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Does Animal Welfare Trump Religious Liberty? The Danish Ban on Kosher and Halal Butchering

R.J. DELAHUNTY*

Western European governments since the eighteenth century Enlightenment have frequently enacted laws and regulations that have adverse effects (sometimes intended) on traditional Jewish ritual practices, including Sabbath observance, dress, and dietary practices. Regulations of the latter kind have often been adopted in the name of sparing animals from the purportedly cruel and inhumane methods used in the Jewish ritual slaughtering of cattle. Last year, the Danish Ministry of Food and Agriculture issued regulations that require the stunning of cattle before they can be slaughtered. Defended on the grounds of animal welfare, the regulations had the foreseen effect of precluding the use of traditional Jewish—and most Muslim—ritual slaughtering practices, which forbid pre-slaughter stunning. This paper examines the Danish ban in light of the centuries-long history in Scandinavia and elsewhere in northern Europe of enacting “hygienic” and “humane” legislation of this type. The paper concludes that the regulation does little or nothing to promote animal welfare and is in fact probably a reflection of Danish society’s discomfort with the country’s growing Muslim population.

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I. INTRODUCTION

Since at least the early nineteenth century, gentile governments in Europe have been occupied with the issue of Jewish dietary practices.¹ The immigration of large numbers of Muslims into Europe in recent decades has reawakened these concerns, because of the similarity of Muslim dietary rules to Jewish ones. To many Jews and Muslims, such governmental interest is unwelcome and intrusive, because it is usually aimed at prohibiting practices that are central to their religions. Christians and other believers may also view such restrictions with concern, since they can threaten the religious liberties of persons who are neither Jewish nor Muslim.

Against this backdrop, the Danish government issued a set of regulations for animal slaughtering in February 2014 that had the effect of prohibiting Jewish and Muslim cattle butchering rituals.² The Danish Minister of Food and Agriculture who signed the ban, a 38-year-old Social Democrat named Dan Jorgensen, explained the ban on Danish television by saying “animal rights come before religion.”³

Denmark’s action is part of a broader trend in northern Europe. Denmark has joined several other western European nations, including

1. See *infra* pp. 360–66.

2. Adam Withnall, *Denmark bans kosher and halal slaughter as minister says ‘animal rights come before religion*, THE INDEPENDENT (Feb. 18, 2014), <http://www.independent.co.uk/news/world/europe/denmark-bans-halal-and-kosher-slaughter-as-minister-says-animal-rights-come-before-religion-9135580.html>. The regulations (in Danish) are available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=161815>.

3. *Id.*; Robert J. Delahunty, *From Babylon to Denmark*, CANON & CULTURE (Mar. 28, 2014), <http://www.canonandculture.com/from-babylon-to-denmark/>.

Norway, Sweden, Iceland, Switzerland⁴ and, most recently, Poland⁵ in prohibiting such ritual slaughter. (The Polish Constitutional Court has recently declared that nation's legislation unconstitutional, however.)⁶ Holland also attempted to ban Jewish ritual slaughter, but a compromise was negotiated in 2012.⁷ The decisions to ban ritual slaughter are themselves part of still more sweeping legal developments in Europe that are hostile to that continent's Jewish and Muslim minorities, including possible bans on male circumcision.⁸ In part because of these recent trends, the United States Commission on International Freedom, an independent government advisory body, has found it necessary to monitor Western Europe for threats to religious liberty.⁹

Denmark's Jewish community (which numbers a mere 6,400 persons¹⁰) opposes the Ministry's decision. So do large numbers of Denmark's Muslims (who constitute, overall, an estimated 4.1% of the nation's

4. Sam Sokol, *Denmark outlaws Jewish and Muslim ritual slaughter as of next week*, JERUSALEM POST, Feb. 14, 2014, available at <http://www.jpost.com/Jewish-World/Jewish-News/Denmark-outlaws-Jewish-and-Muslim-ritual-slaughter-as-of-next-week-341433>.

5. See *Polish judges accept review of kosher slaughter ban*, WORLD JEWISH CONGRESS (Nov. 28, 2013), http://www.worldjewishcongress.org/en/news/14191/polish_judges_accept_review_of_kosher_slaughter_ban.

6. The Constitutional Court's decision of December 2014 is not yet available in an English translation. For an English-language summary of the decision, see <http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/7277-uboj-rytualny/>.

7. See Canaan Liphshiz, *Dutch Senate scraps ban on kosher slaughter*, JTA (June 19, 2012), <http://www.jta.org/2012/06/19/news-opinion/world/dutch-senate-scraps-ban-on-kosher-slaughter>.

8. See generally Robert A. Kahn, *Are Muslims the New Catholics? Europe's Headscarf Laws in Comparative Historical Perspective*, 21 DUKE J. COMP. & INT'L L. 567 (2011); Malcolm D. Evans, *From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression Before the European Court of Human Rights*, 26 J.L. & RELIG. 345, 361–68 (2010–11); U.S. COMM'N ON INT'L FREEDOM, ANNUAL REPORT 164 (2014), www.uscirf.gov/sites/default/files/USCIRF_2014_Annual_Report_PDF.pdf.

9. *Id.* at 163–64 (citing a variety of recent measures, including those on ritual slaughter, the Report states that the Commission “[i]s concerned that these restrictions are creating a hostile atmosphere against certain forms of religious activity in Western Europe.”).

10. *Vital Statistics: Jewish Population of the World*, JEWISH VIRTUAL LIBRARY (2014), <http://www.jewishvirtuallibrary.org/jsource/Judaism/jewpop.html>; see also *The Fate of the Danish Jews*, DANISH CENTER FOR HOLOCAUST AND GENOCIDE STUDIES, <http://www.holocaust-education.dk/holocaust/danmarkoghlocaust.asp>.

population.¹¹) Danish Halal, an umbrella group representing fifty-three Muslim organizations, announced a plan to submit a petition with 20,000 signatures in opposition to the ban.¹² The European Commissioner for Health, Tonio Borg, questioned the legality of the ban, saying that it “contradicts European law.”¹³ On the other hand, Jorgensen’s decision was acclaimed by the Animal Welfare Intergroup, for which he had previously served as President.

International reaction to the Danish ban has been vigorous, and usually highly critical. Leaders of Jewish and Muslim organizations have met with Danish Embassy personnel in Washington D.C. and other nations’ capitals. Danish exports to Muslim nations and tourism from those nations to Denmark are likely to suffer.¹⁴ One critic claimed:

This assault on Judaism is, of course, part of a broader assault on religion, all religions, including Christianity, and the biblical understanding of life. The basic idea is that religion is primitive and ignorant and must be repressed. This is a militant form of secularism and while Muslims and Jews are today’s victims, there will be many more tomorrow.¹⁵

Certainly, it is true that Danish society, like those of its near neighbors in Scandinavia, is pervasively secularized.¹⁶ It is also true that Denmark has experienced substantial difficulty in adjusting to the growing Muslim presence in the country, and that opposition to Islamic immigration and cultural influence is common.¹⁷ Indeed, the storm over the 2006 Danish

11. This figure is estimated to approach 5.6% by 2030. *The Future of the Global Muslim Population*, PEW RESEARCH CENTER (Jan. 27, 2011), <http://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-regional-europe/#1>.

12. *Denmark Muslims and Jews slam halal slaughter ban*, WORLD BULLETIN (Feb. 17, 2014), <http://www.worldbulletin.net/news/129090/denmark-muslims-and-jews-slam-halal-slaughter-ban>.

13. Sokol, *supra* note 4.

14. Rashid Hassan, *Denmark set to lose millions following halal slaughter ban*, ARAB NEWS (Feb. 23, 2014), <http://www.arabnews.com/news/529981>; *see also Anger as Denmark bans halal meat*, SAUDI GAZETTE (Feb. 20, 2014), <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20140220196373>.

15. Mark A. Kellner, *Danish ban on ritual slaughter unites Jews and Muslims*, DESERET NEWS (Feb. 21, 2014), <http://www.deseretnews.com/article/865597101/Danish-ban-on-ritual-animal-slaughter-unites-Jews-and-Muslims.html?pg=all#ygx0PgTZDevChx bA.99>.

16. *See* Phil Zuckerman, *Why are Danes and Swedes So Irreligious?*, 22 NORDIC J. RELIGION & SOC’Y 55, 55 (2009).

17. *See* Peter Stanners, *DF says no to more Danish Muslims*, COPENHAGEN POST (Dec. 17, 2013), <http://cphpost.dk/news/df-says-no-to-more-danish-muslims.8128.html>; CW, *Danes: We are too tolerant of Muslims*, COPENHAGEN POST (Oct. 15, 2013), <http://cphpost.dk/news/danes-we-are-too-tolerant-of-muslims.7324.html>; *Of mosques and meat*, ECONOMIST (Aug. 17, 2013), *available at* <http://www.economist.com/news/europe/21583660-denmarks-largest-religious-minority-gets-its-first-proper-prayer-house->

“cartoon controversy,” in which leading Danish political figures contrasted their nation’s “Enlightenment values” to Islam, have still not subsided.¹⁸ Denmark’s overall record of respecting and safeguarding the

mosques-and-meat; *Muslims in Denmark Face a Wave of Intolerance*, NATIONAL PUBLIC RADIO (June 28, 2011), available at <http://www.npr.org/2011/06/28/137480110/muslims-in-denmark-face-a-wave-of-intolerance>; Martin Burcharth, Op-Ed., *Denmark’s problem with Muslims*, N.Y. TIMES (Feb. 12, 2006), available at http://www.nytimes.com/2006/02/12/opinion/12iht-edoped.html?_r=0 (explaining that many Danes view Islam as a threat to Danish culture).

Nor does Denmark seem to be altogether hospitable to its Jewish population. Orthodox Rabbi Itzi Loewenthal reports that he can walk openly as a Jew in Copenhagen (despite numerous attacks on Jews in that city), but that he does not dare to do so in Odense, Denmark’s third largest city. See DANIEL JONAH GOLDHAGEN, *THE DEVIL THAT NEVER DIES: THE RISE AND THREAT OF GLOBAL ANTISEMITISM 167–68* (2013). Other Danish Jews have been warned not to display signs of their Judaism. See *id.*

18. In September 2005, the Danish newspaper *Jyllands-Posten* published twelve satirical cartoons entitled “The Face of Muhammad.” The publisher of the cartoons, Flemming Rose, stated that his aim was to push against media “self-censorship.” Flemming Rose, Op-Ed., *Why I Published Those Cartoons*, WASH. POST, Feb. 19, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/17/AR2006021702499_pf.html. The cartoons triggered a debate within Denmark over freedom of expression and the position of the nation’s Muslim minority. Dan Bilefsky, *Cartoon Dispute Prompts Identity Crisis for Liberal Denmark*, N.Y. TIMES, Feb. 12, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=9F04E3D6153EF931A25751C0A9609C8B63>. The Danish Prime Minister Anders Fogh Rasmussen stoutly defended the publication of the cartoons and refused to meet with diplomats from Muslim countries to discuss the issue. In addition, the Danish Director of Public Prosecutions declined to bring a criminal prosecution in response to the cartoons’ publication. See Director of Public Prosecutions [DPP], *Decision on Possible Criminal Proceedings in the Case of Jyllands-Posten’s Article “The Face of Mohammed,”* No. RA-2006-41-0151 (Mar. 15, 2006), available at <http://rel.as.ua.edu/pdf/danishcartoondecision.pdf>. The European Court of Human Rights subsequently ruled a related complaint inadmissible. See *Ben El Mahi et al. v. Denmark*, ECHR 2006, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78692#{"itemid":\["001-78692"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78692#{).

Writing in 2009, a Danish political theorist at the University of Copenhagen, Christian Rostbøll, observed:

The atmosphere of Danish public debate has for some years, not least since the election in 2001 (and subsequent reelection) of a government that relies on the support of the far-right Danish People’s Party, been very hostile towards Muslims, and *Jyllands-Posten* has been a main contributor to this hostility. In this context, it is difficult to see the cartoons only as a legitimate critique of religiously justified terrorism and not also and primarily as part of an antagonistic discourse toward Muslims. Moreover, the defense of the cartoons was orchestrated by powerful groups and targeted at a weak minority.

Christian F. Rostbøll, *Autonomy, Respect, and Arrogance in the Danish Cartoon Controversy*, 37 POL. THEORY 623, 627, 641 (2009). For reviews of the Danish cartoon

human rights of its Muslim minority is good, although not blameless.¹⁹ However, the February 2015 attacks in Copenhagen by a native-born Danish Muslim on a café and synagogue in that city reveal the continuing tensions in that country that have sometimes led to violence between Muslims and non-Muslims.²⁰

Denmark has defended its 2014 decision on slaughtering primarily on the basis of animal welfare, which it argues is diminished by Jewish and Muslim butchering practices. Under the Jewish laws of kosher butchering

controversy, including the legal developments to which it led, *see* JEREMY WALDRON, *THE HARM IN HATE SPEECH* 125–26 (2014); Lorenz Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions* 31–50, 64–90 (2014); Stéphanie Lagoutte, *The Cartoon Controversy in Context: Analyzing the Decision Not to Prosecute Under Danish Law*, 33 *BROOKLYN J. INT'L L.* 379 (2008).

