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Law and Religion in a Detraditionalized Europe

Zachary R. Calo

Abstract This essay employs the concept of tradition to analyze law and religion cases from the European Court of Human Rights. It argues that Europe is undergoing a detraditionalization process that has altered how religion informs individual and collective meaning. Law, in turn, gives shape to this process. From the perspective of tradition, recent decisions involving public religious symbols, Islamic headscarves, and conscience claims are revealed to have participated in this transformative social process.

1 Europe After Tradition

This essay employs the concepts of tradition and detraditionalization to examine recent European debates about law and religion. Particular attention is given to the jurisprudence of the European Court of Human Rights. The concern, however, is not simply with law and religion, but with how this jurisprudence reveals deeper impulses concerning the shape of European culture, the construction of social meaning, and, the experience of selfhood.

Although not coterminous, religion and tradition overlap in significant ways. Tradition, for purposes of this essay, is understood as the process by which a community understands itself and transmits that understanding across time. By extension, it concerns the ways in which individuals relate to collective forms of meaning. Religion is an essential component of tradition and for some, such as Christopher Dawson,

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"A society which has lost its religion" will also lose tradition.[1] Commenting on Dawson, Rowan Williams similarly proposed that the declining role of religion in society imperils the possibility of traditions surviving. For Williams, a tradition is not a static form of being and believing, but an ongoing conversation within a framework of shared understanding. The loss of religious understanding as an animating social force accelerates the "end of history."[2] This end of history is not some cataclysmic civilizational collapse but rather the cessation of inquiry into human nature and human flourishing. With this end of history, the concern with such matters simply ceases to have a compelling hold on collective imagination. Without a grounding in a tradition or traditions, in other words, the capacity of a society to support a critical encounter with the deepest meanings of the human experience is hindered. Pope Benedict seems to have something similar in mind when he writes that Europe is losing its "history" and "roots," which he identifies as linked specifically to Christian identity.[3] What Benedict fears is that the loss of a religiously-grounded identity will destroy the coherence Europe as an ongoing experiment in collective inquiry and understanding. Without the resources of religious traditions and Christianity in particular, there will not be a sustained conversation about what values Europe should even embody. Removing the Christian dimension of European identity undermines Europe itself.

These ideas lead to the unexpected proposition that tradition is needed for social dynamism. While tradition is often seen as a conservative force that frustrates change and development, Williams and Benedict suggest that achieving a future requires the givenness of a past. To participate in a tradition is to live into in an ongoing reality that invites a dialogical encounter between the given and the not yet. Shared forms of understanding cannot evolve from a position of nowhere. Tradition, that is, places limits upon what persons can individually and collectively become. The future is not pure possibility. Persons are not complete masters of themselves. Personhood is rather achieved through an encounter with an authority outside the self. Tradition invites and indeed requires such conversation. Thus, far from being a roadblock to the emergence of new understanding, tradition is essential to progress. When Williams and Benedict speak of the end of history and the loss of memory, they are identifying the challenge of sustaining a dynamic social order without an anchor in tradition. The choice is not between tradition or progress, but tradition or chaos.

Lieven Boeve has produced particularly insightful writings on the relationship between religion and tradition in Europe. In his assessment, the current European situation is best characterized in terms of "detraditionalization." Boeve defines this concept as follows:

> Detraditionalization as a term hints at the socio-cultural interruption of traditions…which are no longer able to pass themselves from one generation to the next. The latter definitely applies to the Christian tradition in which the transmission process has been seriously hampered. Christianity no longer is the given and unquestioned horizon for individual and social

[1] Dawson (1933), 115.

[2] Williams (2008).

[3] Ratzinger and Pera (2007).

> identity…. On the contrary, because of the absence of such unquestioned and quasi-automatic transmission of tradition, identity is no longer given but has to be constructed.[4]

While Boeve introduces the concept primarily in reference to European Christianity, the concept could be applied more broadly to refer to other religious traditions and even non-religious traditions. Detraditionalization, though, is particularly useful in that it speaks not only to changing patterns of religious belief and observance but, more fundamentally, to the ways in which social meaning and moral order are created, sustained, and conveyed. Detraditionalization focuses on the disruption of Christianity's role as a culture-forming tradition that is able to inform conceptions of self and society.

When discussed in connection with religion, detraditionalization overlaps with the theory of secularization but also goes beyond it. A detraditionalized Europe is not simply a secular Europe unshackled in various ways from the impositions of religion.[5] To the extent that Europe has defined itself against something, it is not simply religion but normative traditions that give ongoing life to authoritative sources of meaning. The resulting social order is characterized by a void of thick meaning, a vacant space governed by no ideology, including secularism. Religion is perhaps the most insistant obstacle to the achievement of a detraditionalized reality, but it is not the only one. Detraditionalization thereby manifests itself not in a simple doctrinaire opposition to religion. What detraditionalization targets is religion as a cultural and life-forming force. It is a tradition that resists traditions.

