

# STATE-SUPPORTED DISPLAY OF RELIGIOUS SYMBOLS IN THE PUBLIC SPACE

SILVIO FERRARI<sup>†</sup>

## INTRODUCTION

In 1980, in *Stone v. Graham*, the United States Supreme Court held that displaying a plaque with the text of the Ten Commandments in Kentucky public schools violated the Establishment Clause.<sup>1</sup> Despite the fact that the plaque included a short inscription that highlighted the significance of the Ten Commandments as a foundation of the legal tradition of Western civilization and, in particular, of the United States, the Court concluded that the law authorizing the display was “plainly religious” and had “no secular legislative purpose.”<sup>2</sup> In 2011, in *Lautsi v. Italy*, the European Court of Human Rights (“ECtHR”) decided that displaying a crucifix in Italian public schools did not infringe Article 9 of the European Convention of Human Rights (the “Convention”) or Article 2 of the first Additional Protocol to the Convention.<sup>3</sup> The ECtHR reasoned that the crucifix was merely a “passive” religious symbol—an argument explicitly rejected by the United States Supreme Court in the *Stone* case—that had no “indoctrinating” effect on students.<sup>4</sup>

Should we say, then, reversing the title of a book by Peter Berger, Grace Davie, and Effie Fokas, “Religious Europe, Secular America”?<sup>5</sup> No, that statement would be inaccurate. The two labels do not reflect the complexity and variety of the case law of the two courts. Moreover, the cultural climates of Europe and

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<sup>†</sup> Professor of Law and Religion, University of Milan.

<sup>1</sup> 449 U.S. 39, 42–43 (1980).

<sup>2</sup> *Id.* at 41.

<sup>3</sup> *Lautsi v. Italy*, No. 30814/06, ¶ 78 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

<sup>4</sup> *Id.* ¶ 72.

<sup>5</sup> PETER BERGER ET AL., RELIGIOUS AMERICA, SECULAR EUROPE? A THEME AND VARIATIONS (2008).

the United States have profoundly changed in the thirty years separating *Stone* and *Lautsi*. The latest United States Supreme Court decisions on this subject—*Van Orden v. Perry*,<sup>6</sup> *Pleasant Grove City v. Summum*,<sup>7</sup> and *Salazar v. Buono*,<sup>8</sup>—are much closer to the judgment of the Grand Chamber of the ECtHR in *Lautsi*.<sup>9</sup> They show that “*La Revanche de Dieu*,” or “The Revenge of God,”—to quote another book, written by Gilles Kepel in the early 90s<sup>10</sup>—has found its way not only into public opinion but also courtrooms on both sides of the Atlantic.

In this Article I describe how complex the concept of the religious symbol is. In Part II, I argue that we must accept the inherent ambiguity of religious symbols because it is impossible, in most cases, to clearly distinguish symbols’ cultural and religious meanings. One must always consider at least two factors: the place where symbols are located and the context in which they are displayed. Next, in Part III, I argue that one must deconstruct the notion of “public space” in order to avoid applying the same standards to profoundly different realities, such as a square and a courtroom. Finally, in Part IV, addressing the issue of context, I conclude by defending the presence of a plurality of religious symbols in the public space. The neutrality of public institutions, I argue, may in fact be understood in an inclusive manner, making it possible to accept the presence of different religious symbols without having to mask their religious significance behind the screen of a country’s cultural tradition. Before doing all this, however, in Part I, I briefly discuss the reasons why religious symbols have become one of the “hottest” and most controversial issues in today’s political debate, and the strategies adopted by European countries in tackling this problem.

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<sup>6</sup> 545 U.S. 677 (2005).

<sup>7</sup> 555 U.S. 460 (2009).

<sup>8</sup> 559 U.S. 700 (2010).

<sup>9</sup> Frederick Mark Gedicks, *Undoing Neutrality? From Church-State Separation to Judeo-Christian Tolerance*, 46 WILLAMETTE L. REV. 691, 691–706 (2010) (highlighting the change in the Supreme Court’s jurisprudence).

<sup>10</sup> GILLES KEPEL, *LA REVANCHE DE DIEU: CHRÉTIENS, JUIFS ET MUSULMANS À LA RECONQUÊTE DU MONDE* (1991).

