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THE EUROPEAN COURT OF HUMAN RIGHTS AND INTRAGROUP RELIGIOUS DIVERSITY: A CRITICAL REVIEW

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The story of religion is, in substantial part, the story of adaptation and response to changing social worlds and, for centuries, the law has been one important figure in this dynamic history. Law has not just struggled with questions of religious freedom but has challenged religion to test the resiliency, complexity, and resources of its own traditions. An important challenge for contemporary human rights law is to ensure that it continues to encourage this dynamism rather than serving as a freezing agent.

— Benjamin L. Berger¹

INTRODUCTION

This Article examines ways in which one of the most established human rights courts—the European Court of Human Rights (“the Court” or “the Strasbourg Court”)—encourages or discourages intragroup religious diversity and dissent.² The Strasbourg Court is thought to be one of the most robust systems of human rights protection in the world.³ Its voice is arguably one of the most influential human rights voices in the growing

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1. Benjamin L. Berger, *Inducing Fundamentalisms: Law as a Cultural Force in the Domain of Religion*, 9 CANADIAN DIVERSITY 25, 28 (2012).

2. Set up in 1959, the Strasbourg Court rules on alleged violations of the European Convention on Human Rights (“ECHR”) in a jurisdiction made up of eight hundred million people living in the forty-seven Council of Europe Member States that have ratified the ECHR. See EUR. CT. H.R. THE COURT IN BRIEF, available at http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf.

3. See, e.g., Paul Johnson, *An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights*, 10 HUM. RTS. L. REV. 67, 74 (2010) (arguing that “the Court must be regarded as one of the most important discursing machines in the world”); Anna Grear, *Challenging Corporate “Humanity”: Legal Disembodiment, Embodiment and Human Rights*, 7 HUM. RTS. L. REV. 511, 536 (2007) (arguing that the Court is “widely thought to be the most juridically mature of human rights regimes”); Peter G. Danchin & Lisa Forman, *The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities*, in PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 192 (Peter G. Danchin & Elizabeth A. Cole eds. 2002) (arguing that the Court “has established itself as the most effective regional system for the protection of human rights in the world.”).

“transjudicial communication,”⁴ as wide reference to its precedents across the world attest.⁵

Yet when it comes to the protection of one of the fundamental freedoms enshrined in the European Convention on Human Rights (ECHR), freedom of religion, the Court’s track record is at best mixed.⁶ In fact, it took more than three decades for the Court to find the first freedom of religion violation in 1993.⁷ During those decades, it looked like the ECHR provision guaranteeing freedom of religion (Article 9⁸) “was going to be effectively a dead letter.”⁹ Today, twenty years since the first Article 9 violation, the Court’s increasing freedom of religion jurisprudence “has not translated into greater protection for religious individuals in many instances.”¹⁰

4. See Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 101 (1994-1995) (referring to the phenomenon of transjudicial communication as “communication among courts—whether national or supranational—across borders.”).

5. Both domestic and supranational courts refer to the European Court of Human Rights precedents. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], octubre 15, 1997, Sentencia T-523/97 (Colom.) (citing *Tyrer v. the United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978)); U.S. Supreme Court, *Lawrence v. Texas*, 539 U.S. 558 (2003) (citing *Dudgeon v. the United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)) and Inter-American Court of Human Rights, *González et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009) (citing *Angelova and Iliev v. Bulgaria*, App. No. 55523/00, Eur. Ct. H.R. (2007), available at <http://echr.ketse.com/doc/55523.00-en-20070726/view/> (unpublished Court (Fifth Section) decision)).

6. The Court has been criticized for offering inadequate protection to the individual exercise of freedom of religion. See, e.g., Javier Martínez-Torrón, *The (Un)Protection of Individual Religious Identity in the Strasbourg Case Law*, 1 OXFORD J. OF LAW AND RELIGION 1, 1 (2012) (arguing that the Court has not adequately protected individual religious identity expressed in ordinary life).

7. The Court found the first violation of Article 9 of the ECHR in *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) (1993).

8. Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 222, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf. “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

9. Carolyn Evans, *Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture*, 26 J.L. & RELIGION 321, 321 (2010-2011).

10. *Id.* In fact, the number of violations of freedom of religion remains strikingly small when compared with the amount of violations found under other rights guaranteed by the ECHR. The Court’s most recent table of violations reveals that, in the period of 1959-2012, the Court has found only forty six violations of freedom of religion. In the same period of time, the Court has found nine hundred and forty violations of the right to respect for private and family life; five hundred and twelve violations of freedom of expression; and a hundred and forty one violations of freedom of association and assembly. See EUR. CT H.R., VIOLATIONS BY ARTICLE AND BY RESPONDENT STATE (1959-2012), available at http://www.echr.coe.int/Documents/Stats_violation_1959_2012_ENG.pdf.

By all accounts, assumptions about religion underlying the Court's understanding of the scope and content of freedom of religion¹¹ may partly explain such an unfortunate state of affairs.¹² To be sure, the ECHR, like many other human rights instruments, does not define religion.¹³ Moreover, the Court has not attempted a formal and comprehensive definition. Yet, at times, implicit assumptions about religion as a set of "theological propositions"¹⁴ to which people adhere and assumptions of orthodoxy about certain religious groups¹⁵ surface in the Court's freedom of religion reasoning.

In this Article I argue that, in sidelining religious practices that do not conform to religious orthodoxy, these sorts of assumptions may obscure and discourage diversity within religious groups. Incorporating insights from religious studies, I thus propose that the Court becomes more critically aware of these background assumptions about religion and about certain religious groups when assessing religious freedom claims. In particular, I suggest that the Court eschew assumptions of orthodoxy about religious groups when these assumptions fix and naturalize certain religious practices as *the* defining ones for the entire group.

My discussion proceeds as follows: I start by outlining one of the main ways in which the legal assessment of freedom of religion is usually framed and by formulating my inquiry differently, in light of insights from religion scholars. With these insights in mind, I then examine the Court's freedom of religion case law, identify the underlying assumptions about religion and about certain religious groups, and unpack the consequences that their workings carry for the protection of applicants' religious practices and the internal diversity in their religious groups. I show that, at times, the Court looks at these cases through lenses that make more space for lived

11. See Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L L. 663, 676 (2011) (arguing that "any attempt to define the scope and content of the right to religious liberty will necessarily involve assumptions about the underlying nature of religion itself.").

12. See Carolyn Evans, *Religious Freedom in European Human Rights Law: The Search for a Guiding Conception*, in RELIGION AND INTERNATIONAL LAW 385, 396 (Mark W. Janis & Carolyn Evans eds., 1999) (arguing that the Court tends to privilege "the cerebral, the internal and the theological over the active, the symbolic and the moral dimensions of religion and belief" and showing how this notion of religion may pose difficulties for religious groups that play greater emphasis on retaining a "distinctive lifestyle."). See also Lourdes Peroni, *Deconstructing "Legal" Religion in Strasbourg*, 2 OXFORD J. OF LAW AND RELIGION 1, 14 (2013). In this Article, I similarly challenge the Court's implicit construction of religion as primarily a matter of internal belief and conscience given the exclusionary and inegalitarian implications it carries for the protection of the religious freedom of people who conceive of religion as practice.

13. See T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189, 189-190 (2003).

14. Evans, *supra* note 12, at 395.

15. I borrow the notion of "assumption of orthodoxy" about certain religious groups from Lori G. Beaman. Lori G. Beaman, *The Missing Link: Tolerance, Accommodation and . . . Equality*, 9 CANADIAN DIVERSITY 16, 19 (2012); see also discussion *infra* Part II.A.2.

experiences of religion and internal group diversity, and at others, through lenses that hardly leave any room for such diversity. I conclude by sketching out some premises on which the Court should ground its analysis to more fully embrace the former and eschew the latter.

