

THE UNAVAILABILITY OF RELIGIOUS ARGUMENTS

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ABSTRACT

Religious arguments, i.e. normative arguments that rely on premises regarding God's commands, routinely figure in legal and public debates. For example, they recently played a public role in the debate on same-sex marriage that ensued after the Supreme Court's decision in Obergefell v. Hodges. However, philosophers are bitterly divided on the question of whether such arguments are permissible in a liberal democracy. In this Article, I offer a novel rationale for excluding several prominent sub-groups of religious arguments from the public sphere, including from legal argumentation. While most philosophers address this issue as a question of political philosophy, I develop an account of religious arguments that draws on theories of practical reasoning. The Article argues that, appearances notwithstanding, many types of religious arguments do not provide standard, run-of-the-mill reasons for action in the same way that (for example) utilitarian or deontological arguments do. In fact, when examined closely, they are revealed to be internally incoherent. The Article thus shifts attention away from political philosophy, where both parties to the debate on religious argumentation have found inconclusive support for their positions, and focuses instead on practical reasoning theories. Analyzing religious arguments in this way shows that there is a fundamental tension between religious argumentation and the way we conduct practical and legal reasoning. This tension makes it hard to take religious arguments seriously qua arguments and consider them in a political or legal scenario. The upshot is that many religious arguments are revealed to be internally incoherent, and therefore unavailable to participants in legal and policy discussions.

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I. INTRODUCTION

Imagine that a supervisor in the Kentucky Ministry of Education one day decides that all public schools in her jurisdiction must openly exhibit a copy of the Ten Commandments on the wall of each classroom. Assume that the relevant state rules do not conclusively specify the considerations the supervisor may rely upon when making regulatory decisions in these circumstances. When pressed for the reasoning behind her decision, the supervisor explains that according to her Christian faith, she is under a divine duty to do all she can so that children under her supervision learn the Ten Commandments by heart.¹ Is such a decision justified in a liberal democracy? Note that in answering this question, we may not simply allude to the fact that the religious supervisor's reasoning is in tension with the Establishment Clause.² The reason for this is that this response relies on a constitutional norm that is specific to the United States but may not apply elsewhere (in Europe, for example).³ Relying on the Establishment Clause thus leaves the more basic question unanswered: is there something other than a contingent legal rule (albeit a constitutional one) that explains the fundamental problem with the religious supervisor's decision?⁴

Most theorists address this issue as a question of political philosophy. They ask whether citizens in a liberal democracy owe a “duty of civility” towards others and argue about whether such a duty prevents citizens with religious outlooks from advancing theological arguments.⁵ In this Article, I offer a different view, based on an account of religious arguments that draws on theories of practical reasoning. My argument challenges a common assumption both sides to the debate make, namely that religious arguments provide standard, run-of-the-mill reasons for action in the same way that (for example) utilitarian or deontological arguments do. I show that many (though not necessarily all) religious arguments are in fact *internally incoherent*, and therefore do not really support any concrete policy or outcome.

1. See *Stone v. Graham*, 449 U.S. 39, 40–42 (1980). In *Stone*, the Court struck down a statute that required the posting of the Ten Commandments in public classrooms because it lacked a nonreligious legislative purpose and was therefore in violation of the Establishment Clause. *Id.* at 42–43.

2. *Id.* at 42.

3. See, e.g., *Lautsi v. Italy*, 54 Eur. Ct. H.R. 60 (2011) (where the European Court of Human Rights upheld a decision to fix a crucifix to the wall of each public-school classroom in Italy); Perry Dane, *Foreword: On Religious Constitutionalism*, 16 RUT. J.L. & REL. 460 (2015); see generally Andrea Pin, *Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State*, 25 EMORY INT'L L. REV. 95 (2011).

4. On the unique encounter between law and religion in such settings, see Perry Dane, *Master Metaphors and Double-Coding*, 53 SAN DIEGO. L. REV. 53 (2016).

5. See *infra* Section III.A.

This conclusion bears on legal reasoning in a particular way, specifically by limiting the forms of discourse that may permissibly be used in constitutional adjudication. I thus propose a unique constraint on the establishment of religion: whatever else the state may or may not *do* in matters of church and state, I maintain that there is a certain manner of *reasoning* it may not employ. This constraint derives from practical reasoning—religious arguments are disqualified not because they breach a “duty of civility,” but because they are lacking *as arguments*. This conclusion should thus stand on its own, regardless of whether or not one accepts the controversial philosophical thesis of “public reason,” i.e. the idea that some forms of reasoning do not respect secular citizens and should, therefore, be banned.

The upshot is that religious adherents cannot ground their legal claims by alluding to religious arguments. This is an important restriction, as many religious followers express their views in exactly this way, and theorists have struggled to explain why such claims cannot receive substantial legal weight. The Article offers a new rationale for explaining a key feature of modern constitutional adjudication, as I show below.

The argument proceeds as follows: in Section II, I make several observations about the scope of the argument and the terms used in the Article. Sections III–IV then offer my central thesis: Section III develops a justification for excluding religious justifications, based on theories of practical reasoning; and Section IV shows that while religious arguments are defined rather narrowly throughout the discussion, the justification for excluding them applies to other major cases of religious argumentation. If this thesis is plausible, then many (though not all) religious arguments ought to be excluded from the public sphere, for reasons that have more to do with practical reasoning than with a duty of civility. I have no remaining complaints against religious arguments that survive my criticism. Section V explores how my thesis bears on legal reasoning: I argue that my view leads to a restriction on introducing religious arguments in constitutional adjudication. A short conclusion follows.

II. SCOPE AND PRELIMINARY COMMENTS

This section sets the stage for the philosophical argument that is presented below. First, note that one may plausibly consider vastly different types of arguments as “religious,” and it would be unwise to oversimplify matters by assuming that all religious arguments are alike.⁶ To avoid making ungrounded assumptions, I employ a piecemeal approach—I start by identifying a group of examples that clearly fall under most plausible definitions of the term, and use this group as a rough first estimate of what a religious argument is. The discussion (up until section IV) thus concentrates on arguments for a specific outcome that rest on *assumptions about God’s commands*, as understood by the Scriptures or through

6. See generally KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988) [hereinafter GREENAWALT, *RELIGIOUS CONVICTIONS*]; Jeremy Waldron, *Two-Way Translation: The Ethics of Engaging with Religious Contributions in Public Deliberation*, 63 *MERCER L. REV.* 845 (2012); ROBERT AUDI, *RATIONALITY AND RELIGIOUS COMMITMENT* (2011) [hereinafter AUDI, *RATIONALITY AND RELIGIOUS COMMITMENT*]; Andrew F. March, *Rethinking Religious Reasons in Public Justification*, 107 *AM. POL. SCI. REV.* 523 (2013).

interpretation of other religiously significant documents.⁷ In the cases I am interested in, God's commands both constitute and exhaust our reasons for action, and settle our practical dilemmas completely—they "throw the last stone," as William James has put it.⁸

It should be noted that this type of argument is of central importance in law, religion, and morality. First, it is historically quite popular among the three Western religions.⁹ Modern philosophers of religion have also claimed that variants of this view underlie the belief structure of most of Western theology.¹⁰ Second, it is also closely related to a moral theory known as Divine Command Morality ("DCM").¹¹ DCM scholars all agree that there are no moral standards other than God's will: without God's commands, nothing would be right or wrong.¹² Finally, this position is regularly brought up in public debates (though it is far from the only argument religious citizens rely on). For example, both the majority and minority opinions in *Obergefell v. Hodges* note that religious claims of this sort animate much of the controversy regarding same-sex marriage, as many opponents of same-sex marriage believe that this practice is a sin against God.¹³ Therefore, to the extent that my argument works, it is directly relevant to many actual theological positions.

7. See CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS 71 (2002); Daniel Statman & Gideon Sapir, *Is a Liberal State Permitted to Act on the Basis of Religious Arguments*, 25 MECHKAREI MISHPAT 599 (2009) (Hebrew) [hereinafter Statman & Sapir, *Religious Arguments*]; DANIEL STATMAN & GIDEON SAPIR, STATE AND RELIGION IN ISRAEL: A PHILOSOPHICAL-LEGAL INQUIRY 66–68 (2014) (Hebrew) [hereinafter STATMAN & SAPIR, STATE AND RELIGION IN ISRAEL].

