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LIBERDADE RELIGIOSA E SEGURANÇA INTERNACIONAL:
DESAFIOS E PERSPECTIVAS

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LIBERDADE RELIGIOSA E SEGURANÇA INTERNACIONAL:
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Para Marcelo, o companheiro da minha vida, que me apoia incondicionalmente, e acredita em mim, sempre. Por vezes, antes do que eu mesma.
À minha Inah, filha e companheira.
Ao meu Matheus, filho e guerreiro.
À minha família, razão da minha existência.
Aos meus alunos, que tanto me ensinam.
A Carlos Roberto Husek, mão que me apoia e alma que me inspira.
E aos meus professores, Claudio Finkelstein e Vladmir Oliveira, que sempre olham por mim.
RESUMO

O presente estudo tem como objetivo principal analisar a observância da liberdade religiosa diante das questões de segurança internacional suscitadas no mundo atual. Reconhece-se que, historicamente, religião e direito coexistiram sob limites tênues, sendo os atores religiosos responsáveis pela construção das relações de poder na história da humanidade. Considera-se no panorama internacional que o tema da liberdade religiosa e da necessidade de segurança vem tomando dimensões vultosas. O terrorismo nos trouxe o medo e com ele a necessidade de ficarmos seguros. O que nos interessa neste trabalho é discutir a questão de quanto de liberdade estamos dispostos a perder em nome do sentimento de segurança. Para tanto, o estudo se desenvolverá em três etapas. Na primeira, examina-se a problemática da relação entre religião e poder político, a partir do referencial do homem religioso. Na segunda, são apresentados os aspectos teóricos e doutrinários mais relevantes na construção da liberdade religiosa, com destaque para a laicidade, e na formulação internacional de segurança. E, finalmente, na terceira etapa, investigam-se os desafios e as perspectivas para essa relação de liberdade religiosa e necessidade de segurança diante do mundo atual. Procura-se demonstrar que a obtenção da liberdade religiosa foi uma conquista determinante do direito internacional, e que não devemos retroceder desse direito por conta do medo instalado em nosso tempo. Para tanto, sugerimos uma ação coletiva internacional para perpetuar a ideia de que a liberdade religiosa e a segurança são peças de uma mesma engrenagem, fazendo parte do objetivo maior: a paz mundial.

ABSTRACT

The objective of the present study is to analyse the observance of religious freedom as it pertains to the current international security situation around the world. Recognizing the fact that historically, religion and law coexisted along a fine line. Religions have been responsible for the power construction of relationships throughout human history. It is considered within the international panorama that the topic of religious freedom and the need for security threaten each other boundaries. Terrorism has brought fear and the need for security. The question to tackle is how much freedom is humanity to lose in the name of security. This study will be disseminated in three parts. First, it examines the problematic relationship between religion and political power, in regards to religious people. Secondly, the theoretical and doctrinal aspects are presented as relevant to the construction of religious freedom, highlighted by a Laicity, and the formation of international security. Finally, in the third part, investigates the challenges and perspectives between religious freedom and the need for security in the current world. This work seeks to demonstrate that religious freedom was a determinant achievement of international law, and this law should not be revoke due to the fear currently prevalent in world. We envisage an international collective action paragraph perpetuate the idea of religious freedom and security are parts for the ear gear, working of the greater purpose: world peace.

Key words: Laicity – Religious Liberty – International Security – Terrorism.
Cette étude vise à examiner le respect de la liberté religieuse des questions de sécurité internationale soulevée dans le monde d'aujourd'hui. Il reconnaît le fait qui, historiquement, la religion et le droit coexistaient sous frontières ténues, avec les acteurs religieux chargés de la construction des relations de pouvoir dans l'histoire de l'humanité. Il est considéré au sein de la scène internationale que la question de la liberté religieuse et la nécessité de la sécurité a pris des sommes considérables dimensions. Le terrorisme nous a apporté la peur et avec elle la nécessité de rester en sécurité. Ce qui nous intéresse dans cet article est de faire face à la question de combien de liberté, nous sommes prêts à donner au nom du sentiment de sécurité. À cette fin, l'étude sera développée en trois étapes de travail. Dans un premier temps, il examine la question de la relation entre la religion et le pouvoir politique de l'homme référentiel religieux. Dans le secondi ème, les aspects théoriques et la doctrine la plus important dans la construction de la liberté religieuse, en mettant l'accent sur la laïcité, et de la formulation de la sécurité internationale sont présentés. Et enfin, la troisième étape, cherche à savoir si les défis et perspectives pour la relation de la liberté religieuse et la nécessité de la sécurité dans la face du monde d'aujourd'hui. Il cherche à démontrer que la réalisation de liberté religieuse été une réalisation définition du droit international, et que nous ne devons pas retirer de cette loi en raison de la peur instillée dans notre temps. Nous envisageons une action collective internationale pour perpétuer l'idée que la liberté et la sécurité religieuse sont parties du même équipement dans le cadre de l'objectif plus large: la paix du monde.

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INTRODUÇÃO

A escolha do tema deste estudo foi bastante complexa. Durante anos, a curiosidade sobre a interseção entre religião e direito nos seduziu. Quando houve, em efetivo, a possibilidade de desenvolvê-lo, uma dúvida nos perseguiu.

Por ser o tema muito abrangente, que envolveria estudos multidisciplinares, o temor de fracassar nos intimidou.

Contudo, o interesse continuava latente, e de uma forma despretensiosa nós nos vimos envolvidos pelo caso dos véus franceses. Surgiu, dessa forma, a possibilidade de desenvolvimento de um estudo mais direcionado, e então aceitamos o desafio.

Este estudo analisará a problemática entre as relações do poder político e da religião, em especial as características e dimensões do Estado laico e a liberdade religiosa diante das questões de segurança internacional.

Parte-se da ideia de que o homem é um ser religioso, que como tal desenvolveu sua sociedade e história sob esse olhar inicial.

Procuraremos delinear, com a ajuda da história, quão conflituosa tem sido a relação entre poder político e religião. Contudo, sob a ótica jurídica, que apresentaremos neste trabalho, procuraremos evidenciar as características e dimensões da construção de um Estado laico e a conquista da liberdade religiosa como um direito fundamental.

Discorreremos sobre as contribuições do direito romano, do direito na Era Cristã, até chegarmos às modernas declarações de direitos, que construíram a ideia de liberdade religiosa como direito fundamental. Prosseguiremos até a época contemporânea para considerar a questão da segurança internacional como uma possibilidade real dentro de uma sociedade internacional, construída sob o pilar da Organização das Nações Unidas.

Com o intuito de evidenciar a construção do Estado laico, discorreremos sobre a laicidade, a secularização e o laicismo, buscando demonstrar a importância da
laicidade como o instrumento viabilizador na construção da ideia de liberdade religiosa.

Discorremos sobre a liberdade religiosa em si, seu caráter de direito fundamental e sua complexa constituição, separando as três formas de apresentação: liberdade de crença, liberdade de culto e liberdade de organização religiosa.

Evidenciaremos alguns dos problemas de aplicação cotidiana dessa liberdade, através de uma pequena amostragem de decisões judiciais sobre o tema.

Demonstrada a liberdade religiosa, seguiremos para a composição do tema da segurança internacional, as suas dificuldades de conceituação e a sua apresentação atual, sob a égide da Organização das Nações Unidas.

Procuraremos indicar a relevância dessa Organização no enfrentamento da questão central de nosso estudo: a liberdade religiosa e a segurança internacional, seus desafios e perspectivas.

Discutiremos sobre o terrorismo, sua história e ameaça atual e como esta serve para desencadear mudanças dentro do sistema internacional.

Alinharemos então a questão da liberdade religiosa diante da questão de segurança, tendo o terrorismo como ponto deflagrador.

Por fim, tentaremos identificar quais são os desafios e perspectivas centrais sobre o tema proposto, apontando uma ideia de solução.
1 O HOMEM COMO SER RELIGIOSO E O CENÁRIO HISTÓRICO DA RELAÇÃO ENTRE DIREITO E RELIGIÃO

1.1. O homem e a religião

Para entendermos o sentido da liberdade religiosa, e como a questão da segurança dos Estados pode influenciar a vida social nos dias de hoje, precisaríamos encontrar um termo inicial. O começo de tudo, entretanto, claro está, é o próprio ser humano, criador e maior beneficiário de direitos.

Lembra-nos Hannah Arendt¹ que a vida é como um milagre, o ser humano como, ao mesmo tempo, um início e um iniciador, acenando que é possível modificar pacientemente o deserto com as faculdades da paixão e do agir. Afinal, “os homens, embora devam morrer, não nascem para morrer, mas para começar”.

Precisamos entender a condição humana e a relação com o sagrado, para enfim podermos alcançar sua dimensão, liberdade religiosa, laicidade e segurança.

Em toda a história humana, acreditamos constatar a presença de uma força maior que não possui uma explicação racional. Os primeiros seres humanos a utilizaram como forma de defesa. O homem primitivo não tinha como entender eventos mais complexos, como a alternância de estações, um terremoto, um raio, uma doença. Mesmo com toda a evolução. O homem moderno busca explicações que lhe sejam compreensíveis, mesmo que a razão científica não lhe confira a certeza dos fatos.

Nessa acepção, Tomazoli²:

É verificável que, na existência humana, o indivíduo, diferente dos demais animais, tem uma percepção, um desejo e uma busca pela espiritualidade ou pelo que se entende, em certos contextos, como religiosidade.

Em todos os povos, nações, tribos e épocas, vê-se a busca pelo místico, pelo poder superior, pelas forças invisíveis capazes de trazer o conforto da alma, a coragem de espírito, o domínio sobre o clima do planeta, a providência das chuvas no tempo e quantidades certas,

e a realização das necessidades e anseios do homem, além da fé em um Poder Superior criador de todas as coisas.

Em concordância, Azevedo³:

O espaço para o divino está para o homem como o altar para o Deus desconhecido que Paulo pregara. Desta forma, o ateu poderá declará-lo vazio; o agnóstico pode considerar sua investigação inútil e o humanista não permitir tal interrogação; mas em todos esses casos a orientação para o divino se mostra inata.

Para compreender essa força espiritual e seu poder sobre a humanidade, vários expoentes apresentaram versões sobre o tema.

Valendo-nos do que ensina Mondin⁴, o homem platônico seria essencialmente alma, sendo esta imortal, e que deveria o quanto antes retornar a seu mundo de origem. O homem aristotélico é composto de alma e corpo, como os demais seres do mundo, desempenhando a alma deste, no papel de forma, mas não escapando da corrupção. Em Plotino, surgiria a noção de noesis ou conhecimento intelectivo, presente unicamente na alma, e as demais funções ficariam ao encargo do corpo.

Com o advento do cristianismo, o homem não só se relaciona com a natureza, mas com Deus e com outros homens, sendo que a reflexão antropológica se dá a partir do conhecimento de Deus (teocêntrica). Aos olhos de Santo Agostinho⁵, vê-se uma paixão extraordinária pelo homem. Nele a filosofia de Platão ganha matiz no que diz respeito ao pensamento sobre mal, pecado, liberdade, pessoa e autotranscendência.

Em São Tomás⁶, deparam-nos com uma concepção bem mais sólida e encadeada, na qual o homem se compõe de alma e corpo, ambos têm seu próprio ato de ser e sua unidade é substancial.

Thomas Hobbes⁷ em seu Leviatã escreveu:

⁶ Idem.
Verificando que só no homem encontramos sinais ou frutos da religião, não há motivo para duvidar que a semente da religião se encontre também apenas no homem, e consiste em alguma qualidade peculiar, ou pelo menos em algum grau eminentemente dessa qualidade, que não se encontra nas outras.

A pesquisa antropológica toma rumos distintos com o modernismo, e ao contrário do que pensam os cósmico-gregos e os teocêntricos, passa a considerar o homem como ponto de partida de toda pesquisa filosófica. Isso se dá com a pesquisa crítica de Descartes. Spinoza, em sua Ética, tem como pressuposto a vida humana, que em Hume é configurada como em um quadro completo de ser social. Tem-se então Freud, que revoluciona os conceitos de complexos e instintos humanos, e Jung, que posiciona o homem como ser religioso com uma força interna que o atraia para Deus, durante toda a história da humanidade.

Já em Berger, o homem tem necessidade de explicações e justificativas para aceitar as coisas tal como a ele se apresentam. Essa tarefa é cumprida pela religião na medida em que legitima as instituições sociais. Para Heidegger, tais instintos sociais ganham o nome de possibilidades.

De modo geral, a perspectiva moderna traz em si simultâneas eclosões que tentam afunilar a imagem do homem, e assim tem-se: em Marx um homem econômico, em Kierkegaard um ser angustiado, em Bloch um ser utópico, em Ricouer um homem falível e em Gadamer um ser hermenêutico. Em Marcel, o

8 Os cósmico-gregos são grupos humanos crentes em vários deuses, advindos da natureza, menosprezando o homem. Os teocêntricos, por sua vez, acreditam que a razão de tudo se baseia em Deus, e não no homem.
15 Idem, ibidem, p. 9.
19 Idem, ibidem.
homem é um ser problemático, que se torna a ser cultural em Gehlen\textsuperscript{21} e profundamente religioso em Luckmann\textsuperscript{22}.

Então, Kant\textsuperscript{23}, em \textit{Crítica da razão pura}, traz o fim da busca metafísica dos filósofos da época renascentista. A mente humana não conceberia um conhecimento absoluto nem do mundo, nem do homem e nem de Deus, pois só concebe aspectos práticos ou morais, segundo \textit{Crítica da razão prática}.

Eliade\textsuperscript{24} conclui que o sagrado é um elemento estrutural da consciência, e não um estágio da história, por isso nunca será esquecido; ainda afirma que o homem total nunca será dessacralizado por inteiro, e, apesar da dessacralização, nenhum homem pode ser reduzido a pura realidade consciente irracional.

Em suma, todos os filósofos, direta ou indiretamente, tiveram algum contato com as questões antropológicas relativas a um ser maior que interfere na vida humana.

1.2. O homem diante da morte e transcendência

Descoberto o homem como ser religioso, devemos passar para as outras justificativas da relação humana com o sagrado.

A única certeza humana é a morte. Todavia, falar sobre este tema é uma das mais árduas tarefas para o ser humano. Primeiro, pela falta clara do desejo de alcançá-la. Segundo, porque discorremos sobre ela sem a termos experimentado.

A impotência humana diante da morte nos revela a religião. Próximo da presença da morte ou durante o luto, o homem busca a compreensão de sua angústia; diante do fato certo, busca preencher com esperança o vazio provocado pela morte. Na busca de porquê encontramos o conforto do pensamento religioso.

\textsuperscript{20} Idem, ibidem.
\textsuperscript{21} Idem, ibidem.
\textsuperscript{22} Idem, ibidem.
Nesse sentido escreve Rubens Alves:

A religião cuidou, com carinho especial, de erigir casa aos deuses e casa para os mortos, templos e sepulcros. Nenhum outro ser existe neste mundo que, como nós, erga súplicas aos céus e enterre, com símbolos, os seus mortos. E isso não é acidental, porque a morte é aquela presença que, vez ou outra, roça em nós o seu dedo e nos pergunta: “Apesar de mim, crês ainda que a vida faz sentido?”.

Luhmann chama a atenção para o fato de que é diante da morte que a religião corrobora sua maior aptidão. Ser ela, a religião, a única a ter uma resposta transcendental e direta para o fato da morte. É na expectativa humana de amenizar a dor causada pela morte que a religião floresce. O consolo dos vivos, os rituais para celebrar os mortos e a promessa de uma continuidade transcendental são campos férteis para a seara religiosa.

É a própria religião que conceitua a possibilidade de transcendência humana. A separação entre o corpo e a alma é dimensionada em tempos diferentes: um tempo físico para o corpo que acaba: mortalidade; e um tempo eterno para a alma: imortalidade.

Como ensina Mondin, quase todos os estudiosos do século XX se defrontaram com o problema filosófico da morte, e todos estão de acordo em um ponto: a morte só destrói o corpo, e não a alma. E quanto ao sentido da morte, podemos vislumbrar duas tendências opostas: os niilistas, para os quais a morte é o fim total, e os não niilistas, para os quais há alguma possibilidade de transcendência.

A experiência da relação com a morte nos traz a certeza de querer viver. E na busca pela vida, elegemos a liberdade de escolher qual caminho seguir, qual escolha religiosa nos serve melhor.

Também é na presença da morte que buscamos a vida e muitas vezes a sensação de segurança com a qual podemos nos confortar.

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1.3. O homem e a sociedade

Um ser religioso e inseguro perante a certeza da morte, sem dúvida o ser humano como indivíduo é fascinante. Mas é, em sua função coletiva, vida comum, que o homem se transforma em real deslumbramento, com a possibilidade do seu próprio crescimento, melhoria e completude.

A vida em sociedade é objeto de pesquisa em diversas áreas da ciência, como já dissemos antes; o ser humano é criatura e criador. Dentre as ciências, é através da história política e social do homem que podemos observar melhor o significado desse ser humano.

Ensina Aristóteles28, em sua Política:

Quando várias aldeias se unem numa comunidade, perfeita e grande o bastante para ser quase ou totalmente autossuficiente, passa a existir o Estado, que nasce das meras necessidades da vida e continua a existir no interesse de uma boa vida. Portanto, se as formas anteriores de sociedade são naturais, assim também é o Estado, porque ele é a finalidade delas e a natureza (completada) é a finalidade... Por conseguinte, é evidente que o Estado é uma criação da natureza e que o homem é por natureza, um animal político. E aquele que por natureza e não por mero acidente não tem Estado, ou está acima da humanidade ou abaixo dela; ele é o sem tribo, sem lei, sem lar.

Para encontrarmos o lar, a tribo e a lei fazemos uso da linha temporal histórica como um norte para nosso questionamento central: liberdade para esse homem designar e honrar seu Deus e se sentir seguro para viver em paz.

1.4. Formação histórica do direito

Investigar a origem do direito é matéria extremamente intrincada. Se pensarmos em onde e quando o direito surgiu, vamos nos deparar com o princípio que denominamos humanidade. Poderíamos dizer que o direito surge junto com as

comunidades e que o direito internacional se inicia quando dos primeiros escambos entre essas comunidades\textsuperscript{29}. Entretanto, como marco histórico, poderemos identificar a origem do direito quando se dá o desenvolvimento da escrita.

Nesse sentido, Adam Watson\textsuperscript{30}:

\begin{quote}
Our study of the evolution of international relations takes us back to the earliest written records. Of course there were cities and kingdoms before that, and of course they had relations with one another. We can see from the archaeological record that there was trade, and war, and other exchanges. But until men developed the art of writing, and began to keep records of transactions between different communities, we cannot now, at this distance, any longer see what these were.
The first records of how communities, which were developed enough to write such things down, conducted relations with each other would be interesting in any case. The earliest records which have survived and which we can decipher are particularly interesting because they come from Sumer. Sumer was one of the earliest and most innovative civilizations, and particularly creative in its ways of managing public affairs. Fortunately for our enquiry, it was not a single empire, as Egypt for instance quickly became, but a cluster of separate communities within the framework of a common culture, each with its own distinct personality and corporate life. When the records of their dealings with each other begin, the Sumerian city-temple states had achieved a high level of civilization, with well-developed agriculture, seafaring, trade and accounting, held together by an impressive system of religion and government.
\end{quote}


Os primeiros registros de como as comunidades, que foram desenvolvidas o suficiente para escrever tais coisas, realizando relações com o outro seriam interessantes em qualquer caso. Os registros mais antigos que sobreviveram e que podemos decifrar são particularmente interessantes porque eles vêm dos sumérios.

Suméria foi uma das civilizações mais antigas e mais inovadoras, e particularmente criativa em suas formas de gestão dos assuntos públicos. Felizmente para o nosso inquérito, não foi um único império, como o Egito, por exemplo, que se tornou rapidamente, mas um aglomerado de comunidades separadas no âmbito de uma cultura comum, cada um com sua própria personalidade distinta e vida corporativa. Quando os registros de suas relações com o outro começaram, os sumérios eram Estados cidade-templo e tinham alcançado um alto nível de civilização, com bom desenvolvimento em agricultura, marinha, comércio e contabilidade, organizada em conjunto por um impressionante sistema de religião e governo (tradução livre).
Para fins deste estudo, iniciaremos nossas pesquisas em um marco histórico um pouco mais adiante, onde o direito se esquematiza de forma a embasar o pensamento em torno da futura liberdade religiosa e da segurança, começando pelos romanos e seu direito até chegarmos ao Estado moderno. Interessa-nos aqui delinear a história do direito e, em particular, do direito internacional\(^{31}\), observando a história da religião e seus pontos comuns. Desde quando ambos observavam uma só fonte, nós nos valemos aqui dos dizeres de Rousseau\(^ {32}\): “Os homens de início, não tiveram outros reis senão deuses, nem outro governo senão o teocrático”.

Nesse sentido, Miranda Guerra\(^ {33}\):

Como fenômeno que penetra nas esferas mais íntimas da consciência humana e, simultaneamente, se manifesta em grandes movimentos coletivos, o fenômeno religioso tem tido sempre importantíssima projeção política e jurídico-política. Tem influído constantemente não só na história cultural, mas também na história política. Nenhuma Constituição deixa de o considerar e repercute-se ainda no Direito internacional.

E Francisco Tomazoli\(^ {34}\):

Verifica-se nestes pensamentos gerais sobre a formação do Estado e do Direito que o mesmo nasce emaranhado dos valores morais e religiosos do povo, reiteradamente praticado e acatado espontaneamente (costume), e que formaram as primeiras ordens sociais. Deste modo, verifica-se que a religião é do homem como a gravidade é do planeta, que a religião é antes do Estado, que o homem religioso é antes do homem civil.

Depois, os homens passaram a construir seus próprios destinos e distanciaram o Estado da religião, como veremos a seguir dentro da formação do Estado moderno.

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\(^{31}\) Cabe aqui uma pequena intervenção sobre a origem do direito internacional. Muitos são os autores que só vão reconhecer o direito internacional na Idade Moderna. Contudo, existem autores que afirmam existir direito internacional desde sempre. Aproximamo-nos mais da segunda corrente para nosso auxílio, quiçá, socorro, sugerimos a leitura de Cláudio Finkelstein em seu trabalho de livre-docência: *Hierarquia das normas internacionais*, p. 31-56.


\(^{34}\) FONSECA, Francisco Tomazoli da. *Religião e direito no século XXI*: a liberdade religiosa no Estado laico. Curitiba: Juruá, 2015. p. 44.
A presença do fenômeno religioso e do direito é de fundamental importância para que possamos compreender o significado do que acontece no mundo atual.

1.5. O direito romano

Roma foi uma das maiores construtoras do direito no mundo, um direito de doze séculos\textsuperscript{35}. É o grande fator quando pensamos em um direito internacional. Os romanos, em suas conquistas, permitiram a muitos de seus conquistados a observação de seu direito pútrio, e até mesmo observância de suas práticas religiosas, desde que, em questões tributárias e relacionadas a guerra, referendassem a Roma. Esse fato traz para o direito romano retroalimentação e a possibilidade de se manter por doze séculos.


Partindo das Leis das XII Tábuas, 753 a.C., o direito romano se multiplicou e aprimorou suas técnicas. De início, o direito fundamentava-se, tão somente, nas ações previstas e tipificadas nas leis supracitadas.

Nesse sentido, Hespanha\textsuperscript{36}:

O cultivo intelectual do direito – a pouco e pouco, mas pela primeira vez, conceitualmente separado de outras ordens normativas – por um grupo de especialistas (os juristas) com grande autoridade social e política, tornou-se a partir de então a principal tecnologia de Governo no Ocidente.

A magistratura dos pretores, em 367 a.C., cria, na figura do pretor, um intérprete da lei, com poderes de decisão, para administração da justiça nas causas civis. Durante a próxima metade de século, os pretores foram acumulando poderes e


fortalecendo cada vez mais suas decisões como paradigmas para o império e, em sequência, decaindo de seu status.

O império romano, desde então, veria a sua divisão definitiva: o Código Theodosiano, a ascensão de Justiniano e a feitura do seu patrimônio maior, o *Corpus Iuris Civilis*\(^\text{37}\).

Nesse escopo:

Esta alteridade do direito romano não exclui que ele tenha inaugurado um paradigma do governo social que se manteve até hoje – o governo pelo direito, como ordem separada de outras (o costume, a religião). E, neste sentido, que tenha marcado os primórdios da modernidade. Mesmo quanto a isto, não é prudente enfatizar muito a novidade, pois o próprio direito romano mantinha vínculos fortes com ordens normativas de diversas origens, desde a natureza das coisas (*rerum natura*) até à religião (*rerum divinarum*). E este modelo de vinculação do direito à natureza, à religião e à tradição (*mores maiorum*) constitui também um importante legado deixado à cultura jurídica europeia\(^\text{38}\).

O maior legado deixado por Roma e seu direito foi a separação dos poderes, entre Estado e religião, que conservamos até os dias atuais como um legado positivo.

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\(^\text{38}\) Idem, ibidem, p. 129.
1.6. A Era Cristã

1.6.1. O início: religião de indivíduos

Foi no ambiente de uma Roma simpática à diversidade de cultura e a certa liberdade religiosa de seus conquistados que surge o movimento do cristianismo. Primeiro, em forma de seita, aparentemente inofensiva aos olhos romanos. Eram pessoas simples, sem força política, pregando as palavras do filho de um carpinteiro. Não pareciam nada ameaçadoras ao império romano.

Nesse sentido, José Miguel García³⁹:

Las fuentes paganas y judías sobre el cristianismo de los dos primeros siglos son más bien escasas y breves. Esta peculiaridad se debe sobre todo al origen insignificante de la fe cristiana; aparece en el mundo como un hecho humano cualquiera, y además en Palestina, una región muy marginada de los centros de poder. Este desconocimiento y ausencia de interés entre los escritores no cristianos de la antigüedad va cambiando a medida que el cristianismo se difunde y adquiere protagonismo social.

Depois, o cristianismo foi ferozmente perseguido por ameaçar objetivos romanos e, por fim, admitido como religião oficial do próprio império romano. O cristianismo vai sedimentar-se de forma inequívoca exercendo grande influência no espaço religioso e no direito.

Ensina Rousseau⁴⁰:

Foi nessas circunstâncias que Jesus surgiu para estabelecer na Terra um reino espiritual; o político, fez com que o Estado cessasse de ser uno, causando as divisões intestinas que jamais deixaram de agitar os povos cristãos. Ora, essa ideia nova de um reino do outro mundo nunca pode entrar na cabeça dos pagãos; estes sempre olharam os cristãos como verdadeiros rebeldes, que, sob a aparência de uma falsa submissão, só esperavam pelo instante de se tornarem independentes e senhores, usurpando diretamente a autoridade que

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³⁹ GARCÍA, José Miguel. Los orígenes históricos de cristianismo. 3. ed. Madrid: Ediciones Encuentro, SA, 2012. p. 27. “As fontes pagãs e judias sobre o cristianismo dos primeiros séculos são bem mais escassas e breves. Essas peculiaridades se devem, sobretudo, à origem insignificante da fé cristã; aparecem no mundo como um fato humano comum, e também na Palestina, muito marginalizados dos centros de poder regiá. Essa ignorância e falta de interesse entre os escritores não cristãos da antiguidade mudá à medida que o cristianismo se espalha e adquire papel social” (tradução livre).

fingiam respeitar em sua debilidade. E foi essa a causa das perseguições. O que os pagãos receavam chegou. Então, tudo mudou de face. Os humildes cristãos mudaram de linguagem, e transformaram-se sob a direção de um chefe visível, no mais violento despotismo neste mundo.

Do início da crença até o século IV, o cristianismo foi mais uma religião de indivíduos sem uma identificação com Estado ou nação; o que os unia era mais uma relação com seu Deus único do que uma igreja constituída. Porém, com a conversão do imperador Constantino, e a promulgação do Edito de Milão, em 313 d.C.⁴¹, toda a concepção de simplicidade cristã foi sendo alterada. E surgiu assim a mais longa aproximação entre Estado e religião já vista, até agora, pela história.

De 380 até 476 d.C., sob a égide do Édito de Constantinopla⁴², o cristianismo se torna religião oficial do império romano, sendo banida qualquer outra forma de culto.

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⁴¹ Em 313 d.C., o imperador romano do Ocidente, Constantino, e o imperador romano do Oriente, Licínio, se reuniram em Milão e num documento conhecido como “Edito de Milão”, dirigido ao governador da Betânia, dispuseram uma nova política religiosa. Com a edição desse documento, marcou-se uma nova era para a Igreja cristã, que, pouco tempo depois, conseguiu suplantar definitivamente o paganismo.

“Eu, Constantino Augusto, e eu, Licínio Augusto, venturosamente reunidos em Milão para discutir sobre todos os problemas referentes à segurança e ao bem público, entre outras disposições a assegurar, cremos dever regulamentar, primeiramente, o bem da maioria, que se refere ao respeito pela divindade, ou seja, garantir aos cristãos, bem como a todos, a liberdade e a possibilidade de seguir a religião de sua escolha, a fim de que tudo o que existe de divino na morada celeste possa ser benevolente e favorável a nós mesmos e a todos aqueles que se encontram sob a nossa autoridade. Este é o motivo pelo qual cremos – num designio salutar e muito digno – devem tomar a decisão de não recusar essa possibilidade a quem quer que seja, tenha essa pessoa ligado a sua alma à religião dos cristãos ou a qualquer outra: para que a divindade suprema – a quem prestamos uma homenagem espontânea –, em todas as coisas, possa nos testemunhar com o seu favor e a sua benevolência costumeira.

“Assim, convém que Vossa Excelência saiba que decidimos suprimir todas as restrições contra os cristãos, encaminhadas a Vossa Excelência nos escritos anteriores, e abolir as determinações que nos parecem totalmente infelizes e estranhas à nossa brandura, assim como permitir, a partir de agora, a todos os que pretenderem seguir a religião dos cristãos, que o façam de modo livre e completo, sem serem aborrecidos ou molestados.” (Disponível em: <http://www.universocotilico.com.br/index.php/o-edito-de-milao.html>. Acesso em: 6 dez. 2015).

⁴² Édito dos imperadores Graciano, Valentiniano (II) e Teodósio Augusto, ao povo da cidade de Constantinopla. “Queremos que todos os povos governados pela administração da nossa clemência professen a religião que o divino apóstolo Pedro deu aos romanos, que até hoje foi pregada como a pregou ele próprio, e que é evidente que professam o pontífice Dâmaso e o bispo de Alexandria,
Nesse sentido, Hespanha⁴³:

Tudo se modificou, porém, com a outorga da liberdade de culto pelo imperador Constantino, em 313 d.C. A jurisdição do Papa e dos bispos sobre os fiéis pode, agora, ser abertamente exercida, sendo mesmo fomentada pelo poder imperial, que atribui força de julgamento às decisões episcopais sobre litígios que lhes tivessem sido voluntariamente sujeitos e reserva para a jurisdição eclesiástica o julgamento das infrações puramente religiosas. A partir do século V, o Império – e, depois, os restantes poderes temporais – reconhece à Igreja o privilégio de foro, atribuindo-lhe uma jurisdição privativa sobre os clérigos. No século X, a Igreja arroga-se a jurisdição sobre todas as matérias relativas aos sacramentos, nomeadamente sobre o casamento.

Assim, estabelecido como religião oficial, o cristianismo católico vai se desenvolver e construir sua Igreja. E essa Igreja vai, aos poucos, se cristalizando junto ao poder, até o ponto em que o poder e a religião cristã, exercida por essa Igreja, vão se amalgamar de forma ora a beneficiar um, ora outro, na influência e dominação social.

1.6.2. A Época Medieval

Com Constantino o envolvimento da religião na história ocidental foi modificado. A religião foi encontrando espaço para, paulatinamente, tomar o Estado. Isto ocorreu devido ao espaço deixado pela queda do império romano e as invasões

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germânicas. No século V, o império romano, sob o poder de Constantino, reconhece a Igreja Católica, como já foi visto antes.

Adiante, no século X, arroga-se à Igreja Católica toda matéria relativa ao casamento, e também é a mesma Igreja que detém o predominio da escrita. Com Carlos Magno, favorecido pelo Papa Leão III, o poder papal se integra definitivamente ao poder estatal.

O poder da Igreja Católica ainda vai se expandir mais, no decreto de Graciano de 1140 d.C.; o poder religioso passa a ser legislador, e surge assim o direito canônico.

45 “Esta expansão institucional da Igreja obriga-a a constituir um corpo normativo muito mais complexo do que o dos primeiros tempos, pois o conteúdo dos Livros Sagrados já não pode regular uma sociedade com problemas e cultura diferentes dos da sociedade hebraica dos tempos bíblicos ou mesmo das comunidades neojudaias/paleocristãs romanas dos primeiros séculos. Uma das fontes desta nova regulação são os decretos dos concílios, ecuménicos, regionais, provinciais ou diocesanos, assembleias dos bispos de toda a cristandade ou de uma região, província ou diocese particulares, respectivamente. Em cada diocese, podem ainda ser promulgados constituídos ou estatutos diocesanos, aprovados pelos síndicos (assembleias de eclesiásticos) locais. Outra fonte do direito canônico é constituída pelas determinações papais. De facto, embora inicialmente o poder normativo da Igreja estivesse atribuído aos órgãos coletivos que eram os concílios e o Papa apenas intervinha para esclarecer ou aplicar concretamente as normas conciliares, a política papal tende a alterar-se — socorrendo-se frequentemente da imagem, paralela, do imperador e das prerrogativas deste segundo o direito romano —, aumentando, progressivamente e de forma não linear, a sua capacidade de edição do direito, emitindo decretais ou constituições pontificiais. De acordo com uma tipologia que tem tanto a ver com as temáticas como com as suas finalidades, as constituições podem designar-se por encíclicas, bulas ou breves. Este crescente poder legislativo dos papas e a inerente capacidade para derogar o direito tradicional — constitui, por sua vez, um modelo para os monarcas medievais e uma fonte de legitimação da sua reivindicação de inovar, por via legislativa, os ordenamentos jurídicos dos reinos. A partir de certa altura, este novo direito escrito da Igreja passa a constituir uma mole normativa apreciável, a necessitar de compilação e de concatenação. Isso é feito, por iniciativa privada, durante os séculos VI a VIII, destacando-se delas uma coleção feita no reino visigótico da Hispânica (Coletivo hispana, século VII). No século XII, um monge, professor de teologia com o contínuo desenvolvimento do direito da Igreja; o Decreto foi-se desatualizando, tornando-se necessárias compilações complementares. Em 1234, Gregório IX encarrega o dominicano espanhol Raimundo de Penha forte, também professor em Bolonha, de completar a compilação de Graciano. O resultado foram as Decretais extra Decretum Gratiani vacantes [Decretais que extravasam o Decreto de Graciano], divididas em cinco livros. Em 1298, Bonifácio VIII completa-as com mais um livro, o chamado Libersextum (ou simplesmente Sextum). Clemente V acrescenta-lhes as Clementinas (1314). João XXII, as Extravagantes de João XXII (1324). E, nos finais do século XV, aparece ainda uma outra coleção oficial, as Extravagantes comuns. O conjunto destas coleções passou a chamar-se
Esse crescimento do poder papal, com direito constituído, vai gerar muitos atritos entre o papa e o imperador, principalmente nos séculos X e XII.

Ensina Maquiavel\textsuperscript{46}:

Resta-nos somente agora falar dos principados eclesiásticos. Nos quais todas as dificuldades existem antes que se o possuam, eis que são adquiridos ou pela virtude ou pela fortuna, e sem uma e outra se conservam, porque são sustentados pela ordem de há muito estabelecida na religião; estas tornam-se tão fortes e de tal natureza que mantemos seus príncipes sempre no poder, seja qual for o modo por que procedam e vivam. (...) pois antes de Alexandre os potentados italianos, e não aqueles que eram ditos “potentados”, mas qualquer barão e senhor, mesmo que sem importância poucos valores davam ao poder temporal da Igreja, e agora um rei de França treme, ela pode expulsá-lo da Itália e ainda logra arruinar os venezianos, apontarei fatos que a despeito de conhecidos, não me parece supérfluo reavivar em parte da memória.

Hobbes\textsuperscript{47}, por sua vez, em \textit{Leviatã}, clarifica a influência e a autoridade da religião sobre o Estado medieval. Hobbes não só demonstra a aproximação, mas a reafirma, explicando a necessidade de estarem juntos religião e Estado.

Assim, por toda a Idade Média o poder da Igreja Católica sobrevive num modelo de “Estado religioso”\textsuperscript{48}.

A ruptura dessa hegemonia católica vai se dar com a reforma protestante de Martinho Lutero. Uma nova face cristã surge, e com ela uma nova ética protestante, que, contrariamente à da Igreja Católica, se preocupa mais com esta vida terrena do que com a promessa ou predição do inferno vindouro.

Além desse fator de divisão, a reforma protestante, é também a partir do século XVI que começa a ser possível a construção de sistemas jurídicos gerais, união científica do direito.

\textit{Corpus iuris canonici}, à semelhança do nome dado à compilação justinianeia de direito civil” (Idem, ibidem, p. 140-141).


\textsuperscript{47} HOBBES, Thomas de Malmesbury. \textit{Leviatã} ou Matéria, forma e poder de um Estado Eclesiástico e Civil. Disponível em: <hdh_thomas_hobbes_leviatan.pdf>.

\textsuperscript{48} Não há a mesma orientação de Estado para a época vigente, daí nossas aspas.
Em 1598, nasce a primeira norma de liberdade religiosa, o Édito de Nantes, trazendo tolerância aos huguenotes num Estado de maioria católica, a França\textsuperscript{49}.

Passado mais de um século, o inglês John Locke traz um aprimorado pensamento sobre a religião, a tolerância entre religiões e a relação entre religião e Estado:

A tolerância para os defensores de opiniões opostas acerca de temas religiosos está tão de acordo com o Evangelho e com razão que parece monstruoso que os homens sejam cegos diante de uma luz tão clara\textsuperscript{50}.

Em concordância, Montesquieu\textsuperscript{51} diz que a religião deve trazer conselhos e o Estado, preceitos. Sendo estes preceitos o pacto social e sua paz civil, por outra via, o caminho religioso deve conduzir paz ao homem, alcançada através da excelência de conduta. Assim, conselhos religiosos são voluntários e os preceitos civis, obrigatórios.

1.7. Do Renascimento ao iluminismo para as revoluções

Findada a Idade Média, o Renascimento foi o primeiro movimento a aparecer com a ascensão da burguesia na Europa. Nele foram retomados valores clássicos com a quebra de tabus religiosos e a volta do homem como foco central da estética artística.

Como ensina Adam Watson\textsuperscript{52}:

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\textsuperscript{52} WATSON, Adam. The Evolution of International Society, A Comparative, Historical Analysis. New York: Routledge, 1992. p. 153: A essência do Renascimento foi o humanismo. A palavra mudou seu significado ao longo do tempo, como tantas outras. No Renascimento isso significava que já não estavam vendo Deus como a medida de todas as coisas, mas concentrando a atenção sobre o homem e suas potenciais realizações. Dois aspectos do humanismo renascentista nos preocupam. Um deles era o acesso directo para o clássico e a experiência especialmente grego, que tinha sido acessível a apenas uns poucos europeus ocidentais e apenas em disfarce cristão. O outro era a
\end{flushright}
The essence of the Renaissance was humanism. The word has changed its meaning over time, like so many others. In the Renaissance it meant no longer seeing God as the measure of all things, but concentrating attention on man and his potential achievements. Two aspects of Renaissance humanism concern us. One was direct access to the classical and especially Greek experience, which had been accessible to only a few west Europeans and only in Christian guise. The other was the diffusion of a liberal spirit of enquiry, and a feeling that men could and should think things out anew. Suddenly in Italy in that century a great number of men and a few women used their imagination both in learning and in the arts. There was tremendous speculation about the real nature of the world and man’s purpose in it, absolutely free from the teachings of Christianity which had hitherto inspired and confined such speculation. Similarly there was an uninhibited quest for beauty, for the new forms which had been recovered by digging up the remains of Roman and Greek civilization which were then plentiful all over Italy. Because man was now the measure of things, beauty and truth were especially associated with the proportions of the human body and the human mind, as they had been in classical Greece. Humanists did not care whether the shape of the body and the ideas of the mind which they saw and copied were unethical or indecent by Christian standards. In the MiddleAges the question had been whether something was right or wrong: now it was a question of whether it was true or untrue, beautiful or ugly, effective or futile. A new spirit of earthy realism and new scientific formulae were applied to painting and to politics, to war and to statecraft.

O iluminismo e o cientificismo tentam desacreditar a religião, como um todo, contudo, por todo o exposto, fracassam em seu objetivo. Apesar de separada do Estado, a religião continuou importante e imprescindível à sociedade como um todo.

Dentro do processo histórico podemos determinar um novo grupo divisor no marco dos direitos. Primeiro a Paz de Westfália, que encerrou um dramático conflito
conhecido como a Guerra dos Trinta Anos. Quase todos os povos do continente europeu envolveram-se nesse temeroso conflito, cujas origens estavam ligadas ao fenômeno da religião e o exercício de sua liberdade. A partir desse tratado o mundo reconheceu, sob uma nova ótica, os estados, a soberania, a paz universal (*pacta sunt servanda*) e respeito aos tratados internacionais.

Ensina Claudio Finkelstein⁵³:

Firmada em Münster e Osnabrück, em 1648, a chamada Paz de Westfália trouxe a primeira previsão positivada da concepção de *igualdade soberana entre os Estados*. Desvincularam-se da Santa Sé, os nascentes Estados europeus, iniciando-se um processo de criação de identidade própria (destaque do original).

A designação de Estado como a conhecemos surge nesta época. Segundo o *Dicionário Houaiss⁵⁴*, designa o “conjunto das instituições que controlam e administram uma nação”; “país soberano, com estrutura própria e politicamente organizado”.

Também o conceito de soberania começa a ser formulado nesse tempo. Primeiramente com a definição de Jean Bodin⁵⁵, garantindo ser a soberania um atributo divino dos reis, sendo modificada por Jean-Jacques Rousseau⁵⁶, que transfeire o conceito de soberania da pessoa do governante para todo o povo, entendido como corpo político ou sociedade de cidadãos⁵⁷.

Em seguida, um grupo de revoluções subsequentes: Revolução Inglesa de 1689 ou Revolução Gloriosa; a Revolução Americana de 1776, Declaração de Direitos da Virgínia; e com maior magnitude a Revolução Francesa de 1789 e sua

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⁵⁷ Em tempo, esse conceito será aprimorado, no século XIX, com um conceito jurídico para soberania.
Declaração Universal de Direitos dos Homens transformariam os direitos humanos, definitivamente.

Nesse sentido, para Vladmir Silveira⁵⁸:

A expressão escrita e codificada das liberdades contida nas declarações de direitos, em suas versões inglesa, francesa e norte-americana, traduziu um salto gigantesco para a humanidade, que se faz mais humana mediante o caráter instrumental e simbólico do direito.

Os modelos constitucionais norte-americano e francês que surgem no final do século XVIII vêm demonstrar a concretização da supremacia estatal em relação às igrejas e à liberdade religiosa.

A Constituição americana de 1787 representa um marco relativo à separação entre Estado e religião; estamos falando do *wall of separation*⁵⁹, ou muro da separação, que estabelece duas normas fundamentais que dividiriam as funções do Estado e da religião de forma nítida: a norma do livre exercício, impedindo o Estado de proibir ou cercear o livre exercício da religião, e o não estabelecimento, que não permite ao Estado compor benefícios ou vantagens para uma ou mais religiões em detrimento de outras. Os efeitos práticos dessa decisão só vão aparecer em 1879, no caso *Reynolds v. United States*⁶⁰.

A norma do livre exercício, que impedia questões de favorecimento tributário às igrejas, propunha uma separação radical entre Estado e Igreja. Enfurecidos, os religiosos locais pregavam a ruína de suas igrejas pela falta do favorecimento pelo Estado, negado pela lei. Porém, ao contrário das expectativas dos religiosos, as


⁶⁰ Caso de acusação por bigamia em função de seita religiosa. George Reynolds foi acusado de bigamia. Ele não se declarou culpado, mas foi considerado culpado. Ele deixou o Tribunal saber que ele era um membro da Igreja Mórmon. Uma doutrina aceita para essa igreja é a prática da poligamia. Ele pediu que o júri considerasse que ele era casado, e que o veredicto não devesse ser culpado porque ele estava cumprindo um dever religioso.
Igrejas prosperaram. A sociedade que clamava a separação entre Estado e Igreja era a mesma que suportaria as igrejas, em louvor a sua fé

Na França, ao revés do modelo americano, a forma de separação entre Estado e religião, emergente da Revolução Francesa, representa uma experiência inédita de radicalização entre Estado e Igreja, até então. O caráter antirreligioso da Revolução Francesa e a marca do radicalismo da religião deixados pela Igreja Católica medieval formaram uma legislação fortemente avessa ao caráter religioso. O cume dela revela-se na Declaração dos Direitos do Homem e do Cidadão (1789), que em seu preâmbulo articula “os direitos naturais, inalienáveis e sagrados dos homens”. Sem os relacionar a Deus.

Mesmo com todos os sentimentos reversos, causados pelas chagas históricas, o processo de laicização na França foi longo e difícil.

Os processos de laicização do Estado foram, portanto, diferentes para cada Estado. Radicais em suas essências, mas diferentes em suas execuções.

1.8. A contemporaneidade

Ainda sob o impacto da Revolução Francesa e guerras napoleônicas, em 1815, o Congresso de Viena tenta refazer a Carta da Europa depois da queda do império napoleônico. Tratou-se, pois, de fazer uma regulamentação internacional do território europeu; desde logo se pode afirmar a ruptura com o momento anterior (de diplomacia agressiva, revolucionária e contestatória). Foi um processo pacífico e de certa forma conciliador de regulação da vida internacional. O congresso de Viena tenta reconstruir as ideias de Westfália perdidas durante o sistema de conquista estabelecido por Napoleão.

Explica Maldonado Correia:

61 Não podemos esquecer a origem histórica dos americanos, colonos ingleses que fugiram da opressão religiosa.
Congresso de Viena não foi apenas isto. A verdade é que, como vários autores ressaltam, ele funcionou como um diretório onde as principais potências da época (Áustria/Prússia/Rússia e Inglaterra) ditaram as suas regras, exerceram as suas ambições, retalhando a Europa como quem divide os quinhões de uma herança. Ao analisar o Congresso de Viena e a sua obra é pois importante não esquecer estes dois aspectos: por um lado, avanço no modo de viver e construir as Relações Internacionais (substitui-se um sistema de relação de forças por um sistema contratual em que se tem em conta o interesse geral, pressupondo um processo pacífico e conciliador de resolução dos problemas); por outro lado sujeição do sistema de Relações Internacionais à conjuntura de forças que as potências no momento histórico apresentavam.

Além de todos os méritos estabelecidos, o Congresso de Viena nos trouxe uma visão de segurança internacional, tão cara a este trabalho.

Ainda seguindo Maldonado Correia⁶⁴:

Sendo o vazio de Segurança uma das principais causas da instabilidade internacional, o Congresso preocupou-se com esta matéria. Privilegiou um sistema de segurança relativa em que, por paradoxo, é a insatisfação geral que é condição da instabilidade, a um sistema de Segurança Absoluta, que procura neutralizar o adversário utilizando como instrumento o direito de conquista. Segurança Absoluta que uma vez concretizada se traduz na Insegurança Absoluta dos adversários. Assim, com base no princípio da segurança relativa o Congresso preocupou-se em criar uma ordem estável. O Congresso preocupou-se também em estabelecer um sistema que traduzisse não apenas uma segurança face a terceiros Estados (segurança subjetiva) mas, também, um sistema que tivesse em conta as causas reais da insegurança.

Os princípios de direito internacional surgidos do Congresso de Viena foram, basicamente, os que regeram a ordem internacional até o final da primeira guerra mundial. A fim de manter a estabilidade do sistema, as cinco maiores potências da época (Áustria, Rússia, Prússia, Reino Unido e França) formaram entre si um sistema de freios e balanços para equilibrar suas ambições territoriais, políticas e econômicas. O princípio da não intervenção nos assuntos internos de outros Estados, que tinha sido afetado pelo clamor revolucionário, foi reintroduzido, como princípio de manutenção da paz pela observância dos tratados.


⁶⁴ Idem.
O século XIX nos trouxe, ainda, um conceito jurídico para a soberania, segundo o qual esta não pertence a nenhuma autoridade particular, mas ao Estado enquanto pessoa jurídica. A soberania tem em sua noção jurídica a função de orientar as relações entre Estados, enfatizando a necessidade da legitimação do poder político pela lei.

Entramos no século XX, e com ele assistimos a acontecimentos de extraordinária importância. Veríamos duas guerras internacionais, uma bipolarização mundial e por fim o fenômeno da globalização. No decorrer desses acontecimentos o direito internacional se consolida. E surge a organização das Nações Unidas, que, pela primeira vez, unirá os direitos humanos de liberdade religiosa e questões de segurança internacional.

Da devastidão da primeira grande guerra resulta o Tratado de Versalhes e com ele a criação da Sociedade das Nações, que vai, em seu curto tempo de existência, propagar a ideia de paz universal e respeito aos direitos humanos.

Contudo, como coloca Accioly, Nascimento Silva e Casella, o Pacto da Sociedade das Nações propõe a criação de uma organização internacional para regular as relações internacionais baseadas em certos princípios, porém a efetividade desses princípios se mostrou economicamente inviável para determinada época. A Segunda Guerra Mundial vem como um disruptor temporal, pondo fim à Sociedade das Nações.

Com o final da Segunda Guerra, deparamo-nos com um mundo bipolarizado. De um lado o capitalismo e de outro, o comunismo soviético. Esse sistema de

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65 Preâmbulo e Capítulos VI e VII.
“bem e mal”

não foi suficiente para ofuscar o grande acontecimento que foi a criação da Organização das Nações Unidas.

A fragilidade apresentada pela Sociedade das Nações não a deixou florescer. Deixou, ao menos, uma semente para a construção da Organização das Nações Unidas. Ela surgia com a força e a necessidade de transformar o mundo, indicando a necessidade real de proteger e garantir direitos humanos e segurança internacional.

Ainda veríamos nesse século, sob o âmbito da ONU, a feitura da nossa carta maior de direitos humanos e a difusão destes pelo mundo.

A globalização é essencial nesse novo contexto, novas ideias serão transmitidas de forma nunca vistas. O mundo se torna, efetivamente, uma só aldeia.

Todos os avanços propostos nos últimos tempos, secularismo, cientificismo e avanço das doutrinas marxista e leninista no século XX e os regimes totalitários nacional-socialistas que se seguiram, formação da ONU e o estabelecimento da bipolarização mundial pareciam ter deslocado a religião para um espaço menor dentro do cenário jurídico-político mundial.

Contudo, esse aparente deslocamento, na verdade, era apenas uma calmaria antes da tempestade. O século XXI inicia com ataques terroristas e um novo movimento mundial que desafia os Estados soberanos e as relações internacionais baseadas nestes.

Nesse sentido, Humberto Martins:

A débâcle do regime soviético e a crise das ideologias políticas, ocorridas na derradeira década do século XX, fizeram renascer o interesse pela Religião como elemento essencial das relações sociais e políticas. O conflito de Civilizações entre Oriente islâmico e o Ocidente cristão, fruto de mal resolvidas incompreensões de multissecular estirpe, é outro ponto de saliência de nova posição do fenômeno religioso em nossos dias. O onze de setembro, data a que

68 No sistema da Guerra Fria, acostumamo-nos a traçar um paralelo entre certo e errado, bom e mau, bem e mal. O mundo se bipolarizou por inteiro, criando uma separação radical baseada nas relações de poder.
se reivindica o status de marco inaugural do século XXI, é o símbolo desta nova tensão político-religiosa.

O século XXI será um período de grandes desafios e expectativas. O direito internacional consolidado vai precisar se reinventar. A simetria de guerras estatais já não mais existe. O mundo busca por um novo sentido. Precisaremos descobrir quais são os inimigos e como agir. De certo, temos apenas a necessidade de uma ação coletiva em nome da segurança internacional e a manutenção de direitos conquistados.

Na visão de Jayme Weingatner Neto⁷⁰:

O início do século XXI percebe-se dominado por duas realidades aparentemente antagônicas: o processo de globalização, de um lado, e a consciência da diversidade cultural e civilizacional do mundo, por outro. Uma possibilidade real (ou tendência) da globalização é que seja a culminância de um processo de homogeneização cultural protagonizado pela modernidade ocidental, com distintas estratégias (colonialismo, desenvolvimentismo, globalização) e bandeiras (cristianismo, modernização, democratização) que não mudam o essencial – o sonho de uma só cultura humana universal, a mais homogênea e uniforme possível, como única maneira de assegurar a paz social e a vida digna.

Com o novo século, um novo modelo mundial será construído. O novo e o velho serão reexaminados, valores serão ratificados enquanto outros, desconstruídos. As garantias são apenas aspirações humanas, como certezas. A nós cabe ter força para perceber o que virá.

2 O ESTADO LAICO: SUAS DIMENSÕES

2.1. A laicização do Estado de direito

As relações entre o Estado e a religião ainda são extremamente complexas. Cabe a cada Estado o estabelecimento das regras relativas à relação do poder estatal com as confissões religiosas.

Existem Estados onde a aglutinação entre poder político e religião permanece ainda nos dias atuais. Esses Estados são classificados por Jorge Miranda\textsuperscript{71} como teocracias e cesaropapismo. No cesaropapismo, apesar da aglutinação entre Estado e religião, prevalece o político sobre o religioso. Nas teocracias prevalece o domínio do religioso sobre o político. É exemplo de Estado teocrático a República Islâmica do Irã\textsuperscript{72}, que segue a lei da Sharia, em que leis civis e religiosas se fundem. Segundo Francisco Tomazoli\textsuperscript{73}, é essa a estrutura que podemos identificar no fundamentalismo islâmico.

O modelo mais sustentado pelos Estados, entretanto, é o do Estado laico. Nesse modelo, a combinação de poder religioso e civil não é aceita, sendo preferível a separação entre os dois. Cada Estado laico pode apresentar características distintas. Assim, surgem algumas divisões de classificação dentro dos Estados


\textsuperscript{72} “Artigo 2º da Constituição da República Islâmica do Irã, 1979.

A Revolução islâmica é um sistema baseado na fé.


Na República Islâmica do Irã, o povo é convidado à virtude, ordenando o bem e proibindo o mal, é um dever mútuo e universal de uns para os outros e do governo no que respeita ao povo e do povo no que respeita ao governo. As especificações, limitações e natureza deste dever são estabelecidas pela lei. “E os crentes, homens e mulheres, são amigos uns dos outros, eles refulgam no Bem e proíbem o Mal” – (Alcorão 9:71).


“Os três poderes soberanos na República Islâmica do Irã são o Legislativo, o Executivo e o Judiciário, que são exercidos sob a supervisão dos dirigentes religiosos (imamate), de acordo com os artigos, que se seguem da presente Constituição. Estes três poderes são independentes.”

laicos, como ensina Jorge Miranda\textsuperscript{74}: existem três identificações entre Estados e religião que são aceitáveis. A primeira diz respeito ao Estado confessional, quando há identificação entre a comunidade política e a comunidade religiosa. Tal identificação corresponde ao Estado laico, onde pode haver uma religião escolhida pelo Estado, tratamento diferenciado para uma religião específica. Na segunda identificação, ocorre uma separação total entre Estado e religião. E na terceira identificação teremos um Estado que se opõe à religião, sendo esse um Estado ateu, ou de confissão negativa.

Podemos utilizar como exemplo dos tipos de afirmações estatais laicas: o Reino Unido Anglicano como Estado laico de opção confessional; como exemplos de separação absoluta, os EUA e o Brasil; e a Coreia do Norte como Estado ateu ou laicista.

O Reino Unido é um Estado laico que opta por ter uma religião oficial, com tolerância pelas demais, ou seja, existe a liberdade religiosa de crença, culto e organização religiosa; contudo, faz-se uma distinção à religião anglicana, garantindo-lhe privilégios.

Os EUA têm separação absoluta. Relembrando a origem desse Estado, identificamos sua escolha visceral; foi um Estado colonizado por refugiados religiosos, fiéis de diversos cultos vindos da Europa para poderem livremente celebrar suas crenças. A separação de Estado e Igreja foi fundamental para uma boa convivência entre os colonizadores.

Ainda como exemplo de separação total podemos adicionar o modelo brasileiro: hoje nosso Estado promove uma separação total entre Estado e Igreja, garantida pela lei maior, em seu artigo 5\textsuperscript{o}, \textit{caput}. Contudo, em nossa Constituição Imperial de 1824, em seu artigo 5\textsuperscript{o}, primeira parte, encontrávamos um Estado confessional, que tinha a religião católica apostólica romana como religião de Estado\textsuperscript{75}.

\textsuperscript{74} Idem, ibidem.

E como exemplo de Estado ateu, laicista, temos a Coreia do Norte, que não só afasta Estado e religião, mas nega o foro da religião na vida social, seguindo exemplo histórico de Estados com linha marxista.

O Estado laico não fomenta, não incentiva, tampouco se opõe à religião e sua força social. O Estado laico ideal é aquele que apenas administra a liberdade religiosa, no intuito de que todos possam professar sua fé, sem incômodos. Esse não é um Estado ateu, é sim um observador de fatos, regulador e garantidor dos anseios de seu povo, afiançando, com isso, a liberdade de todos, sejam estes maioria ou minorias.

2.2. Laicidade

A laicidade estatal foi uma das maiores conquistas da humanidade. Sem ela, não poderíamos ter construído o direito à liberdade religiosa, tal qual conhecemos hoje.

Marco Casamasso\(^76\) reafirma que a laicidade foi indispensável ao Estado moderno, pois sem ela não poderia esse Estado se tornar pleno e acabado, ou seja, não se transformaria em um Estado soberano, acima de quaisquer poderes humanos e livre da interferência religiosa. Consequentemente, a ausência da laicidade demonstraria um sinal de fraqueza ou insuficiência estatal.

Alguns autores\(^77\), a exemplo de Tomazoli da Fonseca, acreditam ser a laicidade um fenômeno cristão. Ela teria sido proposta por Jesus. A constatação dessa teoria estaria em Matheus (22,21), quando Jesus profere a reconhecida máxima: “Dai a César o que é de César e a Deus o que é de Deus”\(^78\). O reino a que


\(^{78}\) “Então, retirando-se os fariseus, consultaram entre si como o surpreenderiam alguma palavra; E enviaram-lhe os seus discípulos, com os herodianos, dizendo: Mestre, bem sabemos que és verdadeiro, e ensinas o caminho de Deus segundo a verdade, e de ninguém se te dá, porque não
pretendia o filho de Deus nada tinha de terreno ou profano, a ele interessava o espírito dos homens e não seus corpos, estaria assim Jesus pregando a divisão entre estado e religião?\(^{79}\)

Nos dizeres de Regis Oliveira\(^{80}\), em seu livro *O Direito na Bíblia*: “Jesus deixa bem clara a separação entre Estado e a Igreja, quando foi lhe indagado se era justo que pagassem os impostos aos romanos”.

A caso essa foi sua ideia, não foi levada adiante por sua Igreja edificada. É certo que, para podermos pensar em laicidade, foi preciso viver todo o terror de um Estado onde religião, igreja católica e poder político se fundiram, deixando grandes marcas na humanidade.

**Nesse escopo, Ives Gandra\(^{81}\):**

Era bem compreensível que os círculos intelectuais em que se promoveu a laicidade do Estado tivessem alguma desconfiança da religião em vista da nefasta aliança entre “trono e altar”, vigente até então, que produzia tantas injustiças em toda a Europa (e algumas também na América). Mas na verdade, frequentemente iam bem além de uma simples desconfiança: considerava-se que todas as religiões eram muito nocivas e que, portanto, deviam ser extirpadas da Sociedade.

A laicidade foi acontecer muito tempo depois, costurando o fim de uma era e trazendo à tona uma nova forma de encarar o Estado. Como ensina o Padre Rafael S. de Moraes\(^{82}\):


O Estado laico surgiu e se desenvolveu no mundo ocidental à medida que a sociedade foi se tornando pluralista. Até a época da Reforma protestante era monolicamente católica. A partir de então, em vários países europeus e nos Estados Unidos, começou a haver diversidade de credos.

A laicidade cotidiana dos Estados do século XXI tem uma origem soberana e nacional. Tudo se inicia na república francesa do final do século XVIII\(^{83}\) e se estende até os nossos dias.

Para garantir a separação entre o Estado e a Igreja, bem como fazer obedecer ao exercício da prática de liberdade religiosa, a França cria a laicidade como característica do seu Estado nacional. A laicidade, portanto, é concebida como exceção nacional.

Segundo o verbete “laicidade” no *Dictionnaire de Pédagogie et d’Instruction Primaire*\(^{84}\):

Costa-Lascoux (1996) informa que a palavra aparece pela primeira vez em 1871, no jornal *La Patrie*, a propósito de uma polêmica sobre ensino religioso na escola. A partir desse momento, os dicionários inserem o adjetivo *Laico* e o substantivo *Laicidade*, com conotação negativa de não religioso. Esse período corresponde à passagem da separação da Igreja do Estado para a neutralidade e dessa para o respeito da liberdade de expressão religiosa. A laicidade articula o ideal de um espaço cívico comum e o princípio de neutralidade confessional do Estado, que subentende liberdade de consciência e igualdade. Laicidade se refere a toda política de ensino público sem nenhuma influência religiosa e com o objetivo de uma neutralidade escolar. Laicismo, ao contrário, representa um combate contra todos os valores religiosos e mais particularmente aqueles defendidos pela Igreja Católica.

A França foi o palco perfeito para o advento da laicidade; por toda sua longa tradição intelectual, por seu apreço ao iluminismo, não seria outro o berço da laicidade.

Nos dizeres de Henri Peña Ruiz\(^{85}\):

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\(^{83}\) Constituição Francesa, 1958, artigo 1\(^{o}\): “A França é uma República indivisível, laica, democrática e social”.

Na França, marcada por guerras de religião e por uma dominação clerical muito forte de uma religião, a lei de 1905 de separação do Estado e das igrejas foi acolhida como uma verdadeira libertação, e um progresso autêntico da igualdade, tanto para as religiões dominadas como para os livres pensadores. Alguns políticos que levaram a cabo esta separação eram eles próprios crentes, mas não confundiam a dominação temporal com a postura espiritual. Deve notar-se que nos países anglo-saxónicos, os católicos, dominados pelos protestantes, são favoráveis à laicidade e os protestantes não: situação contrária à dos países sob dominação católica onde muitos protestantes lhe são favoráveis...

Mas a laicidade não se restringiu à vontade francesa. Como ensina Marco Casamasso, citando Guy Coq, identificamos na laicidade uma vocação existencial que se projeta além da história particular.

Assim, laicidade, em todo o seu sentimento, passa a existir como divisor de águas para a ideia de Estado.

Segundo Fernando Catroga:

A expressão laicidade deriva do termo laico, leigo. Etimologicamente laico se origina do grego primitivo laóς, que significa povo ou gente do povo. De laóς deriva a palavra grega laikός de onde surgiu o termo latino laicus. Os termos laicos, leigo exprimem uma oposição ao religioso, àquilo que é clerical.

Ainda, Palmira Silva:

A laicidade significa simplesmente que há separação entre o Estado e a Igreja, isto é, num Estado laico o Estado é completamente neutro em matéria de religião e as igrejas não detêm qualquer poder político. A laicidade garante simultaneamente a liberdade de todos e a liberdade de cada um ao distinguir o domínio público, o domínio onde se exerce o poder do Estado e onde se cumpre a cidadania, e o domínio privado, onde se exercem as liberdades individuais (de pensamento, de consciência, de convicção, de religião e de associação) e onde coexistem as diferenças (biológicas, sociais,

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pertencendo a todos, o espaço público é indivisível: nenhum cidadão ou grupo de cidadãos deve impor as suas convicções aos outros.

A laicidade é, portanto, um processo social estreitamente ligado ao processo político. Laicidade é a formação de um Estado onde nenhum grupo ou instituição religiosa estejam vinculados ao governo que o representa, e em que a esfera pública seja neutra em matéria religiosa. A laicidade é restritiva, excludente. Ela significa uma não atuação ou exclusão da religião na esfera pública.

2.3. Secularização e laicidade

A secularização é um processo no qual a religião perdeu, gradativamente, sua influência social. Essa supressão de influência fez-se notar na diminuição do número de fiéis e sua participação nas igrejas, no decréscimo de prestígio político, social e econômico das igrejas e, por fim, na implementação de novos ideais científicos.

A partir do século XIX, o declínio religioso levou a vários estudos sobre o que acarretou esse fenômeno de decadência. Hoje, a investigação já não se centra tanto nas causas e nas razões da secularização, mas nas possibilidades da relação da contemporaneidade com o religioso.

Em “Secularização e dessecularização na sociedade contemporânea”, ressalta Rulian Emmerick:

Muito se tem discutido sobre secularização e dessecularização na sociedade contemporânea. Os processos religiosos na contemporaneidade são muito ricos, mas ao mesmo tempo extremamente complexos. Inúmeros sociólogos da religião defendem que a secularização é um projeto que teve início na modernidade e que o futuro da sociedade ocidental seria o de uma sociedade sem religião; ao mesmo tempo, outros defendem que vivemos o retorno do religioso na sociedade contemporânea.

Alguns teóricos\textsuperscript{90} da laicidade acreditam haver significativa diferença entre o Estado laico e o Estado secular. O primeiro seria uma manifestação do campo político de um processo mais amplo que causaria o segundo, o Estado secular. A laicidade seria sobretudo um fenômeno político, e não um problema religioso, ou seja, ela seria derivação do Estado, e não da religião. É o Estado que se afirma e, em alguns casos, impõe a laicidade\textsuperscript{91}.

Já para Baubérot\textsuperscript{92}, a iniciativa laicizadora pode ter como ponto de partida setores da sociedade civil, mas em regra geral o que ocorre é “uma mobilização e mediação do político para que as intenções laicizadoras se operacionalizem e se realizem empiricamente”.

Entretanto, para a grande maioria de leigos, a diferenciação, entre secularização e laicização, é atenuada, quando não simplesmente ignorada. O que mais dificulta esta diferenciação é o fato de os dois tipos de movimentos terem surgido e se firmado ao mesmo tempo, quando da formação do Estado moderno, com a ascendência do político sobre o religioso.

Aponta Cesar Ranquetat\textsuperscript{93}:

O fenômeno histórico-social da secularização está intimamente relacionado com o avanço da modernidade. O direito, a arte, a cultura, a filosofia, a educação, a medicina e outros campos da vida social moderna se baseiam em valores seculares, ou seja, não religiosos. As bases filosóficas da modernidade ocidental revelam uma concepção de mundo e de homem dessacralizadora, profana que contrasta com o universo permeado de forças mágicas, divinas das sociedades tradicionais e primitivas. O desenvolvimento da


ciência, da técnica e do racionalismo faz recuar as concepções sacrais e religiosas do homem e mundo.

Apesar de toda a discussão gerada pela complexa relação de laicidade e secularização, confiamos que são conceitos distintos.

Nesse sentido, Baubérot⁹⁴:

(...) secularização e laicidade são conceitos e processos sociais distintos. A secularização se refere ao declínio da religião na sociedade moderna e a perda de sua influência e de seu papel central e integrador. O processo de secularização relaciona-se com o enfraquecimento dos comportamentos e práticas religiosas. A laicidade é sobretudo um fenômeno político, vinculando-se com a separação entre o poder político e o poder religioso. Expressa a laicidade, a afirmação da neutralidade do Estado frente aos grupos religiosos e a exclusão da religião da esfera pública. A secularização apresenta uma dimensão sociocultural, correspondendo a uma diminuição da pertinência social da religião enquanto que a laicidade revela uma dimensão sociopolítica estreitamente conectada com a relação Estado e religião.

Podemos demonstrar a distinção existente através de exemplos de Estados seculares que não são laicos, exemplo do Reino Unido Anglicano, que fez uma opção confessional, garantindo privilégios à Igreja Anglicana, sem deixar de obedecer aos direitos de liberdade religiosa, pluralismo e tolerância e de Estados laicos que não são seculares, exemplo dos Estados Unidos da América, que não viveu as questões seculares, devido a sua formação histórica.

A secularização tem que ver com a perda de poder das igrejas dentro da sociedade como um todo, enquanto a laicidade é o afastamento político de poderes, sendo então afastados Estado e religião. O caráter social da religião pode existir dentro do caráter privado, distante do público.

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2.4. Laicismo

O laicismo é uma forma aguerrida, combativa, de laicidade que procura erradicar a religião da vida social. O laicismo demonstra sua força sendo extremamente anticlerical e antirreligioso.

Nesse escopo, seguimos Bobbio\textsuperscript{95}:

El laicismo que necesite armarse y organizarse corre el riesgo de convertirse en una iglesia enfrentada a las demás iglesias. Hace unos años escribí lo siguiente: “Cuando una cultura laica se transforma en laicismo, pierde su inspiración fundamental, que es la de no cerrarse en un sistema de ideas y de principios definitivos de una vez por todas”. Y añadía: “El espíritu laico no es en sí mismo una nueva cultura, sino la condición para la convivencia de todas las posibles culturas. La laicidad expresa más bien un método que un contenido. Tanto es así que, cuando decimos que un intelectual es laico, no intentamos atribuirle un determinado sistema de ideas, sino que estamos diciendo que independientemente de cuál sea su sistema de ideas, no pretende que los demás piensen como él y rechaza el brazo secular para defenderlo”\textsuperscript{96}.

O laicismo, portanto, é uma contrarreação negativa a tudo o que é religioso. Mas, ao contrário da ideia laica, não busca exatamente uma neutralidade. Visa, extirpar as igrejas da vida social. É uma forma exacerbada da ideia de afastamento entre Estado e Igreja.


\textsuperscript{96} O laicismo que precisa armar-se e organizar-se corre o risco de se tornar uma igreja que enfrenta outra igreja. Alguns anos atrás eu escrevi o seguinte: “Quando uma cultura laica torna-se laicista, perde sua inspiração fundamental, que não está perto num conjunto de ideias e princípios definitivos uma vez por todas”. Ele acrescentou: “O espírito laico não é em si uma nova cultura, mas a condição para a coexistência de todas as culturas possíveis. Laicismo expressa mais um método do que um conteúdo. Tanto é assim que, quando dizemos que um intelectual é laicista, não tentamos atribuir a ele um determinado sistema de ideias, mas nós estamos dizendo que não importa o que o seu sistema de ideias, não pretende que os outros pensam como ele e rejeita o braço secular para defendê-lo” (tradução livre).
Como ensina Rafael Cifuentes⁹⁷: “Existe, portanto, entre Igreja e Estado, entre religião e política, uma separação lícita e necessária ‘a laicidade’ e uma separação indiferentista e insustentável: o laicismo”.

Formas exacerbadas, historicamente, acabam por enredar seus objetivos primeiros e se aproximar daquilo que ostensivamente combatem.

2.5. Laicidade como separação

A expressão laicidade-separação demonstra a concepção política na qual o Estado e as religiões estabelecem, de forma inequívoca, uma separação. Com esta, deixa o poder estatal de exercer o poder religioso, e as confissões religiosas deixam de exercer o poder político. Percebemos aqui as três características referentes a laicidade, a saber: separação entre Estado e religião; não interferência recíproca entre as alçadas; e o estabelecimento da liberdade do Estado em relação às confissões religiosas e das confissões religiosas para com o Estado.

A primeira dessas características indica o fato de a laicidade ser um empreendimento político, e não um produto da vontade religiosa.

Nesse ínterim, Carmem Bracho⁹⁸:

A laicidade é sobretudo um fenômeno político e não um problema religioso, ou seja, ela deriva do Estado e não da religião. É o Estado que se afirma e, em alguns casos, impõe a laicidade.


Igreja enfatiza a subordinação do Estado à moral e à existência de direitos naturais acima do Estado e independente dela. Condena a separação entre Igreja e Estado.\(^{99}\)

A segunda característica da laicidade-separação é a própria separação. Não uma separação acordada, mas, sim, uma delimitação imposta pelo Estado. Como reflexo da moderna supremacia do político sobre o religioso, é esse mesmo Estado que irá demarcar os limites de atuação da religião, de forma que o espaço da religião seja um e o da atuação política outro. Tais espaços são definidos pelo Estado em função do interesse público.