I. THE LEGAL ASSESSMENT OF RELIGIOUS FREEDOM: FRAMING THE ISSUES

Part of the debates surrounding the assessment of religious freedom has been traditionally couched in terms of objective and subjective approaches.¹⁶ Broadly put, an objective approach involves determining whether a certain act “counts” as religious practice for the purposes of legal protection by reference to the tenets recognized as mandatory in a particular religion (by e.g., the authoritative bodies or other members of the community).¹⁷ A subjective approach, on the other hand, relies “not on what others view the claimant’s religious obligations as being, but rather [on] what the claimant views these personal religious ‘obligations’ to be.”¹⁸ Kent Greenawalt insightfully identifies the two variables usually involved in the process:

One concerns perspective; is that of the *individual* or the *group* to count? The other variable concerns stringency; must the behavior in which the claimant wants to engage. . . be *required* from a religious point of view, be a *central* religious practice or closely related to a central religious belief, or be *merely connected* more weakly to religious belief or practice?”¹⁹

Either way, scholars of religion have made clear that the two tests rest on different understandings of religion. The objective test understands religion as, “doctrinally definite and authoritatively determined by an institutional church. Being religious—exercising religion—is being obedient to the legal prescriptions of that religion.”²⁰ The subjective view, on the other

16. For a discussion of the subjective and objective approaches in the U.S. context, see, e.g., Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441 (1998); Kent Greenawalt, *Judicial Resolution of Issues about Religious Conviction*, 81 MARQ. L. REV. 461 (1998). In the Canadian context, see e.g., Richard Moon, *Religious Commitment and Identity: Syndicat Northcrest v. Amselem*, 29 SUPREME COURT LAW REVIEW 201 (2005); Robert E. Charney, *How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief*, 51 SUP. CT. REV. 47 (2010); Solange Lefebvre, *Religion in Court, Between an Objective and a Subjective Definition*, in REASONABLE ACCOMMODATION: MANAGING RELIGIOUS DIVERSITY 32 (Lori G. Beaman ed., 2012). In the ECHR context, see e.g., CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 111-127 (2001).

17. See, e.g., *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (Can.) at ¶ 43.

18. *Id.* at ¶ 54.

19. Greenawalt, *supra* note 16, at 465 (identifying and unpacking the variables involved in the process of determining whether a claimant’s religion is “substantially burdened” in the U.S. context) (emphasis added).

20. Sullivan, *supra* note 16, at 446.

hand, imagines religion as “personally determined—a matter of individual choice.”²¹ Both tests have raised objections.²² One critique usually made against the objective test is that it tends to be oblivious to the difficulties of determining religious orthodoxy.²³ Another objection is that the objective approach tends to “essentialize and simplify the complicated and complex relationships between believer, belief and practice.”²⁴ Moreover, “in falling back on the majority opinion in a religious community,” this kind of approach may contribute to “the marginalization of minority voices.”²⁵ In turn, a common concern raised about the subjective test is its Protestant bias given its focus on the individual.²⁶ In many religious traditions, as Winnifred Fallers Sullivan explains, the focus is not individual belief: “[T]he needs and identity of the community . . . take[s] precedence and religious practice . . . play[s] a bigger role.”²⁷

In fact, it seems that delving into elements of religious dogma or doctrine cannot be wholly avoided in freedom of religion assessments. Even the most subjective tests—like the sincerity-of-belief test applied by some courts, including the Supreme Court of Canada²⁸—appear to have “unspoken” parts that ultimately involve an assessment of religious doctrine.²⁹ As

21. *Id.*

22. For a brief analysis of the difficulties raised by each of these approaches, see GÉRARD BOUCHARD & CHARLES TAYLOR Report BUILDING THE FUTURE: A TIME FOR RECONCILIATION 175-177 (2008). See also Emmanuelle, Bribosia, Julie Ringelheim, and Isabelle Rorive, *Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?* 17 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 137, 149 (2010).

23. Sullivan, *supra* note 16, at 448.

24. Lori G. Beaman, *Defining Religion: The Promise and the Peril of Legal Interpretation*, in LAW AND RELIGIOUS PLURALISM IN CANADA 192, 201 (Richard Moon ed., 2008).

25. BOUCHARD & TAYLOR, *supra* note 22, at 176.

26. Sullivan, *supra* note 16, at 449. The idea that it is “the individual who decides” is “a basically Protestant understanding of authority.” WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 133 (2005).

27. Sullivan, *supra* note 16, at 449. For critical assessments of courts’ privileging of the individual aspect at the expense of the collective or communal dimension, see, e.g., Benjamin Berger, *Law’s Religion: Rendering Culture*, 45 OSGOODE HALL LAW JOURNAL 277, 288 (2007) (highlighting Canadian courts’ emphasis on the individual and their treatment of collective traditions and institutions as “only of derivative importance” when determining what counts as religious) and AVIGAIL EISENBERG, REASONS OF IDENTITY: A NORMATIVE GUIDE TO THE POLITICAL AND LEGAL ASSESSMENT OF IDENTITY CLAIMS 107-108 (2009) (arguing that privileging individual subjective views ignores “the communal function” of religious practices).

28. A well-known example epitomizing this approach is the case of *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551 (Can.), decided by the Supreme Court of Canada.

29. Lori G. Beaman, *Conclusion*, in REASONABLE ACCOMMODATION: MANAGING RELIGIOUS DIVERSITY 208, 217 (Lori G. Beaman ed., 2012). See also, Lefebvre, *supra* note 16, at 47; EISENBERG, *supra* note 27, at 108. In an analysis of several cases decided by the Supreme Court of Canada, Lefebvre points to the contradiction, between “the affirmation of the secondary character of dogma, doctrine and orthodoxy and the persistent reference to these aspects as criteria to judge the sincerity or the noncentric nature of belief.” Lefebvre, *supra* note 16, at 47. In a similar vein, Avigail Eisenberg contends: “Even in a case like *Amselem*, the Canadian court relies far more heavily on assumptions and

Lori Beaman puts it, the question is ultimately “sincerely held belief in *what?*”³⁰ “One must sincerely believe *in something*.”³¹ “To determine sincerity,” she argues, “someone (the court, an expert, the believer) must identify a set of beliefs and practices.”³² For Beaman, and others, it is therefore simply impossible to separate sincerity from content.³³ Avigail Eisenberg, for instance, contends that “it is nearly impossible for courts to avoid assessing the tenets of religious faith or to base their decisions entirely on individual sincerity, despite their eagerness to avoid scrutiny of religious doctrine and traditions.”³⁴ Eisenberg believes that this impossibility is due to the collective dimension often involved in religious identity claims.³⁵ In reality, sometimes cases cannot be decided from a mere individual perspective; they crucially require an analysis of the group’s perspective.³⁶

The starting point of this Article is therefore that, for the purposes of my inquiry, it is more fruitful to focus on the scope, variety and role of objective elements (e.g., requirements or precepts established in texts or by religious authorities, views/practices of other members of the community). I thus attempt to assess the space the Strasbourg Court makes for religious diversity and dissent *within* religious groups in a less dichotomous manner. The degree of receptiveness to applicants’ varied religious experiences—and, therefore, to intragroup variation and dissent—may be more effectively assessed by focusing on the ways in which the Court deploys objective elements. In other words, the issue is not so much whether the Court applies one *or* the other approach (subjective *or* objective) in a black-and-white fashion. The issue is rather whether, in employing objective elements in its legal analysis, the Court emphasizes (and encourages) or obscures (and discourages) complexity and diversity within religious groups.

To this end, I borrow the notions of “relatively porous” and “relatively dense” lenses developed by Barbara Flagg.³⁷ In an assessment of doctrinal appeals to subjectivity as a strategy for pursuing pluralism in the U.S. legal

assessments about religious dogma than would be necessary if sincerity is the real basis.” EISENBERG, *supra* note 27, at 108.

30. Beaman, *supra* note 29, at 217.

31. Beaman, *supra* note 24, at 201 (emphasis added).

32. *Id.*

33. *Id.* at 209.

34. *See, e.g.*, EISENBERG, *supra* note 27, at 108

35. *Id.*

36. *See, e.g.*, Greenawalt, *supra* note 16, at 467 (giving as an example the case of *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) (concerning the building of a road that would affect sacred sites of Native Americans)).

37. Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273, 331 (1994).

context, Flagg shows that “the lived experience of real people is always filtered through one objective lens or another.”³⁸ The strategy, she claims, is “fraught with peril, from a pluralist perspective” because, in fact, there is no open articulation of the objective criteria employed to determine what subjective experiences “count.”³⁹ In an effort to mitigate the anti-pluralist risk of this approach, Flagg develops the idea of “a continuum of objective filters” overlaying on subjective experiences.⁴⁰ These filters range from, “relatively porous objective standards that operate to validate most, if not all, actual subjective experiences, to relatively dense requirements that function to exclude from further doctrinal consideration some significant portion of the actual range of lived experiences.”⁴¹ Pluralism, she claims, “is served when subjective experience is viewed through a relatively porous objective filter, and it is disserved when the objective lens is relatively dense.”⁴²

In this Article, I share Flagg’s concern with how objective criteria applied by courts to claimants’ lived experiences may make more or less space for pluralism (in my case, intragroup religious pluralism). Thus, I find her notions of relatively dense and relatively porous objective lenses and their role in serving or disserving pluralism apt for present purposes. In the remainder of this Article, I therefore look at the room the Strasbourg Court leaves for intragroup religious diversity through the types of lenses identified by Flagg. I believe that a frame focused on the features of the objective lenses employed in the analysis of religious claims rather than on the more dichotomous subjective/objective approaches (e.g., individual/collective, individual/institutional, practice/theology) might better capture the nuance and complexity that the latter frame tends to miss.

II. LOOKING AT INTRAGROUP DIVERSITY IN STRASBOURG THROUGH OBJECTIVE RELIGIOUS LENSES

A look at the complaints filed with the Strasbourg Court reveals that applicants’ religious practices exhibit different degrees of conformity, if any, to religious dogma. Indeed, some applicants follow religiously prescribed practices strictly. Other claimants engage in practices that are not prescribed or widely recognized. Yet others fully embrace orthodox norms and practices. The large majority of applicants comes to the Court as part

38. *Id.* at 318.

39. *Id.* at 323.

40. *Id.* at 331.

41. *Id.*

42. *Id.*

of collectives. They present themselves as Jehovah's Witnesses, Coptic Christians, Buddhists, Muslims, and Sikhs—to name just a few—bringing to the Court's analysis an inescapable collective dimension. At times, they openly rely on the doctrines or views of institutional bodies or members of their religious groups in support of their claims. Some even portray their practices as the “core” of their group's religious identity. Other times, applicants admit that their practices may not be required by or central to their religion but still claim that they express their deep commitment to it.

One way of assessing the Court's responsiveness to such a variety of religious experiences within religious groups is by focusing on how the Court employs objective filters in determining whether such experiences fall within the scope of freedom of religion. Article 9 of the ECHR guarantees, among other things, the freedom to *manifest* one's religion in teaching, observance, practice and worship.⁴³ One of the preliminary questions the Strasbourg Court asks when examining a religious freedom case is whether a certain act counts as a “manifestation” of the applicant's religion within the meaning of this provision. The purpose of this inquiry is to determine whether the act in question attracts the protection of Article 9 of the ECHR.⁴⁴

Traditionally, the criteria employed by the Court (and by the now extinct European Commission of Human Rights) to recognize “manifestations” of religion in practice “have swung from ‘normal and recognized manifestations’ of the religion or belief to manifestations required by the religion or belief without any strong consistency.”⁴⁵ In reality—and even though it has long been unclear whether the action in question needed to be “required” by the religion or simply strongly connected to it⁴⁶—this ap-

43. Article 9(1) of the ECHR states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to *manifest* his religion or belief, in worship, teaching, practice and observance.” (emphasis added).

44. Another crucial stage in the Court's freedom of religion analysis is the one conducted under Article 9(2) of the ECHR. Article 9(2) of the ECHR provides the grounds on which freedom to manifest one's religion may be restricted by stating: “Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” So if a claim passes all the preliminary hurdles – including the qualification as a “manifestation” of religion – the Court proceeds to examine whether the interference with religious freedom is justified as “necessary in a democratic society.” The Court here checks whether the interference pursues a legitimate aim and, if so, whether the interference is proportionate to the legitimate aim pursued. For a detailed analysis of the stages the Strasbourg Court follows in its Article 9 analysis, see MALCOLM D. EVANS, *MANUAL ON THE WEARING OF RELIGIOUS SYMBOLS IN PUBLIC AREAS* 7-20 (2009).

45. Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 *CARDOZO L. REV.* 2669, 2674 (2009) (footnote omitted).

46. EVANS, *supra* note 16, at 202.

proach has resulted in a distinction between “proper” manifestations of a religion and those acts simply inspired, motivated or influenced by it.⁴⁷

In recent years, however, the Court has gradually started to “count” practices that, though not necessarily required by a religion, are still motivated or inspired by it.⁴⁸ In this way, albeit not consistently, the Strasbourg Court has shown itself more sensitive to forms of religion that may not necessarily be institutionally or textually required.⁴⁹

In what follows, I identify some of the main features characterizing the objective filters employed by the Court in determining what “counts” as “manifestations” of religion for the purposes of Article 9 ECHR. Moreover, I assess the implications that the application of these filters may have for hindering or furthering religious intragroup diversity.

A. Relatively Dense Objective Filters

In this part, I look at two groups of cases. In the first group, the Court refuses to count applicants’ practices as a “manifestation” of religion because they fail to show that such practices are required by it. In the second set of cases, the Court counts the applicants’ practices as a “manifestation” of their religion largely based on essentialist understandings of group identity.

47. The Court has long been criticized for minimizing the scope of Article 9(1) of the ECHR by adopting a restrictive approach to determining what counts as a manifestation of religion or belief. *See, e.g.*, Malcolm D. Evans, *Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions*, in *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* 291, 295 (Peter Cane, Carolyn Evans and Zoe Robinson eds., 2008); EVANS, *supra* note 16, at 394; LUCY VICKERS, *RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE* 96-100 (2008).

48. *See, e.g.*, Gatis Kovalkovs v. Latvia, App. No. 35021/05, Eur. Ct. H.R., at ¶ 60 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-10909931> (unpublished Court (Third Section) decision); Jakobski v. Poland, App. No. 18429/06, ¶ 45, Eur. Ct. H.R. 2005-VI, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102121>; Leyla Sahin v. Turkey [GC], App. No. 44774/98, ¶ 78, Eur. Ct. H.R. 2005-XI, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956>. However, in *Kosteski v. the Former Yugoslav Republic of Macedonia*, App. No. 55170/00, ¶ 38, Eur. Ct. H.R. (2006), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-73342> (unpublished Court (Third Section) decision) the Court does not count taking time off work to celebrate a religious holiday as a “manifestation” of the applicant’s Islamic faith but accepts that it was motivated by it. *See* EVANS, *supra* note 44, at 295.

49. The distinction between religious manifestation and religiously motivated conduct remains however in place in the Court’s jurisprudence. The Court has recently re-affirmed that not every act “in some way inspired, motivated or influenced by it constitutes a ‘manifestation’ of the belief.” *Eweida and Others v. the United Kingdom*, App. No. 48420/10, ¶ 58, 2013 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-115881>.

1. Requiring Conformity with Orthodoxy

In a number of cases, the Court (and the former Commission) has implicitly or explicitly required conformity with religious mandates or prescriptions in order for practices to count as “manifestations” of religion for the purposes of Article 9 of the ECHR. In making the protection of applicants’ freedom of religion *conditional* upon conformity with authoritatively (e.g., institutionally or textually) mandated beliefs or practices, this filter remains relatively closed to what religious scholars call “lived religion.” Lived religion, as Meredith McGuire notes, distinguishes “the actual experience of religious persons from the prescribed religion of institutionally defined beliefs and practices.”⁵⁰ It is the kind of religion that flows into “everyday activities and objects” and that is “spectacularly resistant to hierarchical control.”⁵¹ Robert Orsi describes lived religion in the following terms:

Lived religion cannot be separated from other practices of everyday life, from the ways that humans do other necessary and important things, or from other cultural structures and discourses . . . Nor can sacred spaces be understood in isolation from the places where these things are done—workplaces, hospitals, law courts, homes, and streets.⁵²

Several cases in the Strasbourg case law illustrate the relative density of this type of objective filter and its incapacity to attend to lived religious experiences and diversity within religious groups. One example is *X. v. the United Kingdom* (1981), a case brought by a Muslim school teacher complaining that he was forced to resign from his job for not being allowed to take time off on Fridays to attend prayers at a nearby mosque.⁵³ One of the main disputes between the parties was whether this attendance was “required by Islam and thus a ‘necessary part’ of his religious practice.”⁵⁴ The Commission found that the applicant did not convincingly show that “he was *required by Islam*” to disregard his contractual duties and to go to the

50. MEREDITH B. MCGUIRE, *LIVED RELIGION: FAITH AND PRACTICE IN EVERYDAY LIFE* 12 (2008). McGuire adds: “Although lived religion pertains to the individual, it is not merely subjective. Rather, people construct their religious worlds together, often sharing vivid experiences of that intersubjective reality.” *Id.* On lived religion, see generally, DAVID D. HALL, *LIVED RELIGION IN AMERICA: TOWARD A HISTORY OF PRACTICE* (1997).