## I. RELIGIOUS SYMBOLS: GLOBAL PROBLEM AND LOCAL SOLUTIONS

Just a few examples are enough to show that the conflicts around religious symbols have acquired a global dimension and occur with equal intensity in countries with profoundly different cultural backgrounds, religious traditions, and political institutions. In 2006, the Supreme Court of Canada, in a judgment that has become famous, upheld the right of a Sikh student to wear a ritual dagger, or *kirpan*, at school.<sup>11</sup> In 2009, the Indian Supreme Court ruled on the legality of religious symbols on political campaign posters.<sup>12</sup> In the last thirty years, the display of the Ten Commandments and other religious symbols in public places has been the subject of numerous rulings in American courts.<sup>13</sup> In Turkey, the ban on female students wearing the Islamic headscarf in universities continues to be at the center of political and legal debate.<sup>14</sup> Two laws in France—one enacted in 2004 and the other in 2010—prohibited the wearing of conspicuous religious symbols at schools and the wearing of headscarves that cover the face in all public spaces, including streets. This was a provision clearly aimed at

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<sup>11</sup> See *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 256, para. 4 (Can.).

<sup>12</sup> Dhananjay Mahapatra, *Religion in Poll Symbols? We Can Do Nothing: SC*, TIMES OF INDIA (Mar. 24, 2009, 1:08 AM), [http://articles.timesofindia.indiatimes.com/2009-03-24/india/28046151\\_1\\_election-symbol-free-symbols-unrecognised-parties](http://articles.timesofindia.indiatimes.com/2009-03-24/india/28046151_1_election-symbol-free-symbols-unrecognised-parties).

<sup>13</sup> See, e.g., *Salazar*, 559 U.S. at 706–07 (2010); *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 850–51 (2005); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984); *Stone v. Graham*, 449 U.S. 39, 39–40 (1980).

<sup>14</sup> See John Witte, Jr. & Nina-Louisa Arold, *Lift High the Cross?: Contrasting the New European and American Cases on Religious Symbols on Government Property*, 25 EMORY INT'L L. REV. 5, 23–25 (2011).

preventing the use of the burqa and niqab.<sup>15</sup> In Italy, the display of crucifixes in classrooms has been the subject of two conflicting judgments by the ECtHR.<sup>16</sup>

It is not necessary to continue with examples. It is sufficiently clear that religious symbols have become a catalyst for conflicts generated by the new role that religions play in the public space. Contrary to the predictions of many observers, religions have gained prominence and visibility, becoming capable of mobilizing populations and attracting the interest of the media and broad swaths of public opinion.<sup>17</sup> Consequently, political use of religious symbols has increased, sometimes against the will of, but sometimes with the encouragement of, religious representatives themselves. In the squares of Cairo, the green flags of Islam are the sign of the political and social transformation of Egypt; in the cities of Tibet, the orange robes of Buddhist monks have become the icon of the struggle for independence; in Poland, the use of Catholic symbolism was a powerful weapon to overthrow the Communist regime. Even nations do not hesitate to use religious symbols for political purposes, sometimes with disastrous results: In the Balkan wars, the systematic destruction of the enemy's religious symbols ended a long tradition of peaceful interreligious coexistence.

Religious conflict, which is inherent in the political use of religious symbols, has been accentuated by increasing religious pluralism. Everywhere in the world, as a result of migratory flows, religious demographics are rapidly changing. Christianity is declining in the Middle East but is soaring in the Arabian Peninsula and in some Asian countries like South Korea. Europe

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<sup>15</sup> Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Prohibiting the Concealment of the Face in Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 11, 2011, p. 18344; Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 Regulating, in Accordance with the Principle of Secularism, the Wearing of Signs or Dress Manifesting a Religious Affiliation in Schools, Colleges and Public Schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 15, 2004, p. 5190.

<sup>16</sup> See *supra* text accompanying note 5; Lautsi v. Italy, No. 30814/06, ¶ 56 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

<sup>17</sup> See KEPEL, *supra* note 10; JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 3 (1994) (highlighting this trend approximately twenty years ago).

is home to an increasing number of Muslims. Latin America, which was completely Catholic until twenty years ago, now has a large Protestant population. People who do not identify with any religion make up more than twelve percent of the U.S. population and eighteen percent of the population in Europe.<sup>18</sup> These changes are not painless, and the tensions they cause easily affect religious symbols. Good examples of tensions include the attacks on Christian churches in Nigeria and India, and without getting to that level of violence, the difficulty of opening mosques in many European countries, and the ban on minarets in Switzerland.

