

# Two Facets of Religion: Religious Adherence and Religious Group Membership

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## INTRODUCTION

In this Essay, I will explain the differences between the two basic human rights related to religion that are recognized by Bills of Rights the world over: the right to freedom of religion and the right against religious discrimination. These rights are guaranteed under Articles 8 and 2 of the African Charter on Human and Peoples' Rights, the First and the Fourteenth Amendments to the Constitution of the United States, Articles 9 and 14 of the European Convention on Human Rights, Articles 25 and 15 of the Indian Constitution, Sections 15 and 9 of the South African Constitution, and Articles 18 and 26 of the International Covenant on Civil and Political Rights, respectively. Though they have been articulated as distinct rights in human rights texts, courts have often confused the two rights. Using a hypothetical case that draws on normative arguments as well as illustrative case law from Europe and the United Kingdom, I will show why the differences between the two rights are meaningful and ought to be respected. The case law is not used to make a textual or interpretive point about how these rights are articulated in the respective instruments or read by courts; rather, the cases serve as illustrations of the normative argument and would be just as useful if conceived of as hypothetical. Another caveat is that I draw on European and British cases primarily because the available volume of litigation concerning religion in these jurisdictions is expansive enough for our purposes; the basic argument can be made using many other sufficiently large bodies of religion-related human rights jurisprudence. Before concluding, this Essay will respond to criticism offered by Professor Christopher McCrudden in this Issue.

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## I. TWO RELIGIOUS INTERESTS AND TWO CORRESPONDING RIGHTS

The right to religious freedom and the right against religious discrimination should be seen as two distinct human rights. However, courts have not always seen them in this way. The *Eweida* litigation in the United Kingdom, which concerned cross-wearing in a private workplace, is a good example of this confusion. In this case, although Eweida's lawyers claimed a breach of both rights against a non-state employer after she was prohibited from wearing a cross in her workplace, the right that was emphasized was different in the domestic forum than in the international forum. The domestic litigation focused on religious discrimination. When the case was appealed to the European Court of Human Rights (ECtHR), however, the focus shifted to the right to religious freedom.<sup>1</sup> In fact, the ECtHR explicitly held that the fact that the lower courts at the domestic level lacked the jurisdiction to consider whether her religious freedom was engaged did not entail "that the applicant's right to manifest her religion by wearing a religious symbol at work was insufficiently protected."<sup>2</sup> In other words, as long as one of the two rights was considered, the demands of the other were deemed to have been satisfied. Moreover, the ECtHR applied religious freedom horizontally to the non-state employer (British Airways)—akin to how religious discrimination law operates horizontally—with no discussion of how this new development could be justified.<sup>3</sup> Political reactions were equally confused. Even though Eweida's claim in the ECtHR was grounded in religious freedom, then-Prime Minister David Cameron tweeted shortly afterward that he was "[d]elighted that principle of wearing religious symbols at work has been upheld—people shouldn't suffer discrimination due to religious beliefs."<sup>4</sup>

There are several reasons why the conflation of these rights is wrong. First, it is an established tenet of legal interpretation that legislatures do not use words superfluously, constitution-drafters even less so. It would be astonishing if scores of legislatures, constituent assemblies, and UN bodies that drafted Bills of Rights at very different periods in time to explicitly include both rights did so without intending them to protect distinct rights.

Second, as it happens, human beings do have two very distinct interests in relation to religion. I have argued elsewhere, with Dr. Jane Norton, that our interest in decisional autonomy in matters of religious adherence (and non-adherence) is different from and irreducible to our interest in the un-

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1. *Eweida v British Airways* (2010) EWCA (Civ) 80 (Eng.); *Eweida and Others v. United Kingdom* 2013-1 Eur. Ct. H.R. 215 (2013).

2. *Id.* ¶ 92.

3. *Id.* ¶ 94.

4. For reporting on the issue, see Claire Davenport, *British Woman Wins Discrimination Case*, REUTERS (Jan. 14, 2013).

saddled membership in a religious group (akin to a race or tribe).<sup>5</sup> The content of our interest in religious adherence can only be appreciated from our internally committed point of view; our social, material, and political interest in not being saddled by our (real or perceived) membership in a religious group can be grasped entirely from an external, sociological perspective. The distinctiveness and fundamentality of the two interests justifies the trend toward capturing them in two separate guarantees of fundamental human rights.

Third, religion is one of multiple grounds protected by discrimination law and is almost always mentioned alongside race, gender, disability, sexual orientation, and so on. In relation to these other protected grounds, discrimination law seeks to protect members of disadvantaged groups defined by these grounds (such as racial minorities, women, and LGBTQ people) from being saddled by undeserved and unfair burdens on their group membership.<sup>6</sup> A very strong burden must be discharged to prove the counterintuitive claim that the rationale for prohibiting *religious* discrimination is entirely different from the rationale for prohibiting other forms of discrimination.

We therefore argued that the right to freedom of religion should be understood as protecting our interest in decision autonomy in relation to religious adherence (and non-adherence), and that the right against religious discrimination is best seen, alongside other non-discrimination rights, as safeguarding our interest in not being saddled unfairly by our (actual or perceived) membership in a religious group.