19. *See Racism and Racial Discrimination on Rise Around the World, UN Expert Warns*, UN NEWS CENTER (Mar. 7, 2006), <http://www.un.org/apps/news/story.asp?NewsID=17718#VRcX3P0o45s> (UN Special Rapporteur reported as saying that “the cartoons illustrated the increasing emergence of the racist and xenophobic currents in everyday life, But the political context in Denmark was what had given birth to the cartoons.”) and *compare* Case of M.E. v. Denmark, HUDOC Application no. 58363/10, at ¶¶ 53–65 (Euro. Ct. H.R., July 8, 2014), *available at* [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145341#{"itemid":\["001-145341"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145341#{) (upholding Danish government’s decision to deport Syrian-born immigrant to Syria, notwithstanding his claim that he faced a risk of being tortured if returned there) *with* Mohammed Hassan Gelle v. Denmark, ¶ 7, U.N. Doc. CERD/C/68/D/34/2004 (Mar. 6, 2006), *available at* <http://www1.umn.edu/humanrts/country/decisions/34-2004.html> (finding that Denmark had failed to carry out effective investigation of Danish Parliamentarian’s comparison of Somalis to pedophiles and rapists); Dawas et al. v. Denmark, ¶ 7.5, U.N. Doc. CERD/C/80/46/2009 (Mar. 6, 2012), *available at* http://www.bayefsky.com/pdf/denmark_t5_cerd_c_46_2009.pdf (finding Denmark in violation of treaty obligations for failure to protect Muslim immigrants effectively from an alleged act of racial discrimination and to carry out effective investigation of incident) and *Kashif Ahmad v. Denmark*, ¶ 8, U.N. Doc. CERD/C/56/D/16/1999 (Mar. 13, 2000) *available at* <http://www1.umn.edu/humanrts/country/decisions/16-1999.html> (finding Denmark in violation of treaty for failure to investigate allegations of racial discrimination properly).

20. *See* Andrew Higgins & Melissa Eddy, *Terror Attacks by a Native Son Rock Denmark*, N.Y. TIMES (Feb. 15, 2015), <http://www.nytimes.com/2015/02/16/world/europe/copenhagen-attacks-suspect-is-killed-police-say.html>.

Denmark is not the only Scandinavian country to have suffered severe violence because of the influx of Muslim immigrants. In neighboring Norway, an anti-Islamic extremist, Anders Behring Breivik, killed 77 people at a summer camp for young political activists. Breivik explained his actions by saying that he was seeking to prevent the “Islamic colonization” of Europe. *See Anders Behring Breivik*, N.Y. TIMES (Aug. 24, 2012), http://topics.nytimes.com/top/reference/timestopics/people/b/anders_behring_breivik/ind ex.html. For a recent analysis of the relations in Norway between its Muslim minority and the majority of the population, *see* Hugh Eakin, *Norway: The Two Faces of Extremism*, in N.Y. R. BOOKS, (Mar. 5, 2015), *available at* <http://www.nybooks.com/articles/archives/2015/mar/05/norway-two-faces-extremism/>.

(*shehita* or *shechita*)²¹, cattle and fowl must be slaughtered in a particular, ritualized manner in order for their consumption to be permitted. Kosher butchering requires that a “pious and qualified practitioner” (*shohet*) do the slaughtering.²² The *shohet* must use a sharp, smooth knife to “sever the trachea and esophagus of the animal and to cut its carotid arteries and jugular vein.”²³ Slaughtering is intended to happen quickly. After slaughtering the animal, the *shohet* must examine its carcass to confirm that it is free of blemishes.²⁴ After the inspection, the *shohet* hangs the carcass upside down in order to drain its blood.²⁵

Kosher butchers may not stun an animal before cutting it.²⁶ Rabbis have warned that stunning an animal first might cause bruises or muscle spasms that would make it hard to discover whether the animal had been free of blemishes.²⁷ Moreover, stunning could cause the *shohet* to make a jagged cut, injuring the animal.²⁸ Accordingly, for the slaughtering to be valid, the animal must be conscious when being killed.²⁹ As shown below, the Danish government contends that slaughtering cattle without first stunning them into unconsciousness is inhumane.

In general, the rules for Muslim or *halal* butchery resemble the rules of *shehita*. These rules are rooted in the Quran, which instructs Muslim believers not to eat dead meat, blood, swine, or any other meat over which any other name than Allah’s has been invoked.³⁰ Therefore, it affirmatively commands the invocation of Allah’s name (before slaughter).³¹ Insofar as relevant here, Muslim dietary regulations have been summarized as follows:

21. See ROBIN JUDD, CONTESTED RITUALS: CIRCUMCISION, KOSHER BUTCHERING, AND JEWISH POLITICAL LIFE IN GERMANY, 1843–1933, at 5–7 (2007), for a summary of kosher butchering.

22. *Id.* at 5.

23. *Id.*

24. *Id.*

25. *Id.* Jewish dietary law forbids Jews to consume the blood of animals. *Deuteronomy* 12:23; see also *Acts of the Apostles* 15:20.

26. JUDD, *supra* note 21, at 6.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Surah* 2:172–73.

31. *Surah* 6:118.

In Islam, all meat must be slaughtered. No flesh can be eaten if the animal has died of natural causes, accident, hanging, or being beaten to death (*Quran*, Surah 5, Verse 4). The only exceptions are marine animals. Slaughter is necessary because it drains the blood from the animal. Blood drinking is prohibited. Thus, slaughtering becomes an essential part for the permission of meat for consumption. (Al-Qardawi, 1960).

There are strict laws guiding the slaughtering of animals. Any Moslem having reached puberty is allowed to slaughter after saying the name of Allah and facing Makkah. The animal should not be thirsty at slaughter time. The knife must be sharp, to minimize the time and hence save the animal from pain associated with the slaughtering process. The knife must not be sharpened in front of the animal because it may cause undue stress to that animal. The slaughter is to be done by cutting the throat of the animal or by piercing the hollow of the throat, causing the quickest death with the least amount of pain. The name of Allah has to be mentioned before or during slaughtering, since the Creator is the granter and taker of life; the name to be said by a member of the Moslem faith. Meat slaughtered by people of the Jewish or Christian faith (People of the Book) may also be eaten. The blood must be completely drawn from the carcass. *Hallal* meat, which most Moslems living in the West prefer, has had the blood fully drained and the carcass washed. (Al-Qardawi, 1960).³²

A significantly greater difference exists within the Muslim community regarding the permissibility of pre-slaughter stunning than within the Jewish community. According to some important Muslim authorities, it is permissible to consume meat that has been electrically stunned before being slaughtered, provided that the stunning meets certain standards. A 1997 report by the Muslim World League offers this opinion,³³ which may, in fact, be the dominant Muslim opinion in Denmark.³⁴

This paper shall focus primarily on *shehita*, rather than *halal*, partly because Muslim opinion is more divided, and because the interactions between European Jews and western gentile governments over dietary regulations provide a rich and dense history.

It may be that so long as it allows the import of ritually slaughtered meat from other nations, Denmark would satisfy its legal obligations under the

32. Saud Twaigery & Diana Spillman, *An Introduction to Moslem Dietary Laws*, FOOD TECH. 88, 89 (1989), available at <http://legacy.library.ucst.edu/tid/sqb37a99/pdf>; see also Muhammad Munir Chaudry, *Islamic Food Laws: Philosophical Basis and Practical Implications*, 46 FOOD TECH. 92, 92-93 (1992).

33. See World Health Organization [WHO], *The Right Path to Health: Health Education Through Religion, Islamic Ruling on Animal Slaughter*, at 11-12 (1997), available at <http://applications.emro.who.int/dsaf/dsa49.pdf>.

34. See *Danish 'halal law' changes nothing says imam*, AL-JAZEERA, <http://www.aljazeera.com/news/europe/2014/02/danish-halal-law-changes-nothing-says-imam-2014218131810376890.html> (last updated Feb. 18, 2014); see also Roxanne Palmer, *Mercy Killings: Denmark's Ritual Slaughter Ban and The Science of Humane Butchering*, INT'L BUS. TIMES (Mar. 5, 2014), <http://www.ibtimes.com/mercy-killings-denmarks-ritual-slaughter-ban-science-humane-butchering-1559618>.

European Convention on Human Rights³⁵ not to deny the religious liberty of its citizens. Certainly, a European Court of Human Rights decision from 2000, *Cha'are Shalom Ve Tsedek v. France*, may support that position, depending on how broadly the holding is understood.³⁶ Furthermore, as its recent decision in the so-called “Burqa Ban” case shows, the European Court of Human Rights has a rather blinkered view of the rights of religious minorities.³⁷ But, even if Denmark’s regulation is not considered a violation of positive European law, it remains a matter of serious human rights concern. Denmark rejected the values of pluralism and religious liberty for the sake of a purported, but dubious, gain in animal welfare. Moreover, if, as argued below, Denmark’s “animal welfare” rationale is spurious, it has unnecessarily demeaned two of its minority populations and evinced a particular hostility towards Muslim immigrants.

35. European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, art. 9, June 1, 2010, 213 U.N.T.S. 221, E.T.S. 5.

36. See *Cha'are Shalom Ve Tsedek v. France*, 2000-VII Eur. Ct. H.R. 195, paras. 78–81 (2000), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58738#{"itemid":\["001-58738"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58738#{); see also Carla M. Zoethout, *Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter*, 35 HUM. RTS. Q. 651, 664–65 (2013). Arguably, this precedent can be distinguished. It involved an unsuccessful challenge to a French law permitting, but regulating, *shehita* by a minority segment of the larger French Jewish community. Insofar as the applicants’ dietary needs varied from those of the larger French Jewish community, they could be fully served by imports from Belgium. The French law was itself an accommodation to the Jewish community, and no trace of discrimination could be inferred from the government’s unwillingness to extend the accommodation further. In Denmark’s case, there are obvious indications of discriminatory intent.

37. See *S.A.S. v. France* (Grand Chamber ECHR 2014), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466#{"itemid":\["001-145466"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466#{). In *S.A.S.*, the Grand Chamber of the European Court of Human Rights upheld France’s comprehensive ban on the wearing of the “burqa” by Muslim women in public places other than houses of worship. The “burqa” is a full-face veil with narrow eye slits that conceals the face of the woman who wears it. For some Muslim women, wearing a “burqa” publicly is an important manifestation of their religious identity. The Court’s decision has been criticized by Human Rights Watch, see *France: Face-Veiling Rule Undermines Rights* (July 3, 2014), available at <http://www.hrw.org/news/2014/07/03/france-face-veil-ruling-undermines-rights>, and by Amnesty International, see *European Court ruling on full-face veils punishes women for expressing their beliefs* (July 1, 2014), available at <https://www.amnesty.org/en/articles/news/2014/07/european-court-ruling-full-face-veils-punishes-women-expressing-their-religion/>.

To evaluate the Danish controversy, it is essential to grasp the significance of dietary rules to the Jewish people as a matter both of faith and ethnic identity (Part I). Then, we shall briefly review the recurring interest of Western governments since the Enlightenment in regulating Jewish ritual practices (Part II). Next, we will consider the scientific basis proffered in support of regulating *shehita* (Part III). Finally, against that backdrop, we examine the “animal welfare” justification on which the Danish government relies (Part IV).

II. THE SIGNIFICANCE OF DIETARY REGULATIONS IN JUDAISM

Those who govern Denmark may be actively hostile to the Biblical understanding of life.³⁸ It is more likely, however, that they are simply unable to appreciate the beliefs and values of fellow citizens who *do* base their lives on Biblical teaching, much as tone-deaf people may fail to understand the love of music. In other words, secularist discrimination against religion may spring from either of two sources: animosity to religion or unconcern with it.³⁹

Whatever the explanation, it is essential in evaluating Denmark’s policy to understand the significance of dietary rules in traditional Jewish belief and practice. From the perspective of traditional Judaism, dietary regulations serve at least three major purposes. First, they help to mark the Jewish people as a people set apart, dedicated to becoming *holy*. Second, dietary regulations help to *humanize* those who follow them, by inculcating a sense of both the value of life, including non-human life, and of the rightful limits to human power. Third, recurring holiday and Sabbath feasts involving foods obtained through ritual practices are

38. For an illuminating account of a Biblically-based way of life, written from the viewpoint of a prominent Orthodox Jewish thinker, see JOSEPH SOLOVEITCHIK, HALAKHIC MAN (Lawrence Kaplan trans., 1983).