A laicidade é o mecanismo de regulação que impede a ação das religiões na interação entre os cidadãos e o Estado. Podemos afirmar que a laicização do Estado visa circunscrever a religião à esfera privada, fazendo com que os atos religiosos sejam demonstrações do exercício da liberdade religiosa por parte dos indivíduos, os quais não representem o Estado.

Nessa orientação, Casamasso\(^{100}\):

Deixando de estar associada aos interesses e decisões de entes estatais, a religião passa a estar associada ao exercício do direito subjetivo por parte de indivíduos livres. Dessarte, a relação de forças entre indivíduos e a religião termina se invertendo. Se antes, na condição de aliadas ao poder estatal, as confissões religiosas determinavam, direta ou indiretamente, a existência, o conteúdo e a extensão da fé de todos os indivíduos, com a laicização do estado elas passam a depender, antes de tudo, da livre expressão da vontade – e também da boa vontade – desses mesmos indivíduos outrora subjugados ao poder absoluto. Mas, como veremos, esta redução à esfera privada não deve ser entendida como se fora um xeque-mate para a manifestação social da religião.

A mesma laicidade que conduz a religião ao ambiente privado proíbe o Estado de interferir nas confissões religiosas: em sua organização, doutrinas, cultos, 

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em suas liturgias e na vida de seus fiéis, tornando esse Estado inapto em matéria religiosa.

Destarte a inaptidão do Estado, não devemos entender que essa inabilidade signifique uma indiferença com relação à importância da religião na vida em sociedade. Tampouco podemos confundir a laicidade com o laicismo, tratado anteriormente. Um Estado laico é apartado da religião em sua função política, o que não o impede de reconhecer as religiões existentes e garantir direitos e deveres para todos. Como afirma Peña Ruiz¹⁰¹, não devemos negar à religião seu valor cultural e social.

A laicidade-separação não tem caráter absoluto. Dessa forma, a laicidade separa o Estado da religião, mas nunca a religião da sociedade. Para Maurice Barbier: “a laicidade não se propõe a liberar a sociedade da religião”¹⁰².

Com efeito, para entendermos essa contraposição entre Estado, religião e sociedade, precisamos fazer uma distinção mais ampla que nos permitirá determinar: o Estado, como encarregado do bem-estar político e geral da sociedade, e a sociedade civil¹⁰³, formada por indivíduos livres e atuantes no encalço de seus interesses particulares. Sem essa distinção, não haveria sentido na separação entre Estado e religião, por conseguinte laicidade.

Todavia, hipoteticamente, houvesse um afastamento total da religião e da sociedade, não haveria por que lutar por Estado laico, pois este perderia seu sentido original. Em verdade, uma das consequências de um Estado laico é uma revisão do comportamento social em relação às religiões. Se esta não é imposta aos cidadãos, cabe a eles resolver qual a importância que elas, as religiões, devam ter em sua vida pessoal e na sua formação familiar, ou seja, o Estado laico e sua possibilidade de

liberdade religiosa instigam os cidadãos em fomentar, em definitivo, seu instinto de homem religioso.

Terceira característica da separação entre Estado e Igreja é a liberdade. Esta liberdade deve ser analisada a partir da perspectiva de não interferência recíproca do Estado e confissões religiosas.

A laicidade não pode ser vista como uma dominação do Estado para com a religião, tampouco como alguma forma de aliança. A laicidade é uma liberação mútua entre os dois. A primeira liberdade estabelecida é a negativa. Não se permite que confissões religiosas interfiram no Estado, e nem que o Estado interfira nas confissões religiosas. Essa não interferência interpõe um limite de respeito entre ambos.

Estabelecido esse limite, passamos à liberdade positiva; aqui, cada um, Estado e confissões religiosas, pode se desenvolver em seus campos específicos com garantias de não intromissão.

Contudo, nos exercícios de liberdades sempre surgirá a questão dos limites. Aparentemente, sem a intromissão do Estado nas religiões e vice-versa, estariamos bem perto de uma utopia social.

Em termos práticos, no entanto, podemos nos deparar com problemas como o referido na ADI 2.806/RS, 2003\textsuperscript{104}, em que uma lei estadual do Rio Grande do Sul é considerada inconstitucional por prever adequação das atividades do serviço público estadual e estabelecimentos de ensino aos dias de guarda das diferentes religiões professadas. Ou ainda casos de maior gravidade e polemização, como foi a ADPF 54\textsuperscript{105}, 2012, que teve por escopo a descriminalização do aborto de anencefálicos. Ainda podemos citar muitos outros casos de importância internacional, como a lei francesa de proibição dos véus\textsuperscript{106}, já mencionada, dentre muitos outros.

A menção de casos concretos serve para demonstrar que o exercício da laicidade estatal pode nos conduzir à necessidade de intervenção em assuntos religiosos, invadindo o limite pré-acordado, quando este refere-se a questões públicas. É o limite do qual falávamos. Esse limite pode nos levar a pensar que em um Estado laico as confissões religiosas são subjugadas pelo poder maior do político sobre o religioso, encontrando-se em posição de desigualdade. O grande desafio da laicidade, nesse sentido, é promover um cerceamento mínimo.

O cerceamento mínimo que tratamos diz respeito ao máximo de equilíbrio possível, entre estado laico e sociedade crente.

Nesse sentido, Casamasso\textsuperscript{107}

Mesmo quando amplamente reconhecidas e garantidas a liberdade e emancipação das liberdades das confissões religiosas, o Estado não pode relegar o seu papel de garante principal da laicidade. Malgrado os riscos de excessos e abusos, a intervenção necessária do Estado não é, a princípio, incompatível com a liberdade religiosa. Em certas circunstâncias, tal intervenção pode até vir a tornar-se o único instrumento hábil capaz de garantir-la.

Assim, como a realização de um estado integralmente laico se torna improvável, precisamos balizar os limites de separação e liberdade o máximo possível, resguardando o poder-dever do estado de nos proteger, e a nossa liberdade, na vida em sociedade.

2.6. Laicidade e neutralidade

Já dissemos que o objetivo da laicidade é manter o afastamento entre Estado e religião. Na execução desse afastamento nada melhor que a neutralidade.

Segundo Antonio Gonçalves\textsuperscript{108}:

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Neutralidade é definida como a condição daquele que permanece neutro; condição de um país que não participa de uma guerra (HOUAISS; VILLAR, 2009). Na acepção do direito internacional público, neutralidade exprime a posição de imparcialidade, imposta pela neutralidade declarada. O país neutro fica na obrigação de não intervir no conflito, de qualquer forma, devendo, por isso, abster-se da prática de qual ato que possa aproveitar um dos beligerantes em prejuízo do outro. Assim, a neutralidade, no sentido do direito internacional, não se presume mera indiferença. Revela-se a obrigação de não intervenção ou auxílio, sob qualquer pretexto, salvo para a paz, a favor ou contra quaisquer dos beligerantes.

Ser neutro não significa falta de posição sobre determinado assunto. O Estado laico que é neutro não pode favorecer ou desfavorecer nenhuma confissão religiosa. A neutralidade religiosa do Estado subentende que este tratará de igual modo, com mesma importância, todas as religiões exercidas no seu território. Esta pretensão acarretará três consequências principais. A primeira diz respeito ao Estado e as confissões religiosas, de forma mais direta, implicando a impossibilidade de qualquer benefício ou malefício que as confissões religiosas possam pretender diante do Estado. A segunda alude a hierarquia entre as confissões religiosas. O Estado neutro não deve conceber graus de importância distintos entre as confissões religiosas; sendo assim, são iguais uma religião professada por mil fiéis ou aquela professada por dez fiéis, não havendo também confissões falsas ou verdadeiras. A terceira consequência, e talvez a mais icônica, é que neutro o Estado laico, este não pode determinar uma verdade religiosa.

Para Casamasso\textsuperscript{109}:

Com a laicidade, as verdades religiosas que a princípio são refratárias umas às outras, isto é, desiguais, tornam-se, paradoxalmente, iguais, no sentido de nenhuma delas em particular, nem todas e em conjunto, poderem fundar e estruturar a polis.

Precisamos esclarecer que a neutralidade do Estado não equivale a sua imparcialidade com relação às religiões, como nos lembra Casamasso. Assim, para Barbier\textsuperscript{110}, uma eventual ajuda igualitária às confissões religiosas poderia ser oferecida por um Estado, mas nunca por um Estado laico, que neutro,

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simplesmente, não age. Essa consideração seria letal para as religiões que serviram como braço espiritual do Estado. Sentiriam-se por vezes “rebaixadas”, se comparadas com novas, ou menos numerosas, confissões religiosas.

Igualmente, sobre a laicidade-separação, a neutralidade irá lançar uma nova luz à questão religiosa. As igrejas, sejam elas pequenas ou grandes, antigas ou novas, terão de convocar seus fiéis, se reorganizarem, para demonstrar sua efetiva vocação na vida particular, familiar e social de cada indivíduo.

2.7. Laicidade e tolerância

A ideia de tolerância é bem mais antiga do que a laicidade.

Nas palavras de Voltaire 111,

El derecho humano no puede estar basado en ningún caso más que sobre este derecho natural; y el gran principio, el principio universal de uno y otro es, en toda la tierra: “No hagas lo que no quieras que te hagan”. No se comprende, por lo tanto, según tal principio, que un hombre pueda decir a otro: “Creelo que yo creo y lo que no puedes creer, o perecerás”.

A tolerância começa a ser construída como ideia política nos séculos XVI e XVII, na Europa, em decorrência das inúmeras guerras religiosas. Em princípio, ser tolerante era impossível para cristãos e protestantes que defendiam suas verdades religiosas. Entretanto, as sangrentas guerras ocorridas forçaram o crescimento da ideia de tolerância como solução para a intolerância assassina. Os Estados, temendo o pior, começaram, de forma provisória a aceitar a ideia de tolerância.

Nesse sentido, Emmerich de Vattel 112:

Em geral, contudo, pode-se afirmar com ousadia que o meio mais seguro e mais equitativo para prevenir as confusões que a


diversidade de religião pode causar é uma tolerância universal de todas as religiões que não oferecem perigo para os costumes ou para o Estado.

O final do século XVI e o início do século XVII trouxeram alterações no conceito de tolerância, operando-se uma mudança em seu fundamento original. Elas são, predominantemente, político-civis, na segunda metade do século XVI, chamadas tolerância civil; e filosófico-religiosas, a partir do século XVII. Dessa forma, a tolerância passa a ser discutida como estratégia do Estado para a paz e, posteriormente, como atitude moral e política e social.

A tolerância civil foi executada de maneira provisória e tinha um caráter meramente operacional. Sem dúvida, não lhe podemos negar a importância, uma vez que foi a tolerância civil que desencadeou, servindo como estágio, o processo da tolerância religiosa como princípio, o que mais tarde nos encaminhou a ideia fundamental de liberdade religiosa.

Para Pierre Bayle113, tolerar não era um mal menor, não era produzir paz civil, nem era um instrumento da política. Tolerar era um princípio, uma condição moral, deduzida epistemologicamente a partir da incapacidade do entendimento humano de conhecer a verdade, especialmente em matéria religiosa.

A tolerância religiosa vai então sedimentar-se, de forma tardia, na época Moderna, conduzida pelas ideias de Locke114, dentro de um contexto religioso:

A tolerância para os defensores de opiniões opostas acerca de temas religiosos está tão de acordo com o Evangelho e com a razão que parece monstruoso que os homens sejam cegos diante de uma luz tão clara.

E de Voltaire115, em um contexto político, com homens fracos que não fazem uso da razão ao serem intolerantes.

A tolerância passa a ser um princípio precioso. Muito mais que uma mera obrigação, a tolerância se enraiza nas ideias socioestatais e é observada como valor ético.

Segundo Bobbio:\(^{116}\):

Desse ponto de vista, a tolerância não é apenas um mal menor, não é apenas a adoção de um método de convivência preferível a outro, mas é a única resposta possível à imperiosa afirmação de que a liberdade interior é um bem demasiadamente elevado para que não seja reconhecido, ou melhor, exigido. A tolerância, aqui, não é desejada porque socialmente útil ou politicamente eficaz, mas sim por ser um dever ético. Também nesse caso o tolerante não é cético, porque crê em sua verdade. Tampouco é indiferente, porque inspira sua própria ação num dever absoluto, como é o caso do dever de respeitar a liberdade do outro.

Mesmo nesse sentido, ensinam Elisaide Trevisan e Margareth Leister:\(^{117}\):

Na tolerância está a maior expressão do valor ético do consenso nas relações sociais, devendo-se lembrar de que o fundamento da sociedade está vinculado a esse princípio, onde nasce a liberdade e a igualdade não sob uma resolução desordenada, mas sob o efeito da vontade do homem de conviver com os outros, numa solidariedade pacificadora que aceite as ideias e a diversidade por meio de uma cooperação recíproca e de um digno diálogo.

A tolerância, contudo, refere-se a um Estado tolerante, o qual não é o mesmo que um Estado laico. Com efeito, no contexto de laicidade, não há falar em tolerantes ou tolerados. No Estado laico, falamos em igualdade e liberdade. Não sendo possíveis favorecimentos a esta ou àquela confissão religiosa.

Diferentemente da liberdade religiosa tolerada, que é consentida pela boa vontade de um governante, a liberdade religiosa laica é um direito fundado na lei, que expressa a vontade da sociedade.

Nos dizeres de Émile Poulat:\(^{118}\), a laicidade é a possibilidade de superação dos impasses e ambiguidades da tolerância.

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Assim, a tolerância, nos dias atuais, é muito mais que a coexistência pacífica entre as diferentes culturas. Ela deve ser ativa, inspirada no reconhecimento de direitos e liberdades conquistadas, em específico para este trabalho, a liberdade religiosa, conquistada através da laicidade estatal.

2.7.1. A intollerância

Em contrapartida a tudo de positivo que o conceito de tolerância trouxe à sociedade e a sua evolução natural, a liberdade religiosa laica, temos a intolerância.

Intolerância pode ser considerada um conceito negativo, quiçá involutivo, produzido pela sociedade. Vale aqui esse contraponto, uma vez que, mais adiante, este trabalho irá formular questões relativas à segurança internacional e à própria liberdade religiosa, nos dias atuais.

Voltaire\textsuperscript{119}, em seu \textit{Tratado sobre a tolerância}, traz os dizeres:

Las escrituras nos enseñan, pues, que no solamente Dios toleraba a todos los otros pueblos, sino que tenía para ellos cuidados paternales; ¡y osamos ser intolerantes!
El derecho de la intolerancia es, por lo tanto, absurdo y bárbaro: es el derecho de los tigres, y es mucho más horrible, porque los tigres sólo matan para comer, y nosotros nos hemos exterminado por unos párrafos\textsuperscript{120}.

Por sua vez, Bobbio\textsuperscript{121}:

Tolerância deve ser estendida a todos, salvo àqueles que negam o princípio de tolerância, ou, mais brevemente, todos devem ser tolerados, salvo os intolerantes... Trata-se, de resto, do mesmo princípio pelo qual se afirma que a regra da maioria não vale para as minorias opressoras, ou seja, para aqueles que, se se tornassem maioria, suprimiriam o princípio da maioria.

\textsuperscript{119} VOLTAIRE. \textit{Tratado sobre la tolerancia}. Edición Smashwords. Mexico D. F.: Lectorum, 2015. p. 75. As escrituras nos ensinam, pois, que Deus não somente tolerava a todos os povos como também os tratava como pai. E nós ousamos ser intolerantes!
\textsuperscript{120} Idem, ibidem, p. 36. O direito de intolerância é, portanto, um absurdo e bárbaro: o direito de tigres, e é muito mais horrível, porque os tigres só matam para comer, e temos exterminado por alguns parágrafos (tradução livre).
Não estamos afirmando que o intolerante, acolhido no recinto da liberdade, compreenda necessariamente o valor ético do respeito às ideias alheias. Mas é certo que o intolerante perseguido e excluído jamais se tornará um liberal. Pode valer a pena pôr em risco a liberdade fazendo com que ela beneficie também o seu inimigo, se a única alternativa possível for restringi-la até o ponto de fazê-la sufocar, ou, pelo menos, de não lhe permitir dar todos os seus frutos. É melhor uma liberdade sempre em perigo, mas expansiva, do que uma liberdade protegida, mas incapaz de se desenvolver. Somente uma liberdade em perigo é capaz de se renovar. Uma liberdade incapaz de se renovar transforma-se, mais cedo ou mais tarde, numa nova escravidão.

Concluímos, assim, ser a intolerância uma das doenças mais graves da vida social. Ela adoece a alma dos indivíduos e o corpo da sociedade. A intolerância é capaz de nos fazer regredir, involuir. E, apoiando-me nas palavras de Bobbio, é preferível uma liberdade capaz de renovar-se do que o medo seguro do retrocesso.

2.8. O Estado laico

A concepção de um Estado laico é recente dentro da história. Somente com o fim da Idade Média começam a surgir esboços do sentimento de laicidade que preencheu os Estados. Foi a partir da reforma protestante e do pluralismo religioso que se inicia o longo caminho para a concretização de um Estado laico. Primeiro, como vimos anteriormente, foi preciso falar em separação entre Estado e religião; depois, em neutralidade do Estado; e, por fim, tolerância nos Estados. A ideia de um Estado laico não pode ser demarcada por um só ato histórico. Contudo, podemos demarcar fatos de relevante importância, como foi a reforma protestante e as revoluções modernas, em especial a Revolução Francesa.

Poderíamos ponderar que os Estados laicos se confundem com o surgimento do Estado moderno. Com efeito, as características deste em muito se amalgamam com as de um Estado laico.

A separação entre Estado e Igreja e a neutralidade estatal são peças fundamentais nesse complexo quebra-cabeças.
Nas palavras de Jónatas Machado¹²²:

O Estado, e o correspondente modo de organização e funcionamento, surge agora como uma construção social, emanada da vontade dos indivíduos livres e iguais em ordem de proteção dos seus direitos naturais, radicados num Direito natural caracterizado pela racionalidade e pela universalidade. Este processo representa uma alteração paradigmática do maior alcance, abrindo definitivamente as portas da modernidade.

Da evolução dos Estados, iniciada em Westfália, até o Estado contemporâneo, o mais significante ingrediente é a laicidade.

É a laicidade estatal que vai viabilizar a revolução dos direitos humanos e suas liberdades.


O compromisso maior do Estado estaria ligado à manutenção de suas liberdades históricas e à proteção de seu povo, resguardadas as vontades soberanas e os acordos internacionais.


3 A LIBERDADE RELIGIOSA NO DIREITO INTERNACIONAL MODERNO

3.1. Construção

Ao longo da história, tem havido concepções mais ou menos distintas sobre a liberdade religiosa. Tais concepções acabam por demonstrar variações quanto ao seu conteúdo e dimensões, como foi abordado junto ao tema de laicidade; sendo assim, precisamos de um referencial para este trabalho. Naturalmente, o referencial escolhido foi a Declaração Internacional de Direitos Humanos, de 1948, que identifica a internacionalização dos direitos humanos e da liberdade religiosa. Com efeito, não menosprezando as posições constitucionalistas, nosso trabalho faz referência ao Direito Internacional, a liberdades e direitos.

Iniciaremos, então, pela Declaração Internacional de Direitos Humanos, de 1948, e a construção do que é liberdade religiosa e o impacto causado por ela, o patenteamento do direito dos indivíduos de poderem escolher livremente uma religião, ou abster-se de fazê-lo (agnósticos), e a não interferência do poder político nos assuntos religiosos, tanto no plano individual como no plano das igrejas, confissões religiosas.

3.2. A internacionalização dos direitos humanos

Os direitos humanos são direitos históricos, construídos através das necessidades e exigências humanas decorridas nos últimos séculos. As revoluções glória, francesa e demais muito significaram para a construção dos direitos humanos. Entretanto, as conquistas dessas revoluções ainda não conseguiam alcançar a todos os homens, as ideias voavam, mas, em relação à efetividade, se restringiam aos Estados soberanos.

Nesse sentido, Bobbio, em *Era dos direitos*: “(...) doutrina do direito internacional, que vê corretamente nesse processo, o ponto de partida de uma profunda transformação do direito das 'gentes', como foi chamado durante séculos, em direito também dos ‘indivíduos’, dos indivíduos singulares, os quais, adquirindo pelo menos potencialmente o direito de questionarem o seu próprio Estado, vão se transformando, de cidadãos de um Estado particular, em cidadãos do mundo”.
Essa realidade só seria modificada no século passado, com a configuração de duas grandes guerras.

O hodierno direito internacional dos direitos humanos é um acontecimento do pós-guerra. Sua razão de ser está relacionada às monstruosidades produzidas pelo regime nazista no decorrer da Segunda Guerra. O mundo entendeu que, se houvesse um sistema de proteção internacional eficaz, talvez os horrores vividos nesse período tivessem sido evitados.

Nesse sentido, Sidney Guerra\textsuperscript{125}:

Após a hecatombe da Segunda Guerra Mundial, durante a qual o mundo teve a oportunidade de assistir uma série de barbaridades envolvendo milhares de pessoas, sentiu-se a necessidade de se criarem mecanismos que pudessem garantir proteção aos seres humanos. A partir daí floresce uma terminologia no Direito Internacional, relacionando-o aos direitos humanos: o direito Internacional dos Direitos Humanos.

A saída encontrada para solucionar a falta de proteção internacional foi a criação da Organização das Nações Unidas, em 1945. Pela primeira vez, estivemos diante de uma proposta internacional, um documento que reuniria as questões de igualdade, liberdade, segurança e dignidade humana\textsuperscript{126}.


\textsuperscript{126} “Nós, os povos das Nações Unidas, resolvidos a preservar as gerações vindouras do flagelo da guerra, que por duas vezes, no espaço da nossa vida, trouxe sofrimentos indizíveis à humanidade, e a reafirmar a fé nos direitos fundamentais do homem, na dignidade e no valor do ser humano, na igualdade de direito dos homens e das mulheres, assim como das nações grandes e pequenas, e a estabelecer condições sob as quais a justiça e o respeito às obrigações decorrentes de tratados e de outras fontes do direito internacional possam ser mantidos, e a promover o progresso social e melhores condições de vida dentro de uma liberdade ampla. E para tais fins, praticar a tolerância e viver em paz, uns com os outros, como bons vizinhos, e unir as nossas forças para manter a paz e a segurança internacionais, e a garantir, pela aceitação de princípios e a instituição dos métodos, que a força armada não será usada a não ser no interesse comum, a empregar um mecanismo internacional para promover o progresso econômico e social de todos os povos. Resolvemos conjugar nossos esforços para a consecução desses objetivos. Em vista disso, nossos respectivos Governos, por intermédio de representantes reunidos na cidade de São Francisco, depois de exibirem seus plenos poderes, que foram achados em boa e devida forma, concordaram com a presente Carta das Nações Unidas e estabeleceram, por meio dela, uma organização internacional que será conhecida pelo nome de Nações Unidas” (Disponível em: <http://www.unicef.org/brazil/pt/resources_10134.htm>. Acesso em: 11 dez. 2015).
Três anos mais tarde, seria promulgada, dentro da ONU, a Declaração Internacional de Direitos Humanos, que trouxe uma extraordinária inovação ao conter uma linguagem de direitos até então inédita. Estavam combinados, nesse documento, o discurso liberal da cidadania e o discurso social, sendo enumerados direitos civis e políticos e também econômicos, sociais e culturais, de forma igual e indivisível, confirmando a visão contemporânea dos direitos humanos.

Para Vicente Rão¹²⁷:

É da mais alta importância e assinala considerável progresso o reconhecimento, não por uma, mas pela quase totalidade das Nações, dos direitos fundamentais do homem, considerados sob triplex aspecto: o individual, o social e o universal.
A par de toda a comunhão interna, proclama-se, aqui, a existência de uma comunhão universal, de uma *família humana*; e como na ordem interna se visa a paz social, assim também, na ordem externa, afirma-se a existência do direito à paz universal. Os direitos inerentes à personalidade humana, não são mais, como na Declaração proclamada pela Assembleia nacional Constituinte de França, os de caráter civil e político estritamente individuais, mas, também, os de caráter social, econômicos inclusive e, ainda, os de caráter internacional (destaque do original).

Encoraja-se a ideia de que a proteção dos direitos humanos não deve se resumir ao direito interno dos Estados, em suas soberanias, pois é responsabilidade de todo o mundo em seu movimento internacional. Estados e cidadãos passam a ser objeto da atenção global.

A Declaração Universal de Direitos Humanos abraça a ideia de universalidade e indivisibilidade de direitos humanos, e com isso as garantias oferecidas são maiores e mais amplas. Para tanto, desenvolve-se um parâmetro de proteção mínima, o mínimo ético irredutível.

Segundo Flávia Piovesan¹²⁸:

Neste contexto, a Declaração de 1948 vem inovar a gramática dos direitos humanos, ao introduzir a chamada concepção

contemporânea de direitos humanos, marcada pela universalidade e indivisibilidade destes direitos.
Universalidade porque clama pela extensão universal dos direitos humanos, sob a crença de que a condição de pessoa é o requisito único para a titularidade de direitos, considerando o ser humano como um ser essencialmente moral, dotado de unicidade existencial e dignidade, esta como valor intrínseco à condição humana. Isto porque todo ser humano tem uma dignidade que lhe é inerente, sendo incondicionada, não dependendo de qualquer outro critério, senão ser humano. O valor da dignidade humana, incorporado pela Declaração Universal de 1948, constitui o norte e o lastro ético dos demais instrumentos internacionais de proteção dos direitos humanos.

Ensina Bobbio\textsuperscript{129}: A Declaração Universal contém em germe a síntese de um movimento dialético, que começa pela universalidade abstrata dos direitos naturais, transfigura-se na particularidade concreta dos direitos positivos, e termina na universalidade não mais abstrata, mas também ela concreta, dos direitos positivos universais (...)

(...) Com a Declaração de 1948, tem início uma terceira e última fase, na qual a afirmação dos direitos é, ao mesmo tempo, universal e positiva: universal no sentido de que os destinatários dos princípios nela contidos não são mais apenas os cidadãos deste ou daquele Estado, mas todos os homens; positiva no sentido de que põe em movimento um processo em cujo final os direitos do homem deverão ser não mais apenas proclamados ou apenas idealmente reconhecidos, porém efetivamente protegidos até mesmo contra o próprio Estado que os tenha violado. No final desse processo, os direitos do cidadão terão se transformado, realmente, positivamente, em direitos do homem.


Conjuntamente com o sistema internacional de proteção aos direitos humanos, florescem sistemas regionais, como o europeu, o americano, o africano e

outros ainda em construção. Esses sistemas não surgiram com uma imagem dicotomizadora; em verdade são como grandes amplificadores de um direito que é único, igual para todos nós humanos.

Em 1993, a Declaração de Direitos Humanos de Viena ratifica a Declaração de 1948, ressaltando a indivisibilidade e a universalidade dos direitos humanos. A Declaração de Viena afirma, ainda, a interdependência entre os valores democráticos, humanos e de desenvolvimento. Vale dizer que o regime democrático é o que mais alcança os ideais dos direitos humanos. Segundo Flávia Piovesan¹³⁰, não existem direitos humanos sem democracia e tampouco democracia sem direitos humanos.

Ainda em Vicente Ráo¹³¹:

Essa Declaração Universal dos Direitos do Homem substituiu o conceito de direitos do indivíduo pelo dos direitos da personalidade humana integrada nos grupos sociais dentro dos quais se desenvolve e aperfeiçoa e, mais ainda, transformou a simples igualdade política das Declarações anteriores, no reconhecimento de uma igualdade política e social, na qual incluiu o direito ao bem-estar econômico.

E, baseados nesses documentos estatutários, licito nos é indicar os seguintes princípios gerais, que devem inspirar a organização do Estado de Direito, ou seja, a organização democrática do Estado:

¹º Origem popular do poder e do direito.

Para facilitar os estudos sobre o tema da internacionalização dos direitos humanos, designou-se uma classificação entre esses direitos. Foram concebidas, assim, as chamadas gerações de direitos, baseadas na época em que foram sendo admitidas.

Ensina Carlos Roberto Husek¹³²: No século XVI, junto à transição entre o feudalismo e capitalismo surge a primeira geração, que vai ser o nosso foco de estudo, trata dos direitos individuais – direitos relativos à vida, à liberdade (direitos


de personalidade), propriedade, inviolabilidade de domicílio (direito da intimidade), liberdade de reunião e associação, segurança, igualdade (liberdades públicas); Depois dela, a segunda geração, trata dos direitos chamados metaindividuais, coletivos ou difusos, com a consolidação do Estado liberal; terceira geração, últimos três séculos, se responsabilizaria por direitos de solidariedade, e a quarta geral, ou atual, dos direitos relacionados a comunicação. Nenhuma dessas gerações de direitos tem fim para o início de outra. Elas vão apenas se aperfeiçoando.

Entendendo a lógica da internacionalização dos direitos humanos, seguiremos para o entendimento da liberdade religiosa na concepção da Declaração de 1948.

3.3. Liberdade como direito fundamental

Os direitos fundamentais são aqueles direitos considerados básicos para todos os seres humanos, independentemente de condições especiais. São direitos que compõem um núcleo intangível\(^\text{133}\) de direitos dos seres humanos submetidos a determinada ordem jurídica.

Dito isso, precisamos entender que o conceito de direitos fundamentais está atrelado a um princípio-guia: a dignidade da pessoa humana.

A dignidade da pessoa humana é um princípio aberto, que, em síntese, reconhece a todos os seres humanos, pelo simples fato de serem humanos, alguns direitos básicos. Justamente os direitos fundamentais.

Ingo Sarlet\(^\text{134}\) define-a da seguinte forma:

\(^{133}\) Em relação a essa intangibilidade, ler Bobbio: não é difícil prever que, no futuro, poderão emergir novas pretensões que no momento nem sequer podemos imaginar, como o direito a não portar armas contra a própria vontade, ou o direito de respeitar a vida também dos animais e não só dos homens. O que prova que não existem direitos fundamentais por natureza. O que parece fundamental numa época histórica e numa determinada civilização não é fundamental em outras épocas e em outras culturas.

(...) por dignidade da pessoa humana a qualidade intrínseca e distintiva de cada ser humano que o faz merecedor do mesmo respeito e consideração por parte do Estado e da comunidade, implicando, neste sentido, um complexo de direitos e deveres fundamentais que assegurem a pessoa tanto contra todo e qualquer ato de cunho degradante e desumano, como venham a lhe garantir as condições existenciais mínimas para uma vida saudável, além de propiciar e promover sua participação ativa e corresponsável nos destinos da própria existência e da vida em comunhão com os demais seres humanos (...).

Dentro da perspectiva apresentada, o que seria mais fundamental e digno do que a liberdade religiosa?

Tratada no seio da primeira geração de direitos humanos fundamentais, a liberdade religiosa é um corolário da liberdade de consciência, ou seja, é o fruto da possibilidade de um indivíduo tutelar juridicamente qualquer que seja sua opção religiosa, sendo até mesmo plausível a incredulidade como opção.

Segundo Jellinek\(^{135}\), existe um vínculo genético entre a liberdade religiosa e os direitos fundamentais. Esse vínculo seria o reflexo das demandas e lutas por liberdade religiosa, passando pelos períodos de tolerância, valores pertinentes à própria liberdade religiosa até chegar na positivação da liberdade pelas cartas internacionais de direitos humanos.

Ensina Bobbio\(^{136}\):

Os direitos de liberdade negativa, os primeiros direitos reconhecidos e protegidos, valem para o homem abstrato. Não por acaso foram apresentados, quando do seu surgimento, como direitos do Homem. A liberdade religiosa, uma vez afirmada, foi se estendendo a todos, embora no início não tenha sido reconhecida para certas confissões ou para os ateus; mas essas eram exceções que deviam ser justificadas. O mesmo vale para a liberdade de opinião. Os direitos de liberdade evoluem paralelamente ao princípio do tratamento igual. Com relação aos direitos de liberdade, vale o princípio de que os homens são iguais. No estado de natureza de Locke, que foi o grande inspirador das Declarações de Direitos do Homem, os homens são todos iguais, onde por “igualdade” se entende que são iguais no gozo da liberdade, no sentido de que nenhum indivíduo pode ter mais liberdade do que outro. Esse tipo de igualdade é o que aparece enunciado, por exemplo, no art. 1º da Declaração Universal,


na afirmação de que “todos os homens nascem iguais em liberdade e direitos”, afirmação cujo significado é que todos os homens nascem iguais na liberdade, no duplo sentido da expressão: “os homens têm igual direito à liberdade”, “os homens têm direito a uma igual liberdade”. São todas formulações do mesmo princípio, segundo o qual deve ser excluída toda discriminação fundada em diferenças específicas entre homem e homem, entre grupos e grupos, como se lê no art. 3º da Constituição italiana, o qual, depois de ter dito que os homens têm “igual dignidade social” – acrescenta, especificando e precisando, que são iguais diante da lei, sem distinção de sexo, de raça, de língua, de religião, de opinião política, de condições pessoais ou sociais. O mesmo princípio é ainda mais explícito no art. 2º, I, da Declaração Universal, no qual se diz que “cabe a cada indivíduo todos os direitos e todas as liberdades enunciadas na presente Declaração, sem nenhuma distinção por razões de cor, sexo, língua, religião, opinião política ou de outro tipo, por origem nacional ou social, riqueza, nascimento ou outra consideração”. Essa universalidade (ou indistinção, ou não discriminação) na atribuição e no eventual gozo dos direitos de liberdade.

Os pioneirismos da liberdade religiosa na positivação dentro das cartas de direitos humanos internacionais podem ser afirmados em função de duas causas principais. A primeira causa deve-se ao fato de que por muito tempo a base da sociedade foi, intrinsecamente, ligada às confissões religiosas. Ora por conta das relações sociais de comunidade, ora pela ligação com o poder político. Portanto, não se estranha que as mudanças ocorridas na Europa e nos EUA, no século XVIII, empoderassem a liberdade religiosa, quando da separação entre Igreja e Estado.

A segunda causa diz respeito às exigências contidas na ideia de liberdade religiosa: para exercer tal liberdade, o indivíduo precisa gozar de seu foro íntimo. Destacado esse foro, precisa ser capaz de protegê-lo, tanto das pessoas particulares quanto das pessoas públicas, como o Estado. Jónatas Machado\textsuperscript{137} denomina essa capacidade “essência íntima e pessoal do homem”.

Mas a liberdade religiosa é muito mais abrangente do que a personificação do eu íntimo. A liberdade religiosa exige que a convicção de suas crenças seja externalizada. De tal modo, os fiéis têm o direito de expor suas crenças, associar-se de forma livre, de celebrar seus cultos, ensinar e catequizar os seus de acordo com sua fé. Por fim, o direito de exercer sua fé sem nenhum receio em demonstrá-la.

Associamos então o direito à liberdade religiosa aos direitos de liberdade de consciência, pensamento, não discriminação, liberdade de associação e reunião, liberdade de ir e vir, respeito às minorias.

Assim, não nos surpreende a afirmação de Jônatas Machado\textsuperscript{138} que diz ser a liberdade religiosa a mãe de todas as liberdades.

3.4. O artigo 18 da Declaração Internacional dos Direitos Humanos e as liberdades envolvidas

Os direitos abrangidos neste artigo são amplos e profundos. Eles dizem respeito à primeira geração de direitos humanos, que garantem, basicamente, as liberdades individuais ou liberdades negativas, aquelas que dependem mais dos indivíduos e de uma não ação por parte do Estados.

Vejamos o artigo 18 da Declaração dos Direitos Humanos (1948):

Toda pessoa tem direito à liberdade de pensamento, consciência religião; este direito inclui a liberdade de mudar de religião ou crença e a liberdade de manifestar essa religião ou crença, pelo ensino, pela prática, pelo culto e pela observância, isolada ou coletivamente, em público ou em particular.

A manifestação do pensamento é livre e garantida a todos, afinal é o ato de pensar que nos diferencia dos demais seres que habitam a Terra. Mais que só pensar a liberdade de pensamento, garante-nos exteriorizar o que estamos pensando. Nos dizeres de José de Afonso Silva\textsuperscript{139}: “liberdade de o indivíduo adotar a atitude intelectual de sua escolha: quer um pensamento íntimo, quer seja a tomada de posição pública; liberdade de dizer o que se crê verdadeiro”.

A consciência, por sua vez, é a fonte, núcleo básico de todas as formas de liberdades envolvidas. Nela reside toda a atividade político-social do ser humano, e seu exercício pode gerar direitos e deveres para o seu titular.

\textsuperscript{138} Idem, ibidem.

Passemos, então, para a liberdade de religião propriamente dita. Como já vimos antes, ela foi construída através dos tempos e vem galgando passo a passo seu lugar como direito fundamental. Consiste em uma liberdade complexa, podendo ser dividida em três liberdades básicas: liberdade de ter uma crença ou não, liberdade de culto e liberdade de organizar-se religiosamente. Iremos visualizar cada uma delas distintamente.

3.4.1. A liberdade de crença

O termo “crença” pode significar o fato de acreditar numa coisa ou pessoa; ter convicção profunda; ou ainda ter uma religião, segundo o *Diccionário Houaiss* da língua portuguesa. Para efeito deste estudo, limitaremos nossa compreensão de crença: ao ato de acreditar religioso, crença religiosa.

A liberdade de crença foi apresentada ao pensamento jurídico através da Declaração de Direitos do Bom Povo da Virgínia (1776), o qual dizia que:

Artigo XVI
Que a religião ou os deveres que temos para com o nosso Criador, e a maneira de cumpri-los, somente podem reger-se pela razão e pela convicção, não pela força ou pela violência; consequentemente, todos os homens têm igual direito ao livre exercício da religião, de acordo com o que dita sua consciência, e que é dever recíproco de todos praticar a paciência, o amor e a caridade cristã para com o próximo.

A primeira emenda à Constituição americana (1789), *United States Bill of Rights*, previa que:

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EMENDA I
O Congresso não legislará no sentido de estabelecer uma religião, ou proibindo o livre exercício dos cultos; ou cerceando a liberdade de palavra, ou de imprensa, ou o direito do povo de se reunir pacificamente, e de dirigir ao Governo petições para a reparaçãode seus agravos.

A liberdade de crença, portanto, não se dissocia da liberdade de consciência. Mas, adverte-se, elas não são confundíveis. Ter consciência é uma questão de foro íntimo, uma articulação de pensar individual. A crença, por sua vez, também tem seu momento intrínseco individual, quando se dá a formação da convicção, porém não é só intimidade.

Com efeito, se as crenças religiosas só se manifestassem no campo mental, provavelmente não teríamos conflitos religiosos. Crer é acreditar e exteriorizar a sua crença. O momento extrínseco da liberdade de crença é poder exercer sua sociabilidade e sua institucionalização, encontrando no mundo outros indivíduos que professem sua mesma crença ou fé. Além disso, a liberdade de crença prevê a prática do proselitismo sem qualquer intimidação, desde que nos limites da ordem estabelecida.

Ensina Jayme Weingartner Neto¹⁴³:

O indivíduo é livre para crer ou não na divindade, no sobrenatural, na liberdade, na transcendência, nas respostas sobre o sentido da vida e da morte – a liberdade, neste aspecto, poderia chamar-se, também, a religiosa, já que a crença pode exercer-se em qualquer direção... a liberdade de crença, de atuar e professá-la, de proselitismo de divulgar-la, de informar (se), de aprender e ensinar religião.

A liberdade de crença permite mudar de crença, reverter sua opção de fé. Ou, ainda, não ter fé, caso dos ateus e agnósticos. Apesar de parecer distante da ideia inicial de crença, sua qualidade negativa deve ser protegida como um direito fundamental, exatamente como sua manifestação positiva. A liberdade protegida é a de possuir consciência e de exercê-la.

3.4.2. A liberdade de culto

A liberdade de culto é um desdobramento da liberdade de crença, é o reforço da convicção exteriorizada, o direito de manifestar sua prática religiosa em um local convencionado, demonstrando em público a prática da liberdade religiosa.

Com efeito, o culto é elemento fundamental da prática religiosa. Ele pode ser individual e silencioso, como na prática de orações, caridade e jejum, ou pode ser coletivo, como nos serviços religiosos dos templos, procissões e homilias. A proteção garantida a eles faz referência a ambas as formas. Daí podem surgir alguns inconvenientes práticos.

É uma máxima conhecida no direito que: “o seu direito termina onde começa o do outro”. Sendo assim, também com direitos fundamentais temos alguns problemas de superposição.

No caso da liberdade de culto, esta também está sujeita a determinações da ordem pública para coexistir em harmonia dentro da sociedade. Por exemplo, no caso de uma procissão religiosa, esta deve seguir as mesmas normas de uma manifestação pública, uma vez que estaria circunscrita à mesma liberdade de reunião garantida fora da concepção da liberdade religiosa.

Nesse sentido, Jônatas Machado: “Entendemos que a liberdade religiosa compreende posições jurídicas, que podem reconduzir-se, igualmente, ao âmbito normativo de outros direitos, liberdades e garantias”.

Em termos pragmáticos, a limitação da liberdade de culto deve ocorrer no limite das regras estatais preestabelecidas. E esses limites devem tanger entre a liberdade de religião e a ordem pública. O que parece ser meramente uma civilizada organização social pode, muitas vezes, se tornar um ato de abuso, tanto pelo lado das confissões religiosas em exacerbado proselitismo quanto por outro um abuso de

poder de polícia por parte do Estado, quando impõe seu conceito subjetivo de ordem pública.

Os casos americanos da década de 40 servem para exemplificar a questão, como o caso *Cantwell v. Connecticut*\(^{145}\), em que três senhores, testemunhas de Jeová, foram presos por violar a paz e não apresentar documentos de representação, e o Estado de Connecticut os condenou sem levar em consideração a primeira emenda americana, anteriormente mencionada, que garante a liberdade de religião. A Suprema Corte Americana reformou a decisão e fez garantir a execução da primeira e décima quarta emendas em todos os níveis da Federação Americana, garantindo, assim, maior segurança aos atores religiosos. Em outro caso, desta vez brasileiro, temos o Mandado de Segurança n. 593156896 TJRS\(^{146}\), que vedou a utilização de aparelhos amplificadores durante o culto religioso, por causar perturbação e poluição sonora, alegando inexistência de ofensa ao culto religioso.

Identificam-se, nesse fim, as dificuldades práticas apresentadas na imposição de limites estatais de ordem pública, diante da liberdade de culto. Contudo, devemos nos lembrar que existe uma ascendência do político sobre o religioso, e que os Estados são, hoje, em sua maioria Estados laicos. Assim, o limite estará estabelecido pela sociedade construtora desse Estado.

3.4.3. Liberdade de organização religiosa

No contexto de um Estado laico, com separação total entre Estado e religião, devemos pensar a liberdade de organização religiosa também de forma total. Nessa


ótica, todas as confissões religiosas, sejam elas majoritárias ou minoritárias, antigas ou recentes, tradicionais ou não, deverão deter a mesma autonomia para agir em relação às suas ações essenciais, podendo determinar sua doutrina, seu culto, liturgias, empreender atividades beneficentes e arrecadatórias de fundos, estabelecer critérios de admissão e expulsão, bem como regras de comportamento, além de praticar o proselitismo e o ensino religioso.

A liberdade de organização religiosa depreca, portanto, o máximo possível da inação do Estado. Nesse ínterim, explica Casamasso147: “quanto menor for a presença e interferência do estado nesta esfera maior será a liberdade das confissões religiosas para se organizarem”.

A natureza dessa organização pode ocorrer de forma bastante simplificada, como o prerito na Bíblia, em Mateus 18:20148: “porque onde dois ou três estão reunidos em meu nome, aí estou eu no meio deles”. Ou por formas mais rebuscadas de organização, como a maioria das igrejas institucionalizadas.

Diante do exposto, Jónatas Machado sugere que a liberdade de organização religiosa deva ser concedida até mesmo para as confissões religiosas de fato, aquelas que ainda não tenham sido reconhecidas como tal. De outro modo, esclarece Machado, devemos manter o mínimo de requisitos para denominar o que seria uma confissão religiosa, um mínimo de institucionalização, o que mantém um nível de segurança mínimo para os cidadãos em geral.

A neutralidade do Estado deve ser mantida em nome da laicidade e da liberdade de religião. Deverá o Estado garantir a igualdade jurídica para todas as confissões religiosas, como vimos no item sobre laicidade.

A referência que fazemos à liberdade de organização religiosa é a mesma que fazemos aos demais direitos fundamentais. Assim, se houver superveniência de direitos, deverá o Estado decidir como resolver a situação fática. Mencionamos isso pelo fato de que na maioria das vezes as confissões religiosas desenvolvem

atividades que não lhe são essenciais, como serem proprietárias de imóveis e empresas, como fundações, escolas, editoras e toda sorte de empreendimentos relacionados à promoção de sua confissão. Nesses casos, em específico, deverão ser enquadradas como as demais pessoas similares dentro do ordenamento jurídico. Explica Jónatas Machado que são genuínas as atividades ligadas ao culto, sua atividade-fim.

Uma vez mais, tratamos a liberdade de organização religiosa como um direito fundamental de liberdade, em que o Estado não deve intervir ou, se for necessário, fazê-lo da menor forma possível.
4 O PRINCÍPIO DE SEGURANÇA SOB A ÓTICA INTERNACIONAL

4.1. Qual segurança?

Um fator sempre presente nas organizações sociopolíticas é a segurança. Alcançar a segurança para membros do grupo e garantí-la em face dos perigos que o ameaçam de desagregação têm sido exigências prioritárias dos grupos humanos.

A sensação de segurança, antes pretendida em termos de indivíduo e grupos com determinações fronteiriças, ganha contornos globais quando verificamos a projeção de terrorismo mundial.

Nas palavras de Laura Bazzicalupo:

A palavra segurança, por si mesma, com toda sua polissemia, não é suficiente: não basta pensar a organização política como destinada à manutenção de uma segurança social cada vez mais problemática e de caráter público. É necessário pensar inseparavelmente liberdade e risco, segurança e autogoverno, responsabilidade individual e gestão das populações. Um ponto fundamental do discurso é, com efeito, precisamente a compatibilidade e coexistência de elementos e lógicas heterogêneas: as velhas formas de estratégias securitárias e disciplinares centradas sobre uma dinâmica de exclusão não desaparecem, mas foram sustentadas, substituídas ou transformadas internamente pela lógica econômica preponderante na atual razão securitária.

Hoje, mais do que nunca, precisamos nos sentir seguros, e, para isso, de forma consciente ou não, vamos abrindo mão de pequenas, e não tão pequenas assim, situações cotidianas, como deixar o carro para fazer determinado percurso a pé, ou até mesmo preferir um governo com poderes para vasculhar nossa intimidade, sempre em nome do bem maior: a segurança.

A segurança para os Estados soberanos é uma preocupação constante, uma atribuição fundamental desses Estados na definição de seus territórios. Contudo, a ideia de interdependência internacional, advinda do fenômeno da globalização, levanta a questão da internacionalização da segurança. Ora, se a segurança é uma

preocupação constante do ser humano, como indivíduo ou coletividade, ela também o é na dimensão internacional.

A verdade é que questões referentes à segurança do ser humano vivendo nas sociedades internas e na sociedade internacional são uma das preocupações do mundo moderno, sendo uma consideração importante para este trabalho dentre as ideias de direitos fundamentais, liberdade religiosa, terrorismo e paz.

Assim, vamos, aqui, estruturar a questão de segurança internacional, seu princípio e sua funcionalidade.

4.2. A tentativa de um conceito

O tema de segurança é bastante controverso, estando relacionado à segurança do indivíduo, do Estado ou à segurança internacional. Desde a Segunda Guerra Mundial, os estudiosos do tema vêm sendo divididos em duas correntes, ou, melhor dizendo, propostas. A primeira, dos denominados realistas, trata a segurança através da relação entre poder e força. A segunda corrente, os idealistas, entende que só há de se falar em segurança relacionando-a ao conceito de paz. Essas duas correntes, preconizadas por Buzan\(^\text{150}\), só puderam desenvolver-se com o desenrolar da guerra fria instituída entre o mundo do capitalismo versus o comunismo.

Para os realistas, a soberania estatal, conjurada com os princípios internacionais de autodeterminação e não intervenção, garante aos Estados soberanos total controle sobre a injerência da sua segurança nacional. Portanto, o nacionalismo, garantidor de coesão, tende a empoderar o Estado ante seus pares no cenário internacional, por ser o detentor do poder soberano, definindo quem é amigo e quem é inimigo da segurança nacional, sendo a segurança uma

consequência do poder. Nas palavras de Ramina e Cunha\textsuperscript{151}: “a aquisição de poder por um estado necessariamente resultaria em gozo de mais segurança”.

Os idealistas, por seu turno, abordam o tema de segurança pelo conceito de paz. Através desse conceito, podemos entender a segurança dentro de um ambiente de maior completude. Independentemente do conceito e prática da soberania, a busca da paz é um objetivo constante e impede a ameaça de uma nova guerra, de proporções mundiais. A segurança seria um resultado da paz: tendo paz, tem-se segurança.

Ambas as posições geram efeitos pouco satisfatórios em termos de um norte para o conceito de segurança no sistema internacional. Enquanto a posição realista gera atitudes destrutivas, baseando seu conceito no sistema de poder, com propostas belicistas e entendendo que os Estados que detêm exércitos e tecnologia nuclear detêm a força mundial, a proposta idealista, por muitas vezes, é tida como pueril, em acreditar que a paz vai gerar segurança, independentemente do poder dos Estados.

O uso de um “sub” conceito para segurança, notadamente por parte dos realistas, proporcionou uma aproximação danosa entre o conceito de segurança e o de militarismo. Na década de 1950, John Herz\textsuperscript{152} chama a atenção para o que ele denominou “o dilema de segurança”. Dizia o autor que os esforços unilaterais de um Estado para garantir sua própria segurança nacional podem ser interpretados como elevação do nível de ameaça para outros Estados, levando estes a tomar medidas defensivas para sua própria segurança e promovendo a insegurança internacional. Cria-se um círculo vicioso que nunca chega ao fim.

As contextualizações feitas para Herz apontavam o perigo de um confinamento do conceito de segurança pelos estrategistas militares e defensores das políticas nacionais. A segurança não poderia ser pensada a partir,


exclusivamente, da concepção nacional, senão nunca sairíamos do ciclo apresentado no dilema de segurança.

Mas como explicar o subdesenvolvimento de um conceito para segurança, mesmo após duas guerras mundiais, e a instalação da Organização das Nações Unidas? Vamos nos amparar nas hipóteses sugeridas por Buzan.

A primeira hipótese levantada pelo autor é a da complexidade do estabelecimento de um conceito, ainda que o tema seja fundamental em toda a contemporaneidade. O conceito de segurança guardaria uma forte acepção ideológica, impedindo a resolução de sua ideia e a sua execução.

Nesse sentido, afirmam Ramina e Cunha:

Conceitos como Estado e Justiça não podem admitir uma definição tão precisa que seja geralmente aceita, por se tratar de conceitos essencialmente em disputa, isto é, de natureza controvertida. O mesmo ocorre com o conceito de segurança.

A segunda explicação diz respeito ao momento vivido, depois de duas grandes guerras e vivenciando a guerra fria; conceitos mais operacionais, como o de poder, ganham mais força prática. A terceira e a quarta assertivas confrontavam as ideias realista e idealista e apontavam para um ganho de causa para os realistas, que operacionalizavam o conceito de poder.

A quinta explicação, muito mais política, faz menção à facilitação da manutenção do poder político dos líderes e estadistas, que, desenvolvendo a aproximação entre segurança, poder e armas, controlam melhor o status quo, dominado por esses políticos.


De concreto, fortalecemos algumas ideias. A globalização não é mais uma possibilidade, ela é fato consumado, assim como a interdependência criada por ela. O mundo está interligado. Os Estados continuam a ser a forma de organização mais numerosa. E a segurança ainda precisa ser discutida. De tudo o que constatamos, podemos concluir que é preciso falar de segurança global. E o melhor lugar para essa discussão não é outro que não a Organização das Nações Unidas.

4.3. A importância da ONU

Apesar de não podermos conceituar segurança internacional de forma definitiva, o tema é de essencial relevância na contemporaneidade. E a importância da Organização das Nações Unidas, fundamental para o tema de segurança.

A eclosão da Segunda Guerra Mundial veio comprovar o fracasso do sistema internacional de segurança. Após o término dessa guerra, fica clara a necessidade de se recompor o sistema, mais que isso, fica clara a urgência da reinvenção do sistema de segurança internacional. Para tanto, é preciso criar uma organização com força suficiente para manter a paz mundial. Nasce, assim, a Organização das Nações Unidas.

Como ensina Carlos Husek, a Organização das Nações Unidas é um organismo intergovernamental, criado por intermédio de uma associação voluntária de Estados, com personalidade jurídica própria, como especificam os artigos 104 e 105 de sua Carta constituinte.

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155 Artigo 104
A Organização desfrutará, no território de cada um de seus membros, da capacidade jurídica necessária ao exercício de suas funções e à realização de seus propósitos.
Artigo 105
1. A Organização desfrutará, no território de cada um de seus membros, dos privilégios e imunidades necessários à realização de seus propósitos.
Seus objetivos estão traduzidos no artigo primeiro de sua Carta, e como já foi dito, pela primeira vez na história, temos um documento que inclui de forma conjunta a manutenção da paz, o respeito às liberdades e a segurança internacional.¹⁵⁶

A importância da Organização das Nações Unidas é incontestável. Pensar em como poderia ter sido o mundo nos últimos setenta anos sem a presença da Organização das Nações Unidas é algo insustentável. No relatório “Um mundo mais seguro: nossa responsabilidade dividida”¹⁵⁷, da própria Organização, existe a constatação de que:

Sem a ONU, o mundo seria, provavelmente, um lugar mais sangrento... As Nações Unidas diminuíram a ameaça de guerra interestatal de várias maneiras. A Paz foi desencadeada pela invenção de manutenção da paz; diplomacia foi realizada pelo Secretário-Geral; disputas foram corrigidas no âmbito do Tribunal Internacional de Justiça; e uma norma forte foi mantida contra a guerra agressiva.

Ainda nesse sentido, Cançado Trindade¹⁵⁸:

Embora as regras gerais sobre responsabilidade internacional originam-se no direito consuetudinário e, (...) não há como negar que são condicionadas pelo arcabouço normativo da Carta das Nações Unidas. O surgimento da responsabilidade agravada, os limites

2. Os representantes dos membros das Nações Unidas e os funcionários da Organização desfrutarão, igualmente, dos privilégios e imunidades necessários ao exercício independente de suas funções relacionadas com a Organização.
3. A Assembleia Geral poderá fazer recomendações com o fim de determinar os pormenores da aplicação dos parágrafos 1 e 2 deste artigo ou poderá propor aos membros das Nações Unidas convenções nesse sentido.

¹⁵⁶ Ainda que de questionável aplicação material, o preâmbulo da Carta das Nações Unidas nos dá a certeza dos ideais dessa Organização. E sua redação nos deixa a clareza dos fundamentos envolvidos.
¹⁵⁷ (Tradução livre.) “Nonetheless, without the United Nations the post-1945 world would very probably have been a bloodier place. There were fewer inter-State wars in the last half of the twentieth century than in the first half. 13 Given that during the same period the number of States grew almost fourfold, one might have expected to see a marked rise in inter-State wars. Yet that did not occur and the United Nations contributed to that result. The United Nations diminished the threat of inter-State war in sever always. Peace was furthered by the invention of peace keeping; diplomacy was carried out by the Secretary-General; disputes were remedied under the International Court of Justice; and a strong norm was up held against aggressive war” (A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change. United Nations, 2004. Disponível em: <http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf>. Acesso em: 16 dez. 2015).
impostos ao uso de contramedidas e ao recurso à legítima defesa e a própria definição do crime de agressão ilustram como o direito de responsabilidade internacional é informado pela Carta da ONU. Como argumenta Abi-Saab, a Carta, e os instrumentos posteriores que consagaram valores também informados pela Carta (direitos humanos e direito internacional humanitário), criaram uma nova situação no sistema jurídico. Este sistema não é mais desarticulado. Ele não é apenas vazio num vazio conceitual e normativo. O sistema jurídico passa a ter um centro institucional e normativo. Todo o resto deve ser situado em relação a esta referência, que determina o grau de liberdade que pode ser acomodada no interior do sistema. A Carta das Nações Unidas desempenha o papel de constituição “material” da comunidade internacional.

Antes de adentrarmos na questão do Conselho de Segurança e sua força instrumental na manutenção da paz e segurança internacional, vamos mencionar alguns princípios relacionados à segurança que vão ser listados pela Carta das Nações.

4.3.1. Princípios relacionados à segurança internacional

A segurança internacional é um dos objetivos da Organização das Nações Unidas. Todos os seus princípios vão, de alguma forma, interagir com a questão da segurança. Contudo, três princípios nos saltam aos olhos quando falamos diretamente de segurança internacional. São eles: o princípio de autodeterminação dos povos, o da não intervenção e o de solução pacífica de controvérsias, que examinaremos a seguir de forma breve.

4.3.1.1. O princípio de autodeterminação

É o princípio que garante às soberanias o direito de se autoconstituirem. Todo povo deve decidir sobre si mesmo, de maneira política, econômica e social.
Segundo Carlos Roberto Husek\textsuperscript{159}:

Representa este princípio um prestígio aos princípios da soberania e da independência nacional e que de certa forma, poderia contrariar a existência de uma ordem internacional superior, continuando os Estados como sujeitos principais e primários do sistema internacional. Também vem inserta a ideia de que cada nação deve corresponder a um Estado Soberano.

Ganha sua versão moderna, com a Liga das Nações, como uma garantia e reconhecimento aos Estados, primeiros sujeitos de direito internacional, e sua importância como construtores desse direito.

4.3.1.2. Não intervenção

Fundamental ao direito internacional, o princípio da não intervenção começa a ser formulado, no século XVIII, nos escritos de Kant e Wolf. Segundo Celso A. Mello\textsuperscript{160}, em sua passagem pelo tempo foi princípio mais político do que jurídico. No século XX, o princípio passa a ter conotações jurídicas ao ser identificado na Carta das Nações Unidas, artigo 2º, alínea 7.

O princípio da não intervenção tem relação direta com o princípio da autodeterminação, em que cada Estado se desenvolve da forma que lhe convier, sendo soberano e não estando sujeito a sofrer intervenção de qualquer outro Estado, seja ele qual for.

Esse princípio não tem previsão absoluta. Existem duas possibilidades, arquitetadas também na Carta das Nações Unidas, sob a condição de autorização pelo Conselho de Segurança. São as hipóteses ameaça à paz mundial e de legítima defesa do Estado\textsuperscript{161}.

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\textsuperscript{161} Artigos 39 a 51 da Carta das Nações Unidas.
4.3.1.3. Solução de conflitos por meios pacíficos

A tradição internacional é a das soluções pacíficas, mas foi ao final da Segunda Guerra Mundial que tal tradição ganhou roupagem contemporânea como princípio dentro da Carta da Nações Unidas.

Esse princípio nos lembra que os esforços na busca pela paz valem todas as tentativas possíveis, sem que haja uma hierarquização dos modos de tentativa admissíveis, elencados no artigo 33 da Carta das Nações Unidas.

Ainda, sob o dever de tentar uma solução pacífica, fica proibido o uso da força nas relações internacionais, artigo 2.4. Esse princípio se baseia na busca incessante pela manutenção da paz mundial e da segurança jurídica. Como antes indicado, existem duas possibilidades de exceção a esse princípio: ameaça à paz mundial e legítima defesa dos Estados.

4.4. O Conselho de Segurança e o *jus cogen*

Sem dúvida, para a manutenção do sistema internacional, como configurado hoje, o Conselho de Segurança é o órgão da Organização das Nações Unidas que apreende o instrumental necessário para assegurar a paz mundial e a segurança internacional. A Carta das Nações Unidas, no artigo 24, faz menção às funções atribuídas a esse conselho.

Se, anteriormente, garantimos a importância da Organização das Nações Unidas na construção de um mundo pacífico e seguro, é no Conselho de Segurança que vamos encontrar a força de ação da Organização. Nesse sentido, é seu órgão mais importante.

Existem, pois, grandes questionamentos sobre esse Conselho, uma vez que a forma como ele se estrutura é pouco comum, artigo 23.1, numa Organização onde a igualdade é princípio primeiro. É um Conselho de função executiva, sendo considerado como a polícia da Organização das Nações Unidas.
Para Thales Castro\textsuperscript{162}:

O CSNU se tornou um órgão de manutenção conservadora da ordem mundial, embora, pela Carta da ONU, o CSNU deva ser o órgão responsável pela preservação da paz e da segurança internacionais... Nossa argumentação é que o CSNU é um órgão de manutenção conservador da ordem mundial centralizada na hegemonia unipolar norte-americana. Quando os interesses da highpolitics da superpotência hegemônica se harmonizam com os demais países-membros do CSNU em um dado momento, então o CSNU terá papel eficaz e eficiente na manutenção. Contrariamente, quando esses interesses não são coincidentes, então o CSNU revela o jogo do poder internacional capitaneado pelos EUA, cujo interesse maior é preservar o status quo da ordem mundial.

Apesar de controverso e imperfeito, quando o assunto em tela é segurança internacional, é o Conselho de Segurança que, efetivamente, gerencia a questão. E assim, é ele que detém o poder de resolver os problemas, até mesmo fazendo uso da força, com exceção da proibição de uso da força. As normas imperativas sancionadas pelas resoluções do Conselho de Segurança, mesmo que por algumas vezes insatisfatórias ou desastrosas\textsuperscript{163}, vêm ao longo desses setenta últimos anos evitando a presença da catástrofe maior: uma nova guerra mundial.

Segundo o WEX\textsuperscript{164}:


Exemplos de \textit{jus cogens} incluem: proibição de uso da força; a lei do genocídio; princípio da não discriminação racial; crimes contra a humanidade; e as regras de proibir o comércio de escravos ou tráfico de seres humanos.

Nesse sentido, Salem Nasser\textsuperscript{165}:


\textsuperscript{163} Como no caso da demora de agir no genocídio de Ruanda.


\textsuperscript{165}
Nos trabalhos da Comissão de Direito Internacional e nos escritos dos doutrinadores é possível encontrar exemplos de normas apresentadas como de *jus cogens*, entre elas algumas das mais comumente citadas são: o princípio *pacta sunt servanda*; a proibição do uso ou da ameaça do uso da força; a proibição de atos que infrinjam a soberania e a igualdade dos Estados; o princípio da autodeterminação dos povos; o princípio da soberania sobre os recursos naturais; a proibição do tráfico de seres humanos; a proibição da pirataria; a proibição do genocídio (CDI, 1966-II, p. 248-249; 1976, p. 103) (Wouters e Verhoeven, 2005) (Lauterpacht, 1993, p. 439-441); a proibição dos atos qualificados como crimes contra a humanidade e (Ago, 1971, p. 324); os princípios do direito humanitário codificados nas Quatro Convenções de Genebra, princípios fundamentais dos direitos humanos e do direito do meio ambiente. Admita-se, para fins de argumentação, que estas normas são de fato normas imperativas e inderrogáveis. A observação nos permite perceber que uma ao menos, *pacta sunt servanda*, é norma fundamental, logicamente necessária ao direito internacional, pois permite a existência de uma de suas fontes que é o tratado internacional. Outras são normas que, se não são logicamente necessárias, são fundamentais porque dão ao direito internacional os seus contornos e suas características essenciais: a partir da norma que diz serem os Estados soberanos e iguais, passando pela determinação de que a soberania inclui aquela sobre os recursos naturais e pela previsão de que os povos têm o direito de autodeterminação e de se transformarem em Estados soberanos, chegando à norma que prescreve o uso da força nas relações entre os Estados. Outras ainda são aquelas proibições de atos tidos como crimes que interessa à comunidade internacional inteira coibir: a pirataria, o comércio de seres humanos, o genocídio e os outros crimes contra a humanidade. Finalmente é possível identificar uma outra categoria de normas que se pretende alçar ao *status* de *jus cogens*: são aquelas (todas ou algumas, não se sabe ao certo) inseridas em regimes internacionais, como o do direito humanitário, dos direitos humanos e do direito do meio ambiente.

Se o *jus cogens* é possível para o direito internacional, ele vai encontrar sua força executória no Conselho de Segurança e em suas resoluções.

Qualquer tentativa de mudança desse Conselho nos parece distante, principalmente agora com o anúncio de uma nova ameaça à paz e à segurança internacionais: o terrorismo.

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4.5. A ameaça do terrorismo

O terrorismo é um mal humano. Podemos analisar essa frase do ponto de vista histórico, uma vez que conhecemos atos de terror desde o início dos tempos. O terrorismo poderia ser, sozinho, objeto de um estudo aprofundado, porém, para os fins deste estudo, iremos trabalhar com uma breve visão histórica, enfatizando o denominado terrorismo religioso e contextualizando-o com a nova ameaça terrorista.

4.5.1. Uma breve história do terror

O terrorismo pode ser encontrado em toda a história da humanidade, desde a Antiguidade até os dias atuais. Grupos infraestatais violentos com propósitos e motivações diversas protagonizaram atos de terror contra diversos opositores, sendo o mais constante o governo dominante. Até mesmo o Estado, controlador de poder, utilizou o terrorismo como forma para se perpetuar.


Como ensina Nuno Rogério, com motivações diversas vários grupos violentos cometeram atos de terror. Desde os hashashines tugues, passando por niilistas e anticzaristas Narodnye Volye, até os mais recentes IRA e ETA, com suas cruzadas separatistas ou ainda os Tupamaros, Sendero Luminoso, aos contemporâneos da Al Qaeda.

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Quanto ao terrorismo de ordem religiosa, fundamentalistas na fé, podemos pensar somente nos islâmicos e sua *jihad*. Contudo, existiriam fundamentalistas em todas as religiões. Temos como exemplo: os cristãos ortodoxos na Romênia, como Guarda de Ferro; os cruzados antigos; os protestantes da Ku Klux Klan, e a Verdade Suprema, seita que queria o reconhecimento como sistema religioso. Essa espécie de terrorista busca substituir o sistema político vigente, utilizando da bandeira do sagrado, recrutando sob o imperativo dos mandamentos da religião.

Em verdade, o grande trunfo do terrorismo é a implementação do medo, independentemente de sua força ou razão de atuação. Mao Tse Tung disse, com muita propriedade: “Mate um e aterrorize mil”\(^\text{168}\). Ainda, nos dias de hoje, é esta a sensação causada pelo terrorismo.

4.5.2. O terrorismo hoje, uma guerra assimétrica

Com o fim da Guerra Fria, parecia que o nevoeiro das guerras religiosas, as quais assolaram o século XX, iria se dispersar. Contudo, os anos 1990 foram prolixos na escala dos sofrimentos humanos. As guerras religiosas, que eram alimentadas por ideologias seculares, expandiram-se de forma assombrosa, renovando o fundamentalismo religioso. Esses movimentos fundamentalistas se manifestavam em espécies de cruzadas e contracruzadas. A ascensão da barbárie tem sido contínua, mas não uniforme.

Os grupos terroristas, antes com ideologias fechadas e poucos recrutamentos, encontraram na pobreza extrema dos homens a massa de manobra perfeita. Como exemplo vimos, em 1979, uma das invenções mais nefastas com

relação a esse assunto, a figura do homem-bomba, utilizado pela primeira vez em 1983, contra os EUA, pelo Hezbollah\textsuperscript{169} no Líbano.

O terror só aumentou de lá para cá. A disseminação da informação via web e mídia global foi um dos fatores exponenciadores dessa nova realidade.

Não vivemos mais uma situação de simetria, em que exércitos estatais se enfrentam de forma mais ou menos igual. Hoje, vivenciamos uma situação assimétrica; ninguém sabe quem é o terrorista, sua face ou quando ele pode agir. Fala-se de “lobos solitários”, esperando para serem ativados\textsuperscript{170}. Coisificamos as pessoas em nome de uma luta sem identidade revelada.

O pior do terrorismo é, sem dúvida, a imposição do medo. Além disso, quem pratica o terror hoje acredita ser ele uma ação legítima, tanto do lado de quem o emprega em atos terroristas quanto do lado daqueles que o combatem, os Estados\textsuperscript{171}.

Nesse sentido, Eric Hobsbawn\textsuperscript{172}:

Existe, no entanto, um fator mais perigoso na geração da violência sem limites. É a convicção ideológica, que desde 1914 domina tanto os conflitos internos quanto os internacionais, de que a causa que se defende é tão justa, a do adversário é tão terrível, que todos os meios para conquistar a vitória e evitar a derrota não só são válidos como necessários. Isso significa que tanto os Estados quanto os insurgentes sentem ter uma justificativa moral para o barbarismo...

(…) A ascensão do megaterror no século passado não reflete a “banalidade do mal” e sim a substituição dos conceitos morais por imperativos superiores.

Com esse terrorisme, é essencial que o mundo se uma em torno dos ideais internacionais de paz, segurança e direitos humanos, e suas liberdades


\textsuperscript{170} Expressão cunhada pela mídia global.


fundamentais. Não é possível pensarmos em uma resposta diferente, revanchista\textsuperscript{173}. É preciso quebrar o círculo vicioso da violência que nos cerca.

\textsuperscript{173} O sentimento de revanche poderia ser interpretado como “olho por olho, dente por dente”, de Hamurabi. Ou seja, combater o terror com mais terror, este realizado em contra-ataque aos terroristas, desta vez em nome dos Estados.
5 DESAFIOS E PERSPECTIVAS

Muitos são os desafios e as perspectivas quando tratamos da liberdade religiosa e da segurança no sistema internacional. Serão destacadas cinco situações centrais para a compreensão do intercâmbio proposto neste tema.

5.1. Universalismo x relativismo cultural

O primeiro desafio abordado diz respeito a um ponto fundamental ao nosso tema. É preciso entender a questão primordial dos direitos humanos para podermos compreender suas conquistas e aflições.

A contenda entre universalistas e relativistas culturais é bastante complexa. Ela nos remete a dilemas fundamentais dos direitos humanos: por que o homem tem direitos? As normas válidas para um religioso são válidas para um agnóstico? Os direitos humanos podem ser universais, mesmo com a diferença cultural existente no mundo?

Todas essas perguntas são respondidas pela questão inicial: são os direitos humanos universais ou relativos de cada cultura?

Embora desde a Declaração de Viena, em 1993, tenha sido validada a tese da universalidade dos direitos humanos, ainda hoje diversas argumentações são construídas em favor do relativismo cultural dos direitos humanos.

Para os relativistas, a noção de direitos está diretamente relacionada à sociedade em que se está inserido culturalmente. Por isso, eles tecem algumas críticas ao sistema dos direitos humanos.

A noção de direito pode: contrapor-se à noção de obrigação religiosa, imposta aos fiéis em suas confissões, como, por exemplo, nos casamentos arranjados, sem liberdade de escolha dos noivos; a visão dos direitos humanos é antropocêntrica, centrada no homem, o que não corresponde à realidade de algumas culturas religiosas; os direitos humanos são fundamentados no ideal ocidental; não há como
falar de uma moral universal única; o universalismo trata de um homem descontextualizado (sem valores, cultura, língua, costumes e outros vínculos).

Nesse sentido, Flávia Piovesan\textsuperscript{174}:

Para os relativistas, a noção de direitos está estritamente relacionada ao sistema político, econômico, cultural, social e moral vigente em determinada sociedade. Cada cultura possui seu próprio discurso acerca dos direitos fundamentais, que está relacionado às específicas circunstâncias culturais e históricas de cada sociedade. Não há moral universal, já que a história do mundo é a história de uma pluralidade de culturas. Há uma pluralidade de culturas no mundo e estas culturas produzem seus próprios valores. Na crítica dos relativistas, os universalistas invocam a visão hegemônica da cultura eurocêntrica ocidental, na prática de um canibalismo cultural.

Com efeito, as críticas construídas pelos relativistas nos levam a refletir sobre a questão cultural e a massificação causada pelo processo de globalização.

Diz Érica Peixoto\textsuperscript{175}:

O processo de globalização tem causado importantes transformações ao redor do mundo. A revolução tecnológica que vem se desenvolvendo nos últimos anos tem sido um fator fundamental na construção dessa nova era. Por meio da internet, por exemplo, é possível navegar por uma imensidão de costumes e contextos culturais. Isso pode aproximar pessoas e/ou grupos que estejam em polos opostos do globo, como também pode acirrar diferenças.