51. SULLIVAN, *supra* note 26, at 140.

52. Robert A. Orsi, *Is the Study of Lived Religion Irrelevant to the World We Live In?*, 42 J. SCI. STUDY OF RELIGION 169, 172 (2003).

53. *X. v. United Kingdom*, App. No. 8160/78, 22 Eur. Comm’n H.R. Dec. & Rep. 27 (1981), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74929>.

54. *Id.* at 34.

mosque during school time.⁵⁵ It added, however, that, even if such religious obligation were assumed, the case was anyhow inadmissible on other grounds.⁵⁶ In another case, *X. v. the United Kingdom* (1974), the Commission similarly found that the applicant, a Buddhist prisoner, showed that communication with other Buddhists was an important part of his religious practice but “failed to prove that *it was a necessary part of this practice* that he should publish articles in a religious magazine.”⁵⁷ The applicant’s complaint that he was not allowed to send out articles for publication in a Buddhist magazine was therefore found manifestly ill-founded.

Another, newer, case in point is *Jones v. the United Kingdom* (2005).⁵⁸ The case was brought by a father banned from placing a memorial stone with a photograph on the grave of his daughter. His complaint was that the bar on photographs interfered with his religion, as the Church of Wales accepts photographs on graves. His practice, however, did not count as a “manifestation” of his religious beliefs in the sense protected by Article 9 of the ECHR. After pointing out that it was “irrelevant for this purpose that the church of which the applicant is a member permitted such photographs,” the Court held: “[I]t cannot be argued that the applicant’s belief *required* a photograph on the memorial or that he could not properly pursue his religion and worship without permission for such a photograph being given.”⁵⁹ In the first part of this reasoning, the Court dismisses the relevance of institutional permission; it considers irrelevant that the Church of Wales permits photographs. In the next part, the Court appears to emphasize the relevance of institutional requirement; it suggests that, since placing such a photograph on the memorial is not a requirement of the applicant’s religion, the act does not fall under Article 9 protection. The suggestion seems to be that the photograph has nothing to do with the applicant’s religion: he can perfectly practice his religion without it. The complaint was quickly dismissed as incompatible *ratione materiae* with the ECHR

55. *Id.* at 35 (emphasis added). The kind of test requiring applicants “to show that they [are] required to act in a certain way because of their religion or belief” has come to be known as the *Arrowsmith* test. EVANS, *supra* note 16, at 115. The test “was intended to introduce an element of objectivity into the determination of whether an action is a ‘practice’ for the purposes of Article 9(1).” *Id.* at 203. For an analysis and critique of this test, see *id.* at 111-127.

56. *X. v. United Kingdom*, App. No. 8160/78, 22 Eur. Comm’n H.R. Dec. & Rep., at 27, 35.

57. *X. v. United Kingdom*, App. No. 5442/72, 1 Eur. Comm’n H.R. Dec. & Rep. 41, 42 (1974), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74994> (emphasis added).

58. *Jones v. United Kingdom* (dec.), App. No. 42639/04, Eur. Ct. H.R. (2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70437> (unpublished Court (Fourth Section) decision).

59. *Id.* at ¶ 3 (emphasis added).

provisions,⁶⁰ even when many scholars of religion would agree that practices surrounding individuals' death or that of their loved ones "are close to the heart of religion."⁶¹ Winnifred Fallers Sullivan, for example, emphasizes the importance that "practices associated with a burial site" can have for religious people.⁶² These practices may include "placing of material objects symbolic of the dead person's life."⁶³

Another kind of relatively dense filter can be found in *D. v. France* (1983).⁶⁴ The case concerned a Jewish applicant who, in refusing to deliver the divorce document ("get") to his ex-wife, was found in disagreement with the tenets of his religion. The Commission first noted that the applicant did not allege that, in delivering the *get*, he would be acting against his religious convictions but that he would be forfeiting the possibility of remarrying his ex-wife.⁶⁵ Next, the Commission found that the applicant's refusal was "at variance on this point with the religious leaders."⁶⁶ In this respect, it observed that it appeared from a domestic court's judgment that "under Hebrew law it is customary to hand over the letter of repudiation after the civil divorce has been pronounced, and that no man with genuine religious convictions would contemplate delaying the remittance of this letter to his ex-wife."⁶⁷ Based on these reasons, the Commission concluded that the applicant's refusal did not count as a manifestation of his religion and declared his complaint manifestly ill-founded. While the first point made by the Commission seems sensible (the fact that the applicant's refusal to deliver the *get* was not actually based on his religious convictions), the second point appears problematic (the fact that the applicant was at variance with religious leaders). Indeed, the second approach is problematic because, in implicitly requiring agreement with the opinion of religious leaders in order to attract Article 9 protection, the Court risks marginalizing minority or dissenting voices within religious groups.

The rationale underlying the Court's reasoning in *D. v. France* is somehow different from the one underpinning the reasoning in the three

60. The subject matter of the claim did not come within the scope of the ECHR and was therefore rejected pursuant to Article 35 §§ 3 and 4 of the ECHR.

61. SULLIVAN, *supra* note 26, at 215. See also my analysis of the *Jones* case along similar lines in Lourdes Peroni, *Deconstructing "Legal" Religion in Strasbourg*, in 2 OXFORD JOURNAL OF LAW AND RELIGION 1, 14 (2013).

62. SULLIVAN, *supra* note 26, at 217.

63. *Id.* at 216.

64. *D. v. France*, App. No. 10180/82, 35 Eur. Comm'n H.R. Dec. & Rep. 199 (1983), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74175>.

65. *Id.* at 202.

66. *Id.*

67. *Id.* As Carolyn Evans notes, this conclusion is taken from a domestic court's decision rather than from expert evidence offered to the Commission. EVANS, *supra* note 16, at 121 n.108.

other cases discussed earlier. In the three previous cases, Article 9 of the ECHR did not protect the applicants because they sought to engage in practices seemingly *not required* by their religions. In *D. v. France*, on the other hand, Article 9 of the ECHR did not protect the applicant, in part, because he wanted to engage in an act viewed as *contrary to the requirements* of his religion.

The approach adopted by the Court (and the Commission) in cases such as the ones examined above has been criticized for disadvantaging religious people who do not accept all doctrinal prescriptions of a particular religion or who believe that their religion places further demands on them.⁶⁸ Moreover, this approach does not take into account that some religions “may specify a group of mandatory practices;” others, however, may encourage their members to “demonstrate their piety and their desire to achieve the holy, by engaging in practices that go well beyond any set of obligatory rules.”⁶⁹ The kinds of filters employed in the cases discussed in this part do not attend to questions such as what if the practices in question are not endorsed by the elites, authorities or majority but only by a minority of the religious group of which applicants claim to be part? Or, what if there is internal disagreement over whether certain acts are required or essential to religious practice? So, one of the dangers of this approach is that it may lead to the rejection of claims that fall outside the mainstream of a religion.⁷⁰ At a deeper level, the objective filters used by the Court to narrowly construct the notion of “manifestation” of religion seem to fit with an understanding of religion as “a set of theological propositions” rather than as “a particular way of living.”⁷¹

In sum, the filtering mechanisms that the Court (and the Commission) employs in the cases outlined above are normatively dense. They tend to favor those who conform to what is authoritatively prescribed while disempowering those who may disagree, those who may engage in practices prescribed by only a minority within the group or those who may engage in practices authoritatively encouraged (or accepted). These kinds of filter appear to miss one crucial insight from religious studies: the fluidity of

68. See, e.g., EVANS, *supra* note 16, at 122. Moreover, the Court’s approach in cases such as the ones discussed in this part has been criticized for not being truly objective: the Court does not really look for evidence from religious leaders or communities but uses its own subjective judgment instead when determining the requirements of a religion. See *id.* at 203.

