Questions of Indirect Discrimination on the Basis of Religion

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Introduction

The pursuit of equality in international human rights law includes both prohibitions of intentional discrimination and prohibitions of practices with discriminatory impact on groups of persons. The latter category, often designated as "indirect discrimination," raises numerous questions that have not been fully explored.[1] As part of a broader research project on indirect discrimination norms, the present Article and its companions in this Issue address an important subset of questions relating to indirect discrimination on the basis of one's religion. The Essays and Commentaries that follow continue the dialogue of a workshop held in April 2020.[2]

Indirect discrimination norms generally require sufficient justification for actions with differential impact on the specified grounds. Some of the questions that arise concern the purpose served by the indirect discrimination norm, the scope of the actions that the norm regulates, the kind of showing of differential impact that must be made before justification is required, and the type or strength of the justification that must be provided. In the context of international human rights norms, other questions relate to the nature of the international oversight of the application of nondiscrimination rules by national authorities.

Take, for example, the old practice of Sunday closing laws in countries where the majority of the population is Christian. These laws facilitated a day of worship or leisure for many shopkeepers and their employees, and did not prohibit anyone from closing a shop for another day as well, but they imposed an incidental economic disadvantage on those who observed

1. As other articles in this Issue explain, there is disagreement about exactly where the line between direct and indirect discrimination falls, and about whether the two concepts overlap. Still, it is generally understood that intentional discrimination corresponds roughly to direct discrimination, and that practices that are discriminatory only in their effect correspond roughly to indirect discrimination. At the risk of oversimplification, I will use the terms accordingly.

2. The workshop was organized by the Human Rights Program of Harvard Law School, and cosponsored by the *Harvard Human Rights Journal*, the Columbia Law School Human Rights Institute, and the Harvard Program on Disability.

Saturday as a day of rest.[3] Assuming that they serve a valid secular purpose, how should their indirect impact be evaluated?

Or take the newer laws in some European states that regulate appearance in public with the face fully covered, which became controversial within and among human rights tribunals in the decade before COVID-19 mask mandates.[4] For some Muslim women, such laws expose them to criminal or civil sanctions as a result of their religious practice. If they are viewed as government action with discriminatory impact, how should these laws be analyzed? One could ask whether it matters if only a small minority of Muslim women in the particular country believe in fully covering the face, or if other religions in the country also believe in fully covering the face, or how many people have secular reasons for fully covering the face. The analysis could be directed toward the impact on members of a particular religion, or toward the impact on holders of a specific religious belief; in either case, one could ask what empirical evidence should be submitted to support the claim of indirect discrimination. Assuming differential impact has been shown, one can ask what kind of justification the state can offer that would outweigh it.

Moreover, the law against face covering could be analyzed instead as an interference with the right to religious freedom rather than as a denial of equality. Various human rights treaties guarantee the right to manifest religion or belief in practice.[5] Not all claims of differential impact on the members of a particular religious group can be traced to the effect of a specific religious practice,[6] but prominent examples can. Where both claims are made, should the analysis be the same, or is the impact of the prohibition on other believers and nonbelievers irrelevant to the religious freedom claim, and is the level of justification required to outweigh the religious freedom claim the same or different? Similar questions can be posed not only in relation to discrimination based on religion, but when-

3. *See* Braunfeld v. Brown, 366 U.S. 599, 609 (1961) (finding no violation of the Equal Protection, Free Exercise, or Establishment Clauses).

4. A majority of the European Court of Human Rights upheld the well-known French law in *S.A.S. v. France* [GC], 2014-III Eur. Ct. H.R. 341., over a dissent echoed more recently in the concurring opinion in *Dakir v. Belgium*, App. No. 4619/12, Eur. Ct. H.R. (Dec. 11, 2017), http://hudoc.echr.coe.int/eng?i=001-175660 (Spano, J., concurring) (noting weaknesses in the reasoning of *S.A.S.* and doubting the proportionality of stronger sanctions under Belgian law). The Human Rights Committee, in contrast, found that the same French law violated both freedom of religion and the prohibition of discrimination in *Yaker v. France*, although the committee left ambiguous whether the law involved direct or indirect discrimination. *See* 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).

5. *See, e.g.*, International Covenant on Civil and Political Rights art.18, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights art. 9, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights art. 12, Nov. 22, 1969, 1144 U.N.T.S.123; African Charter on Human and Peoples' Rights art. 8, June 27, 1981, 1520 U.N.T.S. 217.

6. For example, a religious minority might consist disproportionately of recent immigrants, and differential outcomes might result from language or educational differences rather than religious belief or practice.

ever discrimination norms address attributes that are closely linked to the exercise of a substantive right.

Such questions can be framed in purely normative terms or in relation to particular legal systems of domestic or transnational law. As background, Part I of this Essay will briefly identify some of the range of normative positions that theorists have taken regarding the prohibition of indirect discrimination. Part II will then sketch the status of indirect discrimination in the U.S. domestic legal system: Under the U.S. Constitution, the Equal Protection Clause does not include a prohibition of actions with discriminatory impact based on religion, but some statutory provisions applying to certain fields of activity, such as employment and housing, do. Part III will show how international human rights systems address such discrimination, either expressly or as a matter of interpretation. Part IV considers at length a specific example derived from an international case and its implications for different accounts of indirect discrimination on the basis of religion. Part V then examines how international institutions should review states' particular efforts to implement the nondiscrimination norm in this context and argues for some acceptance of variations from state to state.