The presence of religious symbols in the public space is therefore a global problem. But the strategies to address it are different. Although the problem is the same, each country makes use of the particular tools that are available in its arsenal of cultural and legal traditions. Broadly speaking, it is possible to identify three strategies with which European countries are trying to manage the issue of the state-supported display of religious symbols in the public space. The first option is to emphasize the secular character of the public space. France followed this path, first with the 1905 law on the separation of church and state and more recently with the two laws of 2004 and 2010.<sup>19</sup> These three laws mark a steady increase in the implementation of the principle of secularism. In 1905, public institutions were forbidden to display religious symbols;<sup>20</sup> in 2004, students were forbidden to enter public institutions wearing conspicuous religious symbols;<sup>21</sup> and, in 2010, this prohibition was extended—in reference to the burqa and niqab—

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<sup>18</sup> *National Profiles: United States (General)*, ASSOCIATION OF RELIGION DATA ARCHIVES, <http://www.thearda.com/internationalData/regions/index.asp> (last visited June 17, 2012).

<sup>19</sup> See Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat [Law of December 9, 1905 on the Separation of Church and State], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 19, 2011, art. 28; Loi 2010-1192 du 11 octobre 2010; Loi 2004-228 du 15 mars 2004; JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 18–19 (2007); Christian Joppke, Limits of Restricting Islam: The French Burqa Law of 2010 1 (Jan. 25, 2011) (unpublished manuscript), available at <http://www.unige.ch/ses/socio/rechepub/dejeuner/dejeuner2010-2011/chapter.burka2010.pdf>.

<sup>20</sup> Caitlin Killian, *From a Community of Believers to an Islam of the Heart: "Conspicuous" Symbols, Muslim Practices, and the Privatization of Religion in France*, 68 SOC. OF RELIGION 305, 308 (2007).

<sup>21</sup> *Id.* at 307–08.

to all public spaces, including streets and squares.<sup>22</sup> The prohibition of religious symbols, originally limited to public institutions, was extended first to people at public institutions—students at school—and later—only with reference to the burqa and niqab—to people in any public space whatsoever.<sup>23</sup>

The second strategy is to favor the dominant religion in a country. This strategy is exemplified by Italy's policy of displaying crucifixes in schools, courtrooms, and other public offices.<sup>24</sup> In this case, symbols of the dominant religion are considered part of the cultural identity of the nation and thus shielded from criticisms that they infringe on religious freedom and equality.

The third strategy is more complex. It prohibits public institutions from displaying religious symbols but allows public employees to wear them. This is the case, for example, in Great Britain, where courts, public schools, and police barracks do not display religious symbols, but teachers, judges, and police officers may wear them.<sup>25</sup> Albeit with conspicuous exceptions, notably those arising from the existence of a Church established by law, the dividing line runs between public institutions as such—which may not have religious characteristics—and the representatives of these institutions, who may manifest their religious beliefs through the wearing of symbols even when they are exercising their official functions.

Each of these models manifests the historical, cultural, and religious traditions of the country concerned; each, therefore, is not easily exportable to Nation States with different legal and political systems. This does not mean that each is equally

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<sup>22</sup> Steven Erlanger, *Parliament Moves France Closer to a Ban on Facial Veils*, N.Y. TIMES, July 14, 2010, at A6.

<sup>23</sup> Places of worship are the exception. See Olivia Bui-Xuan, *L'espace public: L'émergence d'une nouvelle catégorie juridique? [Public Space: The Emergence of a New Legal Category?]*, 27 REVUE FRANÇAISE DE DROIT ADMINISTRATIF [R.F.D.A.] 551, 551–59 (2011) (Fr.), available at <http://www.dalloz.fr/documentation/lien?famille=revues&doctype=RFDA/CHRON/2011/0123>.