Dr. Norton and I further explained in a companion paper that the following key doctrinal implications follow from this normative distinction between the two distinct religious interests:<sup>7</sup>

- (i) the scope of the prohibition of religious discrimination is narrower than that of the protection of religious freedom,
- (ii) the prohibition of religious discrimination may be legitimately extended to certain non-state actors,<sup>8</sup> but the duty to uphold religious freedom should be restricted to the state and state-like bodies,<sup>9</sup>

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5. This claim is developed and defended in Tarunabh Khaitan & Jane Calderwood Norton, *The Right to Freedom of Religion and the Right Against Religious Discrimination: Theoretical Distinctions*, 17(4) INT'L J. CONST. L. 1125 (2019).

6. Tarunabh Khaitan, *The Point of Discrimination Law*, in *THE EMPIRE OF DISGUST* (Martha Nussbaum ed., 2018).

7. See Tarunabh Khaitan & Jane Calderwood Norton, *Religion in Human Rights Law: A Normative Restatement*, 18(1) INT'L J. CONST. L. 111 (2020).

8. The non-state actors who may be legitimately burdened with the duty of non-discrimination include employers, retailers, service providers, and landlords. The determination is contingent and contextual, based on factors explained in TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* 195–214 (2015).

9. Admittedly ill-defined, the phrase “state-like bodies” is intended to capture bodies that are contractually or legally obligated to perform certain functions of the state, such as running a prison service. I leave open the question of whether large multinational corporations are sufficiently “state-like” to be required to shoulder human rights obligations, including the obligation to respect religious

- (iii) establishing a state religion (and other non-zero-sum benefits for a particular religion) may be compatible with the right to religious freedom but is always discriminatory on the ground of religion,
- (iv) and, assuming that no other right is implicated, it would normally be easier to justify an interference with religious freedom than to justify religious discrimination.<sup>10</sup>

## II. DUNYA'S CASE

Some of these claims can be illustrated by applying our analytic and normative framework to the following hypothetical case:<sup>11</sup> Dunya is a member of the Russian Orthodox Church in Belarus. For most of her life, national identity documents did not include an assigned number as a personal identifier. In 1996, a new form of identity document was introduced that assigned each citizen a personal identification number. This new form of identification was not motivated by a desire to target or adversely affect any religious group. Dunya refused to obtain such a document on the ground that her beliefs as an Orthodox Christian prohibited the substitution of a number for a name as a basis for interpersonal interaction, because such substitution ostensibly treated humans created by God as soulless objects. Dunya is not alone in asserting this type of objection, which is shared by select other Orthodox Christians, select members of other Christian denominations, and select members of non-Christian religions. However, the Holy Synod of the Russian Orthodox Church issued a statement in 2001 that explained that numbers on personal identity documents have no religious significance. As a result of Dunya's refusal to obtain a national identity document in the newly required format, the government of Belarus denied her application for particular government-supplied benefits to which she was otherwise legally entitled. The government refused to accept any alternative proof of identity and relied on its consistent practice of requiring current national identity documents from all applicants for such benefits. She challenged the denial of these benefits as a disproportionate restriction

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freedom, with which we normally burden the state. Notice, however, that even if we decide that they should be so required, the category of "state-like bodies" will still be smaller than the category described in *supra* note 8.

10. Bills of Rights (in most jurisdictions other than the United States) tend to frame rights in a qualified rather than absolute manner (rare exceptions include the rights against torture and slavery, which are always absolute). See Tarunabh Khaitan, *Beyond Reasonableness—A Rigorous Standard of Review for Article 15 Infringement*, 50(2) J. INDIAN L. INST. 177 (2008). To determine whether such qualified constitutional rights have been breached, courts will typically apply a two-stage analysis: They first determine whether there has been a *prima facie* infringement of the right; if they find that there has, they then ask whether the infringement is justified, usually by asking whether the infringement is "reasonable" or "proportionate" in relation to the aim that is pursued by limiting the right. *Id.* at 178–79.

11. *Yachnik v. Belarus*, CCPR/C/111/D/1990/2010, No. 1990/2010, U.N. Hum. Rts. Comm., Views Adopted by the Committee at its 11th session (July 21, 2014). I am grateful to Professor Gerald L. Neuman for providing this helpful adaptation of the facts of the case.

on her right to freely practice her religion and as indirectly discriminating against her on the basis of her religious beliefs.

### A. *Dunya's Religious Freedom Claim*

1. Because the interference took the form of state action, Dunya should have the right to bring a claim. If the facts were different, and the number-based identification were used by a small *private* employer, Dunya should not be able to sue. Religious freedom should not be enforced horizontally between *X* and *Y*: just as *X* has the freedom to adhere to her religion, *Y* should also have the freedom to not be obliged to act (or refrain from acting) because of *X*'s religious adherence, because such an obligation would illegitimately interfere with *Y*'s freedom from *X*'s religion.<sup>12</sup>
2. The only relevant interest engaged with respect to Dunya's religious freedom claim is her interest in freely adhering to her religion.<sup>13</sup> Some more difficult cases in this area concern the scope of "belief" under the right to freedom of religion *and* belief.<sup>14</sup> Dunya's case evades this difficulty, because her claim straightforwardly concerns her freedom of religion rather than any (non-religious) belief. The scope of what Dunya's religion demands of her can be properly assessed only from her own committed, internal viewpoint. Given the remarkable diversity and plurality that characterizes religious adherence, both across and within religions, supposing that only the "official" doctrine of a religion deserves the law's protection would severely curtail the enjoyment of religious freedom of dissenters and heterodox believers—incidentally, those most in need of protection.<sup>15</sup> Very little would be left of religious freedom if the state

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12. The right to religious freedom is best understood as a way to respect an individual's decisional autonomy. Thus, it ought to protect both religious adherence *and* non-adherence. In practice, this means that any claim by an adherent of religion *X* can be met with a counterclaim by a non-adherent to not be subjected to the demands of *X*. This problem can only be avoided when one party does not possess the right to religious freedom in the first place, which is only true for state and other public bodies. Otherwise, the court has the unenviable task of determining which party's religious freedom claim is weightier. See Khaitan & Norton, *supra* note 7, at 120–21.

