undermines efforts in law and policy"[15] and a failure to grasp what is really at stake can seriously undermine the law's attempts at a response. This is true despite the fact that Islam's interaction with the apocalypse of the Qur'an has been ongoing for many centuries.[16]

Khadem's work focuses on the differences between al-Quaeda and ISIS and relative predictions about the literal apocalypse, according to various religious understandings of that concept—when it will occur, and the effect that has on these movement's activities, especially those designed to support a system of earthly governance. Khadem notes:

> Although ISIS governance practices have been partially exposed within Middle Eastern and Islamic Studies, these findings have not yet been integrated within legal scholarship—a fact that is reflected

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Individual Conscience and How It Should Be Treated, 31 JOURNAL OF LAW AND RELIGION 306, 306–320 (2016).

[14] References to The Apocalypse or apocalypse should be interpreted in context. Any reference to *Revelation* or *The Book of Revelation* will be taken to mean the last book of the New Testament. This book is "not an easy book to understand . . .. Its central message, however, is crystal clear: the Almighty reigns (19:6). Revelation reminds readers of God's eternal sovereignty (4:2, 9–10); Christ's eternal victory (1:5, 17–18); and the Spirit's eternal presence (1:10; 2:7; 22:17)"; *see* Raymond Brown, BIBLE GUIDE (1999), at 307. Aspects of Revelation are foreshadowed in the Old Testament Books of Ezekiel and Daniel, amongst others.

[15] Ali Rod Khadem, *Why Should Law and Policy Makers Understand Extremist Beliefs? The Islamic State (Isis) As A Case Study*, 23 LEWIS & CLARK L. REV. 10, 177 (2019) [hereinafter Khadem]. Arguing, "inadequate comprehension of extremist doctrines undermines efforts in law and policy." The author discusses the phenomenon of "apocalypticism" and the key differences between ISIS and al-Quaeda. In simplest terms, the "doctrinal disagreement between al-Qaeda and ISIS concerns the question of imminence: how soon will this apocalypse occur?," at 177. According to Khadem, for ISIS, the matter is one of urgency, whereas al-Quaeda takes a longer-term view.

[16] *See The Princeton Encyclopedia of Islamic Political Thought*, eds. Gerhard Bowering, Devin J. Stewart, & Muhammad Qasim Zaman (2012), s.v. "apocalypse," 38–39 [hereinafter *Encyclopedia of Islamic Political Thought*]. The entry notes the groundbreaking work of Paul Casanova's MOHAMMED ET LA FIN DU MONDE: ÉTUDE CRITIQUE SUR L'ISLAM PRIMITIF (1911–24) [Mohammed and the End of the World: Critical Studies on Primitive Islam].

in the dearth of literature on the movement's practices within law reviews and related domains of scholarship.[17]

This article will suggest that there is a dearth of literature and discussion within the *legal* context on the concept of the apocalypse in the Judeo-Christian (Western) tradition, and that a better understanding of *this* tradition's insights into the apocalypse will shed light on *all* claims of an apocalyptic nature, regardless of the source or the specific nature of their claim. A better understanding of such claims, it will be argued, is necessary for bolstering our understanding in many related areas including conscience claims generally,[18] the laws of war,[19] international law,[20] and other related areas.[21] To paraphrase Samuel Johnson, since all judgment is comparative,[22] we must be able to compare apocalyptic claims with other similar claims, and thereby refine our understanding of both.

To achieve the goals of this work, I will present a clear philosophical (non-theological) exposition on the Christian Apocalypse found in the work of well-respected German philosopher, Josef Pieper (1904–1997). Pieper's *The End of Time* is his most comprehensive consideration of the philosophy of history. Little describes this area of philosophy as playing "a

[17] Khadem, at 108

[18] *See* David S. Oderberg's discussion of the right to disassociation in OPTING OUT: CONSCIENCE AND COOPERATION IN A PLURALISTIC SOCIETY (2018) [hereinafter *Opting Out*]. Oderberg notes, "[s]ecessionism, balkanization and similar quasi-apocalyptic ideas (at least in the eyes of some political theorists) are essentially group concepts, and they generally have geopolitical or interstate ramifications. They affect entire states, and as movements they can have motivations that are far removed from what usually moves individuals and groups seeking selective dissociation within a society," at 15.

[19] *See e.g.*, Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 1 (2016) (discussing the various legal arguments used by the United States and other states (*e.g.*, Russia) for using lethal force in combating ISIS). The author suggests that there has been an "evolution of the right to use force in self-defense against non-state actors and . . . that events in 2015 triggered a "Grotian Moment": a fundamental paradigm shift that will have broad implications for international law," at 1.

[20] *E.g.*, the integration of a state into the international order; *see* Khadem, 124.

[21] *E.g.*, the constitutionality of US military action; *see* Khadem, 143.

[22] "To know anything . . . we must know its effects; to see men we must see their works that we may learn what reason has dictated, or passion has incited, and find what are the most powerful motives of action. To judge rightly of the present, we must oppose it to the past; for all judgment is comparative, and of the future nothing can be known. The truth is, that no mind is much employed upon the present: recollection and anticipation fill up almost all our moments. Our passions are joy and grief, love and hatred, hope and fear. Of joy and grief the past is the object, and the future hope and fear; even love and hatred respect the past, for the cause must have been before the effect"; Samuel Johnson, THE HISTORY OF RASSELAS, PRINCE OF ABYSSINIA(1759), in THE WORKS OF SAMUEL JOHNSON, L.L.D., A NEW EDITION, (1825), at 2:27.

fundamental role in human thought."[23] He notes:

> It invokes notions of human agency, change, the role of material circumstances in human affairs, and the putative meaning of historical events. It raises the possibility of "learning from history." And it suggests the possibility of better understanding ourselves in the present, by understanding the forces, choices, and circumstances that brought us to our current situation. . . . This [philosophical] work is heterogeneous, comprising analyses and arguments of idealists, positivists, logicians, theologians, and others, and moving back and forth over the divides between European and Anglo-American philosophy, and between hermeneutics and positivism.[24]

Having authored more than fifty books (with translations into at least fifteen languages), Pieper was best-known for his ever-popular *Leisure, the Basis of Culture*.[25] Writing soon after Pieper received the Ingersoll Prize for scholarly letters, David Heim noted the strength of Pieper's defense of the cardinal virtues (prudence, justice, fortitude and temperance) and likewise the theological one (faith, hope and love).[26] Jon Vickery has convincingly rebutted the claim that Pieper made any peace with or supported National Socialism.[27] Pieper is no stranger to the law reviews and journals of the United States, being cited in areas as diverse as the relationship between justice and love,[28] the dangers of flattery,[29] love and the

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[23] Daniel Little, "Philosophy of History," THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2017), https://plato.stanford.edu/archives/sum2017/entries/history/.

[24] *Id*.

[25] JOSEF PIEPER, LEISURE, THE BASIS OF CULTURE (New American Library 1963). This work is a philosophical defense of leisure—and often pounced upon by undergraduates who, after reading only the title, believe it will justify a lazy semester. How wrong they are! For a reflection on Pieper's leisure in the context of sleep deprivation, *see* Alison McMorran Sulentic, *Now I Lay me Down to Sleep: Work-Related Sleep Deficits and the Theology of Leisure*, 20:2 Notre Dame J.L. Ethics & Pub. Pol'y 749, 763–767. (2006) (Symposium on the American Worker).

[26] David Heim, *Josef Pieper and the Pursuit of Virtue*, THE CHRISTIAN CENTURY 1076–1077 (December 2, 1987).

[27] Jon Vickery, *Searching for Josef Pieper*, 66:3 THEOLOGICAL STUDIES 622, 623 (2005). According to Vickery, "[u]p until this time historians have done Pieper a significant injustice. It is my contention that he may be safely exonerated from the accusation of succumbing to the deceptive power of his age," at 623.

[28] John A. Perricone, *The Relation between Justice and Love in the Natural Order*, 51 J. CATH. LEGAL STUD. 55, 56, 58–59, 69 (2012).

[29] Mark DeForrest, *Introducing Persuasive Legal Argument Via the Letter from a Birmingham Jail*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 109, 112, 131 (2009). De Forrest cites Pieper's short but powerful essay *Abuse of Language*, *Abuse of Power* (Lothar

economy,[30] the right to housing,[31] the takings power,[32] legal theory,[33] corporate law,[34] education,[35] financial regulation,[36] employment law,[37] jury trials,[38] free speech,[39] originalism,[40] and criminal defense,[41] to name only some.

II. APOCALYPTIC CLAIMS

As foreshadowed above, apocalyptic claims can form part of a conscience-based resistance to civil law or become joined to declarations of civil disobedience. Thus, the claims of those interrupting traffic to block the passage of nuclear material on a public road,[42] a multiple-arrest plan of civil disobedience,[43] or activist conflicts at military installations[44] all integrate an

Krauth trans., Ignatius Press 1992).

[30] John M. Breen, *Love*, *Truth*, *and the Economy: A Reflection on Benedict XVI's Caritas in Veritate*, 33 HARV. J.L. & PUB. POL'Y 987, 1007 (2010).