I. Normative Premises

Is the law regarding indirect discrimination explained by the fact that indirect discrimination is morally wrong? some theorists contend that indirect discrimination is morally wrong for the same reasons why purposeful discrimination on particular grounds is morally wrong—such as denial of respect, disregard of merit, or irrationality.[7] Others maintain instead that acts of indirect discrimination, in contrast with direct discrimination, are not in themselves morally wrong.[8] Overt discrimination treats like persons differently, conflicting with a vision of formal equality, whereas indirect discrimination rests on a conception of substantive equality that insists on unlike persons being treated in an appropriately different manner.[9] Some arguments for the moral wrongfulness of indirect discrimination depend on the relationship between the indirect discrimination and prior occurrences or existing patterns of direct discrimination.[10] Some arguments distinguish between each individual's moral duty not to engage in indirect discrimination and the obligation of society as a whole to avoid and prevent indirect discrimination. The latter may require transformative measures to recon-

7. For a survey of positions, see Andrew Altmann, *Discrimination*, *in* The Stanford Encyclopedia of Philosophy (Apr. 20, 2020), https://plato.stanfbrd.edu/entries/discrimmation.

8. *See, e.g.*, Benjamin Eidelson, Discrimination and Disrespect 67—68 (2015).

9. *See* Sandra Fredman, *Substantive Equality Revisited*, 14 INT'L J. Const. L. 712, 712 (2016).

10. *See, e.g.*, Michael Selmi, *Indirect Discrimination, and the Anti-discrimination Mandate*, *in* Philosophical Foundations of Discrimination Law 250, 266 (Deborah Hellman & Sophia Moreau eds., 2013).

figure the structures that cause indirect discrimination.[11] Other theorists assert an individual moral duty not to compound existing societal injustice.[12]

From a purely normative perspective, different accounts of *why* indirect discrimination is wrongful may lead to different conclusions about *when* it is wrongful—for what categories of persons as victims, for what categories of actors, and what features of an action determine its wrongfulness. Whether a group must be socially disadvantaged to count as a subject of indirect discrimination may depend on which explanation applies. Disagreements of this kind may lie behind differing interpretations of indirect discrimination favored by different judges or different legal systems.

Even if indirect discrimination is not considered morally wrong, there may be other reasons to adopt legal rules prohibiting indirect discrimination. Preventing a particular kind of indirect discrimination may be useful as a matter of social policy in a particular time or place. Laws against indirect discrimination have also been defended instrumentally as a supplement to laws prohibiting intentional discrimination, to prevent their circumvention and surmount difficulties of proving hidden motives.[13]

These philosophical debates illuminate, but do not fully guide, the proper interpretation of human rights treaties. I have argued that it is useful to consider international human rights treaty norms—and constitutional norms as well—from three different perspectives, focusing on their consensual and institutional aspects as well as their suprapositive aspects.[14] Human rights treaty provisions may rest on a suprapositive, moral authority that exists independent of or before their embodiment in positive law. But the positive legal force of treaty norms arises from the consensual acts of states, including the initial drafting and ratification of the treaty, and sometimes later forms of consensual revision. Moreover, treaty provisions amount to positive legal rules, to be given effect in an institutional context. The drafting and interpretation of such legal rules may take into account the realities of that institutional context, facilitating compliance by the duty holders and oversight by adjudicatory and monitoring bodies. These three aspects all play a legitimate role in the interpretation of the positive human rights treaty provisions.

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11. Fredman, *supra* note 9, at 733.

12. *See* Deborah Hellman, *Indirect Discrimination and the Duty to Avoid Compounding Injustice*, *in* Foundations of Indirect Discrimination Law 105, 120 (Hugh Collins & Tarunabh Khaitan eds., 2018) (concluding that this duty supports some, but not all, applications of the norm against indirect discrimination).

13. *See, e.g.*, Eidelson, *supra* note 8, at 46—48.

14. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance.*, 55 Stan. L. Rev. 1863 (2003).

II. U.S. Legal Framings

A brief indication of the plurality of U.S. antidiscrimination norms, in general and in relation to religious discrimination, may be useful to illustrate the existing legal variety in the domestic system that most readers of this Article will know best. I will describe them as positive legal norms and do not put them forward as models to be emulated.