13. This autonomy-based rationale for religious freedom finds ample support in caselaw. See, e.g., *Jehovah's Witnesses of Moscow v. Russia*, 53 Eur. H.R. Rep. 4, ¶¶ 134–35 (2010) (framing religious freedom as an individual's right to personal autonomy in the sphere of physical integrity and religious beliefs); *Eweida, EWCA (Civ.) 80*, ¶ 40 (Eng.), *supra* note 1 (stating that religion and belief are matters of choice); *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School* (2006) UKHL 15, (2006) 1 AC 100, ¶ 93 (appeal taken from Eng.); *Syndicat Northcrest v. Amselem*, (2004) 2 S.C.R. 551, ¶ 40 (Can.).

14. For example, the European Court of Human Rights has held over time that beliefs in pacifism, vegetarianism, veganism, and scientology, are all protected under Article 9 of the Convention. See *Arrowsmith v. United Kingdom*, 3 Eur. H.R. Rep 218 (1978); *Jakobski v. Poland*, 55 Eur. H.R. Rep 8, ¶ 46 (2011); *Church of Scientology Moscow v. Russia*, 46 Eur. H.R. Rep 16 (2007).

15. The Indian Supreme Court has taken a view along these lines by choosing to protect only the *essential* practices of *major* religions. See Gautam Bhatia, *Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom Under the Indian Constitution*, 5(3) GLOBAL CONSTITUTIONALISM

could tell adherents that their religion is not, in fact, what they think it is. Therefore, the Holy Synod's view on the matter is irrelevant. Also irrelevant is any state official's own interpretation of the demands of Russian Orthodox Christianity on Dunya.<sup>16</sup> Whether Dunya alone follows this interpretation of her religious tradition or shares it with several other followers is also beside the point. The very objective of protecting decisional autonomy in religious adherence will be frustrated if it is only protected when it is exercised jointly with many others; arguably, it is *less* in need of protection in such cases. So long as Dunya's claim is sincerely made, and the object of her claim (numerical personal identification) has a plausibly religious character, Dunya's interest in her autonomous exercise of religious adherence is engaged.<sup>17</sup>

3. Both the sincerity and plausibility requirements are relatively low-threshold gatekeepers of the right to religious freedom claims. They both turn on issues of empirical fact, and, in most cases, courts presume they are satisfied unless otherwise shown. Dunya is likely to satisfy both requirements. The sincerity requirement merely demands that the subject of Dunya's claim in fact follows from her religious adherence, which is easily established in this case. The plausibility requirement is satisfied if a reasonable person sufficiently familiar with Dunya's sociocultural context would recognize the *object* of her claim (as opposed to the claim itself) as having a religious character. For example, a religious objector to same-sex marriages need only show that marriage is plausibly a religious object, rather than that the religion plausibly disapproves of same-sex marriage.<sup>18</sup> The object of Dunya's claim—a numerical personal identifier—is likely to satisfy this test. There is, after all, a long history of religious objections to identity cards for myriad reasons in various contexts. Although such a history of similar objections is not

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357–63 (2016). This, in turn, has led to a “marked disinclination of the Court to accept more recent religious groups as a ‘proper’ religion or even religious denomination.” See RONOJOY SEN, ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE INDIAN SUPREME COURT 58 (2010).

16. See, e.g., *Hasan and Chaush v. Bulgaria* [GC], 2000-XI Eur. Ct. H.R. 117, ¶ 78 (noting that the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate); see also *Metropolitan Church of Bessarabia and Others v. Moldova*, 35 Eur. H.R. Rep 306, ¶ 117 (2001); *Serif v. Greece*, 31 Eur. H.R. Rep 561, ¶ 52 (1999).

17. These proposed plausibility and sincerity inquiries are already recognized in slightly different forms in both European Court of Human Rights and United Kingdom jurisprudence. See generally *Campbell and Cosans v. United Kingdom*, 4 Eur. H.R. Rep. 293, ¶ 36 (1982) (stating that convictions must “attain a certain level of cogency, seriousness, cohesion and importance”); *R (Williamson) v. Secretary of State for Education and Employment*, (2005) UKHL 15, ¶ 23 (“a belief must satisfy some modest, objective minimum requirements”) and ¶ 64 (“[the court] must have regard to the implicit (and not over-demanding) threshold requirements of seriousness, coherence and consistency with human dignity”).

18. For a more detailed explanation of the distinction between the religious character of the claim itself and the object of the claim, see Khaitan & Norton, *supra* note 5, at 1128–29.

necessary for her claim, the existence of historical engagement between religiosity and a particular object makes the plausibility claim significantly easier to satisfy. Thus, the requirement can be shown to interfere with Dunya's interest in her religious adherence.