Acrescenta Edgar Montiel\textsuperscript{176}:

Os produtos de revolução digital, com seu potencial para transmitir informações desde uma multiplicidade de centros de tempo real, fazem com que qualquer indivíduo que tenha à mão o controle remoto de um televisor ou o mouse de um computador possa transitar por um mundo de costumes, valores, mentalidades, crenças, gostos, comidas, canções, narrações ou modas das regiões mais distantes do mundo. Em virtude dessa exposição constante a novos símbolos, se estabelecem novos vínculos identificatórios, os perfis culturais mudam, mudando seus referentes tradicionais, costumes e visões originárias, para ir se organizando em função de códigos


simbólicos que provêm de repertórios culturais muito diversos, que têm sua origem nos diferentes formatos eletrônicos. Desse modo, as identidades tendem a diluir-se e surgem novas formas de identificação, poliglotas, multiétnicas, migrantes, com elementos de diversas culturas.

Então, o que nos dizem os universalistas em seu favor? Para os universalistas os direitos humanos são decorrentes da dignidade da pessoa humana. São direitos intrínsecos à condição humana, pertencentes a um homem livre, que pode, por si só, definir seus paradigmas. Um homem que pensa e, portanto, decide qual religião seguir, em que e em quem acreditar. Um homem que interage com o resto do mundo, curioso e permeável às diferentes possibilidades que lhe são apresentadas. É para esse ser universal que a concepção atual de direitos humanos deve pretender um diálogo entre as diferentes culturas, identificando direitos que se expressem universalmente.

Na análise de Fernando Quintana177, o que se espera é justamente esse universalismo concreto em que o “eu” vê o “outro” como um igual, mas, entretanto, reconhece que possa ser diferente. Segundo o autor, essa é a postura interculturalista, que promove o diálogo, a complementaridade e é capaz de pensar a unidade na pluralidade de suas formas particulares.

Para Boaventura Santos178:

Os direitos humanos têm que ser reconceptualizados como multicultural. O multiculturalismo, tal como eu o entendo, é pré-condição de uma relação equilibrada e mutuamente potenciadora entre a competência global e a legitimidade local, que constituem os dois atributos de uma política global a partir da transformação cosmopolita dos direitos humanos. Na medida em que todas culturas possuem concepções distintas de dignidade humana, mas são incompletas, haveria que se aumentar a consciência destas incompletudes culturais mútuas, como pressuposto para um diálogo intercultural. A construção de uma concepção multicultural dos direitos humanos decorreria deste diálogo intercultural.

Assim, em defesa do universalismo dos direitos humanos, a capacidade de escolha deste homem deve favorecer o multiculturalismo, sem que isso signifique uma batalha de valores. Devemos sair da era dos confrontos para um tempo de diálogo contínuo.

5.2. Laicidade x fundamentalismo religioso

O segundo desafio proposto diz respeito à importância da conquista da laicidade estatal para o mundo. O Estado laico é uma construção fundamental para a prevalência do direito internacional e direitos humanos.

Ao se manter afastado das confissões religiosas, o Estado garante a não adoção de dogmas incontestáveis para sua vida civil. Não é possível que um Estado construído de forma plural possa adotar uma só proposta de fé, ou melhor, um só balizamento em relação à moral e à sociedade.

Nesse sentido, Roger Raupp Rios¹⁷⁹:

Exatamente por atentar especialmente à importância do pluralismo e da diversidade, a laicidade apresenta-se como arranjo político-institucional e como configuração jurídico-constitucional mais apropriados à proteção das liberdades de pensamento, de opinião e de crença. Com efeito, a laicidade revela-se princípio de organização estatal que possibilita, simultaneamente, a proteção em face do perigo de intervenção e manipulação estatal no âmbito religioso e a defesa de indivíduos e de grupos diante da tentação de majorias que almejam impor suas convicções religiosas sobre os demais por meio do processo político.

Mais uma vez, ratificamos a ideia de que a religião é peça fundamental na construção de uma sociedade. É ela que irá ajudar na construção do caráter individual de seus fiéis e contribuir para uma sociedade caridosa e benevolente. Contudo, ao fundamentarmos nossos direitos na concepção de um ser humano capaz de pensar e de trocar de pensamento, temos de manter o Estado e a religião

em separado, para que a dinâmica da sociedade seja livre e permeável ao incessante plano das ideias.

A esse respeito, Marília De Franceschi Neto Domingos\(^{180}\):

A laicidade é ao mesmo tempo, um direito jurídico e um ideal político, visando a fundação de uma comunidade de direito onde coexistem os princípios de liberdade de consciência, igualdade, prioridade ao bem comum, respeito e tolerância. A laicidade então permite a manifestação da diversidade sem comunitarismos, preservando o direito das minorias sem excluí-las do princípio de inclusão na sociedade. É a manutenção do princípio da unidade na diversidade, atenta à emancipação da pessoa humana nos planos intelectual, ético, social e espiritual.

Não podemos esquecer que o fato espiritual é uma tendência natural do ser humano, na busca de uma transcendência, enquanto o fato religioso é a resposta das religiões a esta tendência fundamental que aflora quando o Homem toma consciência da fragilidade da sua própria existência.

Ressaltamos, ainda, que a concepção fundamentalista é um extremo perverso da relação social. Todo o fundamentalismo é capaz de subverter a mais pura das ideias. O mundo já vivenciou muitas amostragens do fundamentalismo e nenhuma delas obteve bons resultados.

Nas palavras de José Reinaldo Lopes e Oscar Vilhena\(^{181}\):

Vertentes fundamentalistas das diversas religiões são uma ameaça à democracia. Isto porque tal abrangência requer que seus adeptos sigam sua doutrina em todas as dimensões de suas vidas, sobrepondo seus deveres morais religiosos àquelles decorrentes da participação na comunidade política nacional; tal fundamentalismo pretende estabelecer conteúdos indiscutíveis, vinculadores de todas as dimensões da vida de seus fiéis; também porque tal proselitismo faz da ampliação dos seguidores um objetivo fundamental. Assim, as religiões entram em rota de colisão com o pluralismo e a diversidade, cujo pressuposto é precisamente o convívio simultâneo e não excludente de diferentes visões de mundo, decorrentes ou não de convicções religiosas.


O desafio sobre a laicidade e o fundamentalismo religioso está em manter a separação entre Estado e religião, porque, quanto mais o Estado parece desejar tal separação, a religião tenta adentrar seus domínios.

5.3. Respeito à diversidade x intolerância

Talvez este seja um dos maiores desafios apresentados até aqui. Dizemos isso porque, para que exista tolerância para com a diversidade, não é necessário somente uma lei. É preciso educação. Educação para conviver com o diferente, para aceitar que a diversidade existe, e que ela é boa. Seria impensável um mundo em que todos os seres humanos fossem iguais.

Contudo, isso nos parece muito complicado. Ainda hoje, temos dificuldades em conviver com o diferente, e não só dificuldade, temos medo.

Nas palavras de Kofi Annan:

Um dos desafios mais importantes enfrentados pela comunidade internacional de hoje é como livrar o mundo de intolerância – um flagelo que pode ter consequências mortais, como a história tem mostrado com demasiada frequência. Como a transformação de nossas sociedades – pela globalização, migração e mobilidade sem precedentes – continua a levantar questões fundamentais sobre a capacidade das pessoas de viver juntos, a ignorância e o medo do “outro” ainda estão sendo explorados para incitar o ódio e justificar a exclusão. Desde muito, em praticamente qualquer canto do mundo que não é caracterizado pela diversidade, o recrudescimento da intolerância representa uma ameaça para a democracia universal, paz e segurança.

A primeira fase de organização internacional dos direitos humanos, que denominamos primeira geração de direitos, já abordava a questão de tolerância e diversidade, quando falava de proteção ao direito do indivíduo. Essa fase


corresponde ao final da Segunda Guerra, em que o temor pela diferença tinha chegado ao extremo (regime de extermínio nazista). O caminho encontrado, à época, foi instituir a igualdade formal como base do processo de construção dos direitos humanos fundamentais.

Todavia, era insuficiente tratar o indivíduo de forma genérica, geral e abstrata. Foi preciso identificá-lo, em relação à sua particularidade, e a partir daí tratar das diferenças entre os grupos formados. Pareada a igualdade formal, nascia o direito à diferença como direito fundamental.

Ensina Boaventura Santos\textsuperscript{184}:

\begin{quote}
(...) temos o direito a ser iguais quando a nossa diferença nos inferioriza; e temos o direito a ser diferentes quando a nossa igualdade nos descaracteriza. Daí a necessidade de uma igualdade que reconheça as diferenças e de uma diferença que não produza, alime ou reproduza as desigualdades.
\end{quote}

Vejamos que, passados setenta anos da Segunda Guerra, ainda estamos enfrentando os mesmos desafios com relação a tolerância e diversidade. E, infelizmente, a situação é diversa da imposta pelo nazismo, mas nem tão diferente.

Hannah Arendt\textsuperscript{185}, em seu livro \textit{Eichmann em Jerusalém}: um relato sobre a banalidade do mal, muito bem representou o que acontecia de mais grave com relação à intolerância humana. Dizia ela: “O problema com Eichmann era exatamente que muitos eram como ele, e muitos não eram nem pervertidos, nem sádicos, mas eram e ainda são terrível e assustadoramente normais”.

Tão grave quanto a conclusão de Hannah Arendt é o fato de que, ainda no século XXI, podemos citá-la para mencionar acontecimentos atuais.

Segundo Carol Leão\textsuperscript{186}:

\begin{quote}
Arendt dizia que a banalidade do mal se instala na ausência de pensamento. Ao discutir o mal, Hannah Arendt retomou o tema do \end{quote}

Mal Radical, de Kant, um dos filósofos que mais contribuíram para o esclarecimento do problema da moral humana. Há, na verdade, uma grande e intensa tradição social e epistemológica em analisar o que é a maldade e como ela pode se desenvolver na sociedade. Kant parte de uma lógica ética: o que eu quero, eu posso; o que eu posso, eu devo? Hannah retoma essa questão de forma complexa, mas que aponta para uma direção. Se eu quiser fazer o mal, o farei, independente de estrutura social e Declaração de Direitos Humanos. E não. Não se trata de uma massa de psicopata. Mas daquele vizinho, da sua manicure, de um estudante ou de um parente próximo que, ao descortinarmos o véu de sua atuação social, encontraremos alguém com crença suficiente para acreditar que defender o linchamento de um criminoso é o que podemos fazer para viver melhor.

Assim, seguimos com o desafio da tolerância versus diversidade, mantendo a certeza de que essa é uma luta válida, no caminho para uma significativa mudança na sociedade mundial.

5.4. Combate ao terror x preservação de direitos e liberdade religiosa

O combate ao terror, preservando direitos e liberdades públicas, entre elas a liberdade religiosa, é sem dúvida um enorme desafio. Como já vimos antes, tudo que é diferente nos dá medo. O terrorismo é mais que isso, é um vazio, um rompimento no tecido da rede que nos ampara, o sistema internacional.

Como ensina Tercio Sampaio Ferraz Jr. 187:

Nem estamos pensando no clima de intimidação, que impõe silêncios e faz calar as consciências. Reportamo-nos sim ao clima de suspeita, ao sentimento de condescendência para com a inversão da ordem constituída que se pode alastrar solidariamente quando, de repente, a sociedade é levada a admitir que o direito, pela sua dignidade, acaba revelando uma certa impotência para fazer frente ao terror.

Na sequência dos atentados de 11 de setembro, os riscos de comprometimento dos direitos humanos e da liberdade religiosa sob o clamor público de maior segurança são imensos.

Basta olhar para o recrudescimento da lei americana antiteror, com a instalação da lei conhecida como Patriotic Act188, que concede poderes, entre outras medidas, aos órgãos de segurança e de inteligência dos EUA para interceptarem ligações telefônicas e e-mails de organizações e pessoas supostamente envolvidas com o terrorismo, sem necessidade de qualquer autorização da Justiça, sejam elas estrangeiras ou americanas.


Essa sucessão de ataques vem transformando o mundo num lugar de medo. É, entretanto, imprescindível uma ação positiva conjunta por parte do direito internacional para não deixar que o terrorismo vença, derrubando todos os direitos e liberdades adquiridos.

Nas palavras de Celso Rodrigues e Gabriel Ziero190:

Uma compreensão da problemática do terrorismo relaciona-se à questão dos Direitos Humanos e, evidentemente, à sua promoção... Além disso, é imperiosa a necessidade de exercermos uma perspectiva crítica sobre o tema, que revitalize o Direito à Memória, uma vez que devemos manter em mente que pretestos como derrotar o inimigo e abolir o mal já serviram de motivos que levaram a desconsideração do outro, escreveram capítulos sangrentos da História da Humanidade, como os campos de concentração do Terceiro reich e o exterminio dos muçulmanos na Bósnia.

De todas as falas sobre o tema do combate ao terrorismo e garantia de direitos, existe uma que nos é muito cara. Estamos nos referindo ao discurso


Nas palavras de Clarence Darrow¹⁹²:

> Se tornar o ensino da evolução nas escolas públicas um crime. Amanhã será um crime ensiná-los em escolas particulares e começará a banir livros e jornais. E logo, serão protestantes contra católicos, protestantes contra protestantes. Tentando impor sua religião à mente do homem. Porque quem faz um faz outro. Pois a ignorância e o fanatismo sempre vão existir. Eles só precisam ser alimentados. E logo Excelência, Com bandeiras e tambores, marcharemos para o glorioso século XVI. Quando fanáticos condenaram Galileu, Por ousar trazer inteligência e esclarecimento aos homens¹⁹³.

Em 1925, o temor de um advogado é o mesmo temor que nos ronda no século XXI.

Podemos demonstrar esse temor usando o exemplo do tribunal francês que instituiu uma lei de proibição de vésus em ambientes públicos, em nome da

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¹⁹³ (Tradução livre.) Texto na íntegra: “If today you can take a thing like evolution and make it a crime to teach it in the public school, tomorrow you can make it a crime to teach it in the private schools, and the next year you can make it a crime to teach it to the hustings or in the church. At the next session you maybe an books and the newspapers. Soon you may set Catholic against Protestant and Protestant against Protestant, and try to foist your own religion upon the minds of men. If you can do one you can do the other. Ignorance and fanaticism is ever busy and needs feeding. Always it is feeding and gloating for more. Today it is the public school teachers, tomorrow the private. The next day the preachers and the lectures, the magazines, the books, the newspapers. After while, your honor, it is the setting of man against man and creed against creed until with flying banners and beating drums we are marching backward to the glorious ages of the sixteenth century when bigots lighted fagots to burn the men who dared to bring any intelligence an den lightenment and culture to the human mind”.

segurança, sentença essa que foi ratificada pelo Tribunal Europeu de Direitos Humanos, caso S.A.S. v. France\textsuperscript{194}.

No caso francês, assim como no caso americano, houve um julgamento favorável ao Estado, que pretensamente estaria protegendo sua comunidade. Acontece que no caso ocorrido em 1925, o americano, a sentença foi meramente formal, e o julgamento deu ensejo a um novo diálogo nacional que culminou com o aumento da liberdade religiosa, enquanto no caso francês, em 2010, a sentença foi ratificada pelo Tribunal Europeu de Direitos Humanos e, consequentemente, trouxe uma perda para a liberdade religiosa.

Por mais uma vez, pensamos ser necessária a implementação de um diálogo internacional multilateral que construa um novo corolário em matéria de segurança, que garanta a preservação de direitos e liberdades fundamentais, até aqui construídas.

5.5. Unilateralismo x multilateralismo: fortalecimento do Estado de direito internacional e a construção da paz mundial, mediante a valorização dos direitos humanos

Em arremate, devemos enfatizar que depois dos últimos atentados terroristas insurge o desafio de continuar com a construção de um Estado de direito internacional que prime por fazer prevalecer os direitos humanos e liberdades conquistadas, mais que isso, que consiga, em efetivo, fomentar a segurança internacional e a paz mundial.

Ensina Flávia Piovesan\textsuperscript{195}:

Contra o risco do terrorismo de Estado e do enfrentamento do terror, com instrumentos do próprio terror, só resta uma via – a via


construtiva de consolidação dos delineamentos de um “Estado de Direito” no plano internacional. Só haverá um efetivo Estado de Direito Internacional sob o primado da legalidade, com o “império do Direito”, com o poder da palavra e a legitimidade do consenso. À luz deste cenário, marcado pelo poderio de uma única superpotência mundial, o equilíbrio da ordem internacional exigirá o avivamento do multilateralismo e o fortalecimento da sociedade civil internacional, a partir de um solidarismo cosmopolita.

Se a urgência do medo pós-traumático dos atos de terror leva os Estados a retroceder, aumentando sua política de segurança nacional, cerceando liberdades, exercendo o unilateralismo com força total, privilegiando o lema realista de que a segurança internacional é construída com base na força e no poder, somente a cooperação multilateral internacional será suficiente para derrubar esse novo inimigo que é o terror.

Multilateralismo e sociedade civil internacional: nas palavras de Flávia Piovesan196 são as únicas forças capazes de deter o amplo grau de discricionariedade do poder do império, dos Estados soberanos, e civilizar este temerário “Estado da natureza” e permitir que, de alguma forma, o império do direito possa domar a força do império.

Um multilateralismo renovado que possa incluir outros atores, que não só os Estados, em um diálogo reestruturante, que identifique uma forma de persistir na crença de que a implementação de direitos humanos universais e suas liberdades garantidas são a única possibilidade de um não retrocesso aos tempos da Inquisição Católica, lembrando as palavras de Darrow197.

Nesse cenário, faz-se necessário o fortalecimento de uma sociedade internacional atuante, com um repertório aumentado pela construção das redes sociais198, que fomentam a interlocução entre as entidades locais, regionais e mundiais, a partir de um solidarismo universal.

196 Idem, ibidem, p. 192.
197 Idem, ibidem, p. 192.
5.6. Uma proposta

O tema da liberdade religiosa no mundo contemporâneo é complexo. Estudos recentes indicam que 68% da população mundial vive em Estados que restringem, de alguma maneira, o livre exercício da religião.

Além disso, o mundo contemporâneo vivencia, neste começo de século XXI, um renovado apelo religioso, o qual não estava previsto para um mundo, até então, secularizado. A ideia secular de que a religião cairia em desuso falhou. Os atentados terroristas de 11 de setembro, conflitos de caráter político-religioso que se tornaram questões internacionais, o crescimento e a influência de atores estatais e não estatais religiosos no âmbito internacional reaviram a questão religiosa.

Nesse sentido, Scott Thomas:

O ressurgimento global da religião é uma crescente proeminência e poder de persuasão da religião, ou seja, a ascendente importância das crenças, práticas e discursos religiosos na vida pública e privada, assim como o crescente papel dos grupos não estatais, partidos políticos, comunidades e organizações na política doméstica de caráter religioso, vêm ocorrendo de um modo que tem implicações significantes para a política internacional.

Outro modo de avaliar o reinteresse da sociedade internacional no tema da religião foi a valorização midiática de líderes religiosos, como celebridades internacionais, sendo exemplos: o Dalai Lama, o Papa, entre outros. Além disso, a pobreza humana e as falhas estatais para amenizá-la incrementaram a busca pelo sagrado.

Diz Pedro Soares:

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200 Ver Capítulo 2.
202 SOARES, Pedro Gustavo Cavalcanti. Um coeficiente religioso nas teorias das relações internacionais?: paradigmas, teóricos e soft power. Faculdade Damas – Caderno de Relações
O ressurgimento da religião pode ser observado também no nível individual, perpassando as escolhas, as crenças e os valores dos indivíduos, incluindo o impacto que eles podem ter no cenário político. Como expoentes nesse quesito, evidenciamos o Aiatolá Khomeini, o Dalai Lama, o Papa, Martin Luther King, entre outros, que sendo líderes religiosos, se tornaram atores individuais nas relações internacionais.

No contexto global, as transformações e migrações sociais em ebulição deram margem às correntes religiosas para consolidarem novas redes sociais, afirmar personalidades e amenizar males da modernidade, como o egoísmo e o consumismo. Além disso, o fator religião supriu as carências negligenciadas pela burocracia do Estado. Dessa forma, através da adaptação a valores seculares e da reestruturação do pensamento sagrado, a religião reaparece sob um novo enfoque.

Devemos pontuar que a possibilidade de uma relação livre entre sociedade internacional e religião só é possível porque temos assegurado o direito fundamental da liberdade de religião, com a balização do direito internacional, artigo XVII da Declaração de Direitos Humanos de 1948.

Junto a isso soma-se a questão de segurança internacional e o desafio de solucionar o terrorismo internacional.

O desafio do século parece ser como resolver o problema da segurança internacional, garantindo a preservação dos direitos e liberdades fundamentais construídas pelos direitos humanos internacionais.

Nesse sentido, Knox Thames:\n
Responder aos ataques à liberdade de religião será o desafio do século 21. Situação de repressão religiosa gera instabilidade e fomenta o extremismismo, enquanto ameaçam outros direitos fundamentais como o de expressão e associação. Métodos passados de advocacia não são mais suficientes, já que governos abusivos e grupos extremistas reprimem os indivíduos de praticar a sua fé através da violência. Vidas estão em jogo e o tempo não é um luxo.


Não existe uma fórmula pronta para essa questão. Mas é preciso resolvê-la. Alguns autores, dentre eles Flávia Piovesan\(^{204}\), acreditam que a solução possa estar no processo de justicialização do direito internacional. Particularmente, não descartamos essa possibilidade, mas não estamos convictos de que a solução para o problema seja uma verticalização dos direitos internacionais. Entraríamos para o mesmo sistema de direito impositivo, tal qual o dos Estados, que não tem sido eficiente para resolver a situação atual. Também percebemos não haver tempo hábil para a construção de todo o processo de instalação desse sistema obrigatório. A questão do terrorismo é urgente, e o tempo é um luxo que não temos, segundo Thames\(^{205}\).

Infelizmente, não temos uma solução. Com certa ousadia, temos uma proposta.

Temendo que as ações unilaterais por parte dos Estados nos levem a uma nova guerra, ou ainda a um retrocesso histórico de falta de liberdades, em especial, a religiosa, propomos uma grande ação internacional capitaneada pela Organização das Nações Unidas. Mas não como uma associação de Estados. Ao longo desses setenta anos, a Organização das Nações Unidas tem se mostrado sensível à proposta de inclusão de novos atores internacionais, não estatais.

Então, a abertura de um novo diálogo internacional sobre segurança e liberdade religiosa seria moldada na ideia de ouvir todos os atores envolvidos, para solucionarmos essa questão.

Esses atores seriam os Estados internacionais, naturalmente a sociedade internacional e os líderes ou representantes das religiões existentes no mundo.

Não estamos propondo uma dessecularização, muito menos que os Estados deixem de ser laicos, a laicidade é o alicerce da liberdade religiosa. Estamos


\(^{205}\) Idem, ibidem, p. 203.
propondo que sejam ouvidos os lados envolvidos na questão. Com efeito, esse é um preceito básico do direito.

Envolver o maior número de atores internacionais interessados no processo é a única forma positiva, sem guerra, de algum resultado concreto.

As confissões religiosas tiveram de passar por todo um processo de adaptação, depois que deixaram de ser legitimadoras do Estado (laicização). Hoje, há um grande varejo de confissões. O fiel só permanece, dessa forma, por livre convicção. Portanto, as confissões religiosas têm uma aproximação maior na conscientização de seus fiéis. Exemplo disso são todas as entidades filantrópicas, de cunho religioso, que atuam na esfera internacional.

Da mesma forma, seria interessante a presença da sociedade civil leiga, que, como demonstramos, é atuante e pode contribuir com outro olhar sobre o tema, não deixando de ser uma das maiores interessadas.

Ao envolvermos o maior número de atores internacionais no processo desse tratado, aumentamos a possibilidade de seu cumprimento. Afinal, o direito internacional é um direito originário, construído, não havendo motivo para seus “construtores” fugirem ao combinado.

É uma proposta singela, podíamos denominá-la idealista. Mas é uma possibilidade de construção multilateral, universalista, de um tratado de direito internacional possível dentro da realidade atual.
CONCLUSÕES

1. O direito e a religião são áreas distintas do conhecimento. O direito é parte integrante da ciência humana, enquanto a religião é um sistema de fé, sistema solidário de crenças e de práticas que formam uma comunidade moral (Durkheim). Nos últimos duzentos anos, a religião tem sido estudada por aspectos científicos, contudo sua essência é a fé. Isto posto, verificamos que mesmo em campos distintos as duas matérias estão interligadas pelo fenômeno social. Ambas, o direito e a religião, têm um sujeito comum: o ser humano.

2. O homem é um ser religioso. E é preciso entender a condição humana e a sua relação com o sagrado, seus medos com relação à morte e transcendência para que se possa compreender o desenvolvimento da sociedade humana.

3. Na história da humanidade, a religião apresenta-se, intrinsecamente, ligada ao direito e ao poder político. Por vezes, sendo o principal instrumento legitimador de ambos, ou atuando como forma de (des)legitimá-los, a religião também se revela como instrumento ideológico, quando utilizada como objeto de manipulação de grupos governantes.

4. Contrastando com o desenvolvimento das instituições políticas da era medieval, o Estado moderno procura estabelecer uma separação entre política e religião, a partir da primazia do poder político sobre o poder religioso. Essa forma de separação foi objeto de estudo dos maiores expoentes do pensamento político moderno, tendo como principal instrumento a laicidade estatal.

São esses mesmos pensadores modernos que assinalam o surgimento da soberania e a aptidão da religião como autenticadora dessa soberania a serviço do Estado.

5. Junto ao Estado moderno, a reforma protestante e a secularização foram processos importantes na construção de um Estado em que o fator político é superior ao fator religioso.

A reforma protestante acarretou uma grande transformação no mapa sócio-político da Europa, no século XVI, rompendo o monopólio religioso da Igreja Católica
e promovendo uma nova ética protestante (Weber) que vai auxiliar os Estados capitalistas.

O movimento de secularização representa uma tendência da redução da força religiosa na fundamentação da relação política e social dos estados.

6. A paz de Westfália é um marco importante para o direito internacional. Ela encerra o conflito conhecido como a Guerra dos Trinta Anos, cujas origens estavam ligadas ao fenômeno da religião e ao exercício de sua liberdade. E inaugura uma nova concepção para os Estados, a soberania, a paz universal, o *pacta sunt servanda* e respeito aos tratados internacionais.

7. Um grupo de revoluções: Revolução Inglesa de 1689, ou Revolução Gloriosa; a Revolução Americana de 1776, Declaração de Direitos da Virginia; e com maior magnitude a Revolução Francesa de 1789 e sua Declaração Universal de Direitos dos Homens vai revolucionar os conceitos de direito. O direito se humaniza, e com ele a sociedade.

Os modelos constitucionais norte-americano e francês do final do século XVIII vêm demonstrar a concretização da supremacia estatal em relação às igrejas e à liberdade religiosa.

8. O século XIX nos traz um novo entendimento sobre soberania, relacionando-a não mais a um indivíduo, mas à função de Estado. E o Congresso de Viena vai, dente outras resoluções, indicar os princípios de direito internacional válidos até a primeira guerra mundial, já num outro século.


10. A laicização do Estado começa como uma exceção do Estado francês, que busca na laicidade uma maneira de separar Estado e religião de forma definitiva. Contudo, a laicidade não se limita ao Estado francês e ganha outros
Estados; é uma vocação existencial que se projeta além da história particular (Guy Coq).

11. A laicidade, a secularização e o laicismo não devem ser confundidos. Laicidade se origina do grego laós, que significa povo, e é a oposição ao religioso. Ela é um fenômeno político, e não um problema religioso, deriva da vontade do Estado, e não da religião. Secularização, por sua vez, é a perda da influência da religião no contexto político e social. Por fim, o laicismo é uma radicalização. É a ruptura da sociedade com a religião, o que não é desejável, visto que não pertence à natureza humana.

12. Para fins deste trabalho, dividimos a laicidade em três aspectos: a separação, a neutralidade e a tolerância. A separação significa que o Estado e a religião terão mútua liberdade, desde que em separado. Assim o Estado respeitará as confissões religiosas, só intervindo no rigor da ordem pública, ou seja, no limite do respeito de convivência entre os dois, fundamentados pela lei.

A neutralidade é um aspecto bastante complexo. Ela propõe que o Estado e a religião estejam separados e que o aquele se mantenha neutro, de igual forma, para todas as confissões religiosas existentes em seu seio, não importando se tais confissões são antigas ou novas, majoritárias ou minoritárias, não podendo beneficiar nenhuma delas. A complexidade, antes mencionada, vem exatamente deste ponto: as religiões tradicionais, que por muito tempo funcionaram como brações do Estado, sentem-se prejudicadas com essa falta de benefícios e terminam por se intrometer na vida política, através de bancadas partidárias formadas por seus fiéis. Temos de deixar claro que a neutralidade pretendida é um dever do Estado, e não das confissões religiosas.

A tolerância é o terceiro aspecto da laicidade e é o elo entre laicidade e liberdade religiosa. Tolerar era um princípio, uma condição moral, deduzida epistemologicamente a partir da incapacidade do entendimento humano de conhecer a verdade, especialmente em matéria religiosa (Bayle). A tolerância não é ideal por não se tratar de um direito constituído, sendo uma mera liberalidade concedida pelo poder político.
13. A intolerância é um conceito negativo, involutivo, produzido pela sociedade. Ela é detestável, porque traz à tona tudo de pior que o ser humano tem na sua essência. A intolerância nos revela o medo do diferente e a dificuldade de convivência. Ela foi o estopim das piores tragédias que vimos na história da humanidade.


15. O marco inicial para a construção da liberdade religiosa como um direito fundamental foi a Declaração Internacional de Direitos Humanos, de 1948. Essa declaração concebe a liberdade religiosa como o direito dos indivíduos de poderem escolher livremente uma religião, ou abster-se de fazê-lo (agnósticos), e da não interferência do poder político nos assuntos religiosos, tanto no plano individual como no plano das igrejas e confissões religiosas.


Primeiramente, formou-se a Organização das Nações Unidas com o objetivo de fomentar a segurança internacional e manter a recém-conquistada paz mundial. Em seu âmbito, foi criada a Declaração Internacional de Direitos Humanos e com ela o início dos direitos humanos internacionais.

17. Os direitos fundamentais são aqueles considerados básicos para todos os seres humanos, independentemente de condições especiais. São direitos que compõem um núcleo intangível de direitos dos seres humanos submetidos a determinada ordem jurídica.

18. O princípio da dignidade da pessoa humana reforça a lógica dos direitos fundamentais, no sentido de confirmar que é o Estado um meio a serviço de um fim
maior, que é o homem e sua singularidade. Por esse motivo, é o princípio da dignidade humana considerado o princípio-guia dos direitos humanos internacionais.

19. Para fins de estudo, dividem-se os direitos fundamentais em gerações. Cada geração foi formada em distinta época, daí a classificação. A primeira geração trata dos direitos individuais – direitos relativos à vida, à liberdade (direitos de personalidade), à propriedade, à inviolabilidade de domicílio (direito da intimidade), à liberdade de reunião e de associação, à segurança, à igualdade (liberdades públicas). Depois dela, a segunda geração trata dos direitos chamados metaíndividuais, coletivos ou difusos, com a consolidação do Estado liberal. A terceira geração, nos últimos três séculos, responsabilizar-se-ia por direitos de solidariedade, e a quarta geração, ou atual, dos direitos relacionados à comunicação. Nenhuma dessas gerações de direitos tem fim para o início de outra. Elas vão apenas se aperfeiçoando.

20. A liberdade religiosa é tratada no âmbito da primeira geração de direitos humanos fundamentais, por se tratar de liberdade individual. A liberdade religiosa é um corolário da liberdade de consciência, ou seja, é o fruto da possibilidade de um indivíduo tutelar juridicamente, qualquer que seja sua opção religiosa, sendo até mesmo, plausível, a incredulidade como opção.

21. A liberdade religiosa detém dois momentos distintos. O primeiro, intrínseco, é o momento íntimo de formação da convicção religiosa (consciência). O segundo, extrínseco, dá-se no direito de exposição de sua convicção (crença, culto), sendo permitido até mesmo o proselitismo. Sendo assim, a liberdade religiosa consiste nos direitos de liberdade de consciência, pensamento, não discriminação, liberdade de associação e reunião, liberdade de ir e vir, respeito às minorias.

22. Concordamos com Jónatas Machado quando afirma ser a liberdade religiosa a mãe de todas as liberdades.

23. Para atender à complexidade da liberdade religiosa, vamos separá-la em três partes: a liberdade de crença, a liberdade de culto e a liberdade de associação religiosa.
A liberdade de crença exige os dois momentos anteriormente mencionados: o da convicção interna, que melhor se define como liberdade de consciência, e o de exteriorização, liberdade de crença, propriamente dita. A liberdade de crença pode ser resumida na exposição daquilo em que se crê. Portanto, nesse momento, cabem várias formas de professar a fé, sendo elas silenciosas, como a oração, o jejum, ou coletivas, como os cultos, as pregações públicas, entre outras. As questões relativas aos problemas enfrentados por confissões religiosas e Estados laicos se dão nesse exato momento, quando na manifestação pública de fé as confissões religiosas terminam por ignorar os limites da ordem pública ou os Estados extrapolam seus poderes de intervenção.

Por liberdade de culto entendemos ser o direito de manifestar sua prática religiosa em um local convencionado, demonstrando em público a prática da liberdade religiosa. É um desdobramento da liberdade de crença, é o reforço da convicção exteriorizada.

A liberdade de organização religiosa, dentro de um Estado laico, é a possibilidade de demonstrar sua crença de forma organizada, sem a interferência do Estado, podendo determinar sua doutrina, seu culto, liturgias, empreender atividades beneficentes e arrecadatórias de fundos, estabelecer critérios de admissão e expulsão, bem como regras de comportamento, além de praticar o proselitismo e o ensino religioso. Concordamos com Casamasso quando ele afirma que, *quanto menor for a presença e interferência do Estado nessa esfera, maior será a liberdade das confissões religiosas para se organizarem*. Também aqui se encontram os maiores problemas, quando o Estado ou as confissões religiosas ultrapassam os limites preestabelecidos.

24. A segurança internacional não tem uma conceituação definida. O que pudemos concluir foi que a segurança é uma preocupação real para indivíduos, Estados (estes pensam mais do que nunca e conseguem fazer uma conceituação baseada em controle da segurança como função primordial do Estado) e sociedade internacional.

25. Mesmo sem um conceito comum, a segurança internacional é uma realidade. O desenvolvimento da ideia de segurança internacional vem acontecendo,
no âmbito da Organização das Nações Unidas, desde o fim da Segunda Guerra Mundial. Duas são as propostas principais sobre o tema da segurança internacional: a realista e a idealista.

Para a corrente realista, a segurança internacional deve ser tratada sob o enfoque da relação poder e força, e a soberania estatal, associada a princípios internacionais, de autodeterminação e não intervenção, garante ser dos Estados toda a legitimidade para tratar o tema de forma plena.

A corrente idealista discute o tema segurança internacional sob a égide da paz, acreditando ser um diálogo multilateral a única chance para o tema.

26. Apesar de imperfeita, identificamo-nos com a proposta idealista. A ideia de alcançar a segurança internacional, promovendo um diálogo multilateral amplo e garantidor de direitos e liberdades já construídas, é cativante, quiçá utópica.

27. Voltando à realidade do pós-guerra, deparamo-nos com um mundo dividido entre o capitalismo e o comunismo. A denominada Guerra Fria, juntamente com um subconceito de segurança internacional utilizado pelos realistas, cria uma aproximação do tema ao militarismo.

28. “O Dilema da Segurança”, este foi o nome dado à teoria desenvolvida por Herz, na década de 1950, para demonstrar que os esforços unilaterais de um Estado para garantir sua própria segurança nacional podem ser interpretados como elevação do nível de ameaça para outros Estados. Ao tomar medidas defensivas para sua própria segurança, os Estados acabam por promover a insegurança internacional, criando um círculo vicioso que nunca chega ao fim.


A autodeterminação é a garantia dada às soberanias de se autoconstituírem. O princípio de não intervenção tem interação direta com a autodeterminação; cada Estado se autoconstitui, sendo vedado qualquer tipo de intervenção por parte de
outro Estado. Existem duas exceções possíveis: ameaça à paz mundial e legítima defesa. O terceiro princípio é o da solução pacífica de controvérsias, que proclama que todos os Estados-membros da Organização das Nações Unidas devem buscar resolver seus problemas através de meios pacíficos.


31. O Conselho de Segurança é o órgão mais importante da Organização das Nações Unidas quando o assunto é segurança internacional. Ele é o detentor do poder de polícia na referida Organização. O Conselho tem muitos problemas, sendo o principal sua composição permanente, que não corresponde ao princípio da igualdade.

32. Se o *jus cogens* é possível para o direito internacional, ele vai encontrar sua força executória dentro do Conselho de Segurança e suas resoluções. Ainda nos restam dúvidas quanto ser a utilização do *jus cogens* a melhor saída para as ações internacionais no assunto de segurança internacional. Mas sendo preciso, é o Conselho de Segurança o órgão legítimo para sua execução.

33. Qualquer tentativa de mudança desse Conselho nos parece distante, principalmente agora com o anúncio de uma nova ameaça à paz e à segurança internacionais: o terrorismo.

34. O terrorismo é um grande mal para humanidade. Sempre existiu e sempre foi um problema. Agora, porém, nos parece pior. Não estamos medindo o mal; isso seria impossível. Constatamos que, por conta do fenômeno da globalização e da massificação das comunicações, o mundo se tornou uma aldeia, difundindo a ideia do terror em proporções exponenciais.

35. Se até agora os temas do homem religioso, de laicidade, da liberdade religiosa e da segurança internacional pudessem parecer desconexos, é o terrorismo a linha que alinhava nosso trabalho.

36. O medo imposto pelo terror à sociedade internacional é latente e precisa ser discutido.
37. Na natureza, quando os animais se sentem ameaçados, existem basicamente duas reações instintivas: a primeira é o recolhimento: os animais se escondem para se proteger. A segunda é o ataque, também com a intenção da proteção. Da mesma forma natural reagem os Estados diante de um ataque terrorista. Recolhem-se, aumentando, de forma aparente, sua proteção, e depois atacam, também em busca dessa pretensa defesa. Quando começamos este trabalho, mencionamos que o que nos diferencia, seres humanos, dos demais seres vivos deste planeta é o ato de pensar. Pensar para escolher nossos caminhos, pensar para definir em que acreditam. Então não seria melhor, diante de um ataque terrorista, pensar e alcançar em definitivo uma solução para a insegurança internacional? Foi refletindo sobre isso que passamos às ponderações de desafios e perspectivas para alcançar a segurança internacional, mantendo a liberdade e os direitos humanos construídos até aqui.

38. Destacamos cinco situações centrais que devem ser pensadas com relação ao tema de segurança internacional e a manutenção dos direitos e liberdades, em especial a religiosa, construídos. São elas: universalismo x relativismo cultural; laicidade x fundamentalismo religioso; respeito à diversidade x intolerância; combate ao terror x preservação de direitos e liberdade religiosa; unilateralismo x multilateralismo: fortalecimento do Estado de direito internacional e a construção da paz mundial, mediante a valorização dos direitos humanos.

39. Existem duas formas de interpretação dos direitos humanos. O relativismo cultural e o universalismo. O primeiro conceitua que o homem deve ser compreendido através do ambiente de sua inserção, devendo ser observadas suas práticas sociais e culturais. Analisada essa perspectiva, os direitos humanos deveriam acompanhar as características sociais e culturais de cada indivíduo. Essa interpretação faz muitas críticas ao universalismo, entre elas a de que ele homogeneiza a sociedade internacional de uma forma simplória.

O universalismo indica que os direitos humanos são decorrentes da dignidade da pessoa humana. São direitos essenciais à condição humana, e pertencem a um homem livre, que pode, por si só, definir seus paradigmas. A Declaração de Viena, de 1993, validou a ideia universalista dos direitos humanos.
40. O respeito à diversidade versus intolerância é um dos grandes desafios a ser enfrentado; mais uma vez não é uma questão de valoração, e sim a constatação de que respeitar a diversidade e impedir indivíduos de serem intolerantes não se resume a implementar uma lei, é uma questão de educação. É preciso construir o referencial de que ser diferente é bom, que se toda a humanidade fosse igual seria entediante. Com relação à intolerância, além de edificar um conceito por meio da educação, deveríamos manter uma memória coletiva de aonde a intolerância pode nos levar enquanto humanidade. Hannah Arendt nos lembra o quanto banal pode ser o mal.

41. O combate ao terror versus a proteção de direitos e liberdade religiosa. A cada desafio que propusemos, a dificuldade nos assola. Como combater o terrorismo e, ainda, preservarmos os direitos e a liberdade religiosa construídos. Não existe uma solução fácil para esse desafio. O que podemos traçar é o caminho no qual acreditamos. O terrorismo não é constituído só do ataque físico. O pior do terrorismo é o medo produzido por ele que nos impregna. Já dissemos antes que, instintivamente, ou nos recolhemos ou atacamos depois de um ataque. E também que o que nos faz diferentes dos outros seres é o ato do pensamento. Assim, o caminho que perseguimos é o da manutenção das liberdades, principalmente da religiosa, que nos possibilita escolher em que acreditar. É claro que a segurança internacional é importante, e que o fundamentalismo não vai se extinguir em pouco tempo, mas o caminho a seguir não pode ser o do exterminio. A escolha que fizemos é acreditar que o direito internacional pode procurar uma solução através de uma ação de diálogo multilateral.

42. Na proposta inicial deste estudo, nosso questionamento central era o quanto de direitos e liberdades conquistadas estaríamos dispostos a perder em nome da segurança. Agora, próximos do final deste trabalho, respondemos com convicção que não estamos dispostos a perder nenhuma liberdade e nenhum direito, principalmente a liberdade de acreditar.

43. Com a presença de um terrorismo internacional de cunho religioso, a primeira medida dos Estados é, em nome da pretensa segurança, cercear as liberdades, entre elas a religiosa.
44. Acreditamos que a única possibilidade que temos, como sociedade internacional, de não sucumbir diante do medo e da manipulação governamental em relação a ele é propor um diálogo internacional multilateral de cooperação para possibilitar uma solução, sem que esta seja uma nova guerra.

45. No mundo atual não existe nenhum sujeito internacional melhor que a Organização das Nações Unidas para conduzir uma proposta de diálogo. Sabemos de suas imperfeições, de suas fragilidades, mas também reconhecemos seu sucesso em evitar uma guerra.

46. Ainda em defesa dos direitos de todos, inclusive dos que pensam diferente de nós, ficamos com as palavras de Voltaire: eu discordo do que você diz, mas defenderei até a morte o seu direito de dizê-lo. E lembrando das palavras de Clarence Darrow, se começarmos agora a cercear os direitos e a liberdade religiosa, daqui a um pouco estaremos vivendo novamente num tempo de inquições.

47. A reaproximação da sociedade com o fator religioso não é um fato estranho. Começamos este trabalho a partir da ótica do homem como ser religioso. O flerte com valores religiosos, no começo deste século, pode ser encarado como parte dos ciclos humanos.

48. A valorização do multilateralismo e da sociedade internacional livre nos conduzirá a um caminho de construção positiva.

49. Nossa proposta de um tratado internacional, alinhavado pela Organização das Nações Unidas, com a participação de mais atores internacionais além dos Estados, provém do anseio de solucionar o dilema da liberdade religiosa e da segurança internacional da forma mais rápida, eficiente e pacífica possível.

50. Consideramos que a presença das confissões religiosas e seus líderes num tratado dessa monta só seria benéfica. E não seria agressiva a laicidade, por não se tratar de uma mudança para os Estados constituidos. Com efeito, quando discutimos a questão da laicidade, deixamos clara a sua importância, falamos de sua gradação. Essa gradação, que já existe dentro da prática estatal (não existem Estados totalmente laicos), seria também utilizada na concepção internacional.
51. As confissões religiosas têm um apelo significativo com relação aos seus fiéis, podendo promover o proposto tratado de uma forma eficaz.

52. A participação da sociedade civil leiga é fundamental, como contrapeso, dentro do tratado proposto. É a visão mais próxima de uma imparcialidade, uma vez que esse tema é complexo e de interesse comum.

53. Quanto maior o número de atores envolvidos, maior se verifica a chance de o tratado proposto funcionar. São princípios básicos do direito internacional ser originário e ser feito para funcionar: *pacta sunt servanda*.

54. O terrorismo é criminoso, tenha ele qualquer base ideológica. Logo, a proposta apresentada por nós não propõe um diálogo com o terror.

55. A tese proposta não vem de encontro ao direito internacional, ela é uma aprimoração deste, sem que haja a necessidade de ruptura do tecido internacional existente.
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**ANEXO 1 – Quadro explicativo – Direito romano**

| Indistinção ius-fas-mos. |  |
| A Lei das XII Tábuas (c. 450 a.C.) |  |

| Época clássica (130 a.C. – 230 d.C.) | • Expedientes do pretor baseados no *imperium*: ex. a *stipulatio praetoria*, as *restitutiones in integrum* (obmetum, obdolum, oberrorem, obaetatem), os interdicta possessoria (uti possidetis, unde vi). Expedientes baseados na *iurisdicção* (depois da *Lex Aebutia de formulis*, c. 130 a.C.): • *action espraetoriae* (in factum conceptae, utiles); a fórmula (*Titiusiudex esto. Si paret Nume - Siparet Nume* *Negidiu Aulo Ageriocentumdareopor -tere, condemnato. Si non paret, absolvito); • *exceptiones*. |
| Ascensão e auge do direito pretório (*ius praetorium est quod praetores introduserunt adiuvandivel corrigendivel supplendi iuris civilis gratia propter utilitatem publicam, Papinianus, D.,1,1,7,1*). Decadência do direito pretório: • a ossificação do direito pretório – o *Edictum perpetuum* (130 d.C.); • a generalização da cidadania romana (com Caracala, 212 d.C.). A inventiva doutrinal (*iurisprudentia*): *non ex regula iussumatur, sedexiure quod est regula fiat*. |

| Época pós-clássica (230-530) Vulgarização: |
| • Oficialização (lei e critérios oficiais de valorização da doutrina); • Codificação. Helenização. | A eficácia disciplinar do direito legislado: • centralização; • generalidade; • codificação (*Codex Theodosianus*, 438 d.C.) A ratificação imperial (<*imperium*) da autoridade (*auctoritas*) dos juristas: o *ius respondendi ex auctoritate principis* (Augusto, c. 25 a.C.); a equiparação da doutrina à lei (Adriano, c. 120 d.C.); a Lei das Citações (426 d.C.). |

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ANEXO 2 – Quadro explicativo – Estado e religião

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<tbody>
<tr>
<td>A) Identificação entre Estado e religião, entre comunidade política e comunidade religiosa (Estado confessional)</td>
<td>Com domínio do poder religioso sobre o poder político</td>
<td>– teocracia – cesaropapismo</td>
</tr>
<tr>
<td></td>
<td>Com domínio do poder político sobre o poder religioso</td>
<td></td>
</tr>
<tr>
<td>B) Não identificação (Estado laico)</td>
<td>Com união entre o Estado e uma confissão religiosa (religião do Estado)</td>
<td>União com ascendentes de um dos poderes sobre o outro</td>
</tr>
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<td>• Clericalismo (ascendente do poder religioso) • Regalismo (ascendente do poder político)</td>
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<td>União com autonomia relativa</td>
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<td>Separação relativa (com tratamento especial ou privilegiado de uma religião)</td>
</tr>
<tr>
<td>C) Oposição do Estado à religião</td>
<td>Com separação</td>
<td>Separação absoluta (com igualdade absoluta das confissões religiosas)</td>
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<tr>
<td></td>
<td>Oposição relativa</td>
<td>– Estado laicista</td>
</tr>
<tr>
<td></td>
<td>Oposição absoluta</td>
<td>– Estado ateu (ou de confessionalidade negativa)</td>
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Clarence Darrow’s Most Famous Trial

By 1925 Clarence Darrow was already one of the most well-known attorneys, if not the most famous in the country, because of several important cases. He first became known nationally to some extent during the Pullman strike in 1894, and much more so with the Haywood trial in 1907. Three years later the Los Angeles Times bombing, in which twenty-one people were murdered, was front page news across the country. Darrow’s fame grew when he was hired to defend the McNamara brothers, who were charged with the bombing.

Darrow’s defense in the McNamara case led to his indictment and trial for jury bribery in two separate trials. He repaired his reputation and continued practicing law and taking on some controversial cases. Darrow was also well known to the public because of his writings and frequent speeches, debates and pronouncements on various social issues of the day. But it was the Leopold and Loeb case in 1924 that propelled Darrow into the national headlines more than any of his previous cases. The case garnered interest around the country and even worldwide. Just a year later, the Scopes trial would surpass even the Leopold and Loeb case in public interest and lasting impact. It would ensure Darrow’s reputation as the most famous lawyer of his day, and one of the most famous in American history.

Key Players

Scopes Defense Team

**Clarence Darrow:** At the age of sixty-eight, Darrow was at the pinnacle of his career and likely the most famous lawyer in the United States. His participation in the Scopes trial came less than a year after his defense of Leopold and Loeb, in which he saved them from the death penalty in the “trial of the century.” Darrow would gain even greater fame during the Scopes trial. Darrow was a very vocal critic of religion and an ardent believer in science. He often called himself an agnostic, although he could easily be seen as an atheist. Upon learning that William Jennings Bryan volunteered to help the prosecution, Darrow volunteered to help defend John Scopes.
Arthur Garfield Hays: Newly appointed as general counsel for the fledgling ACLU (American Civil Liberties Union), Hays was a very successful attorney who did extensive legal work for civil liberty causes he believed in. About a year after the Scopes trial, he would team up with Darrow in the Sweet murder trials in Detroit. Hays would also later defend Sacco and Vanzetti.

Dudley Field Malone: Malone was a successful lawyer who specialized in international divorces for wealthy clients. He was also Third Assistant Secretary for William Jennings Bryan when Bryan was Secretary of State for Woodrow Wilson. Malone gained a note of respect from courtroom observers for keeping his suit coat on during the trial despite the searing temperature in the courtroom. He only took off his coat when delivering his famous speech. Malone’s stirring speech for freedom was regarded by many as the best of the entire trial.

John R. Neal: Neal was actually the official chief counsel for the defense, with Darrow and the others acting as assistant counsel. Neal was an eccentric law professor and a determined advocate for civil liberties issues.

Neal obtained an M.A. and a law degree from Vanderbilt University, and a Ph.D. in history from Columbia University. He then went to Colorado and taught law at the University of Denver before returning to Tennessee in 1907. Back in Tennessee, Neal won election to the Tennessee General Assembly. Two years later, he won election to the Tennessee Senate. In 1917, Neal was hired to teach at the University of Tennessee College of Law.

As a law professor, Neal was liked by his students, but his eccentric personality irked the school’s administration. He failed to turn in grades on time and even failed to grade some exams. He told one class that they would all get a grade of 90 without taking an exam, and anyone who objected could take the exam. He often missed class and when he did show up he focused more on discussion of current events than teaching law.

Significantly, during the appeal to the Tennessee Supreme Court Neil failed to file the defense’s bill of exceptions on time. This upset much of the defense planning for the appeal because they were unable to appeal the trial court’s ruling excluding the defense’s expert testimony from biblical scholars and scientists.

John Scopes: Scopes was a relatively new teacher at the Rhea county high school where he had just completed his first year of teaching. He taught general science and coached the football team. Later, Scopes confirmed that he never actually taught evolution, but agreed to be the defendant for the test case because he disagreed with the anti-evolution law.

Scopes was born in Paducah, Kentucky in 1900. His family lived in Danville, Illinois for two years before moving to Salem, Illinois, where Scopes graduated from high school. Interestingly, Salem, Illinois is also the birthplace of William Jennings Bryan. Bryan
would later give the commencement address at Scopes’ high school graduation ceremony.

Scopes was well-suited to be the defendant challenging the Butler Act. He was well-liked, quiet and not confrontational, and although he believed in evolution and opposed the Butler Act, he did not display contempt for religion. Because Scopes was from out of town, single, and not otherwise tied to Dayton, he did not have to risk alienating neighbors and family as might have been the case for a lifelong Dayton native.

Scopes Prosecution Team

**William Jennings Bryan:** As a leader of the antievolution movement, Bryan offered to assist the prosecution during the Scopes trial. In the early 1900s, Bryan had become increasingly alarmed about the teaching of evolution in public schools and what he perceived to be the application of the “survival of the fittest” doctrine in society. He believed that the theory of evolution if applied to society could be used by the more powerful to justify marginalizing the powerless. Bryan also believed that adherence to this theory led to German militancy and contributed to the slaughter of World War I. By 1921, Bryan was one of the leading critics of evolution in the United States. However, Bryan’s stance was more nuanced as he was mainly against teaching evolution in public schools at taxpayer expense. As Bryan and many of his followers viewed the issue, it was unfair that the Bible and Christianity could not be taught in public schools along with evolution. Taxpayers were paying for the very instruction they believed was undermining children’s faith in their parents’ religion. Bryan was also against teaching evolution as fact instead of just theory.

Bryan served as the 41st United States Secretary of State under President Woodrow Wilson. Originally trained as a lawyer, he had not practiced for about thirty years prior to the Scopes trial. Bryan is considered one of the most effective public speakers in the history of the United States. Politically, he held many views that would be considered populist; he was a member of the Democratic Party and also a devout Christian.

**William Jennings Bryan Jr.:** Bryan Jr. was the only son of William Jennings Bryan. He studied law at Georgetown University, and after becoming a lawyer, served as Assistant U.S. Attorney for the District of Arizona from 1915-1920 and as a Regent of the University of Arizona. In 1921 he moved to Los Angeles to practice law. Bryan Jr. was appointed to be the Collector of Customs for the port of Los Angeles by President Roosevelt in 1938 and was reappointed for four terms in this position. He also served as the federal commissioner for the San Francisco Exposition of 1939.

**Ben G. McKenzie:** Ben McKenzie, a retired Tennessee attorney general, joined his son on the prosecution team. Initially, McKenzie’s style and humor rankled the defense, but they soon came to like him and Darrow came to be very good friends with McKenzie over the course of the trial. As the oldest attorney in the trial, he was greatly affected by the heat in the courtroom, which caused him to faint once and nearly faint again. This prompted Dudley Field Malone on the defense team to come to his aid and even offer to
pay for the installation of electric fans. McKenzie was referred to by the title of “Colonel” throughout the trial because of his previous position as an attorney general.

**Gordon McKenzie:** Gordon was the son of Ben G. McKenzie. A Dayton attorney, he supported the anti-evolution law on religious grounds.

**Herbert E. Hicks:** Herbert Hicks was recently appointed the acting Rhea County attorney. Along with his brother Sue Hicks, he agreed to prosecute John Scopes for teaching evolution in violation of Tennessee’s newly enacted anti-evolution law.

**Sue Hicks:** Sue Hicks was named after his mother, who died at his birth. A graduate of Hiwasee College and the University of Kentucky, Sue Hicks was practicing law in Dayton, Tennessee with his brother Herbert E. Hicks, the recently appointed acting Rhea County attorney, when the Tennessee antievolution law was passed and the controversy arose. Sue Hicks participated in the plan to challenge the Tennessee antievolution statute and agreed to prosecute his friend John Scopes. Supposedly, the Johnny Cash song “A boy named Sue” was based on Sue Hicks’ name.

Sue Hicks later served as a judge in Tennessee and remained interested in the issues involved within the Scopes Trial. He was greatly upset by the movie *Inherit the Wind*, which he considered a travesty of the Scopes trial. His family had to dissuade him from buying television time to set the story straight.

**Tom Stewart:** Because Stewart was the state attorney general for Tennessee’s eighteenth judicial district where Rhea County was located, he served as the lead prosecutor. He fought hard to limit the case by opposing the defense’s introduction of expert witnesses on evolution and the Bible, hoping instead to focus on whether John Scopes taught evolution and thus violated the Butler Act. Stewart engaged in most of the legal arguments for the prosecution.

Stewart later served as a Democratic United States Senator, representing Tennessee from 1939 to 1949.

**Others**

**Judge John Raulston:** As the Eighteenth Circuit Court judge, Raulston eagerly anticipated presiding over what he knew would be the most important case in his legal career. Notably, Raulston was an ordained Methodist minister. Prior to the Scopes trial, a large part of Judge Raulston’s criminal trial work involved trials for bootlegging whiskey. Few judges have presided over a trial with such historical significance – especially when compared to their former trial experience.

**George Rappleyea:** Rappleyea was the prime instigator in challenging the Butler Act, Tennessee’s antievolution law. He believed that such a trial would generate publicity and tourism for Dayton, Tennessee, which was suffering economically. Rappleyea was a civil engineer who came from New York to Dayton to manage ironworks in the area for out-
of-state owners. He and others hatched the plan to challenge the law after he saw an ACLU advertisement in a newspaper offering to defend anyone in Tennessee who would challenge the law. Although not an attorney, he was an open supporter of Scopes, hosted defense lawyers and expert witnesses, and often sat with the defense team during the trial.

**Frank E. “Doc” Robinson:** Several Dayton residents decided to challenge Tennessee’s anti-evolution statute while talking in Robinson’s drugstore. Robinson and several others helped persuade John Scopes to be the defendant who would be charged with violating the law.

**Walter White:** White was a school superintendent who participated in the plan to have John Scopes challenge the anti-evolution statute. White would later replace George Rappleyea as the person bringing the complaint against Scopes.

**H.L. Mencken (Henry Louis) (1880–1956):** Mencken was editor of the *American Mercury* and reporter for *The Baltimore Sun*. Mencken was an iconoclast who wrote scathing attacks against the South and religion; he covered the trial for the *Baltimore Sun*. Mencken is generally credited with coining the phrase “Bible Belt” to describe the South where religious fundamentalists were influential. Prepared to find Dayton just as he envisioned it, he told his readers, “The town, I confess, greatly surprised me. I expected to find a squalid Southern village, with darkies snoozing on the houseblocks, pigs rooting under the houses and the inhabitants full of hookworm and malaria. What I found was a country town of charm and even beauty.”

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**Significant Figures Not Directly Involved in the Scopes Trial**

**Charles Robert Darwin (1809–1882)**: Born in Shrewsbury, Shropshire, England, Charles Darwin was not an atheist and described himself as an agnostic.

Darwin’s eventual fame grew largely out of his years spent as naturalist aboard the H.M.S. Beagle during an expedition to explore the South American coast in 1831-1836. Darwin was recommended for the expedition by a professor of botany at Cambridge, John Stevens Henslow. Darwin’s most famous work and the work most responsible for starting the evolution controversy is *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*, which is usually abbreviated as *On the Origin of Species*. It was published in 1859 when Darwin was 50 years old.

Adding to the controversy was Darwin’s *The Descent of Man*. Published in 1871, the book argued that Darwin’s evolutionary theory applied to man just as it did to the animal kingdom. Thus, man was influenced by natural selection.

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1 H.L. Mencken, *Mencken Finds Daytonians Full of Sickening Doubts About Value of Publicity*, *Baltimore Evening Sun*, July 9, 1925, at 1. Note that several sources quote the word “horseblocks” instead of “houseblocks.”

**Thomas Henry Huxley (1825–1895):** Huxley was an English biologist. He was such a determined advocate of Charles Darwin's theory of evolution that he was known as "Darwin's Bulldog."

**Antievolutionists**

**William Bell Riley:** As a prominent minister of the First Baptist Church in Minneapolis, Riley was one of the most outspoken opponents of evolution. He founded the interdenominational World Christian Fundamentals Association (WCFA) in 1919. When he neared retirement, Riley picked a young evangelist named Billy Graham to replace him. Riley’s influence was substantial:

> It is difficult to overstate William Bell Riley’s importance to the early fundamentalist movement . . . . Riley founded and directed the first interdenominational organization of fundamentalists, served as an active leader of the fundamentalist faction in the Northern Baptist Convention, edited a variety of fundamentalist periodicals, wrote innumerable books and articles and pamphlets (including . . . a forty-volume exposition of the entire Bible), presided over a fundamentalist Bible school and its expanding network of churches, and masterminded a fundamentalist takeover of the Minnesota Baptist Convention. Besides all this, in these years William Bell Riley also established himself as one of the leading antievolutionists in America.³

**Billy Sunday:** Before his conversion at the Pacific Garden Mission in Chicago in 1891, Sunday was a very successful professional baseball player with the Chicago White Stockings. Sunday left professional baseball and devoted himself to full-time Christian work beginning at Chicago's YMCA, and then working for itinerant evangelists. In 1896, he began his own career as a preacher and became one of the most dynamic and successful evangelists in the country. It is estimated that over his lifetime, Sunday preached to over 100 million people without the aid of loudspeakers, radio or television.

Sunday is most famous for his “Sawdust Trail” preaching circuit, in which he traveled the country and spoke in temporary wooden structures or tabernacles, with sawdust covering the floor. Sunday urged his audience to trust Christ and they walked up the sawdust covered aisles to shake his hand. Sunday was also an ardent prohibitionist stating in his “Booze” sermon that “I am the sworn, eternal and uncompromising enemy of the liquor traffic. I have been, and will go on, fighting that damnable, dirty, rotten business with all the power at my command. I shall ask no quarter from that gang, and they shall get none from me.”

**T.T. Martin (Thomas Theodore Martin):** In 1920, Martin became prominent in the anti-evolution movement in North Carolina when he attacked the President of Wake Forest College, William Louis Poteat, in a series of articles. In 1923, he wrote *Hell and the High Schools*, a vehement attack on teaching the theory of evolution that portrayed

evolutionist teachers as worse than war criminals. Martin was a vocal presence in Dayton during the Scopes trial, where he sold copies of his book *Hell and the High Schools*.

Martin held important leadership positions in national anti-evolution organizations, including the Anti-Evolution League of America and the Bible Crusaders of America. He participated in the successful campaign to enact anti-evolution legislation in Mississippi and in 1926 traveled to North Carolina to help fight to ban the teaching of evolution in public schools.

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**William Jennings Bryan and the Anti-evolution Movement**

Since he was so influential in the anti-evolution movement and the Scopes trial, it is useful to understand how Bryan became involved in this social and legal controversy. During his more than four decades of public life, William Jennings Bryan was a formidable presence both as a religious speaker and as a major political figure. Bryan was the Democratic nominee for president in 1896, 1900, and 1908. Although he never won the presidency, he did receive between 45 and 48 percent of the popular vote. Bryan was also a former U.S. Secretary of State and a renowned speaker on various social and religious issues.

**Concern about Evolution Being Taught in Schools**

Deeply religious, Bryan became increasingly alarmed about the influence of Darwin’s theory of evolution and its impact on students in public schools and society in general. Although the controversy between evolution and religion had been going on for decades, and Bryan had long been suspicious of the theory of evolution, it was not until 1904 that he publicly addressed Darwin’s theory. But it would be almost another two decades before he became sufficiently concerned to make it a focus of his speaking and writing. In 1919, he gave a speech in Baltimore entitled “Back to God” in which he briefly discussed the threat posed by Darwin’s theory, which elicited a positive reaction from his audience. A decisive event occurred in 1921 when he read a book published five years previously titled *The Belief in God and Immortality*, by James H. Leuba, a psychology professor. Leuba demonstrated that a college education greatly reduced the religious beliefs that students held before attending college. Leuba also noted that very few scientists believed in God. The belief that teaching the theory of evolution in schools undermined the religious faith of students made a powerful impact on Bryan and many others.

In his autobiography, Darrow writes about the impact of Leuba’s work on Bryan:

Mr. Bryan's attention was called to a book by Professor James H. Leuba, in which he stated that more than half of the instructors of modern institutions of learning are agnostics. This caused Mr. Bryan considerable anguish, so for several years he made a point of speaking in university towns and propounding a series of
questions to professors and presidents of our schools of learning--questions concerning the origin of man, which could easily have been answered if the teachers had only looked at the first and second chapters of Genesis, by which Mr. Bryan marked the examination-papers of the instructors.

The more Mr. Bryan thought about this subject, the more excited he became. The children must be saved from the infidelity of the teachers and professors. Strange how anxious old folk are apt to be over "the children." The main reason for this is that children do not act like the old people. Mr. Bryan, being orthodox in his views, of course thought that the proper remedy in the premises was to "pass a law." This shows the psychology of a fundamentalist compared with the citizens of the effete monarchies of Europe, who have never even considered passing a law against teaching evolution.4

Influence of World War I

Another decisive factor that turned Bryan into an avowed opponent of Darwin’s theory was the mass slaughter of World War I. Bryan deplored the massive loss of life that resulted from the war. Mystified as to how “supposedly Christian nations could engage in such a brutal war,” Bryan found answers in two books which identified “misguided Darwinian thinking” as the problem.5 In Headquarters Nights, Vernon Kellogg, a well respected zoologist at Stanford University, described his experiences as a peace worker in post-war Germany during which he met German military leaders. First published in the Atlantic Monthly in 1917,

[Kellogg’s work] made explicit the association of Darwinian theory, especially the depiction of nature as struggle, with German war ideology during World War I. Kellogg’s anti-Darwinian and anti-German rhetoric influenced a number of biologists who sought to counteract the negative connotations of Darwinian theory.6

In The Science of Power, the philosopher Benjamin Kidd explored how Darwin’s theory influenced German philosopher Friedrich Nietzsche, and how this was tied to German war making.7 Bryan came to believe that German militancy was the logical result of the application of Darwin’s theory of evolution to nation states. He saw Germany’s rise to military power and subsequent use of that power as driven by notions of the survival of the fittest, in which the strong would rule over or eliminate the weak by military force.

True Threat Posed by the Theory of Evolution

4 CLARENCE DARROW, THE STORY OF MY LIFE 245–46 (Charles Scribner’s Sons 1932) [hereinafter STORY OF MY LIFE].
5 EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA’S CONTINUING DEBATE OVER SCIENCE AND RELIGION 40 (Basic Books 1997) [hereinafter SUMMER FOR THE GODS].
7 SUMMER FOR THE GODS, supra note 5, at 40.
These factors were enough to convince Bryan that the theory of evolution was far more
dangerous than he previously believed. In 1922 he composed a more complete criticism
of the theory in his lecture “The Menace of Darwinism.” Bryan later published this
lecture and mailed thousands of copies around the country. Bryan’s distrust of the theory
of evolution grew until he came to believe it to be the number one threat to America. He
vigorously denounced the doctrine in speeches around the country. Bryan’s concerns
about the dangers of the theory of evolution as applied to the human race were similar to
earlier criticisms of the theory, in which “[m]any attacks were leveled at the effects of
Darwinism rather than on the merits of the theory per se.”

**Taxpayers Should not be Forced to Support Destructive Teaching**

Especially galling to Bryan was the use of taxpayer dollars to support public institutions
where a small cadre of elites taught evolution. As Bryan saw it, this doctrine denied the
religious beliefs of millions of parents whose tax money was paying these same teachers’
salaries. Bryan also thought it absolutely unfair that the theory of evolution was being
taught to children who could not be taught about the Bible and religious beliefs. He
became actively involved in the drive to enact state legislation prohibiting the teaching of
evolution in public schools, and soon was the most visible proponent of state anti-
has a little irresponsible oligarchy of self-styled intellectuals to demand control of the
schools of the United States in which twenty-five millions [sic] of children are being
educated at an annual expense of ten billions of dollars?”

As a leader in the anti-evolution movement, “Bryan was indispensable, bringing to it not
only his name recognition and reputation, but also his astonishing energy.” Starting in
1921, he spoke to audiences across the country and in 1923 he was invited to speak in
support of anti-evolution legislation before eight state legislatures. He also
communicated his message to millions of his followers through publication of his beliefs
in books, pamphlets and news columns syndicated around the country.

Although Bryan was an effective opponent of the theory of evolution, he was not a strict
constructionist of the Bible like many other anti-evolutionists. Bryan did not interpret the
Genesis story of creation and other Bible stories literally word for word as did many
fundamentalists. He subscribed to the “day-age” theory of creation under which the days
contained in Genesis could represent very long geological epochs perhaps lasting
millions of years. The image of Bryan and some other fundamentalists is more
complicated than that commonly portrayed:

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8 Kenneth K. Bailey, The Enactment of Tennessee’s Anti-Evolution Law 9 (June 13, 1949) (unpublished
9 WALTER LIPPMANN, AMERICAN INQUISITORS: A COMMENTARY ON DAYTON 12-13 (1928) [hereinafter
COMMENTARY ON DAYTON].
10 MICHAEL LIENESCH, IN THE BEGINNING: FUNDAMENTALISM, THE SCOPES TRIAL, AND THE MAKING OF
THE ANTI-EVOLUTION MOVEMENT 127 (2007) [hereinafter IN THE BEGINNING].
11 Id.
By the late nineteenth century even the most conservative Christian apologists readily conceded that the Bible allowed for an ancient earth and pre-Edenic life. With few exceptions, they accommodated the findings of historical geology either by interpreting the days of Genesis 1 to represent vast ages in the history of the earth (the so-called day-age theory) or by separating a creation “in the beginning” from a much later Edenic creation in six literal days (the gap theory). Either way, they could defend the accuracy of the Bible while simultaneously embracing the latest geological and paleontological discoveries. William Jennings Bryan, the much misunderstood leader of the post–World War I antievolution crusade, not only read the Mosaic “days” as geological “ages” but allowed for the possibility of organic evolution—so long as it did not impinge on the supernatural origin of Adam and Eve.12

Although Bryan was greatly alarmed at what he perceived as the evil effects of teaching the theory of evolution to students, his views were tempered:

[I]n private, he confided to correspondents that he personally believed evolution to be true, at least for plants and animals, though not for human beings. Moreover, he always insisted that evolution should be taught in schools, though as theory rather than fact, and alongside rather than instead of creationist accounts. At no time did he endorse serious penalties for violation of any antievolution law.13

Bryan’s less militant anti-evolution beliefs would later cause him trouble in the Scopes trial. Bryan would be caught between his own more moderate views and the views of many of his supporters. Mainly through the actions of Clarence Darrow during the trial, Bryan would be forced to defend a literal interpretation of the Bible which left no room for the theory of evolution, but instead made Bryan appear an uneducated fundamentalist. When he tried to avoid this by giving nuanced answers about a literal interpretation of the Bible, Bryan antagonized many of his fundamentalist followers who viewed him as abandoning the literal interpretation of the Bible which underpinned their faith.

The Campaign to Enact Anti-Evolution Laws in the States

The anti-evolution controversy in Tennessee was part of a much larger anti-evolution campaign. Concerned that the theory of evolution was being taught in public schools, a movement grew to influence state legislatures to prohibit the teaching of the theory in taxpayer-supported public schools. Most sources identify the anti-evolution campaign’s first victory in getting a state anti-evolution law enacted as Oklahoma in 1923. Passage was achieved by tying an anti-evolution amendment to a bill to provide free textbooks to students. The bill prohibited the inclusion of Darwin’s theory in the textbooks. It was a limited victory because it only pertained to textbooks for the first through eighth grades,

13 IN THE BEGINNING, supra note 10, at 128.
which normally did not contain information on evolution anyway. Nonetheless, Bryan saw it as a positive achievement and one worth emulating in other states.

One source\(^1\) states that on March 5, 1921, the state of Utah passed a law that was in part aimed at the theory of evolution. The law made it “unlawful to teach in any of the district schools of this state while in session, any atheistic, infidel, sectarian, religious, or denominational doctrine and all such schools shall be free from sectarian control.”\(^2\) The statute did allow “moral instruction tending to impress upon the minds of the pupils . . . good manners, truthfulness, temperance, purity, patriotism, and industry” as long as it was given as part of the regular school work.