8. WILLIAM JAMES, THE WILL TO BELIEVE, HUMAN IMMORTALITY, AND OTHER ESSAYS IN POPULAR PHILOSOPHY (1956).

9. In Christianity, they are attributed to Duns Scotus, William of Ockham, Martin Luther, John Calvin, and possibly John Locke and William Paley, to name a few. In Islam, they form the theological basis for the influential Ash'ari school, and they have also been accepted, to some degree, by prominent Jewish thinkers throughout history: Rabbi Ovadiah of Bertinoro, Rabbi Zvi Hirsch Levin, Rabbi Abraham Isaiah Karelitz ("Hazon Ish"), Rabbi Abraham Isaac Kook, Yeshayahu Leibowitz, Immanuel Jakobovits, Marvin Fox and Aharon Lichtenstein. See generally, John Hare, *Religion and Morality*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE, <http://plato.stanford.edu/archives/spr2014/entries/religion-morality/> (last modified Oct. 1, 2010); Thomas M. Osborne Jr., *Ockham as a Divine-Command Theorist*, 41 RELIGIOUS STUD. 1 (2005); George F. Hourani, *Two Theories of Value in Medieval Islam*, 50 MUSLIM WORLD 269 (1960); Richard M. Frank, *Moral Obligation in Classical Muslim Theology*, 11 J. RELIGIOUS ETHICS 204 (1983); Steffen A.J. Stelzer, *Ethics*, in 161 THE CAMBRIDGE COMPANION TO CLASSICAL ISLAMIC THEOLOGY (Tim Winter ed. 2008); MARIAM AL-ATTAR, ISLAMIC ETHICS: DIVINE COMMAND THEORY IN ARABO-ISLAMIC THOUGHT (2010); see also MICHAEL J. HARRIS, DIVINE COMMAND ETHICS: JEWISH AND CHRISTIAN PERSPECTIVES 36–50, 110–20 (2003).

10. See generally J.L. Schellenberg, *Prolegomena to a Philosophy of Religion*, 66 INT'L J. PHIL. RELIGION 113 (2009).

11. See, e.g., Hare, *supra* note 9; DIVINE COMMANDS AND MORALITY (Paul Helm, ed., Oxford University Press 1981); Thomas V. Morris & Christopher Menzel, *Absolute Creation*, 23 AM. PHIL. Q. 353 (1986); AVI SAGI & DANIEL STATMAN, RELIGION AND MORALITY (1995) [hereinafter SAGI & STATMAN, RELIGION AND MORALITY]; PAUL ROONEY, DIVINE COMMAND MORALITY (1996); Mark C. Murphy, *Divine Command, Divine Will, and Moral Obligation*, 15 FAITH AND PHIL. 3 (1998); ROBERT MERRIHEW ADAMS, FINITE AND INFINITE GOODS: A FRAMEWORK FOR ETHICS (2002); JOHN E. HARE, GOD AND MORALITY: A PHILOSOPHICAL HISTORY (2007).

12. See note 11 and accompanying text.

13. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Justice Kennedy, writing for the Court: "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises . . ." *Id.* at 2602; Chief Justice Roberts, dissenting: "Many good and decent people oppose same-sex marriage as a tenet of faith." *Id.* at 2625 (Roberts, C.J., dissenting); see generally Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015).

With that, I do not argue that this sub-group of cases represents the common structure of religious arguments—it stands on its own as a unique variant of religious discourse that does not typify other theological positions. I only argue that my chosen sub-group of cases is paradigmatically religious; and that arguments of this kind *do actually* get brought up in public debates. Section IV generalizes these assertions by making similar claims regarding other sub-groups of religious argumentation, e.g. arguments in which God acts as an epistemic authority, and arguments in which other, independent normative factors may outweigh God's commands.

Restricting ourselves to arguments that refer to divine commands in this way limits the scope of the thesis in several respects. First, I presuppose a Western conception of religion, and a particular view of the connection between religion and God. Therefore, the argument does not apply to religions that operate differently (i.e. Buddhism). Second, I assume that a religious argument is a practical argument that has religious content. Third, I am not concerned with arguments from religious feelings or from autonomy, since such justifications are really straightforward arguments from moral or legal rights. Lastly, throughout the discussion, I assume a “clean case” of religious argumentation: a scenario in which an agent only offers a single, religious justification for action. I assume that only after we understand them in their “pure” form can we decide how to treat religious arguments when we encounter them in practice. Thus, if they truly are incoherent, they should just drop out of the argumentative equation. When this happens, it might be the case that other reasons for action that support the same outcome as the discarded religious argument are strong enough to win the day on their own, but that is largely immaterial for this investigation.

The second major term I use throughout the discussion, “public sphere,” denotes the space in which we generally use arguments for and against the application of organized state power by government officials, through the various mechanisms the state operates. The Kentucky example discussed above is a good example of such a case. I do not examine whether it is permissible for a private citizen to rely on religious arguments in private matters, or for a legislator to vote on a piece of legislation based on preferences alone, though the argument does apply to private citizens debating questions of public policy, as well to the judiciary.

III. A PROPOSED RATIONALE FOR EXCLUDING RELIGIOUS ARGUMENTS

The problem of religious argumentation has received two distinct answers. The first view (“The Exclusion Approach”) holds that it is impermissible to use religious justification to ground state action.¹⁴ Theorists who take the opposing position (“The Inclusion Approach”) try to show that there is nothing wrong with using religious arguments in the public sphere.¹⁵

14. See *infra* Section III.A.

15. See *infra* Section III.A.

A. The Political Rationale for Excluding Religious Argumentation

The argument for the exclusion approach usually starts with the assumption that a liberal state should respect its citizens' autonomy.¹⁶ This obligation entails that we should only use state power according to reasons that are in line with what Kant, and Rawls after him, called "public reason."¹⁷ More recently, philosophers tend to put this point in terms of a "duty of civility" that each citizen has towards her fellow citizens.¹⁸ This duty restricts the types of justification that one can offer in public matters, sometimes to the point of excluding some or all religious arguments.¹⁹ Obviously, the first major concern for the exclusion approach is to explain exactly why civility requires that we refrain from using religious arguments. For this purpose, exclusionists usually introduce a principle (an "exclusion principle") that performs three tasks:

- (1) It identifies a certain attribute, or group of attributes that arguments usually have, and maintains that they are essential for all acceptable arguments in the public sphere;
- (2) It explains why these attributes are of fundamental importance;
- (3) It shows that some arguments (among them religious arguments) lack all, or some of these attributes, and therefore are not to be allowed into public discourse.²⁰

Many exclusionists have tried to form an exclusion principle that meets these specifications.²¹ Rawls, for example, thought it inappropriate to rely on any form of argument that could not be accepted by all "reasonable citizens."²² According to Audi, one should refrain from using arguments that cannot be tolerated by a "rational citizen," defined as a citizen with regular mental capacities and all of the relevant information regarding the decision to be made, unless one can provide supporting, secular reasons for his position.²³ And finally, Nagel's suggested exclusion principle focuses on a desired epistemic quality that arguments possess.²⁴ He argued that we shouldn't allow arguments that lack "common grounds

16. See, e.g., THOMAS NAGEL, *EQUALITY AND PARTIALITY*, 141–42 (1995). For different justifications, see Jonathan Quong, *On the Idea of Public Reason*, in 265 *A COMPANION TO RAWLS* (J. Mandle & D. Reidy eds., 2013) (These other accounts also lead to the same normative conclusions).

17. See JOHN RAWLS, *THE LAW OF PEOPLES: WITH "THE IDEA OF PUBLIC REASON REVISITED"* 54–58 (1999).

18. See, e.g., GREENAWALT, *RELIGIOUS CONVICTIONS*, *supra* note 6; EBERLE, *supra* note 7.

19. *Id.*

20. See, e.g., RAWLS, *supra* note 17; Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 *SAN DIEGO L. REV.* 677, 679–85 (1993) [hereinafter Audi, *Democratic Society*]; ROBERT AUDI, *DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE* 40 (2011) [hereinafter AUDI, *DEMOCRATIC AUTHORITY*]; Thomas Nagel, *Moral Conflict and Political Legitimacy* 16 *PHIL. & PUB. AFF.* 215, 230 (1987) [hereinafter Nagel, *Moral Conflict*]; see also NAGEL, *EQUALITY AND PARTIALITY*, *supra* note 16, at 154–68.

21. For a fuller analysis of these attempts, see EBERLE, *supra* note 7, at 198–234. See also Ulf Zackariasson, *A Critique of Foundationalist Conceptions of Comprehensive Doctrines in the Religion in Politics-Debate*, 65 *INT'L J. PHIL. RELIGION* 11 (2009).

22. See RAWLS, *supra* note 17, at 177–78.

23. Audi, *DEMOCRATIC AUTHORITY*, *supra* note 20; Audi, *Democratic Society*, *supra* note 20.

24. Nagel, *Moral Conflict*, *supra* note 20, at 228–30; NAGEL, *EQUALITY AND PARTIALITY*, *supra* note 16, at 154–68.

of justification”—i.e. arguments that we can’t “reasonably reject” on a joint inter-subjective basis—into public deliberation.²⁵ More specifically, Nagel thought that a proper argument should always be open to future modification on the basis of criticism, and that arguments should only be based on grounds that are publicly accessible.²⁶

Although very different, all exclusion principles purport to exclude religious arguments (though some of them also exclude certain non-religious justifications as well). This is not logically necessary—there is nothing in the concept of an exclusion principle that requires it to exclude religious arguments. And yet, as one inclusionist, Christopher Eberle, ironically states: “[A] necessary condition of the adequacy of any conception of public justification is that it gives the result that a religious rationale is insufficient for a public justification[.]”²⁷ Many inclusionists challenge the exclusionist project precisely on this point and argue that most exclusion principles do not in fact show that religious arguments are problematic.

Regardless of whether this criticism is correct, it is worth considering the fact that the exclusion approach offers a way to explain our intuitive hesitation to allow religious arguments into the public sphere. It seems hard to deny the strength with which this intuition grasps us (at least in the group of cases I am interested in—recall the example in the Introduction), and so it would be wise to give it close attention before concluding that it is mistaken.