Detraditionalization is an account of collective social change, but it most pointedly impacts the individual experience of being and becoming in the world. This quintessential human task of making the self is being fundamentally refashioned within Europe. In premodern societies, Charles Taylor observes, one could not image oneself outside of a fixed social order. The possibilities for self-creation were limited by the fact that "self-understanding was embedded in society."[6] While modernity breaks down these fixities, and opens space for new experiences of selfhood, detraditionalization pushes the process to its more totalizing completion. It frees the self to encounter a world that is a flattened moral plane defined by openness and possibility. Along these lines, Rowan Williams writes that a constitutive feature of modern Europe:

> is the belief that what is most uniquely human is a capacity for 'self-creation' – for the making of choices that will establish a secure place in the world and shape an identity that is not determined from outside, determined by social power that acknowledges no accountability or by doctrines and models that have no public evidence to support them.[7]

The "European enterprise," Williams adds, is defined by a belief that "the essence of the human task is *defining yourself*." The cultivation and realization of authentic

[4] Boeve (2005), 104–105.

[5] Boeve (2005), 107.

[6] Taylor (2004), 55–66.

[7] Williams (2008).

selfhood, in other words, becomes the quintessential experience of authenticity.[8] It is a project that has no end, but rather involves, in Russell Sandberg's apt characterization, the self "constantly being created and recreated, negotiated and renegotiated."[9] Detraditionalization is both a continuation and an acceleration of what begins with modernity. It is a way of speaking about the world that emerges when cultural vestiges of traditions are pushed away.

Law is central to detraditionalization. It shapes and reinforces detraditionalized space and mediates the experience between individual, community, and society therein. Because of the foundational role of religion in shaping tradition, law and religion debates are particularly useful for assessing this process.[10] In what follows, the essay considers how understandings of religious tradition have informed law and religion jurisprudence in recent judgments of the European Court of Human Rights. Three cases are considered: *SAS v. France* (2014), *Eweida v. United Kingdom* (2013), and *Lautsi v. Italy* (2011). Examining these law and religion cases from the perspective of tradition brings a new interpretive lens to this field of jurisprudence. It is not infrequently asserted that these cases reveal a contest between religious and secular values, and to some extent this is correct.[11] However, framing debate on these terms misses a critical dynamic, for what is occurring in law is not primarily a contest for the supremacy of one normative value system over another, but the emergence of a reality that moves beyond the categories of religious and secular. These cases concern different issues, and result in what might initially seem contrary decisions, but detraditionalization provides a framework for identifying a common process that is reshaping the moral account of self and society in Europe.

[8] Public life in turn, Williams adds, "organises the aspirations of individuals in such a way that they don't interfere with each other too dramatically." There are circumstances in which the aspirations of self-creation on the part of individual will conflict with those of another. In these instances, the violence of the law makes choices about how to carve into the ambitions of one for the sake of another. Williams (2008). Pope John Paul II makes a similar point in his 1995 encyclical letter *Evangelium Vitae*, in which he discusses "the promotion of the self…understood in terms of absolute autonomy." The concept of freedom, the Pope argued, has become linked to a form of anthropological individualism in which that prioritizes the project of become the maker and master of the self. *Evangelium Vitae*, Section 20.

[9] Sandberg (2015), 1.

[10] See Fokas (2015), 54–75.

[11] See, for instance, the provocative statements of former Anglican Bishop of Rochester Michael Nazir-Ali. Bishop joins row over right to wear the cross (2012).

2 Islam, Christianity, and the European Court of Human Rights

2.1 SAS v. France

SAS concerned the compatibility of a 2010 French law banning face coverings in public with the European Convention on Human Rights, including Article 9.[12] The law was generally understood to have targeted Muslim women who wore a full-face veil, and the applicant was a devout Muslim who wore the burka and niqab on certain occasions as an expression of religious faith.

Given that the law clearly interfered with the exercise of religion, the central question before the Strasbourg Court was whether the law could be justified under Article 9 as being "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." The French government maintained that the law was designed both to advance public safety and democratic values.

As stated in an explanatory memorandum accompanying the bill, "The defence of public order…. 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, permitting the wearing of the full veil entailed a "breach of the dignity of the person" and a conspicuous denial of the equality between men and women.[13] Only a ban could preserve French political and social values from the symbolic and substance challenge posed by this practice.