Sources differ somewhat in describing how many states had proposed anti-evolution legislation and which states actually passed anti-evolution laws during the 1920s. One source states that even with strong anti-evolution sentiment in the South, such bills were defeated in Oklahoma, Arkansas, Missouri, Georgia, South Carolina, North Carolina, West Virginia, Minnesota, New Hampshire and Kentucky during the 1920s.\(^3\) A few southern states took a different approach with the state boards of education in North Carolina, Georgia and Texas issuing rulings that restricted the teaching of evolution.\(^4\) Another source states that prior to Tennessee’s enactment of an anti-evolution statute in 1925, only Oklahoma and Florida had banned the teaching of evolution.\(^5\) In Florida, the legislature, heavily influenced by William Jennings Bryan, passed a concurrent resolution which was not legally binding and therefore provided no legal punishment for violations. According to another source, anti-evolution bills were introduced in 37 state legislatures from 1921 to 1929, with only three of these states actually enacting anti-evolution laws – Mississippi in 1926, Arkansas in 1928 and Texas in 1929.\(^6\) This list of three states must be in addition to Tennessee in 1925. Yet another source states that during the mid-1920s there were “no fewer than forty-five antievolution bills” introduced in twenty-one states.\(^7\) Of this number, the five southern states of Oklahoma, Florida, Tennessee, Mississippi, and Arkansas, would pass anti-evolution statutes.\(^8\) The number of actual anti-evolution laws passed could easily have been higher, as several bills were defeated by a single vote. Out of the several states that passed such laws, it appears that Tennessee’s “was the strongest. It banned the teaching of Darwinism in any public school.”\(^9\)

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\(^{14}\) Id. at 121.

\(^{15}\) ALVIN W. JOHNSON, THE LEGAL STATUS OF CHURCH-STATE RELATIONSHIPS IN THE UNITED STATES: WITH SPECIAL REFERENCE TO THE PUBLIC SCHOOLS 216 (1934).

\(^{16}\) 1921 Utah Laws Ch. 95.

\(^{17}\) Kenneth K. Bailey, The Enactment of Tennessee’s Antievolution Law, 16 J.S. Hist. 472, 473 n.4 (1950) [hereinafter Bailey, Tennessee’s Antievolution Law].

\(^{18}\) Id. at 472.

\(^{19}\) MARVIN OLASKY & JOHN PERRY, MONKEY BUSINESS: THE TRUE STORY OF THE SCOPES TRIAL 8 (Broadman & Hollman 2005) [hereinafter MONKEY BUSINESS].


\(^{21}\) IN THE BEGINNING, supra note 10, at 115.

\(^{22}\) Id.

Kentucky

In 1921, Kentucky became a hotbed of anti-evolution activity, mainly through the actions of John W. Porter, pastor of the First Baptist Church of Lexington. Porter reached many of his followers through the Baptist publication *The Western Reporter* for which he occasionally served as editor.\(^{24}\) Porter was instrumental in bringing William Bell Riley to Kentucky, and Riley would eventually make twenty-two visits to the state in his ongoing battle against evolution.\(^{25}\) On January 19, 1922, William Jennings Bryan came to Kentucky to support the battle, speaking to large numbers of Kentuckians and giving a speech to a joint session of the Kentucky legislature. In addition, ordinary citizens of Kentucky were very active, and put pressure on the state legislature. A focal point of the anti-evolution campaign was a proposal promoted by University President Dr. Frank L. McVey to significantly enlarge the University of Kentucky. Many citizens were concerned that the taxpayer funded University was teaching the theory of evolution and destroying the religious faith of students.

On January 23, 1922, a bill was introduced in the Kentucky House that would “prohibit the teaching in public schools and other public institutions of learning, Darwinism, atheism, agnosticism or evolution as it pertains to the origin of man.”\(^{26}\) If enacted, the bill would become a criminal statute with fairly significant penalties. Anyone convicted would be “fined not less than fifty nor more than five thousand dollars or confined in the county jail not less than ten days nor more than twelve months, or both fined and imprisoned in the discretion of the jury.”\(^{27}\) The bill would also penalize public schools that “knowingly or willingly teach or permit to be taught” the same prohibited subjects, and any institution convicted would forfeit its charter and be fined not more than five thousand dollars.

Two days later, Senate bill 136 was introduced to prohibit the teaching in public schools of “any theory of evolution that derives man from the brute or any other form of life, or that eliminates God as the creator of man by a direct creative act.”\(^{28}\) The bill banned textbooks containing the prohibited theories. It was less punitive because it did not include any jail sentence, with punishment a fine of “not less than fifty dollars and nor more than one thousand dollars.” However, any teacher convicted would “forfeit his position and place as such teacher or instructor and [would] be entitled to no salary, either past or future.”

University of Kentucky President McVey became the main opponent of the anti-evolutionist legislation. McVey sounded the alarm by contacting university leaders,

\(^{24}\) IN THE BEGINNING, *supra* note 10, at 123.

\(^{25}\) Id. at 124–25.


\(^{27}\) Id. at 230.

\(^{28}\) S. 136, Gen. Assem. (Ky. 1922).
educators and scientists around the country to inform them of the events in Kentucky. Some did not take the threat seriously, including Nicholas Murray Butler, president of Columbia University. McVey was concerned enough that he basically worked full-time to defeat the legislation. He not only worked at getting support in the state legislature and from university alumni, he also worked with church leaders.

McVey’s most important ally became E.Y. Mullins, president of the Southern Baptist Convention, who was “perhaps the best-known Southern Baptist of his day,” and a strong believer in the importance of separation between church and state. Along with E.L. Powell, pastor of the First Christian Church in Louisville, Mullins proposed a legislative substitute that did not mention evolution. This substitute would allow evolution to be taught but prohibit teachers from attempting to destroy their students’ religious beliefs. Under the bill, no teacher could “directly or indirectly attack or assail or seek to undermine or weaken or destroy the religious beliefs and convictions of pupils” in public schools. Although President McVey opposed the bill as an intrusion into personal liberty and academic freedom, the Mullins compromise actually helped McVey’s cause. When it was introduced into the Kentucky Senate, the compromise bill divided legislative support. McVey ultimately triumphed because the Senate anti-evolution bill never made it out of committee and the House bill was defeated by a vote of 42 to 41.

Despite the loss, Bryan viewed it as a moral victory and informed J.W. Porter that such a close vote boded well for the movement, which would soon prevail across the nation and “drive Darwinism from our schools.” Interestingly, the agitation against teaching the theory of evolution in schools generated significant interest in learning about evolution. A contemporary account of the battle in Kentucky states:

[T]he controversy greatly stimulated investigation, thought, and discussion of all subjects which have any bearing on evolution. There has been so much demand for the works of Darwin, works on biology, and on geology that it has been almost impossible to secure any of these in the public libraries. In the second place, the term evolution has lost much of its objectionable connotation as the public has become better informed. It is not so much of a scare-term as it was a few months ago.

Florida

It was in his adopted state of Florida that Bryan had the most influence on a state legislature grappling with the evolution controversy. He and his wife had spent a significant part of their time in Florida since 1912. By 1923, Bryan had enough influence

29 Id. at 125.
30 IN THE BEGINNING, supra note 10, at 126.
31 Id.
32 Id.
33 Id. at 126-27.
34 Fortune, supra note 26, at 235.
with those in political power in the Florida legislature to get a resolution introduced in the Florida House denouncing the teaching of evolution in public schools. The House passed the resolution and the Senate concurred. Significantly, this was a resolution - so it did not have the force and effect of law. This was in keeping with Bryan’s beliefs about the controversy because even though he viewed the teaching of evolution in public schools as a threat, he actually favored a much less restrictive and less punitive approach to dealing with it. In fact, it was Bryan who suggested the language for Florida’s non-binding resolution:

That is the sense of the legislature of the state of Florida that it is improper and subversive to the best interest of the people of this state for any professor, teacher, or instructor in the public schools and colleges of this state, supported in whole or in part by public taxation, to teach or permit to be taught atheism or agnosticism, or to teach as true Darwinism, or any other hypothesis that links man in blood relationship to any other form of life.  

Tennessee

By 1923, some members of the Tennessee legislature were sufficiently concerned about the teaching of Darwin’s theory of evolution in Tennessee schools to take action. On March 16, 1923, Senator Whitfield introduced a bill that would prohibit teaching “certain hypotheses in institutions of learning (Atheism, Darwinism, and ‘such theories’).” The bill was referred to the Education Committee. On the same day, Senator Rhodes introduced a joint resolution acknowledging Whitfield’s bill and inviting William Jennings Bryan to address a joint session of the Tennessee legislature on the evolution issue. The resolution passed the Senate and was sent to the House. Three days later, Representative Haynie introduced a bill into the House that would prohibit teaching in public schools any “hypothesis that links man in blood relationship to any other form of life.” The bill easily passed the House and was sent to the Committee on Education.

Although it seemed there was support for both bills, just a few days later, the Education Committees in both houses issued adverse reports after reviewing the bills. The same day, the House tabled the joint resolution invitation to Bryan. Several newspapers did voice criticism of the proposed legislation, but surprisingly the Memphis Commercial Appeal, a conservative Tennessee newspaper, hardly mentioned the anti-evolution action in the legislature. Unlike in Kentucky the year before, there was not an organized effort to enact legislation prohibiting the teaching of evolution in Tennessee in 1923.

\[35\] H.R. Con. Res. 7, at 2200-01 (Fla. 1923).
\[36\] Anti-Evolution Law thesis, supra note 8, at 76 (citing Senate Journal of the Sixty-Third General Assembly of the State of Tennessee 599 (Nashville 1923)).
\[37\] Id. at 77.
\[38\] Id. at 77–78 (citing House Journal of the Sixty-Third General Assembly of the State of Tennessee 666 (Nashville 1923)). This quote refers to H.R. 947.
\[39\] Id. at 78.
\[40\] Id.
The lack of concerted effort to enact anti-evolution legislation in Tennessee proved to be temporary. In 1924, W.B. Marr, a Tennessee attorney, invited Bryan to speak in Nashville. Bryan accepted Marr’s invitation and on January 24, 1925, Bryan delivered a strong rebuke to evolution with his speech “Is the Bible True?” As he would often do, Bryan emphasized that evolution was a theory and not a fact. Numerous members of Tennessee society were in attendance, including Governor Austin Peay. Bryan’s speech was published and a group of his followers sent copies around the state. The next year when anti-evolution bills were introduced in the Tennessee legislature, Marr sent five hundred copies of Bryan’s speech to the legislature.

“The Public Welfare Requiring It” – The Butler Act (Tennessee’s Anti-Evolution Statute)

On January 20, 1925, Senator John A. Shelton introduced a bill that would make it a felony to teach the theory of evolution in Tennessee public schools. A Methodist, lawyer, and Democratic politician, Shelton was also an admirer of Bryan and was likewise concerned about the effects of teaching evolution on religious beliefs. After introducing his bill, Shelton wrote to Bryan informing him of the proposed legislation. Bryan replied with approval but suggested that the penalty provision be dropped to make it easier to pass; he believed that if a penalty provision was needed, one could be added later. Bryan emphasized to Shelton, “The special thing that I want to suggest is that it is better not to have a penalty” because “our opponents, not being able to oppose the measure on its merits, are always trying to find something that will divert attention, and the penalty furnishes the excuse . . . . The second reason is that we are dealing with an educated class that is supposed to respect the law.”

The day after Shelton introduced his bill, John Washington Butler introduced an anti-evolution bill into the Tennessee House. Butler was a Macon County farmer and member of the Primitive Baptist Church. Butler became concerned about the theory of evolution in 1921 when a preacher told him of a young local woman who had attended a university and returned having lost her faith, now believing in evolution instead of God. This greatly alarmed Butler and he decided to run for the state legislature in order to fight the teaching of evolution in public schools. Butler was not the only one shocked to discover that teaching evolution in schools could undermine students’ religious faith. Indeed, this was one of the major concerns for the whole anti-evolution movement. Butler was elected although he did not initially propose legislation banning the teaching of evolution. When Butler ran for a second term he pledged to introduce anti-evolution legislation, and he defeated his opponent who did not address the issue by a ten to one margin.

The first three sections of the Butler bill, which constitute most of the bill, provide:

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41 MONKEY BUSINESS, supra note 19, at 22.
42 Anti-Evolution Law thesis, supra note 8, at 83.
43 Bailey, Tennessee’s Antievolution Law, supra note 17, at 475–76.
44 SUMMER FOR THE GODS, supra note 5, at 54 (citing William Jennings Bryan Papers, William Jennings Bryan to John A. Shelton (Feb. 9, 1925) (Library of Congress, Washington, D.C. 1925)).
45 Anti-Evolution Law thesis, supra note 8, at 85.
AN ACT prohibiting the teaching of the Evolution Theory in all the Universities, Normals and all other public schools of Tennessee, which are supported in whole or in part by the public school funds of the State, and to provide penalties for the violations thereof.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be unlawful for any teacher in any of the Universities, Normals and all other public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.

Section 2. Be it further enacted, That any teacher found guilty of the violation of this Act, Shall be guilty of a misdemeanor and upon conviction, shall be fined not less than One Hundred $ (100.00) Dollars nor more than Five Hundred ($ 500.00) Dollars for each offense.

Butler’s inclusion of a penalty provision would later prove crucial:

With no penalty, of course, there would be no martyrs to the cause of freedom—and no Scopes trial—simply obstinate schoolteachers flaunting the public will. Bryan could foresee the public relations impact of both courses. On the brink of victory, however, Tennessee crusaders ignored his words of caution.

Shelton’s bill was rejected by the Senate’s judiciary committee because “it would not be the part of wisdom for the legislature to pass laws that even remotely affected the question of religious belief.” Most committee members thought it better to leave the issue to school boards and some questioned the constitutionality of such legislation. Butler’s bill fared better in the House. It was referred to the Committee on Education, which recommended it for passage on January 23. Six days later, the entire House approved the bill by a vote of 71 to five with five House members present but not voting on the measure.

Although the anti-evolution bill was popular, it was not supported by everyone in Tennessee. The most interesting criticism after the House vote came from an unexpected source. The pastor of the First Methodist Church in Columbia, Dr. Richard Owenby, sharply criticized the Tennessee legislators. Owenby would have made Darrow proud with the scorn he heaped on them. In a sermon, Owenby told his congregation that the legislators were “making monkeys of themselves at the rate of 71 to 5.” He did not

\[\text{\footnotesize 46 An Act to Prohibit the Teaching of Evolution in all Schools in the State, H.R. 185, 64th Gen. Assem., Reg. Sess. (Tenn. 1925).} \]
\[\text{\footnotesize 47 SUMMER FOR THE GODS, supra note 5, at 54.} \]
\[\text{\footnotesize 48 Anti-Evolution Law thesis, supra note 8, at 86–87.} \]
\[\text{\footnotesize 49 Id. at 87.} \]
\[\text{\footnotesize 50 Bailey, Tennessee’s Antievolution Law, supra note 17, at 476.} \]
\[\text{\footnotesize 51 Anti-Evolution Law thesis, supra note 8, at 89.} \]
think a state legislature “could possibly devise a more asinine performance” and he told
his audience that “the missing link . . . might be found near Capital Hill.”52 Along with
his criticism he called on the Tennessee Senate to defeat the bill.

A member of the Tennessee House was in the congregation during the sermon and
accounts of it were published in two newspapers, the Nashville Tennessean and the
Columbia Herald. Owenby’s sermon was so critical it prompted the Tennessee House to
pass a resolution officially condemning his remarks as “unfair, unchristianlike and
unpatriotic.”53 While some legislators thought it best to ignore Owenby’s remarks, others
thought they should respond. The resolution passed with at least one of the five
representatives who voted against the Butler bill voting in favor of the resolution
criticizing Owenby.54

When the Butler bill was sent over to the Senate, some believed that it would be
defeated.55 This appeared to be the case when the Senate Judiciary Committee rejected it
as it had done with Shelton’s bill.56 When the bill was read for the third and final time on
the Senate floor, one of the opponents of the bill moved that it be tabled. But in a
significant act, the speaker of the Senate, Lew D. Hill, rose and gave an impassioned plea
for passage of the bill. Hill cited support for the bill that he had received from women
around the state and the teacher’s association. At this point, Senator McGinness, the
Chairman of the Judiciary Committee that had rejected the bill, suggested that
consideration of the bill be delayed for five days, a request which was granted.

After the five day delay, Senator McGinness asked for another delay and requested that
both the Shelton and Butler bills be referred back to the Judiciary Committee so they
could be reconciled. This delay was also granted, and just four days later the legislature
adjourned for a four-week recess.57 This gave anti-evolution proponents ample time to
mount pressure on the Tennessee legislature to enact the bill. After the recess, the Senate
judiciary committee reversed its position on the Butler bill and recommended it for
enactment.58 On March 13, the Butler bill was debated for three hours in the Senate. One
of the senators, poking fun at the bill, offered an amendment to "prohibit the teaching that
the earth is round," but Speaker Hill ruled it out of order as not being germane.59 Another
senator opposed to the bill stated that after listening to three hours of debate on it he was
convinced that “we did come from monkeys.”60

Despite these humorous comments, many of the Senators’ constituents held very strong
religious beliefs and supported the bill, so there was true debate. The leading opponent,
Senator Giles Evans of Fayetteville, made arguments very similar to if not identical to

52 Id.
53 Id.
54 Id. at 90.
55 Id.
56 Bailey, Tennessee’s Antievolution Law, supra note 17, at 478.
57 Anti-Evolution Law thesis, supra note 8, at 95.
58 Bailey, Tennessee’s Antievolution Law, supra note 17 at 480.
59 Id. at 480–81.
60 Anti-Evolution Law thesis, supra note 8, at 103.
some of the arguments that the Scopes defense would make during the trial. Senator Evans argued that the theory of evolution did not conflict with a liberal interpretation of the Bible: “I say that the theory of evolution does no violence to the Biblical story of the origin of man.”61 Evans also read a petition signed by numerous religious leaders from around the state that urged the legislature to reject the bill. Senator Cecil Sims argued against the bill on constitutional grounds.

It is commonly believed that the Tennessee legislature in 1925 was dominated by simple, uneducated farmers who tended towards religious fundamentalism. This stems from John Butler’s background as a Primitive Baptist with little formal education. It is believed that Butler had only four years of formal education; the white illiteracy rate in his home county of Macon was twenty-two percent, which meant that Macon had the second lowest literacy rate in Tennessee.62 However:

Of the 98 members of the House of Representatives, 42, or less than half professed to be full or part-time farmers. In the Senate, 4 of the 33 senators were full-time farmers, with two more professing to be part-time farmers. . . . There was only one Primitive Baptist other than Butler in the General Assembly; Methodists were the most numerous, followed by Baptists and Presbyterians, respectively. In occupation and religion, Butler did not typify the General Assembly of 1925.63

**Governor Peay**

A final vote was taken and by a vote of 24 to six, the Senate followed the House in approving the bill. It was sent to Governor Peay to either sign or veto it. There was a great deal of speculation about what Governor Peay would do with the bill. He did meet with a delegation of citizens opposed to the bill and he also received many thousands of letters urging him to either sign or veto it. Politically, a Governor Peay needed legislative support for his agenda which included an important education bill, a very important factor that may have weighed on his decision. A veto would anger some legislators and many citizens of Tennessee who were in favor of anti-evolution legislation. In addition, both the Tennessee House and Senate had passed the bill with veto-proof majorities.

Given these political realities, on March 21, 1925, Governor Peay signed into law the bill which has become known as the Butler Act.64 Given the considerable interest in the controversy, Governor Peay provided a signing statement:

> Because of the unusual interest which has been manifested in . . . the “Anti-Evolution Bill,” I ask to spread on your journals, the following statement in reference to this bill. Many earnest and interesting communications have been


62 Anti-Evolution Law thesis, supra note 8, at 84.


64 The Tennessee Anti-Evolution Act, 1925 Tenn. Pub. Acts ch. 27.
received regarding it. As might be expected, many of these approved the bill and many of them disapproved it. Freedom of religion and strict separation of church and state are fixed principles in this country. This bill should be rejected if it contravenes either proposition. In my judgment, it does neither.65

Then to show that the Tennessee Constitution “records the belief of our people in God and a future life,” Governor Peay quoted from the Article 9, Section 3: “No person who denies the being of God or a future state of rewards and punishment, shall hold any office in the Civil Department of this State.”

For Peay as for Bryan, the rewards and punishments were found in revealed religion:

By what laws shall the rewards and punishments be meted to us in the future state? Obviously, the answer must be by those laws, which God has revealed to us. And the further answer must be that His laws have been revealed to us in the Holy Bible, if at all. It is this Bible which orders our conduct and by which we shall be judged for rewards or punishment in the future state. Therefore, our civil institutions under our constitution, are directly related to the Bible, and our whole scheme of government is inseparably connected with it by this provision in our organic law.66

Peay then moved to the public schools:

The minds of children are moulded and taught in these schools. Since our Constitution has recognized God, and if the Bible is His holy word directly governing our relationship to the future state of rewards and punishments, how is it possible for our school system to omit all attention to the Bible and to wholly ignore it? It is manifestly impossible.67

Peay then quoted from a 1915 Tennessee law that required ten verses of the Bible to be read “without comment” every day in every public school. Given the importance of the Bible, the need for the Butler Act was obvious because “the very integrity of the Bible in its statement of man’s divine creation, is denied by any theory that man descended or has ascended from any lower order of animals.”68 The Butler Act “does no more than provide that such integrity shall not be negativene in the minds of our children on the fundamental point of man’s Divine creation.”69 This only made sense since by law the Bible had to be read in Tennessee public schools.

Peay spoke for many fundamentalists when he declared that something very wrong was happening in the country:

65 Austin Peay, Message from the Governor (Mar. 23, 1925), in TENN. HOUSE OF REPRESENTATIVES, HOUSE JOURNAL 741-42 (1925 Reg. Sess.).
66 Id. at 742.
67 Id.
68 Id. at 743.
69 Id.
Right or wrong, there is a deep and wide-spread belief that something is shaking the fundamentals of the country, both in religion and morals. It is the opinion of many that an abandonment of the old fashioned faith and belief in the Bible, is our trouble in large degree.  

Concluding, Peay envisioned the Butler Act as a symbolic protest:

After a careful examination, I can find nothing of consequence in the books now being taught in our schools with which this bill will interfere in the slightest manner. Therefore, it will not put our teachers in any jeopardy. Probably the law will never be applied. It may not be sufficiently definite to permit of any specific application or enforcement. Nobody believes that it is going to be an active statute. But this bill is a distinct protest against an irreligious tendency to exalt so called science, and deny the Bible in some schools and quarters—a tendency fundamentally wrong and fatally mischievous in its effects on our children, our institutions and our country.

A critical factor that helped in the passage of the Butler Act was its exclusive application to public schools. The bill was strongly supported by many citizens of Tennessee because they did not want their tax money funding instruction of a doctrine to their children that they believed directly contradicted their religious beliefs. This was a central theme of the anti-evolution movement that was championed by Bryan. As for the Tennessee legislature, “evidence indicates that most legislative supporters of the measure did not regard their action as an attempt to regulate what an individual might think, but rather as a step to control the action of employees of the state.” It is important to note that the statute was not a blanket prohibition because it expressly applied only to “public schools of th[e] State which [we]re supported in whole or in part by the public school funds of the State . . . .”

Thomas Jefferson and William Jennings Bryan

The influential journalist Walter Lippmann commented on the Scopes trial three years later, comparing Bryan and the fundamentalists’ arguments to the views of Thomas Jefferson about religion and government. Lippmann was not at all on the side of the anti-evolutionists but he did take seriously their concerns and arguments. Lippmann examined Jefferson’s Bill for Establishing Religious Freedom drafted in 1779 which was enacted into law with barely any changes by the Virginia General Assembly in 1786. Lippmann described the law, called The Virginia Act For Establishing Religious Freedom, as “the first law ever passed by a popular assembly giving perfect freedom of

70 Id. at 744.
71 Id. at 745.
72 Bailey, Tennessee’s Antievolution Law, supra note 17, at 490.
conscience, and by common consent it is regarded as one of the great charters of human liberty.”75 Lippmann compared this law to Tennessee’s Butler Act and concluded that:

No two laws could be further apart in spirit and in purpose than these two. And yet at one point there is a strange agreement between them. On one vital matter both laws appeal to the same principle although they aim at diametrically opposite ends.

Lippmann focused on Jefferson’s words in a particular part of The Virginia Act: “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”76 In analyzing the Butler Act, Lippmann wrote:

You will note that the Tennessee statute does not prohibit the teaching of the evolution theory in Tennessee. It merely prohibits the teaching of that theory in schools which the people of Tennessee are compelled by law to contribute money. Jefferson had said that it was sinful and tyrannical to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves. The Tennessee legislators representing the people of their state were merely applying this principle. They disbelieved in the evolution theory, and they set out to free their constituents of the sinful and tyrannical compulsion to pay for the propagation of an opinion which they disbelieved.77

Comparing Jefferson and Bryan, Lippmann wrote:

One hundred and forty years later, the political leader who in his generation professed to be Jefferson’s most loyal disciple, asked whether, if it is wrong to compel people to support a creed they disbelieve, it is not also wrong to compel them to support teaching which impugns the creed in which they do believe. Jefferson had insisted that the people should not have to pay for the teaching of Anglicanism. Mr. Bryan asked why they should be made to pay for the teaching of agnosticism.78

Interestingly, Darrow would write that “[o]f all the political leaders of the past, Thomas Jefferson made the strongest appeal to me.”79 John Scopes called William Jennings Bryan “the greatest man produced in the United States since Thomas Jefferson.”

### Generating a Controversy - Setting the Stage for the Scopes Trial

The American Civil Liberties Union (ACLU) had been monitoring developments around the country looking for violations of civil liberties. The ACLU was looking for legal battles that would give the obscure organization, formed just five years earlier, a chance

75 COMMENTARY ON DAYTON, supra note 9, at 14.
76 The Virginia Act For Establishing Religious Freedom.
77 COMMENTARY ON DAYTON, supra note 9, at 12.
78 Id. at 14.
79 STORY OF MY LIFE, supra note 4, at 284.
to gain public attention. The ACLU leadership was aware of the anti-evolution movement and soon learned that Tennessee had passed an anti-evolution law. They immediately saw that the Tennessee statute could provide a test case for academic freedom. They wanted to challenge the law by taking a case to federal court and perhaps ultimately have the statute declared unconstitutional by the United States Supreme Court. The group advertised in Tennessee newspapers for someone willing to break the law and then receive legal support from the ACLU.

A mining engineer in Dayton, Tennessee named George Rappleyea, who was originally from New York, saw the ACLU advertisement in the May 4th edition of the Chattanooga Times:

We are looking for a Tennessee teacher who is willing to accept our services in testing this law in the courts. Our lawyers think a friendly test case can be arranged without costing a teacher his or her job. Distinguished counsel have volunteered their services. All we need now is a willing client.80

After seeing the ACLU ad, Rappleyea decided he also wanted to challenge the law in a test case. But Rappalyea had a different motive. He wanted to stir up a controversy that would bring visitors to Dayton where they would hopefully spend money, because the town badly needed an economic boost. Dayton, located in Rhea County, Tennessee is about 36 miles north of Chattanooga, 80 miles south of Knoxville and 139 miles southeast of Nashville. Since the 1890s the town had suffered a loss of jobs as well as population.

Rappalyea went to Robinson’s Drugstore located on the main street of Dayton. The drugstore was a social hub in a town where adult entertainment and socializing was curtailed by prohibition. The drugstore was owned by Frank E. “Doc” Robinson who was also the chairman of the Rhea County School Board. Robinson and School Superintendent Walter White were present in the store. Rappleyea brought the ACLU ad to Robinson’s attention because he knew Robinson was also interested in generating publicity for Dayton. Both Robinson and White came to think Rappleyea had a good idea. Later Rappleyea contacted the ACLU and confirmed that they would support a challenge to the Butler Act.

At about this point in the retelling of the Scopes trial legend there are several different versions of exactly how events unfolded. As a 2005 source puts it, “[t]he exact order of events that followed over the next few days, and even details of the events themselves, have been retold, reinterpreted, and spun to the point where no definitive account clearly emerges from the historical mist.”81 Despite the numerous versions, the following description drawn mainly from Scopes’ autobiography contains some of the generally agreed upon details.

A Willing Client

80 Some references call it the Chattanooga Daily Times.
81 MONKEY BUSINESS, supra note 19, at 12.
The next day Rappalyea went back to Robinson’s Drugstore and met Doc Robinson. They brought the issue of challenging the Butler Act up with others there including Mr. Brady, who ran the other Dayton drug store, Sue Hicks, a city attorney considered the “town’s leading lawyer,” and another attorney named Wallace Haggard. A different version of the events places Sue Hicks’ brother Herbert at the scene as well. In any event, the Hicks brothers agreed to prosecute if they could find a teacher who had taught evolution during the brief time between when the anti-evolution law was enacted and the end of the school year. Haggard agreed to assist the prosecution. Central High School was the only high school in Rhea County, so their defendant would have to be a teacher at that school. They decided to contact W.F. Ferguson, the high school principal, who was also the biology teacher. Ferguson quickly turned down the invitation, as he was worried it would adversely affect his job. At some point, someone mentioned a 24-year old local high school teacher and football coach named John Scopes as a possible challenger. Rappalyea and Scopes knew each other, having met on a number of occasions in the small town, and Scopes had even attended two parties at Rappleyea’s home during his time in Dayton. The group sent a young boy to fetch Scopes who was playing tennis with some of his students.

When Scopes arrived at Robinson’s Drugstore, Rappalyea told him about their discussion. Rappalyea got right to the point and stated that the group had concluded it was impossible to teach biology without also teaching the theory of evolution. Scopes agreed with this logic. Robinson’s Drugstore also sold school textbooks and on a nearby shelf Scopes found a copy of the biology textbook used in Tennessee high schools, *A Civic Biology: Presented in Problems* by George W. Hunter. Rappalyea asked Scopes if he had ever used the book in class. Scopes was not a biology teacher but he had filled in part-time on occasion for Ferguson, the regular biology teacher. Scopes said he had used Hunter’s book during those times for review purposes. Robinson then told Scopes that he had violated the anti-evolution law. Scopes recounted in 1967, “I didn’t know, technically, whether I had violated the law or not. I knew of the Butler Act; I’d never worried about it . . . . I assumed that if anyone had broken the law it was more likely to have been Mr. Ferguson.”

Hunter’s textbook at the center of the controversy was “the state-approved text, prescribed for use in all Tennessee high schools.”82 It was also “the best-selling text in the field….“83 Darrow later quipped in his autobiography, “[i]t seems strange that the Dayton school board did not adopt the first and second chapters of Genesis as a modern textbook on biology.”84

Doc Robinson showed Scopes the ACLU ad in the Chattanooga News and asked if he would agree to become a defendant to challenge the law in a test case. Reflecting on this moment over forty years later, Scopes wrote, “I realized that the best time to scotch the snake is when it starts to wiggle. The snake already had been wiggling a good long

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82 SUMMER FOR THE GODS, supra note 5, at 90.
83 Id. at 23.
84 STORY OF MY LIFE, supra note 4, at 248.
time.” Implied that it was not clear that he had actually violated the Butler Act, Scopes replied to Robinson and the others present, “[i]f you can prove that I’ve taught evolution, and that I can qualify as a defendant, then I’ll be willing to stand trial.”

None of the planners who had summoned Scopes to the drugstore were actually concerned about whether Scopes had actually taught evolution. Robinson, as chairman of the school board, telephoned the Chattanooga News to inform them that they had arrested a teacher for teaching evolution. Not realizing what he had gotten himself into, Scopes left to finish his tennis match. The ACLU was also informed and they promised to publicize the news and provide financial and legal support. Rappalyea was first named as the prosecutor in the sense that he claimed that Scopes had violated the Butler Act. Later, Walter White would take Rappleyea’s place. Eager for publicity, Rappleyea went so far as to contact the famous British writer H. G. Wells to ask him to help defend Scopes, but Wells declined.

Scopes would write in his 1967 autobiography:

If I had been the regular biology teacher at Rhea County Central High School I wouldn’t have let the law restrict my teaching the truth. How could I have, considering my environmental influences? My father had read to me from Charles Darwin’s *Origin of Species, Descent of Man*, and *The Voyage of the Beagle*, which I had then finished reading myself, and, although not a trained scholar, I thought Darwin was right.

A 1959 thesis about the case states that before the conversation with Scopes about whether he had taught evolution, White went to the law office of the Hicks brothers, Herbert and Sue, who were serving as city attorneys. White, as Superintendent of Schools, said he had a legal question for them. White asked if they thought that he should send out a questionnaire to all former and prospective teachers to find out their views about the theory of evolution before he did any re-hiring. Sue Hicks responded that this was a difficult question and since no one had an actual copy of the new law nor did anyone know how it would be interpreted or enforced, White could ignore it for now. According to this source, it was at this point that White and the Hicks brothers decided to go to Robinson’s drug store for refreshments. Soon after they arrived, Rappleyea came to the drugstore with John Scopes. Then the conversation turned to the anti-evolution bill and whether Scopes had violated it.

According to this version, Scopes said you could not teach Hunter’s Biology textbook without violating the new law. Sue Hicks, who was a friend of Scopes, looked through Hunter’s Biology text and said, “[i]f you taught that you violated the law and we could

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86 Id. at 60.
87 Id. at 53.
89 Id. at 59-60.
prosecute you. What about it Scopes[?][90] Scopes replied, “I don’t care. Go ahead.”[91] Robinson then said, “Well, you can get John Godsey to defend you, and these boys and Wallace Haggard can prosecute you.”[92] Then Sue Hicks wrote out a warrant and Rappleyea went in search of a justice of the peace; he immediately found Bert Wilbur for the job. They agreed to meet a week later after they had time to get a copy of the Butler Act and read it. Rappleyea then signed the complaint and went and found a constable, Perry Swafford, to serve the warrant. According to this version, the Chattanooga Times was called but whoever answered did not convey enough enthusiasm or did not realize the significance of the situation, so the Nashville Banner was contacted. It was the Banner that first ran with the story. The Associated Press and other news services published the story and within twenty-four hours it became news nationwide. The ACLU had succeeded in getting their test case, but it would be far different than the one they planned on.

The first lawyer to offer his services to Scopes was John R. Neal. Neal was a former law professor at the University of Tennessee who lost his job after fifteen years; he had also served two terms in the Tennessee legislature.93 Scopes recalled that soon after news of his arrest spread, he was called to the Hotel Aqua in town where someone was waiting to meet him. When Scopes arrived, Neal came up to him and shook his hand, saying, “[b]oy, I am interested in your case and, whether you want me or not, I’m going to be here. I’ll be available twenty-four hours a day.”94 Scopes quickly became very fond of Neal. Scopes noticed, as did others, Neal’s eccentricity but he quickly learned to look beyond it. Scopes wrote in his autobiography that Neal was “one of the warmest-hearted men I have ever known.”95 Scopes also considered Neal’s “coming to Dayton one of the fortunate things that happened to me that summer.”96

On May 9, Scopes attended his preliminary hearing, where he was represented by John Neal and John Godsey. He was bound over for a grand jury set for August. Scopes soon left Tennessee and went back to Kentucky to visit his family. On May 25, a special grand jury was called by local judge John T. Raulston to speed up the legal process - so that no other Tennessee city could create a test case and steal Dayton’s chance at fame. During the grand jury hearing, three of Scopes’ students testified that he had taught evolution (Scopes recalled that seven of his students testified). The grand jury indicted Scopes for violating the Butler Act. He was arrested as a formality but was not detained. Scopes’ bail was set at $500 and paid by the owner of the Baltimore Sun newspaper.

**Bryan and Darrow**

Bryan was a lawyer who had not practiced for decades. Most accounts of the Scopes trial state that Bryan volunteered to assist the prosecution in the upcoming trial. But in

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90 Id. at 60.
91 Id.
92 Id. at 60-61.
93 MONKEY BUSINESS, supra note 19, at 18.
94 CENTER OF THE STORM, supra note 85, at 63.
95 Id. at 63.
96 Id. at 64.
Bryan’s autobiography (finished by his wife Mary Baird Bryan) is a reprinted letter from Sue Hicks of the Dayton prosecution team that shows Bryan was asked to join the prosecution. The letter, written on May 14, 1925, states in part:

We have been trying to get in touch with you by wire to ask you to become associated with us in the prosecution of the case of the State against J.T. Scopes . . . We will consider it a great honor to have you with us in this prosecution. We will have no difficulty in obtaining the consent of the attorney general and the circuit judge for you to appear in the case. . . . we will send you a copy of the text book taught in the school and a copy of the statute under which we are prosecuting Scopes.97

Whatever the actual facts of how Bryan got involved, it was Bryan’s entry into the controversy that caught the attention of Clarence Darrow.

Interestingly, Darrow and Bryan were on the same side of most political and social issues in earlier times. During the 1896 presidential election, Bryan, a former Nebraska congressman, came to Chicago to attend the Democratic National Convention at the Chicago Coliseum. It was at this convention that Darrow first met Bryan. At the time, Bryan was thirty-six years old and Darrow was thirty-nine. On July 9, 1896, with Darrow looking on, Bryan delivered his famous “Cross of Gold” speech to the convention, considered by many to be the most famous political speech in the history of the United States. Darrow later wrote, “I have enjoyed a great many addresses, some of which I have delivered myself, but I never listened to one that affected and moved an audience as did that.”98 The speech was electrifying and Darrow said that it produced “the greatest ovation that I had ever witnessed.”99 The speech won Bryan his party’s nomination for President.

At the time, Illinois Governor John Peter Altgeld was running for re-election as a Democrat. Altgeld was Darrow’s mentor and good friend, and Altgeld persuaded a reluctant Darrow to run for Congress. Because his district was thought to be safely Democratic, Darrow did not campaign for himself but instead traveled to other districts to campaign for other Democratic candidates. Darrow recounts that the “district was overwhelmingly Democratic, and I felt sure that with Bryan for President and Altgeld for governor there would be no doubt of my election.”100 However, after the ballots were counted, Bryan lost the election to McKinley, Altgeld lost the governorship and Darrow lost his race by 300 votes. Darrow wrote in his autobiography that he lost by about one hundred votes.

Bryan was again the Democratic nominee for the 1900 presidential election and Darrow again campaigned for him. Bryan lost to McKinley for the second time, but received the

98 STORY OF MY LIFE, supra note 4, at 91.
99 Id. at 91.
100 Id. at 92.
Democratic Party’s nomination once again eight years later, in 1908. This time when Bryan asked Darrow to campaign for him by giving some speeches, Darrow declined.

Darrow grew to dislike Bryan over the years. Bryan’s increasing visibility as the leader of the anti-evolution movement greatly antagonized Darrow, who was a fervent believer in science and human knowledge and greatly resented religious influences that hindered the pursuit of scientific knowledge. Perhaps Darrow was especially wary of Bryan because he knew how forceful and effective Bryan was as a speaker and leader of the masses. Darrow had a lifelong aversion to mobs or masses of people caught up in emotions, and combined with religious fervor, this movement must have greatly disturbed Darrow.

Clarence Darrow Enters the Controversy

Among the many interesting aspects of the Scopes controversy is that the ACLU, which had instigated the controversy, fought to keep Darrow away from the trial. Although it sounds peculiar today, the ACLU thought Darrow was too radical. According to one account:

The ACLU was concerned that neither Scopes’ civil rights nor freedom of speech greatly motivated Darrow, who saw Darwin’s theory as a useful tool in his own mission against religion. Darrow’s militant agnosticism concerned the ACLU’s executive committee, which was not hostile to religion per se and thought Darrow could actually imperil Scope’s defense. ACLU officials knew Darrow would generate bad publicity because of his agnosticism and would displease liberal, religious constituents of the organization. One ACLU attorney stated that accepting Darrow’s services was a mistake because it allowed fundamentalists to portray the event as religion vs. anti-religion, which was exactly how Darrow viewed the trial. It was, for him, the pinnacle of his lifelong war on religious intolerance.101

Darrow at first declined to get involved with the Scopes case because he recognized that his well-known agnostic views would not be welcomed by the ACLU; he had also just announced his retirement.102 But he quickly changed his mind when he found out that William Jennings Bryan was going to assist the prosecution. In his autobiography Darrow wrote, “[f]or the first, the last, and the only time in my life, I volunteered my services in a case; it was in the Scopes case in Tennessee that I did this, because I really wanted to take part in it.”103 Darrow made clear that Bryan’s involvement was the deciding factor: “At once I wanted to go. My object, and my only object, was to focus the attention of the country on the program of Mr. Bryan and the other fundamentalists in America. I knew that education was in danger from the source that has always hampered it—religious fanaticism.”104

102 SUMMER FOR THE GODS, supra note 5, at 100.
103 STORY OF MY LIFE, supra note 4, at 244.
104 Id. at 249.
Arthur Garfield Hays had recently been appointed general counsel for the ACLU in New York and was tasked with defending Scopes. Hays knew he needed someone on the defense who knew the local culture and people in Tennessee. Accordingly, he appointed John Randolph Neal as chief counsel for the defense.\(^\text{105}\) Scopes was a party to the discussions that led to Neal’s appointment, and wrote that Neal “played as important a role as anyone in my defense.”\(^\text{106}\) Darrow claimed that one local lawyer was on Scopes’ side but “at the last minute he ran away from the case in fear and trepidation. The sentiment of the town and the State was more than he could face.”\(^\text{107}\)

Darrow was consulting with Dudley Field Malone in New York when he learned of Bryan’s decision to assist the prosecution in Dayton. Malone, an international divorce lawyer, had previously worked as Undersecretary of State under Bryan in the Wilson Administration. Malone “still harbored resentment against his former boss from those days.”\(^\text{108}\) Darrow and Malone agreed to offer their services to defend Scopes and sent a telegram to Neal, also releasing a copy to the press. The offer stated they were willing “without fees or expenses” to help defend Scopes.\(^\text{109}\) Without consulting with the ACLU, Neal publicly accepted the offer.\(^\text{110}\) This took the ACLU by surprise. Although the organization was instrumental in creating the controversy, it was unable to regain control over events.

For Scopes, the telegram from Darrow and Malone “was my first knowledge that some Class-A sluggers were willing to champion our cause.”\(^\text{111}\) However, the ACLU had chosen Bainbridge Colby, a New York attorney, to defend Scopes. Colby, who had formerly worked under Bryan, was a founder of the United States Progressive Party and also served as Woodrow Wilson's last Secretary of State. Scopes traveled to New York to meet with the ACLU about a month before the trial: “By then I had made up my mind that I wanted Clarence Darrow. It was going to be a down-in-the-mud fight and I felt the situation demanded an Indian fighter rather than someone who had graduated from the proper military academy.”\(^\text{112}\)

Scopes described the atmosphere during the meeting when Malone formerly offered his and Darrow’s services:

Malone’s brief speech triggered a bitter argument, most of it against accepting the Malone-Darrow offer. The arguments against Darrow were various; that he was too radical, that he was a headline hunter, that the trial would become a circus, that with Darrow in the case there would be no chance of getting it into the Federal courts.\(^\text{113}\)

\(^{105}\) *Monkey Business*, *supra* note 19, at 18.

\(^{106}\) *Center of the Storm*, *supra* note 85, at 65.

\(^{107}\) *Story of My Life*, *supra* note 4, at 249.

\(^{108}\) *Summer for the Gods*, *supra* note 5, at 101.

\(^{109}\) Id.

\(^{110}\) Id.

\(^{111}\) *Center of the Storm*, *supra* note 85, at 67.

\(^{112}\) Id. at 70.

\(^{113}\) Id. at 72.
So great was the ACLU’s reluctance to have Darrow involved with the defense that the
group did its best to keep Darrow away, even after Scopes had chosen Darrow.\textsuperscript{114} When
Scopes made it clear that he was sticking with Darrow, the ACLU leadership tried to
adjust to his presence. However, according to one source Roger Baldwin, the founder of
the ACLU, “pointedly refused to participate further and thereby missed his organization’s
most famous trial.”\textsuperscript{115} In contrast, Scopes stated that after the offer of Malone and
Darrow’s services, “[t]he only real support for Darrow that I could see came from
Baldwin and Father Ryan.”\textsuperscript{116}

Darrow’s strong agnosticism undoubtedly ratcheted up the controversy and ensured that
it was going to be a battle of religion versus science. However, Darrow was also
controversial because “[c]ountless Americans never forgave Darrow for his role in the
Leopold-Loeb trial.”\textsuperscript{117} Many Americans were outraged over the senseless thrill-killing
of fourteen-year-old Bobby Franks by Leopold and Loeb, two privileged men from
wealthy families whom Darrow saved from being hanged. Darrow’s controversial
defense of Leopold and Loeb would later be referred to during the Scopes trial.

Despite this controversy, Clarence Darrow was in the fight now; it was the participation
of Darrow and Bryan that set the stage for what has become known as the “Monkey
Trial.” Their presence in the case propelled the controversy into a media and public
interest story that captivated the country and generated headlines around the world.

**Darrow’s View of the Controversy**

Darrow grew up in a household that cherished reading and knowledge. His father was a
voracious reader and Darrow claims that when it came to books, “we had Darwin’s as
fast as they were published.”\textsuperscript{118} Thus it is not surprising that Darrow, a strong supporter
of learning and science, dismissed the Tennessee law:

> From any point of view, the law was silly and senseless. At the time of its
> passage, even in the states of Tennessee and Mississippi the schools were
> teaching that the earth was round instead of flat, and the day and night were due
to the revolution of the earth on its axis and not from the sun and moon going
around it, or being drawn across the horizon.\textsuperscript{119}

**Darrow’s Views on Religion**

Darrow viewed organized religion largely with contempt and he was not afraid to express
his views. His views about religion were surely formed in his childhood. In his semi-

\textsuperscript{114} SUMMER FOR THE GODS, supra note 5, at 101.
\textsuperscript{115} Id. at 102.
\textsuperscript{116} CENTER OF THE STORM, supra note 85, at 72.
\textsuperscript{117} SUMMER FOR THE GODS, supra note 5, at 106.
\textsuperscript{118} STORY OF MY LIFE, supra note 4, at 250.
\textsuperscript{119} Id. at 247.
autobiographical novel *Farmington* he wrote a chapter devoted to “The Church,” in which he describes the influence of the church on his hometown and its people.

Darrow’s mother made him attend church regularly, and he seems to equate mandatory church attendance with child abuse: “I could not understand then, nor do I today, why we were made to go to church; surely our good parents did not know how we suffered, or they would not have been so cruel and unkind.” After he survived church, Darrow was still not free because he had to attend Sunday school:

> But the one thing that most impresses me as I look back on the day-school and the Sunday-school where we spent so many of our childhood hours is the unreality of it all. Surely none of the lessons seemed in any way related to our lives. None of them impressed our minds, or gave us a thought or feeling about the problems we were soon to face.

Darrow’s strong dislike of organized religion and Bryan in particular is evident in his 1932 autobiography: “Mr. Bryan was the logical man to prosecute the case. He had not been inside a courtroom for forty years, but that made no difference, for he did not represent a real case; he represented religion, and in this he was the idol of all Morondom.”

Despite Darrow’s despise of the fundamentalist efforts to dictate what was taught in public schools, he remained consistent in his view that people, even fundamentalists like Bryan and his followers, were not responsible for their actions or beliefs. Darrow said of these people:

> [N]o right-thinking person can blame them, but can only be sorry for their plight, and combat the spirit of fanaticism and cocksureness that has brought them to such a state. I truly felt sorry for Mr. Bryan. I had to a certain extent followed him through his career, had recognized his idealism and zeal and force, and it was a shock to me to see this concentrated energy and power turned to wormwood and gall through failure and despair and bigotry.

**Darrow Goes to Tennessee**

The Scopes controversy and the evolution versus religion struggle raised passionate emotions on both sides. Darrow was the target of vilification by some. A Tennessee pastor stated that he “had been searching literature and the pages of history in an effort to find someone with whom he might class Darrow, but as yet had not been able to place him but in one class, and that of the Devil.”

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120 CLARENCE DARROW, FARMINGTON 107 (2d ed. 1904).
121 Id. at 117.
122 STORY OF MY LIFE, supra note 4, at 249.
123 Id. at 277.
124 SUMMER FOR THE GODS, supra note 5, at 123 (quoting Pastor Compares Darrow, Devil, KNOXVILLE JOURNAL, July 1, 1925, at 2).
Darrow was entering a highly charged controversy and it was well known that he was an agnostic. It is likely that many in Tennessee and around the country either confused this with or equated this with being an atheist – or simply did not care if there was a distinction between the two. Since he was entering a part of the country that H. L. Mencken would label the “Bible belt,” it would not be surprising if Darrow’s presence angered those who held strong religious beliefs. But when Darrow actually traveled to Dayton, he found that the people treated him very well. He did not get the grand reception that Bryan did when he arrived in Dayton, but:

Still, there were some people at the depot to meet me; I was received most kindly and courteously, at that. As a matter of fact, all through the event down there people treated us with extreme consideration in many ways, in spite of the fact that they must have been shocked by my position in the case.125

In another demonstration of goodwill before the trial, a local banker left his home for a family retreat and let Darrow and his group stay there during the trial. Arthur Garfield Hays recalled that despite Darrow’s notoriety among religious believers, he won many over with his personality:

At the beginning, Bryan was the hero of Dayton, and the towns-people looked at Darrow with foreboding. Within a few days, however, Darrow’s kindliness, charm, and good humor were compared by the people of Dayton with Bryan’s solemnity, dignity, and show of virtue. Messenger boys who came to us would receive tips of quarters or half dollars; they got no tips from Bryan. Darrow would eat in a public restaurant, attend public affairs, even a high-school dance; Bryan ate at home, attended funerals and religious services. Darrow talked with individuals; Bryan preached to groups. The people came to prefer the human being to the messiah. They had been brought up on Bryan’s ideas but they liked Darrow’s behavior.126

Pre-Trial Strategies

The battle between Bryan and Darrow began well before the trial. After he joined the Scopes defense team, Darrow immediately went after Bryan. In numerous speeches before the trial, Darrow emphasized how important the trial was and how significant the threat was to intellectual freedom. Darrow sought to cast Bryan as the personification of the threat to individual liberty and Darrow “characteristically presented this threat as emanating from religious bigotry, making antievolution laws appear particularly ominous . . .”127

Darrow portrayed the prosecution as honest but zealous, putting the threat they posed in stark terms:

125 STORY OF MY LIFE, supra note 4, at 252.
127 SUMMER FOR THE GODS, supra note 5, at 103.
They are opening the doors for a reign of bigotry and heresy equal to anything in the Middle Ages. No man’s belief will be safe if they win. They will not be satisfied with even a belief in Christ and Christianity, but will enforce their own sort of belief in them.128

Bryan prepared for the trial by focusing attention on the basic question of who should control public education. The clear answer, he thought, was taxpayers who fund the schools and their elected representatives, not an outside minority that scoffed at the religious beliefs of parents concerned about what their children learned at school. Darrow believed that Bryan changed tactics and turned to the majority rule issue because he saw that the defense would win the evolution arguments in court. However, Bryan did state early on that the case could be decided without debating the merits of evolution.129 According to one authoritative account, while Bryan never publicly changed his views that the trial was about the right of the taxpayers to control what is taught in their schools, in private Bryan “hoped to discredit the theory of evolution through expert testimony.”130

The pre-trial barbs continued in Dayton. Darrow recalled:

When Mr. Bryan arrived in Dayton he was met by a throng of people. From the newspaper accounts one would judge the whole country was out to receive the defender of the faith. His reception proved that he was the ruler of "the Bible belt." The newspaper representatives flocked around him for crumbs of information, asking what he thought would be the outcome of the combat; and among other statements by him he said that this case was to be ‘a fight to the death.’ The next morning I read Mr. Bryan's reply with some surprise. I had not realized that it was to be such a conflict.131

The defense also engaged in pre-trial legal maneuvering. If it was up to the defense team, Dayton would not be the location for the upcoming trial. The defense wanted to remove the case to one of the federal courts in Chattanooga, Knoxville or Nashville so it could test the constitutionality of the Butler Act in federal court. But a federal judge rejected their motion, and so Dayton was safely the center of attention.

The Evolution Controversy and Race

A less known aspect of the evolution controversy is how contemporary blacks viewed the issues and the Scopes trial. There was a small group of predominately secular black leaders and commentators who held far different religious views than the majority of blacks, who identified very strongly with their belief in God. In addition to scoffing at the piety of marginalized blacks, these secular leaders perceived a fear of racial equality in the anti-evolution movement. They believed that the battle between evolution and

128 MONKEY BUSINESS, supra note 19, at 31.
129 Id.
130 SUMMER FOR THE GODS, supra note 5, at 129.
131 STORY OF MY LIFE, supra note 4, at 251.
religion was not purely science versus faith. They were convinced that the fear of evolution was not prompted solely by the threat to religion, but also because it threatened the underpinnings of racial segregation and discrimination. According to one historian:

Unlike almost every white commentator at the time and every historian since, many African American editorialists claimed that racial discomfort lay behind Tennessee’s decision to outlaw evolution. In the course of the Tennessee antievolution trial, therefore, secular African American leaders proclaimed their support for John Scopes and identified racial improvement with the progress of science in America.132

To this secular black minority, white fear of Charles Darwin’s theory of evolution was really a fear that the Jim Crow theory of racial superiority was scientifically wrong:

Secular black commentators charged that the goad to the antievolution movement, from the top on down, was fear of Darwinism’s racial implications. If black and white had a common ancestry, as evolutionary theory suggested, then the South’s elaborate racial barriers might seem arbitrary rather than God-given.133

Another source stated that among the anti-evolution groups, “[o]ne of the most stressed notions which went around was that evolution made a Negro as good as a white man—that is, threatened White Supremacy.”134 Another scholar states that this “may . . . have been true, but it is difficult to document from the publications of the time.”135

Despite evidence that some of the support for the anti-evolution movement was based on fear of racial equality between blacks and whites, there is considerable evidence that many pro-evolution leaders did not believe that the races were equal and instead believed that whites were the superior race. Ironically, this is displayed graphically in the very book that was at the root of the controversy in the Scopes trial. The classroom textbook that Scopes used and which formed the basis for the charge that he taught evolution in class was itself a clear example of racial bigotry. This textbook, A Civic Biology: Presented in Problems by George W. Hunter, was “the official Tennessee biology text.”136 Tennessee schools first began to use Hunter’s textbook in 1909, ten years before the state commission officially adopted it.137

The section on evolution in Hunter’s biology textbook that created such a controversy is only three pages long. This small section on evolution ends with a paragraph entitled “The Races of Man,” which states:

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133 Id. at 899.
135 Ronald L. Numbers, Darwinism Comes to America 67 (1998).
137 Monkey Business, supra note 19, at 89.
The Races of Man.—At the present time there exist upon the earth five races or varieties of man, each very different from the other in instincts, social customs, and, to an extent, in structure. These are the Ethiopian or negro type, originating in Africa; the Malay or brown race, from the islands of the Pacific; the American Indian; the Mongolian or yellow race, including the natives of China, Japan, and the Eskimos; and finally, the highest type of all, the Caucasians, represented by the civilized white inhabitants of Europe and America.¹³⁸

Hunter’s textbook credited Darwin with providing proof for the theory of progress that was “decidedly anthropocentric and heavily laced with the scientific racism of the day.”¹³⁹

Darrow, Religion and Race

Darrow was clearly sympathetic to the black experience of racial inequality and on numerous occasions he used his considerable legal talents to help blacks in court and his renowned oratorical skills to plead for racial equality in speeches. Darrow’s most important efforts on behalf of blacks would come later in 1925 and in 1926 in the Sweet trials in Detroit. There, Darrow and Arthur Garfield Hays successfully defended a number of black defendants accused of murdering a white man when a mob of whites had attempted to drive a black family from a white neighborhood.

A vast majority of blacks in this time period turned to religion as the bedrock upon which they found the strength to endure virulent racism and poverty. Darrow, a well known critic of organized religion and religious leaders, was also very vocal in advising the black community to turn away from religion and the church. Darrow’s message was shared by some leading black intellectuals of the time, who viewed religion as a hindrance rather than a solution to racial equality. Darrow and this minority of important black intellectual leaders counseled blacks against believing in and relying on religion and religious faith as a way to better their lives.

An interesting example of this dynamic involving Darrow, race and religion occurred in 1925, during the period in between the two Sweet trials in Detroit. During a NAACP fundraising event in Detroit to raise money for the Sweet defense and other cases, Darrow spoke before a black audience. According to the New York Amsterdam News, a leading black newspaper, Darrow told the audience: “You are too blooming pious. Many people get consolation out of religion; but if the Lord was going to do something for you he would have done it long ago. I would have more confidence in him if there wasn’t a white and colored Y.M.C.A.”¹⁴⁰ He also told the audience that “[t]he sooner Negroes

¹³⁹ SUMMER FOR THE GODS, supra note 5, at 23.
¹⁴⁰ NEW YORK AMSTERDAM NEWS, Dec. 16, 1925, XVII, No. 3.
find out that they can’t depend on Daniel and the Lord and get busy for themselves the better off they will be.”

According to Edward Larson:

Relatively little comment about the trial survives from African Americans. A few black evangelists, such as Virginia’s John Jasper, endorsed Bryan’s position, while the NAACP, which worked regularly with the ACLU, participated in some of the ACLU’s New York meetings on the trial. In any event, the outcome would not affect African Americans, because Tennessee public schools enforced strict racial segregation and offered little to black students beyond elementary instruction.

Women and the Evolution Controversy

Women played an important role in the evolution controversy. Although the leaders of the anti-evolution movement were all men, women as a group were strongly against evolution, with one estimate asserting that women represented seventy percent of the anti-evolutionists. Women were prominent in contacting Tennessee House members to voice their support for the Butler Act. During the legislative process leading up to the enactment of Tennessee’s anti-evolution law, nearly all the letters to the newspapers in support of the bill came from women, while most of the letters against the law came from men.

Why would women be so prominent in the anti-evolution movement? It appears many believed evolution instruction interfered with their role as mothers and protectors of their children. Like the prohibition movement, the anti-evolution movement “was a female-dominated reform movement that invoked a mother’s duty to protect her children and make the state an extension of maternal moral influence.”

Circus Atmosphere

Besides the clash between Darrow and Bryan near the end of the trial, the most enduring visual aspect of the event was the circus-like atmosphere during the run-up to the trial and the trial itself. It is likely that many people in Dayton as well as throughout the country were not well acquainted with the finer points of Darwin’s theories. However, it is likely that everyone who had heard of the theory had some notion that it tried to account for the origin of the human race by tying it to the animal kingdom, with man as the end result of a long evolution from some lower form of life. Because primates were the closest animals to humans, the monkey (or chimpanzee) quickly became the symbol

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141 Id.
142 SUMMER FOR THE GODS, supra note 5, at 122.
144 Id. at 71.
145 Id.
for the trial. So popular was the monkey, linked to the trial, that it prompted a surge in attendance at zoos across the country.

Numerous accounts of the controversy that summer describe it as taking on a circus-like atmosphere. Contributing to the festive mood, merchants displayed pictures of primates in their stores to advertise wares, the local constable placed a “Monkeyville Police” sign on his motorcycle and Robinson’s drugstore, where the event was hatched, offered “simian” sodas. Real monkeys made periodic appearances including “Joe Mendi,” a trained chimpanzee that wore a suit and provided entertainment such as playing a mall piano. Joe Mendi was brought from New York to Memphis and Dayton. Mendi was billed as the “$100,000 chimpanzee with the Intelligence of a Five-Year Child” and his promoters advertised that “[e]very man has a perfect right to decide for himself as to whether his ‘family tree’ bore cocoanuts or not.” Coincidently, a Dayton store was already named the J.R. Darwin’s Everything to Wear Store. Not one to pass up such an opportunity, Mr. Darwin, the owner of the store, capitalized on his name. He displayed a sign that read “DARWIN IS RIGHT inside” and claimed that his clothes were the “fittest,” cleverly referencing Darwin’s “survival of the fittest” theory.

Scopes recounts that Bryan’s presence had a sobering effect on the carnival atmosphere of Dayton. According to Scopes, when Bryan arrived “most of the citizens followed his lead and assumed more sedate roles. The monkey signs went down and the religious posters started going up.” Robinson’s Drugstore continued to sell “Monkey fizz and a simian watch [that] could be bought for sixty-five cents. But generally speaking, with the arrival of Bryan, the theme in Dayton had changed fast, from the monkey business to the God business, and from chuckles and smiles to a semblance of seriousness.”

Rappleyea succeeded in drawing a great deal of attention to tiny Dayton. However, his dreams of igniting an economic boom from tourism did not pan out. “Only about five hundred visitors stayed in Dayton during the trial, and almost half of these were associated with the media.” This was far below the estimates of visitors expected to descend upon Dayton.

The Chicago Tribune’s WGN radio sent personnel to the trial for the first national broadcast of an American court trial, generating interest in the case nationwide.

**State of Tennessee v. John Thomas Scopes**

The prosecution consisted of Herbert and Sue Hicks, Tom Stewart, Ben B. McKenzie, his son J. Gordon McKenzie, Wallace Haggard and William Jennings Bryan. The defense
team included Dudley Field Malone, Arthur Garfield Hays, John Neal and Clarence Darrow. Darrow and Bryan met that first morning, shook hands and briefly conversed. Early on in the trial, Judge Raulston began referring to both Stewart and Ben McKenzie as “General” in reference to their service as Attorney-General (Stewart held the office at the time). Darrow was referred to as “Colonel” as was Bryan. Bryan had actually been a colonel during the Spanish-American War, although he did not participate in the conflict.

Day One - Friday July 10, 1925

One of the most famous trials in American history began on Friday July 10, 1925. The following summary including quotes comes from the 1925 publication of the trial transcript titled *The World’s Most Famous Court Trial, Tennessee Evolution Case; A Complete Stenographic Report of the Famous Court Test of the Tennessee Anti-evolution Act, of Dayton, July 10 to 21, 1925, Including Speeches and Arguments of Attorneys.*

The trial opened that morning with a prayer given by Reverend Cartwright. The defense did not like having a prayer in a case involving religious controversy, but did not make an issue of it — at least not right away. The first order of business after the prayer was to empanel a grand jury to re-indict Scopes. It appears that the original grand jury indictment was not properly done and both sides were “anxious that the record be kept straight and regular, [and] that no technical objection may be made to it in the appellate court.” Judge Raulston charged the new grand jury by reading the Butler Act. Because it was alleged that Scopes had taught a doctrine denying the story of the Divine creation of man, the judge also read the first chapter of Genesis.

Judge Raulston instructed the grand jurors that their task was simply to determine whether Scopes violated the Act, and not to “inquire into the policy or wisdom of this legislation.” He also informed them that a violation of the Butler Act was a misdemeanor; although the statute did not classify the degree of misdemeanor violation, he said:

> I regard a violation of this statute as a high misdemeanor, . . . I make no reference to the policy or constitutionality of the statute, but to the evil example of the teacher disregarding constituted authority in the very presence of the undeveloped mind whose thought and morals he directs and guides.

After Scopes was re-indicted, Clarence Darrow rose to ask the judge questions about the defense’s expert witnesses. The defense planned to introduce expert testimony by scientists on the theory of evolution and by theological scholars on various interpretations of the Bible. The defense had lined up nationally known experts including scientists, zoologists, geologists and educators who were willing to travel to Dayton. The defense correctly anticipated that the prosecution would object to the admissibility of expert testimony and Darrow wanted to get that matter out of the way before these experts traveled all the way to Dayton. The defense and prosecution conferred on the matter and Stewart announced to the court that the defense’s efforts to introduce expert testimony would be “resisted by the state as vigorously as we know how to resist it.”

152 Quotes are not cited to a particular page.
The battle over whether to allow expert testimony for the defense would turn out to be one of the main battles in the trial. Whether Scopes actually taught evolution and whether he violated the Butler Act in doing so quickly became minor issues. From the start, “the issue was not whether Scopes was guilty but whether the defense could offer evidence to prove that the theory of evolution was valid and that it did not conflict with the Bible.”153

Stewart recommended they pick a jury first before arguing the expert testimony issue, but he also asked the court to adjourn for the day because the defense had traveled a great distance and were not yet acclimated to the heat. Darrow even pushed the issue several times by requesting that they adjourn for the rest of the day. But Judge Raulston decided that they should stay in session for two hours to begin the jury selection process.

**Jury Selection**

Judge Raulston began the examination of each potential juror. Each juror was asked whether they were related by blood or marriage to the defendant Scopes or Walter White, the person named to bring the complaint against Scopes.

Darrow was ever mindful of how important jury selection was in a trial. It was one of the keys to his success in tough cases. He knew that the citizens of Dayton took their religious beliefs seriously: “We realized that a jury drawn from Dayton, Tenn., would not permit a man to commit such a heinous crime as Scopes had been guilty of and allow him to go scot-free.”154 However, Darrow did not have to agonize over jury selection in Dayton. Unlike any of his other cases, this time he and the other members of the defense team wanted his client convicted so they could appeal the case to a higher court. An acquittal would leave the constitutionality of the law unchallenged.

Despite the low stakes involved in picking this particular jury, Darrow did challenge several jurors. Darrow questioned J.P. Massingill, a preacher, by directly asking whether he preached against evolution:

Q—Did you ever preach on evolution?
A—Yes. I haven’t as a subject; just taken that up; in connection with other subjects. I have referred to it in discussing it.
Q—Against it or for it?
A—I am strictly for the Bible.
Q—I am talking about evolution. I am not talking about the Bible. Did you preach for it or against it?
A—Is that a fair question, judge?
Court—Yes, answer the question.
A—Why, of course.

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154 **STORY OF MY LIFE, supra note 4, at 260.**
Darrow also got Massingill to admit that he believed evolution is contrary to the Bible and that Scopes had taught evolution. Darrow challenged the preacher for cause and the judge excluded him.

There was no shortage of potential jurors. Scopes wrote that “[m]any were anxious to become jurors, not for the pay they would earn but to have ringside seats.”155 Ironically, those chosen for jury duty actually missed most of the trial, including many of its most dramatic moments, because the jury was often dismissed while the attorneys on both sides argued legal issues before the judge.

Scopes described the jury selection process, showing great insight into Darrow’s trial technique:

Darrow handled the jury selection for the defense and accepted several men who he probably was certain were against him. This did not bother him; he made a point of complimenting a man who had given what seemed to be a straight answer. It was part of Darrow’s philosophy of choosing juries; he would take a juror who seemed opposed to him if he thought the man was honest. Darrow’s thinking was that, as long as a man was honest, he could reach him through reason and bring him to see other viewpoints, in spite of any residual prejudices.156

The jury of twelve men was selected in about two and a half hours. This is one of the strongest indications that Darrow was not concerned about his client being convicted. It would have taken many days to select a jury if his goal was to prevent Scopes from being convicted. After the jury was selected, Scopes noted:

I knew every man on the jury, by sight if not by name, and, going by what they revealed in court, it was safe to assume that I had an excellent chance of being convicted—which, after all, was what we expected, so that we could appeal the verdict and get into the Federal courts. There were six Baptists, four Methodists, one Disciple of Christ . . . and one who didn’t belong to a church.157

Mary Baird Bryan accompanied her husband to the trial and afterwards described the jury selection process in a letter:

The selection of the jury was exceedingly interesting to me. They succeeded in filling it up, but almost all with mountain men, and there is only one man on the jury who is not a church member, and all are Bible readers except one who admitted he could not read. Darrow did the cross questioning and several were not permitted on the jury because of too great devotion to the church. If this trial had been held in some Western states, say Arizona or New Mexico, Darrow would have had no difficulty in finding plenty of men who were not church members

155 CENTER OF THE STORM, supra note 85, at 106.
156 Id. at 106-107.
157 Id. at 106.
and who never read their Bibles, but these fellows were planted on solid ground. .

Summer Heat

Tensions during the highly charged legal and religious controversy were exacerbated by the oppressive summer heat. Although the first modern electrical air conditioning was invented in 1902 by Willis Haviland Carrier, it would be many years before air conditioning became a required fixture of buildings. The scorching temperature in Tennessee that summer was a constant presence during the trial and was commented on in numerous accounts. It was inevitable given the religious dimensions of the case that comparisons with biblical Hell would be made. Darrow, ever the wit, wrote in his autobiography that “[c]ertainly Tennessee can never be blamed if our souls were not saved that hot summer, in that torrid land that might have inspired one to beware of ever going to a hotter clime.”

Darrow was clearly awed by the extreme heat. As he recalled, “Tennessee must be very close to the equator; or maybe the crust is very thin under this little sin-fearing section, or, where could such hellish heat come from?”

John Scopes also wrote about the summer heat:

Dayton in 1925 was as hot as any hell the white-headed evangelist, T.T. Martin, might have conjured up. It was midsummer; the sun baked the sidewalks and its heat boiled into the courtroom, becoming a constant source of annoyance and discomfort. By the time court convened each morning around nine o’clock, the sun was already high, and by noon the room on the second floor was so ovenlike that collars wilted right along with their wearers.

During the course of the trial, Dudley Field Malone intrigued courtroom spectators and gained their respect by keeping his suit jacket on despite the heat, only removing it for his main speech of the trial.

Day Two – Monday July 13, 1925

The second day of the trial was especially important in terms of the defense strategy. Soon after the opening prayer, Neal moved to quash and dismiss the indictment against Scopes. A successful movement to quash the indictment would have fulfilled the defense’s goal because it would have been done on constitutional grounds. But Neal’s motion was placed on hold until after the indictment was read. When Neal began to explain the defense motion, he told the court that even though they were moving to quash and dismiss the indictment, they actually wanted the court to hold off ruling on that until after the trial. The prosecution objected to that request and so Neal proceeded to read the motion. The motion alleged specific violations of various sections of the Tennessee

158 POLITICAL PURITAN , supra note 153, at 245-46.
159 STORY OF MY LIFE, supra note 4, at 255.
160 Id. at 256.
161 CENTER OF THE STORM, supra note 85, at 101.
Constitution. Although references were made to the U.S. Constitution, the defense concentrated on arguing that the statute violated the Tennessee Constitution.

The emphasis on the Tennessee Constitution rather than the federal constitution was necessary because it would be two decades before the United States Supreme Court would use the incorporation doctrine to hold that some protections under the Bill of Rights also applied to the states. Just a month before, the United States Supreme Court handed down its first decision announcing the incorporation doctrine in the case of *Gitlow v. New York*.  

Benjamin Gitlow was an activist who had been expelled from the Socialist party; in 1919, he became a founding member of the Communist Labor Party, which later merged into the Communist Party. Gitlow and James Larkin, an Irish activist, were arrested and convicted under New York State Criminal Anarchy Act for distributing copies of a "left-wing manifesto" that advocated the overthrow of the government by force.

In *Gitlow*, the Court ruled:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.  

Although it took years, the Supreme Court “began the process of incorporation in its decision in *Gitlow v. New York*.“ Interestingly, Clarence Darrow had defended Benjamin Gitlow in his criminal trial, but did not participate in the subsequent appeals that eventually ended in the U.S. Supreme Court. Scopes’ defense team would later cite the *Gitlow* decision in their appellate brief to the Supreme Court of Tennessee.

After reading the motion, Neal again asked the court to reserve ruling on the motion until later. The defense wanted a delayed ruling on their motion because they believed that their evidence would “be of enlightening character” to the court and the jury. General Stewart insisted that the motion be ruled on without delay. Neal argued that contrary to popular belief among the public and even lawyers, the trial judge had the power and the duty to rule on constitutional issues because this power was not reserved to just appellate courts.

### Defense Motion to Quash Indictment

Neal then proceeded to give brief explanations of the defense’s legal arguments based on the motion to quash. Neal argued that the Butler Act violated Section 17 of the Tennessee Constitution, which states, “[n]o bill shall become a law which embracers more than one subject, that subject to be expressed in the title.” Neal argued that because the caption of

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the Act prohibits teaching “the Evolution Theory” while the body of the Act prohibits teaching “any theory that denies the story of the Divine Creation of man as taught in the Bible . . .,” the Act is in violation of Section 17. Neal emphasized to the judge that “probably four-fifths of the law which the Tennessee supreme court has ultimately held unconstitutional . . . has been based upon this particular provision.” The defense would point to this discrepancy between the caption and body of the Butler Act several times.

Next, Neal argued that the Butler Act violated Section 13, Article II of the Tennessee Constitution, which acknowledges the importance of “[k]nowledge, learning and virtue” and directs that “it shall be the duty of the general assembly in all future periods of this government, to cherish literature and science.” The defense would make repeated references to the duty of the legislature to “cherish literature and science.” The defense believed banning evolution instruction to be the antithesis of cherishing science.

Neal then came to Section 3, Article 1, which he described as the “most sacred provision of the constitution of Tennessee.” Neal then read the article, which provides:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

According to Neal, the State of Tennessee had the power to control its schools, but not to violate the freedom of religion embodied in that provision of their constitution. Neal argued the Butler Act violated this freedom of religion because it made “mandatory the teaching of a particular doctrine that comes from a particular religious book” and in doing so established a preference for a particular religion.

