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**Church-State Relations in Europe:
From Legal Models to an Interdisciplinary Approach**

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Abstract

This article contends that scholarship itself has become a barrier to the understanding of church and state relations in Europe. It argues that legal analysis to date has taken an overly narrow approach, focussing purely on the means by which religion is recognised and ignoring the end. The first part of the article elucidates and critiques the three models conventionally elucidated by lawyers (the state church systems, separation (secular) systems and hybrid or cooperationist systems), concluding that an alternative approach is required. The second part outlines an alternative interdisciplinary approach, suggesting the benefits of fusing insights from both law and sociology.

Keywords

church and state, Europe, religion, law, sociology of religion, interdisciplinarity

1. Introduction

In recent years, the complex interactions between laws and religions have rarely been far from the news headlines. In the context of the United Kingdom heated debates concerning the wearing of religious dress in school and at work and concerns about the application of anti-discrimination law to religious bodies have dominated the public arena.¹ These debates, together with other high profile contests concerning anti-terrorism measures and allegedly blasphemous cartoons, have been felt throughout the continent of Europe as a whole.

However, despite this resurgence in interest, little attention has been paid to the legal status of religious groups as opposed to religious individuals. European lawyers have tended to analyse church-state relations comparatively by constructing models that focus solely upon the letter of the constitutional provisions, rather than the socio-legal reality. This conventional approach is misguided and constrains scholarship in the field by focussing upon the *means* by which religion is regulated at the cost of understanding the *end*.² By critically evaluating the model approach, and suggesting a new conceptualisation of the field of law and religion, it is possible to identify a new approach built upon interdisciplinary socio-legal research.

2. The Conventional Approach

¹ Mark Hill & Russell Sandberg, "Is Nothing Sacred? Clashing Symbols in a Secular World," *Public Law* (2007), 488-506, p. 488; Russell Sandberg & Norman Doe, "Religious Exemptions in Discrimination Law" *Cambridge Law Journal* 66/2 (2007), 302-312, p. 302; Russell Sandberg, "Controversial Recent Claims to Religious Liberty" *Law Quarterly Review* 124 (2008), 213-217, p. 213.

² This survey focuses solely upon the countries of Western Europe. For an analysis of church-state relations in Eastern Europe see Balázs Schanda, "Church and State in Eastern Europe," *Ecclesiastical Law Journal* 8/37 (2005), 186-198, p.186.

European jurists frequently distinguish between three models or systems of church-state relations: state church systems, separation (secular) systems, and cooperationist (hybrid) systems.³ At first glance, this tripartite distinction seems to be both apt and constructive. State church systems are those countries characterised by the existence of close links between the state and a particular religious community, which may be styled as a ‘state,’ ‘national,’ ‘established,’ or ‘folk’ church. Examples include England, Denmark, Greece, Finland, Malta, and Bulgaria. By contrast, separation systems include those countries where there is a constitutional barrier forbidding the financial support and establishment of any one religion. Examples of such a separation are France (with the exception of the three eastern *départements*), the Netherlands, and Ireland. Hybrid systems, effectively, are those states whose constitutional provisions concerning religion come in between state church systems and separation systems. Also known as cooperationist systems or sometimes concordatarian systems, these states are characterised by a simple separation of state and church coupled with the recognition of a multitude of common tasks which link state and church activity, which are often recognised in the form of agreements, treaties, and Concordats. Examples include Spain, Italy, Germany, Belgium, Austria, Hungary, Portugal, and the Baltic States.

However, further examination reveals that these models are flawed.⁴ The state church categorisation often has more to do with theory than practice; with history rather than sociology. Although it is true that those countries labelled under this heading have in common the fact that they grant one religious community (or more) a special constitutional position and special benefits and burdens resulting from that special position, it may be observed that Eu-

³ Gerhard Robbers, “State and Church in the European Union,” in: idem, *State and Church in the European Union* (Baden-Baden: Nomos, 2005), 577-589, 578–580.

⁴ For further elucidation and critique, see Russell Sandberg & Norman Doe, “Church-State Relations in Europe,” *Religion Compass* 1/5 (2007), 561-578, p. 561. Cf. also Sabine Riedel’s contribution to this issue of the *Journal of Religion in Europe*.

European state church systems have little else in common. The high degree of state control found in Denmark, where the Danish National Church has no synod, no legal personality, and is not a corporate body, has very little in common with the Greek Orthodox Church which has its own legal status as a legal person and where the self-government of the church is guaranteed by the Greek constitution. This heterogeneity is underlined by the case of Finland which has two churches treated favourably by the state: the status of the Finnish Evangelical Lutheran Church is analogous to that of the Orthodox Church in Greece; while the status of the Finnish Orthodox Church, the country's second largest religious community, is not dissimilar to that of the Evangelical Lutheran Church in Denmark.⁵ Perhaps more problematic is the state church categorisation's failure to accommodate those states where although there was formerly a state church, that legal status has been removed but some special bond still exists. Sweden and Wales are invariably omitted from the legal typologies entirely.⁶ These considerations cast doubt upon the usefulness of the distinction.

An even more compelling criticism is that the focus upon the relationship between the state and one religious group (or in the case of Finland, two groups) does not paint an accurate picture of the legal regulation of religion in those countries. For example, the fact that England has a state church system says very little about the legal regulation of religion in England. Indeed, the most recent and authoritative House of Lords judgment concerning the position of the Church of England seemed to suggest that there was some distance between the established church and the state. In *Aston Cantlow v Wallbank*⁷ Lord Hope of Craighead noted that “[t]he relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government.” Moreover,

⁵ Sandberg & Doe, “Church-State Relations in Europe.”

⁶ Robbers, “State and Church in the European Union,” 578–581.

⁷ [2003] UKHL 37, [2004] 1 A.C 546 [UK House of Lords decision].

this exclusive focus upon the state church ignores the legal status of other religious groups. Reference to such groups in state church countries reveals that although in general they are treated legally as private organisations, the degree of state involvement differs greatly. Whilst in England and Denmark such groups have no special legal status,⁸ in Finland and Sweden there are complex registration requirements.⁹ Such groups are also protected by freedom of religious clauses found in national and international law. If such equality provisions are seen as the main source of law in relation to religion, then characterising these countries on the basis that they have a state church seems outdated.