[31] Kristen David Adams, *Do We Need a Right to Housing?*, 9:2 NEV. L.J. 275, 285 (2009)

[32] Caryn L. Beck-Dudley & James E. MacDonald, *Lucas v. South Carolina Coastal Council, Taking*, *and the Search for the Common Good*, 33 AM. BUS. L.J. 153, 169 (1995).

[33] John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J.L. & PUB. POL'Y 513, 557 (2009).

[34] James V. Schall, *The Corporation and the Human Person*, 4 AVE MARIA L. REV. 105, 111 (2006)

[35] George Charles Roche III, *A View of Education in America*, 1 HARV. J.L. & PUB. POL'Y 27, 35 (1978).

[36] Oskari Juurikkala, *The Behavioral Paradox: Why Investor Irrationality Calls for Lighter and Simpler Regulation*, 18:1 FORDHAM J. CORP. & FIN. L. 33, 87 (2012).

[37] James A. Sonne, *Monitoring for Quality Assurance: Employer Regulation of Off-Duty Behavior*, 43 GA. L. REV. 133, 147 (2008).

[38] Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 101 (1996).

[39] G. Robert Blakey & Brian J. Murray, *Threats*, *Free Speech*, *and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. REV. 829, 1091 (2002).

[40] Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL'Y 909, 931 (2005).

[41] Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 514 (1999).

[42] *E.g.*, the 2008 disruption of the mass transport of nuclear waste in Germany; *see* The World from Berlin, *The Renaissance of the Anti-Nuclear Movement*, SPIEGEL ONLINE, November 10, 2008, https://www.spiegel.de/international/germany/the-world-from-berlin-the-renaissance-of-the-anti-nuclear-movement-a-589456.html

[43] *E.g.*, Jane Fonda's series of arrests at The US Capitol as part of a climate protest known as "Fire Drill Fridays," which, according to reports, were "inspired by the Swedish teenage climate activist Greta Thunberg's *cri de coeur*, "Our house is on fire""; *see* Cara Buckley, *Jane Fonda's Arresting Development*, N.Y. TIMES, November 4, 2019, C1.

[44] For example, activities of the Kings Bay Plowshares group; *see* Lindsey Ever,

element of "end times" necessity in their justifications.

Even lawyers (and law students) have become involved in such activities and are also subject to potentially more serious consequences for breaching the law in this way.[45] Members of other professions (for example, medicine and related fields) are also very much alive to questions of conscientious objection.[46]

Military personnel, it is often argued, also have a distinctive interest in claims to conscientious objection.[47] The history of this right, as related by Kessler, outlines "the fraught relationship between international human rights law and national sovereignty."[48] The right is still in development and in some countries, for example, in Ireland, military personnel are still unable to access a scheme of objection.[49]

Activists Raid Nuclear Submarine Base with Hammers and "*Baby Bottles of Their own Blood*," THE WASHINGTON POST, April 6, 2018, https://www.washingtonpost.com/news/energy-environment/wp/2018/04/05/activists-raid-nuclear-submarine-base-with-hammers-and-baby-bottles-of-their-own-blood/.

[45] "As candidates for bar admission, law students who participate in nonviolent civil disobedience take on certain risks that members of the general public do not, including the possibility of an adverse character and fitness determination or delayed admission to the bar"; *see* Julia Morgan-Trostle, *A Guide for Law Students Considering Nonviolent Civil Disobedience*, 42 HARBINGER 21, 22 (2017).

[46] *See* book-length discussion in *Opting Out.*

[47] For an early discussion on conscientious objection to military service as an international human right, *see* Matthew Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Right*, 21 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL, 31 (1990).

[48] Jeremy Kessler, *The Invention of a Human Right: Conscientious Objection at the United Nations*, *1947–2011*, 44 COLUMBIA HUMAN RIGHTS LAW REVIEW 753 (2013), https://ssrn.com/abstract=2267462. Kessler relies on Samuel Moyn's analysis in THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010); *Imperialism, Self-Determination, and the Rise of Human Rights*, *in* THE HUMAN RIGHTS REVOLUTION: AN INTERNATIONAL HISTORY 159–178 (Akira Iriye, Petra Goedde, & William I. Hitchock eds., 2012). *See also* Kessler's comprehensive review of the prior literature on this topic, at 754 of *The Invention of a Human Right: Conscientious Objection at the United Nations*, *1947–2011*.

[49] The Irish defense personnel advocacy group Permanent Defense Forces Representative Association (PDFORRA) has recently sought more protection from the Council of Europe for military personnel who wish to register as conscientious objectors; *see* the European Committee of Social Rights Case Document No 4, Response from EUROMIL to the Government's Submissions on the Merits, European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 164/2018 (May 3, 2019) (setting out EUROMIL's response to a submission made by the Irish Government on February 13, 2019), https://rm.coe.int/cc164casedoc4-en/1680945111. *See also* Sean O'Riordan, *PDFORRA Seeking Conscientious Objection Rights*(commentary), IRISH EXAMINER (November 2, 2019), https://www.irishexaminer.com/breakingnews/ireland/pdforra-seeking-conscientious-objection-rights-961287.html.

III. TAXONOMIES OF CONSCIENTIOUS OBJECTION

Like religious interests *simpliciter*,[50] various taxonomies of conscientious objection have been developed over time. These taxonomies cross literary, social, and eschatological borders.[51] One classification, which has proven useful, suggests breaking the collection into two parts: those which are "about war" and those that are "not about war." Such classification also acknowledges that the latter grew out of the former, but is still distinct from it in important ways. Why this taxonomy? First, because the taxonomy better reflects history. The objections "about war" are much older and more venerable. For example, some writers analyze the history of conscientious objection in terms of the three classical works in the area: the Hebrew Scriptures, Cicero, and St Paul.[52] These are the urtexts and yet also reflect modern experience of total war as it has appeared in the twentieth century. As Richard A. Glenn has noted, "with the enormous impact of war on the modern world and the widespread government practice of military conscription, conscientious objection is usually understood to refer to [objection to] military service."[53]

Second, an analysis that takes account of these two categories will better explain the role of the apocalyptic, which invariably has a war-like tone and even makes predictions about it.

Finally, there is an element of the apocalyptic that can only be perceived from inside its own particular tradition and thus is a matter of faith. This is important because the spiritual path is so often compared to a war or to the engagement with some kind of ultimate battle against evil.[54] While

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[50] *See* discussion of religious interests taxonomy in PETER W. EDGE, RELIGION AND LAW, 40 (2006).

[51] "Scholarship in religious studies over the last 50 years suggests that apocalypse is a complex literary and social historical phenomenon that comprises three separate categories intimately related in history and individual religious experience: eschatology, social movement, and literary genre"; *Encyclopedia of Islamic Political Thought*, 38.

[52] 3 LINDSAY JONES, MIRCEA ELIADE, & CHARLES J. ADAMS, ENCYCLOPEDIA OF RELIGION, (2nd ed. 2005), s.v. "conscience."

[53] Richard A. Glenn, *Conscientious Objection*, *in* THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA (Christopher B. Gray ed. 1999), at 146.

[54] These faith experiences are very difficult to communicate to others. As Pieper has noted: "there are experiences which can be repeated and so tested by others; and there are experiences which are not communicable in this sense; *e.g.*, the experiences of the believer are altogether incommunicable to the unbeliever. It is of the essence faith that a complete identification takes place between the believer and the thing believed, so that the assumption that the thing believed is not true cannot even be made in abstract and hypothetically. For the same reason, it is equally impossible for the unbeliever to assume, abstractly and, so to speak, "purely theoretically" that the thing believed is true ("let us assume Christians to be right, and let us see where this leads us"). [In other words,] faith is not like the experience gained from a lookout tower or a telescope, one that can be used by everyone in a

this taxonomy is not definitive, it will be useful as the arguments unfold below.

IV. Pieper as Philosopher of the Apocalypse

There are many Christian commentaries on the Apocalypse, as well as any number of historical movements, grim predictions, and gloomy screeds, together with an equal number of disappointed believers down through the ages.[55] However, few professional philosophers have turned their minds to the question of apocalypse, and equally few evince the vast range of expertise as that of Josef Pieper. Jude P. Dougherty's memorial for Pieper praised his "rare ability to go immediately to the core of his subject matter, defining and distinguishing, while ever attentive to the essential structures controlling his inquiry."[56]

Pieper's foray into the apocalyptic is, on its own terms, philosophical. It is his attempt to explore the limits of this concept within his own tradition, and in doing so, he provides an original point of comparison with other versions of the idea of the end of the world. While the present work is unlike Nathanial A. Warne's "applied exegesis of Pieper,"[57] it is meant to be a helpful addition to the legal literature, designed to bring Pieper's philosophical tradition to a wider audience.

Thus, to reprise Johnson's statement about comparative judgment: Pieper provides us with many useful comparative points of reference, not the least of which is his philosophical attitude, which allows the consideration of serious matters stripped of their emotive and sometimes overwhelming force. If we can think calmly about the end of the world, and if we can even philosophize about it, there is much to be learned. Warne[58] has made a somewhat similar use of Pieper's work in his critique of modern education, and thereby mounted a convincing argument in favor of a more holistic approach. Whether a holistic approach to the apocalypse is possible is

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spirit of experiment. [On the contrary,] only he who believes, with complete existential earnestness, is also able to perceive the right which falls from the believed truth upon reality"; END OF TIME, at 51.