**Hays Offers Hypothetical Law**

Arthur Garfield Hays followed Neal. Hays argued that the statute was too vague and that it exceeded the police power of the state. To illustrate his point, Hays used a hypothetical law he entitled: “An act prohibiting the teaching of the heliocentric theory in all the universities, normals, and all other public schools of Tennessee which are supported in whole or in part by the public school funds of the state . . . .” Hays’ Act would prohibit teaching “any theory that denies the story that the earth is the center of the universe, as taught in the Bible, and to teach instead, that the earth and planets move around the sun.”

In a bit of overkill, Hays’ Act made violations a felony punishable by death. Aside from the death penalty, Hays argued that the only difference between his act and the Butler Act was public acceptance: the Copernican theory is “so well fixed scientifically that the earth and planets move around the sun” and is “so well established that it is a matter of common knowledge.” Hays believed that the theory of evolution was as much a scientific fact as the Copernican theory.
Hays argued that the Butler Act was unconstitutional because it was an unreasonable exercise of the police power of the state. According to Hays: “To my mind, the chief point against the constitutionality of this law is that it extends the police powers of the state unreasonably and is a restriction upon the liberty of the individual.”

General McKenzie countered for the prosecution with an argument that could just as easily have come from Bryan:

Under the laws of the land, the constitution of Tennessee, no particular religion can be taught in the schools. We cannot teach any religion in the schools, therefore you cannot teach any evolution, or any doctrine, that conflicts with the Bible. That sets them up exactly equal. No part of the constitution has been infringed by this act.

In dismissing the defense’s argument about the statutory rule of construction, McKenzie pointed out the defense lawyers were from out of town:

The questions have all been settled in Tennessee, and favorable to our contention. If these gentlemen have any laws in the great metropolitan city of New York that conflict with it, or in the great white city of the northwest that will throw any light on it, we will be glad to hear it. They have many great lawyers and courts up there.

This rankled Malone, who interjected, “I would like to say here ... I do not consider further allusion to geographical parts of the country as particularly necessary, such as reference to New Yorkers and to citizens of Illinois. We are here, rightfully as American citizens.” Judge Raulston tried to placate Malone by explaining that everything McKenzie said was meant to be humorous. McKenzie then sought to assure the defense that he meant no harm by his remarks. McKenzie also ridiculed the defense’s argument that they had to bring in expert testimony to help interpret the statute: “The smallest boy in our Rhea county schools, 16 years of age, knows as much about it as they would after reading it once or twice.”

**Bible versus Koran**

Darrow got involved in the arguments during the afternoon session. He reiterated the argument that there was a conflict between the caption and body of the statute. Darrow asserted that the statute gives a preference for the Bible which violates the provision of the Tennessee Constitution protecting the freedom of worship. Darrow asked why it did not give preference to the Koran. Stewart was apparently astonished at the question. He told the court, “[i]f your honor please, the St. James version of the Bible is the recognized one in this section of the country. The laws of the land recognize the Bible; the laws of the land recognize the law of God and Christianity as a part of the common law.” Malone picked up on this line of argument and pressed Stewart to answer whether the statute
gives preference to the Bible over the Koran. An exasperated Stewart finally responded, “[w]e are not living in a heathen country, so how could it prefer the Bible to the Koran?”

**Myer v. Nebraska and Leeper v. State**

Hays repeatedly argued that the statute is a violation of the police powers of the state. Stewart acknowledged that this was the only defense argument that the state might “seriously” consider. At this point the state referred to an important U.S. Supreme Court decision - *Myer v. Nebraska*, which was decided in 1923. Meyer, who taught German in a Lutheran school, was convicted under a Nebraska law similar to some other state laws that prohibited the teaching of modern foreign languages to grade school children. The Court held that the statute violated the Fourteenth Amendment's Due Process clause.

Stewart explained to Judge Raulston that in *Meyer*, the Supreme Court held the Nebraska statute unconstitutional because it affected all the schools – both public and private. Stewart then quoted from the case:

> The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instruction in English is not questioned. Nor has challenge been made of the state’s power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy.

Stewart placed a great deal of emphasis on the *Meyer* decision and on the 1899 Tennessee case of *Leeper v. State*. Leeper, also a teacher, was convicted of violating the “Uniform Text-Book Act” for using an unapproved geography textbook. The Supreme Court of Tennessee held that the text-book act was constitutional. The court ruled that the power of the Legislature to regulate and control the public schools is based upon its police powers. The court also stated:

> [I]t is impossible to conceive of the existence of a uniform system of public schools without power lodged somewhere to make it uniform, and, in the absence of express constitutional provisions, that power must necessarily reside in the legislature; and hence it has the power to prescribe the course of study, as well as the books to be used . . . .

Stewart argued that *Leeper*, when combined with the ruling in *Meyer v. Nebraska*, presented a very strong case that the Butler Act was constitutional. To Stewart it was logical that if the courts ruled the legislature had the police power to administer the public schools and determine curriculum and textbooks, then it could prohibit instruction on the theory of evolution. Stewart, referring to *Meyer* and *Leeper*, told the court:

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166 *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962 (Tenn. 1899).
That is the very crux of this lawsuit. That is absolutely the question involved here, if Your Honor please. And the case of Leeper against the state of Tennessee—on this case, and the case of Leeper against the state of Tennessee we are willing to risk our rights.

Hays asked how Scopes got the book he taught from, implying of course that Scopes was using a state approved biology textbook.

“Colonel” Darrow

Darrow then requested to speak. At this time, Judge Raulston bestowed the title “Colonel” on Darrow. By this time in the trial, Darrow had already come to like McKenzie. Darrow said:

I know my friend, McKenzie, whom I have learned not only to admire, but to love in our short acquaintance, didn’t mean anything in referring to us lawyers who come from out of town. For myself, I have been treated with the greatest courtesy by the attorneys and the community.

Darrow then announced: “I shall always remember that this court is the first one that ever gave me a great title of ‘Colonel’ and I hope it will stick to me when I get back north.” Judge Raulston replied: “I want you to take it back to your home with you, Colonel.”

Darrow’s remarks were genuine; he would recount in his 1932 autobiography how well he liked McKenzie. Although there were heated legal arguments during the trial, Darrow wrote in his autobiography that most of the lawyers on the side of the State “were courteous and kindly and we all got along exceedingly well.” He went on:

[E]specially General Ben MacKenzie and his son, whom we took to be stolid Scotchmen, became most agreeable and even lovable, so that a strong affection developed between us which I am sure will continue so long as we live. After all, men in all lands and at all times have been found human and loving outside their religious attitudes.167

With these pleasantries over, Darrow then took a dig at Bryan by referring to the fact that both sides had attorneys who came from out of town: “[O]n the other side we have a distinguished and very pleasant gentleman who came from California and another who is prosecuting this case, and who is responsible for this foolish mischievous and wicked act, who comes from Florida.” Darrow began his major speech of the trial during which he primarily argued the Butler Act was unconstitutional because the State of Tennessee was establishing a particular religious viewpoint in the public schools.

Darrow and others often used humor during the trial. Darrow brought up the Leeper case and said, “[m]y fellow is a leper too, because he taught evolution.” The trial transcript mentions numerous times that Darrow elicited laughter from the crowd over something

167 STORY OF MY LIFE, supra note 4, at 252-53.
he said. While making a legal point, he referred to the case of *Ragio v. State*\(^{168}\) in which the Supreme Court of Tennessee held unconstitutional a state statute that made it a “misdemeanor for any one, engaged in the business of a barber, to shave, shampoo, cut hair, or keep open their bath-rooms on Sunday.” Referring to the *Ragio* case, he said:

Well, of course, I suppose it would be wicked to take a bath on Sunday, I don’t know, but that was not the trouble with this statute. It would have been all right to forbid the good people of Tennessee from taking a bath on Sunday, but that was not the trouble. A barber could not give a bath on Sunday, anybody else could. No barber shall be permitted to give a bath on Sunday, and the supreme court seemed to take judicial notice of the fact that people take a bath on Sunday just the same as any other day. Foreigners come in there in the habit of bathing on Sundays just as any other time, and they could keep shops open, but a barber shop, no. The supreme court said that would not do, you could not let a hotel get away with what a barber shop can’t.

**Darrow Finishes with a Warning**

Despite his humor, Darrow ended with a grim warning of where legislation like the Butler Act would lead:

To strangle puppies is good when they grow up into mad dogs, maybe. I will tell you what is going to happen, and I do not pretend to be a prophet, but I do not need to be a prophet to know. Your honor knows the fires that have been lighted in America to kindle religious’ bigotry and hate.

Darrow was interrupted by the judge, who wanted to adjourn for the day. Darrow insisted that he be able to talk for five more minutes and concluded:

If today you can take a thing like evolution and make it a crime to teach it in the public school, tomorrow you can make it a crime to teach it in the private schools, and the next year you can make it a crime to teach it to the hustings or in the church. At the next session you may ban books and the newspapers. Soon you may set Catholic against Protestant and Protestant against Protestant, and try to foist your own religion up on the minds of men. If you can do one you can do the other. Ignorance and fanaticism is ever busy and needs feeding. Always it is feeding and gloating for more. Today it is the public school teachers, tomorrow the private. The next day the preachers and the lecturers, the magazines, the books, the newspapers. After while, your honor, it is the setting of man against man and creed against creed until with flying banners and beating drums we are marching backward to the glorious ages of the sixteenth century when bigots lighted fagots to burn the men who dared to bring any intelligence and enlightenment and culture to the human mind.

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\(^{168}\) *Ragio v. State*, 86 Tenn. 272, 6 S.W. 401 (Tenn. 1888).
The court was adjourned after Darrow’s speech. Darrow’s speech received a great deal of praise. According to a 1997 book, Darrow countered Stewart’s arguments in a “brilliant rebuttal.” The Chicago Tribune called it one of the greatest speeches in Darrow’s career. Even the prosecution attorney Ben McKenzie said it was “the greatest speech that I have ever heard on any subject in my life.”

H.L. Mencken’s coverage of the trial and the citizens of the Dayton area was intentionally sarcastic and dismissive. He reported on Darrow’s speech:

The net effect of Clarence Darrow's great speech yesterday seems to be precisely the same as if he had bawled it up a rainspout in the interior of Afghanistan. That is, locally, upon the process against the infidel Scopes, upon the so-called minds of these fundamentalists of upland Tennessee. You have but a dim notion of it who have only read it. It was not designed for reading, but for hearing. The clanging of it was as important as the logic. It rose like a wind and ended like a flourish of bugles. The very judge on the bench, toward the end of it, began to look uneasy. But the morons in the audience, when it was over, simply hissed it.

Darrow recounted in his autobiography the strategy for the Scopes trial:

I made a complete and aggressive opening in the case. I did this for the reason that we never at any stage intended to make any arguments in the case. We knew that Mr. Bryan was there to make a closing speech about “The Prince of Peace.”

Day Three – Tuesday, July 14, 1925

When the court announced that Reverend Stribling would say the opening prayer, Darrow stunned many court observers when he formally objected. Darrow explained the defense’s concern:

[T]he nature of this case being one where it is claimed by the state that there is a conflict between science and religion, above all other cases there should be no part taken outside the evidence in this case and no attempt by means of prayer or in any other way to influence the deliberation and consideration of the jury of the facts in this case.

Stewart argued in favor the opening prayer:

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169 SUMMER FOR THE GODS, supra note 5, at 162.
170 Id. at 165.
171 H.L. Mencken, Darrow’s Eloquent Appeal Wasted on Ears That Heed Only Bryan, BALT. EVENING SUN, July 14, 1925.
172 STORY OF MY LIFE, supra note 4, at 259.
[T]he state makes no contention, that this is a conflict between science and religion . . . it is quite proper to open the court with prayer if the court sees fit to do it, and such an idea extended by the agnostic counsel for the defense is foreign to the thoughts and ideas of the people who do not know anything about infidelity and care less.

Malone, a Catholic, took exception to this, stating, “I respect my colleagues, Mr. Darrow’s right to believe or not believe as long as he is as honest in his unbelief as I am in my belief.” Malone stated that the defense did not object to the court opening the first day of the trial with a prayer but they did object to it opening each day in that manner because it contributed to a hostile atmosphere for the defense. Malone asked the court if in every prior case it handled it opened every single day of trial with a prayer. Stewart jumped in and said, “[s]o far as creating an atmosphere of hostility is concerned, I would advise Mr. Malone that this is God fearing country.” Malone responded, “And it is no more God fearing country than that from which I came.” The judge then stepped in to stop the argument. The court overruled the defense’s objection and the opening prayer was given. Darrow later asked that the record show the defense objected to the opening prayer for the rest of the trial so they would not need to voice an objection each morning. The judge then adjourned the court so he could study and render a decision on the defense’s previous motion to quash and dismiss the indictment.

When court reconvened several hours later, Hays aroused Stewart’s anger by asking the court to hear a petition signed by numerous religious organizations, churches and synagogues. The petition requested that if the judge continued opening each day with a prayer, he pick clergy from other denominations so there could be a mix of fundamentalist prayers with those of other faiths. Hays explained that this did not mean they were reversing their objection to the opening prayer, but if the opening prayer was to be given, they wanted the process stated in the petition to be used. Judge Raulston referred the petition to the pastor’s association and let them choose who would give each morning’s prayer.

**Judge Angered by Alleged News Leak**

At this point the judge made the accusation that someone had leaked his decision concerning the defense’s motion to quash the indictment. He had gotten word that newspapers around the country were reporting that he had ruled against the defense’s motion. Judge Raulston concluded that there was a leak of information since he had not announced his decision and only he and the court stenographer knew what it was. Judge Raulston suspected it was a member of the press corps and ordered them to meet with him to discuss the matter. Court was adjourned and during the meeting with the press, the judge appointed several members of the press to investigate the leak and report back to him.

**Day Four – Wednesday, July 15, 1925**
This may have been the hottest day of the trial. Neal objected to the opening prayer as soon as it was over. This prompted Sue Hicks, who had remained quiet for most of the trial, to argue that they had an agreement that the defense’s objection would be noted in the record and there was no need for a formal objection each morning. Sue Hicks stated:

We are trying to avoid any religious controversy and we maintain that there is no religious controversy in this case. Their very opposition contradicts their own-selves. They say, your honor, that evolution is not—does not contradict the Bible—does not contradict Christianity. Why are they objecting to prayers if it doesn’t contradict the Bible—doesn’t contradict Christianity?

Judge Raulston defended the morning prayer, explaining that no bias was intended, and overruled the defense’s objection. Darrow reiterated the defense’s objection for the record.

Press Leak Solved

At this point, the results of the press investigation into the news leak of Judge Raulston’s decision were announced. The investigation revealed that a young reporter named Mr. Hutchinson had run into the judge on the way to the hotel, carrying paperwork with him. Mr. Hutchinson asked if the papers contained the judge’s decision. Judge Raulston replied that they did not but that the decision was with the stenographer. The reporter then asked if he would announce the decision later that day and the judge said he intended to. Finally, the reporter asked if after the decision was announced the court would be adjourned until the next day. The judge answered that yes, it would. From this the reporter logically deduced that the only reason court would be adjourned until the next day would be if the judge overruled the defense motion – otherwise, the trial would have ended with that decision. Hutchinson was called before the judge, but after the judge was assured by other reporters that Hutchinson had no sinister motive and was highly regarded by everyone, the judge let the matter go. He told the press to ask him directly for information, agreeing to answer directly when he could.

Darrow Not an Infidel

Darrow announced to the court that he took exception to Stewart calling him an infidel. He made clear that he was not taking exception to being called an agnostic but in fact considered that a compliment. However, he did not think such references should be made in front of the jury as it could influence the jurors. Judge Raulston sided with Darrow on this point and directed that no further references be made to the religious beliefs of counsel in the presence of the jury.

Motion to Quash the Indictment Overruled

The judge then proceeded to read his lengthy decision overruling the defense motion to quash the indictment. Judge Raulston read each legal argument raised by the defense and then gave his decision overruling each argument. Raulston basically agreed with the
prosecution’s rebuttals to all of the defense’s arguments that the Butler Act violated various sections of the Tennessee Constitution.

In addressing the defense’s arguments that the Butler Act violated the Fourteenth Amendment to the U.S. Constitution, the court cited Meyer v. Nebraska, Leeper, and a U.S. Supreme Court opinion decided the previous month, Pierce v. Society of Sisters.173 Pierce was a constitutional challenge to Oregon’s Compulsory Education Act of 1922, which required parents or guardians to send children between the ages of eight and sixteen to public school in the district where they resided. The Society of Sisters was an Oregon corporation that facilitated care for orphans, educated youths, and established and maintained academies or schools. The Court held in a unanimous decision that under the doctrine of Meyer v. Nebraska,174 the Oregon act unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control. According to the Court, "the fundamental liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

Judge Raulston ruled that “[u]nder the holdings in the Oregon case and in the Nebraska case, and in the Leeper Tennessee case, the court is satisfied that the act involved in the case at bar does not violate the Fourteenth amendment to the constitution of the United States.”

They seldom heard from McElwee, but he rose to state that the defense took exception to the ruling, in order to create a record for appeal. The court then adjourned until the afternoon.

Afternoon Session – Jury Brought In

The heat was so intense that during the noon recess, Scopes and two of the prosecutors, William Bryan Jr. and Wallace Haggard went swimming in a mountain pond. They ended up coming back late and Scopes was scolded by Hays: “Where in the hell have you been?”175 Hays then lectured Scopes that he had to appear promptly in court to avoid a technical error and possibly even arrest.

Finally, the jury was brought in to begin. Because of the crowd of people that packed the courtroom, the prosecution had difficulty finding their student witnesses who would testify that Scopes had taught them evolution. Some in the crowd had grabbed the chairs set aside for the prosecution. This prompted McKenzie to ask the court to direct the audience not to carry off the chairs of the attorneys. He said, “[w]e are a necessary evil in the courtroom . . . .” When the jurors were brought in, a juror announced the unanimous request for electric fans, saying, “[the] heat is fearful.” McKenzie replied that they would gladly help but the treasury did not have enough money. Malone volunteered to pay for some fans.

175 CENTER OF THE STORM, supra note 85, at 139.
Neal entered a not guilty plea for Scopes. Stewart made a very brief opening statement for the state. Malone gave the defense’s opening statement, explaining that the prosecution needed to prove two things: “First—That Scopes taught a theory that denies the story of the divine creation of man as taught in the bible, and Second—That instead and in the place of this theory he taught that man is descended from a lower order of animals.” Setting the stage for the battle over expert witnesses, Malone predicted that the defense would “prove by credible testimony that there is more than one theory of creation set forth in the Bible and that they are conflicting.”

**Malone Quotes Bryan**

Malone then read from an introduction that Bryan wrote to Thomas Jefferson’s Statute of Religious Freedom. Malone wanted to show that in previous years Bryan was more tolerant of viewpoints that clashed with his religious beliefs and that he agreed with Jefferson that legislation should not be used to try and control the beliefs of others. Malone also rejected the prosecution’s interpretation of evolution:

> The prosecution has twice since the beginning of the trial referred to man as descended from monkeys. This may be the understanding of the theory of evolution of the prosecution. It is not the view, opinion or knowledge of evolution held by the defense. No scientist of any preeminent standing today holds such a view. The most that science says today is that there is an order of men like mammals which are more capable of walking erect than other animals, and more capable than other animals in the use of the forefeet as hands.

Stewart objected to the use of Bryan’s name and the court sustained the objection. Malone explained why he quoted Bryan:

> These words, your honor, were written twenty years ago by a member of the prosecution in this case, whom I have described as the evangelical spokesman of the prosecution, and we of the defense appeal from his fundamentalist views of today to his philosophical views of yesterday, when he was a modernist to our point of view.

Bryan did not take offense, but the court insisted that his name not be used. Stewart also objected to framing the trial as a religious question and to reading any theories of evolution.

**Examination of Witnesses**

The first witness examined was Walter White. Stewart’s direct examination of White quickly established that Scopes taught from Hunters’ biology textbook; the book was entered into evidence as Exhibit 1. White recounted the scene at Robinson’s drugstore where the group discussed the Butler Act and Scopes, “admitted that he had taught [the
theory of evolution]. He said that he couldn’t teach the book without teaching that and he could not teach that without violating the statute.”

“What is the Bible?”

Stewart then offered into evidence the King James version of the Bible “as explanatory of what the act relates to when it says ‘Bible.’” This prompted Hays to question, “What is the Bible? Different sects of Christians disagree in their answers to this question.” Hays then discussed the various Bibles that were in existence and argued that expert testimony was needed to establish that the King James Version was the “Bible” so the jury could decide whether the expert was correct. Darrow pressed the prosecution on which particular Bible they wanted to offer as evidence and Stewart stated it was “Holman’s Pronouncing Edition of the Holy Bible . . . of 1611, known as the authorized or King James version.” Hays objected because the prosecution was interpreting the statute as prohibiting instruction of a theory that was contrary to the St. James version of the Bible. According to Hays:

If the court should take judicial notice of this exhibit as the Bible, you must likewise take judicial notice that there are various Bibles. And the King James’ version is not necessarily the Bible and when they introduce one book in evidence, we are saying there are several different books called the Bible. It is not relevant unless those books are the same. You know there is a Hebrew Bible, of some thirty nine books; and there is a Protestant Bible, and a Catholic Bible—the Protestant of sixty-six and the Catholic of eighty books; and you have the King James’ version, and a revised version and there are 30,000 differences between the King James’ version and it. . . . Who is to say that the King James version is the Bible? The prosecution will have to prove what Bible it is, and they will have to state the theory as taught in the Bible, and I presume the prosecution will be able to point out which theory of the creation as taught in the Bible they relied upon in prosecuting Mr. Scopes.

The court ruled that the Bible offered by Stewart could be certified because it was the Bible in common usage. The judge assured the defense they should be able to obtain a copy of that Bible at Robinson’s drugstore or in another town. The King James version of the Bible became Exhibit 2.

Darrow Cross-Examines Witnesses

During Darrow’s cross-examination, White clarified how Hunter’s biology textbook became the official biology textbook. White explained that the Tennessee Board of Education did not adopt books - this was the responsibility of the Tennessee Textbook Commission. The Commission officially adopted Hunter’s textbook in 1919, but the contract expired August 31, 1924. However, no other book was selected, so it was still the official textbook in 1925.
Darrow had some fun cross-examining Howard Morgan, one of Scopes’ students who testified that Scopes had taught evolution:

Q—Now, Howard, what do you mean by classify?
A—Well, it means classify these animals we mentioned, that men were just the same as them, in other words—
Q—He didn’t say a cat was the same as a man?
A—No, sir; he said man had a reasoning power; that these animals did not.
Q—There is some doubt about that, but that is what he said, is it?

After questioning Morgan about some aspects of biology taught by Scopes, Darrow asked, “Well, did he tell you anything else that was wicked?” Darrow ended his questioning by asking, “It has not hurt you any, has it?”

Darrow asked another witness who had learned about evolution at school, a seventeen-year-old student named Harry Shelton, “You didn’t leave church when he told you all forms of life began with a single cell?”

Darrow caused more laughter when he cross-examined “Doc” Robinson. After ascertaining that Robinson was selling the offending biology textbook in his drugstore, Darrow asked, “And you were a member of the school board?” When Robinson replied yes, many in the court laughed and Darrow followed with, “I think someone ought to advise you that you are not bound to answer these questions.” Stewart then interjected, “The law says teach not, sell.”

Darrow’s cross-examination of Doc Robinson included a detailed look at the section on the theory of evolution in Hunter’s *A Civic Biology* textbook. Major parts of this section were examined and read into the record. Stewart then asked that the first two chapters of Genesis be read into the record. Soon after this, the state rested its case.

**The Defense’s Case – Darrow does not put Scopes on the Stand**

The jury was removed from the courtroom and the defense put on its first witness - Dr. Maynard M. Metcalf, a zoologist from John Hopkins University. Before Darrow could begin any substantive questioning of Metcalf, Stewart interrupted to inform the defense that in Tennessee, if the defendant did not take the stand first he would not be allowed to testify later. Darrow replied, “Well, you have already caught me on it.” However, the judge said it was a technicality and the defense could withdraw Metcalf and put Scopes on the stand. But Darrow conceded, “Your honor, every single word that was said against this defendant was true.” Scopes wrote, “I sat speechless, a ringside observer at my own trial, until the end of the circus.”\(^{176}\) Scopes was aware of the strategy involved with the decision not to testify:

Darrow had been afraid for me to go on the stand. Darrow realized that I was not a science teacher and he was afraid that if I were put on the stand I would be

\(^{176}\) CENTER OF THE STORM, *supra* note 85, at 136.
asked if I actually taught biology. He knew there was a chance it could provide a traumatic setback for the defense; although I knew something of science in general, it would be quite another matter to deal exhaustively with scientific questions on the witness stand. He also knew there was nothing I could say that would benefit our case.  

Scopes had no illusions that he was the most important actor in the drama playing out in the courtroom: “I did little more than sit, proxylike, in freedom’s chair that hot, unforgettable summer—no great feat, despite the notoriety it has brought me. My role was a passive one that developed out of my willingness to test what I considered a bad law.”

**Defense’s First and Only Witness – Scientist with Religious Beliefs**

Metcalf was a good choice as the defense’s first witness because he was an established scientist and a religious man. He exemplified the defense’s contention that science and religion could co-exist in their respective realms. Depending on the scientific and religious interpretations used, the theory of evolution need not conflict with the Bible and religious beliefs. Darrow led Metcalf through a detailed description of his scientific education and accomplishments, followed by a discussion about his religious beliefs. Metcalf said he was a member of the Congregationalist Church, and was currently a member of the United Church in Oberlin Ohio. He was involved in church activities and had taught Bible classes for three years. Darrow then asked Metcalf:

Q—Are you an evolutionist?
A—Surely, under certain circumstances that question would be an insult, under these circumstances I do not regard it as such.
Q—Do you know any scientific man in the world that is not an evolutionist?

Stewart objected to this question. This resulted in a dispute about whether Metcalf could testify as to what the majority of scientists believed about evolution. Eventually Darrow rephrased the question: “What would you say, practically all scientific men were or were not evolutionists?” Metcalf answered:

I am acquainted with practically all of the zoologists, botanists and geologists of this country who have done any work; that is, any material contribution to knowledge in those fields, and I am absolutely convinced from personal knowledge that any one of these men feel and believe, as a matter of course, that evolution is a fact, but I doubt very much if any two of them agree as to the exact method by which evolution has been brought about, but I think there is— I know there is not a single one among them who has the least doubt of the fact of evolution.

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177 Id. at 187-88.  
178 Id. at 4.
Stewart objected to placing this testimony in the record where journalists and ultimately jury members might see it. The judge agreed and instructed the court stenographers not to provide that part of the transcript to news reporters. The jury was also dismissed so there was no danger that they would hear trial testimony on the speakers outside the courtroom.

Darrow proceeded to question Metcalf on the details of evolution. Darrow led Metcalf through a question and answer session covering the definition of evolution, inorganic and organic matter, the age of certain fossils, how life began, and the classification of mammals. The day ended with Metcalf stating that the theory of evolution applied to man as it did to animals and plants. Metcalf was the only defense expert to testify in court.

Day Five – Thursday, July 16, 1925

The trial was set to resume with Darrow’s direct examination of Dr. Metcalf. This day would involve the most contentious issue of the trial—whether the defense could introduce expert testimony. While Metcalf had already spent time on the witness stand, the court still had to determine whether his testimony – and that of other experts – would be admissible for purposes of the jury’s consideration.

Basic Legal Dispute – Why the Defense Wanted Expert Testimony

The defense argued that the Butler Act only prohibited teaching the specific doctrine of evolution that denied divine creation of man. The defense argued it needed expert testimony to show that evolution did not necessarily conflict with the Bible, as there were many different interpretations of the Bible. The prosecution strongly objected, arguing that the Butler Act prohibited teaching any theory of human evolution. The prosecution believed the trial should only address the narrow legal issue of whether Scopes taught evolution, an issue for which no outside experts were needed. The prosecution also wanted to exclude expert testimony because they had been unable to secure any reputable experts for their side.

Immediately after Darrow asked Dr. Metcalf his first question, involving the evolution of man, Stewart interrupted with a request to confine the testimony. He believed enough scientific testimony had been given by the defense’s expert for Judge Raulston to rule on whether such evidence should be admitted. In defending the defense’s need for expert testimony, Darrow explained:

We expect to show by men of science and learning—both scientists and real scholars of the Bible—men who know what they are talking about—who have made some investigation—expect to show first what evolution is, and, secondly, that any interpretation of the Bible that intelligent men could possibly make is not in conflict with any story of creation, while the Bible, in many ways, is in conflict with every known science, and there isn’t a human being on earth believes it literally. We expect to show that it isn’t in conflict with the theory of evolution. We expect to show what evolution is, and the interpretation of the Bible that prevails with men of intelligence who have studied it.
Judge Concerned Courtroom Floor Could Collapse

William Jennings Bryan, Jr. then rose to argue that the expert testimony should be excluded. Bryan argued in very legal terms, citing cases and other sources to support his position. After Bryan’s argument, the judge raised concerns about the courtroom floor bearing too much weight. He did not want the lawyers who “indulge in a lot of wit” to cause the spectators to laugh and move around, because the floor could possibly collapse.

Darrow and the defense team fought hard to get expert testimony into the trial. The prosecution fought hard to exclude it. The prosecution argued that the statute prohibited any instruction of the theory of evolution as applied to humans, regardless of whether or not it conflicted with Bible. Accordingly, expert testimony on the issue of a conflict was not needed and should not be allowed in. Darrow argued to the judge that the defense wanted to show:

[A]ny interpretation of the Bible that intelligent men could possibly make is not in conflict with any story of creation, while the Bible, in many ways is in conflict with every known science, and there isn’t a human being on earth who believes it literally. We expect to show that it isn’t in conflict with the theory of evolution.

In his autobiography, Darrow wrote, “[W]e expected to introduce evidence by experts as to the meaning of the word ‘evolution’ and whether it was inconsistent with ‘religion’ under correct definition of both words.”179

During the morning session and at the start of the afternoon session, Judge Raulston announced that due to the great crowd of people, there was a tremendous weight on the floor. He asked for order in the court so as not to cause a collapse.

Bryan Speaks – Takes Aim at Darrow and Evolution

Largely silent up to this point, Bryan rose to present his view of the case. According to the transcript, Bryan must have scored numerous points during his speech because his words were often interrupted by laughter and applause. Referring to Darrow he said, “The principal attorney has often suggested that I am the arch-conspirator and that I am responsible for the presence of this case and I have almost been credited with leadership of the ignorance and bigotry which he thinks could alone inspire a law like this.”

Bryan addressed the legal arguments regarding the caption and body of the Butler Act, arguing the law was sound. As Bryan saw it, the defense’s use of experts came too late. That type of evidence should have been given to the legislature before the bill was passed. A trial was not the proper forum to debate whether the law should have been passed. Bryan resented outsiders coming to Tennessee to lecture its citizens about a law passed by their elected representatives.

179 STORY OF MY LIFE, supra note 4, at 260.
As Bryan saw it, the Butler Act merely leveled the playing field. It was a logical case of who should control what is taught in the public schools of Tennessee. Bryan asked:

[You see in this state they cannot teach the Bible. They can only teach things that declare it to be a lie, according to the learned counsel. These people in the state—Christian people—have tied their hands by their constitution... we will not teach that Bible, which we believe even to our children through teachers that we pay with our money... The question is can a minority in this state come in and compel a teacher to teach that the Bible is not true and make the parents of these children pay the expenses of the teacher to tell their children what these people believe is false and dangerous?

Trying to show that Darrow was not as knowledgeable about some issues as he should be, Bryan said: “Little Howard Morgan—and, your honor, that boy is going to make a great lawyer some day. I didn’t realize it until I saw how a 14-year old boy understood the subject so much better than a distinguished lawyer who attempted to quiz him.”

Bryan pointed out in contrast to Darrow and Morgan that man’s origin from a single cell was not evolution but simply normal growth.

Bryan then gave a long impassioned speech against evolution. A constant theme of his attack against evolution was its detraction from the dignity and special status of humans; humans are closer to God because they were made in his image and this theory simply reduced man to another class of mammal. To Bryan, “[T]he Christian believes man came from above, but the evolutionist believes he must have come from below. And that is from a lower order of animals.” He presented Hunter’s biology text to Judge Raulston, and then began to criticize parts of the evolution section. Bryan specifically referred to a chart on page 194 that illustrated a human being’s family tree. Getting excited, he exclaimed:

There is that book! There is the book they were teaching your children that man was a mammal and so indistinguishable among the mammals that they leave him there with thirty-four hundred and ninety-nine other mammals. Including elephants? Talk about putting Daniel in the lion’s den? How dared those scientists put man in a little ring like that with lions and tigers and everything that is bad! Not only the evolution is possible, but the scientists possibly think of shutting man up in a little circle like that with all these animals, that have an odor, that extends beyond the circumference of this circle, my friends.

Bryan hammered home perhaps his main criticism of teaching children the theory of evolution—that it undermined the religious faith of children instilled by their parents. Bryan clearly explained the threat to religion:

Tell me that the parents of this day have not any right to declare that children are not to be taught this doctrine? Shall not be taken down from the high plane upon which God put man? Shall be detached from the throne of God and be compelled
to link their ancestors with the jungle, tell that to these children? Why, my friend, if they believe it, they go back to scoff at the religion of their parents. And the parents have the right to say that no teacher paid by their money shall rob their children of faith in God and send them back to their homes, skeptical, infidels, or agnostics, or atheists.

Bryan criticized Darwin specifically as he quoted from one of Darwin’s most influential works, *The Descent of Man*. Referring to Darwin’s theory that humans branched off from old world monkeys at some point in the past, he emphasized, “Not even from American monkeys, but from old world monkeys.” He also repeated his past criticism that the theory of evolution was not worthy of being called a theory because it was a mere hypothesis. Bryan cited Huxley, Darwin’s chief defender, who said evolution could not rise to the dignity of a theory until a species was discovered that had evolved according to the hypothesis. He also pointed out that Darwin himself had found it strange that with two to three million species, he and others had not been able to find one species that they could trace to another. Bryan mentioned his membership in the American Academy for the Advancement of Science and railed against the lack of evidence for evolution theory:

[T]oday there is not a scientist in all the world who can trace one single species to any other, and yet they call us ignoramuses and bigots because we do not throw away our Bible . . . . they cannot find a single species that came from another, and yet they demand that we allow them to teach this stuff to our children, that they may come home with their imaginary family tree and scoff at their mother’s and father’s Bible.

**Bryan Criticizes Darrow’s Defense of Leopold and Loeb**

Bryan added to his arguments by criticizing Darrow’s defense of Leopold and Loeb the year before. Bryan read directly from a copy of Darrow’s plea to save Leopold and Loeb from execution. Darrow had, among other defenses, blamed the murder at least in part on the teaching of Nietzsche at the University of Chicago where the defendants attended school. Bryan believed that Nietzsche followed the theory of evolution and the survival of the fittest to its logical conclusion. Bryan claimed that Nietzsche praised Darwin and held him to be “one of the three great men of this century” along with Napoleon. Bryan stated:

[W]e have the testimony of my distinguished friend from Chicago in his speech in the Loeb and Leopold case that 50,000 volumes had been written about Nietzsche, and he is the greatest philosopher in the last hundred years, and have him pleading that because Leopold read Nietzsche and adopted Nietzsche’s philosophy of the superman, that he is not responsible for the taking of human life.

Darrow objected that Bryan was misquoting him. Bryan offered to read directly from the transcripts, and informed the audience that transcript copies were for sale in Dayton, where he had purchased several. Bryan then read from his copy of Darrow’s plea:
I will guarantee you can go down to the University of Chicago today—into its big library and find over 1,000 volumes of Nietzsche, and I am sure I speak moderately. If this boy is to blame for this, where did he get it? Is there any blame attached because somebody took Nietzsche’s philosophy seriously and fashioned his life on it? And there is no question in this case but what it is true. Then who is to blame? The university would be more to blame than he is. The scholars of the world—and Nietzsche’s books are published by one of the biggest publishers in the world—are more to blame than he is. Your honor, it is hardly fair to hang a 19-year old boy for the philosophy that was taught him at the university.

Darrow countered that Bryan’s reference to his plea in defense of Leopold and Loeb was incomplete. The plea should have included Darrow’s statement, “I do not believe that the universities are to blame I do not think they should be held responsible.”

**Dudley Field Malone Gives Finest Speech of the Trial**

Scopes recounted how he had heard Malone ask Darrow and Hays if he could respond to Bryan instead of Darrow, and they both agreed. Malone caught everyone’s attention at this point. He had already gained the admiration of the audience with his ability to withstand the heat without once taking his suit coat off, unlike every other participant. Scopes recalled the moment:

[N]o one had ever seen him with his coat off, and now as he rose to answer Bryan he performed the most effective act anyone could have thought of to get the audience’s undivided attention: He took off his coat. He folded it neatly and laid it carefully on the counsel’s table. Every eye was upon him before he had said a single word.180

Malone then proceeded to give the performance of his life. Malone argued in favor of scientific inquiry and pursuit of knowledge instead of religious restrictions on knowledge. Malone, once Bryan’s subordinate, concluded his speech with words that elicited great emotion from the audience:

There is never a duel with the truth. The truth always wins and we are not afraid of it. The truth is no coward. The truth does not need the law. The truth does not need the forces of government. The truth does not need Mr. Bryan. The truth is imperishable, eternal, and immortal, and needs no human agency to support it. We are ready to tell the truth as we understand it and we do not fear all the truth that they can present as facts. We are ready. We are ready. We feel we stand with progress. We feel we stand with science. We feel we stand with intelligence. We feel we stand with fundamental freedom in America. We are not afraid. Where is the fear? We meet it, where is the fear? We defy it . . . .

Malone gave a performance that some spectators found even more powerful and significant than Darrow’s. Scopes described the scene: “The courtroom went wild when Malone finished. The heavy applause he had received during the speech was nothing compared to the crowd’s reaction now at the end. The judge futilely called for order.” Scopes was astonished at the effect Malone’s words had on the audience. “Malone took the crowd away from Bryan the Invincible, even though Bryan had wrapped up the audience and marked it his. Soon the spectators were cheering Malone. It was so dramatic that a transcript couldn’t tell it.”

Stewart finished the day by arguing why the testimony of defense experts should be excluded. After his legal arguments, Stewart turned to religion. “They say it is a battle between religion and science, and in the name of God, I stand with religion because I want to know beyond this world that there may be an eternal happiness for me and for all.” Stewart denounced “teaching that infidelity, that agnosticism, that which breeds in the soul of the child, infidelity, atheism, and drives him from the Bible that his father and mother raised him by . . . .” He declared, “I say, bar the door, and not allow science to enter.” Stewart first paid Darrow a compliment and then proceeded to vilify him:

Mr. Darrow says he is an agnostic. He is the greatest criminal lawyer in American today. His courtesy is noticeable—his ability is known—and it is a shame, in my mind, in the sight of a great God, that mentality like his has strayed so far from the natural goal that it should follow—great God, the good that a man of his ability could have done if he had aligned himself with the forces of right instead of aligning himself with that which strikes its fangs at the very bosom of Christianity.

But it was Malone’s brilliant speech that still electrified the atmosphere. Scopes recounted that after court adjourned and the courtroom emptied only he, Bryan and Malone remained. Bryan said, “Dudley, that was the greatest speech I have ever heard.” To which Malone responded, “Thank you . . . I am sorry it was I who had to make it.” Scopes and others believed Malone’s speech contributed to Bryan’s willingness to go on the stand later in the trial and subject himself to Darrow’s questioning. According to Scopes:

Bryan was never the same afterward and if there were any turning points in the trial that day was one. Dudley Field Malone had shattered his former chief’s unbounded optimism, which Darrow is commonly credited with having done later in the trial. Bryan had reached his peak before Darrow ever got him on the stand. If anything, Malone’s debilitating coup probably made Bryan want to go on the stand, in the vain hope of regaining some of his tarnished glory.

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181 Id. at 154.
182 Id. at 149.
183 Id.
184 Id.
Scopes was deeply impressed by Malone’s speech. Writing more than forty years after he witnessed Malone’s performance, Scopes recalled:

His reply to Bryan was the most dramatic event I have attended in my life. The intervening decades have produced nothing to equal it; nor do I expect to see anything like it in my remaining years.\(^\text{185}\)

A Bryan biographer wrote of Malone’s speech, “Men, unmoved even by Darrow, could not restrain their cheers.”\(^\text{186}\) Darrow said that Malone was “particularly brilliant” in his reply to Bryan.\(^\text{187}\) None other than John Butler, the author of the Butler Act under which Scopes was prosecuted, stated that Malone gave the “finest speech of this century.”\(^\text{188}\)

**Day 6 – Friday, July 17, 1925**

Judge Raulston began the day with a decision regarding the admissibility of defense expert testimony. After a discussion of the legal issues, Judge Raulston concluded:

In the final analysis this court, after a most earnest and careful consideration, has reached the conclusions that under the provisions of the act involved in this case, it is made unlawful thereby to teach in the public schools of the state of Tennessee the theory that man descended from a lower order of animals. If the court is correct in this, then the evidence of experts would shed no light on the issues. Therefore, the court is content to sustain the motion of the attorney-general to exclude the expert testimony.

Since expert testimony constituted the core of the defense’s strategy, they quickly excepted to the ruling. Hays wanted the judge to hear the expert testimony out of the jury’s presence so the defense could try to convince the judge that his earlier ruling (that the Butler act was constitutional) was in error. The expert testimony would also build a record for appealing the decision to exclude such testimony from the trial. Over Stewart’s objections, Judge Raulston agreed to hear the experts. This prompted Bryan to ask if the prosecution would be able to cross-examine the experts. Darrow strongly objected to this request. He argued that the defense was only building a record for appeal of what they would have attempted to prove at trial had they been allowed to bring in their experts. For this reason, the prosecution should not be able to cross-examine the defense experts.

The judge explained the defense could enter affidavits stating what the experts intended to say, but the prosecution would have the opportunity to cross-examine any expert taking the stand. Tempers, exacerbated by the heat, flared numerous times during the trial, as they did when the following exchange took place:

\(^{185}\) *Id.* at 156.
\(^{187}\) STORY OF MY LIFE, *supra* note 4, at 261.
The Court—Colonel, what is the purpose of cross-examination?
Mr. Darrow—The purpose of cross-examination is to be used on the trial.
The Court—Well, isn’t it an effort to ascertain the truth?
Mr. Darrow—No, it is an effort to show prejudice. Nothing else. Has there been any effort to ascertain the truth in this case? Why not bring the jury and let us prove it?
The Court—Courts are a mockery—
Mr. Darrow—They are often that, your honor.
The Court—When they permit cross-examination for the purpose of creating prejudice.
Mr. Darrow—I submit, our honor there is no sort of question that they are not entitled to cross-examine, but all this evidence is to show what we expect to prove and nothing else, and can be nothing else.
The Court—I will say this: If the defense wants to put their proof in the record, in the form of affidavits, of course they can do that. If they put the witness on the stand and the state desires to cross-examine them, I shall expect them to do so.
Mr. Darrow—We except to it and take an exception.
The Court—Yes, sir; always expect this court to rule correctly.
Mr. Darrow—No, sir, we do not.
The Court—I suppose you anticipated it?
Mr. Darrow—Otherwise we should not be taking our exceptions here, your honor.
We expect to protect our rights in some other court. Now, that is plain enough, isn’t it? Then we will make statements of what we expect to prove. Can we have the rest of the day to draft them?
The Court—I would not say—
Mr. Darrow—if your honor takes a half day to write an opinion—
The Court—I have not taken—
Mr. Darrow—We want to make statements here of what we expect to prove. I do not understand why every request of the state and every suggestion of the prosecution should meet with an endless waste of time, and a bare suggestion of anything on our part should be immediately over-ruled.
The Court—I hope you do not mean to reflect upon the court?
Mr. Darrow—Well, your honor has the right to hope.
The Court—I have the right to do something else, perhaps.
Mr. Darrow—All right; all right.

Judge Raulston eventually gave the defense the rest of the day to prepare the expert statements. The judge took notice of Darrow’s testy exchange but let it pass, at least for the time being, and recessed the court until the following Monday.

Day 7 – Monday, July 20, 1925

Many observers thought the case was over after Judge Raulston announced his ruling excluding the expert witnesses for the defense. Indeed, many reporters, including H.L. Mencken, left after the sixth day of the trial. Mencken wrote on Saturday:
All that remains of the great cause of the State of Tennessee against the infidel Scopes is the formal business of bumping off the defendant. There may be some legal jousting on Monday and some gaudy oratory on Tuesday, but the main battle is over, with Genesis completely triumphant. . . .

But Mencken and many court observers could not have been more wrong. What would happen on this day of the trial would ensure that it would go down in history as the “Trial of the Century.”

**Darrow Held in Contempt**

After the morning prayer, Judge Raulston quickly showed that Darrow’s’ comments on Friday were not forgotten. After the jury was excluded, Judge Raulston said, “On last Friday, July 17, contempt and insult were expressed in this court, for the court and its orders and decrees . . . .” He then repeated verbatim the exchange he had with Darrow on that day. Judge Raulston informed those present, “The court has withheld any action until passion had time to subdue” and to ensure that the jury was not present. Then he stated:

> It has been my policy on the bench to be cautious and to endeavor to avoid hastily and rashly rushing to conclusions. But in the face of what I consider an unjustified expression of contempt for this court and its decrees, made by Clarence Darrow, on July 17, 1925, I feel that further forbearance would cease to be a virtue, and in an effort to protect the good name of my state, and to protect the dignity of the court . . . I am constrained and impelled to call upon the said Darrow, to know what he has to say why he should not be dealt with for contempt.

The judge then ordered Darrow served and required he appear to answer the next day. The judge also set a $5000 bond. Darrow told the judge, “Now, I do not know whether I could get anybody, your honor.” But Neal assured the court the bond would be paid. A lawyer named Frank Spurluck from Chattanooga volunteered to cover the bond for Darrow. Spurluck would later work for the defense when it appealed the Scopes case to the Supreme Court of Tennessee.

Hays then repeatedly tried to get into evidence the statement Governor Peay gave when he signed the Butler bill into law. Stewart fought against it, as he had fought against any evidence that did not relate directly to whether or not Scopes violated the statute. Judge Raulston excluded the governor’s statement based on a separation of powers argument, explaining that it was the judicial branch and not the executive branch that had the power to interpret the law.

Hays wanted to read the testimony of their experts or at least summaries of the testimony. Stewart repeatedly objected to this because he believed the defense’s purpose was to engage in an elitist educational campaign to enlighten the backward citizens of

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Tennessee. Darrow also got involved in the argument and insisted that the defense had the right to “state in open court” what they expected to prove. Stewart was adamant that the defense should not be allowed to read the statements, arguing instead they should simply offer them into the record by giving them to the court stenographer. After considerable discussion, Judge Raulston sided with the defense and gave them an hour to read summaries of their statements. Hays then proceeded to read summaries of expert statements from Bible scholars who believed that the Bible should not be interpreted literally word for word, and that the theory of evolution was not necessarily in conflict with the Bible.

Darrow Apologizes to the Court

At the beginning of the afternoon session, Stewart announced that over the noon hour he had conferred with the defense about the contempt citation against Darrow, who had a statement to make about the matter. Darrow then made an extended apology for his remarks. Darrow began:

Your honor, quite apart from any question of what is right or wrong in this matter which your honor mentioned and which I will discuss in a moment—quite apart from that, and on my own account if nothing else was involved, I would feel that I ought to say what I am going to say. Of course, your honor will remember that whatever took place was hurried, one thing, followed another and the truth is I did not know just how it looked until I read over the minutes as your honor did and when I read them over I was sorry that I had said it.

Darrow told the judge that he had made up his mind later on Friday that he would apologize to the court come Monday morning. Darrow said that he had seen a newspaper story stating he was purposely trying to incite a contempt charge; he refrained from apologizing in the morning because he knew the judge would want to speak about the matter. Darrow then got to the substance of his apology:

I have been practicing law for forty-seven years and I have been pretty busy and most of the time in court I have had many a case where I have had to do what I have been doing here—fighting the public opinion of the people, in the community where I was trying the case—even in my own town and I never yet have in all my time had any criticism by the court for anything I have done in court. That is, I have tried to treat the court fairly and a little more than fairly because when I recognize the odds against me, I try to lean the other way the best I can and I don’t think any such occasion ever arose before in my practice.

I am not saying this, your honor, to influence you, but to put myself right. I do think, however, your honor, that I went further than I should have done. So far as its having been premeditated or made for the purpose of insult to the court I had not the slightest thought of that. I had not the slightest thought of that. One thing snapped out after another, as other lawyers have done in this case, not, however, where the judge was involved, and apologized for it afterwards, and so far as the
people of Tennessee are concerned, your honor suggested that in your opinion-I
don't know as I was ever in a community in my life where my religious ideas
differed as widely from the great mass as I have found them since I have been in
Tennessee. Yet I came here a perfect stranger and I can say what I have said
before that I have not found upon anybody's part-any citizen here in this town or
outside, the slightest discourtesy. I have been treated better, kindlier and more
hospitably than I fancied would have been the case in the north, and that is due
largely to the ideas that southern people have and they are, perhaps, more
hospitalable than we are up north...

I am quite certain that the remark should not have been made and the court could
not help taking notice of it and I am sorry that I made it ever since I got time to
read it and I want to apologize to the court for it.

Judge Accepts Darrow’s Apology

The crowd applauded Darrow’s apology. Judge Raulston asked if anyone else had
anything to say on behalf of “Colonel Darrow” but no one responded. Judge Raulston
explained that had this been a private matter between himself and Colonel Darrow, he
would have let it pass, but had to take notice of it since it was directed at the court. He
explained that he had to uphold the great name of Tennessee. Judge Raulston then
accepted Darrow’s apology and included a short sermon on the matter:

My friends, and Col. Darrow, the Man that I believe came into the world to save
man from sin, the Man that died on the cross that man might be redeemed, taught
that it was godly to forgive and were it not for the forgiving nature of Himself I
would fear for man. The Savior died on the cross pleading with God for the men
who crucified Him.

I believe in that Christ. I believe in these principles. I accept Col. Darrow’s
apology. I am sure his remarks were not premeditated. I am sure that if he had
time to have thought and deliberated he would not have spoken those words. He
spoke those words, perhaps, just at a moment when he felt that he had suffered
perhaps one of the greatest disappointments of his life when the court had held
against him. Taking that view of it, I feel that I am justified in speaking for the
people of the great state that I represent when I speak as I do to say to him that we
forgive him and we forgot it and we commend him to go back home and learn in
his heart the words of the Man who said: "If you thirst come unto Me and I will
give thee life.

After the contempt charge was dismissed, the judge decided to move the court
proceedings outside. There had been rumors during the trial that the large crowd was
causing cracks to appear in the ceiling downstairs, and Judge Raulston had several times
said he was afraid of the building. While Scopes thought fear of a floor collapse was a
good story, he thought the oppressive heat inside the courtroom was the real reason for
the move.190

Hays Read Summaries of Expert Testimony

After the court was re-assembled on the courthouse lawn, Hays requested permission to
read the summaries that had been prepared of their expert witness testimony. Hays noted
that the defense attorneys did not take a position on these matters, but simply wanted to
show what “learned Biblical scholars” had to say in regard to interpretations of the Bible
and the theory of evolution. He started with Rabbi Rosenwasser’s statement about
different translations of the Bible, and presented another expert’s opinion that evolution
and the Bible are not in conflict when the Bible is properly interpreted. The judge
allowed Hays to read some statements by Dr. Metcalf even though he had previously
testified for the defense. It turned out in the end that Dr. Metcalf was the only defense
expert allowed to testify. Hays explained the statements of their experts would show “the
Bible is both a literal and figurative document, [and] that God speaks by parables,
allegories, sometimes literally and sometimes spiritually.”

Hays then read statements from their scientific experts. The statements contained details
of estimates of the earth’s age, and details about the theory of evolution. Hays also read a
letter written in 1922 by President Woodrow Wilson to Professor Winterton C. Curtis,
another defense expert: "[O]f course, like every other man of intelligence and education, I
do believe in organic evolution. It surprises me that at this late date such questions should
be raised."191 This letter from President Wilson would also be cited by the defense in
their brief to the Supreme Court of Tennessee.

But before the jury was brought in, another religious controversy arose. Darrow objected
to a large sign near where the jury would sit that read, “Read Your Bible.” This resulted
in another set of arguments between both sides, as the prosecution saw no reason the sign
should be removed. Eventually Judge Raulston sided with the defense, and the sign was
removed.

“The defense desires to call Mr. Bryan as a witness”

Next was an event that would go down in history. The court, prosecution lawyers and
spectators were stunned when Hays announced, “The defense desires to call Mr. Bryan as
a witness . . . .” B.G. McKenzie objected, so the judge told the defense that Mr. Bryan
would be protected from revealing confidential information. Bryan agreed to be
questioned but insisted that Darrow, Malone and Hays also be put on the stand. Darrow
said he did not want Bryan sworn in. Accounts differ as to whether it was actually Hays
or Darrow who called Bryan to the stand. Darrow wrote in his autobiography, “Then I
called Mr. W.J. Bryan as an expert on the meaning of the word ‘religion.’”192 But most
accounts - including the court transcripts and Scopes’ autobiography - state that it was

190 SUMMER FOR THE GODS, supra note 5, at 186.
191 Letter from President Woodrow Wilson to Professor Winterton C. Curtis (Aug. 29, 1922).
192 STORY OF MY LIFE, supra note 4, at 265.
Hays who called Bryan to testify. Regardless of who called Bryan to the stand, it was Darrow who questioned him.

Darrow recalled, “At once every lawyer for the prosecution was on his feet objecting to the proceeding.” 193 Scopes wrote that the prosecution adamantly objected to putting Bryan on the stand as a witness, and Judge Raulston “probably would have ruled with Stewart, had Bryan himself not been on his feet, demanding his right to testify.” 194 Scopes believed Bryan wanted to take the stand to “recoup the glory he had lost after Malone’s blistering attack,” but also because Bryan had come to Dayton to defend “revealed religion” and Bryan believed he “could hold his own as an expert on the Bible.” 195

A 2005 book on the Scopes trial indicates yet another reason for Bryan’s willingness to take the stand: just a week earlier it was reported that Columbia University had proposed barring public school students who did not get a Darwinian education. In response, Rhea County Superintendent of Schools Walter White proposed founding the Bryan University in Dayton, Tennessee. 196 A Florida philanthropist pledged $10,000 to the project and Bryan, who was already thinking about going on a speaking tour about creationism, may have been “eager to jump at the unexpected chance to expand on his beliefs as a witness for the defense.” 197 The school was founded as Bryan College in 1930 and is still in existence today. 198

Interestingly, the moment that Bryan was called to the stand by the defense was captured by WGN microphones and broadcast to radio listeners in Chicago. Some reporters had already left the hot courtroom, completely unaware of what was to happen:

[They] missed an exchange which the listening audience heard in its every detail—the surprise move by the defense which brought William Jennings Bryan to the witness stand, as an expert on the Bible, to be questioned by Clarence Darrow. This encounter was, perhaps, the most dramatic confrontation of the trial, and it may stand today as the trial’s most historically important single event. And the exchange was broadcast live. 199

However dramatic Bryan’s call to the stand appeared, it was no surprise to the defense team. Over the weekend Darrow had planned to call Bryan as a witness, because he was going to get a “Bible expert on the stand” despite Judge Raulston’s rulings. 200 Darrow

193 Id. at 265.
194 CENTER OF THE STORM, supra note 85, at 166 (emphasis in original).
195 Id.
196 MONKEY BUSINESS, supra note 19, at 148.
197 Id.
198 See http://www.bryan.edu/.
199 James W. Wesolowski, Before Canon 35: WGN Broadcasts the Monkey Trial, 2 JOURNALISM HIST. 76, 78 (1975) (noting that the original programs were not recorded so the broadcasts are lost).
200 MONKEY BUSINESS, supra note 19, at 147.
even rehearsed the confrontation with a potential expert witness, Harvard geologist Kirtley Mather, who played the part of Bryan.201

**Bryan on the Stand**

When Bryan took the stand, Darrow proceeded to ask his first question: “You have given considerable study to the Bible, haven’t you, Mr. Bryan?” To which Bryan replied, “Yes, sir, I have tried to.” It was Bryan’s interpretation of the Bible that would be the target of Darrow’s examination. Darrow knew some of Bryan’s biblical interpretations because they had been published in the past. Darrow wanted Bryan to say everything in the Bible should be literally interpreted.

Darrow questioned Bryan for about two hours, asking about various parts of the Bible and trying to show that literal interpretations were nonsensical. Bryan quickly found himself in a bind. If he stubbornly stuck to a literal interpretation by stating he believed everything exactly as written in the Bible, Darrow would make him look foolish. But if Bryan tried a more sophisticated approach and explained that some of the stories in the Bible could be seen as parables or illustrations, he would in effect be admitting that not all parts of the Bible should be taken literally. If he took this approach he would alienate his fundamentalist supporters who did interpret the Bible literally.

Darrow began by questioning Bryan about the story of Jonah being swallowed by a whale. He then moved on to other stories in the Bible. He asked if Bryan believed that Joshua made the sun stand still. After Darrow and Bryan argued back and forth about whether Joshua made the sun stand still, as it states in the Bible, Stewart interrupted and strenuously objected to the questioning. However, Judge Raulston let the questioning continue. Darrow and Bryan continued to debate the story of Joshua and then moved to the story of the flood. Darrow tried repeatedly to get Bryan to admit that the Bible was subject to different interpretations. Right from the start, Bryan refused to admit that everything in the Bible should be interpreted literally, arguing instead it should be understood as illustrative:

Q—You claim that everything in the Bible should be literally interpreted?
A—I believe everything in the Bible should be accepted as it is given there: some of the Bible is given illustratively. For instance: "Ye are the salt of the earth." I would not insist that man was actually salt, or that he had flesh of salt, but it is used in the sense of salt as saving God's people.
Q—But when you read that Jonah swallowed the whale--or that the whale swallowed Jonah-- excuse me please--how do you literally interpret that?
A—When I read that a big fish swallowed Jonah--it does not say whale....That is my recollection of it. A big fish, and I believe it, and I believe in a God who can make a whale and can make a man and make both what He pleases.
Q—Now, you say, the big fish swallowed Jonah, and he there remained how long--three days-- and then he spewed him upon the land. You believe that the big fish was made to swallow Jonah?

201 *Id.*
A—I am not prepared to say that; the Bible merely says it was done.
Q—You don't know whether it was the ordinary run of fish, or made for that purpose?
A—You may guess; you evolutionists guess.
Q—But when we do guess, we have a sense to guess right.
A—But do not do it often.

Darrow spent considerable time quizzing Bryan about the concept of time used in the Bible.

Q—Would you say that the earth was only 4,000 years old?
A—Oh, no; I think it is much older than that.
Q—How much?
A—I couldn't say.
Q—Do you say whether the Bible itself says it is older than that?
A—I don't think the Bible says itself whether it is older or not.
Q—Do you think the earth was made in six days?
A—Not six days of twenty-four hours.
Q—Doesn't it say so?
A—No, sir.

There were numerous testy exchanges between Darrow and Bryan. Both were clearly angry at each other at times. Stewart objected again, and Bryan followed with:

The purpose is to cast ridicule on everybody who believes in the Bible, and I am perfectly willing that the world shall know that these gentlemen have no other purpose than ridiculing every Christian who believes in the Bible.

Darrow responded: “We have the purpose of preventing bigots and ignoramuses from controlling the education of the United States and you know it, and that is all.”

Later Darrow went back to the concept of Biblical time:

Q—Then, when the Bible said, for instance, "and God called the firmament heaven. And the evening and the morning were the second day," that does not necessarily mean twenty-four hours?
A—I do not think it necessarily does.
Q—Do you think it does or does not?
A—I know a great many think so.
Q—What do you think?
A—I do not think it does.
Q—You think those were not literal days?
A—I do not think they were twenty-four-hour days.
Q—What do you think about it?
A—that is my opinion—I do not know that my opinion is better on that subject than those who think it does.
Q—You do not think that?
A—No. But I think it would be just as easy for the kind of God we believe in to make the earth in six days as in six years or in 6,000,000 years or in 600,000,000 years. I do not think it important whether we believe one or the other.
Q—Do you think those were literal days?
A—My impression is they were periods, but I would not attempt to argue as against anybody who wanted to believe in literal days.

Of this exchange, Scopes wrote:

These were astonishing answers. When Bryan admitted the earth had not been made in six days of twenty-four hours, the Fundamentalists gasped. The Bible had used plain language, stating that the earth was made in six days. . . . It seemed incredible that William Jennings Bryan, the Fundamentalist knight on the white charger, had betrayed his cause by admitting to the agnostic Darrow that the world hadn’t been made in six days! It was the great shock that Darrow had been laboring for all afternoon.202

Another source supports Scopes’ assessment of this part of the confrontation between Darrow and Bryan: “For the first time it became evident to many of Bryan’s followers that their leader did not accept the Bible literally at all times.”203 As a result of his debate with Darrow, “If Bryan lost popularity among some of Dayton’s residents due to the trial, it was not because they had been converted to Darrow’s side, but because they were deeply disappointed at the concessions Bryan made under Darrow’s questioning.”204

Bryan Not Afraid of Agnostics and Atheists

Several times Bryan stated that his purpose in taking the stand was to show that he was not afraid to defend his faith against Darrow and others who ridiculed religious beliefs. At one point Bryan stated:

The reason I am answering is not for the benefit of the superior court. It is to keep these gentlemen from saying I was afraid to meet them and let them question me, and I want the Christian world to know that any atheist, agnostic, unbeliever, can question me anytime as to my belief in God, and I will answer him.

Later Bryan declared:

Your honor, they have not asked a question legally and the only reason they have asked any question is for the purpose, as the question about Jonah was asked, for a chance to give this agnostic an opportunity to criticize a believer in the world of God; and I answered the question in order to shut his mouth so that he cannot go

202 CENTER OF THE STORM, supra note 85, at 178.
203 DEFENDER OF THE FAITH, supra note 186, at 349.
204 Id. at 352-53 n.73.
out and tell his atheistic friends that I would not answer his questions. That is the only reason, no more reason in the world.

At the end of the two hour confrontation, the following exchange took place:

Mr. Bryan—Your honor, I think I can shorten this testimony. The only purpose Mr. Darrow has is to slur at the Bible, but I will answer his question. I will answer it all at once, and I have no objection in the world, I want the world to know that this man, who does not believe in God, is trying to use a court in Tennessee—
Mr. Darrow—I object to that.
Mr. Bryan—to slur at it, and while it will require time, I am willing to take it.
Mr. Darrow—I object to your statement. I am exempting you on your fool ideas that no intelligent Christian on earth believes.

Scopes describes the scene during this exchange: “They were standing and glaring at each other. The afternoon, filled with alternating humor and hostility, now at climax. Emotions had reached a bursting point.”205

At this point, Judge Raulston adjourned the court until the next morning. According to several sources, “Raulston acted none too soon; several mountain men had grabbed their rifles and were ready to shoot Darrow if he took hold of Bryan.”206

Darrow Recounts the Duel with Bryan

In his autobiography written seven year later, Darrow described his battle with Bryan: “I began by asking him concerning his qualifications to define religion, and especially fundamentalism, which was the State religion of Tennessee.”207 Bryan explained his religious activities and his anti-evolution efforts. Darrow wrote of proceeding to question Bryan about his fundamentalist ideas on the Bible and religion. Darrow noted his questions were “practically the same” as questions he had published two years earlier in a Chicago paper for Bryan to answer.208 Darrow published the questions in response to questions that Bryan had submitted to the press, directed at the President of Wisconsin University, and published in the Chicago Tribune in July 1923. Darrow recalled, “Needless to say, when I ventured those questions two years before I got not answer.”209

Darrow remembered that Bryan was interviewed back then; in the interview, he claimed not to have read the questions and stated he had no quarrel with agnostics (like Darrow) but with pretend Christians. Darrow believed that it would not have done Bryan any good to have read the questions two years earlier, because he still would have been “compelled to choose between his crude beliefs and the common intelligence of modern times.”210

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205 CENTER OF THE STORM, supra note 85, at 182.
206 Burton W. Folsom, Jr., The Scopes Trial Reconsidered, 12 CONTINUITY 103, 123 (1988).
207 STORY OF MY LIFE, supra note 4, at 266.
208 Id.
209 Id.
210 Id. at 267.
Darrow described his examination of Bryan: “Now Bryan twisted and dodged and floundered, to the disgust of the thinking element, and even his own people.” Darrow believed his battle with Bryan had influenced some of the spectators, because after the court adjourned for the day, it became evident that the audience had been thinking, and perhaps felt that they had heard something worth while.” He continued: “Much to my surprise, the great gathering began to surge toward me. They seemed to have changed sides in a single afternoon. A friendly crowd followed me toward my home. Mr. Bryan left the grounds practically alone.” Darrow believed that Bryan’s followers thought he had deserted them when he stated that the first six days of Genesis could actually be millions of years.

Darrow’s examination of Bryan perhaps bothered Stewart more than anyone else, including Bryan. By the time the two hour ordeal was over, Stewart had had more than enough and would not endure anymore. That night he told Bryan he should not submit to any more questioning, nor should he call Darrow or other defense lawyers to the stand. But Bryan wanted to examine the defense attorneys so he could show that Darrow and others were motivated by a desire to attack revealed religion. Bryan disagreed with Stewart’s recommendation, but Stewart warned that if he persisted, Judge Raulston would end questioning or the state would dismiss its case against Scopes.

**Day Eight – Tuesday, July 21, 1925**

Judge Raulston refused to permit further questioning of Bryan and ruled that Bryan’s testimony would be stricken from the record. Judge Raulston explained that in an effort to be “absolutely fair” to both sides, he had gone too far in allowing Mr. Bryan to be questioned. He justified his ruling by explaining that Bryan’s testimony would not aid a higher court in determining whether his previous rulings - such as barring expert testimony - were made in error. Just as the prosecution had throughout the trial, Judge Raulston now explained:

[T]he issue now is whether or not Mr. Scopes taught that man descended from a lower order of animals. It isn’t a question of whether God created man by the process of development and growth. These questions have been eliminated from this court and the only question we have now is whether or not this teacher, this accused, this defendant, taught that man descended from a lower order of animals. As I see it, after due deliberation, I feel that Mr. Bryan’s testimony cannot aid the higher court in determining that question. . . . I am pleased to expunge this testimony, given by Mr. Bryan on yesterday from the records of this court and it will not be further considered.

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211 Id.
212 Id.
213 SUMMER FOR THE GODS, supra note 5, at 190.
214 Id.
Not surprisingly, Darrow objected. He had not finished questioning Bryan and wanted to make an exception. Stewart, who had not displayed much patience during the trial, was in no mood to do so now. He told Darrow, “Make your exception and don’t begin an argument about it.” When Darrow asked for a clarification from the court, Judge Raulston explained that the record of Darrow’s examination of Bryan would only come before an appellate court if that court issued a writ for it.

**Darrow’s Final Strategic Move**

Darrow then implemented his final strategy, which greatly upset Bryan’s trial plans. Darrow explained that “we have no witnesses to offer, no proof to offer on these issues that the court has laid down here, that Mr. Scopes did teach what the children said he taught, that man descended from a lower order of animals.” Darrow then moved that the jury be brought in and instructed to find the defendant guilty. This would mean that the defense would not make a closing statement. Even more importantly, it prevented the prosecution from making their closing statement. This “deprived Bryan of delivering the monumental summation of the case he had been working on in Florida before he even came to Dayton.”

Bryan immediately suspected Darrow’s strategic move was intended to deprive him of the opportunity to make a dramatic closing to his followers. Before the jury was called, Bryan did ask to speak. Darrow objected, but the judge agreed to hear Bryan.

Bryan said he would have to trust the press to report the previous day’s events accurately, and offered to provide reporters a list of the questions that he would have asked the defense attorneys if given the opportunity. Darrow said it would be better if Bryan questioned the defense attorneys in front of the press so the press would have both questions and answers. But Bryan simply wanted to provide his side of the issue:

> I think it is hardly fair for them to bring into the limelight my views on religion and stand behind a dark lantern that throws light on other people, but conceals themselves. I think it is only fair that the country should know the religious attitude of the people who come down here to deprive the people of Tennessee of the right to run their own schools.

Darrow objected, but the court overruled him. Malone then took issue with Bryan’s statement that the defense was hiding and afraid to reveal their religious views. General McKenzie suggested that Bryan and the defense have a joint discussion about the matter outside of court. Instead, Malone then asked for the jury to be brought in.

**Jury Called**

The jury was called in and seated. Outside of the hearing of the jury and spectators, Darrow argued the defense’s request for a jury instruction stipulating that Scopes was guilty was under the law was not a plea or admission of guilt. Darrow explained that the

215 Id. at 154-55.
defense had not been permitted to make their case because expert testimony was excluded, and so there was no logical reason to continue the trial – the outcome was inevitable. He also said that it was “probably the best result,” clearly implying that the defense’s plan was to appeal the Butler Act to a higher court on constitutional grounds. With the prosecution in agreement, Darrow suggested that instead of his usual formal charge to the jury, the judge use Stewart’s idea. Stewart explained that both sides wanted the case to be appealed to a higher court. He asked Judge Raulston to charge the jury, but to explain that the court did not object to a guilty verdict and hoped the case would be appealed to a higher court.

**Darrow Speaks to the Jury**

The judge then read an extended charge to the jury. Stewart then said that Mr. Darrow has something to say. Darrow spoke:

May I say a few words to the jury? Gentlemen of the jury, we are sorry to have not had a chance to say anything to you. We will do it some other time. Now, we came down to offer evidence in this case and the court has held under the law that the evidence we had is not admissible, so all we can do is to take an exception and carry it to a higher court to see whether the evidence is admissible or not. As far as this case stands before the jury, the court has told you very plainly that if you think my client taught that man descended from a lower order of animals, you will find him guilty, and you heard the testimony of the boys on that questions and heard read the books, and there is no dispute about the facts. Scopes did not go on the stand, because he could not deny the statements made by the boys.

I do not know how you may feel, I am not especially interested in it, but this case and this law will never be decided until it gets to a higher court, and it cannot get to a higher court probably, very well, unless you bring in a verdict. So, I do not want any of you to think we are going to find any fault with you as to your verdict. I am frank to say, while we think it is wrong, and we ought to have been permitted to put in our evidence, the court felt otherwise, as he had a right to hold. We cannot argue to you gentlemen under the instructions given by the court—we cannot even explain to you that we think you should return a verdict of not guilty. We do not see how you could. We do not ask it. We think we will save our point and take it to the higher court and settle whether the law is good, and also whether he should have permitted the evidence. I guess that is plain enough.

**Confusion Over Who Can Set Fine – Judge or Jury?**

Before the jury left to deliberate, Stewart brought up an issue involving a section of the jury instructions. Under the instructions, if the jury found Scopes guilty and believed his offense required a greater punishment than the statutory $100 minimum, then the jury would have to impose a higher fine that did not exceed $500. But if the jury believed the $100 minimum fine was sufficient, then all they had to do was return a verdict of guilty
and the judge would impose the $100 fine. Stewart was not sure this was legally correct because he thought it was the jury’s duty to impose the fine.

Judge Raulston responded that he thought under Tennessee law the court could impose minimum fines, noting, “[T]hat is our practice in whisky cases, the least fine in a transporting case is $100.” Stewart mentioned that they had more whisky cases than any other type of criminal case, to which Darrow, who hated prohibition, quipped, “That is encouraging.” Judge Raulston told Stewart that there was no reason the jury could not fix the minimum fine if they so chose, but the court believed it could also set the minimum fine according to common practice. Stewart was still not sure if this was correct, but Darrow said that either way, the defense would not object. The defense would later regret this legal confusion.

Scopes Convicted and Gets to Speak for First Time in Trial

The jury deliberated for only about nine minutes before finding Scopes guilty. The judge fined him $100 before realizing that Scopes never had a chance to state why he should not be punished. So, for the first time during the trial, Scopes was heard:

Your honor, I feel that I have been convicted of violating an unjust statute. I will continue in the future, as I have in the past, to oppose this law in any way I can. Any other action would be in violation of my ideal of academic freedom--that is, to teach the truth as guaranteed in our constitution, of personal and religious freedom. I think the fine is unjust.

Nevertheless, Judge Raulston imposed the $100 fine and court costs. The judge’s decision to set the minimum fine instead of requiring the jury to do so, a seemingly trivial legal issue, would later haunt the defense during its appeal to the Supreme Court of Tennessee. Malone then asked about a bond, which the judge set at $500 because it was a misdemeanor case. Malone announced the defense had accepted an offer from the Baltimore Evening Sun to post the bond.