However, this type of justification has also been subject to much criticism. I discuss three problems, in particular, below.

(1) Exclusion principles tend to exclude too many core forms of argumentation out of the public sphere.²⁸ They are thus *too strong* to be effective in a liberal society—the criterion might exclude religious arguments at the cost of also rejecting most other common forms of argument. Eberle attributes this problem to Rawls,²⁹ and he seems to be making a valid point: Why should reasonable citizens agree on *any* major form of argumentation? In assessing this issue, it is important to remember that Rawls himself is famous for arguing that citizens can reasonably disagree on “comprehensive doctrines.”³⁰ Under Rawls’ view, then, as long as even a small sub-group of reasonable citizens do not accept a type of argument, that type ought to be banned from the public sphere. This solution seems to leave us with little to work with in public debates.

(2) Many exclusion principles are *too weak* to work properly—they fail to show that there is anything wrong with religious arguments. Needless to say, this is antithetical to the whole project of formulating an exclusion principle in the first place. Audi and Nagel seem to suffer from a combination of this problem and the first objection, at least on some (plausible) interpretations of them. Audi doesn’t clarify what he means by a “rational citizen.” Under a lenient definition of “ration-

25. NAGEL, EQUALITY AND PARTIALITY, *supra* note 16, at 161.

26. *Id.* at 158.

27. See EBERLE, *supra* note 7, at 205.

28. See *id.* at 204.

29. *Id.* at 214–16.

30. See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 184 (2001).

al,” it is banally true that religious arguments are also to be considered rational.³¹ And if we opt for a stricter conception of rationality, Audi will have to explain why secular arguments, even those that can employ highly controversial normative notions, pass the rationality test, whereas religious arguments do not. This is not a simple objection to meet—there is no such obvious explanation, and Audi indeed does not offer one.³²

The same could be said of Nagel’s use of the “public accessibility” standard. What exactly does Nagel mean by “a more impersonal standpoint”? Does the “more” in “more impersonal” actually mean complete? Under this rather strict reading of Nagel, the first problem returns, because we acknowledge only arguments that others can understand objectively. There is evidence that Nagel wanted to defend such a position,³³ but as he himself observes (in other contexts), we can never completely “exit” our subjective point of view, since trying to achieve complete objectivity undermines our very nature. Arguments that are valid from an objective point of view are scarce, if they exist at all.³⁴ If, however, we relax the impersonality condition, the second worry returns—how impersonal should we go, and why is it that only religious arguments fail this test? Thus some substantive work needs to be done to show that there exists a level of impersonality that religious arguments alone cross. This further important step in the argument cannot be found in Nagel’s comments on the matter, and indeed it is hard to figure out how to go about demonstrating this.³⁵

(3) The last hurdle for exclusionists concerns the justifications for the exclusion principles themselves. The inclusion camp argues that the very idea of such a principle assumes that liberal theory stands on a “higher plane” than competing views, while it is actually just another normative theory, which should not be entitled to any special epistemological privileges. Nagel sees this as a “suspicion” regarding exclusion principles,³⁶ but for Larry Alexander, it is not a suspicion but a reality, as “liberalism and religion are on the same epistemological level,” and therefore “liberalism must establish its tenets by rejecting conflicting religious ones, not by the illusion of ‘neutrally’ banishing them to the ‘private’ realm, where they can somehow remain ‘true’ but impotent.”³⁷ This objection is not easy to discharge. How can the exclusion approach neutrally explain its use of an exclusion principle? And if exclusionists admit to using a normative standard, why should we allow this first-order normative position to exclude other first-order

31. See Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 654.

32. See Statman & Sapir, *Religious Arguments*, *supra* note 7, at 611.

33. See Nagel, *Moral Conflict*, *supra* note 20, at 229 (Arguing that “On the view I would defend, there is a *highest-order* framework of moral reasoning . . . which takes us outside ourselves to a *standpoint that is independent of who we are*. It cannot derive its basic premises from aspects of our particular and contingent starting points within the world . . .”) (emphasis added).

34. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 210 (1986).

35. See Nagel, *Moral Conflict*, *supra* note 20, at 229.

36. See *id.* at 235–37 (emphasis added).

37. See Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology* 30 SAN DIEGO L. REV. 763, 789–90 (1993); see also Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1, 9 (2004).

normative positions, on account of some unexplained resort to second-level neutrality? If the inclusion approach is correct in this point, the appeal to neutrality collapses to a first-order viewpoint regarding the good, which we have no neutral reason to accept.

It seems, then, that the philosophical debate regarding religious arguments is at an impasse, at least as far as the project of justifying exclusion is concerned. In light of these difficulties, I now turn to propose a new conceptualization of the problem, and consequently, a new solution.

B. The Proposed Exclusion Principle

Let me first give a rough first sketch of my view. My exclusion principle includes a normative and a conceptual premise. Normatively, I maintain that one ought to use the coercive force of the state only on the basis of what one believes to be an “all-things-considered” reason for action, i.e. a conclusive reason that derives from the process of practical reasoning (although one does not have to go through the process of practical reasoning oneself). The conceptual part of the exclusion principle is more complex. I argue that practical reasons must conceptually take the form of potentially-inconclusive considerations—reasons for action that could, in principle, be defeated (or ‘Pro Tanto’ duties). This entails the *toning down constraint*: Toning down an argument means treating it as only pro tanto true, even if it was submitted as conclusive.

The amalgamation of these claims is that reasons for action that refuse to be toned down cannot, conceptually, count as valid outcomes of practical reasoning (because of the conceptual premise), and therefore should not be used in the public sphere (because of the normative premise). This poses a unique problem for religious arguments, but not for many other types of arguments—because religious arguments become incoherent when subjected to the toning down constraint. The exclusion principle thus presents a two-pronged dilemma for religious arguments: either become toned-down and incoherent, or reject the toning-down constraint and remain out of the public sphere.

All this needs further explanation. I first address the merits of the conceptual premise, and return to the normative component later.

The conceptual premise asserts that religious arguments—but not other normative arguments—become internally incoherent when toned down. My argument for this conclusion draws on the famous distinction between “All Things Considered” (“ATC”) and “Pro Tanto” (“PT”) duties. Explaining this point requires elaborating on theories of practical reasoning, but the digression is necessary.

On the standard account of practical reasoning, a result (X) is “ATC required” if, after reviewing all relevant factors, X is indeed called for.³⁸ On the other hand, X is only “PT required” if there is some factor that leads to accepting X.³⁹ Other considerations might outweigh those in favor of X, but it is still true that X is at least

38. See *infra* note 40.

39. See *infra* note 40.

PT required.⁴⁰ Thus, one can come to the conclusion that an “ATC argument” (an argument with an ATC duty as its conclusion) is correct only *after* reviewing all relevant factors.⁴¹ However, the introduction of a “PT argument” (an argument with a PT duty as its conclusion) says nothing of other possibly relevant considerations.⁴²

Practical reasoning, as usually construed, thus involves *moving from PT arguments to ATC conclusions*.⁴³ The way to do this is to measure all contradicting PT reasons. Philosophers believe that reasons for action have a dimension of weight, and that considering conflicting reasons for action amounts to ascertaining which reason, or group of reasons, outweighs the rest.⁴⁴ For example, by promising to meet a friend for lunch I create a PT reason to keep my promise. But if on the way I encounter a situation in which I can help save a person's life (with little risk to myself), this establishes a second, contradicting reason to act, assuming I cannot do both things. I thus should compare my reasons to act and see which one outweighs the other. In this example, I should arguably break my promise and try to save the person's life.

We can now understand the logic behind the toning down constraint: If practical reasoning consists of weighing conflicting reasons until one reaches an ATC conclusion, that entails that *before* an ATC conclusion is reached, we can only accept PT reasons as “input.”⁴⁵ Toning down an argument means conceptualizing it in a way that makes it possible to inquire whether it is in fact outweighed or otherwise defeated by other reasons for action.⁴⁶

For example, consider the view that what I ought to do in the example above is keep my promise, period—no other considerations are relevant. There is obviously some truth in this claim, which stems from the fact that I *do* have a reason—a PT reason—to keep my promise. But the argument is presented as an ATC conclusion, and therefore what I ought to do is tone it down, by retaining the core of the argument (the reason to keep the promise) but labeling it differently—as a PT reason that could, conceptually, be outweighed. This doesn't mean that it is always outweighed or otherwise defeated in fact, but only that the duty to keep my promise is *defeatable*.

This account of practical reasoning is surely partial. For reasons of space, I cannot address all the nuances of this framework, but it would help to show that

40. See, e.g., JOSEPH RAZ, PRACTICAL REASON AND NORMS 27 (2nd ed. 2002) [hereinafter RAZ, PRACTICAL REASON AND NORMS]; see generally Henry S. Richardson, *Moral Reasoning*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE, <https://plato.stanford.edu/entries/reasoning-moral/> (last modified Oct. 1, 2013).

41. This should not be read to endorse any constructivist account of practical reasoning. My assertion here only pertains to the logical difference between PT and ATC duties. See generally John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515 (1980).