39. See John Gardner, *Liberals and Unlawful Discrimination*, 9 OXFORD J. LEGAL STUD. 1, 3–5 (1989); compare *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (neutral laws of general applicability do not infringe impermissibly on religious liberty, even if adversely impacting it), with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (laws singling out a religious minority for disparate treatment, even if defended on grounds of animal welfare, may discriminate unconstitutionally against that minority). To be clear, not all laws of general application that have an adverse impact on a religion should be considered discriminatory. The English philosopher John Locke describes the case of a governmental decision to suspend the slaughter of all cattle for a period in order to replenish herds “destroyed by some extraordinary murrain . . .” John Locke, *A Letter Concerning Toleration*, in POLITICAL WRITINGS 390, 415 (David Wooton ed., Hackett Publishing 2003). This, he argues, is within the government’s rightful power even if as an incidental effect it also precludes the use of cattle for a time as a sacrifice in worship. *Id.*

essential to the continuous renewal of Jewish *collective memory and identity*.

A. Holiness

“[T]he Bible constantly associates [holiness] with the Dietary Laws.”⁴⁰ Indeed, the Bible makes known the importance of dietary regulations in the Jewish tradition from the very beginning.⁴¹ In the narrative of the creation of humanity, God imposed His original command upon humanity in the person of the newly-made Adam—a dietary restriction:

The LORD God took the man and put him in the garden of Eden to till it and keep it. And the LORD God commanded the man, “You may freely eat of every tree of the garden; but of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat of it you shall die.”⁴²

By subjecting humanity to this command, the Bible may, in effect, be saying that humanity is distinguishable from all other species. This divine command applies to humans alone. No other animal species is required to abstain from a kind of food to which it may be attracted; all other animal species may forage as they wish. Humanity, however, is commanded to abstain altogether from a particular food despite finding it to be pleasing and good. It is expected, in other words, to resist its appetite. The conscious decision not to eat food of a certain kind, purely out of obedience to a divine command, is a specific characteristic, burden, and privilege of being human.

40. SAMUEL H. DRESNER, *THE JEWISH DIETARY LAWS: THEIR MEANING FOR OUR TIME* 44 (1959).

41. In saying this, I most definitely do not mean to deny that there are substantial differences of opinion *within Judaism* regarding the importance of the ceremonial law, including dietary restrictions. The great Jewish thinker Martin Buber, for one, denied the significance of such ritual commandments to Jewish life. MARTIN BUBER, *ON JUDAISM* 44–49 (Nahum N. Glatzer ed., Eva Jospe trans., 1967). For a critique of Buber’s view of the law, see FRANZ ROSENZWEIG, *The Builders: Concerning the Law*, in *ON JEWISH LEARNING* 72, 72–92 (Nahum N. Glatzer ed., 1955). I am trying here to describe general trends in Judaism, not purporting to define its “essence.”

42. *Genesis* 2:15–17. To be sure, God had earlier told humanity, “[b]e fruitful and multiply, and fill the earth and subdue it . . .” *Genesis* 1:28. However, this is “more an instruction and encouragement” than a command; it merely urges humanity to follow its natural inclinations and it is not buttressed by the threat of any sanction. ROBERT A. BURT, *IN THE WHIRLWIND: GOD AND HUMANITY IN CONFLICT* 4 (2012).

Elsewhere, the Bible enjoins dietary restrictions on the Jews alone.⁴³ Jews have long held themselves as a people apart, dedicated to God's service and bound by His commands in ways that other peoples are not.⁴⁴ One of the most prominent and visible ways in which the Jewish people have distinguished themselves from others is through their dietary regulations.⁴⁵ These regulations are ultimately founded on scriptural teachings.⁴⁶

The Bible underscores the importance of dietary regulations in the first verse of *Leviticus* 11, the chapter in which the restrictions are laid out in the greatest detail. That verse describes the regulations as being delivered from God “unto Moses and Aaron.” The same form of words is used in the first verse of *Leviticus* 15 (the purity rules).⁴⁷ By contrast, the commandments God delivers in *Leviticus* chapters 12:1, 14:1, 16:1, 17:1, 18:1, 19:1, 20:1, 21:1, 22:1, 23:1, 24:1, 25:1 and 27:1 are given only “unto Moses.”⁴⁸

The regulations found in scripture do not exhaust the entire content of Jewish dietary rules. Although the traditional Jewish view is that God gave the dietary regulations directly to Moses and the current regulations

43. It may be noted, however, that the so-called “Noachide Laws,” which are binding on Gentiles and which have been understood to derive from Chapter Nine of *Genesis*, include the so-called Law of the Torn Limb, which prohibits the eating of live animals. See DAVID NOVAK, *THE IMAGE OF THE NON-JEW IN JUDAISM: THE IDEA OF NOAHIDE LAW* 135–43 (Matthew Lagrone ed., 2d ed. 2011); Jewish Virtual Library, *Jewish Concepts: The Seven Noachide Laws*, http://www.jewishvirtuallibrary.org/jsource/Judaism/The_Seven_Noahide_Laws.html.

44. See, e.g., *Deuteronomy* 7:6 (“For thou art an holy people unto the LORD thy God: the LORD thy God hath chosen thee to be a special people unto himself, above all people that are upon the face of the earth.”); *Deuteronomy* 14:2 (“For thou art an holy people unto the Lord thy God, and the Lord hath chosen thee to be a peculiar people unto himself, above all the nations that are upon the earth.”); *1 Chron.* 16:13 (“O ye seed of Israel his servant, ye children of Jacob, his chosen ones.”); *Psalms* 33:12 (“Blessed is the nation whose God is the Lord; and the people whom he hath chosen for his own inheritance.”); *Psalms* 135:4 (“For the Lord hath chosen Jacob unto himself, and Israel for his peculiar treasure.”).

45. In general, Biblical laws relating to animals “expressed an understanding of holiness, and of Israel’s special status as the holy people of God. The division into clean (edible) foods and unclean (inedible) foods corresponded to the division between holy Israel and the Gentile world.” Gordon J. Wenham, *The Theology of Unclean Food*, 53 *EVANGELICAL Q.* 6, 11 (1981).

46. See *Deuteronomy* 12:23–24, 14:3–21; see also *Leviticus* 11; *Hosea* 9:3; *Ezekiel* 4:13–14; *Isaiah* 52:11; *Zechariah* 14:21.

47. The occurrences of this formula in *Leviticus* 13:1 and 14:33 also appear to concern purity regulations.

48. *Leviticus* 12–14, 16–25, 27. The point is noted in Rabbi Samson Raphael Hirsch’s classic commentary. *THE PENTATEUCH* 410–11 (Ephraim Oratz ed., Samuel Raphael Hirsch & Gertrude Hirschler trans., 1997).

are identical to those originally given,⁴⁹ a more critical position is that current Jewish dietary rules were largely fashioned over the centuries through rabbinic interpretation and legislation.⁵⁰ However, in Judaism, such “oral” law can have an authority and force equivalent to the Biblical text. “From the revealed Torah of God at Sinai, say the rabbis, flows a continuous revelation of teachings through their authoritative expositions. . . . [T]he divine voice heard at Sinai does not cease, according to the traditional Jewish self-understanding, but is authoritatively developed through the human words of the sages.”⁵¹ Interestingly, the command to avoid cruelty to animals, although of rabbinic origin, was accorded the authority of divine revelation to Noah, binding on Jews and non-Jews alike.⁵²

The underlying principle of Jewish dietary rules is summarized (perhaps, in an extreme form⁵³) in the apocryphal *Book of Jubilees*:

And do thou, my son Jacob, remember my words,
And observe the commandments of Abraham, thy father:

Separate thyself from the nations,
And eat not with them:

And do not according to their works,
And become not their associate;

For their works are unclean,
And all their ways are a pollution and an abomination and uncleanness.⁵⁴

49. See *Dietary Laws*, THE JEWISH ENCYCLOPEDIA, <http://www.jewishencyclopedia.com/articles/5191-dietary-laws>.

50. See David Kraemer, *Dietary Laws*, OXFORD BIBLIOGRAPHIES, <http://www.oxfordbibliographies.com/view/document/obo-9780199840731/obo-9780199840731-0010.xml>. The contrast between the two views lies deep in Jewish history. Some Talmudic sages were of the opinion that the practice of eating matzah and bitter herbs at Passover was merely a rabbinic obligation; others taught that it was scriptural. See GEDALIAH ALON, *THE JEWS IN THEIR LAND IN THE TALMUDIC AGE (70-640 C.E)* 261–62 (Gershon Levi ed. & trans. 1980).

51. MICHAEL A. FISHBANE, *JUDAISM: REVELATION AND TRADITIONS* 14–15 (1987).

52. See Louis Finkelstein, *Some Examples of the Maccabean Halaka*, 49 J. BIBLICAL LITERATURE 20, 21–25 (1930).

53. See MAX WEBER, *ANCIENT JUDAISM* 353–54 (Hans H. Gerth & Don Martindale eds. & trans., 1952) (contending that this prohibition on eating with the Gentiles has had as little acceptance as the command not to enter gentile homes).

54. *Book of Jubilees* 22:16. Jesus’ disciples expected him to follow Jewish dietary regulations restricting commensality with non-Jews. See *John* 4:33 (assuming that no Samaritan had offered Jesus anything to eat). Jesus expected, however, that in the coming

Among the canonical books of the Bible, the *Book of Daniel* perhaps sheds the most light on the centrality of dietary rules to the Jewish faith.⁵⁵ That work recounts how Daniel and his three companions, all of them young and faithful Jews, were educated to play leading roles in the service of Nebuchadnezzar, the gentile King of Babylon.⁵⁶ Willing though they were to use their talents and training in the King's service, they drew the line at partaking in "the royal rations of food and wine."⁵⁷ Being tested on a diet of vegetables and water instead, they were found to be even healthier and fatter than when dining on Nebuchadnezzar's food.⁵⁸

The Bible sometimes uses Babylon to represent secular civilization.⁵⁹ Babylon both captures the best that such a civilization has to offer, but also expresses a drive for world domination and for the elimination of any particularity and distinctiveness, including Israel's.⁶⁰ Daniel's refusal to dine on the royal cuisine of Babylon thus represents the unwillingness of the Jewish people to succumb to the attractiveness and glamor of the universalizing secular world.⁶¹ Daniel and his companions are willing to enjoy much of what that civilization offers, but they decline to be wholly absorbed into it.⁶² They will stand out—a people set apart for YHWH, owing allegiance to One higher than any earthly ruler.

By conscientiously following their dietary rules, the Jewish people acknowledge God's supremacy in their lives at every meal, each day. They enact the special calling of Israel to be a witness to the nations. They signify Israel's refusal to be absorbed into secular culture, however great

divine dispensation, Jews and Gentiles would share meals together. See *Matthew* 8:11; see also *Luke* 13:29; *Isaiah* 25:6. Jesus' declaration that all foods are clean was not a repudiation of the dietary laws; rather, it was a rejection of the strict Pharisaic requirement that food must be consumed in a ritually pure fashion. *Mark* 7:19; see Daniel Boyarin, *Jesus Kept Kosher: The Jewish Christ of the Gospel of Mark*, 27 *TIKKUN* 43, 43–44 (2012). Under the influence of Paul, the early Christian community decided not to apply Jewish dietary restrictions to Gentile converts. See MICHAEL GOULDER, *ST. PAUL VERSUS ST. PETER: A TALE OF TWO MISSIONS* 24–38 (1995).

55. See *Daniel* 1.

56. *Id.* at 1:5–6.

57. *Daniel* 1:13

58. *Daniel* 1:12–15.

59. The Biblical imagery surrounding Babylon is generally hostile; it is depicted both as an idolatrous religious system and as a corrupt political/commercial center. See, e.g., *Isaiah* 14:3–22; *Jeremiah* 50–51; *Revelations* 17–8. For discussion of the Biblical metaphor of "Babylon," see ANDRÉ LACOCQUE, *THE BOOK OF DANIEL* 26–28 (David Pellauer trans., 1979); Walter Brueggemann, *At the Mercy of Babylon: A Subversive Rereading of the Empire*, 110 *J. BIBLICAL LITERATURE* 3, 20 (1991).

60. LACOCQUE, *supra* note 59, at 26–28.

61. *Id.*

62. *Id.*

its allure. They reject the claim of the surrounding civilization, whether that of Babylon or that of the modern West, to offer a comprehensive vision of life, contrasted with and truer than the Biblical one.