4. The outcome of the case will depend on whether this interference is justified, which, in turn, will depend on the result of a proportionality analysis that weighs Dunya's interests against those of the state and any third parties. A proportionality analysis is extremely familiar to many jurisdictions in Europe, Canada, and South Africa. Although its minutiae remain controversial, it is, broadly speaking, a means-end analysis that examines the legitimacy of the state's interests in interfering with the right in question; the suitability of the means adopted to achieve those interests; the necessity of those means, especially vis-à-vis the availability of any appropriate alternative means; and a cost-benefit balancing of the state's interests against the right in question (such that, for example, a compelling state interest that is only marginally realized by a means that substantially breaches a weighty right is unlikely to be found to justify the means).<sup>19</sup>
5. In Dunya's case, a more granular access to the factual context is required to determine whether the interference is proportionate and, therefore, justified. Under the proportionality analysis described in (4), the following considerations are relevant:
  - a. Interference with religious freedom often implicates the adherent's other fundamental freedoms. For example, *burqa* bans engage freedom of expression, identification photographs engage privacy rights, and so on.<sup>20</sup> It does not seem, at least prima facie, that any of Dunya's other fundamental freedoms are engaged in this case. There is no restriction on her freedoms of expression, movement, association, privacy, occupation, and so on, or, at

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19. Some of the limbs of this analysis are comparable to the "strict scrutiny" that US courts sometimes engage in, although there are important differences.

20. *Burqa* bans have been challenged repeatedly on freedom of religion as well as non-discrimination grounds, with different jurisdictions reaching diametrically opposed conclusions. The European Court of Human Rights has consistently found in favor of states in such cases, holding that though such bans were capable of infringing the right to privacy, freedom of religion, or both, they were, on balance, necessary to protect the "rights and freedom of others" or to protect the value of "living together" and, therefore, justified. See *Dakir v. Belgium*, App. No. 4619/12 (July 11, 2017); *Belcacemi and Oussar v. Belgium*, App. No. 37798/13 (July 11, 2017); *S.A.S. v. France* [GC], 2014-III Eur. Ct. H.R. 341. In contrast, the Human Rights Committee has found such bans to violate both the right to religious freedom and the right to non-discrimination, rejecting France's submissions that such bans were proportionate to or the least restrictive means of achieving the state interest in promoting the conditions for "living together" in a democratic society. See *Hebbadj v. France*, CCPR/C/WG/123/DR/2807/2016, No. 2807/2016, U.N. Hum. Rts. Comm., Views adopted by the Committee under Article 5(4) of the Optional Protocol at its 123rd session (July 17, 2018), and *Yaker v. France*, CCPR/C/123/D/2747/2016, No. 2747/2016, U.N. Hum. Rts. Comm., Views adopted by the Committee under Article 5(4) of the Optional Protocol at its 123rd session (July 17, 2018).

least, no more so than a document that identifies her by name. Her objection is not to an identity document as such but to one that identifies her using a number. So, her religious freedom claim in this case is not buttressed by claims invoking other fundamental freedoms and is, as a result, relatively weak.

- b. A court should also consider the legitimacy and weight of the state's interest in numerical identification.<sup>21</sup> It may be that numerical identification is more reliable and efficient, that a name-only identification system is no longer feasible for a large population, or that a non-numerical system is not accepted by other jurisdictions whose recognition this document requires (especially if it is a passport).
- c. The consequences of Dunya's exercise of her religion also matter. Here, the impact is serious: She is denied state benefits to which she is, presumably, otherwise entitled. The state must also show that there is no alternative identification system it can feasibly use to grant these benefits. Accordingly, the state's reasons for preferring identification by numbers matter, but so do the costs of either retaining the old system for everyone (or, at least, for those who oppose numerical identification for religious reasons) or accepting alternative modes of identity verification in at least some contexts.<sup>22</sup> If these costs are relatively small, or an alternative system that does not implicate religious freedom can ade-

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21. Both the International Covenant on Civil and Political Rights and the European Convention on Human Rights, for example, prescribe that the only legitimate interests a state may have in restricting freedom of religion are public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5, art. 9(2); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 18(3). The relative weight of the state's interest, meanwhile, will depend, *inter alia*, on the means with which and degree to which it infringes on the right at issue. *See, e.g.*, *Jehovah's Witnesses of Moscow and Others v. Russia*, *supra* note 13, ¶¶ 131–42 (holding, *inter alia*, that though the state's interest in preserving the life or health of a patient was legitimate and very strong, it must yield to the patient's freedom to accept or refuse specific medical treatment, given its strong foundation in the principles of self-determination and personal autonomy, except where there is a need to protect third parties, making mandatory vaccination during an epidemic permissible).