Similarly, although separation systems *seem* to be homogenous in that they are characterised by a strict separation of state and church, usually in the form of a constitutional prohibition forbidding intervention by the state in religious affairs, closer examination shows that this is not the case. Although the letter of the constitution seems unique in separation countries, in practice there is very little to distinguish these countries from other European jurisdictions. European separation systems view separation as the means, not the end:¹⁰ the state's response to religion is not characterised by indifference. Indeed, the state's role is facilitative.

⁸ In England, civil courts will uphold the internal rules of the association upon assenting members but will generally only interfere to protect a civil right or to administer property (*Forbes v Eden* (1867) LR Sc & Div 568 [UK House of Lords decision]). In Denmark, other religious communities are seen legally as independent, private institutions. Although they have no special legal status, they have special connections with different public authorities: for example, the Minister of Ecclesiastical Affairs has the capacity to decide questions about the authorization of marriages: Inger Dübeck, "Non-Covenantal Cooperation of State and Religion in Denmark," in: Richard Puza & Norman Doe (eds.), *Religion and Law in Dialogue: Covenantal and Non-Covenantal Cooperation between State and Religion in Europe* (Leuven: Peeters, 2006), 39-46, p. 43.

⁹ See Markku Heikkilä et al., "State and Church in Finland," and Lars Friedner, "State and Church in Sweden," in: Gerhard Robbers (eds.), *State and Church in the European Union* (Baden-Baden: Nomos, 2005), 519-536, 537-552, at pp. 519 and 537.

¹⁰ Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), 130.

Neutrality is not a passive obligation: rather, in its pursuit of religious freedom and equality, the state actively seeks to remove all existing boundaries and often seeks to provide the means whereby all citizens—regardless of their religious convictions—enjoy the equal right to manifest their religiosity throughout their everyday life. This means in practice there is little to distinguish so-called separation systems from the third hybrid category. The only difference is not the actual legal relationship but the emphasis of the letter of the law. The means may be different but the end is the same.

Reference to the separation countries supports this conclusion. Although French constitutional law establishes the secular posture, or the *laïcité*, of the state,¹¹ stating that no religious denomination will be recognised, remunerated or subsidized and that “France shall be an indivisible, secular, democratic and social Republic,”¹² it has gradually been accepted that a ‘positive posture,’ rooted in its *laïcité positive*, is required whereby there is “frequent intervention in order to bring into being everywhere the necessary practical conditions for public worship in respect of each religion.”¹³ Similarly, although the constitution of Ireland spells out fairly precisely the terms of the separation of church and state, it does this by means of an express legal recognition of the value of religion.¹⁴ Moreover, Colton contends the Irish education system, “an area manifestly so fertile with church-state synergy, both historically and

¹¹ Brigitte Basdevant-Gaudemet, “State and Church in France,” in: Gerhard Robbers (eds.), *State and Church in the European Union* (Baden-Baden: Nomos, 2005), 187-208, p. 187

¹² Article 2 of the French law of 1905; Article 1 of the Constitution of 1958.

¹³ Basdevant-Gaudemet, “State and Church in France,” 187.

¹⁴ Article 44(2) of the Constitution currently provides that “[t]he State guarantees not to endow any religion” and “shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status,” but Article 44(1) states that “[t]he State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.”

administratively,”¹⁵ is proof that Irish church-state relations are actually characterised by the “inextricable interdependence” of church and state.¹⁶ This interpretation would place Ireland within the hybrid category. At the very least, such a conclusion requires modification of the separation system category.

However, the hybrid category is the most problematic of the three. It is unknown what the definitive element of this type of system is. From Robbers, one may infer that the definitive element is entirely negative: a hybrid system is characterised by the lack of both a formal state church and a strict system of separation.¹⁷ Yet, this means that it is difficult to distinguish hybrid systems from the other two categories. First of all, it is difficult to distinguish hybrid systems from separation systems. The test cannot simply be the existence of a formal agreement since this is not definitive either politically or legally: as Ferrari notes, the absence of a concordat in Belgium has not prevented the Roman Catholic Church there from enjoying a better legal position than it does in some countries where there is a concordat.¹⁸ This means that the existence of a formal agreement is merely a reflection of the cooperationist nature of the system rather than the proof of the existence of a cooperationist system.¹⁹ Second, it is difficult to distinguish hybrid countries from state church systems since in most cases there is a

¹⁵ Primary and secondary education is organised predominantly on denominational lines and is extensively supported by state funding.

¹⁶ Paul Colton, “Religion and Law in Dialogue: Covenantal and Non-Covenantal Cooperation of State and Religions in Ireland,” in: Richard Puza & Norman Doe (eds.), *Religion and Law in Dialogue: Covenantal and Non-Covenantal Cooperation between State and Religion in Europe* (Leuven: Peeters, 2006), 93-114, p. 101.

¹⁷ “The third type features the basic separation of state and church while simultaneously recognising a multitude of common tasks, in the fulfilment of which State and Church activity are linked” (Robbers, “State and Church in the European Union,” 578–579).

¹⁸ Silvio Ferrari, “The Emerging Pattern of Church and State in Western Europe: The Italian Model,” *Brigham Young University Law Review* (1995), 421-437, at pp. 421–422.

¹⁹ Robbers, “State and Church in the European Union,” 579.

clear legal favouring of a particular religious organisation, such as the Roman Catholic Church in Italy, Spain and Belgium. In these three countries, there operates a three-tier distinction between the Roman Catholic Church, other religious communities with whom the state has made agreements with and all other religious groups with whom no agreement has been made.²⁰ Therefore, it seems that the only distinction between Italy, Spain and Belgium as opposed to countries in the state church category is that the favouring of a particular religious group is provided in a different constitutional form, in terms of agreements as opposed to classical establishment.