<sup>24</sup> See Lauso Zagato, *La «saga» dell'esposizione del crocifisso nelle aule: simbolo passivo o spia di un (drammatico) mutamento di paradigma?*, in DEMOCRAZIE E RELIGIONI: LA SFIDA DEGLI INCOMPATIBILI? 169–93 (Mario Ruggenini et al. eds., 2011). See generally EDOARDO DIENI ET AL., I SIMBOLI RELIGIOSI TRA DIRITTO E CULTURE (Edoardo Dieni et al. eds., 2006).

<sup>25</sup> See generally Silvio Ferrari, *Religion in the European Public Spaces: A Legal Overview*, in RELIGION IN PUBLIC SPACES: A EUROPEAN PERSPECTIVE (Silvio Ferrari & Sabrina Pastorelli eds., 2012).

respectful of religious freedom and equality such that each can be defended by invoking the “margin of appreciation” that the ECtHR case law grants member states.<sup>26</sup> As reiterated by the ECtHR in the *Lautsi* case, the existence of a “margin of appreciation” does not exempt states from complying with the Convention’s rules on religious freedom and equality.<sup>27</sup> Therefore, it is necessary to examine the particular solutions that each country has adopted with reference to state-supported religious displays in order to assess the compatibility of those solutions with the provisions of the Convention. This examination, however, cannot be performed without a few preliminary remarks on the nature of religious symbols.

## II. THE UNAVOIDABLE AMBIGUITY OF SYMBOLS

By nature, a symbol is a complex reality embodying a plurality of meanings. It is almost never the case that a symbol—a cross, a veil, a kippa, etcetera—has a single meaning that can be ascertained in objective terms. A symbol carries a plurality of meanings that, on a case-by-case basis, depend both on the person who displays the symbol and the person who views it. It is possible to illustrate this point with a short example. Imagine a woman who walks the streets of a city wearing a veil. Passers-by observe her. One of them understands the veil as a religious symbol, another as the sign of the subjugation of women to male power, a third as an ornament that emphasizes the beauty of the female face. One of the passers-by, more curious than the others, asks her why she wears the veil. The woman answers that she wears it because she comes from a family where women have always worn the veil, that she chose a green veil because green is the color of Islam and also, she adds with a smile, because it matches the green color of her eyes.

This simple narrative shows that symbols are intrinsically polysemic.<sup>28</sup> The hammer and sickle are not only two tools for work but the symbol of an ideology and a political party; the Star

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<sup>26</sup> See ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012) (discussing the margin of appreciation).

<sup>27</sup> *Lautsi v. Italy*, No. 30814/06, ¶ 68 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

<sup>28</sup> See Luigi Lombardi Vallauri, *Simboli e realizzazione*, in EDOARDO DIENI ET AL., SYMBOLON/DIABOLON: SIMBOLI, RELIGIONI, DIRITTI, NELL’EUROPA MULTICULTURALE, 13, 13–36 (2005).

of David is not only two interlaced triangles, but the symbol of a State. When it becomes a symbol, an object or a sign adds to its original meaning another meaning, derived from the new reality that is expressed by the symbol. To repeat what I said a moment ago, a symbol that is commonly defined as religious—a cross, a veil, a kippa—almost never has only a religious meaning, but rather, brings with it a variety of meanings that depend, on a case-by-case basis, both on the person who wears or displays the symbol and the person who observes it.

In other words, the unavoidable ambiguity of a symbol has an internal and an external dimension. Starting with the latter, a symbol may acquire different meanings according to the viewer's perception, as shown by the reactions of passers-by to the woman who wears the veil. These different perceptions are not irrelevant from a legal point of view. If the veil is seen as a religious symbol, it is protected by laws on the freedom to manifest religion or belief; if the veil is seen as the symbol of female subjugation, it is condemned by the laws that prohibit discrimination based on sex. But how should a court ascertain, in a specific case, whether a veil is worn freely, as a matter of religious choice, or by imposition of the husband, the father, or the brothers? This question brings us to the second dimension of ambiguity, which concerns the person who herself wears or displays the symbol. A woman can wear a cross around her neck for ornamental reasons, religious reasons, or both; that is, she may wear it because the cross has a shape that is particularly well suited to the cut of her dress, or because the cross manifests her Christian faith, or for both reasons. If worn in a workplace, where it is forbidden to wear religious symbols, a cross could pose problems, but how should a court determine, in each particular case, whether the cross is worn for aesthetic or religious reasons?