42. See generally RAZ, PRACTICAL REASON AND NORMS, *supra* note 40.

43. See JOSEPH RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 22–23 (Oxford Univ. Press 2003).

44. I will assume here that such measuring is possible and that incommensurability is not an unresolvable difficulty. See, e.g., Ruth Chang, *All Things Considered*, 18 PHILOSOPHICAL PERSPECTIVES 1, 1–2 (2004).

45. Exclusionary reasons are also PT reasons in this respect, since one has to check whether other exclusionary reasons exist.

46. Chang, *supra* note 44.

many ordinary arguments can be explained as practical arguments. Consider these examples:

(a) *Rules and second-order reasons*: many norms are not weighed against competing reasons for action but rather constrain the first-order process of practical reasoning itself, by functioning as *exclusionary reasons*.⁴⁷ An exclusionary reason is a reason to avoid relying on a certain reason for action in the first-order reasoning process just described.⁴⁸ For example, adopting a “five-mile run on Mondays” rule means that I don’t have to always measure all contradicting reasons to go out for a run every Monday. Instead, the rule excludes reasons to stay at home—it gives me a reason not to rely on those reasons—and leaves only the reasons I have for going for the run in the first place. But even when second-order reasons are present, deciding what one ought to do entails considering the relative weight of the reasons for action that have not been excluded—practical reasoning always ends with a first-order process of moving from PT arguments to an ATC conclusion.⁴⁹ This is true even if, after some reasons for action have been excluded, we can only identify one remaining reason (the process would then end quickly, of course).⁵⁰

(b) *Lexical priority*: some believe that certain values enjoy lexical priority over others.⁵¹ When value X has lexical priority over value Y, X will always come out ahead of Y, no matter how weighty they are in a given situation.⁵² But even values that have lexical priority over others are considered PT reasons.⁵³ In fact, this must be assumed in order to make sense of the notion of lexical priority: Lexical priority is a way of moving from PT arguments to ATC conclusions—in this case, without checking the strength of the reasons.⁵⁴ To see this more clearly, consider the fact that values that are lexically superior are sometimes defeated themselves, i.e. by arguments of the same lexical type that are weightier. For example, Rawls claims that certain liberties enjoy lexical priority over other principles of justice, but adds that conflicting claims can be founded on these liberties.⁵⁵ When this happens, the lexically-superior claims must be

47. RAZ, PRACTICAL REASON AND NORMS, *supra* note 40, at 40.

48. *See id.*

49. *See id.*

50. *Id.*

51. *See infra* note 52.

52. *See, e.g.*, JOHN STUART MILL, UTILITARIANISM 8–38 (1863) (“Few human creatures would consent to be changed into any of the lower animals, for a promise of the fullest allowance of a beast’s pleasures.”).

53. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 37–39 (revised ed., 1999) (characterizing principles that have lexical priority as defeating other PT arguments but “avoids . . . having to balance principles . . .”).

54. *Id.*

55. *Id.* at 214.

weighed to see which one prevails (using Rawls' principles of measurement).⁵⁶

(c) *Particularly strong reasons for actions*: some believe that certain actions should never be committed, e.g. the state ought never to torture.⁵⁷ Assuming for a moment that this is correct, the argument against torture should still be conceptualized as a PT argument that becomes an ATC conclusion when no defeating considerations apply. For *why* is it the case that the state should never torture? To answer this question, some reason has to be supplied. Call this reason T, and assume for the sake of argument that T indeed justifies the “no-torture” rule. What this means is that T outweighs or otherwise defeats other contradicting reasons for action. For example, T might include an exclusionary reason that supports it, or it might have lexical priority over other reasons, etc. But this is consistent with, and presupposes that, T had to be conceptualized as a PT reason for action before it became our ATC conclusion. Arguing for T assumes the very normative playground in which T interacts with other reasons for action, and supposedly defeats them. And this is even if, for rhetorical purposes, it is stated in unequivocal terms.

We see, then, that the framework of practical reasoning is flexible enough to accommodate many different modes of inquiry. In addition—and this point is highly important—both sides to the debate (i.e. exclusionists and inclusionists) use the language of practical reasoning in order to explain their positions. For example, Eberle states that a citizen “ought to pursue rational justification for the claim that her coercive actions are morally appropriate, all things considered[,]”⁵⁸ and other inclusionists seem to agree.⁵⁹ Inclusionists, by their own lights, only care about the ability to rely on specific reasons for action that will defeat others, and not about actual outcomes. This means that by thinking about this problem through practical reasoning theories we are not prejudicing against the inclusion camp, but in fact only making explicit what both sides to the debate already assume is the case.

C. The Toning Down Constraint and Religious Arguments

The toning down constraint begins to explain the problem with religious arguments. These arguments are presented as ATC conclusions, and should therefore be toned down. However, this is a unique case in which toning the arguments

56. *Id.* at 220; JOHN RAWLS, *POLITICAL LIBERALISM* 289–96 (expanded ed., 2005).

57. *See, e.g.*, Michael Davis, *The Moral Justifiability of Torture and other Cruel, Inhuman, or Degrading Treatment*, 19 *INT’L J. APPLIED PHIL.* 161 (2005); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 *V.A. L. REV.* 1425 (2005).

58. EBERLE, *supra* note 7, at 91. I take Eberle’s argument to be that even when one cannot find a secular argument to present, she still has a duty to remain within the confines of practical reasoning, albeit by only using religious arguments.

59. *See, e.g.* Alexander, *supra* note 37; Statman & Sapir, *Religious Arguments*, *supra* note 7, at 604; WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 109 (1991); STATMAN & SAPIR, *STATE AND RELIGION IN ISRAEL*, *supra* note 7, at 69.

down would render them internally incoherent, for reasons that are explained shortly.

Why are religious arguments presented as ATC arguments? The reason is simple. Recall that in Section II, I explain that for the time being, I am only interested in cases in which God's commands *constitute and exhaust* the moral realm. An objection might be raised that other ways of defining religious arguments are conceptualized differently. I respond to this claim in length in Section IV, by discussing various other definitions of religious argumentation and showing that the exclusion principle applies to them as well. For now, let us focus on the first subgroup of religious arguments, which is presented in the form of an ATC conclusion—arguments of this type seem to settle the normative question entirely.

But why is toning down a religious argument especially problematic? To explain this fundamental issue, consider these two examples of arguments that ought to be toned down:

- (i) Christina argues that we ought to perform X, because X-ing conforms with God's commands.
- (ii) Harry argues that we should perform Y, on strict utilitarian grounds (that is, Harry believes that reasons of utility are the only ones that count).

I maintain that though Christina's argument becomes internally incoherent when toned down, Harry's argument remains consistent. And this is the point in the debate in which I take a different path than those who discuss religious argumentation from a point of view that is informed by a duty of civility. I focus not on the relationship between Christina and her fellow citizens, but on *her argument for X-ing itself*. The only question I ask is whether Christina's argument actually supports X. In this way, I wish to sidestep the difficult moral question of identifying the counters of Christina's duty of civility towards other citizens. If Christina's argument is incoherent, no evaluation of her position vis-à-vis political morality is required. A religious agent's duties towards other citizens in regards to a religious argument she endorses are only relevant to the extent that the agent's argument is actually coherent (that is, that it is an actual argument). Therefore, my thesis should stand regardless of the truth or falsity of any theory on a duty of civility or "public reason."

Let us, then, consider Christina's argument. She believes (1) that God's commands constitute and exhaust our reasons for action; and (2) that God commanded us to X. To that we should now add, taking into account our practical reasoning framework, that (3) Christina's argument is a PT argument and that it could, conceptually, be defeated. That is, even if Christina is completely correct about (1)–(2), some other reason or group of reasons might *in principle* outweigh or otherwise defeat her proposed reason for action. Again, I am not arguing that Christina's argument *is in fact* defeated; for my exclusion principle to work, it is enough to admit of the possibility of such an occurrence.

Once these assumptions are spelled out, Christina's account starts to lose its internal coherence. The reason is this: Christina's argument is grounded on a the-

ology that posits God as omnipotent, omniscient, and omnibenevolent.⁶⁰ Omnibenevolence—the property of being perfectly good—implies that “it is metaphysically impossible that these two concepts, *being (morally) obligatory* and *being in accord with God’s will for (morally appraisable) actions of created beings*, not apply to the same deeds.”⁶¹ This creates a problem for Christina, since it means that assumption (1) implicitly entails the impossibility of what assumption (3) hypothesizes is possible.

In other words, the fact that God is perfectly good means that whatever He commands *must* be what we ought to do, all things considered—God’s command cannot be true but inconclusive (otherwise, God could not be characterized as perfectly good). And yet this theological assumption contradicts assumption (3). The upshot is that the argument itself is incoherent, and as a result cannot count as a reason for X-ing.

Now, recall Harry’s argument in favor of Y-ing. This argument should also be toned down, with the result being roughly that while Y-ing promotes utility, there could in principle be other, more pertinent duties that are relevant. This argument, I contend, is clearly still coherent. There is no problem with treating reasons from utility as PT reasons.