[55] The list is very long; *see*, *e.g.*, the story of Joanna Southcott (1750–1814) of Bedford, England, who claimed to be pregnant with the Messiah and who predicted that the end of the world would occur in 2004; *see* https://www.encyclopedia.com/people/philosophy-and-religion/protestant-christianity-biographies/joanna-southcott.

[56] Jude P. Dougherty, *In Memoriam: Joseph Pieper (1904-1997)*, 51:2 THE REVIEW OF METAPHYSICS, 491 (December 1997).

[57] Nathaniel A. Warne, *Learning to See the World Again: Josef Pieper on Philosophy*, *Prudence*, *and the University*, 47:3 JOURNAL OF MORAL EDUCATION 289–303 (2018).

[58] Warne, *supra* note 54, at 291.

something the reader may care to contemplate as we move into the details of Pieper's unique philosophical work, *The End of Time*.

V. THE APOCALYPTIC IN PIEPER'S *THE END OF TIME*

Pieper's epigraph in *The End of Time* contains quotes from two prominent Germans: philosopher Johann Hamann (1730–1788)[59] and journalist and critic Konrad Weiss (1880–1940).[60] The quote from Weiss proposes the paradox of the "goal of the Incarnation" against the enduring peace so earnestly desired during his era.[61] Hamann, by contrast, is cited for the following: "Who can hope to obtain proper concepts of the present, without knowing the future?" While this quote may at first may seem quite cryptic, it sets up apparently unanswerable questions about the end of the world. Some of Hamann's writings relate to the apocalypse,[62] while Weiss wrote religious and mystical poetry. Nevertheless, both quotes set the stage for Pieper's dense and challenging volume to which we now turn in detail.

A. Pieper Chapter One – Philosophy and History

Chapter One of Pieper's essay considers the meaning and aims of a philosophy of history, the complex relationships between philosophy and theology, and the philosophical nature of prophecy. The chapter begins by noting that the philosophy of history is not about "what actually happened,"[63] but will inevitably spill beyond that question in various ways, without ever

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[59] Although Hamann never held a position as a philosopher, his work was respected at the time and is still of considerable interest today; *see* Gwen Griffith-Dickson, "Johann Georg Hamann," THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2017), https://plato.stanford.edu/archives/fall2017/entries/hamann/.

[60] Henry Garland & Mary Garland eds., THE OXFORD COMPANION TO GERMAN LITERATURE (3rd ed., Online ver. ,2005), s.v. Konrad Weiss, (Gaildorf, Württemberg, 1880–1940, Munich), https://www.oxfordreference.com/search?q=Weiss%2C+Konrad.

[61] The full epigraphical quote from Hamann as it appears in Pieper's END OF TIME is as follows: "The will, which is today growing even greater, to create a condition that shall hold within it an exemplarily complete essence of humanity and an enduring peace, is burdened by the heavy paradox that it is not humanity which is the goal of the Incarnation."

[62] *See e.g.*, Kirby Don Richards, *Johann Georg Hamanns Apocalyptic Rhetoric*. Ph.D. Dissertation, Department of Theology, University of Virginia (1999). *Also,* as it relates to Hamann's philosophy of language: "If only I was as eloquent as Demosthenes, I would have to do no more than repeat a single word three times. Reason is language—Logos; I gnaw on this marrowbone and will gnaw myself to death over it. It is still always dark over these depths for me: I am still always awaiting an apocalyptic angel with a key to this abyss. (ZH 5, 177:16–21)," *supra* note 58. *Note*: ZH refers to JOHANN GEORG HAMANN, *BRIEFWECHSEL* [Exchange of letters] (vols. 1–3, Walther Ziesemer and Arthur Henkel eds; vols. 4–8, Henkel ed.,1955–1975).

[63] *Id*. at 11.

entirely precluding consideration of what "takes place through time."[64] The task of philosophers is to consider historical events, and then to reveal their meaning as best they can. This meaning is especially important not only for understanding the past, but also for understanding what is happening in the present and what may (or will) happen in the future. In this way, Hamann's enigmatic question begins to find an answer.

Writing in 1954, Pieper was alert to the new and pressing problems of nuclear war and its potential devastating consequences, and so adverts to "particular forms of sectarian apocalyptic" that were being discussed at that time.[65] He writes,"[e]veryone is aware of the extent to which the question of the end of history is today exercising the minds of men."[66] He is not, however, interested in overblown eschatological answers but wants to consider the question with a "high measure of sobriety and exactitude."[67] He naturally renounces any possible answer to the actual issue of when an Apocalypse will occur. Moving quickly beyond a temptation to leave the question alone altogether, Pieper proposes that *post Christum natum* (after the birth of Christ),[68] the question of an Apocalypse will always be open for consideration and that Aristotle's opinion that history repeats itself indefinitely can no longer be taken seriously.[69]

According to Pieper, the ideas of "beginning" and "ending" with regard to time itself are now loose in the world, and older discourses precluding such events (*i.e.*, definitive beginnings and endings) cannot continue to dominate.[70] In fact, anyone who now uses terms like "historical development" or "progress" is already buying into the idea that history has a course, which it will run, and which will, at some point, reach an end-state.[71] Pieper argues that such phrases "contain the implication that history is leading up

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[64] *Id*.

[65] *Id*. at 12.

[66] *Id*.

[67] *Id*.

[68] The reader is presumed aware of Christ's predictions about the end of time found in the Gospels (*e.g.*, Chapter 21 of Luke, in which Jesus predicts the destruction of the temple, persecutions, signs in the heavens, distress of nations, etc.) as well as Revelation. The Christian Old Testament is also a source of such predictions, the Book of Daniel being most prominent.

[69] He refers to Aristotle's *Meteorologica*, I, 3. Of course this does not render Aristotle obsolete, since Pieper makes use of him throughout his corpus of work.

[70] Pieper notes "We can "omit" neither the concept of the beginning, of the creation out of nothingness (nor this concept of nothingness itself, which is the truly radical one), nor the concept of the end. This, it seems to me, is to be numbered among the changes that entered into the world of man on the basis of the event "revelation in Christ""; END OF TIME, at 13.

[71] END OF TIME, at 14.

to something . . . a particular state of perfection or impoverishment."[72]

Because other philosophical questions—for example, "What is cognition?"—have never been answered with abiding philosophical precision, Pieper initially asks whether questions about the end of history are simply unanswerable and so best left alone. Moreover, even the difficult questions about cognition have some (immediately available) sensory data on which a philosopher might build, whereas the question, "What is history?," philosophically posed, appears to have no immediate "experiential foundation"[73] at all. This puts the question in a special situation "but does not consist in its being different in principle from that of anyone else who philosophizes,"[74] it merely means that "an element inherent in all philosophizing in general appears here with greater intensity."[75]

Pieper's next move is to consider the relationship between philosophic inquiry and theology. He is of the view that these two areas are contrapuntal,[76] that is, "there is no philosophical question which, if it really wants to strike the ground intended by itself and in itself, does not come upon the primeval rock of theological pronouncements."[77] He returns to the question of cognition's experimental basis, and, noting Heidegger's question[78] about *from where* the exerciser of the cognitive faculty (call them "the cognizer") receives their direction toward the existent, states that we can never really understand cognition until we have come to grips with this subterranean issue: "Whence does cognition derive its dependence upon the existent?"[79] Such questions, he says, can only be answered by a theological pronouncement. Any attempt to do otherwise is bound to fail in one of two ways: either the philosopher stops asking the question for fear of a demarcation dispute between theology and philosophy, or the philosopher stops asking because "philosophy deems itself one special science alongside others and confines itself to certain specialized questions (of a formal-logical nature, for instance)."[80] This latter move is not, according to Pieper,

[72] *Id*. at 14.
[73] *Id*. at 15.
[74] *Id*. at 15.
[75] *Id*. at 15.
[76] A term borrowed from the musical concept of counterpoint meaning "[t]he ability, unique to music, to say two or more things at once comprehensibly. The term derives from the expression *punctus contra punctum* [point against point or note against note]; *see* THE OXFORD DICTIONARY OF MUSIC, (6th ed, 2012), s.v. "counterpoint."
[77] END OF TIME, at 16.
[78] According to Pieper, Heidegger has formulated the question thus: "Whence does the assertion of representation derive the injunction to take its direction from the object and to accord with correctness?", *id*. at 17, citing M. Heidegger, *Vom Wesen der Wahrheit* (Frankfurt, 1943), at 13.
[79] END OF TIME, at 18.
[80] *Id*.

philosophy in "the sense of Plato and Aristotle and the great Western tradition."[81]

Thus, Pieper argues, philosophy must be "methodologically open"[82] to theology. Failure to do so is "simply unphilosophical."[83] This applies with even great force to questions about the end of time for the following three reasons. First, all ideas of beginning and end (of history) must be built on something "revealed" since there is, by definition, no form of human experience that can aid their comprehension. Second, the concept of the end of history concerns itself with "salvation and disaster"[84] and such mysterious[85] things can only be understood on a revelational basis. Third, the philosopher who works in this theological/philosophical area is "[striking] the exact center of a theological pronouncement, which is a pronouncement concerning the historical process of the 'salvation of man'"[86]—not an ontological point, but a history of salvation.