The limitations of the hybrid system can be illustrated by reference to Germany. Robbers characterises Germany as a hybrid system on the basis that it “takes a middle of the road approach between that of having a state church and having a strict separation between church and state”.²¹ However, this is questionable: Monsma and Soper note that “some observers would make the case that in Germany there is an informal multiple establishment” and conclude that church-state relations in Germany are characterised by the two basic principles of “partnership and autonomy”.²² Robbers notes, somewhat ambiguously, that in Germany state-church relations are structured around three basic principles: “neutrality, tolerance, and parity.”²³ Regardless of the precise terminology used, it is difficult to see how these principles characterise a distinct German approach to religion. Monsma and Soper adopt the same tripartite distinction to propose three models of church and state at a global level but frame their third model as “the pluralist or structural pluralist” model, claiming that this is characterised

²⁰ Sandberg & Doe, “Church-State Relations in Europe,” 568–569.

²¹ Gerhard Robbers, “State and Church in the Germany” in: idem, *State and Church in the European Union* (Baden-Baden: Nomos, 2005), 77-95, pp. 77.

²² Steven V. Monsma & J. Christopher Soper, *The Challenge of Pluralism: Church and State in Five Democracies* (New York: Rowman & Littlefield, 1997), 11.

²³ Robbers, “State and Church in the Germany,” 60.

by the fact that religion is seen “not as a separate sphere with only limited relevance to the other spheres as the liberal strict separationists so, but as having a bearing on all of life.”²⁴ However, this rests upon the assumption that separation systems are indifferent towards religion and do not facilitate it, which is incorrect. Surely all European states embody these principles. It remains unclear what, in particular, is unique about the hybrid systems. The mere fact that the state cooperates with religious groups cannot be definitive. Doe has contended that it is possible not only to recognise such cooperation in state church and separation systems but to actually conceive of it as an ‘informal’ or ‘quasi concordat’ in a non-technical sense.²⁵ For Doe, constitutional conventions concerning state cooperation with religious bodies are ‘informal’ or ‘quasi-concordats’ in substance if not in form. He contends that such cooperation can be found in the United Kingdom, in respect not only of the established Church of England but all other religious groups (or at least, all groups recognised as religions). Surely such cooperation is characteristic across Europe as a whole. It seems that the characteristics commonly attributed to hybrid states are invariably characteristics common to Europe as a whole and cannot distinguish or justify the existence of a separate ‘catch-all’ category. Ironically, it is this problem that points towards the solution. European jurisdictions have more in common in relation to their treatment of religion than the constitutional letter may suggest.

It has been conceded that this tripartite distinction traditionally adopted by lawyers is seriously flawed. Robbers notes that this classification “according to legal and theoretical considerations is constantly overrated and rendered questionable by social circumstance which suggests different groupings.”²⁶ In short, the three legal categories seem overly formu-

²⁴ Monsma & Soper, *The Challenge of Pluralism*, 11.

²⁵ Norman Doe, “The Concordat Concept as Constitutional Convention in Church-State Relations in the United Kingdom,” in: Richard Puza & Norman Doe (eds.), *Religion and Law in Dialogue: Covenantal and Non-Covenantal Cooperation between State and Religion in Europe* (Leuven: Peeters, 2006), 237-250, p. 237.

²⁶ Robbers, “State and Church in the European Union,” 579.

laic. Although, the conventional legal approach has some benefits: as Monsma and Soper point out no country embodies any categorization “in a pure form, but by starting out with these models in mind will help to organize and focus the mass of observations” that can be made by studying each system,²⁷ it is difficult to disagree with the argument of Ferrari who advocates that the tripartite system should be abandoned.²⁸ He laments what he perceives to be the “persistent recourse (to a large extent due to mental laziness) to an outmoded classification” that “grants excessive importance the formal element of the relationship between church and state” which “overlooks its legal substance.” However, the question of whether there is a preferable approach remains unanswered.

3. A New Approach

To answer that question, it is necessary to determine the precise shortcoming of the current legal approach. It seems that the shortcoming is that the legal model focuses upon the *means* and ignores the *end*. It focuses exclusively upon the constitutional position of religion. Conventional legal scholarship in this field runs the risk of missing the point. There is a need for a shift in approach and method by those engaged in research into this area. Part of the problem is that, despite the growth in literature, little attention has been paid to the direction and content of law and religion scholarship itself.²⁹ To date, this area of study has defied categorisation. For European lawyers, church-state relations and other laws regulating religion are often

²⁷ Monsma & Soper, *The Challenge of Pluralism*, 10.

²⁸ Silvio Ferrari, “The New Wine and the Old Cask: Tolerance, Religion and the Law in Contemporary Europe,” *Ratio Juris* 10/1 (1997), 75-89, at pp. 75, 78.

²⁹ There are some exceptions to this trend: see, for example, Anthony Bradney, “Politics and Sociology: New Research Agenda for the Study of Law and Religion,” in: Richard O’Dair and Andrew Lewis, *Law and Religion* (Oxford: Oxford University Press, 2001), 65-82, p.81.

said to be subsumed under the heading of ‘ecclesiastical law.’ However, the use of this term is extremely problematic since it has been employed inconsistently by both commentators and the judiciary.³⁰ For example, while some commentators, such as May, have contended that the term describes the “entirety of the norms of the law laid down by God and by the Church” and excludes all laws regulating church affairs that are made by the state,³¹ the majority of European jurists have taken the opposite approach and have defined ‘ecclesiastical law’ as covering the “law created by the state for the church,”³² including only those laws created by the state. Moreover, this confusion is exasperated in the context of England where the term ‘ecclesiastical law’ has taken on a technical meaning: the term exclusively refers to “the law of the Church of England to the exclusion of all other law applicable to other churches.”³³ This means that the leading English text, Hill’s *Ecclesiastical Law*, uses the term to describe “the law of the Church of England, howsoever created.”³⁴

Different terminology is thus required in order to recognise a distinction, helpfully drawn by Huizing, between the ‘internal’ ecclesiastical law, the basic juridical relations within the church, and the ‘external’ ecclesiastical law, the juridical relations between church and state.³⁵ This distinction may be used to elucidate what the study of law and religion entails. To date, books published in the UK which use the two words in their title do not provide a defini-

³⁰ Norman Doe, *Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996), 12–13.

³¹ Georg May, “Ecclesiastical Law,” in: Karl Rahner, *Encyclopaedia of Theology* (London: Burns and Oats, 1981), 395, quoted by Doe, *Legal Framework*, 14.

³² E.g., Thomas G. Watkin, “Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales,” *Ecclesiastical Law Journal* 2 (1990), 110-115, pp. 110–111.