This conscious apartness from other peoples often caused incomprehension, derision, or outright hostility towards Jews. In the ancient world, Jews were often ridiculed and derided by pagan Hellenistic and Roman writers for their distinctive rituals and practices, especially the Sabbath, circumcision, and, most relevant here, their abstention from pork, a custom based squarely on *Deuteronomy* 14:8–10.⁶³ “Philo reports that the Emperor Gaius asked the Jewish embassy why they refused to eat pork, provoking outbursts of laughter among his attendants . . . Plutarch tells us that Cicero referred in jest to the Jewish attitude toward pork . . . Juvenal mocks a ‘long-standing clemency [which] allows pigs to attain old age.’”⁶⁴

Far worse than ridicule was the treatment allegedly meted out by the Hellenistic King Antiochus IV of Syria to seven Jewish brothers for their refusal to eat pork. The story is told in the (apocryphal) *Second Book of Maccabees*, an account of the mid-second century B.C. Jewish rebellion against King Antiochus.⁶⁵ Each of the seven brothers was hideously tortured and finally killed in the sight of their mother, who nonetheless exhorted them to face their sufferings bravely and with trust in God, rather than to eat forbidden foods.⁶⁶ After witnessing their heroic deaths, she also dies.⁶⁷ The Jewish tradition accepts that obedience to divinely instituted dietary rules may require acceptance of martyrdom.⁶⁸

63. For a collection of translations of primary sources revealing ancient pagan attitudes to these Jewish practices, see LOUIS H. FELDMAN & MEYER REINHOLD (eds.), *JEWISH LIFE AND THOUGHT AMONG GREEKS AND ROMANS: PRIMARY READINGS* 366–80 (1996).

64. Jerry L. Daniel, *Anti-Semitism in the Hellenistic-Roman Period*, 98 *J. BIBLICAL LITERATURE* 45, 55–56 (1979); see also PETER SHÄFER, *JUDAEOPHOBIA* 66–81 (1997) (providing an extensive survey of views of pagan antiquity on the Jewish custom of abstaining from pork).

65. See *II Maccabees* 7.

66. *Id.*

67. *Id.* at 7:41.

68. See JONATHAN A. GOLDSTEIN, *II MACCABEES* 283–84 (1983).

B. Humanity

In the beginning, the *Book of Genesis* relates, God gave Adam “every seed-bearing plant . . . and every tree” for food.⁶⁹ Not until after the Flood was mankind, in the person of Noah, permitted to eat animal flesh: “Every moving thing that lives shall be food for you; and just as I gave you the green plants, I give you everything.”⁷⁰ And even that permission is conditional: “Only, you shall not eat flesh with its life, that is, its blood.”⁷¹ In the Biblical conception, there is something problematic about consuming flesh. Human beings hunger for it, and that natural craving is not denied. However, boundaries must be set to it, so that humanity’s power over animals does not make humankind excessively cruel and wanton.

In a commentary on the *Book of Leviticus*, Jacob Milgrom sees this principle as the underlying basis of the dietary restrictions set out there and elsewhere in the scriptures.⁷² Milgrom argues that “the dietary laws serve as an ethical guide—a system whereby people will not be brutalized by killing animals for their flesh.”⁷³ Biblical law posits dietary rules for the consumption of animal flesh, in other words, to maintain the distinction between humans and animals—to ensure that humans are not dehumanized.

Milgrom identifies three tiers of dietary regulations aimed at this objective. First, the choice of animal food is severely restricted.⁷⁴ Some species are simply taken, so to say, off the table. *Deuteronomy* 14:4 restricts to a mere ten species the animals whose flesh may be eaten, three of which are domesticated herbivores.⁷⁵

Second, these domesticated species may be slaughtered only by those who qualify for the task by training and piety.⁷⁶ Not every Jew may engage in butchery, and great care must be taken so that even those who *are* permitted to engage in it are not desensitized by the recurring experience of taking life.⁷⁷ Their prescribed training, together with the instruments and techniques they must employ (such as a razor-keen knife that is inspected regularly for the slightest notches), underscore the value of animal life and the importance of avoiding all unnecessary cruelty. The

69. *Genesis* 1:28–29.

70. *Genesis* 9:3.

71. *Genesis* 9:4.

72. See JACOB MILGROM, *LEVITICUS: A BOOK OF RITUAL AND ETHICS* 103–04 (2004).

73. *Id.* at 104.

74. *Id.* at 103.

75. “These are the animals you may eat: the ox, the sheep, the goat, the deer, the gazelle, the roebuck, the wild goat, the ibex, the antelope, and the mountain-sheep.” *Deuteronomy* 14:4.

76. MILGROM, *supra* note 72, at 103.

77. *Id.*

requirement of piety guards against the deadening of the soul that otherwise is likely to follow from repeatedly witnessing or inflicting bloodshed.

Third, even after an animal has been slaughtered in conformity with ritual prescriptions, it may not be eaten until all its blood has been drained off. *Leviticus* 17:4 says: “For the life of every creature—its blood is its life; therefore I have said to the people of Israel: You shall not eat the blood of any creature, for the life of every creature is its blood; whoever eats it shall be cut off.” The prohibition on eating or drinking blood checks the drive to a boundless human mastery over creation. As Milgrom explains, “[h]umans have a right to nourishment, not to the life of others. Hence the blood, which is the symbol of life, must be drained and returned to the universe, to God.”⁷⁸

Consistent with this view of humanity’s place in Creation, Biblical teachings emphasize the need for kindness to animals and consideration of their needs. Thus, *Exodus* 20:10 enjoins that working animals are to be given a day of rest on the Sabbath; *Deuteronomy* 22:6 forbids removing eggs from under a nesting mother bird; *Deuteronomy* 25:4 prohibits muzzling an ox while it is treading out grain; and *Leviticus* 22:7 requires that new-born oxen, sheep, and goats be left with their mothers for at least seven days before being taken. The rules of *shehita* were fashioned and refined over the centuries in light of this guiding principle, so as to inflict the minimum of pain, or none at all.

C. Memory and Collective Identity

Finally, to an extent that is arguably without parallel in other faiths, Judaism emphasizes the importance of the *meal*. (I say this even though communion is the central sacrament of Christianity.) The great Jewish philosopher Franz Rosenzweig described the meals that attend Jewish Sabbaths, holidays, and feasts as essential to the continuously renewed life of the Jewish community in this way:

[T]he inner life of the community does not begin and end with this initial silent listening. This life is born again only in an act which is essentially a renewal. Not a mere repetition of a beginning once created, but in the re-creating of what has grown effete. The re-creating of bodily life, the transforming of matter grown old, occurs in the course of a ritual. Even for the individual, eating and drinking

78. MILGROM, *supra* note 72, at 103.

constitute re-birth for the body. For the community, the meal taken in common is the action through which it is reborn to conscious life.⁷⁹

Studies by anthropologists confirm Rosenzweig's insight into the importance of common meals for the identity and continuity of a community, even a non-religious one.⁸⁰ These studies have *noted* the important connection between food and memory, both individual and collective. As one anthropologist pointed out, in Marcel Proust's great novel, "the canonized taste of the squat little madeines is the catalyst for remembrances to fill dense, thick volumes."⁸¹ The collective memory of cooking and eating prescribed foods on certain specific or recurring occasions may serve to stabilize or constitute a religious or ethnic group's identity. This is certainly true of the Jewish people, whose life as a group is commemorated and renewed by regularly recurring meals such as the Passover Seder, which the Jewish scholar Jacob Neusner said "defines" Judaism.⁸² At that great feast, certain prescribed foods are ritually eaten and their significance to Jewish identity over the millennia is explained:

At the festival of Passover, Jewish families gather around their tables for a holy meal. There they retell as an account of themselves and where they come from and who they are, the story of the Exodus from Egypt in times long past. They were slaves to Pharaoh in Egypt and God brought them out of bondage with an outstretched arm and a mighty hand. Therefore they celebrate—just as Scripture says—and tell the tale of liberation.⁸³

Kosher food is obviously indispensable in Jewish festive and Sabbath meals, and thus has an essential place in sustaining Jewish identity, both religiously and ethnically.⁸⁴ Indeed, ethnic and religious differences are often marked, albeit in derogatory ways, by reference to dietary practices.⁸⁵ In a study of kosher practices in Denmark, one anthropologist concluded:

79. FRANZ ROSENZWEIG, *HIS LIFE & THOUGHT* 316 (1998).

80. For overviews of the subject, see Jon D. Holtzman, *Food and Memory*, 35 ANN. REV. ANTHROPOLOGY 361, 366 (2006); Claude Fischler, *Food, Self and Identity*, 27 SOC. SCI. INFO. 275 (1988).

81. Holtzman, *supra* note 80, at 362.

82. JACOB NEUSNER, *JUDAISM: THE BASICS* 38–47 (2006).

83. *Id.* at 38.

84. The Passover Seder often includes lamb, which must of course be slaughtered in accordance with ritual rules. On the whole, the animal welfare concerns in the ritual slaughter of sheep are less than they are for cattle, because cattle take longer to lose consciousness. See Temple Grandin, *Welfare During Slaughter without stunning (Kosher or Halal) differences between Sheep and Cattle*, DR. TEMPLE GRANDIN'S WEB PAGE (last updated Sept. 2012), <http://www.grandin.com/ritual/welfare.diffs.sheep.cattle.html>.

85. Roman Catholics in the United States were once referred to as "mackerel snappers" because of their habit of eating fish on Friday. 2 THE NEW PARTRIDGE DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH 1250 (Tom Dalzell & Terry

To be Jewish is to have one foot in and one foot out of Danish culture; a basic part of the Jewish experience is an ongoing struggle to maintain and make sense of such a posture. Dietary practice expresses this experience, providing an index of individual and group choices about the nature of Jewish identity. Through the ways that they adhere to or depart from kosher rules, Jews state to themselves, to other Jews, and to non-Jews how they balance the conflicting claims of their national and ethnic affiliations.⁸⁶

Indeed, even *butchering* practices—as distinct from *dietary* ones—can serve as important markers and commemorations of ethnic identity. “In Spain, the ritual public slaughter of pigs, the *matanza*, has come to symbolize the resistance of Christians to the Muslim occupation. The *matanza* ritual has come to be a modern element in the formation of Spanish religious and cultural identity.”⁸⁷

In summary, dietary rules and rituals, including those relating to animal slaughter, enter into traditional Jewish life, thought, and practice in a variety of complex ways. They serve to mark the Jews as a people apart, consecrated to the service of God and owing special responsibilities to Him. They continually remind observant Jews of the limits of human power and the rightful claims of the rest of nature. Moreover, they reinforce the religious, historical, and cultural ties that bind Jewish families and the larger Jewish community together.

III. GOVERNMENTAL RESTRICTIONS ON JEWISH RITUAL RULES: THE BEGINNINGS

The Jewish people of Europe, like the other peoples of that continent, were profoundly affected by the massive social, political, and legal changes that began in the eighteenth century Enlightenment.⁸⁸ Above all,

Victor eds., 2006). To the French, the English were *les rosbifs*; to the English, the French were “frogs.” RENÉ JAMES HÉRAIL & EDWIN A. LOVATT, THE DICTIONARY OF MODERN COLLOQUIAL FRENCH 271 (Digital Printing 2006); 1 THE NEW PARTRIDGE DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH 806 (Tom Dalzell & Terry Victor eds., 2006).

86. Andrew Buckser, *Keeping Kosher: Eating and Social Identity among the Jews of Denmark*, 38 ETHNOLOGY 191, 206 (1999).

87. Richard A. Lobban, Jr., *Pigs and Their Prohibition*, 26 INT’L J. MIDDLE E. STUD. 57, 57 (1994).

88. To be sure, Jews had suffered harrowing persecution at the hands of Christians for centuries before the Enlightenment. See, e.g., PAULA FREDERICKSEN, AUGUSTINE AND THE JEWS: A CHRISTIAN DEFENSE OF JEWS AND JUDAISM 79–102 (2008) (origins of Christian anti-Semitism from Apostolic Age to 4th Century); MARCEL SIMON, VERUS ISRAEL: A STUDY OF THE RELATIONS BETWEEN CHRISTIANS AND JEWS IN THE ROMAN EMPIRE A.D. 13–425,

perhaps, traditional European Jewry was shaken to its foundations by the collapse of the society of the *ancien régime*, honeycombed with estates, nations, guilds, and other types of corporate bodies having distinct legal privileges and obligations, in which the Jews “essentially constituted an *universitas* apart from all others . . .”⁸⁹ The ensuing transformation of that hierarchical and variegated social order into a uniform body of “citizens” who stood on a footing of civic equality was liberating, but destructive.⁹⁰ The Enlightenment gave birth to the emancipation of the Jews, but it also created a besetting tension in Jewish identity: the duties one owed to God as a Jew and those one owed to the State as a citizen began to diverge and conflict.⁹¹ As the great Jewish historian Salo Baron put it:

at 207–33 (H. McKeating trans., 1996) (documenting Christian anti-Semitism from second through fifth centuries); GAVIN I. LANGMUIR, TOWARD A DEFINITION OF ANTISEMITISM 57–62 (1990) (distinguishing anti-Judaism from anti-Semitism); *id.* at 301–10 (discussing medieval anti-Semitism); R.I. MOORE, THE FORMATION OF A PERSECUTING SOCIETY: AUTHORITY AND DEVIANCE IN WESTERN EUROPE 950–1250, at 26–41 (2007) (treatment of Jews in medieval Latin Christendom). This paper, however, focuses on the Enlightenment rather than on Christianity as a source of anti-Semitism in contemporary post-Christian European society.