By asking these questions I want to make clear that any investigation of the meaning of a symbol—to determine whether it is religious, cultural, ethnic, political, and so on—inevitably leads to an examination of the intentions of the person who displays it and the perceptions of those who are exposed to it. This twofold aspect of the problem—expressed by the duality of intention and perception—has not escaped the attention of legal commentators. For example, Adam Linkner, analyzing the

United States case, *Salazar v. Buono*,<sup>29</sup> addressed the issue of state-supported displays of religious symbols through a two-part test. The first, which is defined as “the inside perspective,” aims at examining whether “the predominant purpose or intent of a government action is to promote religion,” and the second, the “outside perspective,” consists of examining whether, to a hypothetical reasonable observer, “the effect of the government’s conduct appears to endorse religion.”<sup>30</sup> Linkner’s suggestion is interesting, but it does not solve the difficulties lawyers encounter when they attempt an inevitably subjective analysis of intentions and perceptions.<sup>31</sup> Law, in fact, has few tools to investigate what canonists call the *forum internum*, i.e. the conscience or mind, a problem that emerged clearly a few years ago in connection with the attempt to regulate the so-called new religious movements.<sup>32</sup>

The inability of law to understand, distinguish, and regulate the multiple meanings of symbols often generates a sense of frustration that results in two opposite responses. The first is simply to give up addressing the problem in legal terms in favor of an exclusively political solution. The clearest example of this attitude comes from Switzerland, where citizens went to the polls to decide whether Muslims had the right to build minarets.<sup>33</sup> This response—an apparently blameless call for democracy—in fact, hides rather an unacceptable abdication of law: One cannot legitimately submit the freedom of religion to a majority decision

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<sup>29</sup> 559 U.S. 700 (2010).

<sup>30</sup> Adam Linkner, *How Salazar v. Buono Synthesizes the Supreme Court’s Establishment Clause Precedent into a Single Test*, 25 EMORY INT’L L. REV. 57, 59 (2011).

<sup>31</sup> In *Salazar*, two Justices reached opposite conclusions about a cross on public land, using the same “reasonable observer” test. For one (Justice Stevens), the cross would have been seen by this hypothetical observer as “government endorsement of religion”; for the other (Justice Alito), as a “commemoration of those who died in World War I.” *Id.* at 68–69.

<sup>32</sup> See generally James T. Richardson, *Regulating Religion: A Sociological and Historical Introduction*, in REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 1, 1–20 (James T. Richardson ed., 2004) (discussing the issue of “new religious movements”). It is not a coincidence that the states (Belgium and France), that a few years ago passed laws against the “new religious movements,” are the same ones that have now adopted laws banning the burqa niqab. See ALESSANDRO FERRARI & SABRINA PASTORELLI, THE BURQA AFFAIR ACROSS EUROPE: BETWEEN PUBLIC AND PRIVATE SPACE (2013).

<sup>33</sup> See generally, Marcel Stüssi, *Banning of Minarets: Addressing the Validity of a Controversial Swiss Popular Initiative*, 3 RELIGION & HUM. RTS 135 (2008); Ferrari, *supra* note 25.

as if fundamental rights of the human person could be put to a vote. The second response is the opposite of the first: to solve the problem in authoritarian terms, establishing once and for all what is the “authentic” meaning of a symbol. The most obvious manifestation of this tendency is found in the French Constitutional Council’s decision upholding the law prohibiting the wearing of the burqa and niqab in all public places. The Council’s decision states that women’s self-determination is irrelevant. Even if the decision to wear this garment is made in a free and conscious way, the Council stated, women are in an objective “situation of exclusion and inferiority patently incompatible with constitutional principles of liberty and equality.”<sup>34</sup> That is, the Council assumed that the burqa and niqab is, always and everywhere, a symbol of women’s marginalization and inferiority, and ignored the possibility that the garment can also have other meanings. This conclusion is clearly unacceptable. But the opposite attitude, characterized by the resigned abdication to the role of law, is also unsatisfactory. It opens the way for the “law of the strongest,” which in turn can be the parents who force their daughter to wear the full veil when leaving the house or the majority of the citizens of a State that democratically decide to ban the construction of minarets.