In its judgment, the Court held the ban to be permissible under the European Convention insofar as it sought to establish conditions necessary to the sustentation of democratic values. Although exhibiting a certain hesitation, the Court concluded that it could "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…forms an indispensable element of community life."[14] From this starting point, the Court found it acceptable to limit certain rights in order to create "a space of

[12] Article 9 provides: 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. The European Convention on Human Rights and its Five Protocols, Council of Europe, Nov. 4, 1950.

[13] *SAS v. France*, App. No. 43835/11, §25 ECHR 2014. The applicant, by contrast, characterized wearing the veil as an act of emancipation, self-assertion, and participation in society. *Id.* at §77.

[14] *Id.* at §122.

socialization which makes living together easier."[15] While the law impedes religious expression, it is an appropriate mechanism for upholding the values of pluralism, tolerance, and democracy.[16]

The Court addressed a number of other cases arising from bans on Muslim dress prior to *SAS*. This line of cases is notable in that the Court has consistently held that limitations on the wearing of Islamic dress by women are not violative of Article 9 rights.[17] By one measure, this judgment can be read as exhibiting a conventional reliance on the margin of appreciation, as in these prior cases. As the Court stated, regarding "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'."[18] The Court added that, "It indeed falls within the powers of the State to secure the conditions whereby individuals can live together in their diversity," thus seeming to disclaim a deep role in analyzing the substantive legal issues at stake.[19] Both in its deference to domestic judgments, as well as its connecting bans on religious dress to the sustentation of pluralism, *SAS* does little to change existing jurisprudential patterns.

At the same time, this case presents facts that bring into relief certain impulses more occluded in the earlier cases. Even if this matter is located primarily in the line of cases about laique bans, it is not in the end only about face coverings and secularism, but Islam, European self-understanding, and the relationship between religion and tradition. In particular, what this case reveals is the extent to which law is being employed to advance a process of detraditionalization. *SAS* is particularly important because it expressly links the effacement of religious identity with the sustentation of liberal values. As such, the Court sanctions the use of law to separate a person from the substantive experience and expression of her tradition. In unmasking, the law is detraditionalizing. In fact, the Court impliedly adopts a binary framing of the situation in which two forms of tradition—religion and liberal freedom—stand in a posture or irreconcilable tension. Judges Nussberger and Jäderblom drew attention to this point in their dissent, noting that bans on the full-face veil are linked to "interpretations of its symbolic meaning."[20] The veil embodies values, and is constitutive of a tradition that is antithetical to a free society and a free self. In the Government's view, women who wore the veil were "effaced" from public life.[21] It is the role of the Court to

[15] See Footnote 14.

[16] *Id.* at §153.

[17] These cases include *Dahlab v. Switzerland*, App. No. 42393/98, ECHR 2001; *Leyla Sahin v. Turkey*, App. No. 44774/98, ECHR 2004; *Dogru v. France*, App. No. 27058/05, ECHR 2009. For a critical analysis of these cases see, Calo (2010), 261–280. More recently, the Court considered Belgian's ban on the full veil. See, *Belcacemi and Oussar v. Belgium*, App. No. 37798/13, ECHR 2017; *Dakir v. Belgium*, App. No. 4619/12, ECHR 2017.

[18] *SAS v. France*, App. No. 43835/11, §129 ECHR 2014.

[19] *Id*. at §141.

[20] *SAS v. France*, App. No. 43835/11 (dissenting opinion of Judges Nussberger and Jäderblom), §6 ECHR 2014.

[21] *SAS v. France*, App. No. 43835/11, §§77, 82, 85 ECHR 2014.

free these women from the burdens of their tradition, to make them members of the liberal public through a forcible unmasking.

It is notable that the Court does not expressly connect its defense of the ban with secular values. Indeed, the case is only superficially about secularism and religion. To read the Court's judgment as the imposition of doctrinaire laicism ignores the extent to which this case has the effect of undermining all ideology. The issue, as the Court frames it, is not a contest between the religious and the secular, but rather strong forms of religion that impose values onto free persons and the void of public life. The aim of living together on which the Court rests its decision is accomplished through denying persons their particularity. The public is a space in which persons must be literally unmasked from the weight of tradition through the liberation of law. Law frees so that women might create themselves.

This case also reveals the distinct ways in which Islam is informing and advancing the process of European detraditionalization. Headscarves and facial coverings serve a particularly important role by symbolizing forms of strong tradition against which the Court positions itself. Yet, this framing of Islam does not prompt the Court to advance a counter-tradition, be it Christian or secularist. While it has been argued that presence of Islam illuminates the extent to which European law and culture remain tethered to residual if eviscerated Christian presuppositions, *SAS* does not entail the reassertion of Christianity so much as resistance to a tradition that imbues thick moral meaning into public understanding. The problem with Islam is not that it threatens Christianity or secularism but a hallowed detraditionalized Europe.