89. Salo W. Baron, *The Jewish Question in the Nineteenth Century*, 10 J. MOD. HIST. 51, 59 (1938) (alteration in original); see also RONALD SCHECHTER, OBSTINATE HEBREWS: REPRESENTATIONS OF JEWS IN FRANCE, 1715–1815, at 18–34 (2003).

90. See generally William Rogers Brubaker, *The French Revolution and the Invention of Citizenship*, 7 FRENCH POL. & SOC’Y 30 (1989). One leading French revolutionary, the abbé Emmanuel Sièyes, “spoke of the need to make all the parts of France into a single body, and all the peoples who divide it into a single Nation.” DAVID A. BELL, THE CULT OF THE NATION IN FRANCE: INVENTING NATIONALISM, 1680–1800, at 14 (2001). See ALBERT S. LINDEMANN, ESAU’S TEARS: MODERN ANTI-SEMITISM AND THE RISE OF THE JEWS 44–48 (1997) for a description of the impact of these attitudes on the Jews of France.

91. The process of “emancipating” Europe’s Jews supposedly began with the Austrian Emperor Joseph II’s Edict of Toleration of 1781 and the provincial patents following its promulgation. See Charles H. O’Brien, *Ideas of Religious Toleration at the Time of Joseph II: A Study of the Enlightenment Among Catholics in Austria*, in TRANSACTIONS AM. PHIL. SOC’Y, at 1, 23–44 (Am. Phil. Soc’y, No. 59/7, 1969). For the background to the “emancipation” of the Jews of the German-speaking world and the hospitality of a distinctive tradition of pluralism in German thought to this development, see H.B. Nisbet, *On the Rise of Toleration in Europe: Lessing and the German Contribution*, 105 MOD. LANGUAGE REV. xxviii (2010).

A radical proposal for the emancipation of Britain’s Jews had been issued two generations before Austria’s Edict of Tolerance by the Irish philosopher John Toland. He called for the Jews to be fully naturalized—meaning not only that they should be accounted British subjects, but also that they should have the same civil rights as other subjects. See generally JOHN TOLAND, REASONS FOR NATURALIZING THE JEWS IN GREAT BRITAIN AND IRELAND, ON THE SAME FOOT WITH ALL OTHER NATIONS (1714). And in his *Nazarenus*, Toland argued that the “[original plan of] C[hristianity]” had contemplated “a [u]nion without [u]niformity, between Jew and Gentile” in which Jews would observe the Mosaic Law and Gentiles the Noachide Law. JOHN TOLAND, NAZARENUS 117, 179 (Justin

[t]he modern egalitarian state could no longer tolerate the existence of such a self-governing corporate body. Within the short span of a few decades the Jewish people was expected to divest itself of all the mores, manners and outlook on life peculiar to an autonomous group in a territorial or fictitious ghetto and to become citizens on a par with the non-Jewish majority. Emancipation, thus, was not, as it was often viewed at the time, a one-sided gift of a liberal-minded government to a declassed group, but an exchange of the duties of citizenship for the right of extensive self-government.⁹²

As Western governments began to extend civil rights—including, ostensibly, religious liberty—to their Jewish populations, they also began demanding that emancipated Jews conform to the standards and practices of what were still largely Christian societies. For those governments, refractory Jewish square pegs had to be pounded into Gentile round holes. In particular, Western governments found Jewish rituals troubling and disruptive. These concerns were usually stated, not as objections to Judaism as such, but in terms of purportedly “neutral” criteria. Thus, Jewish Sabbatarian observance has been questioned as incompatible with the obligations of citizenship or military service;⁹³ circumcision has been denounced in the name of the rights of the child;⁹⁴ Jewish marital law has been denied effect on the ground that it permits incest;⁹⁵ and Sunday Sabbath laws have burdened Jewish merchants competitively.⁹⁶ Jewish burial practices were outlawed beginning in the 1770s out of anxiety over

Champion ed., 1999); see generally Pierre Lurbe, *John Toland and the Naturalization of the Jews*, 14 EIGHTEENTH-CENTURY IRELAND 37 (1999).

92. Baron, *supra* note 89, at 59–60.

93. See JACOB KATZ, *OUT OF THE GHETTO: THE SOCIAL BACKGROUND OF JEWISH EMANCIPATION, 1770–1870*, at 167 (1973) (discussing Mecklenberg-Schwerin regulations of 1812 requiring Jewish soldiers to serve on Sabbath); cf. *Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding constitutionality of Air Force regulation that prevented Orthodox Jew from wearing yarmulke while on duty).

94. See Raimo Lahti, *Infant Male Circumcision—Finnish Supreme Court Ruling on a Multicultural Legal Problem*, in *NORDIC HEALTH LAW IN A EUROPEAN CONTEXT—WELFARE STATE PERSPECTIVES ON PATIENTS’ RIGHTS AND BIOMEDICINE* 216, 217–18 (Elisabeth Rynning & Mette Hartlev eds., 2011).

95. See *In re May’s EState*, 114 N.E.2d 4 (N.Y. 1953) (discussing the choice of law question of whether to apply State law prohibiting uncle-niece marriage permitted under Mosaic regulations); *In re De Wilton*; *De Wilton v. Montefiore*, [1900] 2 Ch. 481 (Eng.) (holding invalid a marriage between Jewish uncle and niece, English domiciliaries, in England although validly contracted abroad).

96. See, e.g., *Gallagher v. Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961) (upholding constitutionality of Sunday-as-Sabbath laws as applied to kosher supermarket).

mistaken burials of those still alive; from 1810 to 1850 public health authorities condemned *mikveh*—the Jewish ritual bath—as filthy and unsanitary, even as the source of venereal disease.⁹⁷ Denmark’s current ban is but a recent expression of such recurring suspicions, in the context of Jewish dietary practices.

In enacting such measures, Western governments were following the lead of influential Enlightenment thinkers and savants. Despite the liberating impact such writers often had, the policy of according Jews the legal privileges of membership in gentile society while demanding that they discard distinctively Jewish practices and observances grew directly out of Enlightenment thought. As Frank Manuel, a leading historian of the Jewish past, has put it:

The philosophical Enlightenment was prepared to accept the Jews if they were willing to be denatured, to deny the traditional practices of Judaism. From one viewpoint this was no more and no less than what historical Christianity in its various denominations had always demanded of the Jews. Even Immanuel Kant, the herald of a new secular morality, would permit Jews to enter his enlightened polity only if they abandoned their rabbinic law and ceremonials in favor of a civil constitution that would make them like all the gentiles. Napoleon, a latterday son of the Enlightenment, who once figured as a great emancipator in Jewish historiography, assembled a makeshift Jewish Sanhedrin in order to draw from the Jews commitments to renounce certain occupations such as moneylending, adopt productive professions, till the soil, and ignore traditional prohibitions against marriage with Christians. The Enlightenment put into a new cast Christianity’s ambivalent relationship to Judaism.⁹⁸

Likewise, while acknowledging that the core values of the Enlightenment, including freedom of opinion and speech, protected minorities such as the Jews, the historian Adam Sutcliffe, in his study *Judaism and Enlightenment*, wrote that:

[T]he Enlightenment vision of universal tolerance and emancipation stood uneasily alongside the identification of Judaism as so atavistically contrary to all emancipatory values and modes of thought. Judaism was thus profoundly ensnared in the relationship between the Enlightenment and the Christian worldview from and against which it emerged.⁹⁹

And the philosopher Diego Lucci wrote:

97. See ARNOLD M. EISEN, *RETHINKING MODERN JUDAISM: RITUAL, COMMANDMENT, COMMUNITY* 41 (1998); Shai J. Lavi, *Enchanting a Disenchanted Law: On Jewish Ritual and Secular History in Nineteenth-Century Germany*, 1 U.C. IRVINE L. REV. 813, 819–21 (2011).

98. FRANK E. MANUEL, *THE BROKEN STAFF: JUDAISM THROUGH CHRISTIAN EYES* 173 (1992).

99. ADAM SUTCLIFFE, *JUDAISM AND ENLIGHTENMENT* 6 (2003).

[I]n the so-called age of Enlightenment, despite the divergent views of the origins and development of Jewish culture, contemporary Judaism was mostly regarded as an obsolete system of beliefs and practices—a system radically different from the ‘emancipatory values and modes of thought’ that both radical and moderate thinkers asserted, though to different degrees and for diverse goals. And the Jews, who abided by their peculiar, ancestral, ‘obsolete’ laws and doctrines though living in Europe, were regarded as the ‘others’ par excellence, in a civilization whose fundamental beliefs, lifestyle, and social institutions were rapidly “evolving.”¹⁰⁰

It was thus wholly consistent with the spirit of the Enlightenment for Immanuel Kant to have called for “the euthanasia of Judaism.”¹⁰¹

Indeed, the contemporary sociologist Zygmunt Bauman has argued that “modernity”—by which he means the Enlightenment-born project of ordering, rationalizing, managing, standardizing, and segregating society—led to the destruction of European Jewry in the Holocaust, and may lead to the destruction of other “pariah” groups in the future.¹⁰² To be sure, the

100. Diego Lucci, *Judaism and the Jews in the British Deists' Attacks on Revealed Religion*, 3 HEBRAIC POL. STUD. 177, 179 (2008).

101. Kant, *Academy Edition* VII, p. 52–53, quoted in Susan Meld Shell, *Kant and the Jewish Question*, 2 HEBRAIC POL. STUD. 101, 125 (2007); see also JONATHAN M. HESS, GERMANS, JEWS AND THE CLAIMS OF MODERNITY 6–11, 137–69 (2002); MICHAEL A. MEYER, THE ORIGINS OF THE MODERN JEW: JEWISH IDENTITY AND EUROPEAN CULTURE IN GERMANY, 1749–1824, at 76–77 (1967); HANNAH ARENDT, *The Enlightenment and the Jewish Question*, in THE JEWISH WRITINGS 3 (Jerome Kohn and Ron H. Feldman eds., 2007). Kant's successors in the German idealist tradition, including Fichte and Hegel, radicalized his critique of Judaism. See MICHAEL MACK, GERMAN IDEALISM AND THE JEW: THE INNER ANTI-SEMITISM OF PHILOSOPHY AND GERMAN JEWISH RESPONSES 6–7 (2003). German theologians in the generation after Kant were also hostile to Judaism, arguing for the subordination of ceremonial law to civil law. See Anders Gerdmar, *Roots of Theological Anti-Semitism: German Biblical Interpretation and the Jews, from Herder and Semler to Kittel and Bultmann*, in STUDIES IN JEWISH HISTORY AND CULTURE 71–73 (Hava Tirosh-Samuelson & Giuseppe Veltri eds., 2008) (discussing Freidrich Schleiermacher's views of Judaism and Christianity). Leading figures in the French Enlightenment, such as Voltaire, also expressed contempt for Jews and Judaism. See Arnold Ages, *Tainted Greatness: The Case of Voltaire's Anti-Semitism*, 21 NEOHELICON 357, 367 (1994) (finding in Voltaire's writings “a powerful diatribe against a people [i.e., the Jews] viewed as a threat to the utopian but secular universalism that the *philosophes* promoted. It may be argued that Voltaire . . . served as a catalyst in transforming the medieval image of the Jews . . . to the pre-modern secular concept of the Jew as non bio-degradable material in society.”).