This unsatisfactory choice between abstention and intervention cannot be avoided through an analysis focused exclusively on the religious or cultural significance of symbols because, as we have seen, the same symbol can have different meanings for different people and sometimes even for the same person. For example, the Italian courts’ insistence on the exclusively cultural significance of the classroom crucifix is the most unsatisfactory element of their reasoning on the question.<sup>35</sup> Apart from the implausible results to which this insistence leads,<sup>36</sup> a cultural defense of the crucifix implicitly devalues its religious significance and, indirectly, endorses the principle that a symbol can be displayed in a public institution only if the

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<sup>34</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. 1, 1 (Fr.).

<sup>35</sup> See the contributions of Jlia Pasquali Cerioli, Claudio Martinelli, and Nicola Fiorita published in DIENI ET AL., *supra* note 24. On the latest developments, see Zagato, *supra* note 24.

<sup>36</sup> See Andrew Koppelman, *The New American Civil Religion: Lessons for Italy*, 41 GEO. WASH. INT'L L. REV. 861, 872 (2010) (“The claim that the crucified Christ simply stands for civic values is one that cannot be made with a straight face.”).

symbol has no religious character. Before accepting this conclusion, which a little paradoxically coincides with that of the strongest supporters of state secularism, I believe it is appropriate to take into account whether the examination of the religious or cultural meaning of a symbol should not be accompanied by a consideration of the place where the symbol is displayed. This second line of inquiry leads us to consider the notion of the public space.<sup>37</sup>

### III. DECONSTRUCTING THE PUBLIC SPACE?

A few years ago, Jürgen Habermas proposed a distinction between the political and institutional public sphere.<sup>38</sup> The first of these, the political sphere, is the space of debate and discussion where the public discourse takes shape. It should not be understood only as a space of intellectual “argumentation about the truth value of propositions,” but more broadly as “a realm of creativity and social imaginaries in which citizens give shared form to their lives together, a realm of exploration, experiment, and partial agreements.”<sup>39</sup> In Robert Cover’s words, it is the space where new “normative worlds” take shape.<sup>40</sup> It can be a metaphorical—mass media, internet, etcetera—as well as a physical space—a political rally in a square, for example. In order to perform its creative function, the political space should be free and pluralistic: The visible presence of different religions and beliefs in this area is indispensable for the pluralism on which a democratic society is based.<sup>41</sup>

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<sup>37</sup> See generally Ferrari, *supra* note 25.

<sup>38</sup> Jürgen Habermas, *Religion in the Public Sphere*, 14 EUR. J. PHIL. 1, 1–25 (2006). See Philippe Portier, *Religion and Democracy in the Thought of Jürgen Habermas*, 48 SOC’Y 426, 426–32 (2011).

<sup>39</sup> JUDITH BUTLER ET AL., THE POWER OF RELIGION IN THE PUBLIC SPHERE 129 (Eduardo Mendieta & Jonathan VanAntwerpen eds., 2011).

<sup>40</sup> Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (arguing that every person lives in a normative universe that is defined as “a world of right and wrong, of lawful and unlawful, of valid and void”). Religious communities are a good example of these normative worlds: They are places where new legal meanings are created through the personal commitment of the community members, who apply their will to transform the “extant state of affairs” according to their “visions of alternative futures.” *Id.* at 9.

<sup>41</sup> See Metro. Church of Bessarabia v. Moldova, No. 45701/99, ¶ 114 (Eur. Ct. H.R. Dec. 14, 2001), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59985>.

The institutional public space, by contrast, is the place where coercive deliberations, compulsory for all, take place—parliament, the law courts, public administration, etcetera. It is not only the space of debate and discussion, but also the space for decisions that, once taken, have to be respected by everybody.<sup>42</sup> The law court is not a television talk show. One does not go to court to have a nice chat with a judge. One goes there to obtain an enforceable judgment about who is right and who is wrong. In order to gain the general respect and recognition that is required for the enforcement of such binding decisions, the institutional public space must not only be, but must also be seen to be, fair and impartial.