69. David M. Brown, *Neutrality or Privilege? A Comment on Religious Freedom*, 29 SUPREME COURT OF CANADA L. REV. 222, 226 (2005).

70. EVANS, *supra* note 16, at 123.

71. Evans, *supra* note 12, at 395.

religion and the dynamic character of religious traditions. As Benjamin Berger notes:

Perhaps the only safely generalizable statement within religious studies is that religious traditions are in a constant state of change and adaptation in response to their surrounding social conditions. Religions are constantly in flux, redefining their practices and beliefs in dialogue with their local, historical, and social milieus.⁷²

Avoiding positing orthodox dogma as *the sole standard* of the inquiry⁷³ does not necessarily mean a rejection of institutional or textual forms of inquiry in the analysis. In fact, attention to lived forms of religion does not have to involve an either-or approach. According to religious scholar Robert Orsi, the study of lived religion “directs attention to institutions *and* persons, texts *and* rituals, practice *and* theology, things *and* ideas.”⁷⁴

Objective elements, as argued in the previous part, are inevitable and substantially contribute to the assessment of religious freedom claims. What is crucial, though, is that in the process, courts remain aware that interpretations within religious groups are “multiple, contested, and conflicting”⁷⁵ and avoid tests that encourage what Berger terms “religious fundamentalism,” that is to say, “a rigid or absolutist fidelity to a particular interpretation of a tradition.”⁷⁶

2. Essentializing Religious Groups

In recent years, the Court appears to have gradually moved away from approaches that explicitly or implicitly require conformity with orthodox doctrine when determining the scope of freedom of religion. Yet, at times, the Court’s essentialist views of certain religious groups based on what Lori Beaman calls “the assumption of orthodoxy”⁷⁷ still risks hindering intragroup diversity. Beaman notes:

72. Berger, *supra* note 1, at 27.

73. As Berger also notes, making orthodox interpretation “the standard for the religious . . . would be to undergird existing authorities within a community by lending them the definitional support of the state.” *Id.*

74. Orsi, *supra* note 52, at 172. *See also* Linda Woodhead, *Five Concepts of Religion*, 21(1) INTERNATIONAL REVIEW OF SOCIOLOGY - REVUE INTERNATIONALE DE SOCIOLOGIE 121, 133 (2011) (arguing that lived religion “is less interested in formal theologies and religious structures *per se* than in their relations with religious practices in ‘everyday’ life, which includes domestic, familial and leisure settings, as well as designated religious settings.”).

75. Beaman, *supra* note 24, at 212. *See also* Lefebvre, *supra* note 16, at 47 (warning against “reducing the [doctrine] inquiry to the most official dogma of the religious group in question”).

76. Berger, *supra* note 1, at 26.

77. Beaman, *supra* note 15, at 19.

There is a tendency when dealing with religious groups with which we are not familiar to essentialize them, often in orthodox ways. Thus, not all Muslims require prayer space, not all Sikhs wear kirpan, and so on. Religious groups and individuals themselves complain that such essentialization is pushing them toward an orthodoxy of practice that is inappropriate.⁷⁸

Assumptions of this sort make the filters employed by the Court to determine what “counts” as a “manifestation” of religion relatively dense because they posit certain religious practice as *the* group paradigmatic practice and fix it as the “essence” of a certain group identity. These essentialist assumptions are problematic because they tend to use certain practices as *the* yardstick against which group membership is judged and to deny legal protection to those who do not conform to *the* standard.

The Court has employed this kind of filter most notably in cases involving Sikh applicants. One example is *Mann Singh v. France* (2008), a case concerning a Sikh man denied the renewal of his driver’s license for refusing to take off his turban for the picture.⁷⁹ In assessing whether Mann Singh’s wearing of his turban falls within the scope of Article 9 of the ECHR, the Court says:

According to the applicant, the Sikh faith compels its members to wear the turban in all circumstances. *It is not only considered* at the heart of their religion, but also *at the heart of their identity*. Therefore, the Court notes that this is an act motivated or inspired by a religion or belief.⁸⁰

In the second sentence of this passage, the Court leaves out the applicant and objectivizes his practice by means of a linguistic move known in discourse analysis as “passivization”—the use of the passive voice instead of the active voice.⁸¹ Indeed, the Court states that the turban (“it”) is *considered* to be at the heart of the Sikh religion and identity without saying who actually considers the turban as such.⁸² The context indicates that it is Mann Singh, the applicant himself, who views the turban this way.⁸³ How-

78. *Id.*

79. *Mann Singh v. France* (dec.), App. No. 24479/07, Eur. Ct. H.R., at 5 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89848> (unpublished Court (Fifth Section) decision) (author’s translation).

80. *Id.* at 5 (author’s translation) (emphasis added).

81. See, e.g., Michael Billig, *The Language of Critical Discourse Analysis: The Case of Nominalization*, 19 DISCOURSE AND SOCIETY 783, 785 (2008). For an analysis of *Mann Singh* along similar lines, see Lourdes Peroni, *Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Essentializing and Stereotyping*, INT’L J.L. IN CONTEXT (forthcoming June 2014).

82. The Court engages in passivization by stating “the turban is considered” rather than, say, “Mann Singh considers the turban” *Mann Singh*, App. No. 24479/07, Eur. Ct. H.R., at 5. See also Peroni, *supra* note 81.

83. A reading of Mann Singh’s application confirms that this characterization comes from the applicant. Referral to the European Court of Human Rights for Mann Singh 2 (June 11, 2007) (author’s translation) (on file with author and Chicago-Kent Law Review). See also Peroni, *supra* note 81.

ever, with the passive construction in “[the turban] is considered”—that is to say, with the deletion of Mann Singh as the subject—the Court separates the turban from its wearer and objectivizes his religious practice by representing it as though it were a “thing” or “entity” rather than a dynamic practice.⁸⁴ Moreover, this reification of the applicant’s practice enables the Court to further situate “the turban” at the “heart” of the Sikh identity, in a move that fixes it and posits it as *the* defining group characteristic.⁸⁵

Two forms of essentialism are at work in this mode of reasoning: (1) the attribution of certain characteristics to some “static ‘essence,’” in a move that “naturalizes differences that may be historically variant and socially created” and (2) the treatment of such characteristics “as the defining ones for everyone in the category.”⁸⁶ This kind of language (re)affirms *intragroup* exclusions and inequalities because it suggests that those who do not follow the “core” practice of wearing a turban—or do not follow it strictly—may be regarded as less members than others or, simply, as not members at all.⁸⁷ In other cases concerning Sikhs—this time students expelled from French schools for refusing to take off their “*keski*” (a small turban) in alleged violation of the principle of *laïcité*—the Court has further reinforced the essentialist understanding of Sikh identity by stating that the Sikh religion imposes on its male adherents wearing the turban “in all circumstances.”⁸⁸ The cases in point are *Ranjit Singh v. France* and *Jasvir Singh v. France*.⁸⁹ Mann Singh and the Sikh students may have met the criterion of group membership implicitly established by the Court but future Sikh applicants not wearing the turban “in all circumstances” will most likely fail the test and get “stuck” in the dense filter thereby created.

84. On the notion of “objectivation” in critical discourse analysis, see THEO VAN LEEUWEN, DISCOURSE AND PRACTICE: NEW TOOLS FOR CRITICAL DISCOURSE ANALYSIS 63-66 (2008). Van Leeuwen explains that social actions may be objectivized in discourse when they are “represented statically, as though they were entities . . . rather than dynamic processes.” *Id.* at 63. For a more detailed analysis of the use of objectivation and its implications in *Mann Singh*, see Peroni, *supra* note 81.