102. See ZYGMUNT BAUMAN, MODERNITY AND AMBIVALENCE 102–59 (1991). “With the rise of modernity, separation of Jews did become an issue. Like everything else in modern society, it had now to be manufactured, built up, rationally argued, technologically designed, administered, monitored and managed. . . . [t]he conditions propitious to the perpetuation of genocide are thus special, yet not at all exceptional . . . [n]ot being an

Enlightenment was a complicated development, with radically different and opposing currents of thought, which made vital contributions to human liberty.¹⁰³ Yet it can hardly be doubted that much Enlightenment thought harbored deep hostility (whether conscious or unconscious) to religion in general and to Judaism in particular. Thus, Alexis de Tocqueville characterized the philosophy of the Enlightenment as “profoundly anti-religious.”¹⁰⁴

Governmental policies inimical to traditional Jewish law and custom have persisted since these origins. Throughout the nineteenth century and continuing well into the twentieth, German governments, both national and local, were preoccupied with what were called the *Rituelfragen*—i.e., the “problems” of Jewish rituals. Among these issues, of course, was whether kosher butchering should be forbidden by law. Proponents of a ban on *shehita* frequently argued that ritual slaughtering inflicted gratuitous suffering on animals. In an 1878 article, one advocate of a ban argued:

The *shochet* [*sic*] comes with his knife the length of his arm and cuts the sword into and through the neck of the animal, that [knife] however goes right through his shaking bellow. . . . Such barbaric animal cruelty still takes place today . . . With this kind of animal cruelty, all others [kinds of animal cruelty] are kids’ play.¹⁰⁵

By the 1870s, demands for animal protection were interwoven into German-speaking and Scandinavian countries with modern anti-Semitism. The demand for humaneness in the treatment of animals was coupled with the claim that Jewish slaughtering practices were cruel, anachronistic, and uncivilized. Thus, the *Tierschutz Verband des Deutschen Reiches*, a

immanent attribute of modern society, they are not yet an alien phenomenon either. As far as modernity goes, genocide is neither abnormal nor a case of malfunction. It demonstrates what the rationalizing, engineering tendency of modernity is capable of if not checked and mitigated, if the pluralism of social powers is indeed eroded—as the modern ideal of purposefully designed, fully controlled, conflict-free, orderly and harmonious society would have it. Any impoverishment of grass-root ability to articulate interests and self-govern, every assault on social and cultural pluralism and the opportunities of its political expression . . . make a social disaster on a Holocaust scale just a little bit more feasible.” ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* 57, 114–15 (1989).

103. See JONATHAN ISRAEL, *RADICAL ENLIGHTENMENT: PHILOSOPHY AND THE MAKING OF MODERNITY 1650–1750* (2001) (contrasting “Radical” Enlightenment, “Mainstream Moderate” Enlightenment, and “Counter” Enlightenment).

104. ALEXIS DE TOCQUEVILLE, *THE ANCIEN RÉGIME AND THE FRENCH REVOLUTION* 21 (Gerald Bevan ed. & trans., 2008). Tocqueville goes on, however, to distinguish two “quite distinct and separable trends” in Enlightenment thought: one concerning law and politics, which enshrined such “fundamental, lasting and authentic” principles as that of human equality; and the second concerning religion, which was “a sort of frenzy.” *Id.* at 21–22.

105. JUDD, *supra* note 21, at 74.

German humane society founded in 1881, attacked the practice of *shehita*, arguing that “even religious views are not unchangeable but must conform to the progressing standards of humanity and education.”¹⁰⁶ Fueled in part by anti-Semitism, the animal rights movement scored notable political successes between 1890 and 1940, as *shehita* was increasingly outlawed in various States and localities of northern Europe. In the German-speaking world, the practice was extensively debated after 1870,¹⁰⁷ and it was eventually outlawed by decree in the Kingdom of Saxony in 1892,¹⁰⁸ by a national referendum in Switzerland in 1893,¹⁰⁹ by either legislation or administrative action in German provinces such as Bavaria in 1930,¹¹⁰ and finally by the decree of Adolf Hitler in April, 1933.¹¹¹

Events moved on a similar track in the Nordic and Scandinavian world, where a 1902 decree in Finland, 1929 legislation in Norway, and legislation

106. Dorothee Brantz, *Stunning Bodies: Animal Slaughter, Judaism, and the Meaning of Humanity in Imperial Germany*, 35 CENT. EUR. HIST. 167, 175 (2002).

107. For an account of these debates, see Shai Lavi, *Animal Laws and the Politics of Life: Slaughterhouse Regulation in Germany, 1870–1917*, 10 THEORETICAL INQUIRIES IN LAW 221 (2006).

108. See James Retallak, *Conservatives and Antisemites in Baden and Saxony*, 17 GERMAN HIST. 507, 512 (1999).

109. See *Switzerland*, in THE JEWISH ENCYCLOPEDIA, available at <http://www.jewishencyclopedia.com/articles/14149-switzerland>.

110. See JUDD, *supra* note 21, at 212–15 (Bavaria). Germany had had a long tradition of animal welfare legislation. See Kate M. Natrass, “. . . Und Die Tiere”: *Constitutional Protection for Germany’s Animals*, 10 ANIMAL L. 283, 285–87 (2004).

111. For early Nazi “animal welfare” legislation, see *Das deutsche Reichstierschutzgesetz vom 24. November 1933* [Nazi Germany and Animal Rights 1933 Law on Animal Protection], available at <http://www.akademijanst.se/tierschutzgesetz>, English translation available at http://www.worldfuturefund.org/wffmaster/Reading/Germany/Nazi_animalrights.htm.

The promotion of animal welfare was an important part of the early Nazi program. “[T]he Nazis . . . instituted the strongest laws for the protection of animals in research that Europe had ever seen. Their laws also mandated humane treatment of animals in farms, movie sets, and restaurants, where fish had to be anesthetized and lobsters killed swiftly before they were cooked.” STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 462 (2011). The French philosopher Luc Ferry has reviewed this legislation and argues that it stemmed from attitudes to nature that were characteristic of German romanticism. See LUC FERRY, *THE NEW ECOLOGICAL ORDER* 91–107 (Carol Volk trans., 1995).

Some of the Nazi animal welfare legislation was aimed against Jews. On its impact, see MARION A. KAPLAN, *BETWEEN DIGNITY AND DESPAIR* 33–34 (1999); JUDD, *supra* note 21, at 239–43.

in Sweden in 1902, 1929, and 1937 all abolished *shehita*.¹¹² Denmark considered such legislation at various times in this period, but did not enact it.¹¹³ Eventually, in 1953, Denmark did require the stunning of animals before they were slaughtered, but *shehita* was exempted from this legislation.¹¹⁴

The Norwegian and Swedish bans merit brief consideration. After several unsuccessful attempts to introduce anti-*shehita* legislation, Norway adopted it in 1929, in a public and parliamentary debate tainted with anti-Semitism:

“[T]he shehita was portrayed as a heartless method of slaughter that stood in conflict with Norwegian values. It might be acceptable in more southerly climes, where people were hard on each other, as well as on animals, but it was not acceptable in Norway. As for the Jews, they were expected to accommodate themselves to the modes of thinking predominant among their hosts. One Agrarian Party member went even further, proclaiming that the Jews should ‘use animals other than ours. . . . We have no obligation to expose our domestic animals to the cruelty of the Jews; we did not invite the Jews into this country, and we are under no obligation to supply the Jews with animals for their religious orgies.’”¹¹⁵

The Norwegian Parliament specifically considered, but rejected, the argument for a religious exemption from the requirement of stunning before slaughter. On the other hand, it did carve out an exception for the slaughter of some 15,000 reindeer annually in Lappland, in accordance with local customs.¹¹⁶

Partly under the influence of Norway, Sweden enacted its own ban on *shehita* in 1937. Other factors affecting Sweden’s decision were then-recent Nazi and British regulations regarding animal slaughter.¹¹⁷ As in Norway, the parliamentary debate over the legislation in Sweden sounded anti-Semitic themes. In presenting the bill to the lower house of the Swedish legislature, the Minister of Justice, Karl Gustaf Westman, argued that the invasion of Jewish religious rights counted for little: “[I]n my opinion the interest in not offending the religious customs of this nature [observed by] a small number of citizens cannot outweigh the arguments

112. See Michael F. Metcalf, *Regulating Slaughter: Animal Protection and Antisemitism in Scandinavia, 1880–1941*, 23 *PATTERNS OF PREJUDICE* 32, 32–33 (1989).

113. *Id.* at 33.

114. *Id.*; see *id.* at 46 (suggesting a possible explanation of Denmark’s exceptionalism). It is also important to remember Denmark’s exceptional concern with the fate of its own Jews during the Nazi occupation in the Second World War. See generally BO LIDEGAARD, *COUNTRYMEN* (Robert Maass trans., 2013) (describing Danish efforts to protect Jews).

115. Metcalf, *supra* note 112, at 39.

116. *Id.*

117. *Id.* at 41.

for a prohibition.”¹¹⁸ In the upper house, a leading proponent of the bill, Otto Wallén, denounced *shehita* as a ““barbarous procedure”” and “cited a newspaper headline that described ‘the repulsive and brutal method of slaughter used by the Jews’ as ‘a scandal for our cultured society.’”¹¹⁹ As Norway had done, Sweden, on behalf of its Lapp minority, carved out an exemption for the slaughter of reindeer.¹²⁰

None of this is to say, of course, that the demand for animal welfare is necessarily motivated by anti-Semitism. But it is *historically* linked to it, especially in the German-speaking and Scandinavian parts of Europe.¹²¹ That fact warrants a degree of suspicion when demands for a ban on *shehita* have been renewed in the region.

IV. SCIENTIFIC PERSPECTIVES ON SHEHITA

The case for a ban on *shehita* rests primarily on animal science. We must therefore ask how compelling the scientific arguments for stunning before slaughtering actually are.

In a 2006 law review article, two Israeli legal scholars found some scientific and medical evidence indicating that kosher slaughtering is or can be as humane as killing after stunning.¹²² They also discussed the

118. *Id.* at 42.

119. *Id.* at 43.

120. That exemption still exists in Swedish law. In fact, Sweden extensively subsidizes reindeer slaughtering. See Annika Hernroth-Rothstein, *What is good for the goose, should be good for the gander*, THE JERUSALEM POST (Mar. 6, 2014), <http://www.jpost.com/LandedPages/PrintArticle.aspx?id=344505>.

121. For evidence of continuing anti-Semitism in Norway, see *Jewish Community of Oslo v. Norway*, U.N. Doc. CERD/C/67/D/30/2003 (2005), available at <http://www1.umn.edu/humanrts/country/decisions/30-2003.html>. See also Liam Hoare, *The Scandal of Scandinavia*, THE TOWER (April 2013), <http://www.thetower.org/article/the-scandal-of-scandinavia/>; Aaron Kalman, *Norway paper's cartoon 'so anti-Semitic it would have made Hitler weep with joy.'* THE TIMES OF ISRAEL (May 29, 2013), <http://www.timesofisrael.com/norway-paper-rapped-for-anti-semitic-cartoon/>; Raphael Ahren, *Told that Norway is the West's most anti-Semitic Country, diplomat lashes out at Israel*, THE TIMES OF ISRAEL (Nov. 6, 2012), <http://www.timesofisrael.com/at-jerusalem-panel-norwegians-spar-over-israel-and-anti-semitism/>.

122. Pablo Lerner & Alfredo Mordechai Rabello, *The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities*, 22 J. L. & RELIGION 1, 44–48 (2006–2007). “There are new scientific studies that show there are welfare concerns when animals are slaughtered without stunning. New Zealand researchers conducted a study on calves with a new EEG brain wave method that indicated that the knife cut caused pain. In this study, however, they used a machine-sharpened knife

2003 report of Italy's National Commission on Bioethics, entitled *Ritual Slaughter and Suffering*, which had found that "there are no currently reliable means to determine which slaughtering methods result in what amounts of suffering by animals."¹²³ In *Physiological insights into Shechita*, S.D. Rosen, after an extensive review of the experimental data, concluded that *shehita* "is a painless and effective method by which to stun and dispatch an animal in one rapid act."¹²⁴ Proponents of a ban therefore have to ask themselves whether they are justified in repressing a core religious practice of two great world religions for the sake of questionable gain in animal welfare. This is especially so because stunning before slaughtering an animal is itself often ineffective in preventing avoidable pain to animals.¹²⁵

Of particular interest in the scientific debate is the research done by Professor Temple Grandin of the Department of Animal Science at Colorado State University. Doctor Grandin is a vigorous proponent of animal welfare who has designed a system to reduce strain on livestock during slaughtering in meat plants. In her paper *Religious slaughter and animal welfare: a discussion for meat scientists* (1994), co-authored with Joe M. Regenstein of Cornell University's Department of Food Science,¹²⁶ Dr. Grandin identified three basic issues to be considered when evaluating ritual slaughter from the standpoint of animal welfare: 1) the stressfulness of restraint methods; 2) pain perception during the incision (as evidenced, e.g., by animal vocalization or movement); 3) the length of time after incision before complete insensibility sets in.

that may have been too short. A knife that is too short will cause gouging of the wound . . . [t]o this date, a similar study has not been done with the special long kosher knife." Temple Grandin, *Maximizing Animal Welfare in Kosher Slaughter*, JEWISH DAILY FORWARD (Apr. 27, 2011), <http://forward.com/articles/137318/maximizing-animal-welfare-in-kosher-slaughter/>.