A central feature of religious experience in a detraditionalized society is primacy of individual freedom and choice. As the Belgian government stated in its intervention, its government "had sought to defend a model of society in which the individual outweighed any philosophical, cultural or religious attachments."[22] It is in this respect that Islam has played a defining role in the detraditionalization process. The fully veiled woman, who herself represents Islam, carries the burden of tradition which the state must relieve. As Mark Hill notes, "it is the very concept of obligation (and, by extension, coercion) within Islam" that is viewed as inimical to liberal values.[23] Islam reminds Europe of the urgency and aims of detraditionalization.[24]

2.2 *Eweida and Others v. UK*

Eweida and Others v. UK, particularly the matters involving Lillian Ladele and Gary McFarlane, offers a useful companion to *SAS*.[25] Ladele and McFarlane were both

[22] *Id*. at §88.

[23] Hill (2016), 332.

[24] See Bhuta (2014), 9–35.

[25] The case of *Eweida and Others v. The United Kingdom* involved four consolidated cases. The analysis here focus on the disputes involving two of the claimants, Lillian Ladele and Gary McFarlane.

Christian claimants who objected on the grounds of religious conviction to performing professional activities involving homosexual couples. Ladele was employed as a registrar of births, deaths, and marriages in the London Borough of Islington. The Civil Partnership Act of 2004 provided for the legal registration of civil partnerships between two persons of the same sex and, in December 2005, Islington designated all existing registrars of births, deaths and marriages as civil partnership registrars. In accordance with her Christian convictions, Ms. Ladele believed same sex civil partnerships to be contrary to God's law and she refused to participate in their registration. She was informed that her refusal to do so could put her in breach of the employment code of conduct. In the ensuing litigation, the Court of Appeal concluded that Ms. Ladele's desire to have her religious views respected should not be allowed "to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community."[26]

McFarlane worked as a counsellor for Relate, a private organization that provides sex therapy and relationship counselling services. McFarlane confirmed to his employer that he had difficulty reconciling his Christian beliefs with working with same-sex couples.[27] McFarlane was eventually dismissed from his employment, after which he lodged a claim with the Employment Tribunal. In a 2009 judgment, the Tribunal found that McFarlane had not suffered direct discrimination because under the Employment Equality (Religion or Belief) Regulations 2003 he had not been dismissed because of his faith but because it was believed he would not comply with Relates' polices. Moreover, the Tribunal found that while these policies would put an individual who shared McFarlane's religious beliefs at a disadvantage, they served the legitimate aim of providing counselling services without respect to sexual orientation. The Employment Appeal Tribunal likewise rejected McFarlane's claim, noting that Relate was entitled to refuse to accommodate views counter to its fundamental principles.

The European Court dealt with these two matters was somewhat cursorily. Ladele had brought her complaint under Article 9 of the European Convention, taken in conjunction with Article 14. She maintained that she had been discriminated against on the grounds of religion and that the government had not demonstrated a reasonable relationship between its aims and the discriminatory practices.[28] The Court noted "the strength of her religious conviction" and also acknowledged that "it cannot be said that, when she entered into her contract of employment, [she] specifically waived her right to manifest her religious belief." At the same time, the Court concluded in finding against the claimant that, "the local authority's policy aimed to secure the rights of others" and "national authorities are given a wide margin of appreciation" in balancing competing Convention rights.[29]

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[26] *Eweida and Others v. The United Kingdom*, Apps. Nos., 48420/10, 59842/10, 51671/10 and 36516/10, §§23-30 ECHR 2013.

[27] *Id.* at §§31–40.

[28] *Id.* at §§70–72.

[29] *Id*. at §106.

In assessing McFarlane's claim, the Court similarly acknowledged that his "objection was directly motivated by his orthodox Christian beliefs about marriage and sexual relationships" and that his refusal to undertake certain counselling activities was a manifestation of these beliefs.[30] McFarlane's position was that the margin of appreciation afforded to limitations on freedom of religion must advance the goal of protecting "true religious pluralism."[31] In determining whether the state had struck a fair balance with respect to competing rights, the Court noted that the applicant had knowledge of Relates' policies concerning sexual orientation prior to accepting employment. While this fact alone does not establish whether or not there has been interference with Article 9 rights, the Court found that, on balance, authorities had acted within their permissible margin of appreciation in refusing to find for McFarlane. The most important factor for the Court was that because the employer was implementing a non-discrimination policy, it should be granted a particularly "wide" margin of appreciation.[32]