Pieper drives home the above by going on to claim that any philosophy of history that ignores the above is merely pseudo-philosophy since "insofar as it declines to refer back to theology, it does not descry its subject matter at all; it is altogether unable to obtain a serious view of the totality of history; from the outset it fails to live up to the claim made by its title."[87] In other words, his theological interest is not a matter of a "religious outlook," because "otherwise the inquiry would lose its philosophical character and would therefore simply no longer be worthwhile."[88] In saying this, he does not define theology as the things that have "come down from a divine source"[89]—such pronouncements are *presupposed* by theology. Rather, theology is "the [additional] human endeavor to interpret this body of tradition

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[81] *Id*.

[82] *Id*. at 19. The familiar version of this question and its associated discussion is "What does Athens have to do with Jerusalem?"

[83] *Id*.

[84] *Id*. at 20.

[85] Here he is talking about mystery in "the strictest sense"; *id* at 22. Presumably this relates to things like the mystery of existence, of original sin, of salvation, of the Trinity, or even of iniquity (the latter being the "a religious deception offering men an apparent solution to their problems at the price of apostasy from the truth." *See* CATECHISM OF THE CATHOLIC CHURCH, 675), and not "simple mysteries" such as what caused the defenestration of Frank Olsen (a scientist alleged to be part of the MKUltra Project and now dramatized in a TV series on Netflix) or who killed Somerton Man (the *Tamám Shud* case from South Australia).

[86] *Id*. at 23.

[87] *Id*. at 25.

[88] *Id*. at 29.

[89] Citing Plato, THE PHILEBOS (in English, *Philebus*), which discusses "the good human life and the claims of pleasure on the one hand and a cluster containing intelligence, wisdom, and right opinion on the other in connection with that life," in THE OXFORD HANDBOOK OF PLATO (2008), at 16.

out of itself, by ordering it and weighing it."[90] Thus we find ourselves in the presence of something very important that was "formerly self-evident not just to the Christian West but equally to Plato, Virgil, and Cicero"[91] and also supports the venerable claim that "theology forms a part of general education."[92]

At this stage of his argument, Pieper cautions that this reliance on theology does not make the task of philosophizing any easier. In fact, quite the opposite occurs: a revealed truth (about which a theology then may exercise its reason) is more mysterious, since "the greater the extent to which knowledge discloses being, the more profoundly does the mystery of the existent unveil itself within it."[93]

The next major topic addressed is the Christian philosophy of history, which must deal with the revealed fact of original sin as the source of evil and suffering in the world.[94] This pushes a new mystery on to the stage, which is "much more enigmatic and impenetrable than the empirically encounterable evil in the world,"[95] namely, a mystery that is both an Apocalypse (including an Antichrist figure), yet which, "nevertheless will not and cannot be a philosophy of despair."[96]

The concept of prophecy is then broached. Pieper lists the concepts associated with the essential nature of history as "freedom, decision, uniqueness, unrepeatability, uninterchangeability, unpredictable capacity for variation, [and] the individual solitary."[97] By employing these, he says, "historical happening is distinguished from the unhistorical happening of nature."[98] Prophecy, by way of contrast, has no "foothold in experience"[99] but lies beyond it. [100] Archetypical prophecies, such as the Messianic ones from the Old Testament, are the product of vision, a revelation, and are historical in most central sense of that term. They are not a "result arising out

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[90] END OF TIME, at 29. In the attached footnote, Pieper states, "In this connection it must be noted that theology in this sense is scarcely possible without a genuinely philosophical attitude (and to some extent, also, without philosophical training.)"

[91] *Id.* at 30.

[92] *Id.*

[93] *Id*. at 31.

[94] Pieper mentions other possibilities in passing; *e.g.*, that evil may derive from "an original evil principle operating alongside God, or from a tragic contradiction with God himself"; *id*. at 31.

[95] *Id*.

[96] *Id*.

[97] *Id*. at 33.

[98] *Id*. Examples of this include events like "the flash of lightening, the fall of the stone, the flowing of water"; *id*. at 32.

[99] *Id*. at 34.

[100] Prophecy also leaves behind the concept of "prognosis" which also has "footholds" in the present and merely proceeds towards the "probable"; *id*.

of the interpretative penetration of what can be experienced, but something made known by revelation, a "vision", the announcement of something pertaining to the indeterminate future."[101]

Continuing with his investigation of the *End*, Pieper asserts that unfulfilled prophecies are among the most scandalous things human beings must confront. He draws several times on the work of controversialist religious figure John Henry Newman, who wrote about the attitudes of the Jews towards the Messianic prophesies.[102] Pieper continues that "[i]t is of the essence of prophecy that it can be understood only to the extent to which it is being fulfilled—and even then only by the believer."[103] This, he describes, as a "great complication."[104] This complication works its way out at the end by the fact that "the predictive meaning of a prophecy becomes totally clear only to the man who looks back upon it from the vantage point of its historical fulfillment."[105]

To illustrate the relationship between the philosophy of history and theology generally, Pieper recounts a remarkable story about two Tibetan men found among a group of German soldiers in a POW camp in the United States after World War II. While not giving the story much credibility,[106] he uses it to illustrate the advantages enjoyed by those with an inner conviction of their position and direction in a world that is *in extremis,* as was the case during that time. The two men were reported to be speaking a language that nobody understood. After being identified as Tibetan and provided with appropriate interpreters, they related an amazing and arduous journey from a forced conscription into the Soviet army, to the Russian front, imprisonment by the Germans, a further "draft" into the auxiliary German Army, being taken prisoner by the Americans, and finally sent to a POW camp in the

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[101] *Id*. at 35. In this section, Pieper gives a probing reference to BLAISE PASCAL (1623–1662), PENSÉES (fragments published posthumously circa 1670), Art. 6, 38, which states, "Three hosts. Would he who had possessed the friendship of the King of England, the King of Poland, and the Queen of Sweden, have believed he would lack a refuge and shelter in the world?" (The University of Adelaide Library Kindle ed.) at 900–901. The point Pascal was making (circa 1656), and which is picked up by Pieper, is that all three had by then lost their crowns—an entirely "unpredictable" series of events which could never be foreseen merely through "prognostication."

[102] Pieper quotes Newman's GRAMMAR OF ASSENT (1870), at 446; *see* END OF TIME, at 37.

[103] *Id*. at 38.

[104] *Id*.

[105] *Id*. at 40, and referring again to Newman's GRAMMAR OF ASSENT, at 446.

[106] He places it amongst some of the hardly credible "true stories" of the war. *As I Please*, by George Orwell, published in the TRIBUNE on October 13, 1944, related a similar (but not identical) story, *see* http://orwell.ru/library/articles/As_I_Please/english/eaip_03

United States.[107] Despite having no clue about world affairs, or what the fighting was all about, these two exemplified:

> [T]he superiority of the man who believes (even if he does not know) over the unbeliever (even if he knows) [and which can] be very precisely identified, for instance in those extreme situations which history again and again holds ready for man: a superiority expressed as inner inviolability, as the capacity, above all, not to despair.[108]

For Pieper this "purely believing relation to history . . . is nonetheless most certainly directed upon that which *really* happens."[109] This leads to a reciprocity between theology and philosophy whereby:

> the inquirer in the philosophy of history gazes into the multiplicity of concrete happening, perceiving-examining-interpreting; this in turn makes possible a higher caliber theological interpretation of this believed revealed word of the Apocalypse; from the vantage point of such a formally more exact, contentually more profound theological interpretation, more comprehensive, more penetrating philosophical insight into history becomes possible in turn—and so on.[110]

In the closing parts of Chapter One, Pieper harks back to his original question: Should we simply abandon the question of the End of Time, because it is unanswerable? In philosophical terms, Pieper asserts, "he who philosophizes looks primarily at things, at the being of the world which he can experience and which takes place day by day, and is not, like the theologian, looking at a body of pronouncements which he believes to be revealed."[111] For a "purely immanent cultural sociology," this would seem impossible, since it refuses to look back to any pre-philosophical tradition. But for anyone who "believingly accepts the Apocalyptic prophecy of the end of time,"[112] there is, indeed, something to be gleaned. This person can "see more and, in addition, to see it *in* historical events and formations . . .

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[107] The Orwellian version has them as prisoners of the British rather than the United States, via a different route, including North Africa. In a typical twist, Orwell suggests that "It would round the story off neatly if they were now conscripted into the British army and sent to fight the Japanese, ending up somewhere in Central Asia, quite close to their native village, but still very much puzzled as to what it is all about." Orwell, supra, *As I please*.

[108] END OF TIME, at 45.

[109] END OF TIME, at 45–46 (emphasis in the original).

[110] *Id*. at 47.

[111] *Id*. at 48.