85. See also Peroni, *supra* note 81.

86. Anne Phillips, *What’s Wrong with Essentialism?*, 20 DISTINKTION: SCANDINAVIAN J. OF SOC. THEORY 47, 53-54, 57 (2010).

87. See also Peroni, *supra* note 81.

88. See, e.g., *Ranjit Singh v. France*, App. No. 27561/08, Eur. Ct. H.R., at 2 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93702> (unpublished Court (Fifth Section) decision); *Jasvir Singh v. France*, App. No. 25463/08, Eur. Ct. H.R., at 6 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93701> (unpublished Court (Fifth Section) decision) (author’s translation). In fact, an earlier case concerning a Sikh applicant illustrates that, back then, the Court already understood that the Sikh religion mandates that its male followers wear a turban. *Phull v. France*, 2005-I Eur. Ct. H.R. 419, 424 (holding, in a case brought by a Sikh asked to take off his turban during an airport security check, that “the Sikh religion *requires* its male followers to wear a turban”) (emphasis added).

89. *Ranjit Singh*, App. No. 27561/08, Eur. Ct. H.R.; *Jasvir Singh*, App. No. 25463/08, Eur. Ct. H.R.

A partial and tentative explanation for why the Court ends up developing these relatively dense (essentialist) filters in cases such as *Mann Singh* points to a mix of elements. These elements include, most notably, the applicants' arguments, the Court's own assumptions of orthodoxy about groups with which it is not (sufficiently) familiar, and the lack of dispute in the case.⁹⁰ Indeed, the applicants in *Mann Singh*, *Ranjit Singh*, and *Jasvir Singh* relied on what appears to be mainstream views within their religions in support of their claims (at least, the mandatory or central character of their religious practices do not appear to have been contested either at the domestic level or before the Strasbourg Court). In other words, the validity of their practices as "manifestations" was not challenged.

The essentialist approach adopted by the Court in these cases was, to some extent, beneficial to the applicants. Indeed, it was mainly thanks to this approach that the Court regarded their religious practices as falling under the protection of Article 9 of the ECHR (the essentialist approach, however, played no role at later stages of the analysis and the applicants' interests were ultimately defeated by those of the State). Yet, as mentioned earlier, this essentialist approach is inherently problematic because it might exclude from the scope of protection of Article 9 of the ECHR future Sikh applicants falling short of what the Court views as the "core" of Sikh identity.

In conclusion, what makes the filters examined in the Sikh cases "relatively dense" is the *essentialist* understanding of a particular religious group identity, that is, the view of wearing the turban as "definitional, core, and immutable"⁹¹ to the Sikh identity. This kind of filter does not make space for protecting the practices of those group members who do not stand close enough to the "core" defining group membership and, as a result, does not make room for protecting dissenting voices and intragroup diversity. In fixing and naturalizing what in fact is dynamic and fluid, the Court misses again the kind of insight from religious studies noted by Benjamin Berger above.⁹²

90. See also Peroni, *supra* note 81.

91. Berger, *supra* note 1, at 27 ("If the practice is merely one mutable, though perhaps treasured, component of a vast constellation of interlocking symbolic expressions of a tradition (as it almost always is), the claim will simply not fare as well in a rights analysis as if the claimant presents the practice as definitional, core, and immutable.").

92. Berger further cautions against "adopting tests in the law that encourage individuals or communities to identify an unchanging 'core' in their tradition." *Id.* at 28.

B. Relatively Porous Objective Filters

In this part, I examine two groups of cases. In the first group, applicants rely on what seems to be mainstream views within their religious communities. In these cases, the Court legally “counts” applicants’ religious practices based on objective elements but does not fall into the sort of essentialist formulations employed in the Sikh cases discussed in the previous part. In the second group of cases, the mandatory or essential character of the religious practices applicants seek protection of is called into question in the course of the Strasbourg proceedings. In these cases, the Court recognizes, to a large degree, the applicants’ religious experiences even when they may not be religiously prescribed.

1. Circumventing Essentialism

In a number of cases brought before the Strasbourg Court, applicants engaged in practices that appeared to be widely shared within their groups (or, at least, no objection was raised in their cases as to the essential or mandatory character of such practices). In fact, in one of these cases the religious association in question intervened as a third party in the Strasbourg proceedings in support of the applicant’s claim.⁹³ In these cases, the Court’s considerable reliance on objective filters comes natural and necessary given that the applicants themselves resort to their group’s views in support of their religious freedom claims. The Court’s approach in these cases appears to reflect what Peter Edge calls a “sociological strategy” in determining the scope of freedom of religion.⁹⁴ In employing this strategy, Edge explains, courts give emphasis “to what other co-religionists believe, and how they may behave.”⁹⁵

Take for example the Court’s following formulation in *Thlimmenos v. Greece* (2000), a case concerning a Jehovah’s Witness denied access to the profession of accountant due to a past conviction for refusing to serve in the military for religious reasons:

93. *Bayatyan v. Armenia*, App. No. 23459/03, Eur. Ct. H.R., at 23-4 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95386> (unpublished Court (Third Section) decision). The third-party intervener, the European Association of Jehovah’s Christian Witnesses, supported a Jehovah’s Witness applicant’s claim to conscientious objection to military service in the following terms: Jehovah’s Witnesses is a “known Christian denomination which involve[s] devotion to high moral standards and include[s] a refusal to take up arms against their fellow men.” *Id.*

94. Peter W. Edge, *Determining Religion in English Courts*, 1 OXFORD JOURNAL OF LAW AND RELIGION 402, 416 (2012).

95. *Id.* According to Edge, this is an emerging strategy employed by English courts given the distinctions that reliance on institutional or textual sources may create: “a distinction between the teachings of a religious community and the beliefs and practices of that community.” *Id.*

[T]he Court notes that the applicant is a member of the Jehovah's Witnesses, *a religious group committed to pacifism* and that there is nothing in the file to disprove the applicant's claim that he refused to wear the military uniform only because he considered that his religion prevented him from doing so.⁹⁶

Consider also the following phrasing in *Bayatyan v. Armenia* (2011), a case concerning the conviction of a Jehovah's Witnesses applicant for draft evasion: "The applicant in the present case is a member of Jehovah's Witnesses, *a religious group whose beliefs include the conviction that service, even unarmed, within the military is to be opposed.*"⁹⁷ In the two cases, the Court legally "counts" applicants' religious practices by looking at their group (Jehovah's Witnesses), which is viewed as committed to pacifism or believes that military service is to be opposed.

Though the two formulations turn to the applicants' religious groups' beliefs, none of them makes conformity with what is religiously mandated *a requirement* for freedom of religion claims to fall within the scope of Article 9 of the ECHR. Perhaps most remarkably, what makes the objective filters employed in these cases relatively porous is that the Court does not go as far as essentializing the applicants' religious group in orthodox ways. It does not affirm, for example, that opposition to military service is "at the heart" of Jehovah's Witnesses' religious identity. The *Bayatyan* formulation is particularly more open, as it posits a certain religious conviction (opposition to military service) not as *the* group belief but as *a* group belief among others ("a religious group whose beliefs *include*").⁹⁸ These kinds of formulations suggest that the Court can recognize certain practices as a "manifestation" of religion based largely on their acceptance, recognition

96. *Thlimmenos v. Greece*, 2000-IV Eur. Ct. H.R. 265, 278-79 (emphasis added). In fact, at work in this part of the Court's reasoning is a mix of objective ("*a religious group committed to pacifism*") and subjective elements ("because *he considered* that his religion prevented him from doing so") (emphases added).

97. *Bayatyan v. Armenia*, App. No. 23459/03, Eur. Ct. H.R., at 29 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95386> (unpublished Court (Third Section) decision) (emphasis added). The Court establishes in these terms that Article 9 ECHR was applicable.