³³ Doe, *Legal Framework*, 14.

³⁴ Mark Hill, *Ecclesiastical Law*, 3rd ed. (Oxford: Oxford University Press, 2007), 1–2.

³⁵ Peter Huizing, “Church and State in Public Ecclesiastical Law,” *Concilium* 86 (1970), 126-138, p. 126, quoted by Doe, *Legal Framework*, 14.

tion of their subject matter but rather implicitly accept an underlying theme. Some works adopt what may be styled as the ‘relationship thesis’: to study law and religion is to study the relationship between these two social phenomena.³⁶ Others adopt what we may call the ‘religious freedom thesis’: the study of law and religion is concerned essentially with the scope of religious liberty.³⁷ Regardless of the precise language used, texts on law and religion tend to focus exclusively on what Huizing refers to as the ‘external’ law; moreover, such works tend to focus even more specifically on the question of the extent to which states (or international bodies) accommodate religious difference. Important though this question is, it does not represent the whole concerns of law and religion as a discipline.

A preferable approach may be to follow Huizing and conceptualise law and religion as concerning two complimentary and overlapping elements, (internal) religious law and (external) national and international laws affecting religion. This conceptualisation underscores that the study of how religious and secular laws interact is itself a pressing question for the law and religion academic. Moreover, it allows closer analysis to be paid to the proper ambit of

³⁶ The works of Bradney and Edge are obvious examples: in his discussion of the agenda of the sub discipline, Bradney refers to the subject as “[t]he study of the *relationship* between religion and law in the United Kingdom”(Bradney, “Politics and Sociology,” 65); whilst Edge’s 450-page *Legal Responses to Religious Difference* begins with a recognition that “[a]ny survey of an area as the *interaction* between law and religion must be selective”; see Peter W. Edge, *Legal Responses to Religious Difference* (The Hague: Knwler Law, 2002), 3 (emphasis added).

³⁷ This is typical of several works on religion in the context of international human rights laws; e.g. Carolyn Evans, *Freedom of Religion and the European Convention on Human Rights* (Oxford: Oxford University Press, 2002); Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997); Paul M. Taylor, *Freedom of Religion—UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005); as well as Hamilton’s *Family, Law and Religion* (London: Sweet and Maxwell, 1995), vii, which “examines a number of themes relating to religious freedom” and Ahdar and Leigh’s *Religious Freedom in the Liberal State* which also focuses on religious freedom.

the study of national and international laws affecting religion. These laws may be called ‘religion law.’³⁸ It may be defined by analogy with family law. As Douglas notes, there is a “problem of boundary-setting” in relation to family law since the branch of law does not correspond with a certain legal action, like the law of trusts and the law of tort: instead, family law “relates in some way to an entity—the family—which has meaning [...] outside the legal domain.”³⁹ For Douglas, “the essence of family law is that part of the law which is concerned with the recognition and regulation of certain family relationships and the implications of such recognition.”⁴⁰ These points ring true for religion law: ‘religion’ certainly has meaning outside the legal domain: ‘religion law’ may thus be defined as the part of (national and international) law concerned with the recognition and regulation of certain religious relationships and the implications of such recognition.

Furthermore, Douglas’ understanding of family law may assist an elucidation of religion law in three respects: first, she notes that although many different fields of law (such as tax law and housing law) impact upon family members and family life, these “peripheral laws” are not automatically regarded “as aspects of something called family law” but equally should not be ignored since they interact with the body of family law. This may be useful in terms of constructing religion law: we may decide to distinguish between those areas which are core and which are peripheral. The status of asylum and immigration, for example, may be interesting in this respect. Second, Douglas points out that family law “has grown piecemeal

³⁸ The only use of this term in the UK at the moment is the title for a website kept by a barrister named Neil Addison which mainly deals with human rights, discrimination law and criminal law affecting religion in England and Wales; see <http://www.religionlaw.co.uk/> (accessed on 30 April 2008).

³⁹ Gillian Douglas, *An Introduction to Family Law* (Oxford: Clarendon press, 2nd ed., 2004), 3.

⁴⁰ She points out that “non-recognition is equally important to the discussion”: Douglas, *Introduction to Family Law*, 3.

in response to perceived social change—often presented as a ‘problem’ to be tackled.”⁴¹ The same is true of religion law and scholars in this field should be aware of this; they should, as Bradney has argued, ensure that this conceptualisation does not inhibit scholarship.⁴² Third, Douglas notes that the goal of family policy—a “stable family life”—is recognised by both domestic and international law and that the right to family life is protected as a human right.⁴³ The same is true of religion and religion law, which as a result, should focus on the recognition and regulation of religion domestically and as an international human right.

This elucidation of ‘religion law,’ not to mention the wider elucidation of ‘law and religion’ as being the study of religion law and religious law, may help scholarship on church-state relations move beyond the narrow focus upon the letter of constitutional texts epitomised by the model-based approach. It stresses the fact that a whole host of legal areas may have impact upon religious individuals and groups. Reference should be made not only to constitutional law but also to criminal law, discrimination law, property law, education law, family law, media law, medical law, prison law, and so on.

The work of the European Consortium for Church and State Research provides an excellent example of this approach: despite the group’s name, its annual meetings actually focus upon an area of what we have just described as religion law. The group’s meetings have thus gone beyond ascertaining the constitutional status in European states and have explored a diverse range of areas such as media law on religion, the applicability of the European Convention on Human Rights, property law on religion, and social welfare law affecting religion. However, despite their work and the increasing amount of work on religion law generally,

⁴¹ Douglas, *Introduction to Family Law*, 4.

⁴² Bradney, “Politics and Sociology.”

⁴³ Douglas, *Introduction to Family Law*, 4.

insights gleaned from other areas of law have not been used to improve our analysis of church-state relations.

Reference to other aspects of religion law will enhance understandings of church-state relations and will result in the abandonment of the flawed models in favour of a more nuanced and detailed analysis. Various means of state funding exist throughout Europe, including direct financing of religious communities; indirect funding by the allocation of tax revenue or the facilitation of a church tax system; and systems that offer minimal financial support. These do not coincide neatly with the three ecclesiastical law systems: for example, in England, there is minimal financial support whilst in Spain and Italy there is indirect support in the form of the allocation of tax revenue. Reference to the laws on how religion is financed may provide a critique of the models and a way of achieving a greater understanding. However, it is vital that there is a change in methodology: we should not simply substitute one discredited model with another.