As with *SAS*, these cases might be seen to evidence an antireligious or more specifically anti-Christian bias. This was the position of former Archbishop of Canterbury Lord Carey who argued that the cases in Eweida revealed that, "The secular human rights agenda has gone too far."[33] These decisions might also be seen as privileging legal claims of equality over those of religious freedom. Such arguments are not without basis, but they fail to diagnose the more elemental dynamics at work in this jurisprudence. The anti-Christian bias of which Carey spoke, or the privileging of equalitarianism over religious freedom, are symptoms of the detraditionalization process. Recognizing faith-based exemptions for Ladele and McFarlane would permit tradition to impose itself upon moral life. In the end, these cases are not narrowly about religious rights, but the normativity of tradition as it relates to individual and collective meaning within society.

If the effect of *SAS* was to liberate persons from the grip of tradition, Eweida liberated society from the encroachments of tradition. It did so by advancing an implicit account of religion as interiorized, individualized, and disconnected from community. Indeed, the fact that this case involved Christian claimants is significant in that European Christianity, unlike Islam, is understood to be already in large measure detraditionalized. By severing the connection between faith and action, and by pushing religion more fully into the private and noetic, the Court gives legal sanction to an already regnant arrangement. Yet the decision does more than define belief in these ways. It also limits the capacity of persons to participate fully in communities of inquiry and meaning. By reducing the claimant's religion to interior belief, these judgments isolate persons from embodied moral traditions. A tradition cannot exist apart from a community and the attendant institutions and practices through which tradition is enacted and sustained over time. This decision has the

[30] *Id.* at §108.

[31] *Id.* at §73.

[32] *Id.* at §109.

[33] Christians face judgement day in Strasbourg 'right to wear the cross' case (2013).

effect of cutting off persons from such a reality and limiting the capacity of traditions to carve moral meaning into the world.

It is not surprising that these disputes involved conflict between religious freedom and sexual rights. While religious freedom claims might come into conflict with any number of countervailing rights, sexual identity maintains a particularly central role in the anthropology of the detraditionalized society. Authentication of the sexual self has come to represent the essence of freedom that law should affirm and protect. It is the capstone of the project of self-creation that lies at the heart of a detraditionalized social space. Moreover, realization of the authentic sexual self is what becomes fully possible once the imprint of religious tradition is circumscribed. In this respect, religion and sexuality play key oppositional roles in the unfolding drama of detraditionalization. Their interplay also reveals the implicit teleology at the root of a detraditionalized order. Although this order is properly seen as one shorn of ends, defined instead by openness and possibility, there is also an implicit privileging of a certain kind of authenticity. Detraditionalization is not a neutral process.

2.3 Lautsi v. Italy

The much-discussed case of *Lautsi v. Italy* raises different issues from those in *SAS* and *Eweida*.[34] At first glance, this case would seem to fit awkwardly within a narrative of detraditionalization, as its holding permitted the retention of a form of public religiosity. Yet read differently, *Lautsi* does not reveal the weakness of detraditionalization so much as the extent to which it is already completed.

Lautsi concerned the permissibility of Italy displaying crucifixes in public schools. The applicant alleged that this practice was contrary to the principle of secularism according to which she wanted to raise her children.[35] In the Chamber judgment, the Court took that view that states must "refrain from imposing beliefs, even indirectly, in places where persons are dependent on it or in places where they are particularly vulnerable."[36] As applied to this case, the Court found that the "crucifix may easily be interpreted by pupils of all ages as a religious symbol" and that this might prove "emotionally disturbing" to children of a different faith or no faith.[37] As such, Italy had violated the right to freedom of religion under the European Convention.

In the subsequent Grand Chamber judgment, the Court reversed this decision and found in favor of Italy. The opinion gave particular attention to the Government's position "that the presence of crucifixes in State-school classrooms, being the result of Italy's historical development…gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate." In particular, the Government emphasized that the crucifix

[34] See, e.g., Temperman (2012).

[35] *Lautsi v. Italy*, App. No. 30814/06, §7, ECHR 2009.

[36] *Id.* at §48.

[37] *Id.* at §55.

was connected to the secular values of democracy and western civilization.[38] In light of these considerations, the Court took the view that the decision of "whether or not to perpetuate a tradition" lies within the margin of appreciation.[39]

It is tempting to read the Grand Chamber judgment not only as an endorsement of public religiosity, but as a statement on the importance of tradition and history as ongoing sources of meaning. After all, the language of tradition appears throughout the judgment. The Courts speaks, for instance, of putting crucifixes in classrooms as "a matter of preserving a centuries-old tradition."[40] The Court also referenced discussions of tradition in the submissions of third party interveners. A joint submission from French, German, and Italian nongovernmental organizations urged the Court to "leave a wide margin of appreciation to the States in this area because the organization of the relationship between state and religion varied from one country to another and…was deeply rooted in the history, tradition and culture of a country."[41] The concurring opinion of Judge Bonello added that, "[a] European Court should not be called upon to bankrupt centuries of European tradition."[42] Yet, these and other references to the enduring importance of tradition belie the extent to which the Court's decision sanctions an account of tradition that is not living and culture-forming, but a hollow historical vestige from which religious significance was already drained.