22. To satisfy the necessity and balancing test of the proportionality analysis, the state is required, *inter alia*, to choose the least restrictive means available to accomplish the goal pursued and to avoid placing an excessive burden on the individual. *See, e.g.*, *Yaker v. France*, *supra* note 20, ¶¶ 8.7–8.8 (stating that a comprehensive and absolute prohibition on wearing certain face coverings in public at all times was neither necessary to the objective of public safety and order, nor proportionate, given its considerable impact on the claimant and the availability of less restrictive measures); *Nada v. Switzerland* [GC], 2012-V Eur. Ct. H.R. 276, ¶ 183 (requiring the state to show that it had attempted to take all available measures to implement a sanctions regime in a way that would avoid infringing on the applicant's rights); *Supreme Holy Council of the Muslim Community v. Bulgaria*, App. No. 39023/97, ¶ 97 (Mar. 16, 2005) (stating that the "Government have not stated why in the present case their aim to restore legality and remedy injustices could not be achieved by other means"). The requirement that the state offer alternatives and exemptions for the specific individuals affected by a chosen measure is also well-established. *See, e.g.*, *Bayatyan v. Armenia* [GC], 2011-VII Eur. Ct. H.R. 41, ¶ 124 (requiring Armenia to create a civilian alternative to military service for conscientious objectors); *Glor v. Switzerland*, 2009-III Eur. Ct. H.R. 59–60, ¶¶ 94–95 (holding that where special forms of civilian service



quately serve the state's objectives, Dunya's claim should prevail. If not, it should fail.

Based on the factual assumptions we have made in Dunya's case, it is unclear whether she will ultimately succeed on her religious freedom claim. Although they demonstrate that her right has been subject to interference, whether the interference is justified will depend on additional contextual facts.

### B. *Dunya's Religious Discrimination Claim*

1. The relevant *ground* of the alleged discrimination is religion. This is a ground explicitly protected by almost every anti-discrimination provision.<sup>23</sup>
2. There is no direct discrimination against Dunya on the basis of her religion, because the rule in question does not make any distinction based on religion and (we assume) is not serving as a pretext for targeting any religious group.<sup>24</sup> Nor is it the case that, although facially neutral, the rule burdens *all* Orthodox Christians and *only* Orthodox Christians.<sup>25</sup> On the facts, some Orthodox Christians clearly *do not* find numerical identification problematic for their religious adherence, and it may well be that select persons belonging to some other religions *do*.
3. Therefore, the issue is whether Dunya has been discriminated against *indirectly*. Such a finding requires showing that a facially neutral rule, practice, or policy, such as the one in question, has a disproportionate impact on a protected group.<sup>26</sup>
4. As an empirical matter, a court will first have to determine to which religious group Dunya belongs. For the purposes of indirect discrimination law, a "group" is understood loosely as a collection of people

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tailored to the needs of those in the claimant's situation are "perfectly envisageable," the state's failure to make them available renders its interference with the claimant's rights disproportionate).

23. Protected grounds perform a gatekeeping function in discrimination law, allowing only acts connected to a protected ground to qualify as discrimination. Such grounds include race, gender, caste, and disability. Some rights provisions extend protection to a residual category, such as "other status." In these cases, judges are called on to determine whether an unspecified ground is sufficiently analogous to those specifically protected to fall within this residual clause. For the judicial standards that have evolved to govern this determination, see KHAITAN, *supra* note 8, at 49–51.

24. Direct discrimination is generally established by showing that a rule or act makes intentional use of a protected characteristic, such as religion. See Khaitan & Norton, *supra* note 7, at 117; Case C-83/14, CHEZ Razpredelenie Bulgaria AD v. Komisia za Zashchita ot Diskriminatsia, ECLI:EU:C:2015:480, ¶ 76 (Jul. 16, 2015) ("it is sufficient, in order for there to be direct discrimination . . . that the ethnic origin determined the decision to impose the treatment"). Some jurisdictions, such as the United States, also require that the discriminating agent have an intention to classify based on the protected ground. See *Washington v. Davis*, 426 U.S. 229, 240 (1976).

25. British law treats such cases as directly discriminatory, too. See, e.g., *James v. Eastleigh Borough Council* (1990) 2 AC (HL) 751 (appeal taken from Eng.).

26. See Tarunabh Khaitan, *Indirect Discrimination*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION 30, 32 (Kasper Lippert-Rasmussen ed., 2017); *Bull v. Hall* (2013) UKSC 73 (appeal taken from Eng.), ¶ 19.

sharing the protected characteristic; it need not (but sometimes will) be a close-knit and cohesive community sharing a history, ethnic origin, culture, language, or other such identitarian feature.<sup>27</sup> For example, disabled persons are taken to constitute a group, regardless of whether they share a sense of belonging, history, or identity. However, the group must be a sociological entity, comprised of those who share the protected characteristic (in this case, members of Dunya's religious group). It cannot be a subjectively imagined collection of individuals. Unlike Dunya's religious beliefs, which she is largely free to determine subjectively, which religious group she belongs to is determined not by her internal point of view but the external, sociological point of view.<sup>28</sup> The following considerations will be relevant to a sociological determination of Dunya's religious group membership.

- a. A *religious group*, in this sense, includes people who are or are taken to be members of that group, because they share its dress code, culinary habits, and so on. Atheistic Muslims who have moved to England from Bangladesh, for example, may not be adherents of Islam, but their membership is still likely to be in the group of British Muslims—and they will continue to share the burdens and privileges of this membership—irrespective of whether they have renounced religion. Cultural Christians and many recent converts also see a divergence between their religious adherence and their religious group membership. In Dunya's case, let us assume that there is no divergence between her adherence and her group membership. If so, the relevant religious group she belongs to is likely to be the Russian Orthodox Christian community of Belarus (some of whom may have converted to other religions or even given up on religion entirely, and many of whom may not, even if they are co-believers, share Dunya's particular objection to numerical identification).
- b. Dunya's religious group cannot be all those Belarussians, or even all those Russian Orthodox Christian Belarussians, who share her belief that a numerical identification breaches the tenets of Russian Orthodox Christianity.<sup>29</sup> This way of characterizing a group would ignore the conceptual distinction between Dunya's interest in her religious adherence and her interest in not being saddled by her religious group membership, as well as the normative distinction between the two rights that track these interests. Framing her religious group in terms of this *specific* internal belief would not only collapse the distinction be-

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27. See KHAITAN, *supra* note 8, at 30, 51.