98. Contrast these instances with formulations in other cases concerning Jehovah's Witnesses where the Court, by means of sweeping generalizations, seems oblivious to intra-group religious diversity. For instance, in *Jehovah's Witnesses of Moscow v. Russia*, a case concerning the banning of the community in Russia, the Court stated: "It is a well-known fact that Jehovah's Witnesses are a religious group committed to pacifism and that their doctrine prevents individual members from performing military service, wearing uniform or taking up weapons." 2010 Eur. Ct. H.R. 38, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99221> (unpublished Court (First Section) decision). Though the Court does not use essentialist language, it still presents its claim as a "fact" that is, moreover, "well-known." The Court does not say by whom and how exactly this fact is actually "well-known." My sense is that the sort of formulations present in *Jehovah's Witnesses of Moscow* comes close to the essentialist assumptions examined in Part II.A.2.

or prescription by applicants' religious groups or dogma in ways that do not necessarily brush away internal diversity.

2. Lifting the Requirement to Show that Acts Are Religiously Mandated

Three recent examples in the Court's freedom of religion case law may serve to illustrate the employment of relatively porous filters in the second group of cases discussed in this part. The first example is *Jakóbski v. Poland* (2010), a case brought by a Buddhist prisoner complaining that he was refused meat-free meals; the Court said: "[T]he applicant's decision to adhere to a vegetarian diet can be regarded as motivated or inspired by a religion and was not unreasonable. Consequently, the refusal of the prison authorities to provide him with a vegetarian diet falls within the scope of Article 9 of the Convention."⁹⁹ Another example is *Gatis Kovaļkovs v. Latvia* (2012), also a case concerning the practice of religion in prison, where the applicant alleged, *inter alia*, that he was prevented from adequately performing the rituals of Vaishnavism (the Hare Krishna movement) as a result of the confiscation of his incense sticks.¹⁰⁰ Taking into account the applicant's complaints to domestic authorities, the response given to the Prison Administration by the president of the Rīga Chapter of the International Society of Krishna Consciousness, and the information given by members of the Rīga Vaishnavist congregation, the Court accepted that burning incense sticks could be regarded as motivated or inspired by a religion.¹⁰¹ The third and most recent example is the well-known case of *Eweida and Others v. the United Kingdom*, decided at the beginning of 2013.¹⁰² The case concerned four Christian applicants wishing to manifest their religion at work, two of them by visibly wearing a cross around their necks. The Court accepted that these two applicants' insistence on wearing a cross visibly was motivated by their desire "to bear witness to [their] Christian faith."¹⁰³

99. *Jakóbski v. Poland*, App. No. 18429/06, Eur. Ct. H.R., at 9, 10 (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102121> (unpublished Court (Fourth Section) decision).

100. *Gatis Kovaļkovs v. Latvia*, App. No. 35021/05, Eur. Ct. H.R., at 4 (2012) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109099> (unpublished Court (Third Section) decision).

101. *Id.* at 13.

102. *Eweida and Others v. the United Kingdom*, App. No. 48420/10, 2013 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>.

103. *Id.* at 33, 36. In this Article, I limit my analysis of *Eweida* to the cases of two of the four applicants, that is to say, to the cases of Ms. Eweida and Ms. Chaplin. These two applicants—a check-in employee at British Airways and a nurse at a State hospital—complained that they were not allowed to wear a cross at work.

In one way or another, these recent judgments come to ease one of the hurdles standing on the way to the recognition of more lived forms of religion and intragroup diversity. This is because these judgments legally “count” a variety of practices without demanding that applicants show that such practices are required or mandated by their religions. The Court accepts the applicants’ practices as protected by Article 9 of the ECHR even when their religiously mandated or prescribed character is actually contested by the parties involved in the cases.

Indeed, one notable commonality is that these three applicants’ views were challenged in their cases at the Strasbourg level by the Respondent States (based either on the opinion gathered from religious associations or on other sources). In *Jakóbski*, for example, the Polish government argued that vegetarianism was not “an essential aspect” of the practice of the applicant’s religion, since “the strict Mahayana school to which the applicant claimed to adhere only encouraged vegetarianism but did not prescribe it.”¹⁰⁴ A similar argument was made by the United Kingdom in *Eweida*: “[The] applicants’ desire to wear a visible cross, while it may have been inspired or motivated by a sincere religious commitment, [is] not a recognized religious practice or requirement of Christianity.”¹⁰⁵ In *Gatis Kovaļkovs*, in turn, the Latvian government presented information provided by members of the RīgaVaishnavist congregation. These members had informed the domestic authorities that the obligation to observe the basic rituals of Vaishnavism, including the burning of incense sticks, was “conditional”: burning incense sticks is not mandatory if circumstances do not permit it.¹⁰⁶

In the three cases, the Court resolves the seeming tensions in favor of the applicants, deciding that their acts fall under Article 9 protection. Though the Court does place significant emphasis on the applicants’ subjective views,¹⁰⁷ it still relies on objective elements in its assessment in all cases, albeit to varying extents and at different stages. In *Gatis Kovaļkovs*, for example, the Court’s reasoning exhibits an intricate mix of approaches.

104. *Jakóbski*, App. No. 18429/06, Eur. Ct. H.R., at 9.

105. *Eweida*, App. No. 48420/10, 2013 Eur. Ct. H.R., at 21.

106. *Gatis Kovaļkovs*, App. No. 35021/05, Eur. Ct. H.R., at 4.

107. One indication of the Court’s attentiveness to the applicants’ views is that it often speaks of their “wish”, “decision” or “insistence” to avoid eating meat, worship by burning incense sticks or wear a cross visibly. *Jakóbski*, App. No. 18429/06, Eur. Ct. H.R., at 10 (“[T]he applicant’s decision to adhere to a vegetarian diet can be regarded as motivated or inspired by a religion.”) (emphasis added); *Gatis Kovaļkovs*, App. No. 35021/05, Eur. Ct. H.R., at 13 (“[T]he applicant’s wish to pray, to meditate, to read religious literature and to worship by burning incense sticks can be regarded as motivated or inspired by a religion.”) (emphasis added); *Eweida*, 2013 Eur. Ct. H.R., at 33 (“Ms Eweida’s insistence on wearing a cross visibly at work was motivated by her desire to bear witness to her Christian faith.”) (emphasis added).

In the first stage of the analysis, the Court looks at both subjective and objective elements to count the applicant's ritual of burning incense sticks as a "manifestation" of his religion. Indeed, relying on both the views of the applicant and of the leaders and members of his religious community, the Court first accepts that the applicant's ritual amounts to a manifestation of religion.¹⁰⁸ However, in the next stage—when establishing whether the restriction of the prison authorities on the applicant's religious freedom was justified—the Court relies exclusively on the information provided by the Rīga Vaishnavist congregation and concludes: "[E]xcluding items (such as incense sticks) which are *not essential for manifesting a prisoner's religion* is a proportionate response" of the prison authorities to the need to protect the rights of other prisoners.¹⁰⁹ The objective element—that is, the Rīga congregation's view that burning incense sticks is not mandatory if circumstances do not allow—thus serves to reduce the weight of the applicant's interests at this stage of the analysis.¹¹⁰ The applicant ultimately lost the case.

In *Jakóbski*, in turn, the Court first "counts" the applicant's vegetarian practice as falling within the scope of Article 9 based primarily on the applicant's views.¹¹¹ Then, however, the Court brings up the objective dimension to reinforce the weight of his interests when assessing whether the restriction on his religious freedom was justified: "[a]ccording to the applicant's religion, he was supposed to have a simple meat-free diet."¹¹² The Court makes this statement to indicate that the applicant's request did not place an undue burden on the prison administration, which simply had to leave out meat products from his meals. In this statement, the Court no longer speaks of "the applicant's decision" to adhere to a vegetarian diet

108. *Gatis Kovaļkovs*, App. No. 35021/05, Eur. Ct. H.R., at 13. The Court reached this conclusion after clarifying that it was not its task to determine "what principles and beliefs are to be considered central to the applicant's religion or to enter into any other sort of interpretation of religious questions." *Id.*

109. *Id.* at 16 (emphasis added). I agree however with Saïla Ouald Chaïb that the Court's remarks on the non-essential character of the applicant's practice could have been avoided altogether. As she argues "even if the Riga chapter would have stated that the burning of incense sticks is essential and always obliged for followers of Hare Krishna, . . . the Court would still have accepted that a limitation imposed on this manifestation of religion can be proportionate, namely in light of the rights of the co-detainees not to be disturbed." Saïla Ouald Chaïb, *Gatis Kovaļkovs v. Latvia: The Strasbourg Court Keeps the Door to Reasonable Accommodation Open*, STRASBOURG OBSERVERS (Mar. 15, 2012), <http://strasbourgobservers.com/2012/03/15/gatis-kovalkovs-v-latvia-the-strasbourg-court-keeps-the-door-to-reasonable-accommodation-open/>.