Participants Speak Final Words

Malone then asked to speak on behalf of the defense, in order “to thank the people of the state of Tennessee, not only for their hospitality, but for the opportunity of trying out these great issues here.” This generated applause from the audience. Hays then asked if the court could extend the term for thirty days to ensure the defense had enough time to create their record for appeal. Judge Raulston said that under the statute he could extend it for sixty days, but he preferred not to because that would take it past the time the Supreme Court met. Hays kept reiterating that the defense did not want to lose their rights on appeal, but the Judge said he would extend the term for thirty days and if they needed more time they could request it. The issue of the thirty day time limit would also have severe repercussions for the defense’s appeal. There was additional discussion of the procedures for creating the record for appeal, after which the court asked if anyone else had anything to say.
Bryan’s Final Remarks

Several newspaper reporters expressed their thanks to the court for the hospitality they received. Gordon McKenzie spoke to the out-of-town reporters, who had helped the prosecution take a broader look at issues. Though they disagreed on matters, there was no animosity between them. A member of the Tennessee bar thanked the counsel who came from out of state to participate in the trial. Neal thanked the judge and the prosecution. Then Bryan asked to speak:

I don't know that there is any special reason why I should add to what has been said, and yet the subject has been presented from so many viewpoints that I hope the court will pardon me if I mention a viewpoint that has not been referred to. Dayton is the center and the seat of this trial largely by circumstance. We are told that more words have been sent across the ocean by cable to Europe and Australia about this trial than has ever been sent by cable in regard to anything else happening in the United States. That isn't because the trial is held in Dayton. It isn't because a schoolteacher has been subjected to the danger of a fine $100.00 to $500.00, but I think illustrates how people can be drawn into prominence by attaching themselves to a great cause. Causes stir the world. It is because it goes deep. It is because it extends wide, and because it reaches into a future beyond the power of man to see.

Here has been fought out a little case of little consequence as a case, but the world is interested because it raises an issue, and that issue will some day be settled right, whether it is settled on our side or the other side. It is going to be settled right. There can be no settlement of a great cause without discussion, and people will not discuss a cause until their attention is drawn to it, and the value of this trial is not in any incident of the trial, it is not because of anybody who is attached to it, either in an official way or as counsel on either side. Human beings are mighty small, your honor. We are apt to magnify the personal element and we sometimes become inflated with our importance, but the world little cares for man as an individual. He is born, he works, he dies, but causes go on forever, and we who participated in this case may congratulate ourselves that we have attached ourselves to a mighty issue.

Darrow’s Final Remarks

Not wanting Bryan to have the last word, Darrow asked for permission to speak. Darrow also graciously thanked the prosecution and the people of Tennessee and the “the kind, and I think I may say, general treatment of this court, who might have sent me to jail, but did not.” But Darrow then responded directly to Bryan, reiterating his belief that the issue was the battle between progress and knowledge and narrow-minded religion:

Of course, there is much that Mr. Bryan has said that is true. And nature-nature, I refer to does not choose any special setting for more events. I fancy that the place
where the Magna Carta was wrested from the barons in England was a very small place, probably not as big as Dayton. But events come along as they come along. I think this case will be remembered because it is the first case of this sort since we stopped trying people in America for witchcraft because here we have done our best to turn back the tide that has sought to force itself upon this—upon this modern world, of testing every fact in science by a religious dictum. That is all I care to say.

George Rappleyea then made remarks which would turn out to be prophetic:

I especially wish to pay my respects and thanks and take this opportunity, perhaps the last I shall have, to Mr. Bryan for relieving me of the embarrassing position I was in as original prosecutor, and carrying through what he thought was right in spite of the criticisms that he has had. Mr. Bryan, I thank you.

**Judge Raulston’s Final Remarks**

Judge Raulston then provided some rambling and somewhat ambiguous remarks, but spoke with clear religious conviction:

My fellow citizens, I recently read somewhere what I think was a definition of a great man, and that was this: That he possesses a passion to know the truth and have the courage to declare it in the face of all opposition. It is easy enough, my friends, to have a passion to find a truth, or to find a fact, rather, that coincides with our preconceived notions and ideas, but it sometimes takes courage to search diligently for a truth, that may destroy our preconceived notions and ideas. . . .

Now, my friends, the man—I am not speaking in regard to the issues in this case, but I am speaking in general terms—that a man who is big enough to search for the truth and find it, and declare it in the face of all opposition is a big man.

. . . We do not measure greatness by the size of the village or the town . . . . But greatness depends upon the principles that are involved. . . . the great Dred Scott bill, one of the most famous lawsuits ever tried in America, a case that drew public attention, perhaps, from the whole world simply involved the liberty of one colored man. . . .

Now, my friends, the people in America are great people. We are great people. We are great in the South, and they are great in the North. We are great because we are willing to lay down our differences when we fight the battle out and be friends. And, let me tell you, there are two things in this world that are indestructible that man cannot destroy, or no force in the world can destroy.

One is truth. You may crush it to the earth but it will rise again. It is indestructible, and the causes of the law of God. Another thing indestructible in
America and in Europe and everywhere else, is the word of God, that He has
given to man, that man use it as a waybill to the other world. Indestructible, my
friends, by any force because it is the world of the Man, of the forces that created
the universe, and He has said in His word that "My word will not perish" but will
live forever.

I am glad to have had these gentlemen with us. This little talk of mine comes from
my heart, gentlemen. I have had some difficult problems to decide in this lawsuit,
and I only pray to God that I have decided them right. If I have not, the higher
courts will find the mistake. But if I failed to decide them right, it was for the
want of legal learning, and legal attainment, and not for the want of a disposition
to do everybody justice. We are glad to have you with us.

Hays Offers Judge Copy of Darwin’s Origin of Species

Hays then asked, “May I, as one of the counsel for the defense, ask your honor to allow
me to send you the ‘Origin of Species and the Descent of Man,’ by Charles Darwin?”
Amid laughter, Judge Raulston responded, “Yes; yes.”

Monkey Trial Ends with a Prayer

The bailiff instructed the crowd to exit slowly, without blocking the aisles, and the judge
asked Brother Jones to say a benediction: “May the grace of our Lord Jesus Christ, the
love of God and the communication and fellowship of the Holy Ghost abide with you all.
Amen.” Judge Raulston concluded, “The court will adjourn sine die.” And so, with a
prayer, the Monkey Trial came to an end.

Aftermath

Bryan did not rest after the trial, but continued his crusade. Just hours after the trial
ended, he released questions directed at the defense attorneys asking their views on God,
the Bible, immortality and miracles. Darrow immediately replied with his agnostic
viewpoints.

On July 26, 1925, just five days after the trial, William Jennings Bryan died in his sleep.
Although Bryan’s health had been poor – he suffered from diabetes - news of his death
was shocking. There was a great outpouring of grief by his many admirers. It appeared to
many that Bryan died a martyr, fighting against the infidels and atheists to protect
innocent children from the evils of a Godless belief system. The timing of his death, just
five days after the trial, created a legend that Darrow’s cross-examination had contributed
to Bryan’s death. H.L. Mencken in private declared, "We killed the son of a bitch." But
for public consumption, he said that God had thrown a thunderbolt down to kill Clarence
Darrow but missed and hit Bryan instead.

Darrow described how he first heard the news on the day after the defense motioned for
appeal:
I went to the Big Smoky Mountains in search of a breeze. On Sunday, at sunset, as I was turning back from the walk we had taken to the top, I was met by a reporter with the news of Mr. Bryan’s death. The newspapers, next morning, carried the announcement that he . . . had eaten an unusually heavy Sunday dinner and had gone to this bedroom for a nap, and when the family went to call him they found him dead. The irony of fate—a man who for years had fought excessive drinking lay dead from indigestion caused by over-eating.  

Bryan’s Last Speech

Bryan was not able to deliver his prepared address during the trial. But just hours before he died, he had made arrangements to have the address published. It was titled Bryan’s Last Speech: Undelivered Speech to the Jury in the Scopes Trial. In this speech, Bryan sought to clarify what he saw as the real issues and debunk the arguments of the evolutionists. As he had all along, Bryan argued the issue was who could control public schools. Very early in this final speech, Bryan explained:

Let us now separate the issues from the misrepresentations, intentional and unintentional, that have obscured both the letter and the purpose of the law. This is not an interference with freedom of conscience. A teacher can think as he pleases and worship God as he likes, or refuse to worship God at all. He can believe in the Bible or discard it; he can accept Christ or reject him. This law places no objections or restraints upon him. . . . he can, so long as he acts as an individual, say anything he likes on any subject. This law does not violate any rights guaranteed by any constitution to any individual. It deals with the defendant, not as an individual, but as an employee, an official or public servant, paid by the state, and therefore under instructions from the state.

As he had during the trial, Bryan rejected the accusation that supporters of the Butler Act were bigots:

It need hardly be added that this law did not have its origin in bigotry. It is not trying to force any form of religion on anybody. The majority is not trying to establish a religion or to teach it—it is trying to protect itself from the efforts of an insolent minority to force irreligion upon the children under the guise of teaching science. What right has a little irresponsible oligarchy of self-styled "intellectuals" to demand control of the schools of the United States, in which 25,000,000 of children are being educated at an annual expense of nearly $2,000,000,000?

216 STORY OF MY LIFE, supra note 4, at 269-70.
217 WILLIAM JENNINGS BRYAN, BRYAN’S LAST SPEECH: UNDELIVERED SPEECH TO THE JURY IN THE SCOPES TRIAL (1925). Bryan’s Last Speech is reprinted in The World’s Most Famous Court Trial, Tennessee Evolution Case; A Complete Stenographic Report of the Famous Court Test of the Tennessee Anti-evolution Act, of Dayton, July 10 to 21, 1925, Including Speeches and Arguments of Attorneys. The summary of this speech is from this reprint. Specific page references are not given.
Christians must, in every state of the union, build their own colleges in which to teach Christianity; it is only simple justice that atheists, agnostics and unbelievers should build their own colleges if they want to teach their own religious views or attack the religious views of others.

Bryan repeated his argument against teaching evolution as proven fact:

Evolution is not truth; it is merely a hypothesis—millions of guesses strung together. It had not been proven in the day of Darwin; he expressed astonishment that with two or three million species, it had been impossible to trace any species to any other species. It had not been proven in the days of Huxley, and it has not been proven up to today.

Bryan also repeatedly called evolutionists to task for not providing sufficient proof for people to abandon religion:

If the results of evolution were unimportant, one might require less proof in support of the hypothesis, but before accepting a new philosophy of life, built upon a materialistic foundation, we have reason to demand something more than guess; "we may well suppose" is not a sufficient substitute for "thus saith the Lord."

**Bryan Indicts the Theory of Evolution**

Bryan identified four indictments against the theory of evolution: 1) it disputes the Bible’s account of creation; 2) carried to its logical end it contradicts all the truths of the Bible and leads to agnosticism and then atheism; 3) it diverts attention from important problems by dwelling on “trifling speculation”; 4) it discourages action to solve mankind’s problems because it paralyzes hope for reform. Bryan wrote:

Our first indictment against evolution is that it disputes the truth of the Bible account of man's creation and shakes faith in the Bible as the word of God. This indictment we prove by comparing the process described as evolutionary with the text Genesis.

Our second indictment is that the evolutionary hypothesis carried to its logical conclusion, disputes every vital truth of the Bible. Its tendency, naturally, if not inevitably, is to lead those who really accept it, first to agnosticism and then to atheism. Evolutionists attack the truth of the Bible, not openly at first, but by using weasle-words like "poetical," "symbolical," and "allegorical" to search out the meaning of the inspired record of man's creation.

Our third indictment against evolution is that it diverts attention from pressing problems of great importance to trifling speculation. While one evolutionist is trying to imagine what happened in the dim past, another is trying to pry open the door of the distant future.
Our fourth indictment against the evolutionary hypothesis is that, by paralyzing the hope for reform, it discourages those who labor for the improvement of man’s condition. Every upward-looking man or woman seeks to lift the level upon which mankind stands, and they trust that they will see beneficent changes during the brief span of their own lives. Evolution chills their enthusiasm by substituting eons for years. It obscures all beginnings in the mists of endless ages.”

**Darwin Driven from God by Theory of Evolution**

Bryan used Darwin himself as the first example of how evolution drove believers away from the word of God. Bryan stated, “We call as our first witness Charles Darwin. He began life as a Christian.” Bryan then quoted from a letter Darwin had written which referred to the period from 1828 to 1831: “I did not then in the least doubt the strict and literal truth of every word in the Bible.” Since he had planned to deliver his speech in court, Bryan included this line: “It may be a surprise to your honor and to you, gentlemen of the jury, as it was to me, to learn that Darwin spent three years at Cambridge studying for the ministry.”

As he did during the Scopes trial, Bryan also used Darrow’s defense of Leopold and Loeb to make his points. Among other factors, Darrow blamed Nietzsche’s philosophy for influencing Leopold and Loeb to kill Bobby Franks. Darrow had argued the University, its libraries and the professors that taught Nietzsche’s philosophy were more to blame than Leopold and Loeb. To be fair to Darrow, Bryan did point out that after he appeared to blame the University for teaching Nietzsche, Darrow said that he believed they were not to blame either. According to Darrow, the University’s role was to teach - even if some students were unduly affected. But as Bryan pointed out, if Leopold, Loeb and the University were not to blame, then nobody was. To Bryan:

> This is a damnable philosophy, and yet it is the flower that blossoms on the stalk of evolution. Mr. Darrow thinks the universities are in duty bound to feed out this poisonous stuff to their students and when the students become stupefied by it and commit murder neither they nor the universities are to blame. I protest against the adoption of any such a philosophy in the state of Tennessee.

**Darrow Replies to Bryan’s Last Speech**

Darrow commented on Bryan’s speech in his autobiography:

> Right after the trial, Mr. Bryan had delivered to the newspaper representatives copies of the address that he had meant to make to the jury, but they had declined to carry it. However, after his death, some of them did publish it. It was loaded with the religious aphorisms that he had revelled in for so many years.²¹⁸

**Bryan kept the Faith**

²¹⁸ _STORY OF MY LIFE_, supra note 4 at 270.
Although he did not fight in the Spanish-American War, Bryan served as a colonel of a Nebraska militia unit during this time period, so he was buried in Arlington National Cemetery. On his tombstone is engraved, "He kept the Faith."

Later in recalling the aftermath of Bryan’s death, Darrow wrote:

Mr. Bryan lost his hold in Tennessee when he testified in court, but his tragic end, which came so soon after, restored him to their hearts. Great throngs of people visited the little house in Dayton to take a last look at their hero. All the people of that section seemed to be at the funeral. Then he was taken by a special car to Arlington. The train stopped at all the towns on the route. It took a long time to make the journey, for everywhere a large concourse of mourning friends stood waiting, sometimes for hours, with wreaths and furled flags, in sorrowful remembrance of their lost leader. This out-turning of admirers ended only when they laid him in his grave. I am sincere in saying that I am sorry that he could not have seen all this devotion that followed him to his resting-place.219

Darrow v. Bryan – Who Won?

Much has been written about the courtroom confrontation between Darrow and Bryan. It has been described as “the most famous, and one of the most misrepresented, episodes in the Scopes trial and one of the most legendary episodes in American legal history.”220 The accounts vary greatly in describing which side won. The further one moves from Dayton, Tennessee in 1925, both in terms of time and geographic distance, the more the accounts generally favor Darrow. Contemporary accounts are much more favorable to Bryan, with some claiming that Bryan won or at least held his own. Accounts written later claim that Darrow won and succeeded in making Bryan look bad on the stand. However, even the contemporary accounts differed somewhat depending on whether they came from national newspapers or from Tennessee papers.

For later accounts it seems to make a difference whether the commentator actually read the transcripts of the two hour exchange between Darrow and Bryan and the contemporary accounts of the trial. Alan Dershowitz wrote of the Bryan versus Darrow duel:

As usual, the real story, as told in the trial transcript and in contemporaneous accounts, was more complex and far more interesting. The actual William Jennings Bryan was no simple-minded literalist, and he certainly was no bigot. He was a great populist who cared deeply about equality and about the down-trodden.221

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219 Id. at 271.
220 MONKEY BUSINESS, supra note 19, at 118.
Dershowitz also gives Bryan more credit than many other writers: “All in all, a reading of the transcript shows Bryan doing quite well defending himself, while it is Darrow who comes off quite poorly—in fact, as something of an antireligious cynic.”

A 2005 account of the trial described it as a draw:

Though Bryan had given credible answers to every question he knew and honestly admitted those he didn’t, the Great Commoner failed to land the knockout blow he doubtless expected to score when he took the stand. Darrow hadn’t tripped up Bryan or tricked him into making extrabiblical claims, nor had he backed him into a corner.

A study of the press coverage of the trial explained:

In the press, Darrow could successfully present evidence against the hypothesis he was attempting to disprove. But Bryan hardly could do the same because of the nature of his evidence. As a result, Bryan failed, in the press, to present evidence against evolution, whereas Darrow succeeded against a literal interpretation of Genesis.

**Defense Strategy for Appeal - Darrow Still too Radical**

Darrow’s hostile examination of Bryan and his objections to the morning prayer were viewed by many modernist Christians as an unnecessary attack on religion. Many who did not support the anti-evolution movement nonetheless regretted Darrow’s participation in the trial. Pre-trial predictions that Darrow would turn the trial into a battle between religion and enlightenment, instead of adhering to the ACLU’s narrower goal of protecting academic freedom, proved accurate. The ACLU was well aware that Darrow’s trial actions generated significant criticism, which would not help their appeal to the Supreme Court of Tennessee. As they did before the trial, the ACLU tried to remove Darrow from or at least lessen his role as part of the defense for the appeal. They tried to this by “urging more ‘priority’ for Tennessee counsel.” The ACLU wrote to Neal, suggesting that during the appeal to the Supreme Court of Tennessee, “there ought to be more of Neal and less of Darrow.” Legally, Neal could remove Darrow because he was the chief defense counsel. The ACLU also asked some liberal religious leaders to write letters to Darrow or Neal expressing the view that Darrow’s presence would hurt the appeal.

**Darrow Will not be Pushed Out**

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222 Id. at 266.
223 MONKEY BUSINESS, supra note 19, at 152.
225 SUMMER FOR THE GODS, supra note 5, at 208.
226 Id.
227 Id.
Darrow got wind of the ACLU’s efforts and let them know he had no intention of being pushed out of the case. The ACLU Associate Director Forrest Bailey had been instrumental in trying to get Darrow removed. Bailey apologized to Darrow, claiming the matter was a “misunderstanding” about local counsel and untruthfully denying he requested that Darrow be asked to withdraw from the case.\textsuperscript{228} Darrow agreed with Bailey on the need for a qualified Tennessee attorney in the appeal; because he did not think Neal was up to the challenge, he suggested Robert Keebler (an attorney from Memphis who had vocally denounced the Butler Act as a member of the Tennessee Bar), or Frank Spurlock (an attorney from Chattanooga who had offered to post Darrow’s bail when he was indicted for contempt).\textsuperscript{229} Both Keebler and Spurlock would be listed as counsel for the appeal.

The ACLU hatched yet another plan to replace Darrow. This plan required the ACLU to turn over control of the case to a committee of well-known attorneys who would select as counsel Charles Evans Hughes, a former Justice on the United States Supreme Court and the Republican presidential nominee in 1916.\textsuperscript{230} When Hays learned of this plan, he angrily rejected it. Hays believed Darrow and Malone should be credited for their work on the case; he also didn’t want the conservative lawyers to take credit for the work of the liberal and radical attorneys who took the case to trial.\textsuperscript{231}

Scopes confirmed the existence of efforts to remove Darrow:

\begin{quote}
There had been some maneuvering to get Darrow and Hays, who were considered radical, out of the case for the appeal. I opposed this, of course, because I didn’t think it would have been right to shelve them then after what they had gone through in the lower court. They had absorbed the burden of the shock, and during the down-in-the-mud fight had borne the responsibility that no one else had wanted. It wasn’t a matter of their being radicals; they had already done the hardest part of the chore and they were acquainted with the details.\textsuperscript{232}
\end{quote}

**Appeal of Tennessee v. Scopes**

Scopes appealed his conviction to the Supreme Court of Tennessee. Despite the behind-the-scenes maneuvering, Darrow served as counsel during this appeal along with John Neal, Dudley Field Malone, Arthur Garfield Hays and several other attorneys.\textsuperscript{233} William Jennings Bryan, Jr., the son of Darrow’s trial nemesis, continued to serve as counsel for the State of Tennessee as he did during the trial.

**Neal Misses Filing Deadline**

\textsuperscript{228} Id.
\textsuperscript{229} Id. at 208-209.
\textsuperscript{230} Id. at 209.
\textsuperscript{231} Id.
\textsuperscript{232} CENTER OF THE STORM, supra note 85, at 237.
\textsuperscript{233} These attorneys included Frank Spurlock, Frank McElwee, Robert S. Keebler, Samuel J. Rosensohn, and Walter H. Pollak.
Neal, the eccentric law professor, made a crucial error. He missed the deadline for filing the bill of exception with the Tennessee Supreme Court. The State filed a preliminary motion on October 5, 1925 to strike from the record the bill of exceptions because it was not filed on time.\textsuperscript{234} The trial record documented Judge Raulston’s instruction: “Upon motion the court is pleased to grant defendant 60 days from July 21, 1925, in which to prepare, perfect, and file his bill of exceptions.” But according to the Supreme Court of Tennessee Judge Raulston did not have the power to grant this extension:

In his discretion the trial judge restricted the time for filing a bill of exceptions to 30 days after July 21st, as appears from an order of that date and thereupon adjourned his court. The time in which a bill of exceptions might be authenticated thus became fixed. The discretion of the court in the matter had been exercised and exhausted. Upon the expiration of the 30 days the authority of the judge in the matter ceased. He could not on September 14th, 55 days after adjournment, sign a bill of exceptions or change his former order respecting same. Such an act was at that time beyond his jurisdiction. Consent of counsel could not then avail. Jurisdiction of subject-matter cannot be conferred upon a court by consent.\textsuperscript{235}

The effect of this ruling was to prevent the defense from appealing any errors from the trial - such as the exclusion of expert testimony. The defense could only appeal the constitutionality of the Butler Act. This upset the defense’s plan to use the case as a way to educate courts and the public. They had hoped to discuss Bible interpretations, the theory of evolution, freedom of thought and religious beliefs, and academic freedom. Realizing that this failure to meet the filing deadline ruined much of their appeal, the defense in its brief implored the Supreme Court of Tennessee to review the considerable evidence it had gathered:

[W]hile technically not a part of the present record, [the brief contains] a vast amount of scientific knowledge of which the Court must take judicial notice, but which the Court could probably find nowhere else in so convenient a compass. . . . In view of the action of the Court in striking out this bill of exceptions, we do not present these references and quotations as part of the record but we have retained them because we feel they are valuable in illustrating the argument. We ask the Court to take judicial notice of the statements of scientists referred to in the brief in the same way that it would take judicial notice of such statements if they appeared in encyclopedias.\textsuperscript{236}

In October of 1925, the Tennessee Supreme Court granted the state’s motion to strike from the record the bill of exceptions because it was not filed in time. However, the actual appeal from the Scopes trial did not occur until June 1926 and the Supreme Court of Tennessee did not issue its decision on the matter until January 1927.

\textsuperscript{234} Scopes v. State, 152 Tenn. 424, 278 S.W. 57 (Tenn. 1925).
\textsuperscript{235} Id. at 58.
\textsuperscript{236} Statement of Facts, Assignment of Errors, Br. and Argument in Behalf of John Thomas Scopes, Pl. in Error. In the Supreme Ct. of Tenn. at Nashville by Transfer from Knoxville, John Thomas Scopes, Pl.-in-Error, vs. State of Tenn., Def.-in-Error. No. 2. Rhea County, Criminal Docket Sept. Term, 1925.
Before the Tennessee Supreme Court

Darrow recalled that the Tennessee Supreme Court doubled the time allowed for oral arguments. Darrow was selected by the defense to give the closing argument. Darrow wrote that when he began speaking:

The court and every one else paid the closest possible attention, as I aimed to put the matter plainly and simply without flourishes of any sort. I sympathized with my opponent about the sorrows of fathers and mothers when they found that the children were leaving them behind, but, that was the way of life, and the old have not right to stand in the way of the young. I made no effort at effect, but when I closed I was amazed that the whole room and adjoining offices broke forth in spontaneous applause far greater than had rewarded my opponent, and the court made no sign to check it; the previous outburst having been allowed to go unnoticed and unremarked, this received the same right.237

Scopes’ Appellate Arguments

Scopes’ counsel appealed the conviction on several grounds. First, they argued the statute was overly vague because the term “evolution” was too broad. Second, they argued that Scopes' constitutional right to due process was violated because he could not teach evolution. Third, they reiterated their trial argument that the Butler Act violated the Tennessee State Constitution, which directed the General Assembly “to cherish literature and science.” Finally, they argued that the statute was unconstitutional because it established a state religion in violation of the Establishment Clause of the First Amendment.

Supreme Court of Tennessee Rejects Scopes’ Arguments

The court rejected these arguments. As to the due process argument, the court placed great weight on the fact that the Butler Act applied only to public schools, just as the Tennessee legislature and many citizens of Tennessee had. According to the court:

[Scopes was] a teacher in the public schools of Rhea county. He was an employee of the state of Tennessee or of a municipal agency of the state. He was under contract with the state to work in an institution of the state. He had no right or privilege to serve the state except upon such terms as the state prescribed. His liberty, his privilege, his immunity to teach and proclaim the theory of evolution, elsewhere than in the service of the state, was in no wise touched by this law.238

According to a 1960 article, the statute’s limited application to public schools “was a powerful consideration for the Tennessee court which saw only the freedom of the teacher as in issue and which saw the public school teacher as an employee of the state

237 STORY OF MY LIFE, supra note 4, at 274.
whose constitutional position was like that of the janitor.”239 This also deflected First Amendment concerns because the Butler Act “did not apply to evolution anywhere but in the schools. Presumably anyone in Tennessee was free under the statute to buy a copy of the Origin of Species if he so wished.”240

Judge-Imposed Fine Violates Tennessee Constitution

Judge Raulston’s imposition of a fine against Scopes, a seemingly trivial legal event at the end of the trial, came back to haunt the defense. The Tennessee Supreme Court reversed Scopes’ conviction on the basis that the lower court exceeded its jurisdiction in levying a fine against the defendant; in addition, the trial court lacked the authority to correct the error.241 According to the court, the jury found Scopes guilty of violating the statute but the judge assessed the $100 fine that was provided for. Under the Tennessee Constitution, a fine in excess of $50 must be assessed by a jury; the Butler Act did not permit the imposition of a fine smaller than $100. As a result, the court did not have the power to correct the trial judge’s error. Thus it appears that even if Neal had met the filing deadline, the court would still have overturned the decision on the narrow grounds that the fine could only be imposed by the jury.

Butler Act Held Constitutional

Despite its reversal of Scopes’ conviction, the court upheld the constitutionality of the Butler Act. Although it was never enforced again, it remained on the books until 1967 when it was repealed by the Tennessee legislature.242 At the end of its ruling, the court sought to end Tennessee’s legal involvement in the controversy:

> The court is informed that the plaintiff in error is no longer in the service of the State. We see nothing to be gained by prolonging the life of this bizarre case. On the contrary we think the peace and dignity of the State, which all criminal prosecutions are brought to redress, will be the better conserved by the entry of a nolle prosequi243 herein. Such a course is suggested to the Attorney-General.244

Judge McKinney was the lone dissenter on the court. He quoted precedent from the Supreme Court of the United States interpreting criminal statutes, and would have held the Butler Act unconstitutional because it was “invalid for uncertainty of meaning”:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant

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240 Id. at 515.
243 Nolle prosequi is a Latin phrase which means "not to wish to prosecute" and is pronounced “nahl-ee prawls-<<schwa>>-kwI.” It is a legal notice that a lawsuit or prosecution has been abandoned. BLACK'S LAW DICTIONARY (8th ed. 2004).
244 Scopes, 289 S.W. at 367.
alike with ordinary notions of fair play and the settled rules of law; and a statute
which either forbids or requires the doing of an act in terms so vague that men of
common intelligence must necessarily guess at its meaning and differ as to its
application violates the first essential of due process of law.245

After the court’s decision, Darrow and the other defense lawyers wanted to have the case
reassigned so they could appeal it again to try to overturn the Butler Act, since the case
had ended on a technicality. They did not have this opportunity, as the Tennessee
Supreme Court denied their motion for a new hearing.

Scopes and Hays Gain Darrow’s Friendship

Scopes developed a lasting friendship with Clarence Darrow. This is evident in Scopes’
1967 autobiography, which he began with a discussion of Clarence Darrow, who
influenced him more than anyone but his own father.

After the trial, Scopes accepted a scholarship at the University of Chicago to study
geology and became a petroleum engineer. He worked in Louisiana and also in
Maracaibo, Venezuela, where he wrote at least one letter to Clarence and Ruby Darrow.

Arthur Garfield Hays also lauded Darrow:

The antievolution case in Tennessee gave me something better than a college
education in questions of evolution and the Bible. There began my association
with Clarence Darrow. Nothing in life do I treasure more than that, nothing has
been more inspiring or humanly helpful than his company, his example, and his
friendship.246

Their friendship would bring Hays and Darrow back together as co-counsel in another
important case in 1925 and 1926. In the Detroit Sweet cases, Hays and Darrow
successfully defended a black family against murder charges for shooting a white man
trying to drive them from their home in a white neighborhood. Hays thus played an
essential role in two of Darrow’s most important cases.

The Scopes Trial and History

“No stereotype of the Fundamentalist dies harder than the picture provided by the Scopes
trial.”247

According to several scholars, the legend of the Scopes trial grew out of two popular
works about the trial. According to Edward Larson, the first of these influential works
was the 1931 book Only Yesterday: An Informal History of the Nineteen-Twenties written

245 Id.
247 ERNEST R. SANDEEN, THE ROOTS OF FUNDAMENTALISM: BRITISH AND AMERICAN MILLENNARIANISM
by Frederick Lewis Allen, editor of Harper’s magazine. The second was *Inherit the Wind*, a play written by Jerome Lawrence and Robert Edwin Lee that was later turned into a movie. Larson wrote, “Far more than anything that actually happened in Dayton, these two works shaped how later generations would come to think of the Scopes trial.”

**Only Yesterday**

Allen’s book was a chronicle of the 1920s and not meant to be a work of history. Specifically, it covered “the eleven years between the end of the war with Germany (November 11, 1918) and the stock-market panic which culminated on November 13, 1929.” Depicting major news of events of that decade, he would naturally write about the Scopes trial. *Only Yesterday* was not only a best-seller with over a million copies sold, it was the best selling work of non-fiction in the decade of the 1930s. Even more importantly for the subsequent history of the Scopes trial, “it influenced historians and remained widely used as a college history text for more than half a century.” A 1986 review of the book noted its impact: “More than any other single work, it has for longer than half a century shaped our understanding of American life in the 1920s.”

In 1932, a reviewer of the book wrote, “Mr. Allen knows also what the great masses who do not read histories but do read tabloids and attend movies are interested in; this makes the work not only a history but a historical document for future historians.” Allen deliberately used the phrase "informal history" in the title, and because it was informal:

[H]e was unconstrained by the respect for rules of evidence and argument that is beaten into graduate students. Years later, Allen acknowledged that his "best sources" for Only Yesterday had been "the daily magazines and news-papers of the period." Yet he conceded that these very sources "do not help much" in the effort "to observe clearly the life and institutions of one's own day," because "they record the unusual, not the usual.

Allen’s informal account of the Scopes trial “reduced fundamentalism to antievolution and antievolution to Bryan. Both reductions grossly oversimplified matters and forced Allen to reconstruct the story.” This allowed Allen “to become the first published

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248 *SUMMER FOR THE GODS*, supra note 5, at 225.
249 *Id.* at 225.
250 FREDERICK LEWIS ALLEN, *ONLY YESTERDAY: AN INFORMAL HISTORY OF THE NINETEEN-Twenties* xi (1931) [ONLY YESTERDAY].
251 *Id.* at 227.
252 *SUMMER FOR THE GODS*, supra note 5, at 227.
256 *SUMMER FOR THE GODS*, supra note 5 at 226.
commentator to transform Bryan’s personal humiliation at Dayton into a decisive defeat for fundamentalism generally.’’257 This helps explain why the book has taken on such significance in the history of the Scopes trial.

In summing up his coverage of the Scopes trial, Allen wrote:

Theoretically, Fundamentalism had won, for the law stood. Yet really
Fundamentalism had lost. Legislators might go on passing anti-evolution laws,
and in the hinterlands the pious might still keep their religion locked in a science-
proof compartment of their minds; but civilized opinion everywhere had regarded
the Dayton trial with amazement and amusement, and the slow drift away from
Fundamentalist certainty continued.258

Allen’s premature declaration that religious fundamentalism had been defeated at the
Scopes trial actually hindered the cause he favored. It undercut the ACLU’s ability to
raise the alarm about the threat fundamentalism posed to civil liberties, and evolution
scientists were not as diligent in refuting anti-evolutionists as they would have been had
they known the movement had not ended in Dayton in 1925.259

**Inherit the Wind**

The Scopes trial and the alleged defeat of religious fundamentalism continued to be
misinterpreted in the years after Allen’s *Only Yesterday* was published. This has
happened primarily through the play *Inherit the Wind*, written by Jerome Lawrence and
Robert Edwin Lee, which was later turned into an influential movie. The play opened on
Broadway in January 1955 and in 1960 a Hollywood film was created based on the play.
Even more than Allen’s *Only Yesterday*, “the single most influential retelling of the tale”
is *Inherit the Wind*.260

*Inherit the Wind* is set in a fictitious town in the South called Hillsboro, and the time
period is given as “not too long ago.” Its plot involves a young teacher named Bertram
Cates who is arrested and tried for teaching evolution in a local school. Cates is
prosecuted by Matthew Harrison Brady, a fundamentalist speaker who ran for President
in several campaigns. Brady is obviously based on William Jennings Bryan. Cates is
defended by a well known lawyer named Henry Drummond, who is the Clarence Darrow
of this trial.

Given these characters and the narrative of a trial on teaching evolution, *Inherit the Wind*
naturally appears to be based on the Scopes trial. However, it was actually written as a
warning against Senator Joseph McCarthy’s Red Scare, including the anti-communist
investigations of the 1950s and the House Committee on Un-American Activities.
Lawrence and Lee were not concerned about fundamentalist attacks on the theory of

257 *Id.* at 226-27.
258 *ONLY YESTERDAY*, *supra* note 250, at 206.
259 *SUMMER FOR THE GODS*, *supra* note 5, at 228.
260 *Id.* at 239.
evolution. Instead, they were concerned about the Red Scare. McCarthy was very influential at the time, and writers and actors were accused of communist sympathies and faced blacklists that could ruin their careers. Drawing on the Scopes trial, they created *Inherit the Wind* to dramatize this danger. They explicitly stated that the play was not history, although the play and movie drown out this disclaimer. Generations of viewers, especially of the movie, have erroneously come to believe that *Inherit the Wind* is a truthful account of the Scopes trial.

*Inherit the Wind* has totally rewritten the Scopes trial. It is especially influential in its depiction of William Jennings Bryan:

> In any event, the circus portrayed in *Inherit the Wind* casts Darrow as the ringmaster and Bryan as the clown. Bryan's reputation was ruined by both the movie and the play on which it was based. The film is every bit as entertaining as a trip to the circus and should be relished in that spirit. But history it ain't. The "trial of the century" known as People v. John T. Scopes featured plenty of circus clowns, but William Jennings Bryan was not among them.261

The respected science historian Ronald L. Numbers, who has written extensively about creationism and creation science, wrote in a review of *Inherit the Wind*:

> [I]t grossly caricatures the stated opinions of the protagonists. It especially distorts Bryan's (that is, Brady's) views on Genesis and geology, falsely portraying him as a hidebound biblical literalist. For years before the trial Bryan had been publicly teaching that the "days" of Genesis represented vast geological ages rather than twenty-four-hour periods, and in private he had even conceded the possibility of prehuman evolution.262

The well-known law professor and lawyer Alan Dershowitz has also criticized the portrayal of Bryan in the *Inherit the Wind*:

> Nor was Bryan the know-nothing biblical literalist of *Inherit the Wind*. For the most part, he actually seems to have gotten the better of Clarence Darrow in the argument over the Bible (though not in the argument over banning the teaching of evolution).263

**John Scopes**

Ironically, John Scopes is perhaps the kindest in his remarks about the Scopes trial and William Jennings Bryan. While critical of Bryan’s efforts to prohibit teaching evolution, Scopes viewed Bryan across his whole career, not just the trial in Dayton. “No fair man

263 AMERICA ON TRIAL, *supra* note 221, at 265.
would judge Bryan’s place in history by his actions at Dayton alone; he deserves better.”

Scopes asked, “Was Bryan a demagogue? I don’t know; I don’t think so. He seemed to be a basically honest man who was handicapped by narrow views.”

President of the school board Doc Robinson offered Scopes his old job back teaching math, physics and coaching. However, Scopes was offered a scholarship set up by the expert witnesses for the defense to pursue graduate study in any field he chose. Before the trial, he had intended to enter law school, but mixing with the expert witnesses renewed his interest in science, so he accepted a scholarship at the University of Chicago and earned a master’s degree in geology. He later worked as a petroleum engineer in Venezuela.

Effects of the Scopes Trial

Popular history suggests that the defenders of evolution got the better of the anti-evolution movement, even though Scopes was convicted. But the aftermath of the case is more complicated. A historian writing in 1971 stated:

On the national scene, the dramatic events of the Dayton trial are often viewed as the high point of the American Fundamentalist and anti-evolution crusade. This, however, is open to serious doubt. Because of the reputation of the men involved, it received the most publicity, but instead of being the culmination of the movement it was really the beginning. Before Dayton, only the South Carolina, Oklahoma, and Kentucky legislatures had dealt with anti-evolution laws or riders to educational appropriation bills. With the publicity of the Dayton case, the rush began in earnest. After 1925 pressures on the state legislatures increased steadily until the peak year, 1927, when 13 states, both North and South, considered some form of anti-evolution law. All told, at least 41 bills, riders, or resolutions were introduced into the state legislatures, and some states faced the same issue time and time again.

The Scopes Trial and High School Biology Textbooks

The Scopes controversy focused scrutiny on Hunter’s Civic Biology textbook, the book Scopes was convicted of using to teach evolution in the classroom. Shortly after Scopes was indicted, the Tennessee Textbook Commission dropped Hunter’s book from its approved list of textbooks. The commission chose a new textbook “that barely mentioned evolution.” Significantly, a new edition of Hunter’s textbook published in 1926 was changed in response to the Scopes controversy. According to a 1974 study,
“Hunter himself was concerned that the publicity would drive his book out of the classroom, so he was willing to make changes.” The title was changed, the paragraph on “The Doctrine of Evolution and the evolutionary tree” was removed, the term “evolution” no longer appeared in the index, and the paragraph on the “Evolution of Man” was changed to the “Development of Man.” Other changes were also made to downplay Darwin’s theory and influence. In an obvious move to make the book friendlier to religious communities, a new sentence was added: “Man is the only creature that has moral and religious instincts.”

Importantly, the influence of the Scopes trial was not limited to Hunter’s textbook:

The impact of the Scopes trial on high school biology textbooks was enormous. It is easy to identify a text published in the decade following 1925. Merely look up the word “evolution” in the index or glossary; you almost certainly will not find it. About its place in the text itself, it is harder to make generalizations.

The authors of this 1974 study pointed out that it was common to remove the word “evolution” from the index; if the text itself discussed the basics of evolution, it was done obliquely. Perhaps most surprisingly, the alteration or removal of information on the theory of evolution from high school textbooks was not restricted to the South:

Let us make it explicit that we are not speaking of special expurgated southern editions. The textbooks we have examined are all from northern college and public libraries. … Our subject is not outright censorship and repression, and the locale of our study is not the south alone. We are concerned with the self-censorship that shaped the content of high school biology courses for the 35 years following the Scopes trial.

The authors concluded the conventional wisdom that the Scopes trial left the fundamentalists defeated was very wrong:

The evolutionists of the 1920’s believed they had won a great victory in the Scopes trial. But as far as teaching biology in the high schools was concerned, they had not won; they had lost. Not only did they lose, but they did not even know they had lost. A major reason was that they were unable to understand—sympathetically or otherwise—the strength of the opponents of evolution.

Bryan College

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270 Id.
271 Id.
272 Id.
273 Id. at 835.
274 Id. at 836.
Conceived as a memorial to William Jennings Bryan soon after his death in 1925, Bryan College was founded in 1930 in Dayton. Originally named William Jennings Bryan University, the name was changed in 1958 to William Jennings Bryan College. In 1993, the name was shortened to Bryan College. During the Scopes trial, William Jennings Bryan had expressed his wish that a prep school and junior college for men be created in Dayton. A national memorial association was created after his death to establish Bryan College in his honor. Throughout its history, the school’s mission has been to provide "for the higher education of men and women under auspices distinctly Christian and spiritual."275

The Ongoing Controversy of Teaching Evolution in Public Schools

The original tension between religion and science, especially the theory of evolution, in public schools that played out in Dayton, Tennessee in the summer of 1925 has not gone away. The same basic issues arise today. Below are summaries of a few cases involving teaching evolution in schools that have been decided since 1925, in which the courts refer back to the 1925 Scopes trial.

Epperson v. Arkansas, 393 U.S. 97 (1968)

After the Scopes trial, the most important case in the battle between evolution and religion was Epperson v. Arkansas,276 decided by the United States Supreme Court in 1968. Just as in Scopes, this case involved a high school biology textbook; however, the textbook at issue was adopted many years after the Scopes trial. The official textbook for a high school biology course at a public school in Little Rock did not have a section on Darwin’s theory of evolution. This changed during the 1965-1966 school year with the adoption of a textbook that contained a chapter on a theory of origin in which man came from a lower form of animal. Susan Epperson was hired in 1964 to teach 10th grade biology. When the new textbook was adopted in 1965, she was faced with a dilemma. She was supposed to teach using the new textbook, but she faced criminal prosecution and dismissal because of a 1928 Arkansas anti-evolution statute still in effect.277 Arkansas’ anti-evolution statute was based on Tennessee’s 1925 Butler Act.

Epperson took her case to the Chancery Court, which held that the statute violated the Fourteenth Amendment to the United States Constitution.278 The Chancery Court ruled that the Fourteenth Amendment encompasses the prohibitions upon state interference with freedom of speech and thought which are contained in the First Amendment. The court held that the challenged statute was unconstitutional because, in violation of the First Amendment, it “tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach.”279 Thus, the Arkansas statute was

278 The Court noted that the opinion of the Chancery Court is not officially reported.
279 Epperson, 393 U.S. at 101.
unconstitutional and void, a restraint upon the freedom of speech guaranteed by the Constitution.

In making its decision,

[The Chancery Court] analyzed the holding of its sister State of Tennessee in the Scopes case sustaining Tennessee's similar statute. But it refused to follow Tennessee's 1927 example. It declined to confine the judicial horizon to a view of the law as merely a direction by the State as employer to its employees. This sort of astigmatism, it held, would ignore overriding constitutional values, and “should not be followed,” and it proceeded to confront the substance of the law and its effect.

In a two-sentence per curiam opinion, the Supreme Court of Arkansas reversed the Chancery Court and held:

[The statute] is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.280

Epperson then appealed to the United States Supreme Court, which described the case:

This appeal challenges the constitutionality of the “anti-evolution” statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. The statute was a product of the upsurge of “fundamentalist” religious fervor of the twenties. The Arkansas statute was an adaption of the famous Tennessee “monkey law” which that State adopted in 1925.281 The constitutionality of the Tennessee law was upheld by the Tennessee Supreme Court in the celebrated Scopes case in 1927.282

According to the Court:

The Arkansas law makes it unlawful for a teacher in any state-supported school or university “to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,” or “to adopt or use in any such institution a textbook that teaches” this theory. Violation is a misdemeanor and subjects the violator to dismissal from his position.283

282 Epperson, 393 U.S. at 98.
283 Id. at 98-99.
The Court also noted that the Arkansas law “was adopted by popular initiative in 1928, three years after Tennessee's law was enacted and one year after the Tennessee Supreme Court's decision in the Scopes case” and that “[i]n its brief, the State says that the Arkansas statute was passed with the holding of the Scopes case in mind.”

Writing in late 1968, the Court stated: “Only Arkansas and Mississippi have such ‘anti-evolution’ or ‘monkey’ laws on their books. There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in these States.”

In one of several references to the Scopes trial, the Court stated:

Clarence Darrow, who was counsel for the defense in the Scopes trial, in his biography published in 1932, somewhat sardonically pointed out that States with anti-evolution laws did not insist upon the fundamentalist theory in all respects. He said: “I understand that the States of Tennessee and Mississippi both continue to teach that the earth is round and that the revolution on its axis brings the day and night, in spite of all opposition. The Story of My Life 247 (1932).”

The Court noted that despite the Supreme Court of Arkansas’s “equivocation,” the counsel for the State Arkansas “would interpret the statute ‘to mean that to make a student aware of the theory * * * just to teach that there was such a theory' would be grounds for dismissal and for prosecution . . . and he said 'that the Supreme Court of Arkansas' opinion should be interpreted in that manner.'”

In addition, counsel for the state said, “‘If Mrs. Epperson would tell her students that 'Here is Darwin's theory, that man ascended or descended from a lower form of being,' then I think she would be under this statute liable for prosecution.’”

The Court held that the statute was contrary to the freedom of religion mandate of the First Amendment, and also in violation of the Fourteenth Amendment. According to the Court,

It is of no moment whether the law is deemed to prohibit mention of Darwin's theory, or to forbid any or all of the infinite varieties of communication embraced within the term “teaching.” Under either interpretation, the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas' law selects from the body of knowledge a
particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.\textsuperscript{290}

The Court referred back to the Scopes controversy:

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's “monkey law,” candidly stated its purpose: to make it unlawful “to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.” Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to “the story of the Divine Creation of man” as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, “denied” the divine creation of man.\textsuperscript{291}

\textit{Wolman v. Walter, 433 U.S. 229 (1977)}

\textit{Wolman v. Walter} involved a challenge by citizens and taxpayers of Ohio to the constitutionality of an Ohio statute. The statute authorized various forms of aid to nonpublic schools, most of which were sectarian. Justice Stevens, concurring in part and dissenting in part, wrote:

> The distinction between the religious and the secular is a fundamental one. To quote from Clarence Darrow's argument in the Scopes case: “The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve.”\textsuperscript{292}

\textit{Edwards v. Aguillard, 482 U.S. 578 (1987)}

In \textit{Aguillard v. Edwards}, a group of Louisiana educators, religious leaders and parents of children in the public schools challenged the constitutionality of a Louisiana statute

\textsuperscript{290} \textit{Id.} The Court cited Scopes v. State of Tennessee, 154 Tenn. 105, 126, 289 S.W. 363, 369 (1927) in which Judge Chambliss, concurring, “referred to the defense contention that Tennessee's anti-evolution law gives a 'preference' to 'religious establishments which have as one of their tenets or dogmas the instantaneous creation of man.'”

\textsuperscript{291} \textit{Id.} at 107-09.

\textsuperscript{292} Wolman v. Walter, 433 U.S. 229, 264 (1977) (citation omitted).
called the “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act.” The Court held that the Act served no identified secular purpose, and was unconstitutional because its primary purpose was the promotion of a particular religious belief.

In their dissent, Justice Scalia and Chief Justice Rehnquist referred back to the Scopes trial:

In sum, even if one concedes, for the sake of argument, that a majority of the Louisiana Legislature voted for the Balanced Treatment Act partly in order to foster (rather than merely eliminate discrimination against) Christian fundamentalist beliefs, our cases establish that that alone would not suffice to invalidate the Act, so long as there was a genuine secular purpose as well. We have, moreover, no adequate basis for disbelieving the secular purpose set forth in the Act itself, or for concluding that it is a sham enacted to conceal the legislators' violation of their oaths of office. I am astonished by the Court's unprecedented readiness to reach such a conclusion, which I can only attribute to an intellectual predisposition created by the facts and the legend of Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927)-an instinctive reaction that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression. In this case, however, it seems to me the Court's position is the repressive one.

The people of Louisiana, including those who are Christian fundamentalists, are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools, just as Mr. Scopes was entitled to present whatever scientific evidence there was for it. Perhaps what the Louisiana Legislature has done is unconstitutional because there is no such evidence, and the scheme they have established will amount to no more than a presentation of the Book of Genesis. But we cannot say that on the evidence before us in this summary judgment context, which includes ample uncontradicted testimony that “creation science” is a body of scientific knowledge rather than revealed belief. Infinitely less can we say (or should we say) that the scientific evidence for evolution is so conclusive that no one could be gullible enough to believe that there is any real scientific evidence to the contrary, so that the legislation's stated purpose must be a lie. Yet that illiberal judgment, that Scopes -in-reverse, is ultimately the basis on which the Court's facile rejection of the Louisiana Legislature's purpose must rest.

_Aguillard v. Edwards_, 765 F.2d 1251 (5th Cir. 1985)

Before it reached the United States Supreme Court, the Fifth Circuit ruled that Louisiana’s "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" statute in essence required that whenever evolution was taught in the Louisiana public schools, creation-science must also be taught. The court stated:
We approach our decision in this appeal by recognizing that, irrespective of whether it is fully supported by scientific evidence, the theory of creation is a religious belief. Moreover, this case comes to us against a historical background that cannot be denied or ignored. Since the two aged warriors, Clarence Darrow and William Jennings Bryan, put Dayton, Tennessee, on the map of religious history in the celebrated Scopes trial in 1927 courts have occasionally been involved in the controversy over public school instruction concerning the origin of man. With the igniting of fundamentalist fires in the early part of this century, "anti-evolution" sentiment, such as that in Scopes, emerged as a significant force in our society. As evidenced by this appeal, the place of evolution and the theory of creation in the public schools continues to be the subject of legislative action and a source of critical debate.

The court held the statute’s purpose was the promotion of a religious belief, and therefore violated the Establishment Clause of the First Amendment.


In October 2004, the Dover Area School Board of Directors in Dover, Pennsylvania passed a resolution by a 6-3 vote that read: “Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught.”

In November 2004, the Dover Area School District released a press announcement that, commencing in January 2005, teachers would be required to read the following statement to students in the ninth grade biology class at Dover High School:

The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part.

Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.

Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, Of Pandas and People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.
The press announcement was subsequently referred to as the “Intelligent Design” policy. Several parents of school-aged children and members of the high school science faculty brought an action against the school district and school board challenging the constitutionality of the district's policy.

The trial judge forcefully struck down the policy on three grounds: (1) the policy amounted to an endorsement of religion which violated the Establishment Clause of the First Amendment; (2) the policy violated the Establishment Clause under the Lemon test; and (3) the policy violated the freedom of worship provision in Article 1, § 3 of the Pennsylvania Constitution, which provides:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

The court explained:

It is essential to our analysis that we now provide a more expansive account of the extensive and complicated federal jurisprudential legal landscape concerning opposition to teaching evolution, and its historical origins. As noted, such opposition grew out of a religious tradition, Christian Fundamentalism that began as part of evangelical Protestantism's response to, among other things, Charles Darwin's exposition of the theory of evolution as a scientific explanation for the diversity of species. McLean, 529 F.Supp. at 1258; see also, e.g., Edwards, 482 U.S. at 590-92, 107 S.Ct. 2573. Subsequently, as the United States Supreme Court explained in Epperson, in an “upsurge of fundamentalist religious fervor of the twenties,” 393 U.S. at 98, 89 S.Ct. 266 (citations omitted), state legislatures were pushed by religiously motivated groups to adopt laws prohibiting public schools from teaching evolution. McLean, 529 F.Supp. at 1259; see Scopes, 154 Tenn. 105, 289 S.W. 363 (1927). Between the 1920's and early 1960's, anti-evolutionary sentiment based upon a religious social movement resulted in formal legal sanctions to remove evolution from the classroom. McLean, 529 F.Supp. at 1259 (discussing a subtle but pervasive influence that resulted from anti-evolutionary sentiment concerning teaching biology in public schools).
This judgment is final but may be subject to editorial revision.
In the case of S.A.S. v. France,
The European Court of Human Rights, sitting as a Grand Chamber composed of:
Dean Spielmann, President,
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Boštjan M. Zupančič,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Ganna Yudkivska,
Angelika Nußberger,
Erik Møse,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Aleš Pejchal, judges,
and Erik Fribergh, Registrar,
Having deliberated in private on 27 November 2013 and on 5 June 2014,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 43835/11) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national (“the applicant”), on 11 April 2011. The President of the Fifth Section, and subsequently the President of the Grand Chamber, acceded to the applicant’s request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented before the Court by Mr Sanjeev Sharma, a solicitor practising in Birmingham, Mr Ramby de Mello and Mr Tony Muman, barristers practising in Birmingham, and Mr Satvincer Singh Juss, a barrister practising in London.

The French Government (“the Government”) were represented by their Agent, initially Ms Edwige. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs, then Mr François Alabrune from May 2014.
3. The applicant complained that the ban on wearing clothing designed to conceal one’s face in public places, introduced by Law no. 2010-1192 of 11 October 2010, deprived her of the possibility of wearing the full-face veil in public. She alleged that there had been a violation of Articles 3, 8, 9, 10 and 11 of the Convention, taken separately and together with Article 14 of the Convention.

4. The application was assigned to the Court’s Fifth Section (Rule 52 § 1). On 1 February 2012 notice of the application was given to the Government.

5. On 28 May 2013 a Chamber of the Fifth Section, composed of Mark Villiger, President, Angelika Nußberger, Boštjan M. Zupančič, Ganna Yudkivska, André Potocki, Paul Lemmens and Aleš Pejchal, judges, and also of Claudia Westerdiek, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicant and the Government each filed written observations on the admissibility and merits of the case.

8. The non-governmental organisations Amnesty International, Liberty, Open Society Justice Initiative and ARTICLE 19, together with the Human Rights Centre of Ghent University and the Belgian Government, were given leave to submit written comments (Article 36 § 2 of the Convention and Rule 44 § 3). The Belgian Government were also given leave to take part in the hearing.


There appeared before the Court:

(a) for the respondent Government

Ms Edwige BELLiARD, Director of Legal Affairs, Ministry of Foreign Affairs, Agent,
Ms Nathalie ANCEL, Head, Human Rights Section, Ministry of Foreign Affairs, Co-Agent,
Mr Sylvain FOURNEL, Drafting Officer, Human Rights Section, Ministry of Foreign Affairs,
Mr Rodolphe FERAL, Drafting Officer, Human Rights Section, Ministry of Foreign Affairs,
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THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant is a French national who was born in 1990 and lives in France.

11. In the applicant’s submission, she is a devout Muslim and she wears the burqa and niqab in accordance with her religious faith, culture and personal convictions. According to her explanation, the burqa is a full-body covering including a mesh over the face, and the niqab is a full-face veil leaving an opening only for the eyes. The applicant emphasised that neither her husband nor any other member of her family put pressure on her to dress in this manner.

12. The applicant added that she wore the niqab in public and in private, but not systematically: she might not wear it, for example, when she visited the doctor, when meeting friends in a public place, or when she wanted to socialise in public. She was thus content not to wear the niqab in public places at all times but wished to be able to wear it when she chose to do so, depending in particular on her spiritual feelings. There were certain times (for example, during religious events such as Ramadan) when she believed that she ought to wear it in public in order to express her religious, personal and cultural faith. Her aim was not to annoy others but to feel at inner peace with herself.

13. The applicant did not claim that she should be able to keep the niqab on when undergoing a security check, at the bank or in airports, and she agreed to show her face when requested to do so for necessary identity checks.
14. Since 11 April 2011, the date of entry into force of Law no. 2010-1192 of 11 October 2010 throughout France, it has been prohibited for anyone to conceal their face in public places.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Law of 11 October 2010 “prohibiting the concealment of one’s face in public places”

1. Legislative history

(a) Report “on the wearing of the full-face veil on national territory”

15. The conference of Presidents of the National Assembly, on 23 June 2009, established a parliamentary commission comprising members from various parties with the task of drafting a report on “the wearing of the full-face veil on national territory”.

16. The report of some 200 pages, deposited on 26 January 2010, described and analysed the existing situation. It showed, in particular, that the wearing of the full-face veil was a recent phenomenon in France (almost no women wore it before 2000) and that about 1,900 women were concerned by the end of 2009 (of whom about 270 were living in French overseas administrative areas); nine out of ten were under 40, two-thirds were French nationals and one in four were converts to Islam. According to the report, the wearing of this clothing existed before the advent of Islam and did not have the nature of a religious precept, but stemmed from a radical affirmation of individuals in search of identity in society and from the action of extremist fundamentalist movements. The report further indicated that the phenomenon was non-existent in countries of central and eastern Europe, specifically mentioning the Czech Republic, Bulgaria, Romania, Hungary, Latvia and Germany. It was not therefore a matter of debate in those countries, unlike the situation in Sweden and Denmark, where the wearing of such veils nevertheless remained marginal. Moreover, the question of a general ban had been discussed in the Netherlands and in Belgium (a Law “to prohibit the wearing of any clothing which totally or principally conceals the face” has since been enacted in Belgium, on 1 June 2011; see paragraphs 40-41 below). The report was also critical of the situation in the United Kingdom, where it pointed to a sectarian trend driven by radical and fundamental Muslim groups, who were taking advantage of a legal system that was very protective of individual fundamental rights and freedoms in order to obtain recognition of rights that were specifically applicable to residents of Muslim faith or origin.

17. The report went on to criticise “a practice at odds with the values of the Republic”, as expressed in the maxim “liberty, equality, fraternity”. It
emphasised that, going beyond mere incompatibility with secularism, the full-face veil was an infringement of the principle of liberty, because it was a symbol of a form of subservience and, by its very existence, negated both the principle of gender equality and that of the equal dignity of human beings. The report further found that the full-face veil represented a denial of fraternity, constituting the negation of contact with others and a flagrant infringement of the French principle of living together (le “vivre ensemble”).

The report, thus finding it necessary to “release women from the subservience of the full-face veil”, advocated a three-pronged course of action: to convince, protect women and envisage a ban. It made the following four proposals: first, to adopt a resolution reasserting Republican values and condemning as contrary to such values the wearing of the full-face veil; secondly, to initiate a general survey of the phenomena of amalgamation, discrimination and rejection of others on account of their origins or faith, and of the conditions of fair representation of spiritual diversity; thirdly, to reinforce actions of awareness and education in mutual respect and diversity and the generalising of mediation mechanisms; and fourthly, to enact legislation guaranteeing the protection of women who were victims of duress, which would strengthen the position of public officials confronted with this phenomenon and curb such practices. The report emphasised that among both the parliamentary commission’s members and those of the political formations represented in Parliament, there was no unanimous support for the enactment of a law introducing a general and absolute ban on the wearing of the full-face veil in public places.

(b) Opinion of the National Advisory Commission on Human Rights “on the wearing of the full-face veil”

18. In the meantime, on 21 January 2010, the National Advisory Commission on Human Rights (Commission nationale consultative des droits de l’homme – CNCDH) had issued an “opinion on the wearing of the full-face veil”, stating that it was not in favour of a law introducing a general and absolute ban. It took the view, in particular, that the principle of secularism alone could not serve as a basis for such a general measure, since it was not for the State to determine whether or not a given matter fell within the realm of religion, and that public order could justify a prohibition only if it were limited in space and time. The opinion also emphasised the risk of stigmatising Muslims and pointed out that a general prohibition could be detrimental to women, in particular because those who were made to wear the full-face veil would additionally become deprived of access to public areas.

19. That being said, the CNCDH observed that support for women who were subjected to any kind of violence had to be a political priority; it
advocated, in order to combat any form of obscurantism, encouraging the promotion of a culture of dialogue, openness and moderation, with a view to fostering better knowledge of religions and the principles of the Republic; it called for the strengthening of civic education courses – including education and training in human rights – at all levels, for both men and women; it sought the strict application of the principles of secularism and neutrality in public services, and the application of existing legislation; and it expressed the wish that, in parallel, sociological and statistical studies should be carried out in order to monitor the evolution of the wearing of the full-face veil.

(c) Study by the Conseil d’État on “the possible legal grounds for banning the full veil”

20. On 29 January 2010 the Prime Minister asked the Conseil d’État to carry out a study on “the legal grounds for a ban on the full veil” which would be “as wide and as effective as possible”.

21. The Conseil d’État thus completed its “study on the possible legal grounds for banning the full veil”, of which the report was adopted by the Plenary General Assembly on 25 March 2010. It interpreted the question put to it as follows: can we envisage a legal ban, for particular reasons and within prescribed limits, on the wearing of the full veil as such, or are we required to address the more general issue of concealment of the face, with the wearing of this garment being just one example?

22. The Conseil d’État first observed that existing legislation already addressed this issue in various ways, whether through provisions whose effect was to ban the wearing of the full veil itself by certain persons and in certain circumstances, by imposing occasional restrictions on concealment of the face for public order reasons, or by envisaging criminal sanctions for the instigators of such practices. It noted, however, that the relevant provisions were varied in nature and that comparable democracies were like France in not having national legislation imposing a general ban on such practices in public places. In view of this finding, the Conseil d’État questioned the legal and practical viability of prohibiting the wearing of the full veil in public places, having regard to the rights and freedoms guaranteed by the Constitution, the Convention and European Union law. It found it impossible to recommend a ban on the full veil alone, as a garment representing values that were incompatible with those of the Republic, in that such a ban would be legally weak and difficult to apply in practice. It observed in particular that the principle of gender equality was not intended to be applicable to the individual person, i.e. to an individual’s exercise of personal freedom. It further took the view that a less specific ban on the deliberate concealment of the face, based mainly on public order considerations and interpreted more or less broadly, could not legally apply
without distinction to the whole of the public space under prevailing constitutional and Convention case-law.

23. However, the Conseil d’État believed that, in the present state of the law, it would be possible to enact more coherent legislation, which would be binding and restrictive, comprising two types of provision: first, stipulating that it was forbidden to wear any garment or accessory that had the effect of hiding the face in such a way as to preclude identification, either to safeguard public order where it was under threat, or where identification appeared necessary for access to or movement within certain places, or for the purpose of certain formalities; secondly, strengthening enforcement measures that would particularly be directed against individuals who forced others to hide their faces and thus conceal their identity in public places.

(d) Resolution of the National Assembly “on attachment to respect for Republic values at a time when they are being undermined by the development of radical practices”

24. On 11 May 2010 the National Assembly adopted, by a unanimous vote, a Resolution “on attachment to respect for Republic values at a time when they are being undermined by the development of radical practices”.

In this Resolution the National Assembly made the following statements:

“1. Considers that radical practices undermining dignity and equality between men and women, one of which is the wearing of the full veil, are incompatible with the values of the Republic;

2. Affirms that the exercise of freedom of expression, opinion or belief cannot be relied on by anyone for the purpose of flouting common rules, without regard for the values, rights and duties which underpin society;

3. Solemnly reaffirms its attachment to respect for the principles of dignity, liberty, equality and fraternity between human beings;

4. Expresses the wish that the fight against discrimination and the promotion of equality between men and women should be a priority in public policies concerning equal opportunities, especially in the national education system;

5. Finds it necessary for all appropriate means to be implemented to ensure the effective protection of women who suffer duress or pressure, in particular those who are forced to wear the full veil.”

(e) Bill before Parliament

25. The draft of a law prohibiting the concealment of one’s face in public places was deposited in May 2010, the Government having considered that the other options (mediation and parliamentary resolution) were not sufficiently effective and that a ban limited to certain places or circumstances would not have been an appropriate means of safeguarding the principles in question and would have been difficult to implement (Bill prohibiting the concealment of one’s face in public places, impact assessment, May 2010).
The Bill contained an “explanatory memorandum”, which reads as follows:

“France is never as much itself, faithful to its history, its destiny, its image, than when it is united around the values of the Republic: liberty, equality, fraternity. Those values form the foundation-stone of our social covenant; they guarantee the cohesion of the Nation; they underpin the principle of respect for the dignity of individuals and for equality between men and women.

These are the values which have today been called into question by the development of the concealment of the face in public places, in particular by the wearing of the full veil.

This question has given rise, for about a year now, to a wide public debate. The finding, enlightened by testimony and the report of the National Assembly’s commission, is unanimous. Even though the phenomenon at present remains marginal, the wearing of the full veil is the sectarian manifestation of a rejection of the values of the Republic. Negating the fact of belonging to society for the persons concerned, the concealment of the face in public places brings with it a symbolic and dehumanising violence, at odds with the social fabric.

The decreeing of ad hoc measures has been envisaged, entailing partial bans limited to certain places and, if appropriate, to certain periods or for the benefit of certain services. Such a solution, in addition to the fact that it would encounter extreme difficulties in its implementation, would constitute no more than an inadequate, indirect and circuitous response to the real problem.

The voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of ‘living together’ in French society.

The defence of public order is not confined to the preservation of tranquillity, public health or safety. It also makes it possible to proscribe conduct which directly runs counter to rules that are essential to the Republican social covenant, on which our society is founded.

The systematic concealment of the face in public places, contrary to the ideal of fraternity, also falls short of the minimum requirement of civility that is necessary for social interaction.

Moreover, this form of public confinement, even in cases where it is voluntary or accepted, clearly contravenes the principle of respect for the dignity of the person. In addition, it is not only about the dignity of the individual who is confined in this manner, but also the dignity of others who share the same public space and who are thus treated as individuals from whom one must be protected by the refusal of any exchange, even if only visual.

Lastly, in the case of the full veil, worn only by women, this breach of the dignity of the person goes hand in hand with the public manifestation of a conspicuous denial of equality between men and women, through which that breach is constituted.

Having been consulted about the legal solutions that would be available to the public authorities in order to curb the development of this phenomenon, the Conseil d’État envisaged an approach based on a new conception of public order, considered in its ‘non-material’ dimension.

Whilst it found such an approach too innovative, it did so after noting that it was reflected in certain judicial decisions, particularly in a decision where the
Constitutional Council had found that the conditions of ‘normal family life’ secured to aliens living in France could validly exclude polygamy, or indeed the case-law of the Conseil d’État itself, which allowed certain practices, even if consensual, to be proscribed when they offended against the dignity of the person. This is especially true where the practice in question, like the concealment of the face, cannot be regarded as inseparable from the exercise of a fundamental freedom.

These are the very principles of our social covenant, as solemnly restated by the National Assembly when it adopted unanimously, on 11 May 2010, its resolution on attachment to respect for Republican values, which prohibit the self-confinement of any individual who cuts himself off from others whilst living among them.

The practice of concealing one’s face, which could also represent a danger for public safety in certain situations, thus has no place within French territory. The inaction of the public authorities would seem to indicate an unacceptable failure to defend the principles which underpin our Republican covenant.

It is for the sake of those principles that the present Bill seeks to introduce into our legislation, following the necessary period of explanation and education, an essential rule of life in society to the effect that ‘no one may, in public places, wear clothing that is designed to conceal the face’.”

26. The Bill was supported by the National Assembly’s Delegation on the rights of women and equal opportunities (information report registered on 23 June 2010, no. 2646) and the Standing Committee on Legislation (Commission des lois) issued a favourable report (registered on 23 June 2010, no. 2648).

27. The Law was passed by the National Assembly on 13 July 2010 with 335 votes in favour, one vote against and three abstentions, and by the Senate on 14 September 2010, with 246 votes in favour and one abstention. After the Constitutional Council’s decision of 7 October 2010 finding that the Law was compliant with the Constitution (see paragraph 30 below), it was enacted on 11 October 2010.

2. Relevant provisions of Law no. 2010-1192

28. Sections 1 to 3 (in force since 11 April 2011) of Law no. 2010-1192 of 11 October 2010 “prohibiting the concealment of one’s face in public places” read as follows:

Section 1

“No one may, in public places, wear clothing that is designed to conceal the face.”

Section 2

“I. - For the purposes of section 1 hereof, ‘public places’ comprise the public highway and any places open to the public or assigned to a public service.

II. - The prohibition provided for in section 1 hereof shall not apply if the clothing is prescribed or authorised by primary or secondary legislation, if it is justified for health or occupational reasons, or if it is worn in the context of sports, festivities or artistic or traditional events.”
Section 3

“Any breach of the prohibition laid down in section 1 hereof shall be punishable by a fine, at the rate applying to second-class petty offences (contraventions) [150 euros maximum].

An obligation to follow a citizenship course, as provided at paragraph 8 of Article 131-16 of the Criminal Code, may be imposed in addition to or instead of the payment of a fine.”

The provisions for the obligation to follow a citizenship course can be found in Articles R. 131-35 to R. 131-44 of the Criminal Code. The purpose of the course is to remind the convicted persons of the Republican values of tolerance and respect for the dignity of the human being and to make them aware of their criminal and civil liability, together with the duties that stem from life in society. It also seeks to further the person’s social integration (Article R. 131-35).

29. Law no. 2010-1192 (section 4) also inserted the following provision into the Criminal Code:

Article 225-4-10

“Any person who forces one or more other persons to conceal their face, by threat, duress, coercion, abuse of authority or of office, on account of their gender, shall be liable to imprisonment for one year and a fine of 30,000 euros.

Where the offence is committed against a minor, such punishment shall be increased to two years’ imprisonment and a fine of 60,000 euros.”

B. Decision of the Constitutional Council of 7 October 2010

30. The Constitutional Council (Conseil constitutionnel), to which the matter had been referred on 14 September 2010 by the Presidents of the National Assembly and of the Senate, as provided for in the second paragraph of Article 61 of the Constitution, declared Law no. 2010-1192 compliant with the Constitution, subject to one reservation (point 5), in a decision of 7 October 2010 (no. 2010-613 DC), which reads as follows:

“... 3. Article 4 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims: ‘Liberty consists in being able to do anything which does not harm others: thus the exercise of the natural rights of every man has no bounds other than those which ensure to other members of society the enjoyment of these same rights. These bounds shall be determined solely by the law’. Article 5 of the same Declaration proclaims: ‘The law shall prohibit solely those actions which are harmful to society. Nothing which is not prohibited by law shall be impeded and no one shall be compelled to do that which the law does not prescribe’. Article 10 proclaims: ‘No one shall be harassed on account of his opinions and beliefs, even religious, on condition that their manifestation does not disturb public order as determined by law’. Lastly, paragraph 3 of the Preamble to the Constitution of 1946 provides: ‘The law shall guarantee women equal rights to those of men in all spheres’. 
4. Sections 1 and 2 of the statute referred for review are intended to respond to practices, which until recently were of an exceptional nature, consisting in concealing the face in public places. The legislature was of the view that such practices might be dangerous for public safety and fail to comply with the minimum requirements of life in society. It also found that those women who concealed their face, voluntarily or otherwise, were placed in a situation of exclusion and inferiority that was patently incompatible with the constitutional principles of liberty and equality. In passing the statutory provisions referred for review, the legislature thus complemented and generalised rules which were previously reserved for *ad hoc* situations for the purpose of protecting public order.

5. In view of the purposes which it sought to achieve and taking into account the nature of the sanction introduced for non-compliance with the rule it has laid down, the legislature has passed statutory provisions which reconcile, in a manner which is not disproportionate, the safeguarding of public order and the guaranteeing of constitutionally protected rights. However, prohibiting the concealment of the face in public places cannot, without excessively contravening Article 10 of the 1789 Declaration, restrict the exercise of religious freedom in places of worship open to the public. With this reservation, sections 1 to 3 of the statute referred for review are not unconstitutional.

6. Section 4 of the statute referred for review, which punishes by a term of one year’s imprisonment and a fine of 30,000 euros any person who forces another person to conceal his or her face, and sections 5 to 7 thereof concerning the entry into force of the statute and its implementation, are not unconstitutional.

C. Prime Minister’s Circular of 2 March 2011

31. Published in the Official Gazette of 3 March 2011, the Prime Minister’s Circular of 2 March 2011 on the implementation of Law no. 2010-1192 of 11 October 2010 prohibiting the concealment of the face in public places contains the following indications:

“... I. Scope of the Law

1. Factors constituting the concealment of the face in public places

The concealment of the face in public places is prohibited from 11 April 2011 throughout the territory of the Republic, both in metropolitan France and in French overseas administrative areas. The offence is constituted when a person wears an item of clothing that is designed to conceal his or her face and when he or she is in a public place; these two conditions are necessary and sufficient.