Prohibitions of action with discriminatory impact based on religion form part of statutory antidiscrimination law at both the federal and state level. The U.S. Supreme Court first articulated its "disparate impact" approach to racial discrimination in the field of employment in the famous decision *Griggs v. Duke Power Co*., which has had global influence on the recognition of indirect discrimination as a legal wrong. Interpreting Title VII of the Civil Rights Act of 1964, the Court held that the Act also proscribed "practices that are fair in form, but discriminatory in operation. The touchstone is business necessity."[15] A practice that has racially exclusionary effect must "be shown to be related to job performance."[16] In contrast, the Supreme Court held in *Washington v. Davis* that the constitutional doctrine of equal protection did not support heightened scrutiny of facially neutral practices with racially disparate impact but no showing of discriminatory purpose.[17]

The development of disparate impact standards in U.S. statutory law over the following half-century has been complex and troubled. As has often been observed, the paradigm of racial discrimination has been formative for U.S. antidiscrimination law, whereas the paradigm of sex discrimination has been formative for European antidiscrimination law.[18] Initially, the focus on race produced strict standards for the protection of racial minorities, but over time a conservative reaction in politics and in the judiciary erected barriers to reform.[19] [20] The rejection of race as a basis for subordination was overtaken by an insistence on formal equality (or "color-blindness") that opposed race-conscious measures to overcome disadvantages.[20] The Supreme Court diluted the content of the disparate impact doctrine under Title VII in 1989, requiring plaintiffs to isolate the statistical effect of specific challenged practices, decreasing the justification required for business necessity, and putting the burden on plaintiffs to prove that alternative measures would be equally effective and not more costly.[21]

15. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

16. *Id.*

17. Washington v. Davis, 426 U.S. 229, 247—48 (1976). Measures that have disparate impact by race or religion remain subject to minimal rational basis scrutiny, but this standard is easily satisfied.

18. *See, e.g.*, Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 Yale J. INT'L L. 115, 116—17 (2010).

19. *See, e.g.*, Reva B. Siegel, *The Constitutionalization of Disparate Impact — Court-Centered and Popular Pathways: A Comment on Owen Piss's Brennan Lecture*, 106 Cal. L. Rev. 2001, 2007—10 (2018).

20. Linos, *supra* note 18, at *139—40.*

21. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656, 659-60 (1990).

The majority repeatedly emphasized that such protections for employers were necessary to avoid giving them the incentive to adopt racial quotas for their workforce.[22] Congress pushed back against this dilution in 1991, expressly codifying the disparate impact doctrine and shifting the burden of proof for business necessity back to the employer, but it did so without successfully clarifying a higher standard of justification.[23] More recently, some justices have been attracted to the notion that a disparate impact norm for race is itself unconstitutional because it violates formal equality.[24]

The Supreme Court has interpreted some other federal antidiscrimination statutes that textually resemble Title VII or have language about effects, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Fair Housing Act, as also regulating disparate impact.[25] But statutory language that merely prohibits "discrimination" does not suffice for the Supreme Court to construe it as including a disparate impact norm.[26]

Turning to religious discrimination, Title VII prohibits employment discrimination on the basis of "race, color, *religion*, sex, or national origin," and both the "disparate treatment" concept of intentional discrimination and the "disparate impact" concept of discriminatory effects apply to all of these prohibited grounds.[27] In addition, Congress amended Title VII in 1972 to define "religion" for this purpose as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[28] This explicit requirement of reasonable accommodation was later described by the Supreme Court as an additional form of "disparate treatment" (not disparate *impact*) rule within the Title VII statutory framework.[29] The employer need only afford an accommodation of its choice that is reasonable, not necessarily

22. *Id.* at 652-53.

23. *See* 42 U.S.C. § 2000e-2(k); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 769 (2006) (describing how the vague business necessity standard produces deference to employers).

24. Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring); Texas Dep't of Hous. & Cmtys. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 589-90 (2015) (Alito, J., dissenting); *see also Texas Dep't of Hous.*, 576 U.S. at 557 (Thomas, J., dissenting) (arguing that "disparate-impact jurisprudence was erroneous from its inception," and should not be extended beyond Title VII).

25. *See* Smith v. City of Jackson, Miss., 544 U.S. 228 (2005) (ADEA); Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (ADA); *Texas Dep't of Hous.*, 576 U.S. (FHA).

26. *See* Alexander v. Sandoval, 532 U.S. 275, 285 (2001); *Texas Dep't of Hous.*, 576 U.S. at 534-35. It is unsettled whether Title II of the 1964 Civil Rights Act, which prohibits discrimination on grounds of religion as well as race in public accommodations, covers disparate impact. *See* Hardie v. Nat'l Collegiate Athletic Ass'n, 876 F.3d 312, 324 (9th Cir. 2017).

27. 42 U.S.C. § 2000e-2(a).

28. 42 U.S.C. § 2000e(j).

29. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 135 S. Ct. 2028, 2033-34 (2015). *But see id.* at 2038 (Thomas, J., concurring in part and dissenting in part) (arguing that failure to accommodate should be understood as disparate impact discrimination).

grant the one requested by the employee, and the standard for "undue hardship" does not require substantial expenditure.[30]

Nearly all of the states also have statutes prohibiting discrimination in private employment, and nearly all of those include religion (or "creed") among the regulated grounds.[31] Some of these statutes derive from fair employment laws that predate the federal civil rights laws of the 1960s and that protected racial, ethnic, and religious minorities.[32] Today these statutes frequently apply a disparate impact concept as well as a disparate treatment concept; in some states accommodation of religion is expressly required as in Title VII, while in others an accommodation requirement is inferred from the disparate impact norm.[33]

Where public employment is concerned, and for other public policies more generally, constitutional limitations on religious discrimination also become relevant, most centrally the Free Exercise Clause of the First Amendment. Facially unequal treatment of different religions implicates free exercise rights, and for a period of roughly thirty years the Supreme Court additionally interpreted free exercise as prohibiting unjustified denial of religious exemptions from neutral government regulations.[34] That interpretation was overruled in 1990, although the current Supreme Court majority might revive it another thirty years later.[35] Congress enacted a statutory substitute known as the Religious Freedom Restoration Act ("RFRA") in 1993, which provides for religious exemptions from *federal* regulations that substantially burden religious exercise unless they are the least restrictive means of achieving a compelling government interest.[36]

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30. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986); Tabura v. Kellogg USA, 880 F.3d 544, 551, 557 (10th Cir. 2018). *Cf.* Trans World Airlines v. Hardison, 432 U.S. 63, 84—85 (1977) (finding that to require an employer to bear more than *de minimis* costs would be an undue hardship).

31. Sandra F. Sperino, *Revitalizing State Employment Law,* 20 Geo. Mason L. Rev. 545, 557—61, 560 n.114 (2013).

32. *See* olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 89 L. & CONTEMP. Probs. 115, 115 (2016) (noting also New York precursor of the federal disparate impact standard); Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 Harv. L. Rev. 526 (1961) (describing state laws against discrimination in employment, housing, and public accommodations).

33. *E.g.*, Kumar v. Gate Gourmet, 180 Wash. 2d 481, 500—01 (2014) (inferring the accommodation requirement from the disparate impact norm); N.J. Stat. Ann. § 10:5—12(q) (requiring expressly the accommodation of religion).

34. Christopher Lund, *Religious Liberty after Gonzales: A Look at State RFRAs*, 55 South Dakota L. Rev. 466, 470—71 (2010); *see, e.g.*, Sherbert v. Verner, 374 U.S. 398, 408—09 (1963).

35. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 878—79 (1990) (Scalia, J., majority). The currently pending case *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (U.S. Feb. 4, 2020) (No. 19-123), explicitly describes as one of the questions presented "Whether Employment Division v. Smith should be revisited?". Another certiorari petition pending before the Supreme Court presents the same question with regard to the identification number issue discussed in Part IV, *infra*. *See* Ricks v. Idaho Contractors Bd., 435 P.3d 1 (Idaho Ct. App. 2018), *petition for cert. filed* (U.S. July 10, 2019) (No. 19-66).

36. *See, e.g.*, Burwell v. Hobby Lobby Stores, 573 U.S. 682, 690—91 (2014). As originally enacted, RFRA also guaranteed religious exemptions from *state* regulations, but the Supreme Court held that aspect unconstitutional as beyond federal power in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), in part because of the breadth of the statute and the rigidity of the strict scrutiny standard as a limitation

More than twenty states have also enacted their own "state RFRAs" to provide religious exemptions from *state* regulations.[37]

Thus, where federal or state RFRAs apply, the level of justification required for denying a religious *exemption* is much more rigorous than the level required for denying a religious *accommodation* under employment discrimination law. The international human rights standard of proportionality would lie in between these two levels.[38] [39] This contrast of standards arose from the sequence of enactments: RFRAs arose to replace a constitutional law doctrine that had imposed limits on governmental action, whereas Title VII originally regulated private employment before being extended to public employment in 1972.[39] In short, U.S. regulation of discriminatory effects based on religion both varies internally and differs from the treatment of these issues in international law.

III. International Legal Framings

Further variety exists in global and regional human rights systems. European human rights law includes prohibitions of both direct and indirect governmental discrimination on the basis of religion or belief, within the scope of European Union law and Article 14 of the European Convention on Human Rights.[40] An EU directive regulates direct and indirect private discrimination on grounds of religion or belief in employment, but so far the EU has resisted efforts to enact a broadly phrased directive that would regulate, *inter alia*, private discrimination on several grounds, including religion

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on state power. Congress later enacted a narrower guarantee of religious exemptions from *state* practices applying only to land use regulations and the rights of prisoners. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc.

37. *See* Lucien J. Dhooge, *The Impact of State Religious Freedom Restorations Acts: An Analysis of the Interpretive Case Law*, 52 Wake Forest L. Rev. 585, 588 n.15 (2017); Lund, *supra* note 34, at 475—79 (2010) (discussing varying content and coverage exclusions in state RFRAs).

38. My own view, expressed at the time when the constitutionality of RFRA was being challenged, was that proportionality would have provided a better choice than the compelling interest test for RFRA. Gerald L. Neuman, *The Global Dimension of RFRA*, 14 Const. Comment. 33, 53 (1997). As mentioned in note 36, *supra*, the strictness of the standard under RFRA became one of the reasons why the supreme Court held it unconstitutional as applied to the full range of state government actions in *City of Boerne*, 521 U.s. (1997).

39. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, secs. 2(2), 10, §§ 701(b), 715, 86 Stat. 103, 103, 111 (1972) (adding state and local governments to definition of covered employer, and regulating employment discrimination by the federal government).

40. *See* European Convention on Human Rights, *supra* note 5, at art. 14; Charter of Fundamental Rights of the European Union art. 21(1), Oct. 26, 2012, O.J. C. 326; *see, e.g.*, Biao v. Denmark, App. No. 38590/10, Eur. Ct. H.R., ψ 114 (May 24, 2016), http://hudoc.echr.coe.int/eng7i = 001-163115; Case C-414/16, Egenburger v. Evangelisches Werk für Diakonie und Entwicklung, ECLI:EU:C:2018:257, ψψ 47—48 (Apr. 17, 2018). There is also a broader prohibition of discrimination under Protocol No. 12 to the European Convention, but fewer than half of the states in the Council of Europe have ratified that Protocol.

or belief, in education, housing, and access to other goods and services.[41] Directives can be more detailed than generally worded treaty norms tend to be, and can list exceptions to an antidiscrimination rule rather than leave the situations they cover to case-by-case adjudication.

At the global level, Article 26 of the International Covenant on Civil and Political Rights ("ICCPR") guarantees equal protection of the law and requires states to protect everyone against discrimination "on any ground such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status."[42] The Human Rights Committee, the treaty body created to monitor compliance with the ICCPR, interprets this obligation as applying to both direct and indirect discrimination by both public and private actors.[43] The Human Rights Committee is in the habit, when it reviews states' reports on their compliance, of recommending the enactment of comprehensive antidiscrimination legislation that covers all the types of discrimination addressed by Article 26.[44] The Committee recognizes that practices with differential effect based on a covered ground are not absolutely prohibited, but rather they must be reasonable and objective and serve a legitimate purpose;[45] in this regard, reasonableness includes an inquiry into proportionality.[46]

Proportionality plays a similar role in the regional human rights systems. The European Court of Human Rights ("ECtHR") understands the concept of indirect discrimination as involving the absence of "a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realized."[47] The African Court of Human and Peoples' Rights has interpreted equality under the African Charter as prohibiting indirect discrimination, subject to a requirement of proportionate justification.[48]

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41. Council Directive 2000/78/EC, 2000 O.J. (L 303) (EU); *see* Marie-Claire Foblets, *Freedom of Religion and Belief in the European Workplace: Which Way Forward and What Role for the European Union?*, 13 INT'L J. DISCRIMINATION & L. 240, 248 (2013) (discussing delays in adopting the broader directive).

42. International Covenant on Civil and Political Rights, *supra* note 5, at art. 26 (emphasis added).

43. *See* F.A. v. France, CCPR/C/123/D/2662/2015, No. 2662/2015, U.N. Hum. Rts. Comm., Views adopted by the Committee at its 123rd session, ψ 8.11 (July 16, 2018).

44. *See, e.g.*, Human Rights Committee, Concluding Observations on the Fifth Periodic Report of the Netherlands, ψ 14, U.N. Doc. CCPR/C/NLD/CO/5 (July 18, 2019) (recommending that the state's legislation "[p]rovides full and effective protection against discrimination on all the prohibited grounds under the Covenant in all spheres, including the private sphere, and prohibits direct, indirect and multiple discrimination"); Human Rights Committee, Concluding Observations on the First Periodic Report ofPakistan, ψ 12, U.N. Doc. CCPR/C/PAK/CO/1 (July 25—26, 2017).

45. Human Rights Committee, General Comment No. 18: Non-discrimination, ψ 13 (Nov. 10, 1989).

46. *See* Human Rights Committee, Views, Communication No. 2979/2017, ψψ 7.3—7.6, U.N. Doc. CCPR/C/128/D/2979/2017 (Mar. 13, 2020).

47. *See, e.g.*, D.H. v. The Czech Republic, 2007-iV Eur. Ct. H.R. ψ 196; Di Trizio v. Switzerland, App. No. 7186/09, ψ 91 (Feb. 2, 2016), http://hudoc.echr.coe.int/eng7i = 001-160692.

48. Kambole v. United Republic of Tanzania, App. No. 018/2018, Judgment, Afr. Ct. H.P.R., ψψ 69—72 (July 15, 2020), https://www.african-court.org/en/images/Cases/Judgment/Appl.%20018%20-%202018%20-%20Jebra%20Kambole%20-%20Judgment.pdf. So has the African Commission on Human and Peoples' Rights. *See* Open Soc'y Just. Initiative v. Cote d'Ivoire, Communication 318/06, Afr. Comm'n H.P.R., ψψ 144—145 (2016), https://www.achpr.org/sessions/descions7id = 228.