[112] *Id*. at 49.

to perceive something about the events and formations that has an inner connection with the end of time."[113]

Pieper now breaks out into the quotation given at the very start of this article, which continues as follows:

> The object of the prophecy of the End is, however, explicitly and formally a historical event or, rather, a series of historical events. And theology has, since time immemorial, understood certain historical phenomena, such as persecutions and the figure of the tyrant, to be prefigurations and preliminary forms of the end-state.[114]

By immediately answering the question "*What* does the believer see in the structure of reality?" Pieper makes his point clearer:

> [The believer sees] this arrow pointing toward the End, it is this character of being-directed-toward-the-End, which becomes discernible in and about that which concretely happens, to the eye of him who has accepted the Apocalypse as revelation and bends his gaze upon concrete history from that vantage point.[115]

These experiences are, however, not generally accessible to all. Only the believer can see them. As Pieper describes it:

> Faith is not like a lookout tower or a telescope that can be used by everyone in a spirit of experiment. Only he who believes, with complete existential earnestness, is also able to perceive the light which falls from the believed truth upon reality.[116]

By way of example, phenomena like the totalitarian work State, while appearing extreme from "the viewpoint of liberal thought" is something entirely recognizable by the believer who sees in it "a milder preliminary form of the State of the Antichrist."[117] This is a form of the process by which we better understanding what is "normal" by also considering its extremes and thereby gain a fresh outlook on the normal and so "understand it more profoundly in itself."[118] Historical events, Pieper argues, are also more easily understood in this way by contemplating them in light of "the

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[113] *Id*. (emphasis in original).
[114] *Id*. at 50.
[115] *Id*.
[116] *Id*. at 51.
[117] *Id*. at 53.
[118] *Id*.

End."[119]

Summarizing Chapter One, Pieper reflects again on the goal of philosophy and reiterates that his focus is philosophy, not theology. Nevertheless, recalling the Augustinian touchstone *credo utintelligam*,[120] there is an element of believing that underlies all acts of knowing. Like the moviegoer who sees a screen but only by power of the projector, which lies behind, the philosopher "sees" reality by the power of the Logos: every *intelligere* is grounded on a *credere*[121] This insight was also present in both Plato[122] and Aristotle,[123] but began to wither away over the centuries until it was seen as a purely philosophical cognition. Pieper notes that Kant recognized this and gave it a special paragraph in the second edition of his *Critique of Pure Reason,* where he (Kant) conceded, "in modern times [these propositions have] been erected in metaphysics almost solely *honoris causa*."[124] Like an acid reaction, this corrosive effect on philosophy can start to play out apocalyptic overtones; a world in which "the whole domain "roots of things" falls . . . wholly into darkness for natural, philosophizing Reason that it would remain enterable *only* to the believer, accessible solely through faith in the

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[119] Pieper states that they (*i.e.*, historical events) become "in themselves, more profoundly apprehensible and understandable, if they are conceived *sub specie* of their, in the positive as well as the negative, extreme configurations, in which "normal history" presents itself to us in the visions of revealed mysteries." He asks, "May it not be conceivable that, from Apocalyptic prophecy, a whole fund of such potential experiences has entered into the storehouse of the believer's *anamnesis*, which are then, at the sight of historical phenomena, and to that extent entirely *as* experiences, realized and read out from the kernel of historical reality?"; *id*. at 53–54 (emphasis in original). Note: An "anamnesis" is a recollection, especially of a supposed previous existence. In Christian liturgical practices, it refers to that part of the Mass that memorializes Christ's Passover; *see* CATECHISM OF THE CATHOLIC CHURCH 1362, http://www.vatican.va/archive/ENG0015/_P41.HTM#BN.

[120] "I believe, in order that I might understand" [*Credo ut intelligam*] is a maxim of Anselm of Canterbury (*see Proslogion 1* [Discourse on the Existence of God] [1077–1078]), which is based on a maxim of Augustine, "*Crede ut intellegas* [believe so that you may understand]; *In Evangelium Ioannis Tractutus Centum Viginti Quatuor*, 29.6), https://www.augustinus.it/latino/commento_vsg/index2.htm. Pieper notes, "I am looking the things themselves in the face; the direction of my gaze is toward the reality before my eyes; but it is equally certain that I should not descry this innermost disposition of existent things if they did not lie in the light of the Logos, by which everything was made in the beginning, which shines down, as it were, from behind my back, over my shoulder. Hence, what is involved here is certainly an *intelligere* [understanding], a perception in the encounter with things—but it is an *intelligere* grounded on a *credere* [belief];END OF TIME, at 55.

[121] Pieper here uses Thomas Aquinas's formulation "the reality of things is their light" (citing Aquinas's COMMENTARY ON THE *LIBER DE CAUSIS* [Book of Causes], 2, 6 (1272).

[122] END OF TIME at55. Pieper does not give a direct source in Plato; an occurrence that is not rare in his philosophical writing.

[123] Citing WERNER JAEGER, ARISTOTELES (1923), at 404.

[124] END OF TIME, at 57.

Divine Logos."[125]

B. Pieper Chapter Two - Nihilism

Part Two of Pieper's essay begins, uncannily, with the subtitle "The Grain of Truth in Nihilism." By this, he adverts to the reduction of nothingness implied in the idea of "an-*nihil*-ation," first formulated by Nietsche.[126] This is an "end in the absolute sense, and, as formulated, a revocation of the beginning.[127] This idea conforms to traditional theology in at least three ways: First, "every creature is . . . itself capable of being brought back into nothingness."[128] Second, the reduction of a creature into nothingness would not, of itself, be a malum and so not contrary to the all-good God.[129] Third, sin itself might appear to be an act of "justice" since it had so disordered the universe. For Pieper, then, these are the grains of truth that are also contained in nihilism.[130]

In the context of the Apocalypse, the reduction into nothingness would not be a positive act.[131] Citing the Book of Wisdom,[132] Aquinas (and Pieper) assert that "there will be no annihilation at all, no End in the absolute sense."[133] As well, such idea can only be found in "unreal thinking."[134] In fact, "real reduction into nothingness is an attempt to withdraw into a fallacious God-likeness."[135] This line of argument also has an impact on the way we think about technology and its many recent advances. If mankind is incapable of creating in the same way as the Creator, then it is also incapable of destruction in any absolute sense. As Pieper argues:

> [H]owever immense the advances made by the technological intelligence in the perfection of the machinery of destruction, however great the increase in "destructive efficiency" . . . however much, on the other hand, the despair of the humanity that lives on this violated earth may yearn for *annihilatio* as deliverance—it is not given to

[125] END OF TIME, at 58.
[126] *Id*. at 60
[127] *Id*. at 59–60.
[128] Id. at 60–61. "*omnis creatura vertilibis est in nihil*—every creature is, of itself . . . incapable of persisting in being."
[129] Citing THOMAS AQUINAS, *QUAESTIONES DISPUTATAE DE POTENTIA DEI* Questions Concerning the Power of God], 5, 3 ad 1 (1265–1274).
[130] END OF TIME, at 61.
[131] *Id*. at 62 (citing Thomas Aquinas, SUMMA THEOLOGICA, III, 13, 2 [1265–1274]).
[132] Book of Wisdom 1:14.
[133] END OF TIME, at 63.
[134] *Id*. at 64.
[135] *Id*.

man "to make an end" in this absolute sense.[136]

The end of history, then, must be conceived in a different way. Much more than the "dissolution of an empire" or "decline of the West" it is a period "after which there will no longer be time or history."[137] A post-Enlightenment world which has grown accustomed to an extra-mundane God finds such statements difficult to comprehend since there is no longer any room for the idea that "maintenance in being" actually forms part of the *creatio* itself.

Pieper next picks up a passage written by the young poet and philosopher Friedrich Hölderlin, who, in the immediate wake of the French Revolution,[138] looks ahead with extraordinary optimism to a world "in which everything is working toward better days."[139] Pieper observes that this unbridled optimism is now missing[140] and prefers Dawson's less enthusiastic appraisal:

> We have entered on a new phase of culture . . . in which the most amazing perfection of scientific technique is being devoted to purely ephemeral objects ... It is obvious that a civilization of this kind holds no promise for the future save that of social disintegration.[141]

There follows a rather pessimistic list of those who foresaw similar decline: Donoso Cortes, Jacob Burckhardt, John Henry Newman, Vladimir Solovyev, Theodor Haecker and Alfred Weber. The British Council of Churches sober assessment of the atomic age is also mentioned.[142] Resisting the temptation to despair, continues into a discussion of the inadequacy of the concepts of pessimism and optimism.[143]

For Pieper, a decaying Enlightenment forces consideration of the differences between the concepts of ends and goals. While these two ideas "inwardly cohere"[144] they are not always the same, and their understanding

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[136] *Id*. at 66.

[137] *Id*. at 67.

[138] Writing circa 1790.

[139] END OF TIME, at 73. Friedrich Hölderlin predicted, "These seeds of Enlightenment, these mute desires and aspiration of individuals for the improvement of the human race, will spread and grow strong and bear glorious fruit." Pieper is quoting from Hölderlin's correspondence in COLLECTED LETTERS (*GesammelteBriefe*) (Insel edition, Ernst Bertram ed.), at 88.

[140] The original edition of END OF TIME appeared mid-twentieth century (1954).

[141] *Id*. at 75.

[142] THE ERA OF ATOMIC POWER (1946) (Report commissioned by British Council of Churches).

[143] END OF TIME, at 79.