(a) Concealment of one’s face

Extent of the ban

Items of clothing designed to conceal the face are those which make the person impossible to identify. The face does not have to be fully concealed for this to be so.

The following are prohibited in particular, without this list being exhaustive: the wearing of balaclavas (*cagoules*), full-face veils (burqa, niqab, etc.), masks or any other accessory or item of clothing which has the effect, whether separately or in combination with others, of concealing the face. Since the offence is classified as a petty offence (*contravention*), the existence of intent is irrelevant: it is sufficient for the clothing to be designed to conceal the face.
Statutory derogations

Section 2 of the Law provides for a number of derogations from the ban on concealing one’s face.

First, the ban does not apply ‘if the clothing is prescribed or authorised by primary or secondary legislation’. This is the case, for example, under Article L. 431-1 of the Road-Traffic Code, which requires the drivers of motorcycles to wear crash-helmets.

Secondly, the ban does not apply if the clothing ‘is justified for health or occupational reasons’. The occupational reasons concern, particularly, the subject-matter covered by Article L. 4122-1 of the Employment Code: ‘the employer’s instructions shall stipulate, in particular where the nature of the risks so justify, the conditions of use of any equipment, any means of protection, and any dangerous substances and concoctions. They shall be appropriate to the nature of the tasks to be performed’.

Lastly, the ban does not apply if the clothing ‘is worn in the context of sports, festivities or artistic or traditional events’. For example, religious processions, when they are of a traditional nature, fall within the scope of the derogations from the ban laid down by section 1. There is also a derogation in respect of the face protections that are prescribed in a number of sports.

The provisions of the Law of 11 October 2010 apply without prejudice to any provisions which may otherwise prohibit or govern the wearing of clothing in certain public services and which remain in force.

This is the case for Law no. 2004-228 of 15 March 2004, which regulates, in accordance with the principle of secularism, the wearing of symbols or clothing displaying religious affiliation in State schools, both primary and secondary (Article L. 141-5-1 of the National Education Code and implementing circular of 18 May 2004). Other provisions remaining applicable are those of the charter of hospitalised patients, annexed to the circular of 2 March 2006 on the rights of hospitalised patients, and those of the circular of 2 February 2005 on secularism in health institutions.

(b) Definition of public places

Section 2 of the Law states that ‘public places comprise the public highway and any places open to the public or assigned to a public service’.

The notion of the public highway requires no comment. It should be pointed out that, with the exception of those assigned to public transport, the vehicles that use public highways are regarded as private places. A person who conceals his or her face in a private car is thus not committing the offence referred to in the Law. That situation may, however, be covered by the provisions of the Road-Traffic Code stipulating that the driving of a vehicle must not present any risks for public safety.

Places open to the public are those places to which access is unrestricted (beaches, public gardens, public walkways, etc.) and places to which access is possible, even conditionally, in so far as any person who so wishes may meet the requirement (for example, by paying for a ticket to enter a cinema or theatre). Commercial premises (cafés, restaurants, shops), banks, stations, airports and the various means of public transport are thus public places.

Places assigned to a public service are the premises of any public institutions, courts and tribunals and administrative bodies, together with any other bodies responsible for providing public services. They include, in particular, the premises of various public authorities and establishments, local government bodies and their public
establishments, town halls, courts, prefectures, hospitals, post offices, educational institutions (primary and secondary schools, universities), family benefit offices, health insurance offices, job centres, museums and libraries.

2. Lack of restriction as regards freedom of religion in places of worship

Where they are open to the public, places of worship fall within the scope of the Law. The Constitutional Council has found, however, that ‘prohibiting the concealment of the face in public places cannot, without excessively contravening Article 10 of the 1789 Declaration, restrict the exercise of religious freedom in places of worship open to the public’.

3. Sanction for the offence of concealing one’s face

Section 3 of the Law provides that any breach of the prohibition of face concealment in public places is punishable by a fine, at the rate applying to second-class petty offences (150 euros maximum). The imposition of this fine falls within the jurisdiction of the community courts (juridictions de proximité).

An obligation to follow a citizenship course may also be imposed by the same courts in addition to or instead of the payment of a fine. Such courses, adapted to the nature of the offence committed, must, in particular, ensure that those concerned are reminded of the Republican values of equality and respect for human dignity.

4. Sanction for the use of duress

The fact of concealing one’s face in a public place may be the result of duress against the person concerned, and the third party will then have committed the offence of forcing a person to conceal his or her face.

This offence, provided for in section 4 of the Law (inserting a new Article 225-4-10 into the Criminal Code), is punishable by one year’s imprisonment and a fine of 30,000 euros. Where the offence is committed against a minor, such punishment is increased to two years’ imprisonment and a fine of 60,000 euros.

The punishment of such conduct is part of the public authorities’ policy to combat with vigour any form of discrimination and violence against women, which constitute unacceptable infringements of the principle of gender equality.

II. Requisite conduct in public services

(a) Role of the director

In the context of the powers that he or she holds to ensure the proper functioning of the department, the director will be responsible for ensuring compliance with the provisions of the Law of 11 October 2010 and with the measures taken, in particular the updating of internal rules, for the purposes of its implementation.

It will be the director’s duty to present and explain the spirit and logic of the Law to the staff under his or her authority, to ensure that they observe its provisions and are in a position to enforce compliance therewith, in the best possible conditions, by the users of the public service.

It will also be for the director to ensure that the appropriate information envisaged by the Government in the form of posters and leaflets is made available on premises that receive or are open to members of the public.

(b) Restriction of access to premises assigned to public services
From 11 April 2011 staff responsible for a public service, who may already have had to ask individuals to show their faces momentarily to prove their identity, will be entitled to refuse access to the service to anyone whose face is concealed.

In the event that the person whose face is concealed has already entered the premises, it is recommended that staff remind that person of the applicable rules and ask him or her to observe the Law, by uncovering the face or leaving the premises. A person whose face is concealed cannot benefit from the delivery of public services.

However, the Law does not confer on staff, in any circumstances, the power to oblige a person to show his or her face or leave. The exercise of such constraint would constitute an illegal act and could entail criminal proceedings. It is therefore absolutely forbidden.

When faced with a refusal to comply, the staff member or his or her line manager must call the police or gendarmerie, who are exclusively entitled to take note and make a report of the offence and, if appropriate, to verify the identity of the person concerned. Specific instructions are addressed for this purpose by the Interior Minister to the police forces.

Denial of access to a service can be reconsidered only to take account of particular emergencies, in particular those of a medical nature.

III. — Informing the public

The period leading up to the entry into force of the ban on the concealment of the face should be used to ensure that members of the public are suitably informed.

(a) General information

A poster, distributed on paper or electronically by ministries, within their respective networks, will have to be displayed, in a visible manner, on premises open to the public or assigned to a public service.

The poster carries the slogan ‘facing up to life in France’ (‘la République se vit à visage découvert’) and indicates that the ban on concealing the face in public places will enter into force on 11 April 2011.

This poster may be supplemented, for the benefit of those who wish to have more precise information on the provisions of the Law, by a leaflet distributed in the various services in the same manner and according to the same procedure as the poster.

For travellers wishing to visit France, this leaflet will also be available in English and Arabic at French consulates abroad.

These two documents providing general information will also be accessible via the website www.visage-decouvert.gouv.fr, which will also include a section providing answers to the various questions raised by the implementation of the Law.

(b) Information for persons directly concerned by face concealment

A scheme for the provision of information to the persons concerned has been prepared by the Ministry for Towns and Cities, in coordination with the Ministry for Solidarity and Social Cohesion and the Interior Ministry.

The aim of this information, awareness and individual support scheme is to foster dialogue, in order to persuade the small minority who conceal their face to comply with the ban laid down by Parliament. This dialogue is not a negotiation; the idea is to
bring those concerned, by a process of explanation, to renounce, of their own accord, a practice which is at odds with the values of the Republic.

The scheme, about which specific instructions have been issued by the Minister for Towns and Cities, relies in particular on associations and community networks in the field of women’s rights, in particular the network of information centres on women’s rights (centres d’information des droits des femmes – CDIFF), the 300 ‘prefect’s delegates’ and ‘relay adults’ working in local communities. It will also mobilise all those working in social mediation, especially the mediators of the national education system.

The aim is to provide full information on the Law and personal support to those individuals who cover their face. ...

D. Other circulars

32. On 11 March 2011 the Minister of Justice and Freedoms issued a Circular “concerning the presentation of the provisions on the offence of concealing one’s face in public places”. It was addressed, for action, to public prosecutors at the appellate and lower courts, and for information, to the presidents of the appellate courts and of the tribunaux de grande instance, among others. The Circular presented the offence of concealing one’s face in public places. It also contained indications as to the implementation of the new punitive provisions, with regard to the policy for establishing the offence and prosecuting the offender and the organisation of the citizenship courses.

33. On 31 March 2011 the Minister of the Interior, Overseas Administration, Local Government and Immigration addressed to the Commissioners of Police, prefects and High Commissioners (of Overseas Territories) a Circular for the purpose of “giving instructions to officials within [that Ministry], and in particular to police forces, for the application of the Law of 11 October 2010”. It contained, in particular, indications about the notion of concealing one’s face and about the places in which the ban applied, emphasising that a person present in a place of worship for the observance of religion was not liable to be charged, and “recommend[ing] that police forces avoid any intervention in the immediate vicinity of a place of worship which could be interpreted as an indirect restriction on freedom of worship”.

E. Judgment of the Criminal Division of the Court of Cassation of 5 March 2013

34. The Court of Cassation was called upon to examine an appeal on points of law (no. 12-808091) against a judgment of the Community Court of Paris, dated 12 December 2011, in which a woman had been ordered to follow a two-week citizenship course for wearing the full-face veil with the aim of protesting against the Law of 11 October 2010 in the context of a
demonstration for that purpose outside the Elysée Palace. Examining the arguments submitted by the appellants under Article 9 of the Convention, the Criminal Division found as follows on 5 March 2013:

“...whilst the Community Court was wrong to disregard the religious reasons for the impugned demonstration, the judgment should not be overruled in so far as, although Article 9 of the Convention ... guarantees the exercise of freedom of thought, conscience and religion, paragraph 2 thereof stipulates that this freedom is subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others; ... this is the case for the Law prohibiting the full covering of the face in public places, as it seeks to protect public order and safety by requiring everyone who enters a public place to show their face; ...”

III. RELEVANT INTERNATIONAL LAW AND PRACTICE


35. Adopted on 23 June 2010, Resolution 1743 (2010) states, in particular:

“14. Recalling its Resolution 1464 (2005) on women and religion in Europe, the Assembly calls on all Muslim communities to abandon any traditional interpretations of Islam which deny gender equality and limit women’s rights, both within the family and in public life. This interpretation is not compatible with human dignity and democratic standards; women are equal to men in all respects and must be treated accordingly, with no exceptions. Discrimination against women, whether based on religious traditions or not, goes against Articles 8, 9 and 14 of the Convention, Article 5 of its Protocol No. 7 and its Protocol No. 12. No religious or cultural relativism may be invoked to justify violations of personal integrity. The Parliamentary Assembly therefore urges member states to take all necessary measures to stamp out radical Islamism and Islamophobia, of which women are the prime victims.

15. In this respect, the veiling of women, especially full veiling through the burqa or the niqab, is often perceived as a symbol of the subjugation of women to men, restricting the role of women within society, limiting their professional life and impeding their social and economic activities. Neither the full veiling of women, nor even the headscarf, are recognised by all Muslims as a religious obligation of Islam, but they are seen by many as a social and cultural tradition. The Assembly considers that this tradition could be a threat to women’s dignity and freedom. No woman should be compelled to wear religious apparel by her community or family. Any act of oppression, sequestration or violence constitutes a crime that must be punished by law. Women victims of these crimes, whatever their status, must be protected by member states and benefit from support and rehabilitation measures.
16. For this reason, the possibility of prohibiting the wearing of the *burqa* and the *niqab* is being considered by parliaments in several European countries. Article 9 of the Convention includes the right of individuals to choose freely to wear or not to wear religious clothing in private or in public. Legal restrictions to this freedom may be justified where necessary in a democratic society, in particular for security purposes or where public or professional functions of individuals require their religious neutrality or that their face can be seen. However, a general prohibition of wearing the *burqa* and the *niqab* would deny women who freely desire to do so their right to cover their face.

17. In addition, a general prohibition might have the adverse effect of generating family and community pressure on Muslim women to stay at home and confine themselves to contacts with other women. Muslim women could be further excluded if they were to leave educational institutions, stay away from public places and abandon work outside their communities, in order not to break with their family tradition. Therefore, the Assembly calls on member states to develop targeted policies intended to raise Muslim women’s awareness of their rights, help them to take part in public life and offer them equal opportunities to pursue a professional life and gain social and economic independence. In this respect, the education of young Muslim women as well as of their parents and families is crucial. It is especially necessary to remove all forms of discrimination against girls and to develop education on gender equality, without stereotypes and at all levels of the education system.”

36. In its Recommendation 1927 (2010), adopted on the same day, the Parliamentary Assembly of the Council of Europe asked the Committee of Ministers of the Council of Europe, in particular, to:

“3.13. call on member states not to establish a general ban of full veiling or other religious or special clothing, but to protect women from all physical and psychological duress as well as to protect their free choice to wear religious or special clothing and ensure equal opportunities for Muslim women to participate in public life and pursue education and professional activities; legal restrictions on this freedom may be justified where necessary in a democratic society, in particular for security purposes or where public or professional functions of individuals require their religious neutrality or that their face can be seen.”

2. Viewpoint of the Commissioner for Human Rights of the Council of Europe


“Prohibition of the *burqa* and the *niqab* will not liberate oppressed women, but might instead lead to their further exclusion and alienation in European societies. A general ban on such attire constitutes an ill-advised invasion of individual privacy and, depending on its terms, also raises serious questions about whether such legislation is compatible with the European Convention on Human Rights.

Two rights in the Convention are particularly relevant to this debate about clothing. One is the right to respect for one’s private life and personal identity (Article 8). The
other is the freedom to manifest one’s religion or belief ‘in worship, teaching, practice and observance’ (Article 9).

Both Convention articles specify that these rights can only be subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Those who have argued for a general ban of the burqa and the niqab have not managed to show that these garments in any way undermine democracy, public safety, order or morals. The fact that a very small number of women wear such clothing has made such proposals even less convincing.

Nor has it been possible to prove that women wearing this attire are victims of more gender repression than others. Those interviewed in the media have presented a diversity of religious, political and personal arguments for their decision to dress as they do. There may of course be cases where women are under undue pressure to dress in a certain way – but it has not been shown that a ban would be welcomed by them.

There is of course no doubt that the status of women is an acute problem – and that this problem may be particularly true in relation to some religious communities. This needs to be discussed, but prohibiting the supposed symptoms – such as clothing – is not the way to do it. Dress, after all, may not reflect specific religious beliefs, but the exercise of broader cultural expression.

It is right and proper to react strongly against any regime ruling that women must wear these garments. This is in clear contravention of the Convention articles cited above, and is unacceptable, but it is not remedied by banning the same clothing in other countries.

The consequences of decisions in this area must be assessed. For instance, the suggestion that women dressed in a burqa or niqab be banned from public institutions like hospitals or government offices may result in these women avoiding such places entirely, and that is clearly wrong.

It is unfortunate that in Europe, public discussion of female dress, and the implications of certain attire for the subjugation of women, has almost exclusively focused on what is perceived as Muslim dress. The impression has been given that one particular religion is being targeted. Moreover, some arguments have been clearly Islamophobic in tenor and this has certainly not built bridges nor encouraged dialogue.

Indeed, one consequence of this xenophobia appears to be that the wearing of full cover dress has increasingly become a means of protesting against intolerance in our societies. An insensitive discussion about banning certain attire seems merely to have provoked a backlash and a polarisation in attitudes.

In general, states should avoid legislating on dress, other than in the narrow circumstances set forth in the Convention. It is, however, legitimate to regulate that those who represent the state, for instance police officers, do so in an appropriate way. In some instances, this may require complete neutrality as between different political and religious insignia; in other instances, a multi-ethnic and diverse society may want to cherish and reflect its diversity in the dress of its agents.

Obviously, full-face coverage may be problematic in some occupations and situations. There are particular situations where there are compelling community interests that make it necessary for individuals to show themselves for the sake of
safety or in order to offer the possibility of necessary identification. This is not controversial and, in fact, there are no reports of serious problems in this regard in relation to the few women who normally wear a burqa or a niqab.

A related problem arose in discussion in Sweden. A jobless Muslim man lost his subsidy from a state agency for employment support because he had refused to shake the hand of a female employer when turning up for a job interview. He had claimed that his action was grounded in his religious faith.

A court ruled later, after a submission from the ombudsman against discrimination, that the agency decision was discriminatory and that the man should be compensated. Though this is in line with human rights standards, it was not readily accepted by the general public and a controversial public debate ensued.

It is likely that issues of this kind will surface increasingly in the coming years and it is healthy that they should be openly discussed – as long as Islamophobic tendencies are avoided. However, such debates should be broadened to include the promotion of greater understanding of different religions, cultures and customs. Pluralism and multiculturalism are essential European values, and should remain so.

This in turn may require more discussion of the meaning of respect. In the debates about the allegedly anti-Muslim cartoons published in Denmark in 2005, it was repeatedly stated that there was a contradiction between demonstrating respect for believers whilst also protecting freedom of expression as stipulated in Article 10 of the European Convention.

The Strasbourg Court analysed this dilemma in the famous case of Otto-Preminger-Institute v. Austria in which it stated that ‘those who choose to exercise the freedom to manifest their religion ... cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith’.

In the same judgment the Court stated that consideration should be given to the risk that the right of religious believers – like anyone else – to have their views respected may be violated by provocative portrayals of objects of religious significance. The Court concluded that ‘such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society’.

The political challenge for Europe is to promote diversity and respect for the beliefs of others whilst at the same time protecting freedom of speech and expression. If the wearing of a full-face veil is understood as an expression of a certain opinion, we are in fact talking here about the possible conflict between similar or identical rights – though seen from two entirely different angles.

In Europe, we seek to uphold traditions of tolerance and democracy. Where conflicts of rights between individuals and groups arise, it should not be seen in negative terms, but rather as an opportunity to celebrate that rich diversity and to seek solutions which respect the rights of all involved.

A prohibition of the burqa and the niqab would in my opinion be as unfortunate as it would have been to criminalise the Danish cartoons. Such banning is alien to European values. Instead, we should promote multicultural dialogue and respect for human rights.”
B. The United Nations Human Rights Committee

38. In its General Comment no. 22, concerning Article 18 of the International Covenant on Civil and Political Rights (freedom of thought, conscience and religion), adopted on 20 July 1993, the Human Rights Committee emphasised as follows:

“... 4. The freedom to manifest religion or belief may be exercised ‘either individually or in community with others and in public or private’. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. ... The observance and practice of religion or belief may include not only ceremonial acts but also such customs as ... the wearing of distinctive clothing or headcoverings ...

8. Article 18 (3) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of the parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint. States parties’ reports should provide information on the full scope and effects of limitations under article 18 (3), both as a matter of law and of their application in specific circumstances. ...”

The Human Rights Committee also stated as follows in its General Comment no. 28, concerning Article 3 (equality of rights between men and women), adopted on 29 March 2000:

“13. [Regulations on clothing to be worn by women in public] may involve a violation of a number of rights guaranteed by the Covenant, such as: article 26, on non-discrimination; article 7, if corporal punishment is imposed in order to enforce such a regulation; article 9, when failure to comply with the regulation is punished by arrest; article 12, if liberty of movement is subject to such a constraint; article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly,
article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim.”

The Human Rights Committee has also adopted General Comments on freedom of movement (General Comment no. 27), and on freedom of opinion and freedom of expression (General Comment no. 34).

39. The Human Rights Committee has, moreover examined a number of cases in which individuals complained of measures restricting the wearing of clothing or symbols with a religious connotation. It found, for example, that “in the absence of any justification provided by the State party” there had been a violation of Article 18 § 2 of the Covenant where a student had been expelled from her University on account of her refusal to remove the hijab (headscarf) that she wore in accordance with her beliefs (Raihon Hudoyberanova v. Uzbekistan, communication no. 931/2000, 18 January 2005). However, it has not yet ruled on the question of a blanket ban on the wearing of the full-face veil in public places.

IV. THE SITUATION IN OTHER EUROPEAN STATES

40. To date, only Belgium has passed a law that is comparable to the French Law of 11 October 2010, and the Belgian Constitutional Court has found it compatible with the right to freedom of thought, conscience and religion (see paragraphs 41-42 below). However, the question of a ban on concealing one’s face in public has been or is being discussed in a number of other European States. A blanket ban remains a possibility in some of them. In particular, a Bill has been tabled to that end in Italy: although it has not yet passed into law, it appears that the discussion is still open. In Switzerland the Federal Assembly rejected, in September 2012, an initiative of the Canton of Aargau seeking to ban the wearing in public of clothing covering all or a large part of the face, but in Ticino there was a vote on 23 September 2013 for a ban of that kind (the text still has to be validated, however, by the Federal Assembly). Such an option is also being discussed in the Netherlands, notwithstanding unfavourable opinions by the Council of State (see paragraphs 49-52 below). It should also be noted that the Spanish Supreme Court has ruled on the legality of a ban of that kind (see paragraphs 42-47 below).

A. Belgian Law of 1 June 2011 and judgment of the Belgian Constitutional Court of 6 December 2012

41. A Law “to prohibit the wearing of any clothing entirely or substantially concealing the face” was enacted in Belgium on 1 June 2011. It inserted the following provision into the Criminal Code:
“Art. 563bis. Persons who, unless otherwise provided by law, appear in a place that is accessible to the public with their faces completely or partially covered or hidden, such as not to be identifiable, shall be liable to a fine of between fifteen and twenty-five euros and imprisonment of between one and seven days, or only one of those sanctions.

However, paragraph 1 hereof shall not concern persons who are present in a place that is accessible to the public with their faces completely or partially covered or hidden where this is provided for by employment regulations or by an administrative ordinance in connection with festive events.”

42. Applications for the annulment of this Law were lodged with the Constitutional Court on the basis, inter alia, of Article 9 of the Convention. The Constitutional Court dismissed the applications in a judgment of 6 December 2012, finding in particular as follows:

“... B.17. It can be seen from the explanatory memorandum to the Bill which became the Law at issue ... that the legislature sought to defend a societal model where the individual took precedence over his philosophical, cultural or religious ties, with a view to fostering integration for all and to ensuring that citizens shared a common heritage of fundamental values such as the right to life, the right to freedom of conscience, democracy, gender equality, or the principle of separation between church and State.

... the legislative history shows that three aims were pursued: public safety, gender equality and a certain conception of ‘living together’ in society.

B.18. Such aims are legitimate and fall within the category of those enumerated in Article 9 of the Convention ..., comprising the maintaining of public safety, the protection of public order and the protection of the rights and freedoms of others.

B.19. It remains for the court to examine whether the conditions of necessity in a democratic society and proportionality in relation to the legitimate aims pursued have been satisfied.

B.20.1. It can be seen from the drafting history of the Law at issue that the prohibition of clothing that conceals the face was largely driven by public safety considerations. In this connection the issue of offences committed by persons whose face is concealed was mentioned ...

B.20.2. Section 34(1) of the Law of 5 August 1992 on police duties empowers police officers to verify the identity of any person if they have reasonable grounds to believe, on account of the person’s conduct, any material indications or the circumstances of time and place, that the person is wanted, has attempted to commit an offence or is preparing to commit one, or is likely to cause a breach of public order or has already done so. This identity check could be hindered if the person concerned has his or her face concealed and refuses to cooperate with such a check. In addition, persons who conceal their face would in general not be, or hardly be, recognisable if they commit an offence or a breach of public order.

B.20.3. That being said, it is not because a certain type of conduct has not yet attained a level that would endanger the social order or safety that the legislature is not entitled to intervene. It cannot be blamed for anticipating such risks in a timely manner by penalising a given type of conduct when its generalisation would undoubtedly entail a real danger.
B.20.4. In view of the foregoing, the legislature was entitled to take the view that the ban on concealment of the face in places accessible to the public was necessary for reasons of public safety.

B.21. The legislature further justified its intervention by a certain conception of ‘living together’ in a society based on fundamental values, which, in its view, derive therefrom.

The individuality of every subject of law (sujet de droit) in a democratic society is inconceivable without his or her face, a fundamental element thereof, being visible. Taking into account the essential values that the legislature sought to defend, it was entitled to take the view that the creation of human relationships, being necessary for living together in society, was rendered impossible by the presence in the public sphere, which quintessentially concerned the community, of persons who concealed this fundamental element of their individuality. Whilst pluralism and democracy entail the freedom to display one’s beliefs, in particular by the wearing of religious symbols, the State must pay attention to the conditions in which such symbols are worn and to the potential consequences of wearing such symbols. To the extent that the concealment of the face has the consequence of depriving the subject of law, a member of society, of any possibility of individualisation by facial appearance, whereas such individualisation constitutes a fundamental condition related to its very essence, the ban on the wearing of such clothing in a public place, even though it may be the expression of a religious belief, meets a pressing social need in a democratic society.

B.22. As to the dignity of women, here too the legislature was entitled to take the view that the fundamental values of a democratic society precluded the imposing of any obligation on women to conceal their face, under pressure from members of their family or their community, and therefore their deprivation, against their will, of their freedom of self-determination.

B.23. However, ... the wearing of the full-face veil may correspond to the expression of a religious choice. That choice may be guided by various reasons with many symbolic meanings.

Even where the wearing of the full-face veil is the result of a deliberate choice on the part of the woman, the principle of gender equality, which the legislature has rightly regarded as a fundamental value of democratic society, justifies the opposition by the State, in the public sphere, to the manifestation of a religious conviction by conduct that cannot be reconciled with this principle of gender equality. As the court has noted in point B.21, the wearing of a full-face veil deprives women – to whom this requirement is solely applicable – of a fundamental element of their individuality which is indispensable for living in society and for the establishment of social contacts.

B.24. The court must further examine whether recourse to a criminal sanction to guarantee compliance with the prohibition imposed by the Law has no disproportionate effects in relation to the aims pursued.

B.25.1. The impugned provision was inserted into the Criminal Code, under the category of fourth-class petty offences, and it provides for a fine of between fifteen and twenty-five euros, with imprisonment of between one and seven days, or only one of those sanctions.

Pursuant to Articles 564 and 565 of the Criminal Code, where the offender has already been convicted, within the preceding twelve months, for the same petty
offence, the court is authorised to sentence him or her, independently of the fine, to imprisonment for up to twelve days.

Article 566 of the same Code permits a reduction of the fine to below five euros, but in no case less than one euro, where there are mitigating circumstances. ...

B.28. In so far as the individualisation of persons, of which the face is a fundamental element, constitutes an essential condition for the functioning of a democratic society, of which each member is a subject of law, the legislature was entitled to consider that the concealment of the face could endanger the functioning of society as thus conceived and, accordingly, should be punished by criminal sanctions.

B.29.1. Subject to the exception under point B.30, to the extent that the impugned measure is directed at individuals who, freely and voluntarily, hide their faces in places that are accessible to the public, it does not have any disproportionate effects in relation to the aims pursued, since the legislature opted for the most lenient criminal sanction. The fact that the sanction may be harsher in the event of a repeat offence does not warrant a different conclusion. The legislature was entitled to take the view that an offender who is convicted for conduct punishable by criminal sanctions will not repeat such conduct, on pain of a harsher sentence.

B.29.2. Moreover, it should be observed, as regards those persons who conceal their face under duress, that Article 71 of the Criminal Code provides that no offence is constituted where the perpetrator has been compelled to act by a force that he or she could not resist.

B.30. The impugned Law stipulates that a criminal sanction will be imposed on anyone who, unless any statutory provisions provide otherwise, masks or conceals his or her face totally or partially, such that he or she is not identifiable, when present in a place that is accessible to the public. It would be manifestly unreasonable to consider that such places should include places of worship. The wearing of clothing corresponding to the expression of a religious choice, such as the veil that covers the entire face in such places, could not be restricted without encroaching disproportionately on a person’s freedom to manifest his or her religious beliefs.

B.31. Subject to that interpretation, [the ground of appeal is unfounded] ....”

B. Judgment of the Spanish Supreme Court of 6 February 2013

43. On 8 October 2010 the Ayuntamiento (municipality) of Lérida – like other municipalities – adopted an amendment to the ordenanza municipal de civismo y convivencia (general municipal ordinance on civic rights and responsibilities and living together), authorising reglamentos (specific by-laws) to limit or prohibit access to municipal areas or premises used for public services for persons wearing full-face veils, balaclavas, full-face helmets or other forms of clothing or accessories preventing or hindering identification and visual communication. On the same day, it amended to the same effect its specific by-laws relating to the municipal archives, municipal offices and public transport.

44. Relying inter alia on Article 16 of the Constitution – concerning freedom of opinion, religion and worship – and referring to Article 9 of the
Convention, an association unsuccessfully lodged an application for annulment with the Catalonia High Court of Justice.

45. Ruling on an appeal on points of law, the Supreme Court quashed the judgment of the Catalonia High Court of Justice and annulled the amendments to the general municipal ordinance and to the specific by-laws concerning the municipal archives and municipal offices.

46. In its judgment of 6 February 2013 (no. 693/2013, appeal no. 4118/2011), it first pointed out that under Spanish constitutional law, fundamental rights could be limited only by a law in the formal sense.

47. It then observed that the Catalonia High Court of Justice had wrongly found that the limitations in question pursued legitimate aims and were necessary in a democratic society, whilst explaining that it did not wish to prejudge any legislative intervention. On the first point, it took the view that, contrary to the findings of the court below, it could not be said that “legitimate aims” were constituted by the protection of “public tranquillity”, “public safety” or “public order”, since it had not been shown that the wearing of the full-face veil was detrimental to those interests. It made the same observation for the “protection of rights and freedoms of others”, since the term “others” did not designate the person who sustained an interference with the exercise of the right to respect for freedom of religion but rather third parties. On the second point, it expressed its disagreement with the finding of the Catalonia High Court of Justice to the effect that, whether or not it was voluntary, it was hard to reconcile the wearing of the full-face veil with the principle of gender equality, which was one of the values of democratic societies. The Supreme Court took the view that the voluntary nature or otherwise of the wearing of the full-face veil was decisive, since it was not possible to restrict a constitutional freedom based on the supposition that the women who wore it did so under duress. It thus concluded that the limitations in question could not be regarded as necessary in a democratic society. Lastly, referring to academic legal writings, it stated that a ban on the wearing of the full-face veil would have the result of isolating the women concerned and would give rise to discrimination against them, and would thus be incompatible with the objective of ensuring the social integration of groups of immigrant origin.

48. The Supreme Court further found, however, that it did not need to abrogate the amendment of the specific by-law concerning public transport. It observed that this amendment merely obliged users who enjoyed reduced-rate tickets to identify themselves from time to time, and that this did not constitute a restriction on fundamental rights.

C. Opinion of the Netherlands Council of State, 28 November 2011

49. The Council of State of the Netherlands gave four opinions – all negative – on four separate Bills before Parliament which concerned,
directly or indirectly, a ban on wearing the full-face veil in public. The first, issued on 21 September 2007, concerned a private member’s Bill expressly aimed at banning the burqa; the second, issued on 6 May 2008 (unpublished), concerned a private member’s Bill for the banning of all clothing covering the face; and the third, issued on 2 December 2009 (unpublished), concerned a Bill to introduce a ban on such clothing in schools. The fourth opinion, adopted on 28 November 2011 and published on 6 February 2012, concerned a Bill seeking to ban, on pain of criminal sanctions, the wearing in public places and places accessible to the public (except those used for religious purposes) of clothing completely covering the face, leaving only the eyes visible or preventing the person’s identification.

50. The Government of the Netherlands justified the fourth Bill by the need to guarantee open communication – essential for social interaction –, the safety and “feeling of safety” (veiligheidsgevoel) of members of the public, and the promotion of gender equality.

51. In its opinion of 28 November 2011 the Council of State first indicated that it was not convinced by the usefulness and necessity of such a ban. It observed that the Government had not stated how the wearing of clothing covering the face was fundamentally incompatible with the “social order” (maatschappelijke orde), nor had they demonstrated the existence of a pressing social need (dringende maatschappelijke behoefte) justifying a blanket ban, or indicated why the existing regulations enabling specific prohibitions hitherto deemed appropriate were no longer sufficient, or explained why the wearing of such clothing, which might be based on religious grounds, had to be dealt with under criminal law. As regards the argument about gender equality, the Council of State took the view that it was not for the Government to exclude the choice of wearing the burqa or niqab for religious reasons, as that was a choice to be left to the women concerned. It added that a blanket ban would be pointless if the aim was to prohibit the coercion of others into wearing the burqa or niqab. Lastly, the Council of State found that the subjective feeling of insecurity could not justify a blanket ban on the basis of social order or public order (de maatschappelijke of de openbare orde).

52. The Council of State further indicated that, in view of the foregoing, the Bill was not compatible with the right to freedom of religion. In its view, a general ban on wearing clothing that covered the face did not meet a pressing social need and was not therefore necessary in a democratic society.
THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTIONS

A. Whether the applicant is a “victim”

53. The Government called into question the applicant’s status as a “victim”. In their submission, she has not adduced evidence to show that she is a Muslim and wishes to wear the full-face veil for religious reasons, does not claim even to have been stopped by the police for wearing the full-face veil in a public place, and has not proved that she wore it before the entry into force of the Law in question. They also cast doubt on the seriousness of the consequences of the ban for the applicant, given that she had admitted to refraining from wearing such a veil in public when it would raise practical obstacles, in the context of her professional life or when she wished to socialise, and had said that she wore it only when compelled to do so by her introspective mood, her spiritual feelings or her desire to focus on religious matters. In the Government’s view, the application amounted to an actio popularis. They added that the notion of “potential victim” undermined the obligation to exhaust domestic remedies and that an extensive application of this notion could have highly destabilising effects for the Convention system: it would run counter to the drafters’ intention and would considerably increase the number of potential applicants. In their view, whilst in certain specific cases the Court might take account of very exceptional circumstances to extend the notion of “victim”, the exception should not be allowed to undermine the principle that only those whose rights have effectively and concretely been breached may claim such status.

54. The applicant submitted that she fell within the category of “potential victims”. She pointed out in particular, in this connection, that in the Court’s judgments in Dudgeon v. the United Kingdom (22 October 1981, Series A no. 45), Norris v. Ireland (26 October 1988, Series A no. 142) and Modinos v. Cyprus (22 April 1993, Series A no. 259), the Court had recognised homosexuals as victims on account of the very existence of laws imposing criminal sanctions for consensual homosexual activity, on the ground that the choice they faced was between refraining from prohibited behaviour or risking prosecution, even though such laws were hardly ever enforced. She observed that, in S.L. v. Austria (no. 45330/99, ECHR 2003-I), a seventeen-year-old boy complaining of legislation prohibiting homosexual acts between adults and minors had been recognised by the Court as having victim status, despite the fact that only adult partners were liable to prosecution and no such prosecution was actually at issue.
In the applicant’s submission, her faith is an essential element of her existence, she is a devout believer and the wearing of the veil is fundamental for her. She found it inappropriate for the Government to require her to prove that she was a Muslim and that she wished to wear the veil for religious reasons. She failed to see what proof she could give and observed that it would have been strange to expect applicants in the above-mentioned cases to prove their homosexuality. She added that there could be no doubt that there was an established school of thought within Islam that required women to cover their faces in public, and that, according to the Court’s jurisprudence, it was not for the State to assess the legitimacy of the applicant’s ways of manifesting her beliefs. In her submission, even supposing that it could be doubted that she had worn the full-face veil before the entry into force of the Law, she is a victim of that Law in so far as it prevents her, on pain of sanctions, from wearing it in public when she so desires; the Law affects her directly on account of the fact that she is a devout Muslim woman who conceals her face in public.

55. The Court observes that this objection primarily concerns the status of the applicant as a victim under Article 9 of the Convention. It would point out in this connection that, as guaranteed by that provision, the right to freedom of thought, conscience and religion denotes only those views that attain a certain level of cogency, seriousness, cohesion and importance. However, provided this is satisfied, the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (see Eweida and Others v. the United Kingdom, nos.48420/10, 59842/10, 51671/10 and 36516/10, § 81, ECHR 2013, and the references indicated therein).

It is also true that an act which is inspired, motivated or influenced by a religion or beliefs, in order to count as a “manifestation” thereof within the meaning of Article 9, must be intimately linked to the religion or beliefs in question. An example would be an act of worship or devotion which forms part of the practice of a religion or beliefs in a generally recognised form. However, the “manifestation” of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, applicants claiming that an act falls within their freedom to manifest their religion or beliefs are not required to establish that they acted in fulfilment of a duty mandated by the religion in question (ibid., § 82, and the references indicated therein).

56. It cannot therefore be required of the applicant either to prove that she is a practising Muslim or to show that it is her faith which obliges her to wear the full-face veil. Her statements suffice in this connection, since there is no doubt that this is, for certain Muslim women, a form of practical observance of their religion and can be seen as a “practice” within the
meaning of Article 9 § 1 of the Convention. The fact that it is a minority practice (see paragraph 16 above) is without effect on its legal characterisation.

57. Furthermore, the applicant admittedly does not claim to have been convicted – or even stopped or checked by the police – for wearing the full-face veil in a public place. An individual may nevertheless argue that a law breaches his or her rights in the absence of a specific instance of enforcement, and thus claim to be a “victim”, within the meaning of Article 34, if he or she is required either to modify his or her conduct or risk being prosecuted, or if he or she is a member of a category of persons who risk being directly affected by the legislation (see, in particular, *Marckx v. Belgium*, 13 June 1979, § 27, Series A no. 31; *Johnston and Others v. Ireland*, 18 December 1986, § 42, Series A no. 112; *Norris*, cited above, § 31; *Burden v. the United Kingdom* [GC], no. 13378/05, § 34, ECHR 2008; and *Michaud v. France*, no. 12323/11, §§ 51-52, ECHR 2012). This is the case under the Law of 11 October 2010 for women who, like the applicant, live in France and wish to wear the full-face veil for religious reasons. They are thus confronted with a dilemma comparable *mutatis mutandis* to that which the Court identified in the *Dudgeon and Norris* judgments (both cited above, § 41 and §§ 30-34, respectively): either they comply with the ban and thus refrain from dressing in accordance with their approach to religion; or they refuse to comply and face prosecution (see also *Michaud*, cited above, § 52).

58. The Government’s objection must therefore be dismissed.

**B. Exhaustion of domestic remedies**

59. The Government argued that, in the absence of any domestic proceedings, the application should be declared inadmissible for failure to exhaust domestic remedies.

60. The applicant observed that applicants were not required to exhaust any domestic remedies which would be ineffective or pointless.

61. In the Court’s view, this question is devoid of relevance in the context of the French legal system, in so far as it has found that the applicant is entitled to claim victim status in the absence of any individual measure. As a subsidiary consideration, it would observe that, whilst it is true that the complaints submitted to the Court had not previously been examined by domestic courts in the context of remedies used by the applicant, the Constitutional Council ruled on 7 October 2010 that the Law was compatible with (*inter alia*) freedom of religion (see paragraph 30 above). The Criminal Division of the Court of Cassation has also given a ruling on the matter: in a judgment of 5 March 2013, in the context of proceedings which had nothing to do with the applicant, it rejected a complaint under Article 9 on the ground that the Law of 11 October 2010
had the aim, in accordance with the second paragraph of that Article, of “protecting public order and safety, by requiring anyone present in a public place to show their face” (see paragraph 34 above). From the latter judgment it can, moreover, be seen that, if the applicant had been convicted pursuant to the Law and had subsequently appealed on points of law on the grounds of a violation of Article 9, her appeal would have been dismissed. The Court must therefore dismiss this objection.

C. Abuse of the right of individual application

62. The Government criticised “an improper exercise of the right of individual application”. They described the application as containing “a totally disembodied argument, lodged on the very day the prohibition on concealing the face in public came into force by an applicant who ha[d] not been the subject of domestic proceedings and of whom nothing [was] known, except what she [had] seen fit to say about her religious opinions and about her uncertain way of expressing them in her behaviour”. They observed that two other applications which were very similar in form and substance had been lodged by the same United Kingdom lawyers who were representing the applicant. They added that “questions [might] well be asked about the seriousness of the case” and that it “in no way involve[d] a normal use of the right of individual application” but amounted to an actio popularis.

63. In the applicant’s view, this argument had to be rejected for the same reasons as those that she gave for the dismissal of the objection that she was not entitled to claim victim status.

64. The Government thus seem to have suggested that the applicant is merely being used as a cover. The Court has taken their observations into account on this point. It would observe, however, that its Registry has verified the name and address on the application and has ensured that the lawyers who drafted it have produced the authority form duly signed by the applicant.

65. The Court considers that the Government’s argument should otherwise be examined in terms of Article 35 § 3 (a), which allows the Court to declare inadmissible any individual application that it considers to be “an abuse of the right of individual application”.

66. The Court reiterates in this connection that the implementation of this provision is an “exceptional procedural measure” and that the concept of “abuse” refers to its ordinary meaning, namely, the harmful exercise of a right by its holder in a manner that is inconsistent with the purpose for which such right is granted (see Miroļubovs and Others v. Latvia, no. 798/05, § 62, 15 September 2009). In that connection, the Court has noted that for such “abuse” to be established on the part of the applicant it requires not only manifest inconsistency with the purpose of the right of
application but also some hindrance to the proper functioning of the Court
or to the smooth conduct of the proceedings before it (ibid., § 65).

67. The Court has applied that provision in four types of situation (see
Miroļubovs and Others, cited above, §§ 62-66). First, in the case of
applications which were knowingly based on untrue facts (see Varbanov
v. Bulgaria, no. 31365/96, § 36, ECHR 2000-X), whether there had been
falsification of documents in the file (see, for example, Jian v. Romania
(dec.), no. 46640/99, 30 March 2004) or failure to inform the Court of an
essential item of evidence for its examination of the case (see, for example,
v. Georgia (dec.), no. 5667/02, 2 May 2006) or of new major developments
in the course of the proceedings (see, for example, Predescu v. Romania,
no. 21447/03, §§ 25-27, 2 December 2008). Secondly, in cases where an
applicant had used particularly vexatious, contemptuous, threatening or
provocative expressions in his correspondence with the Court (see, for
example, Řehák v. the Czech Republic (dec.), no. 67208/01, 18 May 2004).
Thirdly, in cases where an applicant had deliberately breached the
confidentiality of negotiations for a friendly settlement (see, for example,
Hadrabová and Others v. the Czech Republic (dec.), nos. 42165/02 and
466/03, 25 September 2007, and Deceuninck v. France (dec.), no. 47447/08,
13 December 2011). Fourthly, in cases where applicants had repeatedly sent
quibbling and manifestly ill-founded applications resembling an application
they had previously lodged that had been declared inadmissible (see Anibal
Vieira & Filhos LDA and Maria Rosa Ferreira da Costa LDA v. Portugal
(dec.), nos. 980/12 and 18385/12, 13 November 2012; see also the
Commission decisions M. v. the United Kingdom, no. 13284/87, 15 October
1987, and Philis v. Greece, no. 28970/95, 17 October 1996). The Court has
also stipulated that, even though an application motivated by publicity or
propaganda is not, by that very fact alone, an abuse of the right of
application, the situation is different where the applicant, driven by political
interests, gives an interview to the press or television showing an
irresponsible and frivolous attitude towards proceedings that are pending
before the Court (see Miroļubovs and Others, cited above, § 66).

68. The Court would first observe that the present application does not
fall into any of those four categories. Moreover, even supposing that it could
be considered that an application which amounts to an actio popularis is
thereby rendered “manifestly at odds with the purpose of the right of
application”, the Court would refer back to its previous observations about
the applicant’s victim status and its conclusion that the present case cannot
be described as an actio popularis (see paragraphs 57-58 above). Furthermore,
there is no evidence capable of leading the Court to consider that,
by her conduct, the applicant has sought to hinder the proper
functioning of the Court or the smooth conduct of proceedings before it.
Also taking into account the fact that the inadmissibility of an application on
the ground that it constitutes an abuse of the right of application must remain an exception, the Court dismisses the Government’s objection.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION, TAKEN SEPARATELY AND TOGETHER WITH ARTICLE 14

69. The applicant complained that, since the wearing in public of clothing designed to conceal the face was prohibited by law on pain of a criminal sanction, if she wore the full-face veil in a public place she would expose herself to a risk not only of sanctions but also of harassment and discrimination, which would constitute degrading treatment. She relied on Article 3 of the Convention, which reads:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

She further complained of a violation of Article 14 of the Convention taken together with Article 3. Article 14 reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

70. The Court observes that the minimum level of severity required if ill-treatment is to fall within the scope of Article 3 (see Ireland v. the United Kingdom, 18 January 1978, § 162, Series A no. 25) is not attained in the present case. It concludes that the complaint under this Article is manifestly ill-founded, within the meaning of Article 35 § 3 (a) of the Convention. This also means that, as the facts at issue do not fall within the ambit of Article 3 of the Convention (see, for example, X and Others v. Austria [GC], no. 19010/07, § 94, ECHR 2013), Article 14 of the Convention cannot be relied upon in conjunction with that provision.

71. Accordingly, this part of the application is inadmissible and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION, TAKEN SEPARATELY AND TOGETHER WITH ARTICLE 14

72. The applicant complained that the statutory ban on wearing clothing designed to conceal the face in public deprived her of the possibility of wearing the Islamic full-face veil in public places. She alleged that there had been a violation of her right to freedom of association and discrimination in the exercise of that right. She relied on Article 11 of the Convention, taken separately and together with the above-cited Article 14. Article 11 reads as follows:
“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

73. The Court observes that the applicant did not indicate how the ban imposed by the Law of 11 October 2012 would breach her right to freedom of association and would generate discrimination against her in the enjoyment of that right. It concludes that, being unsubstantiated, this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention (see, for example, Özer v. Turkey (no. 2), no. 871/08, § 36, 26 January 2010) and is, as such, inadmissible. It must therefore be dismissed pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLES 8, 9 AND 10 OF THE CONVENTION, TAKEN SEPARATELY AND TOGETHER WITH ARTICLE 14

74. The applicant complained for the same reasons of a violation of her right to respect for her private life, her right to freedom to manifest her religion or beliefs and her right to freedom of expression, together with discrimination in the exercise of these rights. She relied on Articles 8, 9 and 10 of the Convention, taken separately and together with the above-cited Article 14. Those first three Articles read as follows:

**Article 8**

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

**Article 9**

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

**Article 10**

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

**A. Admissibility**

75. The Court finds that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

**B. Merits**

1. **The parties’ submissions**

(a) **The applicant**

76. In the applicant’s submission, she was born in Pakistan and her family belongs to a Sunni cultural tradition in which it is customary and respectful for women to wear a full-face veil in public. She claimed to have sustained a serious interference with the exercise of her rights under Article 9, as the Law of 11 October 2010, which sought to prohibit Muslim women from wearing the full-face veil in public places, prevented her from manifesting her faith, from living by it and from observing it in public. She added that, whilst the interference was “prescribed by law”, it did not pursue any of the legitimate aims listed in the second paragraph of that provision and was not “necessary in a democratic society”.

77. The applicant began by observing that this interference could not be said to have the legitimate aim of “public safety” as it was not a measure intended to address specific safety concerns in places of high risk such as airports, but a blanket ban applying to almost all public places. As to the Government’s argument that it sought to ensure respect for the minimum
requirements of life in society, because the reciprocal exposure of faces was fundamental in French society, the applicant objected that it failed to take into account the cultural practices of minorities which did not necessarily share this philosophy or the fact that there were forms of communication other than visual, and that in any event this bore no relation to the idea of imposing criminal sanctions to prevent people from veiling their faces in public. She submitted, moreover, that the Government’s assertion that for women to cover their faces was incompatible with the principle of gender equality was simplistic. She argued that, according to a well-established feminist position, the wearing of the veil often denoted women’s emancipation, self-assertion and participation in society, and that, as far as she was concerned, it was not a question of pleasing men but of satisfying herself and her conscience. Furthermore, it could not be maintained that because of wearing the veil the women concerned were denied the right to exist as individuals in public, when in the majority of cases it was worn voluntarily and without any proselytising motive. She added that other member States with a strong Muslim population did not prohibit the wearing of the full-face veil in public places. She also found it ironic that an abstract idea of gender equality could run counter to the profoundly personal choice of women who decided to wear veils, and contended that imposing legal sanctions exacerbated the inequality that was supposed to be addressed. Lastly, she took the view that in claiming that the prohibition had the legitimate aim of “respect for human dignity” the Government were justifying the measure by the abstract assumption, based on stereotyping and chauvinistic logic, that women who wore veils were “effaced”.

78. Under the heading of “necessity”, the applicant argued that a truly free society was one which could accommodate a wide variety of beliefs, tastes, pursuits, customs and codes of conduct, and that it was not for the State to determine the validity of religious beliefs. In her view, the prohibition on wearing the full-face veil in public and the risk of criminal sanctions sent out a sectarian message and discouraged the women concerned from socialising. She pointed out that the Human Rights Committee, in its General Comment no. 28, had found that any regulation of clothing that women could wear in public might breach the principle of equal rights for men and women, and in its decision in Raihon Hudoyberganova v. Uzbekistan (cited above), had observed that the freedom to manifest one’s religion encompassed the right to wear clothes or attire in public which were in conformity with the individual’s faith or religion. She further observed that, whilst the Law of 11 October 2010 had been passed almost unanimously, the above-cited cases of Dudgeon, Norris and Modinos showed that a measure might have wide political support and yet not be “necessary in a democratic society”.

Moreover, even supposing that the aims pursued were legitimate, the impugned prohibition could not fulfil that condition where they might be
achieved by less restrictive means. Thus, to address the questions of public safety, it would be sufficient to implement identity checks at high-risk locations, as in the situations examined by the Court in the cases of *Phull v. France* ((dec.), no. 35753/03, ECHR 2005-I) and *El Morsli v. France* ((dec.), no. 15585/06, 4 March 2008). As to the aim of guaranteeing respect for human dignity, it was still necessary to weigh up the competing interests: those of members of the public who disapproved of the wearing of the veil; and those of the women in question who, like the applicant, were forced to choose between acting in a manner contrary to their beliefs, staying at home or breaking the law. The rights of the latter were much more seriously affected than those of the former. In the applicant’s view, if it were considered, as the Government argued, that it was necessary to criminalise not only the coercion of another into veiling but also the fact of voluntarily wearing the veil, on the grounds that women might be reluctant to denounce those who coerced them and that constraint might be diffuse in nature, that would mean disregarding the position or motivation of women who chose to cover their faces and therefore excluding any examination of proportionality. Such an attitude was not only paternalistic, but it also reflected an intention to punish the very women who were supposed to be protected from patriarchal pressure. Lastly, the applicant found irrelevant the Government’s comment that freedom to dress according to one’s wishes remained very broad in France and that the ban did not apply in places of worship open to the public, pointing out that her beliefs precisely required her to cover her face and that it should be possible to manifest one’s religion in public, not only in places of worship.

79. In the applicant’s submission, the fact that she was prevented by the Law of 11 October 2010 from wearing the full-face veil in public also entailed a violation of her right to respect for her private life under Article 8 of the Convention. Her private life was affected for three reasons. First, because her ability to wear the full-face veil was an important part of her social and cultural identity. Secondly because, as the Court had pointed out in its *Von Hannover v. Germany* judgment (no. 59320/00, §§ 50 and 69, ECHR 2004-VI), there was a zone of interaction of a person with others, even in a public context, which might fall within the scope of private life, and the protection of private life under Article 8 extended beyond the private family circle and also included a social dimension. The third reason was that if she went out of the house wearing the full-face veil she would probably encounter hostility and would expose herself to criminal sanctions. Thus, being obliged to remove it when she went out and only being able to wear it at home “as if she were a prisoner”, she was forced to adopt a “Jekyll and Hyde personality”.

Furthermore, referring back in essence to her observations on Article 9 of the Convention, the applicant argued that the interference did not pursue any of the legitimate aims enumerated in the second paragraph of Article 8 of
the Convention. She added that, even supposing that one of those aims could be accepted, the impugned interference could not be regarded as necessary in a democratic society, especially as the requirements of the second paragraph of Article 8 were, in this connection, stricter than those of the second paragraph of Article 9.

80. The applicant further argued that the ban on wearing clothing designed to conceal the face in public, which undoubtedly targeted the burqa, generated discrimination in breach of Article 14 on grounds of sex, religion and ethnic origin, to the detriment of Muslim women who, like her, wore the full-face veil. In her view this was indirect discrimination between Muslim women whose beliefs required them to wear the full-face veil and other Muslim women, and also between them and Muslim men. The exception provided for by the Law, according to which the ban did not apply if the clothing was worn in the context of “festivities or artistic or traditional events” was also, in her view, discriminatory, in that it created an advantage for the Christian majority: it allowed Christians to wear in public clothing that concealed their face in the context of Christian festivities or celebrations (Catholic religious processions, carnivals or rituals, such as dressing up as Santa Claus) whereas Muslim women who wished to wear the full-face veil in public remained bound by the ban even during the month of Ramadan.

(b) The Government

81. The Government admitted that, even though it was formulated in general terms, the ban introduced by the Law of 11 October 2010 could be seen as a “limitation”, within the meaning of Article 9 § 2 of the Convention, on the freedom to manifest one’s religion or beliefs. They argued, however, that the limitation pursued legitimate aims and that it was necessary, in a democratic society, for the fulfilment of those aims.

82. In the Government’s submission, the first of those aims was to ensure “public safety”. The ban satisfied the need to identify individuals so as to prevent danger for the safety of persons and property and to combat identity fraud. The second of those aims concerned the “protection of the rights and freedoms of others” by ensuring “respect for the minimum set of values of an open and democratic society”. The Government mentioned three values in this connection. First, the observance of the minimum requirements of life in society. In the Government’s submission, the face plays a significant role in human interaction: more so than any other part of the body, the face expresses the existence of the individual as a unique person, and reflects one’s shared humanity with the interlocutor, at the same time as one’s otherness. The effect of concealing one’s face in public places is to break the social tie and to manifest a refusal of the principle of “living together” (le “vivre ensemble”). The Government further argued that the ban sought to protect equality between men and women, as to consider that
women, solely on the ground that they were women, must conceal their faces in public places, amounted to denying them the right to exist as individuals and to reserving the expression of their individuality to the private family space or to an exclusively female space. Lastly, it was a matter of respect for human dignity, since the women who wore such clothing were therefore “effaced” from public space. In the Government’s view, whether such “effacement” was desired or suffered, it was necessarily dehumanising and could hardly be regarded as consistent with human dignity.

On the question of gender equality, the Government expressed surprise at the applicant’s statements to the effect that the practice of wearing the full-face veil often denoted the woman’s emancipation, self-assertion and participation in society, and they did not agree with the highly positive presentation of that practice by the applicant and the intervening non-governmental organisations. They took note of the study reports presented by two of the third-party interveners, showing that women who wore or used to wear the full-face veil did so voluntarily and those that had given up the practice had done so mainly as a result of public hostility. They observed, however, that those studies were based on only a small sample group of women (twenty-seven in one case, thirty-two in the other) recruited using the “snowball method”. That method was not very reliable, as it consisted in targeting various people fitting the subject profile and then, through them, reaching a greater number of people who generally shared the same views. They concluded that the reports in question provided only a very partial view of reality and that their scientific relevance had to be viewed with caution.

83. As regards the necessity and proportionality of the limitation, the Government argued that the Law of 11 October 2010 had been passed both in the National Assembly and the Senate by the unanimous vote of those cast (less one vote), following a wide democratic consultation involving civil society. They pointed out that the ban in issue was extremely limited in terms of its subject matter, as only concealment of the face was prohibited, irrespective of the reason, and everyone remained free, subject to that sole restriction, to wear clothing expressing a religious belief in public. They added that the Law was necessary for the defence of the principles underlying its enactment. They indicated in this connection that to restrict sanctions only to those coercing someone else to cover their face would not have been sufficiently effective because the women concerned might have hesitated to report it and coercion could always be diffuse in nature. They further pointed out that the Court afforded States a wide margin of appreciation when it came to striking a balance between competing private and public interests, or where a private interest was in conflict with other rights secured by the Convention (they referred to Evans v. the United Kingdom [GC], no. 6339/05, § 77, ECHR 2007-I). They further took the
view that the penalties stipulated were light – a mere fine of 150 euros or a citizenship course. They noted that both the Constitutional Council and the Court of Cassation had recognised the “necessity” of the Law.

84. As to Article 8 of the Convention, the Government indicated that they were not convinced that this provision applied, since the ban on clothing designed to cover the face concerned only public places and it could not be considered that an individual’s physical integrity or privacy were at stake. Pointing out that the applicant’s arguments related, in any event, more to her freedom to manifest her beliefs or religion and therefore to Article 9, they referred back to the arguments they had set out under that head as to the justification for the interference and its proportionality.

85. Lastly, the Government found the applicant “particularly ill-placed to consider herself a victim of discrimination on account of her sex”, as one of the essential objectives of the impugned Law was to combat that type of discrimination as a result of women being effaced from public space through the wearing of the full-face veil. In their view, the assertion that the Law had been based on a stereotype whereby Muslim women were submissive was unfounded and caricatural: firstly, because the Law did not target Muslim women; and secondly, because the social effacement manifested by the wearing of the burqa or niqab was “hardly compatible with the affirmation of a social existence”. In their opinion, it was not possible to infer from Article 14 of the Convention a right to place oneself in a position of discrimination. As to the contention that one of the effects of the Law would be to dissuade the women concerned from going to public places and to confine them at home, it was particularly futile in the instant case since the applicant claimed that she wore this clothing only voluntarily and occasionally.

The Government added that the Law did not create any discrimination against Muslim women either. They observed in this connection that the practice of wearing the full-face veil was a recent development, quite uncommon in France, and that it had been criticised on many occasions by high-profile Muslims. The prohibition in fact applied regardless of whether or not the reason for concealing the face was religious, and regardless of the sex of the individual. Lastly, they pointed out that the fact that certain individuals who wished to adopt behaviour which they justified by their beliefs, whether or not religious, were prevented from doing so by a statutory prohibition could not in itself be considered discriminatory where the prohibition had a reasonable basis and was proportionate to the aim pursued. They referred on this point to their previous arguments.
2. Arguments of third-party interveners

(a) The Belgian Government

86. The intervening Government stated that the wearing of the full-face veil was not required by the Koran but corresponded to a minority custom from the Arabian peninsula.

87. They further indicated that a law prohibiting the wearing of any “clothing entirely or substantially concealing the face” had been passed in Belgium on 1 June 2011 and had come into force on 23 July 2011. Two constitutional challenges lodged against it had been dismissed by the Belgian Constitutional Court in a judgment of 6 December 2012, finding – subject to one reservation concerning places of worship – that the wearing of such clothing posed a safety issue, was an obstacle to the right of women to equality and dignity, and, more fundamentally, undermined the very essence of the principle of living together. They took the view that no one was entitled to claim, on the basis of individual or religious freedom, the power to decide when and in what circumstances they would agree to uncover their faces in a public place. It was necessarily a matter for the public authorities to assess public safety requirements. They further noted that the issue of women’s right to equality and dignity had been raised by both parties, and acknowledged that the wearing of the full-face veil was not necessarily an expression of subservience to men. They considered, however, that the right to isolation had its limits, that codes of clothing which prevailed in our societies were the product of societal consensus and the result of a balanced compromise between our individual freedom and our codes of interaction within society, and that those who wore clothing concealing their face were signalling to the majority that they did not wish to take an active part in society and were thus dehumanised. In their view, one of the values forming the basis on which a democratic society functioned was the possibility for individuals to take part in an active exchange.

88. The intervening Government pointed out that the Belgian legislature had sought to defend a model of society in which the individual outweighed any philosophical, cultural or religious attachments so as to encourage full integration and enable citizens to share a common heritage of fundamental values such as democracy, gender equality and the separation of Church and State. They referred to the judgment of the Belgian Constitutional Court, which had found that, where the consequence of concealing the face was to prevent a person’s facial individualisation, even though such individualisation was a fundamental condition associated with his or her very essence, the prohibition on wearing clothing concealing the face in places accessible to the public, even if it were the expression of a religious belief, met a compelling social need in a democratic society. They added that the Belgian legislature had opted for the lightest criminal sanction
fine) and observed – again referring to the Constitutional Court’s judgment – that if certain women stayed at home so as not to go out with their faces uncovered, that was the result of their own choice and not of an illegitimate constraint imposed on them by the Law. Lastly, they were of the view that the French and Belgian Laws were not discriminatory, as they did not specifically target the full-face veil and applied to any person who wore items concealing the face in public, whether a man or a woman, and whether for a religious or any other reason.

(b) The non-governmental organisation Amnesty International

89. This third-party intervener observed that the right to wear clothing with a religious connotation was protected by the International Covenant on Civil and Political Rights, in terms of the right to freedom of thought, conscience and religion and the right to freedom of expression. It added that the Covenant provided for limitations similar to those in Articles 9 and 10 of the Convention, and argued that public international law required the provisions of both instruments to be interpreted in a similar manner. It thus called on the Court to take into account the Human Rights Committee’s General Comments nos. 22, 27 and 34, together with its jurisprudence (see paragraph 38 above).

90. The intervener added that the right to freedom from discrimination was guaranteed by all the international and regional instruments for the protection of fundamental rights, that a homogeneous interpretation was also required in that connection, and that, in accordance with the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), States had an obligation to take effective measures to put an end to discriminatory practices. It further referred to the Human Rights Committee’s General Comments nos. 22 and 28. It also pointed to the risk of intersecting discrimination: women might experience a distinct form of discrimination due to the intersection of sex with other factors such as religion, and such discrimination might express itself, in particular, in the form of stereotyping of subgroups of women. It also observed that restrictions on the wearing of headscarves or veils might impair the right to work, the right to education and the right to equal protection of the law, and might contribute to acts of harassment and violence.

91. In the third party’s submission, it is an expression of gender-based and religion-based stereotyping to assume that women who wear certain forms of dress do so only under coercion; ending discrimination would require a far more nuanced approach.

(c) The non-governmental organisation ARTICLE 19

92. This third-party intervener observed that the wearing of religious dress or symbols was covered by the right to freedom of expression and the
right to freedom of religion and thought. It also referred to the Human Rights Committee’s General Comment no. 28. It further mentioned that Committee’s decision in Hudoyberkanova v. Uzbekistan (cited above), where it had been found that the freedom to manifest one’s religion encompassed the right to wear clothes or attire in public which were deemed to be in conformity with the individual’s faith or religion, and that to prevent a person from wearing religious clothing might constitute a violation of Article 18 of the International Covenant on Civil and Political Rights. It referred also to the Committee’s General Comment no. 34 on freedom of opinion and expression. It added that, in her 2006 report, the United Nations Special Rapporteur on freedom of religion or belief had laid down a set of guidelines for considering the necessity and proportionality of restrictions on wearing religious dress or symbols and recommended that the following questions be answered by the administration or judiciary when making such an assessment: is the restriction in question appropriate having regard to the legitimate interest that it seeks to protect, is it the least restrictive, has it involved a balancing of the competing interests, is it likely to promote religious intolerance and does it avoid stigmatising any particular religious community?

93. The intervener further observed that, as noted by the Special Rapporteur on freedom of religion or belief in his interim 2011 report, the prohibition on sex-based discrimination was often invoked in favour of banning the full-face veil, whereas such prohibitions might lead to intersectional discrimination against Muslim women. In the intervener’s view, this could be counterproductive as it might lead to the confinement of the women concerned in the home and to their exclusion from public life and marginalisation, and might expose Muslim women to physical violence and verbal attacks. It further observed that the Parliamentary Assembly of the Council of Europe, in particular, had recently recommended that member States should not opt for general bans on the wearing of the full-face veil in public.

94. According to the intervener, international standards on the right to freedom of expression, to freedom of opinion and religion and to equal treatment and non-discrimination did not support general prohibitions on covering the face in public.

(d) Human Rights Centre of Ghent University

95. The intervener emphasised that the French and Belgian Laws prohibiting concealment of the face in public had been passed on the basis of the assumption that women who wore the full-face veil did so for the most part under coercion, showed that they did not wish to interact with others in society and represented a threat to public safety. It referred to empirical research that had been carried out in Belgium among twenty-seven women who wore or used to wear the full-face veil (see E. Brems,
Y. Janssens, K. Lecoyer, S. Ouald Chaib and V. Vandersteen, *Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium Concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering*), together with research carried out in France by the Open Society Foundations (see paragraph 104 below) and in the Netherlands by Professor A. Moors, which all indicated that this assumption was erroneous.

96. In the intervener’s submission, this research showed that the ban did not actually serve its stated purpose: the women concerned avoided going out, leading to their isolation and the deterioration of their social life and autonomy, and cases of aggression against them had increased. It further found the ban disproportionate, because public space was defined very broadly, safety concerns might be addressed by the occasional duty to identify oneself by showing one’s face, and in today’s society there were many forms of social interaction in which people did not have to see each other’s face.

97. In the intervener’s view, in addition to constituting a disproportionate interference with freedom of religion, the ban generated indirect and intersectional discrimination on grounds of religion and sex, endorsed stereotypes and disregarded the fact that veiled women made up a vulnerable minority group which required particular attention.

98. Lastly, the intervener asked the Court to examine the present case in the light of the rise in Islamophobia in various European countries. It took the view that the adoption and enforcement of a blanket ban on face covering in public were all the more harmful as this had been accompanied by political rhetoric specifically targeting women wearing an Islamic face veil, thus reinforcing negative stereotypes and Islamophobia.

(e) The non-governmental organisation Liberty

99. This intervener observed that, although the Law of 11 October 2010 was framed in neutral terms, its aim was to prohibit the wearing of the burqa and it applied to all public places, with the result that the women concerned faced the agonising choice between remaining at home or removing their veil. It pointed out that the origins of the Convention were firmly rooted in the atrocities of the Second World War, that it was the horrors perpetrated against the Jews that had provided the impetus for embedding the right to freedom of religion in the list of fundamental rights, and that since then there had been other crimes against humanity where religion had been at least a contributory factor. It added that there was a close relationship between religion and race.

100. The intervener further emphasised that general rules regulating clothing worn by women in public might involve a violation not only of a number of fundamental rights but also of international and regional instruments such as the Framework Convention for the Protection of National Minorities. As regards the Convention, the intervener was of the
view that Articles 8, 9, 10 and 14 applied in the present case. It submitted that the threefold justification in the explanatory memorandum accompanying the Bill had not been convincing. It further argued that the ban and the debate surrounding it contributed to stigmatising Muslims and fuelled racist attitudes towards them.

101. In conclusion, the intervener observed that, whilst many feminists, in particular, regarded the full-face veil as demeaning to women, undermining of their dignity, and the result of patriarchy, others saw it as a symbol of their faith. In its view, these controversies were not resolved by imprisoning at home those women who felt compelled to wear it, on pain of sanctions. This was not liberating for women and in all likelihood would encourage Islamophobia.

(f) The non-governmental organisation Open Society Justice Initiative

102. This third-party intervener pointed out that the ban on the full-face veil had been criticised within the Council of Europe and that only France and Belgium had adopted such a blanket measure. It emphasised that, even though the French and Belgian Laws were neutral in their wording, their legislative history showed that the intent was to target specifically the niqab and the burqa.

103. The intervener further noted that the aim of the French Law was to preserve public safety, gender equality and secularism. It asserted in this connection that reasoning based on public order might easily disguise intolerance when freedom of religion was at stake. Referring in particular to the Court’s judgment in Palau-Martinez v. France (no. 64927/01, § 43, ECHR 2003-XII), it added that States might rely on this notion to justify interference with the exercise of a Convention right only if they could show that there was concrete evidence of a breach of public order. As regards the protection of gender equality, it noted that such an objective was based on the supposition that women who wore the veil were coerced into doing so and thus disadvantaged, whereas this was not shown by any of the evidence examined in the legislative process.

104. The intervener further referred to the report of a survey conducted in France by the Open Society Foundations involving thirty-two women who wore the full-face veil, entitled Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France and published in April 2011. It indicated that the women interviewed were not coerced into wearing the veil, that many had decided to wear it despite opposition from their families, that one third did not wear it as a permanent and daily practice, and that the majority maintained active social lives. The report also revealed that the ban had contributed to discontent among these women and had reduced their autonomy, and that the public discourse accompanying it had encouraged verbal abuse and physical attacks against them by members of the public. The intervener also submitted a follow-up report published in
September 2013. It noted that, according to the latter, the majority of the women interviewed continued to wear the full-face veil as an expression of their religious beliefs. It added that the report showed the significant impact of the ban on their personal and family lives. The intervener further noted the report’s finding that all women interviewed had described a decline in their personal safety since the ban, with incidents of public harassment and physical assaults resulting from a climate in which the public appeared emboldened to act against women wearing the full-face veil.

105. In conclusion, the intervener argued that there was a European consensus against bans on the wearing of the full-face veil in public. It further stressed the fact that blanket bans were disproportionate where less intrusive measures might be possible, that public order justifications must be supported by concrete evidence, that measures introduced to promote equality must be objectively and reasonably justified and limited in time, and that measures seeking to promote secularism must be strictly necessary.

3. The Court’s assessment

(a) Alleged violation of Articles 8 and 9 of the Convention

106. The ban on wearing clothing designed to conceal the face, in public places, raises questions in terms of the right to respect for private life (Article 8 of the Convention) of women who wish to wear the full-face veil for reasons related to their beliefs, and in terms of their freedom to manifest those beliefs (Article 9 of the Convention).

107. The Court is thus of the view that personal choices as to an individual’s desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life. It has found to this effect previously as regards a haircut (see Popa v. Romania (dec), no. 4233/09, §§ 32-33, 18 June 2013; see also the decision of the European Commission on Human Rights in Sutter v. Switzerland, no. 8209/78, 1 March 1979). It considers, like the Commission (see, in particular, the decisions in McFeeley and Others v. the United Kingdom, no. 8317/78, 15 May 1980, § 83, Decisions and Reports (DR) 20, and Kara v. the United Kingdom, no. 36528/97, 22 October 1998), that this is also true for a choice of clothing. A measure emanating from a public authority which restricts a choice of this kind will therefore, in principle, constitute an interference with the exercise of the right to respect for private life within the meaning of Article 8 of the Convention (see the Kara decision, cited above). Consequently, the ban on wearing clothing designed to conceal the face in public places, pursuant to the Law of 11 October 2010, falls under Article 8 of the Convention.

108. That being said, in so far as that ban is criticised by individuals who, like the applicant, complain that they are consequently prevented from wearing in public places clothing that the practice of their religion requires
them to wear, it mainly raises an issue with regard to the freedom to manifest one’s religion or beliefs (see, in particular, Ahmet Arslan and Others v. Turkey, no. 41135/98, § 35, 23 February 2010). The fact that this is a minority practice and appears to be contested (see paragraphs 56 and 85 above) is of no relevance in this connection.

109. The Court will thus examine this part of the application under both Article 8 and Article 9, but with emphasis on the second of those provisions.

(i) Whether there has been a “limitation” or an “interference”

110. As the Court has already pointed out (see paragraph 57 above), the Law of 11 October 2010 confronts the applicant with a dilemma comparable to that which it identified in the Dudgeon and Norris judgments: either she complies with the ban and thus refrains from dressing in accordance with her approach to religion; or she refuses to comply and faces criminal sanctions. She thus finds herself, in the light of both Article 9 and Article 8 of the Convention, in a similar situation to that of the applicants in Dudgeon and Norris, where the Court found a “continuing interference” with the exercise of the rights guaranteed by the second of those provisions (judgments both cited above, § 41 and § 38, respectively; see also, in particular, Michaud, cited above, § 92). There has therefore been, in the present case, an “interference” with or a “limitation” of the exercise of the rights protected by Articles 8 and 9 of the Convention.

111. Such a limitation or interference will not be compatible with the second paragraphs of those Articles unless it is “prescribed by law”, pursues one or more of the legitimate aims set out in those paragraphs and is “necessary in a democratic society”, to achieve the aim or aims concerned.