The Inter-American Court of Human Rights ("IACtHR") has asserted that there is a *jus cogens* rule of international law that prohibits all forms of discrimination, both direct and indirect, by all actors, public and private, entailing a requirement of proportionality, and requiring positive action to redress discriminatory situations.[49]

The common invocation of proportionality in the context of the human right to equality, however, does not preclude a variation in the intensity of the justification required when differential treatment is based on different grounds.[50] Even for those grounds specifically listed in the relevant treaty provisions, the ECtHR has made clear that some criteria of differentiation (such as race or gender, but not property) require more "weighty" reasons than others, and at times it has referred to vulnerability as one of the factors increasing the needed weight.[51] This practice has some kinship with U.S. constitutional doctrines of suspect classification and tiers of scrutiny.[52] The IACtHR has also emphasized a group's being "traditionally marginalized, excluded or subordinated" as a factor calling for more rigorous examination of the justification.[53] The ECtHR's tendency to afford deference (a wider margin of appreciation) with regard to discrimination on grounds of religion, for reasons that it has not sufficiently explained, is discussed by Professor Christopher McCrudden in his contribution to this Symposium.[54]

IV. A Concrete Illustration

As a specific concrete hypothetical addressed in the workshop, consider religious objection to government identity documents that include a personal identification number. The Human Rights Committee dealt with such a situation in a communication against Belarus, although the majority found the allegations insufficiently substantiated.[55] To stylize the example, in the 1990s a country in Eastern Europe issued new identity documents (passports) that required such numbers for the first time. A Russian ortho-

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49. *See, e.g.*, Case of the Mapiripán Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ψ 178 (Sept. 15, 2005); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ψψ 101-05 (Sept. 17, 2003).

50. *See* Yutaka Arai-Takahashi, *Proportionality*, *in* The Oxford Handbook of International Human Rights Law, 446, 457 (Dinah Shelton ed., 2013).

51. *See* Biao v. Denmark, App. No. 38590/10, Eur. Ct. H.R., ψψ 92—93 (May 24, 2016), http://hudoc.echr.coe.int/eng?i = 001-163115; Chabauty v. France, App. No. 57412/08, Eur. Ct. H.R., ψ 50 (Oct. 4, 2012), http://hudoc.echr.coe.int/eng?i = 001-113715; Horvath and Kiss v. Hungary, App. No. 11146/11, Eur. Ct. H.R., ψ 128, (Jan. 29, 2013), http://hudoc..echr.coe.mt/eng?i = 001-116124.

52. *See, e.g.*, Samantha Besson, *Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?*, 8 Hum. Rts. L. Rev. 647, 665 (2008).

53. Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion oC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ψψ 66, 81 (Nov. 24, 2017).

54. *See* Christopher McCrudden, *infra* 34 Harv. Hum. Rts. J. 249, 276 (2021).

55. 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).

dox believer refused to accept the new document on the ground that reliance on the number rather than a name treated humans created by God as soulless objects. She was later denied her pension pursuant to a rule that requires applicants to present that form of identification. The synod of her Church, which is the majority religion in her country, officially denied that these numbers had any religious significance, but her sincere individual belief was different. She claimed an infringement of her right to manifest her religious belief in practice, and discrimination on grounds of her religious belief.

This example is far from unique; religious objections to identification numbers have been raised within a variety of religions. There is a substantial volume of litigation on this subject in the United States, often taking the form that the Social Security number is the "mark of the Beast" described in the Book of Apocalypse.[56] The apocalyptic objection has also been made to other identification technologies, including biometric scanning[57] and radio-emitting chips.[58] [59] The U.S. Supreme Court considered, but evaded, an objection to the use of Social Security numbers on the basis of Native American religious belief back in 1986.[59] Of course, secular objections to excessive reliance on an identification number can also be made on grounds such as personal privacy.[60]

To examine the indirect discrimination claim in this particular example, one might note first that the discrimination relates to a particular belief held by a Russian Orthodox member, but not widely shared among the Russian Orthodox. Indeed, given the synod's rejection of the validity of her belief, it might be that the Russian Orthodox are less likely to hold the belief than other denominations, and less likely than others are to have strongly held secular objections. One could also wonder how the belief should be described. It might be specified as an objection to a particular category of multi-use documents with an identifying number, or to *any* document with an identifying number. It might also be specified as an objection to the relevant kind of document *because* numerical interaction is soulless, or as an objection to the relevant documents for any reason based in any religion. These distinctions potentially affect the appropriate description of the class of persons subject to the alleged discrimination, and

56. *See* Leahy v. District of Columbia, 833 F.2d 1046, 1048 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.); *see also Ricks*, 435 P.3d (2018) (involving a free exercise challenge to the State's requirement that a contractor provide his Social Security number to register as a contractor).

57. *See* Beach v. Oklahoma Dep't. of Pub. Safety, 398 P.3d 1 (Okla. 2017).

58. *See* A.H. ex rel. Hernandez v. Northside Indep. Sch. Dist., 916 F. Supp.2d 757 (W.D. Tex. 2013).

59. Bowen v. Roy, 476 U.S. 693 (1986).

60. *See, e.g.*, Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability,* 54 HASTINGS L.J. 1227, 1252 (2003) ("SSNs are a key piece of information for identity theft."); Maracich v. Spears, 570 U.S. 48, 64 (2013) (Kennedy, J.) (describing Social Security numbers as among "the most sensitive kind of information").

would influence any attempt to demonstrate empirically that the rule has negative differential impact on a relevant class.