Although it would be possible to identify other legal models, it seems that a fuller understanding of the socio-legal reality may be gained by use of an interdisciplinary approach. As Banaker and Travers note, “interdisciplinary” work may be distinguished from “multidisciplinary” work in that whilst “multidisciplinary” work “juxtaposes several disciplines without any attempt to integrate or synthesise aspects of their knowledge,” “interdisciplinary” work requires “an ambition to understand and integrate aspects of two or several disciplinary perspectives into a single approach.”⁴⁴ The study of laws on religion alone cannot adequately explain the complex relationship between religion, law, and society. An interdisciplinary endeavour combining insights from law and religion, the sociology of religion, and the sociolo-

⁴⁴ Reza Banaker & Max Travers, *Theory and Method in Socio-Legal Research* (Oxford: Hart, 2005), 5

gy of law is required.⁴⁵ Law and religion is concerned with the relationship between law and religion; the sociology of religion is concerned with the relationship between religion and society; and the sociology of law is concerned with the relationship between law and society. A fusion of insights from all three disciplines, a ‘sociology of law and religion,’ is thus concerned with the relationship between religion, law, and society.

The study of church-state relations in Europe may be informed by one sociological work in particular:⁴⁶ Grace Davie’s *Europe: the Exceptional Case. Parameters of Faith in the Modern World*.⁴⁷ Davie contended that it is possible to articulate a shared European approach to religion since Europe is an exceptional case: the status, role, and significance of religion are common throughout the continent and distinct from the rest of the world. For Davie, although precise details differ, the same patterns emerge: the pattern of an “unchurched and residually Christian religion” is “widespread if not universal” in Western Europe.⁴⁸ Moreover, although there remain significant differences within the religious makeup of Europe, such as the broad distinction between the Protestant north and the Catholic south, a common and specifically European trend may be identified, albeit one which is more advanced in the north than the south.⁴⁹ Although some countries fail to fit this pattern, most notably Catholic Ireland, this north-south distinction rests on a basic historical difference which has ongoing sociologically repercussions: the indicators of religious activity⁵⁰ have fallen faster in the

⁴⁵ Norman Doe, “A Sociology of Law on Religion—Towards a New Discipline: Legal Responses to Religious Pluralism in Europe,” *Law and Justice* 152 (2004), 68-92, p. 68.

⁴⁶ See Sandberg & Doe, “Church-State Relations in Europe,” 568.

⁴⁷ Grace Davie, *Europe: the Exceptional Case. Parameters of Faith in the Modern World* (London: Darton Longman & Todd, 2002).

⁴⁸ Davie, *Europe: the Exceptional Case*, ix–xi.

⁴⁹ Davie, *Europe: the Exceptional Case*, 11.

⁵⁰ Such as evidence of regular church-going.

Protestant north than the Catholic south. Moreover, Davie contends that the legal evidence supports this analysis: “the constitutional connections between church and state are part of Europe’s history, whether they are retained or rejected, applauded or critiqued,” a general distinction can be drawn between the benign state churches favoured in the Protestant north and the historic and complex separation laws that exist in the Catholic south, but nonetheless the legal evidence points to “commonalities of European religion.”⁵¹

By juxtaposing Davie’s analysis with the tripartite distinction favoured by lawyers, it becomes evident that Davie’s critique does not simply merit the conclusion that the problematic third ‘hybrid’ category put forward by the likes of Robbers should be disregarded in favour of a broad distinction between northern Protestant state church systems and southern Roman Catholic separation systems. Rather, Davie’s approach suggests that this difference should be accepted but contextualised within the framework of a common European approach to religion. Despite the seemingly different means, church-state relations throughout Europe achieve and are intended to achieve a very similar end. This end may be deduced by following Ferrari’s suggestion and focussing upon the “legal substance.”⁵² Such an approach recognises some differences in terms of details, but ultimately reveals a degree of consistency. European states share common legal sources and resulting common legal characteristics. All are members of the European Union: this entails acceptance of religious diversity and the prohibition of discrimination on grounds of religion.⁵³ All are signatories of various international treaties,

⁵¹ Davie, *Europe: the Exceptional Case*, 2–3; 12–13.

⁵² Ferrari, “New Wine,” 78.

⁵³ Treaty of Amsterdam, Appendix: Declaration on the Status of Churches and Non-confessional Organisations: “The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.” This provision forms the new Article 16C of the Lisbon Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community. (The new Article 16C also provides that “[r]ecognising their identity and their specific Contribution, the Union shall

most notably the European Convention of Human Rights (ECHR), which protects an absolute right to hold or change one's religion and belief and a qualified right to manifest religion or belief (Article 9): the European Court of Human Rights at Strasbourg has placed "a degree of obligation upon the state to ensure a culture of tolerance and pluralism."⁵⁴ Most notably, the Grand Chamber in *Refah Partisi v Turkey*⁵⁵ noted "the state's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs" was a "duty" that was "conducive to public order, religious harmony and tolerance in a democratic society."

As Norman Doe has argued, it is possible to speak of a "common law on religion" in Europe.⁵⁶ Ironically, under this approach, the third legal category of hybrid systems becomes the answer rather than the problem: legal writings on these systems illustrate common characteristics which are shared not only by the so-called hybrid systems but by the states of Europe in general. As an elementary observation, it may be noted that the European approach is characterised by the recognition of religious freedom and the autonomy of religious organisations. Cooperation exists between the state and at least some religious groups and such partnerships may be formulated as being an 'informal' or 'quasi-concordatian.'⁵⁷ A basic level of neutrality, tolerance, and parity is common to the whole continent. No country has a 'strong' state church system where other religious groups are not tolerated and no country has a 'strong' separation system whereby the state is indifferent to religion and religious liberty.

maintain an open, transparent and regular dialogue with these churches and organisations.") On religious discrimination, see Council Directive 2000/78/EC.

⁵⁴ Malcolm D. Evans, "Believing in Communities, European Style," in: Nazila Ghanea (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Boston: Martinus Nijhoff, 2004), 133-156, p.150.