123. Lerner & Rabello, *supra* note 122, at 17.

124. S.D. Rosen, *Physiological insights into Shechita*, 154 VETERINARY REC. 759, 764 (2004), available at http://www.jodendom-online.nl/gfx/artikelen/jodendom/Physiological_insights_into_Shechita_S.D.Rosen_Veterinary_Record_2004_01.pdf.

125. Lord Jonathan Sacks, the distinguished former Chief Rabbi of the United Hebrew Congregations of the Commonwealth, noted this in a speech on January 16, 2014 to the U.K. House of Lords. He said: "Pre-stunning by captive bolt, as your Lordships have heard, often fails at the first attempt. According to the European Food Safety Authority's report in 2004, the failure of penetrating and non-penetrating captive bolts affects around 10 million animals, causing the animal grave distress." Lord Sacks' remarks are available at <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140116-gc0001.htm#14011665000550> and at <http://www.rabbisacks.org/animal-welfare-shechita/>.

126. Temple Grandin & Joe M. Regenstein, *Religious slaughter and animal welfare: a discussion for meat scientists*, MEAT FOCUS INT'L, Mar. 1994, at 115–23, available at <http://www.grandin.com/ritual/kosher.slaugh.html>.

Reviewing ritual slaughter methods in each of these three dimensions, Dr. Grandin concluded that, if *shehita* or halal butchering were done properly, it would be consistent with the protection of animal welfare.¹²⁷

Thus, as to the first issue, she noted that some *shehita* slaughtering factories in North America use very stressful methods of restraint, such as hoisting fully conscious cattle by one rear leg.¹²⁸ Such practices are not dictated by religious rules and should be eliminated in the interest of animal welfare: “A properly designed and operated upright restraint system will cause minimum stress. Poorly designed systems can cause great stress. Many stress problems are also caused by rough handling and excessive use of cattle prods. The very best mechanical systems will cause distress if operated by abusive, uncaring people.”¹²⁹ She recommends the use of devices to restrain the animal’s body during ritual slaughter, and incision within ten seconds after the animal’s head is restrained.

Second, based on her own extensive observations of over 3,000 slaughters in American *shehita* meat plants using restraint systems, she found that:

[T]he animals had little or no reaction to the throat cut. There was a slight flinch when the blade first touched the throat. This flinch was much less vigorous than an animal’s reaction to an ear tag punch. There was no further reaction as the cut proceeded[,] . . . [t]hese animals made no attempt to pull away[,] . . . there was almost no visible reaction of the animal’s body or legs during the throat cut[,] and] . . . [i]t appears that the animal is not aware that its throat has been cut.¹³⁰

Dr. Grandin emphasized that, in achieving such results during ritual slaughtering, the *shohet*’s training and equipment are vitally important; *shohets* must be trained to keep knives razor sharp and free of nicks, the knives must be shaped like straight razors and be twice the width of the animal’s neck, and head holders must be designed so that the place of the incision is held open during and immediately after the cut.¹³¹

Third, loss of consciousness in cattle after both carotid arteries are cut may occur within 30 seconds, but can last for over a minute. “When a *shohet* uses a rapid cutting stroke, 95% of . . . calves collapse almost

127. *Id.*

128. *Id.*

129. *Id.* at 117.

130. *Id.* at 119.

131. *Id.* at 120.

immediately. . . When a slower, less decisive stroke was used, there was an increased incidence of prolonged sensibility.”¹³²

Dr. Grandin’s research suggests that most or all of the injury to animal welfare incurred in the ritual slaughtering of cattle can be eliminated by careful *regulation*, and that outright *prohibition* of ritual slaughtering is not necessary to achieve that end. The improvements she advises – better restraining devices, knives in better condition, less abusive handling of the animals, and more decisive cuts– are all entirely compatible with both *shehita* and halal slaughtering.

Doctor Grandin’s conclusions are supported in chapter seven of the report, *Guidelines for Humane Handling, Transport and Slaughter of Livestock* by the Food and Agriculture Organization (FAO) of the United Nations Regional Office for Asia and the Pacific.¹³³ She was, indeed, one of four co-authors of that report.¹³⁴ After discussing three main methods of stunning (percussion stunning, electrical stunning—which, incidentally, is permitted by some Muslim authorities—and carbon dioxide gas stunning), the report considered kosher and halal slaughtering.¹³⁵ Acknowledging that “many authorities consider that religious slaughter can be very unsatisfactory and that the animal may not be rendered unconscious and suffer considerable discomfort and pain in the slaughter process,” the authors observed that “[a] number of factors must be given serious consideration before this type of slaughter is acceptable.”¹³⁶ In substance, these factors are extremely similar to those Dr. Grandin identified and discussed in the paper cited above. Of key interest here, the FAO *Guidelines* affirmed that if kosher and halal butchering is properly regulated and conducted, it can be “acceptable” from the standpoint of animal welfare.¹³⁷

Finally, many other civilized nations, including European ones, permit ritualized slaughtering in accordance with Jewish and Islamic law, finding it to be a legitimate and humane alternative to killing that is preceded by

132. *Id.* at 121.

133. *Guidelines for Humane Handling, Transport and Slaughter of Livestock*, U.N. FOOD & AGIC. ORG., REG’L OFFICE FOR ASIA & THE PAC., RAP Publ. 2001/4, 49–82, <http://www.fao.org/docrep/003/x6909e/x6909e00.htm>.

134. The authors were Philip G. Chambers (formerly Deputy Director of Veterinary Public Health, Department of Veterinary Services, Bulawayo/Zimbabwe), Temple Grandin (Assistant Professor, Department of Animal Sciences at Colorado State University, USA), Gunter Heinz (Animal Production Officer, FAO Regional Office for Asia and the Pacific, Bangkok/Thailand) and Thinnarat Srisuvan (Veterinary Officer, Department of Livestock Development, Bangkok/Thailand).

135. See *Guidelines for Humane Handling, Transport and Slaughter of Livestock*, *supra* note 133, at 55–68.

136. *Id.* at 74.

137. *Id.*

stunning. Under the Humane Slaughter Act, an Act of Congress, it is considered humane to slaughter “in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.”¹³⁸ American animal rights activists, surely not lacking in energy, have not assailed *shehita* as their Danish counterparts have done.

Kosher slaughter is also legally permissible in Britain, France, Italy, Germany, and Spain.¹³⁹ In Germany, the occupation of Islamic butchering is constitutionally protected.¹⁴⁰ Article 17 of the 1979 European Convention for the Protection of Animals for Slaughter permits State parties to grant exemptions from a general requirement to stun animals before slaughtering them when the slaughtering is done “in accordance with religious rituals.”¹⁴¹ European Council Regulation 1009/2009 on the protection of animals at the time of killing,¹⁴² which took effect on January 1, 2013, allows for the continuation of existing methods of slaughtering without stunning for religious reasons—which suggests that the European Council currently considers that kosher and halal butchering can be carried out consistently with due regard for animal welfare.¹⁴³

Taken as a whole, these exemptions show that several Western nations akin to Denmark consider kosher and halal slaughtering methods to be humane. If they were not, why would these civilized nations permit them?

138. 7 U.S.C. § 1902(b) (2012).

139. *Ritual Slaughtering and Animal Suffering*, Comitato Nazionale per la Bioetica (Spain), 17 (Sept. 19, 2003), available at http://www.governo.it/bioetica/eng/pdf/Ritual_slaughtering_AnimalSuffering.pdf.

140. BVERFGGE, Jan. 16, 2002, 1 BvR 1783/99 (Ger.), available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20020115_1bvr178399en.html.

141. European Convention for the Protection of Animals for Slaughter, art. 17, May 10, 1979, E.T.S. 102, reprinted in 2 SELECTED MULTILATERAL TREATIES IN THE FIELD OF THE ENV'T. 70 (Iwona Rummel-Bulska & Seth Osafo eds. 1991).

142. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:303:0001:0030:EN:PDF>.

143. See Christopher Needham, Library of the European Parliament, *Religious slaughter of animals in the EU* 5 (Nov. 15, 2012), available at [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120375/LDM_BRI\(2012\)120375_REV2_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120375/LDM_BRI(2012)120375_REV2_EN.pdf).

V. DENMARK'S DEFENSES

Faced with such objections to its new policy, Denmark has offered essentially two defenses.¹⁴⁴ First, Denmark claims that a ban on ritual slaughter achieves a gain in animal welfare; and it can safely be assumed that protecting animals from cruelty and promoting their welfare is an important and legitimate governmental interest.¹⁴⁵ Second, Denmark claims that, for a decade beginning in 2004, it had permitted the registration of Jewish and Muslim butcheries, but had received no applications from them, and, consequently, now claims, its new regulation has changed nothing.¹⁴⁶

Denmark's defenses contradict one another. If the new regulations do indeed promote animal welfare, they cannot leave the pre-existing situation unchanged. But if they do leave the prior situation unaltered, then they cannot mark an improvement in animal welfare.

In the past decade, according to the Danish government itself, Danish Jews and Muslims imported their religiously prescribed meats from abroad instead of slaughtering local cattle. Assuming that Denmark has not changed the domestic status quo through its ban, it follows that the ban has done nothing to improve the welfare of its animals.¹⁴⁷

Nor is that all. First, as previously discussed, a scientific basis for the claim that ritual slaughter is inhumane may exist, but the case is unproven. Moreover, even if ritual slaughter were proven to cause more suffering than slaughtering after stunning, that fact alone would not decide the issue. The question of whether the gain in animal welfare was sufficient to outweigh the cost to religious freedom would remain.

Furthermore, even if Denmark could show that its policy brought about a measurable gain in animal welfare, any such gain would be, at best, marginal. It would consist of the difference between animal welfare under a flat ban on slaughtering without pre-stunning, and animal welfare under a policy that regulated, but accommodated, ritual slaughter.¹⁴⁸ Whether that gain would be large or small would depend on the demand for ritual

144. *Fact Sheet about Danish rules on slaughter & killing of animals*, DEP'T OF MINISTRY OF FOOD, AGRIC. & FISHERIES OF DEN., Feb. 28, 2014 [hereinafter *Fact Sheet*], reprinted in Appendix A, *infra*.

145. *Id.*; see, e.g., *United States v. Stevens*, 559 U.S. 460 (2010) (noting the long history of animal protection laws in the United States).

146. See *Fact Sheet*, *supra* note 144.

147. See *id.*

148. Furthermore, given the apparent division of opinion on the Muslim community about the permissibility of electrical stunning, an accommodation with at least part of that community might be relatively easy.

slaughtering in Denmark, if it were permitted.¹⁴⁹ There is no sure way to determine how significant that demand would be.

Moreover, again assuming that the Danish ban *did* promote the welfare of animals in the country, it would only do so at the expense of lowering the level of animal welfare elsewhere. If Danish Jews and Muslims can no longer eat kosher or halal meat of Danish origin, then, assuming that the costs are about the same, they will presumably substitute imported kosher or halal meat for the Danish variety. This simply means that the incidence of the allegedly inhumane slaughter of cattle globally would remain unaffected by Denmark's ban. Denmark would have improved the level of animal welfare *domestically* while lowering that level *outside that country*. That does not appear to be a rational policy—unless Danish cattle are somehow more deserving of protection than, say, German cattle.

As we have seen, Denmark might argue that, although it is forbidding ritual slaughter within its borders, it is not violating the liberties of the two minority faiths in question, because their followers remain free to import their meats from elsewhere. It is also possible that Denmark *could* not legally ban the import of meat from any other European Union member where the method of slaughter used was valid under the laws of that State and the Union.¹⁵⁰ So we can plausibly assume that kosher and halal imports will satisfy the dietary needs of Denmark's Jewish and Muslim populations. But one must then press the question, *what affirmative good is achieved by the ban?* Without an identifiable gain in animal welfare, the Danish ban seems merely gratuitous—or rather, an insult to that nation's Jews and Muslims.

In fact, Denmark may have imposed its ban as a *preemptive* measure. Some years ago, parts of Denmark's Muslim community began to seek governmental approval for creating a halal butchery of their own. The Danish Food and Agriculture Ministry became alarmed at the proposal, and opened a national debate on the subject. That debate ended when the

149. It would also depend on the marginal difference—if any—between the animal suffering that would occur under a complete ban as against that which would occur under regulated ritual slaughter.

150. Council Directive, 88/306/EEC. 1988 O.J. (L 137) 2.6, *available at* http://europa.eu/legislation_summaries/food_safety/animal_welfare/f82001en.htm.