[144] *Id*. at 80.

is further complicated by the need to distinguish between "an *intra*-historical and an *extra*-temporal end of history."[145] Here, we see the terrible apparent contradiction between a catastrophic End (an Apocalypse) and the reaching of the final destination *outside* of time. Inside a Christian-Western philosophy of history, then, the words optimism and pessimism cannot capture what is at stake in a framework of "New Heaven and New Earth."[146] Various ancient and medieval chroniclers bore this out in their writings: Augustine,[147] Anselm of Havelberg,[148] Otto of Friesing, and so too did the activities of Charlemagne and Otto I, who built and founded ferociously despite knowing that they lived in what some of their contemporaries considered the time immediately before the Antichrist. Pieper sees optimism and pessimism as too simple to apprehend "the many layers of this attitude to history."[149] This complex, multifaceted optimism can be compared with that of Renaissance Humanists who saw:

> The current present . . . [was] in no wise seen as the "last" epoch before the kingdom of the Antichrist; the present was rather seen as the latest phase in the approximation to perfection—conceived as occurring entirely within history—as superior to the past and as preparing the way for a still happier future. 'Happiness and salvation, said Francis Bacon, would be disseminated by the science renewed by himself, which he construed as wholly an instrument of progress within history.[150]

Such ideas were promoted by philosophers of history such as Giambattista Vico,[151] Isaak Iselin,[152] and even Johann Gottfried von Herder, who, despite attacking Iselin, conceded that over time, "reason and equity must gain ground among men and foster an enduring humanity."[153] Later views,

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[145] *Id*. at 81.

[146] Id. at 83. These arguments are complex and can be given only in bare outline here.

[147] Citing AUGUSTINE, THE CITY OF GOD, bk 22, chap.30 (early 5th Century CE), http://www.newadvent.org/fathers/120122.htm. This work divides the world into seven stages: "The sixth is now passing, and cannot be measured by any number of generations, as it has been said, '*It is not for you to know he times*, *which the Father has put in His own power*.' Acts1:7"; *see also* 2 Philip Schaff, ed., A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH (First Series 1887).

[148] Citing HERBERT GRUNDMANN, *Studien über Joachim von Floris* [Studies on Joachim von Floris] (Liepzig, 1927), 92.

[149] END OF TIME, at 85.

[150] *Id*. at 88.

[151] Giambattista Vico, an Italian philosopher (1668–1744)

[152] A Swiss writer known for his work CONCERNING THE HISTORY OF MANKIND (1764).

[153] *Id*. at 89, citing Johann Gottfried Herder, IDEEN ZUR PHILOSOPHIE DER GESCHICHTE

like those of Freidrich Engels and Fedor Kalinin rest on "the dissolution of the Christian view of history, from which the element of the catastrophic end within history has been expunged."[154] The City of God[155] is no longer sought outside of time but inside and through the efforts of humanity. This tendency, however, has also bred "a retaliatory pessimism which, having lost its illusions regarding real history, is preparing for a catastrophic End . . . beyond which no promise of deliverance is audible."[156]

In concluding chapter two, Pieper offers a lengthy commentary on Kant (in the area of the philosophy of progress) and some briefer thoughts on Johann Gottlieb Fichte, Novalis,[157] and Johann Joseph von Görres. First considering Kant's *Ideal of a Universal History Based on the Principle of World-Citizenship*,[158] we learn about Kant's unreserved belief that enlightenment will inexorably "mount little by little upon the thrones and even exercise an influence upon the principles by which they govern."[159]

Pieper argues this Enlightenment progress is built upon "a secularization of Christian theology,"[160] which is the debasement and inversion of concepts borrowed from the New Testament.[161] He also discusses Kant's 1798 essay, "Is the Human Race Continually Improving?." [162]

Kant's predictions that war will become more humane and violence will gradually decrease in favor of obedience to law receive, in the light of World War II and the atomic age, a serious rebuff from Pieper: "Kant could hardly have imagined how utterly ineffectual this argument would prove for our generation."[163]

DER MENSCHHEIT [Ideas on the Philosophy of History of Mankind] at 15.

[154] END OF TIME, at 91.

[155] Referring to Augustine's THE CITY OF GOD, *supra*, note 142.

[156] *Id*. at 92.

[157] Novalis was the pseudonym of Georg Philipp Friedrich Freiherr von Hardenberg (1772–1801), an early German Romantic philosopher, poet, and novelist.

[158] Appearing in 1784.

[159] END OF TIME, at 93–94.

[160] *Id*. at 95, citing Kant's THE VICTORY OF THE GOOD PRINCIPLE OVER THE EVIL AND THE ESTABLISHMENT OF THE KINGDOM OF GOD ON EARTH (1792).

[161] END OF TIME, 96–97. Pieper's point is worth quoting in full: "The establishment of the Kingdom of God on earth can, therefore, be put like this: 'If only the principle of gradual transition from ecclesiastical creed to the universal religion of Reason . . . has struck public root, in general or at some particular point, even though the real establishment of the same is still infinitely distant from us—this means: if the suppression of ecclesiastical creed by the religion of Reason has at some particular point, as for example, in Revolutionary France, acquired 'public,' that is to say, State or legal, recognition—then 'it may be said with cause that 'the Kingdom of God has come to us.''' *Id*. at 96.

[162] END OF TIME, at 97. *See* THE CONTEST OF FACULTIES (Der Streit der Fakultäten [1798]) in POLITICAL WRITINGS, eds. Donna M. Brinton & Janet M. Goodwin (1991).

[163] END OF TIME, at 101.

After a discussion of Kant's "The End of All Things" (1794)[164] Pieper concludes that despite Kant's complexity of theory, the post-Kantian theorist vanish into "unhesitating constructivism."[165]

Fichte, Novalis, and Görres all offer accounts of history, which are critiqued by Pieper. Fichte's notion of the end of history is "the epoch of the art of Reason; the era in which mankind builds itself up with a sure and unerring hand to an accurate impression of Reason; the estate of consummate justification and sanctity."[166] Thus, Fichte's series of seventeen lectures on *The Basic Features of the Present Era*, are characterized by Pieper as slightly "frivolous."[167] Likewise Novalis, a disciple of Fichte, is criticized for imagining a "terrestrial-historical Christendom," which, *contra* Augustine, will arise once again after the "re-Christianization of Europe . . . [leading] to a new political and cultural glory."[168] Görres's Munich lectures (1830)[169] are characterized as equally arbitrary.

Chapter two closes on a note of hope. Pieper paraphrases Juan Donoso Cortés to the effect that ages of uncertainty offer special opportunities "in which one experiences the greatest certainty of how one stands vis-à-vis the world."[170] This seminal idea of "hope" will play out more in Part VI below, once we have looked carefully at Chapter Three.

C. Pieper Chapter Three – The pseudo-order of the Antichrist

Part Three of Pieper's essay considers the concept of the Antichrist which was, for Pieper, all the more urgent given his temporal proximity(1954) to totalitarianism, the recent ugliness of "total war," and the impending threats of a nuclear conflict. He notes, first that, as with the ideas surrounding the End, there is much imprecision and confusion of the concept. He cites Johann J. Ignaz von Döllinger[171] in connection with the belief that it would be practically impossible for a persecution of the Church to extend over the entire earth, yet in Pieper's own time, and due to the new "technologically

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[164] Can be found in PERPETUAL PEACE AND OTHER ESSAYS, trans. Ed Humphrey (1983).

[165] Id. at 110. The arguments here have been given in truncated form.

[166] END OF TIME, at 112.

[167] END OF TIME, at 113.

[168] *Id*. at 113. Augustine was decidedly again the idea that if only Rome would "turn Christian" again, it would arise as a world dominating power. *See also Id*., in which Pieper refers to H. von Campenhausen, WELTGESCHICHTE UND GOTTESGERICHT [World History and God's Court] (Stuttgart, 1947), at 11.

[169] JOSEF VON GÖRRES, THE FOUNDATION, SUBDIVISION, AND TEMPORAL SEQUENCE OF WORLD HISTORY (1830); *see* END OF TIME, at 114.

[170] *Id.*at 117 (spelled "Donoso Cortes" in the text).

[171] J. Dollinger, CHRISTENTUM UND KIRCHE IN DER ZEIT DER GRUNDLEGUNG (Christianity and Church in the Time of Foundation)(Regensburg, 1860), at 431.

registerable simultaneity all over the planet,"[172] such persecution would now be obviously much easier to execute. Similarly, the medieval idea of the Antichrist bearing with him a "cremation furnace" is equally disturbing to contemporary minds.[173]

A number of important theological doctrines are implied by the idea of the "Antichrist." First, it presupposes demonic powers in history.[174] Second, the Antichrist is definitively not an angelic figure, but a human one, historically powerful, Prince of this World,[175] and one who, in the words of Haecker, hastens the course of history.[176] Second, the ideas of original and hereditary sin and its vanquishing by the "Logos become man"[177] are critical, as is the view of the Antichrist as one who "despite all his power within history [is] one who is fundamentally already defeated."[178] Third, the concepts of "martyr" and blood testimony are mentioned, together with an interesting aside from E.R. Curtis who, in the context of Toynbee's 1957 *A Study of History*,[179] asks about the Christian Churches and whether their martyrdom "might save us from technocracy?"[180]

Next, the actual *dominion* of the Antichrist receives attention. This struggle prescinds from Goethe's amorphous struggle around mere "belief and unbelief"[181] and focuses on the sole figure of Christ: without which Antichrist would make no sense. *Contra* Liberal Christianity of the nineteenth century, Pieper invokes Erik Peterson's essay on eschatology to assert "that history does not take place in a neutral province of "culture" and what pertains to culture, and that "the "neutrality" of the liberal outlook upon Christ can never be more than a passing phase."[182] Additionally, since "martyr" is,

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[172] END OF TIME, at 121.