⁵⁵ (2003) 37 E.H.R.R. 1. [European Court of Human Rights]

⁵⁶ Norman Doe, "Towards a Common Law on Religion in the European Union," *Religion, State and Society* 2009 (forthcoming).

⁵⁷ See Doe, "The Concordat Concept as Constitutional Convention."

This multidisciplinary approach, using Davie's sociological account to inform legal scholarship and using law to verify her sociological claims is undoubtedly enlightening. This is especially so if the legal analysis extends *beyond* constitutional law. This requires a fuller understanding of the breadth, depth, and purpose of religion law. Douglas' definition of family law reveals that religion law can be conceived of as being concerned with two overlapping but separate questions,⁵⁸ namely: how religion is recognised and how religion is regulated. To date, it is only the second question that has aroused interest and then it has been in the important but narrow context of determining the extent to which religious difference is accommodated. Answers to the first question need to take into account the many and varied ways in which religious individuals and groups are recognised by law. Whilst this undoubtedly includes reference to laws directly concerning religion, such as constitutional provisions and registration law, it extends much further to include laws which simply affect religion, such as general public order legislation and the general criminal law, for instance. Moreover, answering the question of how religion is recognised by European states requires an *interdisciplinary* approach.

Processes by which religious groups and individual are recognised as such have legal, social, economic, and political effects. Recognising religion is "an exercise of power" which can have serious repercussions:⁵⁹ legal systems use explicit and implicit definitions of religion to determine which individuals and groups should be bestowed by legal advantages by virtue of the fact that they are 'religious' and thus benefit from legal and fiscal benefits. Legal defi-

⁵⁸ Douglas, *Introduction to Family Law*, 4.

⁵⁹ Alan Aldridge, *Religion in the Contemporary World—A Sociological Introduction* (Cambridge: Polity, 2000), 23; See also James A Beckford, "The Politics of Defining Religion in Secular Society," in: Jan Platvoet & Arie Molendijk (eds.), *The Pragmatics of Defining Religion: Contexts, Concepts and Contests* (Leiden: Brill, 1999), 23-41, p. 23.

nitions of religion ultimately serve as a means of inclusion and exclusion.⁶⁰ Although the question of definition is not central in most legal disputes,⁶¹ when it is raised the definition question is of prime importance in that it may determine the “entire answer to the question of the scope of, and limits to, religious liberty.”⁶² The legal definition of ‘religion’ may be used as a ‘filtering device.’⁶³ This may fulfil the seemingly laudable objective of excluding ‘sham’ religions. This may be illustrated by the American case of *United States v Kuch*⁶⁴ where the claimant contended that she had a constitutional right to take drugs because it was part of her religion, the Neo-American Church where the sole duty of the faithful was to partake the ‘sacraments’—marijuana and LSD.⁶⁵ The District Court used the definition of religion to exclude the claim, holding that Kuch had “totally failed” in her effort to establish that the group was a religion since her desire to use and take drugs of its own sake regardless of religious experience was the purpose. However, the definition of religion used in this manner is a blunt instrument. The use of the legal definition of ‘religion’ as a ‘filtering device’ may prove problematic when applied to other fact scenarios. Without questioning the decision in *Kuch*, the

⁶⁰ Russell Sandberg, “Defining Religion: Towards an Interdisciplinary Approach,” *Revista General de Derecho Canonico y Derecho Ecclesiastico del Estado*, 17 (2008), 1-23, p. 12.

⁶¹ Neil Addison, *Religious Discrimination and Hatred Law* (London: Routledge, 2007), 2.

⁶² Ahdar & Leigh, *Religious Freedom in the Liberal State*, 111.

⁶³ A ‘filtering device’ is a means by which a claim is excluded at the outset. It means that the right or claim is outside legal protection: the right or claim is denied legal protection. In its classical sense, where a filtering device is used there is then no need to look at the merits of the claim since the claim has fallen at the first hurdle.

⁶⁴ 288 F Supp 439 (1968) [US District Court].

⁶⁵ The church had a nationwide membership of 20,000 and was headed by “Chief Boo Hoo.” The claimant contended that the ‘religion’ also included the member’s “martyrdom record” (of arrests for drug use), a church symbol (the three-eyed frog), an official song (“Puff the Magic Dragon”) and a church motto (“Victory over Horseshit”). See Ahdar & Leigh, *Religious Freedom in the Liberal State*, 112–113.

reasoning must therefore be of concern. The definition tool may be used to filter out potentially deserving claims without examining the merits of the claim.⁶⁶

Although Lord Walker of Gestingthorpe in *Williamson* doubted whether it was right for courts, except in extreme cases, “to impose an evaluative filter” at this stage,⁶⁷ there are many examples of the definition of religion being used for this purpose. In English law, for example,⁶⁸ judicial decisions holding that religion requires belief and worship of a god⁶⁹ have been used by the charity commissioners to hold that the Church of Scientology would not be registered as a charity: it was not an organisation established for the charitable purpose of the advancement of religion because the “core practices of Scientology, being auditing and training, do not constitute worship as they do not display the essential characteristic of reverence or veneration for a supreme being.”⁷⁰ In English discrimination law, a requirement that discrimination on grounds of religion or belief only protects those beliefs that are “similar” to religions⁷¹ has been used to exclude claims relating to nationalism and political. Legal pro-

⁶⁶ Sandberg, “Defining Religion: Towards an Interdisciplinary Approach” 13-14.

⁶⁷ *R. v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15 at para 57 [UK House of Lords].

⁶⁸ For an expanded version of this argument in this paragraph see Sandberg, “Defining Religion: Towards an Interdisciplinary Approach” 14-21.

⁶⁹ *R v Registrar General ex parte Segerdal* [1970] 2 QB 697 [English Court of Appeal]; *Re South Place Ethical Society* [1980] 1 WLR 1565 (English Chancery Division).

⁷⁰ <http://www.charity-commission.gov.uk/Library/registration/pdfs/cosfulldoc.pdf> (accessed on 30 April 2008).