28. See Khaitan & Norton, *supra* note 5, at 1134.

29. See Khaitan & Norton, *supra* note 7, at 118.

- tween religious discrimination law and religious freedom law, but it would also result in the characterization of every case of indirect religious discrimination as a case of direct religious discrimination by definitional fiat.<sup>30</sup>
- c. So, the empirical question the court confronts with regard to Dunya's religious group membership has three possible answers, because Dunya is simultaneously a member of three different sociological groups in virtue of her religious membership: (1) Russian Orthodox Christians in Belarus, (2) Christians in Belarus, and (3) religious adherents in Belarus.
5. To prove *prima facie* indirect discrimination, Dunya will need to show that the group of people adversely affected by the numerical identification policy (call this set of persons "V") is disproportionately comprised of members of at least one of the three aforementioned groups.<sup>31</sup> This is necessarily a comparative analysis, involving comparisons to those who are not members of the respective group in each case, and brings out two difficulties:
    - a. Luckily, in this case, it is possible to avoid the thorny question of the relevant pool for identifying V. Because this case concerns identification documents for all citizens, V will include all citizens who do not wish to be identified by a number on an identification document. Problems with identifying the scope of V arise most controversially in employment cases. Because discrimination law governs pre-contractual as well as post-contractual relationships, it is unclear in such cases whether V should be drawn only from existing employees, from employees as well as job applicants, or from the relevant labor market more broadly.<sup>32</sup>
    - b. Dunya will also have to show a correlation between being a member of the protected group and being disproportionately adversely affected, which is satisfied by demonstrating that group membership is a significant predictor for belonging to V.<sup>33</sup> Claimants have typically found satisfying this technical standard extremely difficult in actual cases, because substantial resource and information asymmetries typically favor the defen-

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30. This would be the consequence at least in British and European law, under which a showing of intention is not necessary for proving direct discrimination; the claimant may instead show an exact correspondence between those who are adversely affected and those who are not, on the one hand, and a protected group and its cognate, on the other. See Khaitan, *supra* note 26, at 36.

31. See Khaitan, *supra* note 8, at 155.

32. Hugh Collins & Tarunabh Khaitan, *Indirect Discrimination Law: Controversies and Critical Questions*, in FOUNDATIONS OF INDIRECT DISCRIMINATION LAW 1, 14 (Hugh Collins & Tarunabh Khaitan eds., 2018).

33. For example, in *Essop v. Home Office* (2017) UKSC 27 (appeal taken from Eng.), ¶ 9, indirect discrimination was found based on an exam pass rate for non-white candidates that was 40.3% that of white candidates, characterized by a 0.1% likelihood that this could happen by chance.

dant in discrimination law. Thus, statistical evidence that can demonstrate a significant correlation is not always available.<sup>34</sup> For pragmatic and fairness-related reasons, therefore, many jurisdictions no longer require statistical proof of disproportionality and find rule-of-thumb evidence satisfying.<sup>35</sup>

- c. Even under this more lenient rule-of-thumb standard of disproportionality, however, the assumed facts are insufficient for determining whether disproportionality will be satisfied vis-à-vis Dunya's membership in any of the three groups. If the case concerned a ban on the wearing of all face coverings in public, for instance, a Muslim claimant's likelihood of satisfying disproportionality would have been higher if she were conceived of as a member of the group of Belarussian Muslims rather than the group of all religious adherents in Belarus, because the group of Belarussian Muslims would be more likely to disproportionately constitute V (i.e., all citizens adversely affected by the ban). This intuition is based on a background empirical assumption about the practice of face-covering across different religious groups (i.e., that Muslim women are more likely to wear a face covering for religious reasons than adherents of other religions). In the numerical identification case, it is difficult to ascertain Dunya's likelihood of success by invoking her membership in different religious groups; it will depend on the degree of social prevalence of the practice of objecting to numerical identification among members of the relevant religious group.
6. Assuming that Dunya does succeed in showing disproportionate impact based on her membership in at least one of the three groups, and thereby establishes *prima facie* indirect discrimination, the state will then need to justify its numerical identification policy. It will have to show that the disproportionate adverse impact on the relevant group passes the proportionality test, i.e., it is a suitable, necessary, and proportionate means of pursuing a legitimate state objective. Although the test applied in this case is the same as the one used to decide whether Belarus's interference with Dunya's religious freedom was justified, the manner in which the test will apply here is different:
  - a. In general, it will be harder for the state to justify *prima facie* indirect discrimination than to justify an interference with re-

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34. See KHAITAN, *supra* note 8, at 159.