(ii) Whether the measure is “prescribed by law”

112. The Court finds that the limitation in question is prescribed by sections 1, 2 and 3 of the Law of 11 October 2010 (see paragraph 28 above). It further notes that the applicant has not disputed that these provisions satisfy the criteria laid down in the Court’s case-law concerning Article 8 § 2 and Article 9 § 2 of the Convention.

(iii) Whether there is a legitimate aim

113. The Court reiterates that the enumeration of the exceptions to the individual’s freedom to manifest his or her religion or beliefs, as listed in Article 9 § 2, is exhaustive and that their definition is restrictive (see, among other authorities, Svyato-Mykhaylivska Parafiya v. Ukraine, no. 77703/01, § 132, 14 June 2007, and Nolan and K. v. Russia, no. 2512/04, § 73, 12 February 2009). For it to be compatible with the Convention, a limitation of this freedom must, in particular, pursue an aim that can be linked to one of those listed in this provision. The same approach applies in respect of Article 8 of the Convention.
114. The Court’s practice is to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to 11 of the Convention (see, for example, the above-cited judgments of Leyla Şahin, § 99, and Ahmet Arslan and Others, § 43). However, in the present case, the substance of the objectives invoked in this connection by the Government, and strongly disputed by the applicant, call for an in-depth examination. The applicant took the view that the interference with the exercise of her freedom to manifest her religion and of her right to respect for her private life, as a result of the ban introduced by the Law of 11 October 2010, did not correspond to any of the aims listed in the second paragraphs of Articles 8 and 9. The Government argued, for their part, that the Law pursued two legitimate aims: public safety and “respect for the minimum set of values of an open and democratic society”. The Court observes that the second paragraphs of Articles 8 and 9 do not refer expressly to the second of those aims or to the three values mentioned by the Government in that connection.

115. As regards the first of the aims invoked by the Government, the Court first observes that “public safety” is one of the aims enumerated in the second paragraph of Article 9 of the Convention (sécurité publique in the French text) and also in the second paragraph of Article 8 (sûreté publique in the French text). It further notes the Government’s observation in this connection that the impugned ban on wearing, in public places, clothing designed to conceal the face satisfied the need to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. Having regard to the case file, it may admittedly be wondered whether the Law’s drafters attached much weight to such concerns. It must nevertheless be observed that the explanatory memorandum which accompanied the Bill indicated – albeit secondarily – that the practice of concealing the face “could also represent a danger for public safety in certain situations” (see paragraph 25 above), and that the Constitutional Council noted that the legislature had been of the view that this practice might be dangerous for public safety (see paragraph 30 above). Similarly, in its study report of 25 March 2010, the Conseil d’État indicated that public safety might constitute a basis for prohibiting concealment of the face, but pointed out that this could be the case only in specific circumstances (see paragraphs 22-23 above). Consequently, the Court accepts that, in adopting the impugned ban, the legislature sought to address questions of “public safety” within the meaning of the second paragraphs of Articles 8 and 9 of the Convention.

116. As regards the second of the aims invoked – to ensure “respect for the minimum set of values of an open and democratic society” – the Government referred to three values: respect for equality between men and women, respect for human dignity and respect for the minimum requirements of life in society. They submitted that this aim could be linked
to the “protection of the rights and freedoms of others”, within the meaning of the second paragraphs of Articles 8 and 9 of the Convention.

117. As the Court has previously noted, these three values do not expressly correspond to any of the legitimate aims enumerated in the second paragraphs of Articles 8 and 9 of the Convention. Among those aims, the only ones that may be relevant in the present case, in relation to the values in question, are “public order” and the “protection of the rights and freedoms of others”. The former is not, however, mentioned in Article 8 § 2. Moreover, the Government did not refer to it either in their written observations or in their answer to the question put to them in that connection during the public hearing, preferring to refer solely to the “protection of the rights and freedoms of others”. The Court will thus focus its examination on the latter “legitimate aim”, as it did previously in the cases of Leyla Şahin and Ahmet Arslan and Others (both cited above, § 111 and § 43, respectively).

118. First, the Court is not convinced by the Government’s submission in so far as it concerns respect for equality between men and women.

119. It does not doubt that gender equality might rightly justify an interference with the exercise of certain rights and freedoms enshrined in the Convention (see, mutatis mutandis, Staatkundig Gereformeerde Partij v. the Netherlands (dec.), 10 July 2012). It reiterates in this connection that advancement of gender equality is today a major goal in the member States of the Council of Europe (ibid.; see also, among other authorities, Schuler-Zgraggen v. Switzerland, 24 June 1993, § 67, Series A no. 263, and Konstantin Markin v. Russia [GC], no. 30078/06, § 127, ECHR 2012). Thus a State Party which, in the name of gender equality, prohibits anyone from forcing women to conceal their face pursues an aim which corresponds to the “protection of the rights and freedoms of others” within the meaning of the second paragraphs of Articles 8 and 9 of the Convention (see Leyla Şahin, cited above, § 111). The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms. It further observes that the Conseil d’État reached a similar conclusion in its study report of 25 March 2010 (see paragraph 22 above).

Moreover, in so far as the Government thus sought to show that the wearing of the full-face veil by certain women shocked the majority of the French population because it infringed the principle of gender equality as generally accepted in France, the Court would refer to its reasoning as to the other two values that they have invoked (see paragraphs 120-122 below).

120. Secondly, the Court takes the view that, however essential it may be, respect for human dignity cannot legitimately justify a blanket ban on
the wearing of the full-face veil in public places. The Court is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy. It notes in this connection the variability of the notions of virtuousness and decency that are applied to the uncovering of the human body. Moreover, it does not have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others.

121. Thirdly, the Court finds, by contrast, that under certain conditions the “respect for the minimum requirements of life in society” referred to by the Government – or of “living together”, as stated in the explanatory memorandum accompanying the Bill (see paragraph 25 above) – can be linked to the legitimate aim of the “protection of the rights and freedoms of others”.

122. The Court takes into account the respondent State’s point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.

(iv) Whether the measure is necessary in a democratic society

(a) General principles concerning Article 9 of the Convention

123. As the Court has decided to focus on Article 9 of the Convention in examining this part of the application, it finds it appropriate to reiterate the general principles concerning that provision.

124. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see, among

125. While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one’s religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists the various forms which the manifestation of one’s religion or beliefs may take, namely worship, teaching, practice and observance (see, *mutatis mutandis*, *Cha are Shalom Ve Tsedek v. France [GC]*, no. 27417/95, § 73, ECHR 2000-VII, and *Leyla Şahin*, cited above, § 105).

Article 9 does not, however, protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one’s religion or beliefs (see, for example, *Arrowsmith v. the United Kingdom*, no. 7050/75, Commission’s report of 12 October 1978, DR 19; *Kalaç v. Turkey*, 1 July 1997, § 27, *Reports of Judgments and Decisions* 1997-IV; and *Leyla Şahin*, cited above, §§ 105 and 121).

126. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected (see *Kokkinakis*, cited above, § 33). This follows both from paragraph 2 of Article 9 and from the State’s positive obligations under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein (see *Leyla Şahin*, cited above, § 106).

127. The Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. As indicated previously, it also considers that the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (see *Manoussakis and Others v. Greece*, 26 September 1996, § 47, *Reports 1996-IV; Hasan and Chaush v. Bulgaria [GC]*, no. 30985/96, § 78, ECHR 2000-XI; and *Refah Partisi (the Welfare Party) and Others v. Turkey [GC]*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 91, ECHR 2003-II), and that this duty requires the State to ensure mutual tolerance between opposing groups (see, among other authorities, *Leyla Şahin*, cited above, § 107). Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other (see *Serif v. Greece*, no. 38178/97, § 53, ECHR 1999-IX; see also *Leyla Şahin*, cited above, § 107).
128. Pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position (see, mutatis mutandis, Young, James and Webster v. the United Kingdom, 13 August 1981, § 63, Series A no. 44, and Chassagnou and Others v. France [GC], nos. 25088/94, 28331/95 and 28443/95, § 112, ECHR 1999-III). Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society (see, mutatis mutandis, the United Communist Party of Turkey and Others, cited above, § 45, and Refah Partisi (the Welfare Party) and Others, cited above § 99). Where these “rights and freedoms of others” are themselves among those guaranteed by the Convention or the Protocols thereto, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society” (see Chassagnou and Others, cited above, § 113; see also Leyla Şahin, cited above, § 108).

129. It is also important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see, for example, Maurice v. France [GC], no. 11810/03, § 117, ECHR 2005-IX). This is the case, in particular, where questions concerning the relationship between State and religions are at stake (see, mutatis mutandis, Cha’are Shalom Ve Tsedek, cited above, § 84, and Wingrove v. the United Kingdom, 25 November 1996, § 58, Reports 1996-V; see also Leyla Şahin, cited above, § 109). As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one’s religion or beliefs is “necessary”. That being said, in delimiting the extent of the margin of appreciation in a given case, the Court must also have regard to what is at stake therein (see, among other authorities, Manoussakis and Others, cited above, § 44, and Leyla Şahin, cited above, § 110). It may also, if appropriate, have regard to any consensus and common values emerging from the practices of the States parties to the Convention (see, for example, Bayatyan v. Armenia [GC], no. 23459/03, § 122, ECHR 2011).
130. In the Leyla Şahin judgment, the Court pointed out that this would notably be the case when it came to regulating the wearing of religious symbols in educational institutions, especially in view of the diversity of the approaches taken by national authorities on the issue. Referring to the Otto-Preminger-Institut v. Austria judgment (20 September 1994, § 50, Series A no. 295-A) and the Dahlab v. Switzerland decision (no. 42393/98, ECHR 2001-V), it added that it was thus not possible to discern throughout Europe a uniform conception of the significance of religion in society and that the meaning or impact of the public expression of a religious belief would differ according to time and context. It observed that the rules in this sphere would consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. It concluded from this that the choice of the extent and form of such rules must inevitably be left up to a point to the State concerned, as it would depend on the specific domestic context (see Leyla Şahin, cited above, § 109).

131. This margin of appreciation, however, goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court’s task is to determine whether the measures taken at national level were justified in principle and proportionate (see, among other authorities, Manoussakis and Others, cited above, § 44, and Leyla Şahin, cited above, § 110).

(b) Application of those principles in previous cases

132. The Court has had occasion to examine a number of situations in the light of those principles.

133. It has thus ruled on bans on the wearing of religious symbols in State schools, imposed on teaching staff (see, inter alia, Dahlab, decision cited above, and Kurtuluş v. Turkey (dec.), no. 65500/01, ECHR 2006-II) and on pupils and students (see, inter alia, Leyla Şahin, cited above; Köse and Others v. Turkey (dec.), no. 26625/02, ECHR 2006-II; Kervancı v. France, no. 31645/04, 4 December 2008; Aktas v. France (dec.), no. 43563/08, 30 June 2009; and Ranjit Singh v. France (dec.) no. 27561/08, 30 June 2009), on an obligation to remove clothing with a religious connotation in the context of a security check (Phull v. France (dec.), no. 35753/03, ECHR 2005-I, and El Morsli v. France (dec.), no. 15585/06, 4 March 2008), and on an obligation to appear bareheaded on identity photos for use on official documents (Mann Singh v. France (dec.), no. 24479/07, 11 June 2007). It did not find a violation of Article 9 in any of these cases.

134. The Court has also examined two applications in which individuals complained in particular about restrictions imposed by their employers on the possibility for them to wear a cross visibly around their necks, arguing that domestic law had not sufficiently protected their right to manifest their
One was an employee of an airline company, the other was a nurse (see Eweida and Others, cited above). The first of those cases, in which the Court found a violation of Article 9, is the most pertinent for the present case. The Court took the view, inter alia, that the domestic courts had given too much weight to the wishes of the employer – which it nevertheless found legitimate – to project a certain corporate image, in relation to the applicant’s fundamental right to manifest her religious beliefs. On the latter point, it observed that a healthy democratic society needed to tolerate and sustain pluralism and diversity and that it was important for an individual who had made religion a central tenet of her life to be able to communicate her beliefs to others. It then noted that the cross had been discreet and could not have detracted from the applicant’s professional appearance. There was no evidence that the wearing of other, previously authorised, religious symbols had had any negative impact on the image of the airline company in question. While pointing out that the national authorities, in particular the courts, operated within a margin of appreciation when they were called upon to assess the proportionality of measures taken by a private company in respect of its employees, it thus found that there had been a violation of Article 9.

135. The Court also examined, in the case of Ahmet Arslan and Others (cited above), the question of a ban on the wearing, outside religious ceremonies, of certain religious clothing in public places open to everyone, such as public streets or squares. The clothing in question, characteristic of the Aczimendi tarikati group, consisted of a turban, a sirwal and a tunic, all in black, together with a baton. The Court accepted, having regard to the circumstances of the case and the decisions of the domestic courts, and particularly in view of the importance of the principle of secularism for the democratic system in Turkey, that, since the aim of the ban had been to uphold secular and democratic values, the interference pursued a number of the legitimate aims listed in Article 9 § 2: the maintaining of public safety, the protection of public order and the protection of the rights and freedoms of others. It found, however, that the necessity of the measure in the light of those aims had not been established.

The Court thus noted that the ban affected not civil servants, who were bound by a certain discretion in the exercise of their duties, but ordinary citizens, with the result that its case-law on civil servants – and teachers in particular – did not apply. It then found that the ban was aimed at clothing worn in any public place, not only in specific public buildings, with the result that its case-law emphasising the particular weight to be given to the role of the domestic policy-maker, with regard to the wearing of religious symbols in State schools, did not apply either. The Court, moreover, observed that there was no evidence in the file to show that the manner in which the applicants had manifested their beliefs by wearing specific clothing – they had gathered in front of a mosque for the sole purpose of
participating in a religious ceremony – constituted or risked constituting a threat to public order or a form of pressure on others. Lastly, in response to the Turkish Government’s allegation of possible proselytising on the part of the applicants, the Court found that there was no evidence to show that they had sought to exert inappropriate pressure on passers-by in public streets and squares in order to promote their religious beliefs. The Court thus concluded that there had been a violation of Article 9 of the Convention.

136. Among all these cases concerning Article 9, Ahmet Arslan and Others is that which the present case most closely resembles. However, while both cases concern a ban on wearing clothing with a religious connotation in public places, the present case differs significantly from Ahmet Arslan and Others in the fact that the full-face Islamic veil has the particularity of entirely concealing the face, with the possible exception of the eyes.

137. Application of those principles to the present case

137. The Court would first emphasise that the argument put forward by the applicant and some of the third-party interveners, to the effect that the ban introduced by sections 1 to 3 of the Law of 11 October 2010 was based on the erroneous supposition that the women concerned wore the full-face veil under duress, is not pertinent. It can be seen clearly from the explanatory memorandum accompanying the Bill (see paragraph 25 above) that it was not the principal aim of the ban to protect women against a practice which was imposed on them or would be detrimental to them.

138. That being clarified, the Court must verify whether the impugned interference is “necessary in a democratic society” for public safety (within the meaning of Articles 8 and 9 of the Convention; see paragraph 115 above) or for the “protection of the rights and freedoms of others” (see paragraph 116 above).

139. As regards the question of necessity in relation to public safety, within the meaning of Articles 8 and 9 (see paragraph 115 above), the Court understands that a State may find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. It has thus found no violation of Article 9 of the Convention in cases concerning the obligation to remove clothing with a religious connotation in the context of security checks and the obligation to appear bareheaded on identity photos for use on official documents (see paragraph 133 above). However, in view of its impact on the rights of women who wish to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety. The Government have not shown that the ban introduced by the Law of 11 October 2010 falls into such a context. As to the women concerned, they are thus obliged to give up completely an
element of their identity that they consider important, together with their
chosen manner of manifesting their religion or beliefs, whereas the
objective alluded to by the Government could be attained by a mere
obligation to show their face and to identify themselves where a risk for the
safety of persons and property has been established, or where particular
circumstances entail a suspicion of identity fraud. It cannot therefore be
found that the blanket ban imposed by the Law of 11 October 2010 is
necessary, in a democratic society, for public safety, within the meaning of
Articles 8 and 9 of the Convention.

140. The Court will now examine the questions raised by the other aim
that it has found legitimate: to ensure the observance of the minimum
requirements of life in society as part of the “protection of the rights and
freedoms of others” (see paragraphs 121-122 above).

141. The Court observes that this is an aim to which the authorities have
given much weight. This can be seen, in particular, from the explanatory
memorandum accompanying the Bill, which indicates that “[t]he voluntary
and systematic concealment of the face is problematic because it is quite
simply incompatible with the fundamental requirements of ‘living together’
in French society” and that “[t]he systematic concealment of the face in
public places, contrary to the ideal of fraternity, ... falls short of the
minimum requirement of civility that is necessary for social interaction”
(see paragraph 25 above). It indeed falls within the powers of the State to
secure the conditions whereby individuals can live together in their
diversity. Moreover, the Court is able to accept that a State may find it
essential to give particular weight in this connection to the interaction
between individuals and may consider this to be adversely affected by the
fact that some conceal their faces in public places (see paragraph 122
above).

142. Consequently, the Court finds that the impugned ban can be
regarded as justified in its principle solely in so far as it seeks to guarantee
the conditions of “living together”.

143. It remains to be ascertained whether the ban is proportionate to that
aim.

144. Some of the arguments put forward by the applicant and the
intervening non-governmental organisations warrant particular attention.

145. First, it is true that only a small number of women are concerned. It
can be seen, among other things, from the report “on the wearing of the full-
face veil on national territory” prepared by a commission of the National
Assembly and deposited on 26 January 2010, that about 1,900 women wore
the Islamic full-face veil in France at the end of 2009, of whom about 270
were living in French overseas administrative areas (see paragraph 16
above). This is a small proportion in relation to the French population of
about sixty-five million and to the number of Muslims living in France. It
may thus seem excessive to respond to such a situation by imposing a blanket ban.

146. In addition, there is no doubt that the ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil for reasons related to their beliefs. As stated previously, they are thus confronted with a complex dilemma, and the ban may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life. It is also understandable that the women concerned may perceive the ban as a threat to their identity.

147. It should furthermore be observed that a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate. This is the case, for example, of the French National Advisory Commission on Human Rights (see paragraphs 18-19 above), non-governmental organisations such as the third-party interveners, the Parliamentary Assembly of the Council of Europe (see paragraphs 35-36 above) and the Commissioner for Human Rights of the Council of Europe (see paragraph 37 above).

148. The Court is also aware that the Law of 11 October 2010, together with certain debates surrounding its drafting, may have upset part of the Muslim community, including some members who are not in favour of the full-face veil being worn.

149. In this connection, the Court is very concerned by the indications of some of the third-party interveners to the effect that certain Islamophobic remarks marked the debate which preceded the adoption of the Law of 11 October 2010 (see the observations of the Human Rights Centre of Ghent University and of the non-governmental organisations Liberty and Open Society Justice Initiative, paragraphs 98, 100 and 104 above). It is admittedly not for the Court to rule on whether legislation is desirable in such matters. It would, however, emphasise that a State which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance (see paragraph 128 above; see also the “Viewpoint” of the Commissioner for Human Rights of the Council of Europe, paragraph 37 above). The Court reiterates that remarks which constitute a general, vehement attack on a religious or ethnic group are incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention and do not fall within the right to freedom of expression that it protects (see, among other authorities, Norwood v. the United Kingdom (dec.), no. 23131/03, ECHR 2004-XI, and Ivanov v. Russia (dec.), no. 35222/04, 20 February 2007).

150. The other arguments put forward in support of the application must, however, be qualified.
151. Thus, while it is true that the scope of the ban is broad, because all places accessible to the public are concerned (except for places of worship), the Law of 11 October 2010 does not affect the freedom to wear in public any garment or item of clothing – with or without a religious connotation – which does not have the effect of concealing the face. The Court is aware of the fact that the impugned ban mainly affects Muslim women who wish to wear the full-face veil. It nevertheless finds it to be of some significance that the ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face. This distinguishes the present case from that of Ahmet Arslan and Others (cited above).

152. As to the fact that criminal sanctions are attached to the ban, this no doubt increases the impact of the measure on those concerned. It is certainly understandable that the idea of being prosecuted for concealing one’s face in a public place is traumatising for women who have chosen to wear the full-face veil for reasons related to their beliefs. It should nevertheless be taken into account that the sanctions provided for by the Law’s drafters are among the lightest that could be envisaged, because they consist of a fine at the rate applying to second-class petty offences (currently 150 euros maximum), with the possibility for the court to impose, in addition to or instead of the fine, an obligation to follow a citizenship course.

153. Furthermore, admittedly, as the applicant pointed out, by prohibiting everyone from wearing clothing designed to conceal the face in public places, the respondent State has to a certain extent restricted the reach of pluralism, since the ban prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public. However, for their part, the Government indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of “living together”. From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society (see paragraph 128 above). It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.

154. In such circumstances, the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The Court has, moreover, already had occasion to observe that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see paragraph 129 above).
155. In other words, France had a wide margin of appreciation in the present case.

156. This is particularly true as there is little common ground amongst the member States of the Council of Europe (see, mutatis mutandis, X, Y and Z v. the United Kingdom, 22 April 1997, § 44, Reports 1997-II) as to the question of the wearing of the full-face veil in public. The Court thus observes that, contrary to the submission of one of the third-party interveners (see paragraph 105 above), there is no European consensus against a ban. Admittedly, from a strictly normative standpoint, France is very much in a minority position in Europe: except for Belgium, no other member State of the Council of Europe has, to date, opted for such a measure. It must be observed, however, that the question of the wearing of the full-face veil in public is or has been a subject of debate in a number of European States. In some it has been decided not to opt for a blanket ban. In others, such a ban is still being considered (see paragraph 40 above). It should be added that, in all likelihood, the question of the wearing of the full-face veil in public is simply not an issue at all in a certain number of member States, where this practice is uncommon. It can thus be said that in Europe there is no consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public places.

157. Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court finds that the ban imposed by the Law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others”.

158. The impugned limitation can thus be regarded as “necessary in a democratic society”. This conclusion holds true with respect both to Article 8 of the Convention and to Article 9.

159. Accordingly, there has been no violation either of Article 8 or of Article 9 of the Convention.

(b) Alleged violation of Article 14 of the Convention taken together with Article 8 or Article 9 of the Convention

160. The Court notes that the applicant complained of indirect discrimination. It observes in this connection that, as a Muslim woman who for religious reasons wishes to wear the full-face veil in public, she belongs to a category of individuals who are particularly exposed to the ban in question and to the sanctions for which it provides.

161. The Court reiterates that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent (see, among other authorities, D.H. and Others v. the Czech Republic [GC], no. 57325/00, §§ 175 and
184-185, ECHR 2007-IV). This is only the case, however, if such policy or measure has no “objective and reasonable” justification, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised (ibid., § 196). In the present case, while it may be considered that the ban imposed by the Law of 11 October 2010 has specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-face veil in public, this measure has an objective and reasonable justification for the reasons indicated previously (see paragraphs 144-159 above).

162. Accordingly, there has been no violation of Article 14 of the Convention taken together with Article 8 or Article 9 of the Convention.

(c) Alleged violation of Article 10 of the Convention, taken separately and together with Article 14 of the Convention

163. The Court is of the view that no issue arises under Article 10 of the Convention, taken separately or together with Article 14 of the Convention, that is separate from those that it has examined under Articles 8 and 9 of the Convention, taken separately and together with Article 14 of the Convention.

FOR THESE REASONS, THE COURT

1. Dismisses, unanimously, the Government’s preliminary objections;

2. Declares, unanimously, the complaints concerning Articles 8, 9 and 10 of the Convention, taken separately and together with Article 14 of the Convention, admissible, and the remainder of the application inadmissible;

3. Holds, by fifteen votes to two, that there has been no violation of Article 8 of the Convention;

4. Holds, by fifteen votes to two, that there has been no violation of Article 9 of the Convention;

5. Holds, unanimously, that there has been no violation of Article 14 of the Convention taken together with Article 8 or with Article 9 of the Convention;
6. *Holds*, unanimously, that no separate issue arises under Article 10 of the Convention, taken separately or together with Article 14 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 1 July 2014.

Erik Fribergh
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Nußberger and Jäderblom is annexed to this judgment.

D.S.
E.F.
A. Sacrificing of individual rights to abstract principles

1. We acknowledge that the judgment, even if no violation has been found, pursues a balanced approach, carefully ponders many important arguments of those opposed to the prohibition on concealing one’s face in public places and assesses the problems connected with it.

2. Nevertheless, we cannot share the opinion of the majority as, in our view, it sacrifices concrete individual rights guaranteed by the Convention to abstract principles. It is doubtful that the blanket ban on wearing a full-face veil in public pursues a legitimate aim (B). In any event, such a far-reaching prohibition, touching upon the right to one’s own cultural and religious identity, is not necessary in a democratic society (C). Therefore we come to the conclusion that there has been a violation of Articles 8 and 9 of the Convention (D).

B. No legitimate aim under the Convention

3. The majority rightly argue that neither respect for equality between men and women, nor respect for human dignity, can legitimately justify a ban on the concealment of the face in public places (see paragraphs 118, 119 and 120). It is also correct to assume that the need to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud is a legitimate aim protected by the Convention (see paragraph 115), but can be regarded as proportionate only in a context where there is a general threat to public safety (see paragraph 139).

4. Nevertheless, the majority see a legitimate aim in ensuring “living together”, through “the observance of the minimum requirements of life in society”, which is understood to be one facet of the “rights and freedoms of others” within the meaning of Article 8 § 2 and Article 9 § 2 of the Convention (see paragraphs 140-142). We have strong reservations about this approach.

5. The Court’s case-law is not clear as to what may constitute “the rights and freedoms of others” outside the scope of rights protected by the Convention. The very general concept of “living together” does not fall directly under any of the rights and freedoms guaranteed within the Convention. Even if it could arguably be regarded as touching upon several rights, such as the right to respect for private life (Article 8) and the right not to be discriminated against (Article 14), the concept seems far-fetched and vague.

6. It is essential to understand what is at the core of the wish to protect people against encounters with others wearing full-face veils. The majority
speak of “practices or attitudes ... which would fundamentally call into question the possibility of open interpersonal relationships” (see paragraph 122). The Government of the Netherlands, justifying a Bill before that country’s Parliament, pointed to a threat not only to “social interaction”, but also to a subjective “feeling of safety” (see paragraph 50).

It seems to us, however, that such fears and feelings of uneasiness are not so much caused by the veil itself, which – unlike perhaps certain other dress-codes – cannot be perceived as aggressive per se, but by the philosophy that is presumed to be linked to it. Thus the recurring motives for not tolerating the full-face veil are based on interpretations of its symbolic meaning. The first report on “the wearing of the full-face veil on national territory”, by a French parliamentary commission, saw in the veil “a symbol of a form of subservience” (see paragraph 17). The explanatory memorandum to the French Bill referred to its “symbolic and dehumanising violence” (see paragraph 25). The full-face veil was also linked to the “self-confinement of any individual who cuts himself off from others whilst living among them” (ibid.). Women who wear such clothing have been described as “effaced” from public space (see paragraph 82).

7. All these interpretations have been called into question by the applicant, who claims to wear the full-face veil depending only on her spiritual feelings (see paragraph 12) and does not consider it an insurmountable barrier to communication or integration. But even assuming that such interpretations of the full-face veil are correct, it has to be stressed that there is no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European life-style. In the context of freedom of expression, the Court has repeatedly observed that the Convention protects not only those opinions “that are favourably received or regarded as inoffensive or as a matter of indifference, but also ... those that offend, shock or disturb”, pointing out that “[s]uch are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’” (see, among other authorities, Mouvement raëlien suisse v. Switzerland [GC], no. 16354/06, § 48, ECHR 2012, and Stoll v. Switzerland [GC], no. 69698/01, § 101, ECHR 2007-V). The same must be true for dress-codes demonstrating radical opinions.

8. Furthermore, it can hardly be argued that an individual has a right to enter into contact with other people, in public places, against their will. Otherwise such a right would have to be accompanied by a corresponding obligation. This would be incompatible with the spirit of the Convention. While communication is admittedly essential for life in society, the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places – the right to be an outsider.
9. It is true that “living together” requires the possibility of interpersonal exchange. It is also true that the face plays an important role in human interaction. But this idea cannot be turned around, to lead to the conclusion that human interaction is impossible if the full face is not shown. This is evidenced by examples that are perfectly rooted in European culture, such as the activities of skiing and motorcycling with full-face helmets and the wearing of costumes in carnivals. Nobody would claim that in such situations (which form part of the exceptions provided for in the French Law) the minimum requirements of life in society are not respected. People can socialise without necessarily looking into each other’s eyes.

10. We cannot find that the majority have shown which concrete rights of others within the meaning of Article 8 § 2 and Article 9 § 2 of the Convention could be inferred from the abstract principle of “living together” or from the “minimum requirements of life in society”.

11. In so far as these ideas may have been understood to form part of “public order”, we agree with the majority that it would not be appropriate to focus on such an aim (see paragraph 117), as the “protection of public order” may justify limitations only on the rights guaranteed by Article 9, but not on the rights under Article 8, whereas the latter provision is undoubtedly also infringed by the restrictive measure in question.

12. Thus it is doubtful that the French Law prohibiting the concealment of one’s face in public places pursues any legitimate aim under Article 8 § 2 or Article 9 § 2 of the Convention.

C. Proportionality of a blanket ban on the full-face veil

1. Different approaches to pluralism, tolerance and broadmindedness

13. If it is already unclear which rights are to be protected by the restrictive measure in question, it is all the more difficult to argue that the rights protected outweigh the rights infringed. This is especially true as the Government have not explained or given any examples of how the impact on others of this particular attire differs from other accepted practices of concealing the face, such as excessive hairstyles or the wearing of dark glasses or hats. In the legislative process, the supporters of a blanket ban on the full-face veil mainly advanced “the values of the Republic, as expressed in the maxim ‘liberty, equality, fraternity’” (see paragraph 17). The Court refers to “pluralism”, “tolerance” and “broadmindedness” as hallmarks of a democratic society (see paragraph 128) and argues in substance that it is acceptable to grant these values preference over the life-style and religiously inspired dress-code of a small minority if such is the choice of society (see paragraph 153).
14. However, all those values could be regarded as justifying not only a blanket ban on wearing a full-face veil, but also, on the contrary, the acceptance of such a religious dress-code and the adoption of an integrationist approach. In our view, the applicant is right to claim that the French legislature has restricted pluralism, since the measure prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public (see paragraph 153). Therefore the blanket ban could be interpreted as a sign of selective pluralism and restricted tolerance. In its jurisprudence the Court has clearly elaborated on the State’s duty to ensure mutual tolerance between opposing groups and has stated that “the role of the authorities ... is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other” (see Serif v. Greece, no. 38178/97, § 53, ECHR 1999-IX, cited by the majority in paragraph 127). By banning the full-face veil, the French legislature has done the opposite. It has not sought to ensure tolerance between the vast majority and the small minority, but has prohibited what is seen as a cause of tension.

2. Disproportionate interference

15. Even if we were to accept that the applicant’s rights under Articles 8 and 9 of the Convention could be balanced against abstract principles, be it tolerance, pluralism and broadmindedness, or be it the idea of “living together” and the “minimum requirements of life in society”, we cannot, in any event, agree with the majority that the ban is proportionate to the aim pursued.

(a) Margin of appreciation

16. Although we agree with the majority that, in matters of general policy on which opinions within a democratic society may differ widely, the role of the domestic policy-maker should be given special weight (see paragraph 154), we are unable to conclude that in this particular situation the respondent State should be accorded a broad margin of appreciation (see paragraph 155).

17. First, the prohibition targets a dress-code closely linked to religious faith, culture and personal convictions and thus, undoubtedly, an intimate right related to one’s personality.

18. Second, it is not convincing to draw a parallel between the present case and cases concerning the relationship between State and religion (see paragraph 129). As shown by the legislative process, the Law was deliberately worded in a much broader manner, generally targeting “clothing that is designed to conceal the face” and thus going far beyond the religious context (see the Study by the Conseil d’État on “the possible legal grounds for banning the full veil”, paragraphs 20 et seq., and its influence
on the Bill before Parliament). Unlike the situation in the case of *Leyla Şahin v. Turkey* ([GC], no. 44774/98, § 109, ECHR 2005-XI), which concerned a regulation on the wearing of religious symbols in educational institutions, the French Law itself does not expressly have any religious connotation.

19. Third, it is difficult to understand why the majority are not prepared to accept the existence of a European consensus on the question of banning the full-face veil (see paragraph 156). In the Court’s jurisprudence, three factors are relevant in order to determine the existence of a European consensus: international treaty law, comparative law and international soft law (see *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31). The fact that 45 out of 47 member States of the Council of Europe, and thus an overwhelming majority, have not deemed it necessary to legislate in this area is a very strong indicator for a European consensus (see *Bayatyan v. Armenia* [GC], no. 23459/03, § 103, 108, ECHR 2011, and *A, B and C v. Ireland* [GC], no. 25579/05, § 235, ECHR 2010). Even if there might be reform discussions in some of the member States, while in others the practice of wearing full-face veils is non-existent, the status quo is undeniably clear. Furthermore, as amply documented in the judgment, the Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe (see paragraphs 35 et seq.), as well as non-governmental organisations (paragraphs 89 et seq.), are strongly opposed to any form of blanket ban on full-face veils. This approach is fortified by reference to other international human rights treaties, especially the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women. Although the Human Rights Committee has not made any pronouncement as regards a general ban on the wearing of the full-face veil in public, it has concluded, for example, that expelling a student wearing a *hijab* from university amounted to a violation of Article 18 § 2 of the Covenant (see paragraph 39). The Committee has stated that regulations on clothing for women may involve a violation of a number of rights (see paragraph 38).

20. The arguments drawn from comparative and international law militate against the acceptance of a broad margin of appreciation and in favour of close supervision by the Court. While it is perfectly legitimate to take into account the specific situation in France, especially the strong and unifying tradition of the “values of the French Revolution” as well as the overwhelming political consensus which led to the adoption of the Law, it still remains the task of the Court to protect small minorities against disproportionate interferences.

(b) Consequences for the women concerned

21. Ample evidence has been provided to show the dilemma of women in the applicant’s position who wish to wear a full-face veil in accordance
with their religious faith, culture and personal conviction. Either they are faithful to their traditions and stay at home or they break with their traditions and go outside without their habitual attire. Otherwise they face a criminal sanction (see the Resolution of the Parliamentary Assembly, paragraph 35, the Viewpoint of the Commissioner for Human Rights of the Council of Europe, paragraph 37, and the judgment of the Spanish Constitutional Court, paragraph 47). In our view, the restrictive measure cannot be expected to have the desired effect of liberating women presumed to be oppressed, but will further exclude them from society and aggravate their situation.

22. With regard to the majority’s assumption that the punishment consists of mild sanctions only (see paragraph 152), we consider that, where the wearing of the full-face veil is a recurrent practice, the multiple effect of successive penalties has to be taken into account.

23. Furthermore, as the majority note, there are still only a small number of women who are concerned by the ban. That means that it is only on rare occasions that the average person would encounter a woman in a full-face veil and thus be affected as regards his or her possibility of interacting with another person.

(c) Less restrictive measures

24. Furthermore, the Government have not explained why it would have been impossible to apply less restrictive measures, instead of criminalising the concealment of the face in all public places. No account has been given as to whether or to what extent any efforts have been made to discourage the relatively recent phenomenon of the use of full-face veils, by means, for example, of awareness-raising and education. The legislative process shows that much less intrusive measures have been discussed. The above-mentioned report “on the wearing of the full-face veil on national territory” devised a four-step programme with measures aimed at releasing women from the subservience of the full-face veil, without recommending any blanket ban or criminal sanctions (see paragraph 17). The National Advisory Commission on Human Rights also recommended “soft” measures and called for the strengthening of civic education courses at all levels for both men and women (see paragraph 19).

D. Conclusion

25. In view of this reasoning we find that the criminalisation of the wearing of a full-face veil is a measure which is disproportionate to the aim of protecting the idea of “living together” – an aim which cannot readily be reconciled with the Convention’s restrictive catalogue of grounds for interference with basic human rights.
26. In our view there has therefore been a violation of Articles 8 and 9 of the Convention.
Syllabus

1. The fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment. P. 310 U. S. 303.

2. The enactment by a State of any law respecting an establishment of religion or prohibiting the free exercise thereof is forbidden by the Fourteenth Amendment. P. 310 U. S. 303.

3. Under the constitutional guaranty, freedom of conscience and of religious belief is absolute; although freedom to act in the exercise of religion is subject to regulation for the protection of society. Such regulation, however, in attaining a permissible end, must not unduly infringe the protected freedom. Pp. 310 U. S. 303-304.

4. A state statute which forbids any person to solicit money or valuables for any alleged religious cause, unless a certificate therefor shall first have been procured from a designated official, who is required to determine whether such cause is a religious one and who may withhold his approval if he determines that it is not, is a previous restraint upon the free exercise of religion, and a deprivation of liberty without due process of law in violation of the Fourteenth Amendment. P. 310 U. S. 304.
So held as it was applied to persons engaged in distributing literature purporting to be religious, and soliciting contributions to be used for the publication of such literature.

A State constitutionally may, by general and nondiscriminatory legislation, regulate the time, place and manner of soliciting upon its streets, and of holding meetings thereon, and may in other respects safeguard the peace, good order and comfort of the community.

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The statute here, however, is not such a regulation. If a certificate is issued, solicitation is permitted without other restriction; but if a certificate is denied, solicitation is altogether prohibited.

5. The fact that arbitrary or capricious action by the licensing officer is subject to judicial review cannot validate the statute. A previous restraint by judicial decision after trial is as obnoxious under the Constitution as restraint by administrative action. P. 310 U. S. 306.

6. The common law offense of breach of the peace may be committed not only by acts of violence, but also by acts and words likely to produce violence in others. P. 310 U. S. 308.

7. Defendant, while on a public street endeavoring to interest passerby in the purchase of publications, or in making contributions, in the interest of what he believed to be true religion, induced individuals to listen to the playing of a phonograph record describing the publications. The record contained a verbal attack upon the religious denomination of which the listeners were members, provoking their indignation and a desire on their part to strike the defendant, who thereupon picked up his books and phonograph and went on his way. There was no showing that defendant's deportment was noisy, truculent, overbearing, or offensive; nor was it claimed that he intended to insult or affront the listeners by playing the record; nor was it shown that the sound of the phonograph disturbed persons living nearby, drew a crowd, or impeded traffic.

Held, that defendant's conviction of the common law offense of breach of the peace was violative of constitutional guarantees of religious liberty and freedom of speech. Pp. 310 U. S. 307 et seq.

126 Conn. 1; 8 A.2d 533, reversed.

APPEAL from, and certiorari (309 U.S. 626) to review, a judgment which sustained the conviction of all the defendants on one count of an information and the conviction of one of the defendants on another count. The convictions were challenged as denying the constitutional rights of the defendants.

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MR. JUSTICE ROBERTS delivered the opinion of the Court.
Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah’s Witnesses and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses. After trial in the Court of Common Pleas of New Haven County, each of them was convicted on the third count, which charged a violation of § 294 of the General Statutes of Connecticut, [Footnote 1] and on the fifth count, which charged commission of the common law offense of inciting a breach of the peace. On appeal to the Supreme Court, the conviction of all three on the third count was affirmed. The conviction of Jesse Cantwell on the fifth count was also affirmed, but the conviction of Newton and Russell on that count was reversed, and a new trial ordered as to them. [Footnote 2]

By demurrers to the information, by requests for rulings of law at the trial, and by their assignments of error in the State Supreme Court, the appellants pressed the contention that the statute under which the third count was drawn was offensive to the due process clause of the Fourteenth Amendment because, on its face and as construed and applied, it denied them freedom of speech and prohibited their free exercise of religion. In like manner,

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they made the point that they could not be found guilty on the fifth count without violation of the Amendment.

We have jurisdiction on appeal from the judgments on the third count, as there was drawn in question the validity of a state statute under the Federal Constitution and the decision was in favor of validity. Since the conviction on the fifth count was not based upon a statute, but presents a substantial question under the Federal Constitution, we granted the writ of certiorari in respect of it.

The facts adduced to sustain the convictions on the third count follow. On the day of their arrest, the appellants were engaged in going singly from house to house on Cassius Street in New Haven. They were individually equipped with a bag containing books and pamphlets on religious subjects, a portable phonograph, and a set of records, each of which, when played, introduced, and was a description of, one of the books. Each appellant asked the person who responded to his call for permission to play one of the records. If permission was granted, he asked the person to buy the book described, and, upon refusal, he solicited such contribution towards the publication of the pamphlets as the listener was willing to make. If a contribution was received, a pamphlet was delivered upon condition that it would be read.

Cassius Street is in a thickly populated neighborhood where about ninety percent of the residents are Roman Catholics. A phonograph record, describing a book entitled "Enemies," included an attack on the Catholic religion. None of the persons interviewed were members of Jehovah’s Witnesses.

The statute under which the appellants were charged provides:
"No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both."

The appellants claimed that their activities were not within the statute, but consisted only of distribution of books, pamphlets, and periodicals. The State Supreme Court construed the finding of the trial court to be that,

"in addition to the sale of the books and the distribution of the pamphlets, the defendants were also soliciting contributions or donations of money for an alleged religious cause, and thereby came within the purview of the statute."

It overruled the contention that the Act, as applied to the appellants, offends the due process clause of the Fourteenth Amendment because it abridges or denies religious freedom and liberty of speech and press. The court stated that it was the solicitation that brought the appellants within the sweep of the Act, and not their other activities in the dissemination of literature. It declared the legislation constitutional as an effort by the State to protect the public against fraud and imposition in the solicitation of funds for what purported to be religious, charitable, or philanthropic causes.

The facts which were held to support the conviction of Jesse Cantwell on the fifth count were that he stopped two men in the street, asked, and received, permission to play a phonograph record, and played the record "Enemies," which attacked the religion and church of the two men, who were Catholics. Both were incensed by the contents of the record, and were tempted to strike Cantwell unless he went away. On being told to be on his way, he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed.

The court held that the charge was not assault or breach of the peace or threats on Cantwell's part, but invoking or inciting others to breach of the peace, and that the facts supported the conviction of that offense.
First. We hold that the statute, a construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. [Footnote 3] The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. [Footnote 4] The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly, such a previous and absolute restraint would violate the terms of the guarantee. [Footnote 5] It is equally clear that a State may, by general and nondiscriminatory legislation, regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon, and may in other respects safeguard the peace, good order, and comfort of the community without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint, but, in the absence of a certificate, solicitation is altogether prohibited.

The appellants urge that to require them to obtain a certificate as a condition of soliciting support for their views amounts to a prior restraint on the exercise of their religion within the meaning of the Constitution. The State insists that the Act, as construed by the Supreme Court of Connecticut, imposes no previous restraint upon the dissemination of religious views or teaching, but merely safeguards against the perpetration of frauds under the cloak of religion. Conceding that this is so, the question remains whether the method adopted by Connecticut to that end transgresses the liberty safeguarded by the Constitution.

The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the
collection of funds is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.

It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

The State asserts that, if the licensing officer acts arbitrarily, capriciously, or corruptly, his action is subject to judicial correction. Counsel refer to the rule prevailing in Connecticut that the decision of a commission or an administrative official will be reviewed upon a claim that

"it works material damage to individual or corporate rights, or invades or threatens such rights, or is so unreasonable as to justify judicial intervention, or is not consonant with justice, or that a legal duty has not been performed. [Footnote 6]"

It is suggested that the statute is to be read as requiring the officer to issue a certificate unless the cause in question is clearly not a religious one, and that, if he violates his duty, his action will be corrected by a court.

To this suggestion there are several sufficient answers. The line between a discretionary and a ministerial act is not always easy to mark, and the statute has not been construed by the state court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action. [Footnote 7]

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt, a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before
permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. [Footnote 8] The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Second. We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

Conviction on the fifth count was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil would pose a question differing from that we must here answer. [Footnote 9] Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature. The court below has held that the petitioner's conduct constituted the commission of an offense under the state law, and we accept its decision as binding upon us to that extent.

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts, but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot, or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of
the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

Having these considerations in mind, we note that Jesse Cantwell, on April 26, 1938, was upon a public street, where he had a right to be and where he had a right peacefully to impart his views to others. There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. It is not claimed that he

intended to insult or affront the hearers by playing the record. It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far, he had invaded no right or interest of the public, or of the men accosted.

The record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were, in fact, highly offended. One of them said he felt like hitting Cantwell, and the other that he was tempted to throw Cantwell off the street. The one who testified he felt like hitting Cantwell said, in answer to the question "Did you do anything else or have any other reaction?" "No, sir, because he said he would take the victrola, and he went." The other witness testified that he told Cantwell he had better get off the street before something happened to him, and that was the end of the matter, as Cantwell picked up his books and walked up the street.

Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or

personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.
We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is that, under their shield, many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country, for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.

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Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question. [Footnote 10]

The judgment affirming the convictions on the third and fifth counts is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

[Footnote 1]

General Statutes § 6294, as amended by § 860d of the 1937 supplement.

[Footnote 2]

126 Conn. 1, 8 A.2d 533.

[Footnote 3]

[Footnote 4]


[Footnote 5]


[Footnote 6]

Woodmont Assn. v. Milford, 85 Conn. 517, 522; 84 A. 307, 310; see also Connecticut Co. v. Norwalk, 89 Conn. 528, 531; 94 A. 992.

[Footnote 7]


[Footnote 8]


[Footnote 9]


[Footnote 10]


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The federal Sex Offender Registration and Notification Act (Act) requires convicted sex offenders to provide state governments with, and to update, information, e.g., names and current addresses, for state and federal sex offender registries. It is a crime if a person who is “required to register under [the Act]” and who “travels in interstate . . . commerce” knowingly “fails to register or update a registration.” 18 U. S. C. §2250(a). The Act defines “sex offender” to include offenders who were convicted before the Act’s effective date, 42 U. S. C. §16911(1), and says that “the Attorney General shall have the authority to specify the applicability of the [registration] requirements” to pre-Act offenders, §16913(d). The Act, which seeks to make more uniform and effective a patchwork of pre-Act federal and 50 state registration systems, became law in July 2006. In February 2007, the Attorney General promulgated an Interim Rule specifying that the Act applies to all pre-Act offenders. He has since promulgated further rules, regulations, and specifications.

Petitioner Reynolds, a pre-Act offender, registered in Missouri in 2005 but moved to Pennsylvania in September 2007 without updating the Missouri registration or registering in Pennsylvania. He was indicted for failing to meet the Act’s registration requirements between September 16 and October 16, 2007. He moved to dismiss the indictment on the ground that the Act was not applicable to pre-Act offenders during that time, arguing that the Attorney General’s February 2007 Interim Rule was invalid because it violated the Constitution’s “nondelegation” doctrine and the Administrative Procedure Act’s notice and comment requirements. The District Court rejected on the merits of Reynolds’ legal attack on the Interim Rule, but the Third Circuit rejected his argument without reaching the merits,
concluding that the Act’s registration requirements applied to pre-Act offenders even in the absence of a rule by the Attorney General. Thus, it found, the Interim Rule’s validity made no legal difference in the outcome.

Held: The Act does not require pre-Act offenders to register before the Attorney General validly specifies that the Act’s registration provisions apply to them. Pp. 6–13.

(a) This conclusion is supported by a natural reading of the Act’s text, which consists of four statements. Statement One says that “[a] sex offender shall register, and keep the registration current.” Statement Two says that, generally, the offender must initially register before completing his “sentence of imprisonment.” Statement Three says that the sex offender must update a registration within three business days of any change of “name, residence, employment, or student status.” Statement Four says that “[t]he Attorney General shall have the authority to specify the applicability of the requirements . . . to sex offenders convicted before the enactment of” the Act. §16913. Read naturally, the Fourth Statement modifies the First. It deals specifically with a subset (pre-Act offenders) of the First Statement’s broad general class (all sex offenders) and thus should control the Act’s application to that subset. See Gozlon-Peretz v. United States, 498 U. S. 395, 407. Also, by giving the Attorney General authority to specify the Act’s “applicability,” not its “nonapplicability,” the Fourth Statement is more naturally read to confer authority to apply the Act, not authority to make exceptions. This reading efficiently resolves what may have been Congress’ concern about the practical problems of applying the new registration requirements to a large number of pre-Act offenders, which could have been expensive and might not have proved feasible to do immediately. It might have thought that such concerns warranted different treatment for different categories of pre-Act offenders. And it could have concluded that it was efficient and desirable to ask the Justice Department, charged with responsibility for implementation, to examine pre-Act offender problems and to apply the new requirements accordingly. This reading also takes Congress to have filled potential lacunae (created by related Act provisions) in a manner consistent with basic criminal law principles. The Second Statement, e.g., requires a sex offender to register before completing his prison term, but says nothing about when a pre-Act offender who has left prison is to register. An Attorney General ruling could diminish such uncertainties, helping to eliminate the kind of vagueness and uncertainty that criminal law must seek to avoid. Pp. 6–9.

(b) The Government’s three principal contrary arguments—that the Court’s reading conflicts with the Act’s purpose of establishing a
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national registration system that includes pre-Act offenders; that the Court’s reading could lead to an absurdly long implementation delay; and that the Act should be read to apply the requirements immediately and on their own to all pre-Act offenders to avoid the possibility that the Attorney General, who has, but is not required to use, “the authority to specify” requirements, might take no action—are unpersuasive. Some lower courts have read the Attorney General’s authority to apply only to pre-Act sex offenders who are unable to comply with the statute’s “initial registration” requirements, but that is not what the Act says. Pp. 9–13.

(c) Because the Act’s registration requirements do not apply to pre-Act offenders until the Attorney General so specifies, the question whether the Attorney General’s Interim Rule is a valid specification matters in this case. P. 13.


BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which GINSBURG, J., joined.
JUSTICE BREYER delivered the opinion of the Court.

The federal Sex Offender Registration and Notification Act (Act), 120 Stat. 590, 42 U. S. C. §16901 et seq. (2006 ed. and Supp. III), requires those convicted of certain sex crimes to provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries. §§16912(a), 16913–16914, 16919(a) (2006 ed.). The Act makes it a crime for a person who is “required to register” under the Act and who “travels in interstate or foreign commerce” knowingly to “fai[l] to register or update a registration . . . .” 18 U. S. C. §2250(a). The question before us concerns the date on which this federal registration requirement took effect with respect to sex offenders convicted before the Act became law.

The Act defines the term “sex offender” as including these pre-Act offenders. 42 U. S. C. §16911(1); see Carr v. United States, 560 U. S. ___, ___ (2010) (slip op., at 7). It says that “[a] sex offender shall register.” §16913(a). And it further says that “[t]he Attorney General shall have the authority to specify the applicability of the [registration]
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requirements . . . to sex offenders convicted before the enactment of this chapter . . .” §16913(d) (emphasis added). In our view, these provisions, read together, mean that the Act’s registration requirements do not apply to pre-Act offenders until the Attorney General specifies that they do apply. We reverse a Court of Appeals determination that, in effect, holds the contrary.

I

A

The new federal Act reflects Congress’ awareness that pre-Act registration law consisted of a patchwork of federal and 50 individual state registration systems. See 73 Fed. Reg. 38045 (2008). The Act seeks to make those systems more uniform and effective. It does so by repealing several earlier federal laws that also (but less effectively) sought uniformity; by setting forth comprehensive registration-system standards; by making federal funding contingent on States’ bringing their systems into compliance with those standards; by requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and by creating federal criminal sanctions applicable to those who violate the Act’s registration requirements. 18 U. S. C. §2250(a) (criminal provision); 42 U. S. C. §§16911(10), 16913–16916 (2006 ed. and Supp. III) (registration requirements); §16925 (federal funding); §129, 120 Stat. 600 (repeal of earlier laws).

The Act’s criminal penalty applies to “[w]ho[me]ver . . . is required to register under [the Act].” 18 U. S. C. §2250(a). It says that such a person (a federal sex offender or a nonfederal sex offender who travels in interstate commerce) must not knowingly fail “to register or update a registration as required by [the Act].” Ibid. (emphasis added); see Appendix, infra, at 14.

The relevant registration requirements are set forth in
an Act provision that states:

“Registry requirements for sex offenders

“(a) In general
“A sex offender [defined to include any offender who was convicted of a sex offense] shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.

“(b) Initial registration
“The sex offender shall initially register [either] before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or [for those not sentenced to prison] not later than 3 business days after being sentenced.

“(c) Keeping the registration current
“A sex offender shall [update his registration within] 3 business days after each change of name, residence, employment, or student status [by] appearing in person in at least 1 jurisdiction involved and informing that jurisdiction of all relevant changes.

“(d) Initial registration of sex offenders unable to comply with subsection (b)
“The Attorney General shall have the authority to specify the applicability of the [registration] requirements to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).” 42 U. S. C. §16913 (emphasis added).

On February 28, 2007, the Attorney General promulgated an Interim Rule specifying that “[t]he requirements of [the Act] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.” 72 Fed. Reg. 8897 (codified at 28 CFR §72.3). Subsequently, the Attorney General promulgated further rules, regulations, and specifications. See 73 Fed. Reg. 38030 (2008); 75 Fed. Reg. 81849 (2010); 76 Fed. Reg. 1630 (2011). The present case focuses upon the applicability of the Act’s registration requirements to pre-Act offenders during the period between (1) July 27, 2006 (when the Act took effect) and (2) the moment when the Attorney General promulgated a valid rule specifying the registration requirements’ applicability, namely, February 28, 2007 (or a later date if the February 28 specification was invalid).

B

Billy Joe Reynolds, the petitioner, is a pre-Act offender. He was convicted of a Missouri sex offense in October 2001; he served four years in prison; he was released in July 2005; he then registered as a Missouri sex offender; but he moved to Pennsylvania in September 2007 without updating his Missouri registration information (as Missouri law required) and without registering in Pennsylvania. A federal grand jury indicted him, charging him with, between September 16 and October 16, 2007, having “knowingly failed to register and update a registration as required by [the Act].” App. 13; see 18 U. S. C. §2250(a). In the Government’s view, Reynolds’ failure to update his address information when he moved to Pennsylvania violated the requirement that a “sex offender” update registration information within “3 business days after each change of . . . residence.” 42 U. S. C. §16913(c).

Reynolds moved to dismiss the indictment on the
ground that in September and October 2007 the Act’s registration requirements had not yet become applicable to pre-Act offenders. He conceded that the Act had become law earlier (namely, in July 2006), and he conceded that the Attorney General had already (in February 2007) promulgated an Interim Rule specifying that the Act’s registration requirements were applicable to pre-Act offenders. But he claimed that the Interim Rule was invalid because it violated both the Constitution’s “nondeligation” doctrine and the Administrative Procedure Act’s (APA) requirement for “good cause” to promulgate a rule without “notice and comment” (as the Attorney General had done). See A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 529 (1935) (nondelegation doctrine); 5 U. S. C. §§553(b)(3)(B), (d)(3) (APA). Because the Interim Rule is invalid, he added, the law must treat him like a pre-Act offender who traveled interstate and violated the Act’s registration requirements before the Attorney General specified their applicability.

The District Court rejected on the merits Reynolds’ legal attack on the Interim Rule. But the Court of Appeals rejected Reynolds’ argument without reaching those merits. 380 Fed. Appx. 125 (2010). That court thought that the Act’s registration requirements apply to pre-Act offenders such as Reynolds (who was subject to a pre-existing state-law registration requirement) from the date of the new law’s enactment—even in the absence of any rule or regulation by the Attorney General specifying that the new registration requirements apply. That being so, the validity of the Interim Rule could make no legal difference, for the Act required Reynolds to follow the new federal registration requirements regardless of any rulemaking.

The Courts of Appeals have reached different conclusions about whether the Act’s registration requirements apply to pre-Act offenders prior to the time that the Attor-
ney General specifies their applicability, i.e., from July 2006 until at least February 2007. Six Circuits have held that the Act’s registration requirements do not apply to pre-Act offenders unless and until the Attorney General so specifies. United States v. Johnson, 632 F. 3d 912, 922–927 (CA5 2011); United States v. Valverde, 628 F. 3d 1159, 1162–1164 (CA9 2010); United States v. Cain, 583 F. 3d 408, 414–419 (CA6 2009); United States v. Hatcher, 560 F. 3d 222, 226–229 (CA4 2009); United States v. Dixon, 551 F. 3d 578, 585 (CA7 2008); United States v. Madera, 528 F. 3d 852, 856–859 (CA11 2008) (per curiam). Five Circuits have held that they apply from the date of the Act’s enactment, and prior to any such specification, at least with respect to pre-Act offenders who had already registered under state law. United States v. Fuller, 627 F. 3d 499, 506 (CA2 2010); United States v. DiTomasso, 621 F. 3d 17, 24 (CA1 2010); United States v. Shenandoah, 595 F. 3d 151, 163 (CA3 2010); United States v. Hinckley, 550 F. 3d 926, 932 (CA10 2008); United States v. May, 535 F. 3d 912, 918–919 (CA8 2008). In light of this split, we agreed to consider the question.

II

A

The question before us is whether the Act requires pre-Act offenders to register before the Attorney General validly specifies that the Act’s registration provisions apply to them. We believe that it does not. For one thing, a natural reading of the textual language supports our conclusion. The text consists of four statements. See supra, at 3. Statement One says that “[a] sex offender shall register, and keep the registration current.” Statement Two says that a sex offender must initially register before completing his “sentence of imprisonment” (or, if the sentence does not involve imprisonment, within three days of conviction). Statement Three says that the sex
offender must update a registration within three business days of any change of “name, residence, employment, or student status.” Statement Four says that “[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter.”

Read naturally, the Fourth Statement modifies the First. It specifically deals with a subset (pre-Act offenders) of a broad general class (all sex offenders) to which the First Statement applies. And it therefore should control the Act’s application to that subset. See Gozlon-Peretz v. United States, 498 U. S. 395, 407 (1991) (specific statutory provision normally controls over one of more general application); see also Bloate v. United States, 559 U. S. ___, ___ (2010) (slip op., at 10) (same).

At the same time, the Fourth Statement says that the Attorney General has authority to specify the Act’s “applicability,” not its “nonapplicability.” And it consequently is more naturally read as conferring the authority to apply the Act, not the authority to make exceptions. That is how we normally understand a term such as “authority to specify” in the context of applying new rules to persons already governed by pre-existing rules. If, for example, the Major League Baseball Players Association and the team owners agreed that the Commissioner of Baseball “shall have the authority to specify the applicability” to the major leagues of the more stringent minor league drug testing policy, we should think that the minor league policy would not apply unless and until the Commissioner so specified.

For another thing, this reading of the Act efficiently resolves what Congress may well have thought were practical problems arising when the Act sought to apply the new registration requirements to pre-Act offenders. The problems arise out of the fact that the Act seeks to make more uniform a patchwork of pre-existing state systems.
Doing so could require newly registering or re-registering “a large number” of pre-Act offenders. That effort could prove expensive. And it might not prove feasible to do so immediately. See 73 Fed. Reg. 38063 (recognizing these problems). Congress’ concern about these problems is reflected in the Act’s providing the States with three years to bring their systems into compliance with federal standards while permitting the Attorney General to extend that 3-year grace period to five years. 42 U. S. C. §16924.

These same considerations might have warranted different federal registration treatment of different categories of pre-Act offenders. Cf. 73 Fed. Reg. 38035–38036, and 38046–38047 (final Department of Justice guidelines allowing States to meet Act requirements without registering certain categories of pre-Act offenders); 76 Fed. Reg. 1635–1636 (supplemental guidelines allowing the same). At least Congress might well have so thought. And consequently, Congress might well have looked for a solution. Asking the Department of Justice, charged with responsibility for implementation, to examine these pre-Act offender problems and to apply the new registration requirements accordingly could have represented one efficient and desirable solution (though we express no view on Reynolds’ related constitutional claim). Cf. 42 U. S. C. §§16912(b), 16914(a)(7), (b)(7), 16919, 16941, 16945 (granting the Attorney General authority to administer various aspects of the Act). And that is just the solution that the Act’s language says that Congress adopted.

Finally, our reading of the Act takes Congress to have filled potential lacunae (created by related Act provisions) in a manner consistent with basic background principles of criminal law. The Second Statement, for example, says that a sex offender must register before completing his prison term, but the provision says nothing about when a pre-Act offender who completed his prison term pre-Act must register. Although a state pre-Act offender could not
be prosecuted until he traveled interstate, there is no interstate requirement for a federal pre-Act offender. And to apply the Act to either of these pre-Act offenders from the date of enactment would require reading into the statute, silent on the point, some kind of unsaid equivalent (e.g., registering or updating within a “reasonable time” or “within three days of first post-Act travel in interstate commerce” or “as preexisting state law requires”).

Pre-Act offenders, aware of such complexities, lacunae, and difficulties, might, on their own, reach different conclusions about whether, or how, the new registration requirements applied to them. A ruling from the Attorney General, however, could diminish or eliminate those uncertainties, thereby helping to eliminate the very kind of vagueness and uncertainty that criminal law must seek to avoid. Cf., e.g., United States v. Lanier, 520 U. S. 259, 266 (1997) (noting that “the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered”).

B

The Government makes three principal arguments to the contrary. First, it says that our interpretation of the Act conflicts with one basic statutory purpose, namely, the “establish[ment of] a comprehensive national system for the registration of [sex] offenders,” 42 U. S. C. §16901, that includes offenders who committed their offenses before the Act became law. The Act reflects that purpose when it defines “sex offender” broadly to include any “individual who was convicted of a sex offense.” §16911(1). And we have recognized that purpose in stating that, in general, the Act’s criminal provisions apply to any pre-Act offender required to register under the Act who later travels interstate and fails to register. See Carr, 560 U. S., at ___ (slip op., at 7).
The Act’s history also reveals that many of its supporters placed considerable importance upon the registration of pre-Act offenders. See, e.g., H. R. Rep. No. 109–218, pt. 1, p. 24 (2005) (H. R. Rep.) (“[Twenty] percent of sexual offenders are ‘lost,’ and there is a strong public interest in finding them and having them register with current information to mitigate the risks of additional crimes against children”); 152 Cong. Rec. 15333 (2006) (statement of Sen. Cantwell) (“Child sex offenders have exploited this stunning lack of uniformity, and the consequences have been tragic. Twenty percent of the Nation’s 560,000 sex offenders are ‘lost’ because State offender registry programs are not coordinated well enough”); id., at 15338 (statement of Sen. Kyl) (“There currently are over 100,000 sex offenders in this country who are required to register but are ‘off the system.’ They are not registered. The penalties in this bill should be adequate to ensure that these individuals register”); id., at 13050 (statement of Sen. Frist) (“There are currently 550,000 registered sex offenders in the U.S. and at least 100,000 of them are missing from the system. Every day that we don’t have this national sex offender registry, these missing sex predators are out there somewhere”)

The difficulty with the Government’s argument, however, is that it overstates the need for instantaneous registration of pre-Act offenders. Our different reading, we concede, involves implementation delay. But that delay need not be long (the Attorney General issued his Interim Rule 217 days after the effective date of the new law). And that delay can be justified by the need to accommodate other Act-related interests. See supra, at 7–9.

Second, the Government suggests that our reading leads to an absurd result. As it points out, the Fourth Statement grants the Attorney General the “authority to specify” the registration requirements’ applicability not only to pre-Act offenders but also to those convicted prior to the
“implementation” of the new Act “in a particular jurisdiction.” Some jurisdictions might not implement the Act for up to five years. See 42 U. S. C. §16924; see also Dept. of Justice, Office of Justice Programs, Justice Department Finds 24 Jurisdictions Have Substantially Implemented SORNA Requirements (July 28, 2011) (stating that as of July 28, 2011, 14 States had implemented the Act’s requirements), http://www.ojp.usdoj.gov/newsroom/pressreleases/2011/SMART_PR-072811.htm (all Internet materials as visited Jan. 19, 2012, and available in Clerk of Court’s case file). Yet, the Government concludes, it is absurd to believe that Congress would have desired so long a delay in the application of its new registration requirements.

The problem with this argument, however, is that reading the two categories similarly (a matter which we need not decide) would not require a long delay in applying the registration requirements to post-Act offenders who committed a crime in a jurisdiction that is slow to implement the new requirements. At most, that reading would require the Attorney General to promulgate a rule applicable to all preimplementation offenders. That rule could specify that the Act’s preregistration provisions apply to some or to all those offenders. And it could do so quickly, well before a jurisdiction implements the Act’s requirements. Indeed, the Attorney General’s Interim Rule and the Department of Justice’s final guidelines, both issued before any jurisdiction implemented the Act’s requirements, state that the Act’s requirements apply to “all sex offenders,” including all preimplementation offenders. See 72 Fed. Reg. 8897 (codified at 28 CFR §72.3); 73 Fed. Reg. 38036; cf. Dept. of Justice, Office of Justice Programs, Justice Department Announces First Two Jurisdictions to Implement Sex Offender Registration and Notification Act (Sept. 23, 2009), http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/SMART09154.htm.
Third, the Government argues against our interpretation on the ground that the Act says only that the Attorney General “shall have the authority to specify the applicability” of the Act’s registration requirements to pre-Act offenders; it does not say that he “shall specify” or otherwise require him to do so. The Act’s language, the Government continues, consequently gives the Attorney General the power not to specify anything; that power is inconsistent with Congress’ intent to ensure the speedy registration of thousands of “lost” pre-Act offenders, supra, at 10; and we can avoid this result only by reading the Act’s registration requirements as applying immediately and on their own to all pre-Act offenders (though the Attorney General would have the power to make exceptions).

This argument bases too much upon too little. There is no reason to believe that Congress feared that the Attorney General would refuse to apply the new requirements to pre-Act offenders. See, e.g., H. R. Rep., at 23–24; Protecting Our Nation’s Children from Sexual Predators and Violent Criminals: What Needs To Be Done? Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 109th Cong., 1st Sess., 4–13 (2005); Office of the Press Sec’y, The White House, President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html. And there was no need for a mandatory requirement to avoid that unrealistic possibility. There is consequently no need to read the language unnaturally as giving the Attorney General the authority only to make exceptions from an implicit (unstated) rule that would otherwise apply the new registration requirements to all pre-Act offenders across the board and immediately.

Finally, we note that some lower courts have read the
Attorney General’s specification authority as applying only to those pre-Act sex offenders unable to comply with the statute’s “initial registration” requirements. See 42 U. S. C. §16913(b). That, however, is not what the statute says. Rather, its Fourth Statement, §16913(d), says that the Attorney General has the authority (1) to specify the applicability of the registration requirements to pre-Act (and preimplementation) offenders, “and” (2) to prescribe rules for their registration, “and” (3) to prescribe registration rules for other categories of sex offenders who are unable to comply with the initial registration requirements. See supra, at 3. The word “and” means that the Attorney General’s authority extends beyond those pre-Act “sex offenders who are unable to comply” with the initial registration requirements.

III

For these reasons, we conclude that the Act’s registration requirements do not apply to pre-Act offenders until the Attorney General so specifies. Whether the Attorney General’s Interim Rule sets forth a valid specification consequently matters in the case before us. And we reverse the Third Circuit’s judgment to the contrary. We remand the case for further proceedings consistent with this opinion.

So ordered.
APPENDIX

18 U. S. C. §2250(a)

“IN GENERAL.—Whoever—
“(1) is required to register under the Sex Offender Registration and Notification Act;
“(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
“(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
“(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
“shall be fined under this title or imprisoned not more than 10 years, or both.”

42 U. S. C. §16913

“Registry requirements for sex offenders

“(a) In general
“A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

“(b) Initial registration
“The sex offender shall initially register—(1) before completing a sentence of imprisonment with respect to
the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

“(c) Keeping the registration current
“A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

“(d) Initial registration of sex offenders unable to comply with subsection (b)
“The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

“(e) State penalty for failure to comply
“Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.”
SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 10–6549

BILLY JOE REYNOLDS, PETITIONER v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[January 23, 2012]

JUSTICE SCALIA, with whom JUSTICE GINSBURG joins, dissenting.

In my view, the registration requirements of the Sex Offender Registration and Notification Act (Act), 120 Stat. 590, 42 U. S. C. §16901 et seq. (2006 ed. and Supp. III), apply of their own force, without action by the Attorney General. The Act’s statement that “[t]he Attorney General shall have the authority to specify the applicability of the [registration] requirements” to pre-Act sex offenders, §16913(d), is best understood as conferring on the Attorney General an authority to make exceptions to the otherwise applicable registration requirements.

To begin with, I do not share the Court’s belief that to “specify the applicability” more naturally means, in the present context, to “make applicable” rather than to “make inapplicable.” See ante, at 7. The example the Court gives, the Commissioner of Baseball’s “authority to specify the applicability” of more stringent minor-league drug testing policies to the major leagues, ibid., is entirely inapt, because it deals with a policy that on its face is otherwise not applicable. Since the major leagues are not covered by the policies, the Commissioner’s “authority to specify [their] applicability” can mean nothing else but the authority to render them applicable. What we have here, however, is a statute that states in unqualified terms that
“a sex offender shall register,” §16913(a)—and that the Court rightly believes was meant to cover pre-Act offenders.* The issue is whether “specify the applicability” means that no pre-Act offenders need register unless the Attorney General says so, or rather that the Attorney General may excuse the unqualified requirement for pre-Act offenders. In that context, it seems to me that the latter meaning is more natural. One specifies the applicability of an application that already exists by describing or revising its contours.

I think it preferable to give “specify” this meaning not only because here it is more natural, but also because the alternative is to read the statute as leaving it up to the Attorney General whether the registration requirement would ever apply to pre-Act offenders, even though registration of pre-Act offenders was (as the Court acknowledges) what the statute sought to achieve. For the statute does not instruct the Attorney General to specify; it merely gives him “authority” to do so. In this respect, the provision at issue here stands in marked contrast to other provisions of the Act which clearly impose duties on the Attorney General. See, e.g., §16912(b) (“The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter”); §16917(b) (“The Attorney General shall prescribe rules for the notification of [certain] sex offenders”); §16919(a) (“The Attorney General shall maintain a national database”); §16926(a) (“The Attorney General shall establish and implement a Sex Offender Management Assistance program”).

*The Court reaches this conclusion based on an inquiry into legislative history. See ante, at 9–10. That inquiry is quite superfluous, however since the text of the Act itself makes clear that Congress sought to “establish[b] a comprehensive national system for the registration of [sex offenders],” 42 U. S. C. §16901, with “sex offender” defined broadly to “mean[n] an individual who was convicted of a sex offense,” §16911(1) (emphasis added).
SCALIA, J., dissenting

The Court’s response to this—that “there was no need for a mandatory requirement to avoid [the] unrealistic possibility” that the Attorney General would not specify, ante, at 12—seems to me a fine answer to the question “What mandatory requirements must a poorly drafted statute contain in order to be workable?” It is an inadequate answer, however, to the question that is relevant here: “Would Congress have written the provision this way if it wanted pre-Act offenders covered and did not think they were covered absent specification by the Attorney General?” Intelligently drafted statutes make mandatory those executive acts essential to their functioning, whether or not those acts would likely occur anyway. It would have taken little effort (in fact, less effort) for Congress to write “the Attorney General shall specify the applicability” instead of “the Attorney General shall have authority to specify the applicability.” The latter formulation confers discretion, and it is simply implausible that the Attorney General was given discretion to determine whether coverage of pre-Act offenders (one of the purposes of the Act) should exist.

Indeed, it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable, see Whitman v. American Trucking Assns., Inc., 531 U. S. 457, 472–476 (2001); Loving v. United States, 517 U. S. 748, 776–777 (1996) (SCALIA, J., concurring in part and concurring in judgment), and “[i]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.” Gomez v. United States, 490 U. S. 858, 864 (1989). Construing the Act to give the
Attorney General the power to *reduce* congressionally imposed requirements fits that bill, because such a power is little more than a formalized version of the time-honored practice of prosecutorial discretion.

The Court points out that there might have been need for “different federal registration treatment of different categories of pre-Act offenders,” *ante*, at 8, and that absent a “ruling from the Attorney General” pre-Act offenders would be uncertain “about whether, or how, the new registration requirements applied to them,” *ante*, at 9. But attending to those details would certainly come within the Attorney General’s authority to “specify” application of the Act—and so would the temporary suspension of registration requirements pending the Attorney General’s resolution of those details. And of course the uncertainty of where to register could form the basis for the Attorney General’s exercise of his discretion not to prosecute in individual cases. Neither problem, it seems to me, justifies the extraordinary interpretation that this Act does not apply to pre-Act offenders unless and until the Attorney General, in his discretion, says so.

For these reasons, I respectfully dissent.