And this brings us to the heart of the matter. Why does Christina’s theological argument break down, while Harry’s utilitarian argument remains coherent? The reason is that *there is a difference between Harry and Christina’s foundational argumentative structures*. Harry may continue to hold on to the positive part of his argument (that utilitarian concerns support Y-ing) even when he admits that some other reasons might outweigh the one he put forward, because there is nothing in the value of well-being, on which Harry’s argument relies, that *logically entails* the exclusion of other forms of value. In other words, the assumption that well-being is valuable does not mean that *only* well-being is valuable. Thus, we can coherently consider well-being to be valuable and entertain other, independent and contradicting reasons for action.

But things are different with Christina’s religious argument. For omnibenevolence—the assumption that God is perfectly good—logically entails both (i) that His commands constitute reasons for action and (ii) that only His commands do so. Christina is committed to a theological assumption about the *completeness* of the source of value she has identified, that Harry does not share. The Western conception of God includes the hypothesis that He is perfectly good, and that in turn means that whatever He commands must conform perfectly to what we should do, all things considered. That is not the case with other conceptions of value, such as well-being or even deontological duties.⁶² This difference makes it easy to

60. See AUDI, RATIONALITY AND RELIGIOUS COMMITMENT, *supra* note 6, at 192.

61. *Id.* at 145 (emphasis in the original).

62. I take modern deontological theories to specify certain restraints or permissions on human behavior, which apply regardless of consequences. Many deontological theories also claim that moral restraints are categorical. This additional claim cannot be derived from the *concept* of a deontological restraint. It has to be defended on independent grounds. To claim otherwise is to deny that the many deontological theories that acknowledge consequentialist reasons for action are coherent. See Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/win2012/entries/ethics-deontological/> (last modified Dec. 12, 2012).

tone down utilitarian arguments but presents a unique challenge to religious claims.

D. The Normative Assumption

Consider this objection to my view: people often bring up what seem to be religious claims, and the conceptual hypothesis only implies that these instances are not really cases of using practical reason. But why should that matter? Here, the normative assumption is helpful: It asserts that one should only base (and propose to base) state action on ATC reasons for action, i.e. reasons that derive from the practical reasoning process. Note that the justification for this view is not grounded in political values. As Raz explained, we should be guided by ATC reasons for action because reasons for action provide us with all the normative justification we have for acting in a certain way, and an ATC reason for action just *is* the reason we find most compelling.⁶³ Many inclusionists understand this implicitly, as I state earlier.

It is important to stress that the normative premise is consistent with the state making a mistake in the reasoning process, or with citizens finding more reasons for action that bear on the question at hand after the state has made up its mind. In addition, the normative premise posits only that one should rely on ATC reasons for action, and not that one should always go through the process of practical reasoning oneself.

Armed with these insights, we may now formulate exactly what is wrong with using religious arguments in the public sphere. The problem is that they refuse, so to speak, to participate in the process of practical reasoning. And yet they are being used, rhetorically, to make it seem as if state action is based on a reasoning process that generated a coherent ATC conclusion. Under this explanation, religious arguments only appear to result from a move from PT considerations to ATC conclusions. To fully participate, the religious argument must be conceptualized as a PT consideration, but that would cause it to become incoherent. When one insists on submitting an un-toned-down religious argument, then, she is simply using an incoherent argument under the guise of furthering discussion. And when one relies on such an argument, she is not really participating in the argumentative process as we understand it. Her actions have certain outcomes, and they look from the outside as a result of deliberation, but there really was no coherent deliberation involved.

IV. THE EXCLUSION PRINCIPLE AND OTHER RELIGIOUS ARGUMENTS

The discussion so far neglected what is arguably the biggest potential problem for the thesis—the fact that the exclusion principle relies on a rather narrow definition of religious discourse. To remedy this, I show in this part that even if we relax our working definition of a religious argument, the exclusion principle, or something close to the exclusion principle, still gives us strong normative reasons to exclude several groups of religious arguments from the public sphere. I examine

63. Joseph Raz, *Incorporation by Law*, 10 *LEGAL THEORY* 1, 2 (2004).

these types of arguments, which might be considered religious, but fall outside of the scope of the definition I put forward in Section II. My aim in this is not to demonstrate that *every* candidate for a religious argument is excluded by the exclusion principle; the point is only to show that many other plausible accounts of religious arguments suffer from problems similar to those the exclusion principle identified. The exclusion principle is thus helpful in explaining one major difficulty with religious arguments, even when that category is understood more broadly.

Let us return to Christina's argument for X-ing. Christina now tries a different strategy, arguing that God's role in supporting X-ing is in fact not normative but epistemic. In this formulation, God's commands act as epistemic guides to doing the right thing, but do not constitute reasons for action themselves. The reasons for X-ing are other-worldly and we, being the small, narrow-minded creatures that we are, cannot correctly identify them. Consequently, we must rely on God's commands to comply with what reason demands of us. In philosophy of religion, this move is known as Skeptical Theism⁶⁴, and I believe it is not a good way out of the problem.

A crucial argument made by skeptical theists is that we should always reserve judgment about whether God has reasons for action that are unknowable to us—"When it comes to good and evil, we do not know how much we do not know."⁶⁵ The point is not that God has reasons beyond our ken, but that we could not know them, if he had them. But as critics of Skeptical Theism persuasively argue, accepting this argument would have disastrous effects on our ability to make any sort of practical decision at all.⁶⁶ Skeptical theism rests on the assumption that we should never move from (a) "these are all the reasons for action that I can identify" to (b) "these are all the reasons for action there are" (supposedly, because other reasons beyond our understanding might also exist). The problem is that all of us, including self-proclaimed skeptical theists, make that sort of move all the time; without it we would be unable to decide how to behave. How can we decide which car to buy, how to spend our afternoon, whether or not to go to college, etc., if we can't ever reach an ATC conclusion?

More worryingly, we would forever be *morally* paralyzed, unable to decide whether to intervene even when we see the most troubling acts performed.⁶⁷ For example, even if Christina believes that one should never commit murder because God so commanded, she might still wonder whether *this* attempted murder she is now witnessing, and can prevent, is overall justified for reasons beyond her ken. After all, perhaps God has reasons to allow *this* act, perhaps *this* is not murder in the divine sense. Without direct divine guidance on any specific policy or outcome (which, unfortunately, we do not have), it seems that a skeptical theist should

64. Justin P. McBrayer, *Skeptical Theism*, INTERNET ENCYCLOPEDIA PHIL., <https://www.iep.utm.edu/skept-th/> (last visited Apr. 24, 2018).

65. Erik J. Wielenberg, *Skeptical Theism and Divine Lies*, 46 RELIGIOUS STUD. 509, 510 (2010).

66. McBrayer, *supra* note 64.

67. See Michael J. Almeida & Graham Oppy, *Skeptical Theism and Evidential Arguments from Evil*, 81 AUSTRALASIAN J. PHIL. 496, 505 (2003); Michael J. Almeida & Graham Oppy, *Evidential Arguments from Evil and Skeptical Theism*, 8 PHIL. 84 (2005); Stephen Maitzen, *The Moral Skepticism Objection to Skeptical Theism*, in THE BLACKWELL COMPANION TO THE PROBLEM OF EVIL 444 (Justin P. McBrayer & Daniel Howard-Snyder eds., 2013).

always wonder whether in the specific situation she is in, God might have reasons beyond our understanding that would make what seems like a good result become actually bad, or vice-versa. We quickly see that such global skepticism contradicts the very foundations of practical reasoning to which Christina must still be committed, since she aims to have argument admitted into the public arena.

Another possibility, closely related to Skeptical Theism, but slightly different, is advocated by Statman and Sagi.⁶⁸ They argue that we only have non-theological reasons for action, but that we need God to show them to us, since man is limited in his epistemic capacities.⁶⁹ This time, it is not that we lack knowledge about the nature of other-worldly reasons, but that we do not know how to properly weigh *this*-worldly reasons for action.

Unfortunately, this view is susceptible to the difficulties that plague skeptical theism. In fact, I believe it actually fares worse. Take, for example, God's command to the Israelites in *Deuteronomy* 25:19, to kill all Amalekites without prejudice ("you shall blot out the name of Amalek from under heaven").⁷⁰ Now, I think that we know relatively well what normative reasons one might have to perform mass-murder of this kind, and they are very weak, to say the least. And yet, according to Sapir and Statman, if we think the Israelites should not have wiped out another ethnic group, it is only because we are confused about the relative weight of the reasons we recognize. Therefore, we should be skeptical about our ability to deliberate in these matters. But this pretty quickly leads to a more global skepticism about practical reasoning in general, and that position is clearly rejected by the considerations I discuss above. If I do not really know why one should avoid mass-murder (as I was given at least one example in which I was clearly mistaken), then it can only be because the general reasons for action that I usually recognize don't add up like I think they do. Therefore, it seems I know very little of reasons and their weight in general.

The example itself, it should be noted, does not really matter. All that matters is that many allegedly divine commands show us that we do not weigh reasons for actions correctly. This would imply a sort of mysticism and a denouncement of practical reason that contradicts the very act of offering rational arguments in normative matters. It should also be noted that even Statman and Sagi eventually do not endorse this position: They conclude their study by stating that Jewish policy makers "exercise their autonomous judgment and . . . rely on their own understanding, including moral understanding, when dealing with the problems before them."⁷¹ The upshot is that the exclusion principle's underlying rationale provides a normative reason to avoid religious arguments, even when God's contribution to the argument is understood in epistemic terms.