35. See *Homer v. Chief Constable of West Yorkshire Police* (2012) UKSC 15 (appeal taken from Eng.), ¶14 (stating that the adoption of the "particular disadvantage" standard in the British Equality Act was intended to do away with the need for statistical comparisons where no statistics might exist).

ligious freedom (assuming that no other fundamental freedom is engaged in either case).<sup>36</sup> This is because:

- i. Whereas the *general* interest in freely adhering to one's religion has substantial weight, secular courts cannot determine the importance of a *particular* religious belief or practice to the claimant when adjudicating religious freedom claims.<sup>37</sup> They should, of necessity, assume that all such claims have a significant weight, but that weight cannot be deemed to be so insurmountable that governance by general laws becomes difficult.<sup>38</sup>
  - ii. The interest in unsaddled membership in one's (chosen or unchosen) religious group, on the other hand, is usually weightier. This is because substantial advantage gaps between different religious groups create a second-class status for (actual or perceived) members of disadvantaged groups, compromising their ability to access key basic goods (which include negative freedom, access to valuable opportunities, and self-respect).<sup>39</sup>
- b. The particular, external consequences for the claimant that flow from the infringement of either right is publicly verifiable. In this case, it is the inability to access state benefits, which surely carries significant weight. Even so, if this benefit is being denied to a protected group (that is, a group defined by normatively irrelevant characteristics, such as real or perceived race, religion, or sexual orientation), such denial may reinforce or exacerbate the group's inferior social, political, or material status. The harm of denying to an individual a benefit that everyone is, in principle, entitled to is bad enough, but its denial to a vulnerable group that is already suffering from relative disadvantage in society is especially odious. Assuming that access to the benefit in question is not itself a right, the law is likely to demand a higher justification threshold for this latter type of denial—and rightly so. The point is not that members of dominant groups should be prohibited from bringing discrimination claims. Rather, it is that discrimination against vulnera-

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36. See Khaitan & Norton, *supra* note 7, at nn.37–41.

37. The right to freedom of religion generally demands that the state take a neutral stance toward the relative importance and/or legitimacy of different religious beliefs or practices. See Hasan & Chaush, *supra* note 16, ¶ 78.

38. Governance would become next to impossible if we assumed a substantial weight for all religious claims in addition to the necessarily broad and subjective scope of that right that I suggest flows from the internal nature of religious adherence. In other words, a shallow bite is an inevitable consequence of the broad scope of the right to religious freedom. This is assuming that the infringement of religious freedom is a side-effect of a general law and is not designed for that purpose.

39. See Khaitan, *supra* note 6.

ble groups should require a higher justification standard than for discrimination against dominant groups.

Although there is insufficient context to fully determine the discrimination dimension of Dunya's claim, what is clear is that if she succeeds in establishing a *prima facie* case for indirect discrimination (by showing that her religious group is disproportionately affected), she is more likely to succeed in the final outcome. Discrimination law protects a sociological, external interest. As such, the scope of the interest is less broad than that of religious adherence. Effective governance demands a trade-off between the scope and the bite of a right: The broader the scope of a right, the shallower its bite. Fewer acts are caught in the regulatory net cast by discrimination law than that cast by religious freedom law, but, once one is caught, it is harder for a discriminatory law to escape via justification.

### III. A BRIEF RESPONSE TO PROFESSOR MCCRUDDEN

In his contribution to this Issue, my former professor, Christopher McCrudden, puts pressure on several claims I make in this Essay and on my previous scholarship that informs it.<sup>40</sup> McCrudden correctly describes the normative claims I have made in my previous work about the *purpose* of discrimination law (to protect our interest in unsaddled membership in certain social groups, including religious groups) and religious freedom law (to protect our interest in decisional autonomy in matters of religious adherence and nonadherence) as *practice-dependent*. A practice-dependent normative account of an area of law takes the practice (by lawyers, judges, administrators, legislators, scholars, publishers, etc.) in that area of law seriously.

McCrudden's key charge against my normative account is that although "Khaitan's analysis is somewhat supported in that it reflects *some* elements of that practice, there is no basis for saying that his description reflects anything approaching a settled understanding about the practice of indirect religious discrimination law."<sup>41</sup> McCrudden asks why, given the messiness of legal practice in both areas, "one element of practice should trump another."<sup>42</sup> Let us characterize this complaint as a challenge based on the 'messiness' of practice.

The challenge misses its mark. As lawyers and legal scholars appreciate, any area of law faces coherence-seeking pressures. The passage of time is a key factor that affects the stability and coherence of an area of law. The recognition of an area of law as *an area of law* by key actors (judges, lawyers, legislators, academics, etc.) is itself a key trigger for these pressures to begin exerting themselves upon that area of law. Appellate judges start giving

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40. Christopher McCrudden, *infra* 34 HARV. HUM. RTS. J. 249, 267–79 (2021).

41. *Id.* at 273–74.

42. *Id.* at 274.

greater weight to precedents from within that area than from without; lawyers start specializing in the area and develop the ability to conceive of it as a system rather than a disjointed set of norms; academics start offering courses in the area; and journals emerge that specialize in it. Over time, these pressures usually result in the area acquiring a measure of coherence; even when such coherence remains elusive, divergent viewpoints coalesce around key rival accounts of the area of law. Needless to say, no area of law is likely to ever achieve complete coherence and stability. The dynamic nature of law will ensure that even the oldest and most stable areas of law can suddenly come to acquire internal messiness when faced with new challenges.