⁷¹ Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660, Regulation 2(1). This requirement has been removed by section 77 of the Equality Act 2006, see Russell Sandberg, “To Equality and Beyond: Religious Discrimination and the Equality Act 2006,” *Ecclesiastical Law Journal* 8 (2006), 470-474 p. 470 and Peter Griffith, “Protecting the Absence of Religious Belief? The New Definition of Religion or Belief in Equality Legislation,” *Religion & Human Rights*, 2 (2007), 149-163, 149.

cesses determining whether claims are recognised as religious should be of interest not only to religion law academics but also to other parts of the academy.

Beckford has criticised the way in which some social theorists have framed religion “in unhelpful ways” by treating it as “a relatively unproblematic unitary and homogenous phenomenon” and has called for an analysis of “the various situations in which religious meaning is constructed, attributed or challenged.”⁷² Reference to law may help overcome these problems by providing case studies of this process.

Moreover, legal scholarship may be enhanced by an interdisciplinary approach. There is a need for empirical and/or theoretical research that examines the desire, course, and effect of legal and other processes. An excellent example may be found in the work of Sophie Gilliat-Ray: in “The Trouble with ‘Inclusion,’” she undertook a case study into the Faith Zone at the Millennium Dome in Greenwich, London, which had been constructed as a visitor attraction to mark the year 2000.⁷³ Gilliat-Ray sought to use the construction of the zone as an “opportunity to examine how religion is contested and negotiated in public” and, by means of empirical investigation,⁷⁴ sought to undertake “a critical evaluation of a number of criteria which set limits on what ‘counts’ as religion in British public life.”⁷⁵ In particular, she sought to understand why the zone had been renamed from the ‘Spirit Zone’ to the ‘Faith Zone’ seemingly contrary to the sociological trend commonly identified which pointed in the opposite direction, moving away “from ‘religion’, in terms of institutionalised dogmas and estab-

⁷² James A Beckford, *Social Theory & Religion* (Cambridge: Cambridge University Press, 2003), 15–16.

⁷³ Sophie Gilliat-Ray, “The Trouble with ‘Inclusion’: A Case Study of the Faith Zone at the Millennium Dome,” *The Sociological Review* (2004), 459-477, p.459.

⁷⁴ The paper is based on structured interviews with 90 visitors to the Faith Zone and semi-structured interviews with members of the “Lambeth Group” who decided upon the content.

⁷⁵ Gilliat-Ray, “The Trouble with ‘Inclusion,’” 460.

lished corporate ways of believing, towards ‘spiritualities of life’ where the emphasis lies on the personal, the individual and the experimental.”⁷⁶

After explaining how and why “the construction of the Faith Zone at the Millennium Zone must be seen as part of a long, well-established process and Government-faith community liaison and establishment,” by reference to the concept of ‘inclusion’ as eulogised by the UK’s New Labour administration, Gilliat-Ray contended that “relationships and structures, and the endorsement of particular individuals and organisations” constrained the construction of the Faith Zone, resulting in the fact “that visitors were presented with only a *partial* reflection of religion in Britain.”⁷⁷ For Gilliat-Ray, this was partly because of “the membership and politics of the so-called ‘Lambeth Group,’ a Government sub-committee that was charged with the responsibility for advising about all religious aspects of the Millennium Celebrations.” The Lambeth Group excluded some faith groups such as the New Age, New Religious Movements, and smaller Christian sects “on the basis of unquestioned, taken-for-granted criteria.”⁷⁸ Membership of the Lambeth Group reflected “world religions” and the individual representatives comprised of, in the words of one interviewee, “the likely lads.”⁷⁹ Under their

⁷⁶ Gilliat-Ray, “The Trouble with ‘Inclusion,’” 459. This trend has also been identified by the judiciary: see, most notably, Lord Walker’s observation in *R. v Secretary of State for Education and Employment and others ex parte Williamson*, “The trend of authority (unsurprisingly in an age of increasingly multicultural societies and increasing respect for human rights) is towards a ‘newer, more expansive, reading’ of religion”: [2005] UKHL 15, [2005] 2 A.C 246 at para 55 [UK House of Lords].

⁷⁷ Gilliat-Ray, “The Trouble with ‘Inclusion,’” 461–462 (original emphasis).

⁷⁸ Gilliat-Ray, “The Trouble with ‘Inclusion,’” 465.

⁷⁹ The Committee included representatives from the Department of Culture, Media and Sport, the Royal Household, the office of the Archbishop of Canterbury, the Interfaith Network for the UK, ecumenical bodies such as Churches Together in England, and representatives from the six major world religions present in Britain (Buddhism, Christianity, Hinduism, Islam, Judaism, and Sikhism) with smaller traditions being actively “consulted” via the Interfaith Network for the UK: Gilliat-Ray, “The Trouble with ‘Inclusion,’” 465–466.

guidance, plans for the content of the Zone were altered as the Lambeth Group demanded that the Zone “reflect the beliefs, practices and values of the faith communities that constituted the committee” and be funded by the “right sort” of sponsors. The accepted sponsors themselves demanded that the “religious content of the Zone was not going to be watered down” and that “the story of Jesus would be told in an appropriate way and not be ‘watered down’ by the content reflecting ‘other faiths.’”⁸⁰ The result was that the final content of the Zone mainly reflected this bias. According to Gilliat-Ray’s research, the exception to this trend, those parts of the Zone concerned with spirituality as opposed to world religions, ironically but predictably, proved more popular.⁸¹

For Gilliat-Ray, theories of social closure provide a useful means of “evaluating the way in which ‘interested parties’ and dynamics of interest push action in certain directions, along certain tracks, thereby including some and excluding others.”⁸² In the case of the Dome’s Zone, a number of often “unspoken” criteria was used as a means of inclusion/exclusion such as the size and historicity of the tradition in Britain, the ready availability of a “respectable” representative or spokesperson with an “established track-record of working successfully with Government and other faith communities,” and the “time and resources to work for the government, more or less for free,”⁸³ not to mention the needed “willingness to conspire with the Government’s own particular and often unspoken terms and conditions

⁸⁰ Other offers for sponsorship, such as one from a nightclub who claimed that dance was the religion of the new millennium were “rejected out of hand”: Gilliat-Ray, “The Trouble with ‘Inclusion,’” 467–468.

⁸¹ Gilliat-Ray, “The Trouble with ‘Inclusion,’” 468.

⁸² Gilliat-Ray, “The Trouble with ‘Inclusion,’” 469.