At this stage another possibility might present itself to Christina. She might argue that a religious argument is based on independent, this-worldly reasons for action, but that weighing different conflicting reasons is accomplished through the

68. See Avi Sagi & Daniel Statman, *Divine Command Morality and Jewish Tradition*, 23 J. RELIGIOUS ETHICS 39, 44 (1995).

69. See *id.*; SAGI & STATMAN, RELIGION AND MORALITY, *supra* note 11, at 88.

70. *Deuteronomy* 25:19 (New International Version).

71. Sagi & Statman, *supra* note 68, at 60.

framework of understanding what God commands (e.g. “the fact that X-ing maximizes utility is a sign that God commands us to X, for God commands to promote utility”). A religious argument is thus the product of a line of reasoning that starts with PT arguments, and God only commands what is independently good.

While this option offers an interesting way to accommodate independent reasons for action under a religious framework, it is also in tension with the exclusion principle's understanding of practical reasoning. Under Christina's new explanation, we would expect our secular ATC conclusions to be almost identical with what God commands. But that, of course, is not the case. God does not simply demand: “Do the right thing, all things considered.” This is very evident if we consider paradigmatic examples of divine commands: God commanded Abraham to sacrifice Isaac,⁷² not go up mount Moriah and do the right thing, all things considered. Similarly, the divine command expressed in *Deuteronomy* 25: 19 is to kill all Amalekites, not to consider all relevant factors and then treat the Amalekites accordingly (again, one may come up with many other examples). In other words, simply insisting that these divine commands are really the result of an interpretive method that weighs all PT reasons for action will not work without some sort of global skepticism.

Finally, what if conforming to God's commands is a second-order rule? After all, Christina does not simply weigh God's commands in every concrete case; rather she just follows what might seem like a general rule, without considering every case on its merits.

Unfortunately, it is hard to understand the duty to conform to God's commands as a rule, at least under the ordinary understanding of what rules are and how they operate. A rule is usually thought of as a generalization that is sometimes over-inclusive and at other times under-inclusive in relation to a certain rationale (i.e. the rule helps us reach the correct decision most of the time, but not always).⁷³ The motivation for adopting a certain rule—the reason we are justified in doing so—is that adopting the rule will on average lead to making better decisions, as we are unable to reach the right decision in every case (because of time constraints, or the complexities of real-life situations etc.). Now a divine rule—an “always follow God's commands” rule—is different in one respect: It stands to reason that this rule will *always* lead to the correct result. After all, that is the whole point of positing an infallible, all-powerful, all-knowing God who issues rules and commands. And yet this line of thought leads us back to Skeptical Theism, which the exclusion principle rejects. Take the biblical example we already mentioned, that of a divine command to sacrifice your child. How is following God's commands, based on the “follow God's commands” rule, supposed to lead to the right ATC conclusion in this case? We already know that one can find very little to support sacrificing one's child on one's own, and just telling us that the “follow God's commands” rule will lead to the right decision doesn't seem to help. It must be that there are other reasons for action that make following the rule

72. *Genesis* 22: 2–8.

73. See FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 29–33 (1991).

acceptable. But we don't know them. So our only way forward is to assume that they are beyond our ken, or that their relative weight is foreign to us.

V. THE EXCLUSION PRINCIPLE AND CONSTITUTIONAL ADJUDICATION

Assuming that the foregoing discussion establishes the validity of the exclusion principle, how does this result affect legal—and more specifically, constitutional—discourse? In answering this question, I want to remain neutral vis-à-vis the particulars of any given constitutional regime. My thesis does not hinge on the details of the Establishment Clause, or on any other specific legal instrument for regulating the dynamics of church and state.⁷⁴ Therefore, although I use mostly American examples, I do not intend to make a U.S.-specific claim (however, I do restrict the discussion to liberal democracies).

Applying the exclusion principle to law means that we may now justify a limit on the *forms of legal discourse* that may be used to discuss issues in which religion plays a part. More specifically, religious adherents ought not to support their claims by alluding to religious arguments in the sphere of law. This imposes a heavy burden on citizens with religious outlooks, as many of them wish to rely on straightforward religious arguments, instead of policy considerations or human rights claims.

An additional claim I make in this Section is that this normative constraint on adjudication is already *de facto* accepted in many legal systems, though its justification is seldom discussed. By this I mean that many courts already exclude religious arguments from deliberation, using a variation of the toning down constraint I explain above. Thus, courts do not conceptualize “pure” religious arguments (i.e. arguments from divine command) as arguments at all, and treat them as foreign to the legal system.

In order to enter the legal sphere, religious arguments need to be translated to PT claims, such as arguments from policy (i.e. religious feelings), rights (i.e. freedom of religion), democracy (i.e. the need to debate the issue further), etc. These new arguments are translated in the sense that they keep a sociological connection to religion—they are sensitive to concerns that many religious citizens deeply care about. But their fundamental argumentative structure is vastly different, as they can now be toned down without difficulty. Without alluding to the exclusion principle, inclusionists will find it hard to justify this fact about adjudication in liberal democracies.

The upshot is that my thesis offers a new philosophical justification for a practice we already accept, but cannot currently explain. I defend these two assertions below.

A. The Exclusion Principle and Legal Reasoning

Legal reasoning is, arguably, a subclass of practical reasoning—it shares practical reasoning's basic conceptual architecture while adhering to additional princi-

74. For a discussion of religious establishment in Europe, see Joseph H. H. Weiler, *Freedom of Religion and Freedom from Religion: The European Model*, 65 ME. L. REV. 760 (2013).

ples.⁷⁵ Therefore, it stands to reason that if an argument fails to present a sound *practical* reason for action, it should not be construed as giving a *legal* reason for action as well (although the opposite does not necessarily apply—not all sound practical arguments can be used in legal reasoning).⁷⁶ Consequently, accepting the exclusion principle means banning religious arguments from legal discourse.

To explain how this constraint works, imagine that religiously-inclined citizens desire that the state accept rule R. When R becomes a matter for legal discussion (i.e. when some aspect of R is brought up in legal proceedings), one may raise several types of arguments in favor of it. For example: interpretative claims (law, properly understood, demands that R be implemented); policy considerations (R is efficient); human rights claims (including, but not restricted to, freedom of religion); reasons that relate to the “nature of democracy” (i.e. the need to sustain a public debate regarding R’s merits); or straightforward religious reasons of the sort discussed in Sections II–IV. Of course, this account is highly schematic, and it avoids many intricate issues. For instance, some of these arguments can be connected in complicated ways, e.g. interpretative claims sometimes hinge on policy or human rights considerations.

Nevertheless, for our purposes it is sufficient, for it makes clear that the exclusion principle effectively prohibits reliance on the latter type of argument, while allowing any other non-religious argument to count in favor of adopting R. My thesis thus leaves ample room for legal debate, while denying religious participants of one central technique for supporting their claims.

Unlike other limits on establishment of religion, this constraint only applies to how the state may *reason*; it remains neutral regarding what it ultimately can and cannot *do*.⁷⁷ However, adopting this constraint may affect the substantive debate in two ways.

First, excluding religious reasons from legal reasoning denies religious citizens a central form of expression in legal debates. Many religious citizens are very sympathetic to straightforward religious claims, as I show in Section II.⁷⁸ The core of religious practice, at least for some, is performing certain acts, and avoiding others, *simply because they accord with or contradict God’s commands*. Of course, citizens would still be permitted to articulate what seems like religious arguments—they enjoy the right to free speech—but their formulations would not be deemed as *arguments*, i.e. as providing courts with reasons to act.⁷⁹ In addition,

75. See JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 203 (2009); SCHAUER, *supra* note 73, at 20, 22; LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 3 (2008); NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 13–15 (2005).

76. See KENT GREENAWALT, RELIGION AND THE CONSTITUTION, VOLUME 2: ESTABLISHMENT AND FAIRNESS 520–24 (2008) (discussing the notion of “law as an illustration of public reasons”).

77. *Id.* at 507.

78. And indeed, following *Obergefell*, “It is . . . in the area of religious practice and belief that the Court’s decision is likely to raise the most significant legal disputes.” Donald H.J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, 49 IND. L. REV. 368, 381 (2016). See also Stephen M. Feldman, *(Same) Sex, Lies, and Democracy: Tradition, Religion and Substantive Due Process (with an Emphasis on Obergefell v. Hodges)*, 24 WM. & MARY BILL RTS. J. 341 (2015).

79. See Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2063 (1992) (book review).

religious citizens could still raise other sorts of arguments in support of their position (as I discuss *infra*).

The second implication of excluding religious argumentation from the legal sphere is narrowing religious citizens' potential sphere of influence. It is common wisdom that courts are major cultural agents—they are theaters of debate in which citizens discuss the most heated and controversial issues of their day, including issues of church and state, and their decisions on how these matters affect society in dramatic ways.⁸⁰ Denying religious argumentation entry into legal reasoning means that at least some views receive diminished support in this important institution.