Even though the Grand Chamber judgment permitted Italy to continue displaying crucifixes in classrooms, this decision does not represent a challenge to detraditionalization. Rather, the Court's decision rests on defining the cross as lacking religious significance or projecting a predominantly religious message. While the Court describes the crucifix as "above all a religious symbol," it adds that "there is no evidence…that the display of the religious symbol on classroom walls may have an influence on pupils."[43] The reason for this conclusion seems to be that, although associated with Catholic Christianity, the crucifix has become a "passive symbol."[44] This language of "passive" is the same used by the United States Supreme Court in a case involving public displays of the Ten Commandments.[45] As with the Supreme Court, the European Court invokes this term to indicate that the symbol is divested of its original theological meaning. The crucifix, in other words, does not impose and project meaning into the public. It lacks power to impinge on the religious freedom of the claimant. It is an artifact of tradition that might be understood in a historical and cultural context, but does not hold a connection to a living tradition that seeks to actively shape public moral understanding. Passivity, in other words, speaks to the detraditionalized character of the crucifix.

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[38] *Lautsi v. Italy* [GC], App. No. 30814/06, §67, ECHR 2011.

[39] *Id.* at §68.

[40] *Id.* at §36.

[41] *Id.* at §55.

[42] *Lautsi v. Italy* [GC] (concurring opinion of Judge Bonell), App. No. 30814/06, §1.2, ECHR 2011.

[43] *Lautsi v. Italy*, App. No. 30814/06, §66, ECHR 2009.

[44] *Id.* at §36.

[45] *Van Orden v. Perry*, 545 U.S. 677 (2005).

The passivity of the crucifix is what, in turn, allows the Court to endorse its continued presence in the classroom. While the Court's judgments in *SAS* and *Eweida* pushed back against forms of meaning that violated the norms of a detraditionalized order, such resistance was unnecessary in *Lautsi*. Even the Italian government's position in the case conceded that the "message of the cross was…a humanist message which could be read independently of its religious dimension and was composed of a set of principles and values forming the foundations of our democracies."[46] The Court does not need to detraditionalize the cross or impose meaning on it. The Court only has to reveal reality for what it has already become. The Court's understanding of the cross as already detraditionalized is made apparent in its somewhat pained attempt to distinguish the facts in *Lautsi* from those in *Dahlab v. Switzerland*, a case which the Court had upheld a prohibition on a Muslim primary school teacher wearing a headscarf in the classroom.[47] While the Court offers a number of observations about the unique situation in Italy, the essential difference ultimately concerns the perceived power of the headscarf to still project strong meaning in a way the crucifix does not.

Lautsi illuminates how detraditionalization works to cut society off from historical meaning. A detraditionalization crucifix is not as an ongoing source of meaning but a historical adornment of the past that has no bearing on the present. It undermines the dialectic by which traditions shape meaning in the world. Detraditionalization is thus not simply a forgetting of the past but an end to the possibility of conversation. In this respect, *Lautsi* is a particularly revealing of what Rowan Williams and Pope Benedict had in mind when speaking of Europe losing a sense of history. Although the Court talks about the historical and symbolic import of the crucifix, it does not imply that the symbol represents an ongoing tradition. The past is ossified and rendered morally nugatory. The crucifix is safe precisely because it does not—it cannot—impose meaning. It poses no challenge to the open social space unrestrained by the lingering presence of religion. Viewed in light of tradition, the categories of secularism and Christianity contribute little to an analysis of what is finally at issue in the case. Although the case attracted international attention and became a referendum on these competing systems of meaning, such a framework is largely inapposite. The process by which religion is being shaped by law is not primarily through a frontal engagement with secularism but a more subtle reworking of cultural meaning.

3 Religion and the Future of Tradition

Detraditionalization is not likely to be reversed, even as the void it opens remains a site of ongoing contestation. Still, the experience of detraditionalization has provoked counter-efforts to retraditionalize Europe by imposing a stable ordering narrative upon it. While these initiatives have taken many forms, they tend to identify in the past

[46] *Lautsi v. Italy*, App. No. 30814/06, §35, ECHR 2009.