What kind of empirical demonstration of disproportionate impact would she need to make? The U.S. emphasis on statistical proof contrasts with less technical methods accepted in Europe.[61] Pertinent statistics may be unavailable in Europe, and there may be legal prohibitions on compiling them.[62] Statistical gaps may be even greater in other parts of the world. Nonetheless, some empirical basis for believing that a practice does have differential effect is surely integral to a finding of indirect discrimination.

The synod's contrary view should not in itself invalidate an indirect discrimination claim. In the related context of freedom to manifest religious belief in practice, protection is afforded to an individual's own belief, and not solely the official beliefs of a religion that the individual adheres to. Protection also extends to optional activities that amount to religious practice, and not solely to actions or inactions that the believer considers obligatory.

What purpose of indirect discrimination norms would be served by vindicating the claim based on this particular belief? The uniform requirement of numerical identity documents is not irrational, and does not deny formal equality. One might say that it shows lack of respect for holders of dissenting religious beliefs, or that it denies substantive equality, if those criteria are understood as fully incorporating the content of the right to manifest a religious belief in practice. The example as described gives no basis for assuming that believers who object to a numerical identity document constitute a socially salient group in the country, or a persecuted subset of the religious majority, or that they have been socially disadvantaged in the past. The only disadvantage mentioned here concerns the practical consequences that will follow from the refusal to present a required document—which in the case of a pension is potentially severe.[63] No basis is provided for concluding that the rule operates as a subterfuge for intentionally discriminating against the Russian Orthodox, or against a Russian Orthodox with particular beliefs.

Now the fact that vindicating the claim in this case may not serve the underlying normative purposes of a prohibition of indirect discrimination does not necessarily mean that no violation should be found. Legal norms,

61. *See* Christopher McCrudden, *infra* 34 HARV HUM. RTS. J. 249, 262 (2021).

62. *Id.*

63. In the actual case on which the present hypothetical is based, my own conclusion was that requiring a number on a passport for travel to other countries was a proportionate limitation on the individual's right under Article 18 of the ICCPR to manifest her religion in practice, but that denying her pension as a public employee was a disproportionate limitation on that right, given the extent of the harm and the likely availability of other means of identifying her for that purpose. *See Yachnik v. Belarus*, Communication No. 1990/2010, *supra* note 55, at Appendix ψψ 1—5 (Gerald L. Neuman & Yuval Shany, dissenting). The majority of the Committee found the communication inadmissible, contending that the individual had failed to demonstrate sufficiently that Belarus would not permit her to prove her identity by alternative means. *Id.* at ψ 8.4.

in statutes as well as treaties, set out general rules that often do not precisely embody the normative principles that underlie them. The manner in which the prohibition was written may provide consensual reasons for applying it more broadly than principle would justify, and there may be institutional reasons why the prohibition should be applied more broadly. In particular, the failure to require a showing of social disadvantage for the allegedly victimized group might reflect the empirical difficulty of evaluating actual disadvantage, or it might reflect the desire to ensure acceptance of the indirect discrimination prohibition by expanding the class of beneficiaries.

Nonetheless, it is worth considering what lessons an example of this kind might have for the proper interpretation of a generally phrased indirect discrimination prohibition that does not give consensual indications of its scope and operation. On the question of scope, in deciding whether the indirect discrimination norm should apply to each specific religious belief and not only to religions, Professor Tarunabh Khaitan argues that antidiscrimination norms are best understood as protecting group membership rather than autonomy.[64] Accordingly, he concludes that a practice with differential impact on the basis of a particular belief raises issues of indirect discrimination only when the impact also varies as between members of different religious groups.[65] Thus, one would need to ask whether objections to numerical identity documents are more likely among the Russian Orthodox than in the rest of the population.[66] Although I find this argument insightful, I am not persuaded that it appropriately distinguishes the coverage of the antidiscrimination norm from the coverage of freedom of religion. First, if a statute expressly provided less favorable treatment to those who hold a particular belief, I think the statute would too clearly raise questions of direct discrimination on grounds of religion for it to be excluded from antidiscrimination law. Second, longstanding jurisprudence of the international human rights system takes a contrary view.[67] Indeed, the Universal Declaration of Human Rights included political opinion along with religion in one of its antidiscrimination clauses, and that phrasing has carried over into provisions of both Covenants and the African, Inter-American, and European regional conventions.[68]

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64. *See* Tarunabh Khaitan, *infra* 34 HARV. HUM. RTS. J. 231, 233—34 (2021).

65. *Id.* at 240-41.