Ministry announced its decision to impose a ban.¹⁵¹ Denmark seems to have feared that its growing Muslim population would, for the first time, slaughter domestic cattle for its own consumption.¹⁵²

Even on that assumption, however, it is hard to see how Denmark could validly claim to be protecting animal welfare. Unless the substitution of domestic for imported halal meat substantially increased the demand for meat from Danish Muslims, how *could* there be an overall gain in animal welfare? Danish Muslims would simply eat more meat from domestic cattle while ceasing to eat imported cattle in a roughly equivalent amount. Thus, unless imported beef is much more expensive, a ban on domestic halal butchering would seem to be irrational as a means of promoting animal welfare overall, so long as imports remain available.

All else failing, Denmark might try to defend its ban by claiming that, although it operated only within Danish territory, Denmark was setting an example for other countries to follow. Over time, therefore, the level of animal welfare in both Denmark and nations that followed its lead would rise. However, it is pure speculation that other countries would be moved by Denmark's example. Denmark's near neighbor Norway has banned kosher slaughter since 1929,¹⁵³ and its other near neighbor Sweden has had a ban in place since 1937.¹⁵⁴ It has taken Denmark roughly eight decades or more to follow the example of two nearby Scandinavian neighbors who are culturally and ethnically most similar to it. It is unlikely that nations outside the Scandinavian world would be influenced by Denmark's example in the near future.

Finally, we may note that Denmark's professed concern with avoiding pain to animals is highly selective. According to Kopenhagen Fur, an industry consortium owned by 1500 Danish mink farmers, Denmark raises about 17.2 million mink each year, making Denmark the home to Europe's largest mink farming industry.¹⁵⁵ The consortium has an annual turnover of 2.48 billion dollars.¹⁵⁶ Mink fur constitutes Denmark's leading export to China/Hong Kong, and the mink industry is Denmark's

151. See Sokol, *supra* note 4; *Nordic Anger over Immigration Fuels Populist Vote*, VOICE OF AMERICA (Sept. 10, 2013), <http://www.voanews.com/content/nordic-anger-over-immigration-fuels-populist-vote/1746758.html>.

152. See Sokol, *supra* note 4.

153. Caroline B. Glick, *Our World: Norway's Jewish problem*, JERUSALEM POST, Aug. 8, 2011, <http://www.jpost.com/opinion/columnists/our-world-norways-jewish-problem>.

154. Elin Hofverberg, *Sweden: Slaughter of Domestic Animals*, LAW LIBRARY OF CONGRESS, GLOBAL RESEARCH CENTER (May 2014), available at <http://www.loc.gov/law/help/slaughter-domestic-animals/sweden.php>.

155. See *Facts*, KOPENHAGEN FUR, <http://kopenhagenfur.com/about-us/facts>.

156. *Id.*

third largest type of animal farming.¹⁵⁷ Danish mink skins are of a superior quality and are the most expensive on the world market.¹⁵⁸ Methods used to slaughter Danish farmed mink include breaking the animal's neck, gassing with carbon dioxide, lethal injection, genital electrocution, and anal electrocution.¹⁵⁹ These methods may cause severe pain.¹⁶⁰ Denmark also permits traditional hunting, which often leaves animals badly wounded and in great pain for hours.¹⁶¹ And Denmark's pig farming industry has been described as "a monstrous engine of quotidian suffering, despite the pre-slaughter stunning."¹⁶² Denmark does not prohibit any of these practices despite their impact on animal welfare, which suggests bias in its ban on *shehita* and halal butchering.

It follows that Denmark's ban is purposeless and irrational—unless, that is, the ban is intended to serve some alternative purpose than the one announced by the Danish government. And there surely *is* an ulterior motive for the ban.

157. *Id.*

158. *Mink and Fur*, DANISH AGRIC. & FOOD COUNCIL, http://www.agricultureandfood.dk/Danish_Agriculture_and_Food/Mink_and_Fur.aspx.

159. See Eliyahu Federman, *Anti-religious bias in Danish slaughter ban*, JERUSALEM POST, (Feb. 18, 2014), <http://www.jpost.com/LandedPages/PrintArticle.aspx?id=341839>. In 2009 and 2010, the animal welfare group Anima published footage of conditions at Danish fur farms. The videotapes revealed animals that have large wounds and gashes and that engaged in cannibalism. *Brutal and intolerable video from Danish mink farms*, (TV 2 television broadcast Apr. 2014) available at http://www.peta.de/nerzfarm#.U0mff_0o7jo. The Danish television station TV 2 aired some of the footage, causing a public outcry and provoking a lawsuit against TV 2 by the Danish Fur Breeders Association. See *Fur farmers retaliate against TV 2 accusations*, COPENHAGEN POST (Apr. 10, 2010), <http://cpb.post.dk/news/fur-farmers-retaliate-against-tv2-accusations.2837.html>.

160. Gassing, for example, is an inhumane method of killing mink, a semi-aquatic species. See *Facts about Fur production*, EUROGROUP FOR ANIMALS 4–5, available at http://eurogroupforanimals.org/files/news/downloads/570/ffa_eurogroup_briefing_for_meps_on_the_fur_industry_english_version.pdf.

161. See Federman, *supra* note 159.

162. See Andrew Brown, *Denmark's ritual slaughter ban says more about human hypocrisy than animal welfare*, THE GUARDIAN: ANDREW BROWN'S BLOG (Feb. 20, 2014), <http://www.theguardian.com/commentisfree/andrewbrown/2014/feb/20/denmark-halal-kosha-slaughter-hypocrisy-animal-welfare>. Brown continues: "The new agriculture minister, Dan Jørgensen, has pointed out that 25,000 piglets a day die in Danish factory farms—they never even make it to the slaughterhouse; that half of the sows have open sores and 95% have their tails docked, a cruel (and under EU regulations, illegal) practice that is needed to stop them chewing and biting one another's tails in their concrete sheds." *Id.*

Until recently, Denmark was, religiously and ethnically, highly homogeneous. Danish Muslims are a large and growing demographic element in the Danish population. Many of them are immigrants; others are converts to Islam. Furthermore, some of Denmark's dominant secularists portray the country's Muslims as hostile to "the values of the Enlightenment" that they wish Denmark to embody.¹⁶³ Denmark's Muslim minority thus presents an inviting target for opportunistic politicians of both left and right.

VI. CONCLUSION

To many outside observers, Denmark appears to be a model State and society. Francis Fukuyama has even characterized the development of the most highly desirable political institutions as the process of "getting to Denmark":

The problem of creating modern political institutions has been described as the problem of "getting to Denmark[.]" . . . For people in developed countries, "Denmark" is a mythical place that is known to have good political and economic institutions; it is stable, democratic, peaceful, prosperous, inclusive, and has extremely low levels of political corruption. Everyone would like to figure out how to transform Somalia, Haiti, Nigeria, Iraq, or Afghanistan into "Denmark," and the international development community has long lists of presumed Denmark-like attributes that they are trying to help failed States achieve.¹⁶⁴

Sadly, Fukuyama's "mythical" Denmark is only too mythical.

Denmark's prohibition of *shehita* and halal slaughtering may not be an unlawful infringement on religious liberty under the current case law of the European Court of Human Rights. The new regulation merely freeze-

163. After the "cartoon controversy" of 2006, Danish Prime Minister Rasmussen reflected: "The Enlightenment . . . has been the driving force behind European development and decisive for why we have come so far, as we have. Therefore we have something here [freedom of expression], with regard to which we cannot give one millimeter." Rostbøll, *supra* note 18, at 626. Another leading Danish political figure wrote that it was essential that "the values of the Enlightenment take hold of more Muslims," because religion "is superseded as the central force that human beings submit to." *Id.*

The attitude expressed by the Danish political figures is rooted in the influential characterization of Islam as antagonistic to Enlightenment values. See, e.g., ANTHONY PAGDEN, *THE ENLIGHTENMENT: AND WHY IT STILL MATTERS* 345–47 (2013) (imagining counter-history in which absence of Enlightenment led to Europe's falling under Ottoman rule); Conor Cruise O'Brien, *Islam: back to the Dark Ages: We should not repeal the Enlightenment to appease Ayatollahs*, says Conor Cruise O'Brien, *INDEPENDENT* (Aug. 12, 1994), <http://www.independent.co.uk/voices/islam-back-to-the-dark-ages-we-should-not-repeal-the-enlightenment-to-appease-ayatollahs-says-conor-cruise-obrien-1382946.html>.

164. FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION* 14 (2011).

framed the existing situation; it did not interfere with any ongoing exercise of religious expression or activity. So long as Denmark's Jews and Muslims remain free to import beef from other countries that has been slaughtered in accordance with their religious prescriptions, Denmark's action may be consistent with European human rights law.

Yet it is undeniable that the Danish government deliberately insulted the religious beliefs and practices of two of the country's minority religions. It is as though Denmark had issued postage stamps reproducing the satirical images of Mohammed that had given so much offense in the 2006 cartoon controversy.¹⁶⁵ Without obstructing the practice of any religion, Denmark would have expressed symbolic, but official, contempt for one religion.¹⁶⁶ And that, indeed, seems to be the case here.

It may well be that the Danish government and society have come to find that the nation's growing ethnic and religious diversity imposes too great a strain on its traditional solidarity and cohesion. And there might

165. Very recently, in the wake of the *Charlie Hebdo* shooting in Paris, Danish politicians have called for the use of the Mohammed cartoons in school textbooks. See *Danish lawmakers propose Muhammed Cartoons in school textbooks*, FOX NEWS (Mar. 9, 2015), <http://www.foxnews.com/world/2015/03/09/danish-proposal-to-put-mohammed-cartoons-in-school-textbooks/>.

166. In that respect, the Danish ban might be described as creating a “reverse-*Lautsi*” situation. See *Lautsi v. Italy*, 30814/06 Eur. Ct. H.R. (2011) (European Court of Human Rights Grand Chamber finding no violation of freedom of religion in State-ordered display of crucifix in public school classroom). By calling this a “reverse-*Lautsi*” situation, I mean this: if the display of a crucifix in a public school could be perceived as the State's endorsement of Christianity and the disparagement of other religions (and some did so perceive it), then Denmark's ban on ritual slaughter could equally well be perceived as the State's endorsement of a secular world view—which is itself effectively a religion—and the corresponding disparagement of two traditional faiths, Judaism and Islam. See Joseph H. Weiler, *Lautsi: Crucifix in the Classroom Redux*, 21 EUR. J. INT'L L. 1, 3–4 (2010) (arguing that in contemporary, multicultural Europe, *laïcité* is not mere absence of faith, but in itself a “rich world view,” and that a secularist might find the classroom display of a crucifix as offensive as a Jew or Muslim would). In other words, a State's preference for a secular world view does not ensure that the State is “neutral” as to religion; rather, the State may affirmatively, if without express acknowledgement, be promoting one religion (secularism) over all others. See generally ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 757–58 (Eduardo Nolla ed., James T. Schleifer trans., 2010) (predicting the eventual emergence in late democracy of a secular belief-system with many features of a religion); JOSEPH BOTTUM, AN ANXIOUS AGE xi–xxii (2014) (arguing that many salient characteristics of contemporary American “secular” liberalism derive from the deconversion of the descendants of mainline American Protestants).

even be valid reasons to defend such a view.¹⁶⁷ But if that is truly the reason for Denmark's kosher and halal ban, then the government should say so openly and transparently, rather than feigning a concern for animal welfare. Those who lay claim to the Enlightenment should dare to know and speak the truth.

167. See generally Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137 (2007).

VII. APPENDIX

Ministry of Food, Agriculture and Fisheries of Denmark
The Department



Fact sheet about Danish rules on slaughter and killing of animals

- As of 17 February 2014 the Danish legislation implementing of Council regulation No 1099/2009 on the protection of animals at the time of killing has been adjusted by the issuing an executive order.
- The order stipulates that religious slaughter be performed only with prior stunning.
- The adjustment in the legislation has no *de facto* effect. The Danish slaughterhouses use the exact same procedures as before February 17th and imported meat from animals slaughtered without prior stunning will continue to be available.
- It is very important to the Danish Government, that everyone has the freedom to practice their religion. To this end the Danish government would like to emphasize the following:
 - No slaughterhouses in Denmark have since 2004 registered their intent to perform religious slaughter without prior stunning, which has been the legal requirement.
 - The supply of imported meat from animals that have been slaughtered without prior stunning has been sufficient to meet the demand from religious groups in Denmark who require this.
- Freedom of religion is a fundamental human right, and Denmark will not allow for any national legislation to be in breach of this or indeed any other fundamental rights.
- Should a situation arise where the supply of meat from animals slaughtered without prior stunning does not meet the demand from the religious, the Danish Government will reconsider the situation.
- The competent authorities will continuously monitor the situation and are engaged in dialogue with Muslim and Jewish organizations with regard to any limitations in their freedom to practice their religion.

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