A public—that is state—school provides a good testing ground for understanding the differences and also the similarities between the political and institutional space. A school is primarily a space of the first type, where a process of communication and exchange between individuals with different conceptions and life experiences takes place. From this point of view, it is essential to ensure freedom of expression and the plurality of experiences. The prohibition of wearing religious symbols at school, which is in force in some European countries, affects negatively the role performed by this political space in a plural society: It limits the students' freedom to manifest their religion and can be justified only on the ground of the protection of a legitimate and pressing social need that must be assessed case by case.<sup>43</sup> But a public school is at the same time an institutional space, which must be characterized by neutrality towards different religious—or non-religious—convictions, both of students and teachers. From this point of view, the compulsory display of a religious symbol—for example, a crucifix—can be problematic, as it indicates the public institution's preference for a specific religion.

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<sup>42</sup> Dominique Wolton writes that in this space—he calls it “political space,” but it corresponds to what I call “institutional space”—“il ne s’agit ni de discuter ni de délibérer, mais de décider et d’agir.” Dominique Wolton, *Espace Public*, DOMINIQUE WOLTON, <http://www.wolton.cnrs.fr/spip.php?article67> (last visited Sept. 15, 2013).

<sup>43</sup> For this reason, the rules that were in force in France before 2004, when the school principal had the power to prevent students from wearing religious symbols if they caused an actual perturbation of the school life, were more in line with the approach supported in the text than the present rule, based on a general prohibition.

Of course, these two spheres—political and institutional—are not strictly separated. In many cases they coexist and overlap: A parliament is a place of debate and decision-making at the same time. Keeping in mind this caveat, the distinction proposed by Habermas has the merit of emphasizing that the place where a religious symbol is displayed is not irrelevant. A crucifix hung on the wall of a courtroom is one thing; a crucifix that stands in the corner of a square is another. Even if the state sponsors both, the difference remains. In the first case, the presence of the crucifix may suggest that the administration of justice is not impartial because it is influenced by the tenets of a religion. In the second, this danger does not exist. In the first case, a person who wants to receive justice is obliged to go to a courtroom where the crucifix is displayed; in the second, a person can change his or her path and avoid crossing the square where the crucifix is placed if he or she does not want to see it.

However, it is not only a matter of space. The individuals who inhabit the space act in different capacities. A public school, for example, is attended both by students and teachers, but only the latter are state employees. Students and teachers share the same space but act in a different capacity. Therefore, the degree of freedom that is granted to students may be greater than that accorded to teachers. For example, in many European countries students can wear religious symbols that teachers are not allowed to wear because the teachers represent a public institution.<sup>44</sup> The religious symbol is the same, but the position of the person who wears it is different: As a consequence, limitations that are unacceptable in one case can be legitimate in the other.

These remarks lead to a conclusion: The legitimacy of a religious symbol displayed in public institutions, or by individuals who represent these institutions, must be subject to a standard more rigorous than that applied to a religious symbol

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<sup>44</sup> This point was made by the European Court of Human Rights in the case *Dahlab v. Switzerland*, where a teacher wanted to wear an Islamic headscarf at school, and the Court decided that “[a]s a civil servant, she represented the State; on that account, her conduct should not suggest that the State identified itself with one religion rather than another.” *Dahlab v. Switzerland*, No. 42393/98, at 9 (Eur. Ct. H.R. Feb. 15, 2001), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643>; see also *Kurtulmus v. Turkey*, No. 65500/01 (Eur. Ct. H.R. Jan. 24, 2006), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88325>.

displayed outside public institutions or by individuals who act in a personal capacity. All things being equal, the cultural significance of a religious symbol can be accepted more easily in the second case. In the first case, the connection between religion and state is closer, and the risk that the display of the symbol will be perceived as state support to religion is higher. Therefore, the insider/outsider test proposed by Linkner should be combined with another test aimed at evaluating the characteristics of the place where the symbol is displayed and the individual who displays it. In this way the excess of subjectivism that characterizes the insider/outsider test is corrected by the reference to an element—the political or institutional character of public space—that can be evaluated in more objective terms.