⁸³ Members of the Lambeth Group were paid expenses but nothing more.

for inclusion.”⁸⁴ As Gilliat-Ray comments, “the Government operates with a particular ‘world view’ of religion and religions as being well-defined, orthodox, and clearly bounded entities”; this not only “hides the often divisive and ‘messy’ realities of religion” but also excludes the “religious activity that operates beyond the boundaries of institutions or organisations.”⁸⁵

Gilliat-Ray concluded that although “it might appear as though the boundaries of inclusion/exclusion in relation to religion in the public sphere in Britain are somehow fixed and impermeable,” this is not so and that a historical approach shows that “boundaries separating the included from the excluded are points of continual negotiation and struggle.”⁸⁶ The Faith Zone provides just one example of “a ‘field’ of struggle around inclusion and legitimacy”;⁸⁷ other examples may be examined. Legal changes may provide case-studies of such changes.⁸⁸ Moreover, reference to non-legal case-studies may help to explain the direction of legal changes. As Gilliat-Ray noted, the “boundary points are contextually variable” in that “what counts as ‘permitted’ religion in British provisions differs from what was ‘acceptably’ religious at the dome.”⁸⁹ Yet, general trends may be identified if an interdisciplinary approach is

⁸⁴ Governmental talk of Britain’s faith communities seeks to “present an image of unity and faith communities working together harmoniously. Intra-faith diversity and division is often overlooked”: Gilliat-Ray, “The Trouble with ‘Inclusion,’” 469–470.

⁸⁵ This view was so powerful that even the Christian churches came across the “Government mindset” that the Zone had to be inclusive. This required “deals to be struck”: for example, at one point, the Lambeth Group looked at the sayings of Jesus and determined which of them could be signed up to by all the faith groups. As a result, “social everyday things like ‘Blessed are the meek’ was included but any reference to the Trinity or the afterlife were excluded”: Gilliat-Ray, “The Trouble with ‘Inclusion,’” 471–472.

⁸⁶ Gilliat-Ray, “The Trouble with ‘Inclusion,’” 472.

⁸⁷ Gilliat-Ray, “The Trouble with ‘Inclusion,’” 473.

⁸⁸ It may also be the case that new laws prohibiting discrimination on grounds of religion or belief in the provision of goods and services (Equality Act 2006, part 2) would have led to a different result today.

⁸⁹ Gilliat-Ray, “The Trouble with ‘Inclusion,’” 473.

adopted. Legal and sociological materials, if understood, contextualised, and scrutinised to the standard expected by their own disciplines, may be fused to provide a greater insight. The total may be greater than the sum of its parts. A ‘sociology of law and religion’ may be able to shed more light upon what Gilliat-Ray refers to as the “sedimentation of a particular kind of structure and patterning of relationships for Government-faith community co-operation.”⁹⁰ It may point towards the prevalence of what may be styled as “banal religiosity,”⁹¹ a civic religion, based upon central shared ethical principles that have been traditionally aligned with religious traditions, which has grown as a response to religious difference. It is clear that further research is needed whereby inadequate models of church-state relations, based on the letter of constitutional provisions, are replaced by interdisciplinary socio-legal investigations into how religion is recognised (and regulated) in European societies, based on theoretically-explained empirical evidence.

4. Conclusion

⁹⁰ Gilliat-Ray, “The Trouble with ‘Inclusion,’” 462. For Anthony Giddens, “[t]he sedimentation of institutional forms in long-term processes of social development is an inescapable feature of all types of society, however rapid the changes they may undergo”: *Central Problems in Social Theory: Action, Structure, and Contradiction in Social Analysis* (London: Macmillan, 1979), 7.

⁹¹ Building upon Billig’s concept of *Banal Nationalism*, (Oxford: Sage, 1995), “banal religiosity” may be seen as being constantly perpetuated by everyday habits. Understood against the background of the current post-9/11 climate the concept of “banal religiosity” can be contrasted with fundamental religiosity in the same way as Billig contrasted banal nationalism with “hot nationalism” which occurs at time of “social disruption.” In an age where the ‘otherness’ of different religious traditions is stressed, “banal religiosity” may explain why almost 72% of adults in England and Wales described themselves as “Christian” in the 2001 census, despite plummeting levels of religious practice.

Legal scholarship in itself has limited understandings of church-state relations in Europe. The fundamental flaw of the legal analysis to date has been the narrow approach taken. The models elucidated by lawyers have constrained scholarship in this field by focussing solely upon constitutional law at the expense of other areas of religion law. The work of the European Consortium for Church and State Research provides a clear exception to this trend and should be followed. However, these purely legal accounts may also be insufficient. The multidisciplinary juxtapositioning of legal materials with materials from elsewhere in the academy may prove instructive. The work of Grace Davie, for example, may point to a common European approach to religion. Such works may inform and inspire further legal scholarship, such as Doe's work identifying a common European law on religion. Moreover, further insight may be gleaned by a fuller understanding of the breadth, depth, and purpose of religion law. Douglas' elucidation of the purpose of family law may point towards a conceptualisation of religion law as being concerned with the recognition and regulation of religion. The question of how religion is recognised is an interdisciplinary question which may be answered by fusing legal and non-legal materials. Beckford's comments as to problems faced by social scientists points to the advantages of fusing sociology with law and Gilliat-Ray's empirical work points to the advantages of fusing law with sociology.

However, this interdisciplinary approach is by no means risk-free. A 'sociology of law and religion' risks prostituting the sociological imagination by demanding that sociology simply solves law's problems when sociology may have its own agenda.⁹² Alternatively, relying too much on sociology may reduce both law and religion to become part of sociology to the extent that the venture misses what is religious about religion and what is legal about law.

⁹² David Nelken, "Blinding Insights? The Limits of a Reflexive Sociology of Law," *Journal of Law and Society* 25 (1998), 407-426, 407.

These considerations merit a nuanced, reflexive, and contextual approach. However, it is clear that there is a need to move away from and beyond an analysis based upon the three models. Instead of focussing solely upon words on paper, there is a need to *also* recognise the often implicit principles and values which underpin the regulation of religion in practice. In short, it is time to stop asking only what the law *says* and to start asking also what the law *means*.

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