[47] *Lautsi v. Italy* [GC], App. No. 30814/06, §73, ECHR 2011.

an account of Europe that offers resources for contemporary renewal. Resurrecting the idea of Christian Europe has proven particularly attractive in the current cultural climate. In certain forms, the idea of Christian Europe is a response to secularism, in others Islam. The two are often combined. For instance, one million Polish Catholics recently gathered along the country's borders to recite the rosary and pray, according to Krakow Archbishop Marek Jedraszewski, for "Europe to remain Europe." The Archbishop added that "we need to return to the Christian roots of European culture if we want Europe to remain Europe." While the official theme of "Rosary at the Borders" was to pray for Europe, it also took on an anti-immigrant and anti-Muslim tone. Christianity and Islam were defined as irreconcilable traditions, both living, but one native and one foreign, competing for the soul of Europe.[48]

Among the more compelling accounts of Christian Europe are those offered by Popes John Paul II and Benedict XV. Loeven Boeve summarizes the popes as arguing that "[o]nly a Europe that rediscovers its Christian roots can survive."[49] For John Paul and Benedict, a Europe without the Christian tradition is unstable and ultimately incoherent. There is no Europe apart from Christianity. As such, the public task of the Church is to reassert an account of Europe that finds its grounding in Christian belief and proclamation. It is "in the Christian tradition," John Paul II writes, that Europe's values are fully realized.[50] The Christian tradition makes possible the European tradition.

It is notable that John Paul and Benedict describe retraditionalization in terms of memory. For both popes, connection to a particular history gives meaning to the present. John Paul II, for instance, writes that "*the loss of Europe's Christian memory and heritage*" has "squandered a patrimony entrusted…by history."[51] Both also invoke the language of "roots" to describe the link between Christianity and Europe.[52] It is rootedness in Christianity that grounds the historic achievement and ongoing reality of European civilization.[53] Without Christianity, there is no Europe. From this perspective, retraditionalization is not a top-down project to be achieved through law, but one whose transformation must work from the bottom-up through culture. The task before the Church, as John Paul II and Benedict frame it, is to sustain the idea Europe being tethered to Christianity. The Church works within culture to sustain a civilizational narrative about what Europe is and should become. This understanding will of course have implications for law, but law exists downstream from culture.

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[48] While Pope John Paul II and Pope Benedict XVI have developed the intellectual case for retraditionalization, this impulse equally finds a more populist expression. Approximately one million Polish Catholics recently gathered to pray the rosary along the country's borders. described the event as a prayer for "Europe to remain Europe." Polish Catholics Gather at Border for Vast Rosary Prayer Event (2017).

[49] Boeve (April 2007), 205.

[50] Pope John Paul II, *Ecclesia in Europa* (2003), §19.

[51] *Ecclesia in Europa*, §7.

[52] *Ecclesia in Europa*, §§7, 19, 25; See also, Ratzinger and Pera (2007).

[53] *Ecclesia in Europa*, §19.

It might be that religion provides the best, perhaps the only, significant challenger to detraditionalization. Yet this Catholic project, whatever its attractiveness, is not going to stem the tide of cultural erosion. There will not be a return to a Christian order. The counter-forces are deeper and more elusive than the popes seemingly acknowledge. The problem is not primarily a shift of people away from traditional Christian beliefs, as if a sociological uptick in self-identified Christians could sustain the work of retraditionalization as the popes frame it. The problem is rather with how belief is experienced and enacted. Dominant patterns of belief undermine the very resources and practices that support tradition.

The most critical factor is the growing individualization of religious life in which, as Boeve notes, Christians have "distanced themselves from the Churches."[54] Deinstitutionalization, in this respect, is a component part of detraditionalization. Deinstitutionalization might include a number of related phenomena, ranging from the diminished authority of institutions to the withdrawal of persons from participating in communal practices.[55] At base, deinstitutionalization results in the meaning-seeking and meaning-creating individual being the primary the source of authority. Collective forms of identity, embodied in institutions, give sustaining life to tradition. Without them, there cannot in any meaningful sense be tradition. Tradition ceases to exist when the individual is the source of meaning. The anthropology of detraditionalization, in which the individual is elevated above collective meaning, mitigates against any attempt to reconstitute tradition.