#### IV. THE PLURALITY OF THE INSTITUTIONAL SPACE: A PATH TO EXPLORE?

The arguments I have developed so far seem to go in the following direction: Political public space should be pluralistic, and therefore open to religious symbols, while institutional public space should be neutral, and therefore exclude the presence of these symbols. In reality, this is not my conclusion. I believe that in some cases the neutrality that must characterize the institutional public space requires the exclusion of religious symbols, but I think that in other cases the same neutrality can be ensured by the inclusion of a number of different religious symbols in that space. The difference depends on the context in which the religious symbol is placed. At least implicitly, the context is taken into account in many decisions of the United States Supreme Court, which has repeatedly drawn a distinction between situations in which government supports the display of a specific religious symbol and those in which government supports the display of the symbols of different religious as well as non-religious conceptions of life and the world. In the latter situation, it is more difficult to understand the government's support as an endorsement of a particular religion or even religion in general. The context plays a less pronounced role in the case law of the Strasbourg Court and of the national courts in Europe, where the main issue is the right of the state and other public authorities to display the symbol of a particular religion in public institutions. Nevertheless, I believe that the attempt to

guarantee the neutrality of the institutional space by including a number of religious and non-religious symbols should not be discarded *a priori*.

Let me start with an easy case, a teacher in a public school. In a public school where teachers are allowed to wear the symbols of their religion—the Christian cross, the Jewish kippa, the Islamic veil, the Sikh turban, etcetera—the neutrality of the institution is no less guaranteed than in a public school where teachers are forbidden to wear these symbols. One could even argue that, in the first case, neutrality is better assured because the school mirrors the plurality of conceptions of life and the world that students find outside the school space. This example shows that the neutrality of a public institution may be guaranteed through inclusion, and not only through exclusion, by allowing a plurality of religious and non-religious symbols and not by excluding them all.

To be sure, it is not always easy to follow this path. The display of the crucifix in the classrooms of public schools indicates the problems that may arise. I did not like the first decision of the ECtHR in the *Lautsi* case, which required removal of the crucifix from Italian schools, and I equally disliked the second decision, which confirmed the right to display the symbol of one religion only.<sup>45</sup> Both judgments are affected, in my opinion, by the same shortcoming. They fail to consider the views of the people—students, teachers, non-teaching staff—who live in the school: Their opinion is considered insignificant. This binary logic, based on the alternative between elimination of all religious symbols and display of the symbol of the majority religion only, cannot work anymore in a country like Italy, which is becoming religiously pluralistic. In this setting, all the persons who, in different capacities, attend the school must be involved in the decision-making process. It is not impossible: Something similar has already been done in relation to the celebration of religious festivities. Today, not only Christmas but also the end of Ramadan and other religious holidays are celebrated in Italian schools. It is not something unheard of: Mechanisms of

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<sup>45</sup> *Lautsi v. Italy*, No. 30814/06, ¶ 57 (Eur. Ct. H.R. Nov. 3, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95589> (referred to the Grand Chamber on March 1, 2010); *Lautsi v. Italy*, No. 30814/06, ¶ 76 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

consultation about the display of the crucifix are already in place in some European countries, such as Romania,<sup>46</sup> and in some German Länder, such as Bavaria.<sup>47</sup> It may be that, at the end of this consultation process, it will still be impossible to reach a mutually agreed solution: In that case, a choice will be required between the application of the majority rule and the recourse to neutrality by exclusion, that is, by banning all religious symbols from schools. But even when a shared decision cannot be reached, consultation and dialogue are not a wasted effort. Through them, the issue of religious symbols becomes part of the educational process. The display of a religious symbol in the classroom is discussed and, whatever decision is taken at the end of the debate, people are compelled to accept their responsibilities. In this way, the crucifix—or another religious symbol—is no longer perceived as something obvious and irrelevant, as is frequently the case when its display follows from a legal command and not the informed decision of the stakeholders.

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<sup>46</sup> See generally Gizela Horváth & Rozália Bakó, *Religious Icons in Romanian Schools: Text and Context*, 8 J. FOR STUDY RELIGIONS & IDEOLOGIES 189 (2009) (discussing the display of religious symbols in the Romanian schools). The Romanian Supreme Court decided in 2008 and 2009 that the display of religious symbols, although not mandatory, is legitimate. The decision is up to the parties involved at the local level.

<sup>47</sup> See Tobias Lock, *Of Crucifixes and Headscarves: Religious Symbols in German Schools*, in LAW, RELIGIOUS FREEDOMS AND EDUCATION IN EUROPE 347, 352 (Myriam Hunter-Henin ed., 2011).