[173] Pieper cites HANS PREUSS, DIE VORSTELLUNG VOM ANTICHRIST . . . [The Presentation of the Antichrist . . .] (1906), at 21.

[174] END OF TIME, at 122.

[175] *Id*. at 122, referring to 2 Corinthians 4:4.

[176] *Id*. at 123, citing THEODOR HAECKER, DER CHRIST UND DIE GESCHICHTE [Christ and History] (Leipzig, 1935), at 124.

[177] END OF TIME, at 124.

[178] *Id*. Following this, Pieper makes the slightly enigmatic comment that "We do not understand the Antichrist if we are not clear about the fact that the meaning of history is not 'culture,'" *id*. at 124–125

[179] *See* ARNOLD J. TOYNBEE, A STUDY OF HISTORY, abridgement by D.C. Somervell (1987).

[180] END OF TIME, at 125. While the reference to modern means of communication is obvious, Pieper is more concerned that this statement in fact shows a false understanding of the End because it refers to an abstract of technical things rather than a person.

[181] Id. at 126 (citing *Israel in der Wüste* [Israel in the Desert] Goethe, NOTEN UND ABHANDLUNGEN ZUM BESSEREN VERSTÄNDNIS DES WEST-ÖSTLICHEN DIVANS [Notes and Essays for a Better Understanding of the West-Eastern Divan] (1887).

[182] END OF TIME, at 126, quoting ERIK PETERSON, ZEUGE DER WAHRHEIT [Witness of Truth] (1937).

in one sense, a political term,[183] so too is the Antichrist "a phenomenon of the political sphere."[184] Unlike a "heretic, the Antichrist is all about worldly power,[185] in which "the End will be characterized by on single governmental structure equipped with prodigious power, which, however, fails to establish and *genuine* order."[186] A pseudo-order will ensue, however, bringing a successful illusion of order.[187]

Pieper continues, "[this] purely organizational social integument, in which everything "technological", from production of goods to hygiene, "functions smoothly" and which is nevertheless fundamentally a phenomenon of disorder, is not very remote from contemporary experience."[188] Thus, in sum, the Antichrist will be a political figure, with world power, who appears along with another "coordinate fact" of the Christian gospel reaching "the totality of the peoples of the earth."[189] Pieper is concerned here to remove, however, a misunderstanding: the traditional doctrines do *not* state that "only" the Antichrist can bring about a domination within a World State. Such a state is quite possible apart from the Antichrist and, he says, "may quite possibly be looked upon as a legitimate goal of political endeavor."[190]

Returning to the idea of tyranny, Pieper quotes numerous figures who offer insights as to its nature— Edward Gibbon, Kant,[191] Lenin, and Jacob Burckhardt.[192] Gibbon's astute contribution is that, within the *Imperium Romanum*, "freedom could have been torn up by the roots . . . because there was no possibility of flight . . . if dominium fell into the hands of one

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[183] *See* NEW CATHOLIC ENCYCLOPEDIA (2003), s.v. "Theology of Martyrdom."

[184] END OF TIME, at 127.

[185] Citing Thomas Aquinas, COMMENTARY ON THE SECOND EPISTLE TO THE THESSALONIANS, chap. 2, lect. 2.

[186] END OF TIME, at 127 (emphasis in original).

[187] Pieper draws on author Ernst Jünger's (1895-1998) comment that nihilism is *unlike* anarchism because it (nihilism) bears a certain "relationship to order"; Jünger, STRAHLUNGEN [Reflections] (Tübingen, 1949), at 469, cited in END OF TIME, at 128. Pieper states: "The description "pseudo-order" is also valid in the sense that the "illusion" is successful; it is an element in the prophecy of the End that the "desert of order" of the Antichrist will be regarded as a true and authentic order."

[188] END OF TIME, at 128.

[189] *Id*. at 129.

[190] *Id*.

[191] Kant's idea of the abolition of "External wars" is replaced with the idea of brutal internal "police actions."

[192] END OF TIME, at 131 (citing Jacob Burckhardt's letter of June 16, 1888 to Friedrich von Preen which declared, "the great future authority which nobody knows, and which does not yet know itself, but for which all-levelling radicalism is preparing the way"). Friedrich von Preen (1823–1894) was a civil servant in Baden.

individual, the world became a safe prison from his adversaries."[193] Lenin's visions that the whole world will become "one office, one factory"[194] is also illustrative.

The actual figure of the Antichrist is also determinative, appearing as a monstrous sea beast composed of many kinds of animals.[195] Pieper notes that the "classical man" (he mentions Goethe) found such a thing to be "insulting to the imagination and grossly absurd."[196] Citing Huxley, Pieper sees elements of this monster in modern experiments with eugenics,[197] and himself opines on the inhumanity of some modern visual arts and poetry. He continues:

> Theological interpretation construes the pronouncement of the Apocalypse entirely after this manner: as a visualization of human apostasy, which also puts away from itself the natural likeness to God ("We do not wish to be what God has called Man") as a characterization and unmasking of the "cunning, coarse, all-devouring empire, of the world power that is governed by bestial instincts and come to life in bestial shapes.[198]

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[193] *Id*. at 130. Typical for Pieper, who had a vast memory for literature, the citation for this quotation is missing. Pieper was likely paraphrasing Edward Gibbon: "But the empire of the Romans filled the world, and when that empire fell into the hands of a single person, the world became a safe and dreary prison for his enemies. The slave of Imperial despotism, whether he was condemned to drag his gilded chain in Rome and the senate, or to wear out a life of exile on the barren rock of Seriphus, or the frozen banks of the Danube, expected his fate in silent despair"; *see* THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE, vol. 1, chap. 3, "Of the Constitution of the Roman Empire in the Age of Antonines," at 111

[194] Citing Lenin, AUSGEWÄHLTE WERKE [Selected Works] (1946), 2:236.

[195] "And I saw a beast rising out of the sea, with ten horns and seven heads, with ten diadems upon its horns and a blasphemous name upon its heads. And the beast that I saw was like a leopard, its feet were like a bear's, and its mouth was like a lion's mouth"; Revelation 13:1–2 (THE HOLY BIBLE CONTAINING THE OLD AND NEW TESTAMENTS WITH THE APOCRYPHAL Rev. Std. Ver., 1973).

[196] Citing Goethe's letter to Lavater regarding Lavater's book on the Apocalypse. Johann Caspar Lavater (1741–1801) was a beloved eighteenth-century literary figure known also as a hymn composer.

[197] Aldous Huxley, *Gedanken über des Fortschritt* (Thoughts about Progress), NEUE SCHWEIZER RUNDSCHAU [New Swiss Review], (1948). The final result of this movement would be "the breeding of a race of hare-lipped, six-fingered idiots," at 400.

[198] END OF TIME, at 135 (citing H. Schlier, VOM ANTICHRIST. THEOLOGISCHE AUFSÄTZE ZUM 50. GEBURTSTAG VON KARL BARTH [From the Antichrist: Theological Courses on the 50th Birthday of Karl Barth] (1936) at 115.

The second beast,[199] then appears and "bears the same relation to the first that propaganda does to the exercise of power"[200] because it had "two horns like a lamb and [yet] it spoke like a dragon."[201] The first beast (Anitchrist) appears to be slain but is healed, thus perverting the Good Friday narrative, as well as echoing the ancient cult of the *fortuna imperatoris*.[202]

According to Pieper, the tradition also speaks of the Antichrist as a Jew (resembling Christ), as does the Talmud[203] and Thomas Aquinas.[204] Pieper makes various comments on this, including the proximate horror of World War II, the advent of the State of Israel, and even the possibility of a "legal review of the trial of Jesus."[205] In ending the chapter, Pieper averts to the relationship between Church and State by noting:

> The final form within history of the relationship between the State and the Church will not be 'controversy,' and not really 'conflict,' but persecution, that is to say, the combating of the powerless by power. The way in which victory will be won over the Antichrist, however, is by the blood-testimony.[206]

In concluding his work, Pieper reiterates the ultimate defeat of the Antichrist, the definitive nature of the theological virtue of hope,[207] and a mute readiness for the duties of the day. His final words urge the following self-described conclusion:

> Without a return to revealed truth, it is impossible not only to

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[199] Revelation 13:11, *supra* note 189.

[200] END OF TIME, at 135; *i.e.*, the first beast exercises raw power, the second uses the power of propaganda. Pieper has written famously on the abuse of the such power in ABUSE OF LANGUAGE, ABUSE OF POWER (1974).

[201] Revelation 13:11, *supra* note 189.

[202] The Emperor as the embodiment of success. For a brief discussion of the various forms of *Fortuna*, *see* TUOMAS M. S LEHTONEN, FORTUNA, MONEY, AND THE SUBLUNAR WORLD: TWELFTH CENTURY ETHICAL POETICS AND THE SATIRICAL POETRY OF THE CARMINA BURANA (1995), at 118.