Law does not cause deinstitutionalization, but it affirms and reinforces the process. Given this state of affairs, it is unsurprising that institutions are increasingly a main site of contest within law and religion debate. Whereas the most pitched debates used to concern matters of individual religious freedom, the focus in Europe and elsewhere has shifted to institutions and such questions as the ministerial exception and religious autonomy. These debates often arise in connection with conflicts between religious freedom and neutral generally applicable laws, such as employment or antidiscrimination statutes. It is often assumed that these tensions have arisen as a result of new flashpoints involving such matters as sexuality. Yet the debate is not simply about conflicts between religious freedom and equalitarian norms, but also the distinctive importance of institutions. Institutions have become so central because they are the vehicle by which communities sustain and transmit tradition. It is through institutions that collective meaning is given embodied expression. In the collective, the individual is made part of something larger than the self and made subject to a source of authority outside of the self. As such, tradition-forming institutions are likely to find themselves more engaged in legal disputes and ever more legally vulnerable.[56]

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[54] Boeve (2005), 104.

[55] The privatization of religion has been notably described by Grace Davie in terms of "believing without belonging." Davie (1990), 455–469.

[56] The European Court of Human Rights has addressed the issue of institutional religious freedom in a number of recent cases. On the whole, the Court has been generally protective of institutional religious freedom, though it has achieved this result more through a pragmatic balancing test than

In spite of these challenges, there is not a straight line that runs from detraditionalization to a legal assault on religious freedom. It is not infrequently asserted that there exists an anti-Christian bias working its way through law. George Carey, for instance, has criticized judges for allowing equalitarian claims to override individual religious freedom.[57] The trouble with such critiques is that they do not fully wrestle with the ways in which religious freedom is healthy and even expanding, particularly at the individual level.[58] This situation exists not in spite of, but because of, detraditionalization. After all, religion is an important means by which persons pursue meaning and define selfhood. Detraditionalization, by clearing away the obstacle of tradition, creates greater space within law for affirming such experiences. What is problematic within a detraditionalized environment is not religion as such, but forms of religion that interfere with the liberating impulse of detraditionalization. To put the matter simply, detraditionalization discriminates between types of religion. Just as former UK Prime Minister Tony Blair spoke of the "two faces of faith"—a framework that divides religion into good and bad forms—so too does detraditionalization draw lines between tolerably anodyne religion and world-forming religion.[59] It likewise distinguishes between individual forms of religion and collective forms of religion. There is a subtle violence to the encounter between religion and the dynamics of detraditionalization.

Detraditionalization manifests itself in ways that are not straightforward or predictable. The current legal environment is beset with complexities and contradictions. What detraditionalization does illuminate is a Europe increasingly defined by a legal impulse to push back against strong systems of meaning in individual, collective, and public forms. Yet, detraditionalization is not so much created by law but revealed through it. And while law is useful for examining the detraditionalization process, it might also be the case that law will become an increasingly marginal site of contestation.[60] Law pushes back against tradition and, in the process, relinquishes its authority as a source of tradition. Law might remain a guardian of detraditionalized social space, but legal wrangling with religion will be ever less important in defining the boundaries of this space.

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assertion of a strong legal principle. *Obst v. Germany*, App No 425/03, ECHR 2010; *Schüth v. Germany*, App 1620/03, ECHR 2010; *Siebenhaar v. Germany*, App. No. 18136/02 (2011); *Fernández Martínez v. Spain*, App. No. 56030/07 (2012).

[57] George Carey: time to say that Christians have rights too (2012).

[58] See, Calo (2014).

[59] On Tony Blair's talk of the "two faces of faith," see Shakman Hurd (2015), Chap. 2.

[60] One notable expression of this is the attention given by Christian thinkers to offer new ways of exercising faith in a world that increasingly lacks legal and cultural crutches. Rather than examining ways of retraditionalization the social order, through law, politics, or even culture, some thinkers have moved to thinking instead about ways to create and maintain community in a detraditionalized society. Talk of the Benedict Option, faithful presence, and Christians as a "creative minority," to name just a few examples, all offer programs for defining and sustaining community in a post-Christian environment. Dreher (2017). On the concept of faithful presence, see Hunter (2010). For Pope Benedict's discussion of Christians as "creative minorities," see "Europe and Its Discontents," *First Things* (January 2006).

As detraditionalization progresses, an important question will be whether a new tradition or traditions can fill the resulting void? Whether, and in what form, a detraditionalized society can endure is a related matter with which Europe must now wrestle. Must something replace the traditions that have been pushed aside?[61] Above all, what can hold Europe together? Can human rights, for instance, provide a source of collective moral meaning to replace religion?[62] Will the presence of Islam hasten detraditionalization, as it provides more fuel for the process, or stall the process by forcing Europe to wrestle with constructive approaches to accommodation? Detraditionalization does not answer these questions but helps to diagnose the sources of the current crisis in meaning and its implications for law and religion.

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[61] Boeve makes claim that, "Institutes cannot survive without common convications." Boeve (April 2007), 215.

[62] On the religious impulse within the human rights movement, see Hopgood (2006).

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