110. It appears that the Court ultimately relied on the opinion of the Rīga Vaishnavist congregation because the applicant did not dispute that information. *Gatis Kovaļkovs*, App. No. 35021/05, Eur. Ct. H.R., at 15. The Court might have not applied this objective element so decisively if the applicant had explicitly stated his disagreement with the views of his religious group in Rīga.

111. *Jakóbski*, App. No. 18429/06, Eur. Ct. H.R., at 9, 10.

112. *Id.* at 11.

but of a diet he was supposed to follow according to a religion.¹¹³ In fact, unlike in *Gatis Kovaļkova*, Mr. Jakóbski's religious community fully supported his claim. The Buddhist Mission in Poland had sent a letter to the prison authorities indicating that "[a]ccording to the rules, a Mahayana Buddhist should avoid eating meat to cultivate compassion for all living beings."¹¹⁴ The applicant won the case because the domestic authorities failed to strike a fair balance between the interests of the prison administration and those of the applicant, "namely the right to manifest his religion through observance of the rules of the Buddhist religion."¹¹⁵ In concluding this way, it becomes clear that the Court's analysis did not disregard objective elements: "the rules of the Buddhist religion."

Finally, in *Eweida*, the Court counts wearing a cross visibly as a manifestation of the applicant's religious belief not without drawing her subjectivity back to Christianity: "Ms Eweida's insistence on wearing a cross visibly at work was motivated by her desire to bear witness to her *Christian faith*."¹¹⁶ Notably, however, the Court speaks of "her" Christian faith—as opposed to "the" Christian faith—thereby putting yet more emphasis on the subjective dimension.¹¹⁷ In fact, *Eweida* is arguably one of the cases in which the Court comes closest to a purely subjective approach. In other words, objective elements are hardly discernible in the Court's reasoning. Ms. Eweida wins the case but the other *Eweida* applicant seeking to wear a cross visibly at work – Ms. Chaplin – loses. For the Strasbourg Court, the domestic courts failed to strike a fair balance of the interests at stake in the case of Ms. Eweida but not in the case of Ms. Chaplin.¹¹⁸

What is particularly relevant about *Eweida* for present purposes is that the Court explicitly states that "there is no requirement on the applicant to establish that he or she acted in fulfillment of a duty mandated by the religion in question."¹¹⁹ As various legal commentators have noted, this statement allows for a broader protection of "more individualistic

113. Moreover, the Court notes that the Buddhist Mission was not consulted on the issue of the appropriate diet, implying that such a consultation would have been desirable. *Id.*

114. *Id.* at 2. The Buddhist Mission in Poland sent another letter to the Prison Director asking him to provide the applicant with a meat-free diet. *Id.* at 3.

115. *Id.* at 12.

116. *Eweida*, App. No. 48420/10, 2013 Eur. Ct. H.R., at 33. The Court follows a similar line of reasoning in the case of the other *Eweida* applicant wishing to wear a cross at work – Ms. Chaplin, a nurse working at a public hospital. However, the Court does not phrase the applicant's wearing of her cross visibly as a manifestation of her "Christian faith" but of "her religious belief." *Id.* at 36.

117. I am thankful to Saila Ouald Chaib for this point.

118. *Eweida*, App. No. 48420/10, 2013 Eur. Ct. H.R., at 35.

119. *Id.* at 30.

manifestations of religion.”¹²⁰ The Court, however, does not mean that all religiously motivated or inspired acts will be protected. It makes clear that they will be so only if they are “intimately linked to the religion or belief.”¹²¹ So, acts that are “only remotely connected to a precept of faith [will] fall outside the protection of Article 9 § 1.”¹²² In short, while the Court might no longer look at whether a particular act is required by an applicant’s religion, it will still look at whether there is a “sufficiently close and direct nexus between the act and the underlying belief.”¹²³

To conclude, the three cases discussed above suggest that there is usually an intricate mix of objective and subjective factors at work in the Court’s overall legal reasoning to the point that at times it is hard to determine the extent to which it is the applicants’ or their religious groups’ views or religious precepts that matter. What is notable, though, is that the Court does not make adherence to a set of prescribed precepts *a requirement* for a religious claim to fall within the scope of protection of Article 9 ECHR. The Court “counts” these applicants’ acts as “manifestations” of their religion, even though it sometimes uses objective elements to diminish the weight of the applicants’ interests in later stages of the analysis. Of equal significance is that the Court eschews essentialist assumptions of orthodoxy. Indeed, the Court does not portray wearing a crucifix visibly as being at the heart of Christianity or vegetarianism at the core of Buddhist religious practice. This is perhaps because the mandatory or central character of these practices was, in one way or another, challenged in all cases by the Respondent States. Either way, the fact is that, as a result, the filters employed by the Court in these cases are porous enough to allow for protection of religious individuals who may dissent from the mainstream views of their religious community and who may engage in more lived forms of religion.

CONCLUSION

This Article has critically assessed the European Court of Human Rights’ attentiveness to intragroup diversity by focusing on the ways in

120. Veit Bader, Katayoun Alidadi & Floris Vermeulen, *Religious Diversity and Reasonable Accommodation in the Workplace in Six European Countries: An Introduction*, 13 INT’L J. OF DISCRIMINATION & L. 54, 71 (2013); see also Tracey Reeves, *Eweida v United Kingdom: Employment–Discrimination–Religion*, 18 COV. L.J. 136, 140 (2013) (arguing that “this potentially allows for a much wider and individualised recognition of what practices are protected as a manifestation of belief under article 9.”).

121. *Eweida*, App. No. 48420/10, 2013 Eur. Ct. H.R., at 30.

122. *Id.*

123. *Id.*

which the Court employs objective lenses to determine whether a certain practice legally “counts” for protection under Article 9 of the ECHR. The objective filters, for the most part inevitable in religious freedom claims given the collective dimension involved, do not have to be exclusionary as such. The Court should try, however, to keep these objective filters *relatively porous* if it is to do fuller justice to applicants’ lived religious experiences and diversity within their groups.

Moving towards relatively porous objective filters requires becoming more critically aware of the implicit assumptions commonly underlying some of the filters employed in the Strasbourg freedom of religion case law. These background assumptions concern “religion” more generally and religious traditions and groups more specifically.

Thus, in the first place, the process of adopting more relatively porous objective filters may require revising implicit understandings of religion as *solely* or *primarily* “a set of theological propositions”¹²⁴ to which religious practitioners adhere. Carolyn Evans insightfully notes that “[s]ome religions . . . give great emphasis to the beliefs or orthodoxy as the constituting factor of the religion. Others do not do so or place equal emphasis on acting and belief.”¹²⁵ As Lori Beaman argues, day-to-day religion “looks quite different from religious teachings on paper.”¹²⁶ Adopting more relatively porous filters does not mean that the Court should de-emphasize institutional, textual and theological elements in its analysis and emphasize individuals, rituals, practice and things instead.¹²⁷ What this might mean is that the Court should try to embrace the terms of these “dichotomies” more interactively and complexly.

In the second place, the process of adopting more relatively porous objective filters may involve incorporating the premise that interpretations of religious doctrine or dogma are always internally diverse and contested.¹²⁸ In other words, the Strasbourg Court (and courts) should avoid reducing its objective inquiry to “the most official dogma of the religious group in question” and remain aware instead “of the possible range of interpretations.”¹²⁹

124. Evans, *supra* note 12, at 395.

125. *Id.* at 396.

126. Beaman, *supra* note 24, at 212.

127. Here, I echo Robert Orsi’s framing of different forms of religiosity. Orsi, *supra* note 52, at 172.

128. Beaman, *supra* note 24, at 212.

129. Lefebvre, *supra* note 16, at 47 (making this point in the Canadian legal context).