[203] Hans Preuss, DER ANTICHRIST (2nd ed., 1909) at 41. Preuss (1876–1951) was a Lutheran theologian.

[204] Aquinas, COMMENTARY ON THE SECOND EPISTLE TO THE THESSALONIANS, chap. 2, lect. 1.

[205] END OF TIME at 137. There are numerous works on this topic; *see e.g.*, Chaim Saiman, *The Halakhah of Jesus*' *Trial*, FIRST THINGS (August 2013), https://www.firstthings.com/article/2013/08/the-halakhah-of-jesus-trial.

[206] END OF TIME at 143–144.

[207] The subject of yet another book-length treatment in Pieper, FAITH, HOPE, LOVE (1997).

> philosophize about history but even to live in the area of real history as a spiritual being: that is to say, as a being who looks with open eyes upon what really happens in the real world, omitting nothing and glossing over nothing, but also abandoning and retracting nothing of that upon which man, by his very nature, cannot cease to set his hopes.[208]

The concept of hope, so important to Pieper, will help us to draw out the above into a more useable format.

VI. THE END OF HISTORY AND HOPE

A book-length set of essays on Pieper appeared in 2009[209] providing a number of insights into Pieper's philosophy in the context of modernity. First, it highlights the linear notions of time defended by Pieper. In Joseph J. Godfrey's essay, *The Future of Pieper's Hope and History*, we learn:

> History, Pieper proposes, is not evolution. History stems from human freedom. While there can be possibilities delivered to humanity by past processes over which there has been no human control, history depends on whether humans take advantage of these possibilities. Evolution delivers the possibilities; humans choose the future. What will happen is not decided on the field of evolution, but on the field of human choices—history. When self-determination obtains, evolution does not.[210]

A little further on, Godfrey employs Johann Baptist Metz to highlight the reality of time's end:

> But Metz contends that the world's time is not to be decoupled from the time of the individual's life. The shift from biblically understood bounded time to unbounded time under the pressure of evolutionary thinking, Metz proposes, is due to the influences not only in but also on the Enlightenment, even on Kant. A notion of cyclical time may have obtained in some cultures, but Christianity brought a notion of

[208] END OF TIME, at 152–153.

[209] Joseph J. Godfrey, *The Future of Pieper's Hope and History*, in Bernard N. Schumacher, A COSMOPOLITAN HERMIT: MODERNITY AND TRADITION IN THE PHILOSOPHY OF JOSEF PIEPER (2009), at 141. Godfrey's essay is more focused on Pieper's later work, HOPE AND HISTORY: FIVE SALZBURG LECTURES [David Kipp trans., 1969/1994], but draws on important elements of END OF TIME.

[210] *Id*. at 144.

> linear time; the modern period has recast linear time into endless duration, and then recast endless duration as evolutionary.[211]

Pieper would scarcely disagree, and may well strongly contend that modern apocalyptic mindsets discussed in Parts II and III above, and the liberal responses to them, are well off target. Godfrey once again:

> Scarce or perhaps completely missing from Fukuyama and Wright is the standpoint Pieper took in *The End of Time: A Meditation on the Philosophy of History*, that time, and human history, will have an end. Fukuyama has "the end of history" as the cessation of major changes in political forms of life as fact and ideal; once liberal democracy has appeared, human history has climbed its last plateau—but the journey continues. Wright guesses that the future may bring more networks of cooperation and trust, but not that these relationships will be *Aufhebende*, or transformed beyond time.[212]

The second important aspect is the independence of hope from "having" and its critical orientation towards "being":

> Pieper reports findings of physician Herbert Plügge to the effect that only when standard hopes collapse can "fundamental hope [. . .] most convincingly be grasped." Disappointment makes way for the "purging of all illusory hope." "Out of the loss of common, everyday hope arises authentic hope." Pieper, drawing on a thesis of Marcel, maintains that such fundamental hope, strictly speaking, cannot be disappointed, because it is just as unshakable as existence itself. Yet it cannot be fulfilled by anything a person can "have"; fundamental hope is oriented toward what a person "is," toward his salvation or self-realization in the future.[213]

The long arms of the octopus of coincidence[214] wrap themselves around these two ideas and show forth Pieper's critical insight into the End of Time and its relationship with Eternity. Under pressure, real hope can be squeezed out of the two and form a basis for an approach to present problems.

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[211] SCHUMACHER, A COSMOPOLITAN HERMIT, *supra* note 203, at 160 (citations omitted).

[212] *Id*.

[213] *Id*. at 144.

[214] I have borrowed this from B. J. Whiting, *Recent Historical Novels*, 24:1 SPECULUM, 106, 95–106 (January 1949).

A. The Hope in Chapter One

This Chapter of Pieper's work has a direct bearing on a number of legal questions including conscience and the laws of war. In the former, the individual confronts eternity over against a claim of the state. The false or contrived conscience claim, as might be seen in cases like *United States v. Quaintance*,[215] is subject to additional scrutiny once, as argued by Pieper, it is made subject to the rigors of philosophy. Indeed, it will be refined and made more rational by any such exposure and thus surely made clearer, and open for judicial consideration. Judges may shy away from theology but must operate in an at least philosophically comprehensible world. Likewise, in legal education there are no generally named "legal theology" courses in law schools[216] but "legal philosophy" is by no means passé.

Second, Pieper's analysis helps courts to draw clearer lines between the legal-philosophical and the theological. His does this by giving theology its proper place in the realm of public discussion and debate on the issues of the day. Following Cicero and Plato, such matters should be part of the general education.

Finally, like the two Tibetan men caught up in a world conflagration, Pieper's analysis reminds us that the believer is a person and that belief is ultimately a personal act, inaccessible to others in the same way. The justice of conscience claims must bear this in mind as courts attempt to navigate claims that are comprehensible in different ways to people of differing histories (in the concrete sense), experiences and religions.

Likewise, the laws of war can be better informed if theology is kept in play by allowing courts a way to access those rights (and duties) which remain constant even when the normal "rule of law" is disintegrating and the world is descending into chaos. In such circumstances, it is often only reliance on the transcendent which allows courts to take the practical steps needed to mitigate such deterioration of civilization.

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[215] 608 F.3d 717 (10th Cir. 2010). Where an attempt to avoid prosecution for drug possession and intended distribution was dismissed despite the protagonists assertion that "they [we]re the founding members of the Church of Cognizance, which teaches that marijuana is a deity and sacrament." *Quaintance* at 718. For further recent discussion, *see* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE, 59 (2014).

[216] I leave to one side the specialist or introductory classes such a *Canon Law* or *Jewish Law: The Rabbinic Idea of Law* (offered at Harvard in 2017 by Professor Chaim Saiman) or *Introduction to Islamic Law* (likewise offered at Harvard by Professor Intisar Rabb in 2017). As to whether this is a good thing or not *see* Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC., 247 (1977-1978).

B. The Hope in Chapter Two

Chapter Two deals generally with themes of nihilism, a world that is not subject to a complete annihilation, the inadequacy of common optimism and pessimism, and the limits of progress. These perspectives provide a conceptual brake on government action, and will force a court to consider the limits of its own ability to make judgments about cause and effect. Environmental crises, for example, may appear different in the light of a temporal or other (for example, moral) limits on technological progress, or may demand diverse solutions in a context where the end of the world is not "nothing" but "something" (even if that "something" remains unclear). The exercise of power in international law would likewise take on a new perspective in such circumstances.

What is more, the idea of "maintenance in being" - apart from the obvious religious implications[217] - may provide a reminder that all kinds of civil order require constant maintenance and conservation. Without this awareness, the rule of law and other essential principles can disintegrate (dis-integrate)[218] under the weight of conflicts over resources, both natural and synthetic. If such (human) maintenance is seen inwardly as itself an act of creation, it is more likely to receive the attention and personal investment that are its due. Here we see Pieper's anti-nihilism grabbing on to the *extra*-temporal end of history and using it to soak up the blackness of an unlimited "destructive efficiency".

C. The Hope in Chapter Three

Chapter three is more purely theological and so it may be more difficult to fit into the above categories. Nevertheless, it says a great deal about the potential misuse of world-encompassing technology, surveillance and the inherent power in something like the *Imperium Romanum.* Any such reminder is never lost in a world where totalitarian regimes are not yet a thing of the past. State-surveillance like that under the East German Stasi, or even some aspects of current bureaucratic regimes, must squirm at Pieper's description of an apparent order which appears to "run smoothly" on the surface, but is in reality a flurry of disorder and even lawless chaos.

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[217] The essential idea here is that God constantly "thinks" of the world, and of each individual, thereby maintaining their existences. Scripture is replete with references to God not forgetting, but always remembering his people. For example, in Genesis 8:1 "But God remembered Noah and all the beasts and all the cattle that were with him in the ark." REVISED STANDARD VERSION (1946, 1952, 1971).

[218] In the sense of a falling apart of that which was formerly integrated and whole.

VII. CONCLUSION

Given that humans don't know "when the play will end," it does us well to ponder the possibility that it might. Pieper's lengthy and sophisticated philosophical consideration of time, and its eventual ending, is an important off-set against the unruly apocalyptic claims which are beginning to encumber our culture and more indirectly our legal system. It is never too late to keep calm and carry on.

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