An uncharitable reading of McCrudden's challenge based on messiness will take it to imply that *any* amount of messiness in legal practice precludes the possibility of normative theorizing. Such a strong claim is, on its face, implausible, because it effectively precludes the possibility of any normative theorization for *any* area of law. I will therefore not attribute this strong, and clearly implausible, interpretation to McCrudden. A more plausible interpretation of his challenge is that a legal practice must achieve a *sufficient* degree of coherence to permit practice-dependent normative theorization. If McCrudden accepts this interpretation of his challenge, he must admit the possibility of practice-dependent theorization in the face of at least *some* messiness in legal practice. In other words, a theorist cannot escape the inevitable choice that "one element of practice should trump another."<sup>43</sup>

But the weaker challenge is also mistaken because it *is* possible to offer a normative theory of an area of law that should qualify as practice-dependent, even if there is insufficient coherence in the legal practice. Let me grant, for argument's sake, that the practice of religious freedom law is especially incoherent, inasmuch as there is *no* unified theory that could make sense of at least the key strands of this practice. To be clear, a unified theory need not be "based on a single value rather than a plurality of overlapping values."<sup>44</sup> Indeed, the need to protect one's interest in unsaddled membership in one's religious group as well as the need to protect one's decisional autonomy in religious (non)adherence are themselves justified by a multiplicity of values.<sup>45</sup> It is one thing to insist that a theory cannot be internally contradictory (because, if it were, at least a part of it must be untrue), but quite another to think that a theory can only appeal to one value. I assume only the former, not the latter.

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43. *Id.*

44. *Id.* at 275.

45. See Khaitan, *supra* note 6 (defending the interest in unsaddled group membership on the basis of the value of three basic goods: secured freedom from unjustified interference, access to a range of valuable opportunities, and self-respect).

Even if it is impossible to fit a substantial part of local practice (in the area of law) into a unified normative theory, it is valuable to identify which strands of the practice have the potential to coalesce around a coherent foundation. Indeed, this is precisely what lawyers who are faced with a developing area of law do when they ask judges to rely on one dimension of the practice as useful precedent and ignore or overrule another. Even while she is driven by the strategic goal of serving her client's interests, a lawyer will have to make *some* normative case for her choice, because practice is—*ex hypothesi*—under-determinate. Judges, when making such choices in a developing area of law, can do so only by preferring, consciously or subconsciously, one normative theory over another. It seems strange, then, for McCrudden to insist that *scholars* must eschew normative theorizing in underdeveloped areas of law, even though proto-theoretical assumptions underpin the choices practitioners must inescapably make. If a scholar acknowledges, candidly, that she is addressing an extremely messy area of law, why is it problematic for her to propose a theory (one that is, of course, justified by independent moral argumentation) that explains what aspects of extant practice fit with the theory? It is in the nature of law—given the demands of rule of law—to seek coherence, especially within an area of law. Scholars, along with practitioners, publishers, and legislators, are actors who, knowingly or not, participate in this centripetal process.

A final comment on “fit” with respect to the issue under examination: Though the practice of religious freedom law is messy, the same cannot be said of the practice of discrimination law. McCrudden is right to say that “there is no basis for saying that [Khaitan’s] description reflects anything approaching a settled understanding about the practice of *indirect religious discrimination law*.”<sup>46</sup> But “indirect religious discrimination law” is not an area of law, whereas discrimination law is. The theoretical salience of an area of law is accepted by otherwise rival traditions in legal theory. Dworkin’s Herculean judge “will normally respect the priority of the department of law in which his immediate problem arises; he will severely mark down some principle as an eligible interpretation of accident law if it uproots that department of law, even if it fits other departments well.”<sup>47</sup> Raz believes that coherence is valuable, but only when pursued locally, i.e., within an area of law rather than within a legal system more generally.<sup>48</sup> The normative pull that the *general* practice of discrimination law exerts on particulars such as indirect religious discrimination law is significant.

Thus, in the area of religious freedom law, where legal practice is especially messy, the ability of a proposed normative theory to explain certain strands of the practice in a coherent manner clearly depends on its appeal to

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46. Christopher McCrudden, *infra* 34 HARV. HUM. RTS. J. 249, 273–74 (2021) (emphasis added).

47. RONALD DWORKIN, LAW’S EMPIRE 402–03 (1986).

48. JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 314 (1994).



(aspects of) practice. In the area of discrimination law, where legal practice is more settled, the appeal to practice is even stronger.

Finally, McCrudden is also wrong to suggest that my claims “result in a clear discontinuity between [freedom of religion] and [discrimination law] such that neither occupies the same space—something that puts clear blue water between the two principles.”<sup>49</sup> Many actions simultaneously violate multiple rights. A ban on abortion breaches privacy rights as well as the right against sex discrimination. A ban on religious preaching violates religious freedom as well as free speech rights. Similarly, the right to freedom of religion and the right against religious discrimination sometimes overlap.<sup>50</sup> These overlaps do not erase the distinctions between the rights. There is no need for “clear blue water” between them.

### CONCLUSION

The goal of this Essay has been to bring some conceptual and normative clarity to legal thinking on religion. The conflation of the rights to religious freedom and against religious discrimination can lead to injustice: A private person may be held liable for the breach of another’s religious freedom at the cost of her own. Discrimination, even when persuasively claimed, may be incorrectly found justified if the weaker standard for the right to religious freedom is applied. Alternatively, the scope of the right against religious discrimination may be illegitimately widened if it is analogized to religious freedom. A more precise understanding and application of these rights is necessary to adjudication that is fair to each party in disputes concerning religious rights.

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49. Christopher McCrudden, *infra* 34 HARV. HUM. RTS. J. 249, 272 (2021).

50. See Khaitan & Norton, *supra* note 7, at 124–25.