B. Religious Arguments and Legal “Translation”

Though seemingly reformist, the suggestion to ban all religious argumentation from legal reasoning actually coheres well with established legal practices in many liberal states. Steven Smith refers to this phenomenon as the “*de facto* disestablishment.”⁸¹ As he notes, “there is little evidence of religious ideas in the typical lawyer’s brief or judicial opinion.”⁸² The lack of religious argumentation in legal reasoning is fairly obvious,⁸³ but is rarely justified.⁸⁴ Therefore, my thesis is important in justifying a prevalent, but little-understood phenomenon.

As most jurists in liberal democracies would agree, “we do not expect to see [religious arguments] in judicial opinions.”⁸⁵ Arguments from God’s commands are not usually brought up by litigators and are not endorsed in judicial opinions, and religious citizens must find different ways of supporting their claims.⁸⁶ In other words, a straightforward religious claim (“we should enact R because God commands us to do so”) cannot be toned-down, as is explained in Section III.⁸⁷ Consequently, it is excluded by many courts.⁸⁸ But descriptive claims (“the Framers believed that God commanded them to act in accordance with R”), comparative claims (“R is accepted in the Mexican and Norwegian legal systems, as well as in Jewish law”), and rights claims (“I have a constitutional right to act in accordance

80. My point here is descriptive—I am only arguing that many courts do function in this way.

81. Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 MARQ. L. REV. 203, 203–04 (1998).

82. *Id.* at 213.

83. See, e.g., GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 6, at 239; Scott C. Idleman, *The Role of Religious Values in Judicial Decision-Making*, 68 IND. L. J. 433, 442 (1993); Richard Garnett, *A Hands-Off Approach to Religious Doctrine: What are We Talking About?*, 84 NOTRE DAME L. REV. 837, 842 (2008).

84. See Smith, *supra* note 81, at 218; SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA 3–4 (2010).

85. GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 6, at 239.

86. GORDON, *supra* note 84, at 3.

87. See Adam Shinar & Anna Su, *Religious Law as Foreign Law in Constitutional Interpretation*, 11 INT’L J. CONST. L. 74, 98 (2013).

88. See *id.* Shinar & Su discuss briefly the possibility of using religious arguments as “persuasive authority” directly. *Id.* They agree this is a possibility but cannot offer one actual example of such a use. *Id.* at 98–100.

with R")—are routinely used.⁸⁹ And note that they are all classic PT arguments that may be outweighed and negated.⁹⁰

I think it is best to see these sorts of arguments as *translations of religious claims*, which themselves cannot participate in legal discourse. I use the word "translation" to express a loose sense of continuity between the straightforward religious arguments and their variations: both claims share a sociological connection to religion (e.g. they are routinely endorsed by religious believers).⁹¹ However, descriptive, comparative, and rights claims are not ordinary translations in the sense that their argumentative structure is vastly different than the religious argument.

Thus, the exclusion principle is helpful in understanding the mechanism through which modern courts adjudicate religious arguments: Courts (usually) adhere to the toning down constraint, and only take into consideration translations of religious arguments that have a PT structure.⁹²

The U.S. Supreme Court decision on same-sex marriage provides a good example.⁹³ As both the majority and minority opinions in *Obergefell v. Hodges* concede, straightforward religious claims animated much of the controversy.⁹⁴ What many opponents of same-sex marriage *really* wanted to say to the Court was that this practice is a sin against God.⁹⁵ And indeed it is clear that the Court's decision was interpreted as going against God's commands by at least some religious communities.⁹⁶ But the formal constraints of legal reasoning prevented the Court

89. For a general discussion of this point in legal reasoning, see Omri Ben-Zvi, *Judicial Greatness and the Duties of a Judge*, 35 L. & PHIL. 615, 628–30 (2016).

90. *Id.*

91. See STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 212 (2010) (discussing the "smuggling" of religious beliefs under the guise of rights-talk).

92. Exceptions are very rare. See, e.g., The first *Lautsi* case, in which the Administrative Tribunal of Veneto employed semi-religious reasoning concerning the sign of the crucifix. TAR Veneto, sez. terza, 17 marzo 2005, n. 1110, Foro it. 2005, III, 3, 366 (It.) (referencing. This decision was seen as highly controversial and unusual in the Italian legal scene (it "occasioned considerable amusement among constitutional law scholars" in Italy). See Susana Mancini, *The Crucifix Rage: Supernational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, 6 EUR. CONST. L. REV. 6, 10 (2010); Pin, *supra* note 3, at 97.

93. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

94. See *Obergefell*, 135 S. Ct. at 2588–91, 2592–93; Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1125 (2009) (arguing that the religious point of view is necessarily relevant for examining the institution of marriage).

95. See *Obergefell*, 135 S. Ct. at 2602. "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." *Id.* at 2625 (Roberts, C.J., dissenting). "Many good and decent people oppose same-sex marriage as a tenet of faith." *Id.*

96. See *RCA Protests Court Ruling on Same Sex Marriage*, RABBINICAL COUNCIL AM. (June 26, 2015), <http://www.rabbis.org/news/article.cfm?id=105821> (Rabbi Leonard Matanky, president of the Rabbinical Council of America, stating, "[N]o court can change God's immutable law."). See also *Statement from Agudath Israel of America on the Supreme Court Ruling Regarding Same Gender Marriage*, YESHIVA WORLD (June 26, 2015), <http://www.theyeshivaworld.com/news/headlines-breaking-stories/322402/statement-from-agudath-israel-of-america-on-the-supreme-court-ruling-regarding-same-gender-marriage.html> (Agudath Israel of America noted in a press release that "The issue is whether the Torah sanctions homosexual conduct or recognizes same gender unions. It does not. The truths of Torah are eternal, and stand as our beacon even in the face of shifting social mores."); Baptists declared "spiritual warfare" on the decision, and, as one Reverend said: "We understand how fully unpopular our view is, and where the culture is on this issue . . . But we must stay true to God's word." Craig Schneider, *Bap-*

from addressing such claims directly. The Court only entertained variations of the core religious arguments: conceptual reasons and arguments from rights, democracy, and policy. And it found that these reasons are outweighed by the petitioners' constitutional rights.⁹⁷ The point I want to make about this result is structural—the Court simply could not adjudicate the religious arguments that stood at the center of the debate themselves, and was forced to address only derivative claims that many religious believers did not reach the heart of the matter. The exclusion principle justifies this type of approach, as claims from rights, democracy or policy are PT translations of religious claims.

The decision in *Obergefell* is by no means unique in this regard. For example, the *Lemon* test famously requires a “secular legislative purpose” in cases involving alleged infringement of the Establishment Clause.⁹⁸ And perhaps even more telling, the Court explicitly notes that “[F]or the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference.”⁹⁹ In fact, it seems that straightforward religious claims are, in their untuned-down variations, simply *alien* to the legal system—they are not perceived as arguments at all, until they are toned down. Only as PT reasons do they become intelligible subject-matter that the legal system identifies as admissible.¹⁰⁰

For example, in the United States a religious belief does not have to be central to the faith, or even valid in itself, to be recognized as religious.¹⁰¹ Indeed, it “need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”¹⁰² These statements reveal much about how courts perceive religious discourse: so little is demanded of religious arguments—they need not even be comprehensible (!)—because they are not conceptualized as arguments at all, at least not until they are toned-down and become arguments from rights, policy, etc.¹⁰³ It is very hard to imagine a Court treating policy considerations similarly (imagine a court saying “a policy argument need not be comprehensible...”), because a policy claim is immediately conceptualized

tists Declare ‘Spiritual Warfare’ over Gay Marriage, ATLANTA J.-CONST. (last updated Sept. 23, 2016) (internal quotations omitted), <http://www.ajc.com/news/news/breaking-news/baptist-leader-declares-spiritual-war-on-gay-marri/nmdn6/>. The Church of Jesus Christ of Latter-day Saints (i.e. Mormon Church) stated that: “The Court’s decision does not alter the Lord’s doctrine that marriage is a union between a man and a woman ordained by God.” *Supreme Court Decision Will Not Alter Doctrine on Marriage*, CHURCH JESUS CHRIST LATTER-DAY SAINTS (June 26, 2015), <http://www.mormonnewsroom.org/article/supreme-court-decision-will-not-alter-doctrine-on-marriage>.

97. I do not mean to suggest that legal reasoning consists of simply taking all considerations into account. Several techniques exist for measuring legal claims, but I will not elaborate on this matter here.

98. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

99. *Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986).

100. See *Obergefell*, 135 S. Ct. at 2602. “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises.” *Id.* at 2625 (Roberts, C.J., dissenting). “Many good and decent people oppose same-sex marriage as a tenet of faith.” *Id.*

101. *Hernandez v. Comm’r*, 490 U.S. 680, 702–03 (1989); *Emp’t Div., Dep’t Human Res. Or. v. Smith*, 494 U.S. 872, 886–87 (1990).

102. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) (emphasis added). *Cf. Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church*, 393 U.S. 440, 451 (1969); *United States v. Lee*, 455 U.S. 252, 261 (1982).

103. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

as a PT argument by the court, and PT arguments are always required to be valid and sound, and to have normative impact. All this is spared from religious arguments because they are not thought of as arguments at all.

We see, then, that many courts employ a *de facto* toning-down constraint: They either inspect religious arguments in their “pure” form, in which case they remain incoherent beliefs, unavailable for the purposes of adjudication; or they translate them into reasons from rights, policy, democracy, etc. These new arguments are then given their proper weight in legal reasoning, but they are markedly different from the original religious argument they stemmed from.¹⁰⁴

This conclusion poses a challenge for inclusionists, namely to explain how they square their general position in favor of religious arguments with their (admittedly tacit) agreement to withhold straightforward religious argumentation from legal reasoning. If the inclusion approach is correct and religious discourse is permitted in the public sphere, why is it that inclusionists (including those who specifically discuss legal reasoning) usually do not argue that a jurist may bring up, and a judge may decide a case upon a straightforward religious argument?¹⁰⁵

I doubt that the inclusion approach has at its disposal resources to meet this challenge. First, it is not enough to state that (say) the Establishment clause forbids use of such reasoning. It is not at all clear that it does,¹⁰⁶ and moreover the norm against straightforward religious argumentation exists in many other legal systems that endorse different establishment regimes.¹⁰⁷ Inclusionism needs to be supplemented with some additional, outside element over and above its core tenets in order to explain this anomaly. This can be done, but only at the cost of creating inconsistency in the inclusionist approach. Here are several examples of such additions, borrowed from the discussion on the limits of establishment.

Some may argue that endorsement of religious doctrine by the state would “corrupt” religion, fearing abuse of state power, unequal treatment or that the

104. See, e.g., KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 142 (1995) [hereinafter GREENAWALT, *PRIVATE CONSCIENCES*].

105. See, e.g., Stephen L. Carter, *The Religiously Devout Judge*, 64 *NOTRE DAME L. REV.* 932, 943 (1989) [hereinafter Carter] (stating that a legal opinion is “formalized justification . . . reining in the judge by forcing her to articulate her decision in a professionally responsible way”) (emphasis in the original). See also Idleman, *supra* note 83, at 481; Samuel J. Levine, *Capital Punishment and Religious Arguments: An Intermediate Approach*, 9 *WM. & MARY BILL RTS. J.* 179, 180 (2000).

106. See, e.g., Carter, *supra* note 105, at 936–40; Shinar & Su, *supra* note 87, at 98.

107. The Canadian Supreme Court also avoids adjudicating religious arguments, stating that “the State is in no position to be, nor should it become, the arbiter of religious dogma.” See *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 581; see also *Levitts Kosher Foods Inc. v. Levin* (1999), 45 O.R. (3d) 147; *Braker v. Marcovitz*, [2007] 3 S.C.R. 607. A recent study found that “Canadian courts have tended to rely heavily – or even exclusively – on the subjective sincerity test in order to avoid both having to give an objective definition of religion and taking a position on the merits or value of beliefs or convictions.” See Rosalie Jukier & Jose Woehrling, *Religion and the Secular State in Canada* 161, 190 in *RELIGION AND THE SECULAR STATE: NATIONAL REPORTS* (Javier Martinez-Torron & W. Cole Durham, eds., 2015). In Israel, which has a very different constitutional structure, arguments from God’s commands are translated into one of two groups: reasons from constitutional rights and reasons from policy (specifically religious feelings or maintaining public peace). See, e.g., Bagatz [HCJ] [High Court of Justice] 10356/02 Hass v. IDF Commander in the Western Bank, P.D. 58(3) 443 (2004) (Isr.) (constitutional rights); Bagatz [HCJ] [High Court of Justice] 1890/03 Bethlehem Municipality v. Ministry of Defense, P.D. 59(4) 736 (2005) (Isr.) (constitutional rights); Bagatz [HCJ] [High Court of Justice] 5434/96 Horev v. Minister of Transportation, P.D. 51(4) 1 (1997) (Isr.) (policy).

state will meddle in matters it knows little about.¹⁰⁸ Unfortunately, I believe inclusionists cannot adopt this rationale—as they support raising religious arguments in many public forums (e.g., the legislator, public officials). If they believe the risk of corruption is small in these state endorsements of religion, it is hard to explain why the courts should be different. Nor can inclusionists allude to the fear that employing religious arguments in legal reasoning would create unnecessary political divisions,¹⁰⁹ and for the same reason. Inclusionists believe that religious citizens may rely on religious arguments routinely in spite of this worry, and therefore they cannot justify a ban on legal reasoning alone.¹¹⁰ Third, the explanation that adopting religious reasoning techniques would alienate parts of the population¹¹¹ is also unavailable for inclusionists. For this is what they explicitly *deny*—the inclusion approach often claims that turning to religious argumentation does not infringe on non-religious citizens' dignity or autonomy (at least in many cases).¹¹²

Finally, Kent Greenawalt argues that judges are under a special duty “to rely on arguments they believe should have force for all judges.”¹¹³ This explanation comes closer to the desired result of banning religious argumentation only in adjudication, but notice the ironic reversal of roles: inclusionists are now busy *defending* exclusion from a certain part of the public sphere, using the exact same arguments that exclusionists have employed to justify a broader ban.¹¹⁴ And, correspondingly, Greenawalt's suggestion is troublesome for the same exact reasons that inclusionists cite when arguing against the exclusion camp. The main problem with this criterion is that because people (including judges) hold divergent ideological and philosophical positions, employing it could lead to abandoning most of our more cherished forms of arguments. It will be enough for even a small group of jurists to find a certain form of argument unsatisfactory for it to be excluded.¹¹⁵ This objection is equally persuasive when the group in question is the judiciary as when it is applied to all citizens, and Greenawalt himself admits as much.¹¹⁶

Thus, we see that it is not easy to accommodate the exclusion of religious argumentation from legal reasoning within an inclusionist framework. The reason for this is clear: justifying a ban on religious reasoning in law goes against the main

108. See Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1927 (2008); Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 380 (1992).

109. See, e.g., ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON 3–4, 27–30 (2000); Kathleen M. Sullivan, *Religion and Liberal Democracy*, U. CHI. L. REV. 195, 198 (1992); Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

110. See, e.g., EBERLE, *supra* note 7, at 179.

111. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring); Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 17 (2007).

112. See, e.g., EBERLE, *supra* note 7, at 249–50; Gideon Sapir, *The Boundaries of Establishment of Religion*, 8 L. & GOV'T IN ISRAEL 155, 194–98 (2005); see generally Statman & Sapir, *Religious Arguments*, *supra* note 7.

113. GREENAWALT, *supra* note 76, at 506.

114. Compare Nagel, *Moral Conflict* *supra* note 20, at 217, with GREENAWALT, *supra* note 76, at 506.

115. See EBERLE, *supra* note 7, at 206–07.

116. GREENAWALT, *supra* note 76, at 508 (“General acceptance might play some role in whether reasons are relevantly public, but it cannot be the exclusive or primary standard.”).

inclusionist tendency of opening up public discourse. To be clear, this is only a challenge, not a conclusive argument against the inclusion approach. For example, one could try to find a better explanation for banning religious arguments from adjudication while supporting them in other “public sphere” scenarios. This position requires a substantive justification, especially because it seems unattractive from an inclusionist point of view. In effect, it means that religious adherents cannot state what they truly believe in an especially important forum of decision. Alternately, inclusionists may take the other prong of the dilemma and demand a grand reform in adjudication—a conclusion that requires a strong new argument in order to be considered attractive.

Before concluding, I must admit that my account leaves something to be desired regarding one important normative issue. The problem is this: inclusionists argue, plausibly, that excluding their religious views from the public sphere infringes on their dignity—it disregards their strongest beliefs and leave them “silenced and forced to become only truncated selves when they enter the public square.”¹¹⁷ It is not that the exclusion principle cannot respond to this claim. On the contrary, I think that its answer is more consistent than other possible replies. The exclusion principle's response is that religious citizens have nothing to complain about since little of value has been taken from them, as their religious arguments are in fact incoherent. This is the logical endpoint of accepting the exclusion principle, but I concede that it strikes me as cold and unresponsive to what inclusionists are trying to say. I have no real solution; all I can recommend is sensitivity to the fact that even though religious arguments cannot count as reasons for action, they do *express* something—a belief in a transcendent reality, perhaps. This element is lost when we exclude religious arguments. Though I believe this is the right solution as a matter of course, there is a true loss here for religious believers. Therefore, ways ought to be found to respect this result.

VI. CONCLUSION

This Article addresses the old problem of religious argumentation through a new framework, inspired by practical reasoning theories. The exclusion principle I propose relies on treating each argument as prone to internal change and external outweighing by other reasons. As a result, many religious arguments should be left out of public debate, but not because they are metaphysically or epistemically inferior to other normative theories. Rather, the reason is that such arguments resist a *true but inconclusive* label, and thus become incoherent *qua* reasons for action. This rationale justifies our current practice of excluding religious arguments in legal reasoning, which is hard to explain otherwise. The emerging picture is one in which religious argumentation is denied a place in the public sphere, but not because of any political or moral defect.

117. Levinson, *supra* note 79, at 2065; *see also* Carter, *supra* note 105, at 940.