66. *Id.* at 241. To be more precise, he offers three alternative framings of the relevant group: Russian Orthodox Christians in Belarus, Christians in Belarus, and religious adherents in Belarus. *Id.*

67. *See, e.g.*, Thlimmenos v. Greece, App. No. 34369/97 (Apr. 6, 2000), http://hudoc.echr.coe.int/eng?i=001-58561; Human Rights Committee, Foin v. France, Communication No. 666/1995, U.N. Doc. CCPR/C/67/D/666/1995 (Nov. 3, 1999). Both cases involved discrimination against conscientious objectors to military service, and condemned discrimination against conscientious objectors as such, not on the basis of membership in a particular religious community. *Id.*

68. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as. . .religion, political or other opinion. . ."); International Covenant on Civil and Political

Assuming that indirect discrimination covers differential effects on holders of specific beliefs as well as on members of specific religions, there may still be lessons for how rules or practices with differential effect on beliefs may be justified. The particular beliefs of the various religions in the world, and even more so the nonstandard beliefs of individual adherents, are essentially boundless. It has been rightly noted that some religious beliefs and practices are antithetical to human rights or to the very idea of human rights,[69] but it may be more significant to recognize that a religious belief "need not be founded in reason [or] guided by reason," or moderated by notions of what is reasonable.[70] Some religious objectors oppose not merely the application of a given rule to themselves personally, but being made indirectly "complicit" in the objectionable policy even as applied to others who do not object.[71] The claims about the "mark of the Beast" share features that are characteristic of the claims that human rights law must address, and are not marginal exceptions. Such beliefs may be very important and cogent to those who hold them; they are absolutely protected as beliefs, and the practices they entail are covered by religious freedom and must be reconciled with countervailing interests such as the rights of others. If the result of such a reconciliation is that the believer cannot act in accordance with the practice within a particular context, then it becomes relevant to ask whether a stricter standard of justification should be applied under the rubric of indirect discrimination based on belief.

The normative considerations underlying prohibitions of indirect discrimination do not provide reason for tightening that standard of justification. From the perspective of substantive equality, if the values informing the equality analysis are derived from the content of the right to manifest belief in practice, then they do not supply support for intensifying the demand for justification. If the believer's group is not differentially affected, but solely practice of the belief, then there is no systematic disadvantage to be redressed, only an isolated contextual disadvantage that has already been found proportionate. There is no call for a transformative project to revise structural conditions in society to conform with the demands of each discrete belief. It thus appears that the inquiry under the rubric of indirect

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Rights, *supra* note 5, at arts. 2(1), 26; International Covenant on Economic, Social and Cultural Rights, art. 2(2), Dec. 19, 1966, 993 U.N.T.S. 3; African Charter on Human and Peoples' Rights, *supra* note 5, at art. 2; American Convention on Human Rights, *supra* note 5, at art. 1(1); European Convention on Human Rights, *supra* note 5.

69. *See* Christopher McCrudden, *infra* 34 Harv. Hum. Rts. J. 249, 278 (2021).

70. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1256 (1994). Beliefs can make extreme demands on the believer and on the surrounding society. Id. at 1256—57.

71. Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367, 2383—84 (2020) (considering "complicity-based" objections to health insurance covering some or all forms of contraception); Sherrod v. Tennessee Dept. of Hum. Servs., 2008 WL 2894691, *3—4 (Tenn. Ct. App. 2008) (considering an individual's refusal to "participate in a system he believed to be a 'Satanic entity'" because it was based on a code provision numbered 666).

discrimination based on a belief should be no more intense than that under the rubric of religious freedom.

On the other hand, these normative arguments may need to be taken together with other types of reasons. If indirect discrimination on the basis of religion covers both impact on religious groups and impact on holders of a particular belief, then it may be difficult or imprudent for a court or treaty body to bifurcate the standard of justification, requiring stronger justification for the former than for the latter. The applicable legal provision may be drafted in a manner that precludes such bifurcation, though I doubt that is true of any human rights treaty provision. Or the court may decide that bifurcating the standard would overcomplicate the law of indirect discrimination, a concept that may be challenging for the public to comprehend anyway.[72]

Indeed, to speak of bifurcating the standard in this context may be overly academic. In practice, the topic is the evaluation of proportionality, and a large number of factors may be involved in such a determination. Emphasizing the distinction between impact on groups and impact on particular beliefs may contribute clarity to the analysis and contribute transparency to the jurisprudence. It may articulate considerations that are already operating in the decision-making or that are lost in conclusory opinions.

V. International Implementation of the Indirect Discrimination Norm

If, as the Human Rights Committee suggests, states should enact comprehensive antidiscrimination legislation, then how should it apply to indirect discrimination on grounds of religion? A simple response would be for all states to adopt a generally phrased prohibition on public and private practices that have disproportionate effect on a religious group or the holders of any religious belief (among other grounds), and that lack a legitimate and proportionate justification; the application of this general standard could be left to case-by-case adjudication without further legislative guidance. From one perspective that would be a satisfactory framework, but from another it entrusts a great deal of leeway to the courts or agencies that enforce the law, and concerns would shift from the law to its implementation or the lack thereof. Perhaps, instead, more specificity could be given in the legislation with regard to the standard of proportionality and the normative weight that attaches to various factors in its evaluation.[73] The evaluation might be structured in the same way in all fields of public and private activity, or indirect discrimination could be more strictly regulated in certain contexts—public as opposed to private, or in particular economic sec-

72. *See* Katayoun Alidadi, *infra* 34 Harv. Hum. Rts. J. 281, 282 (2021).

73. *See, e.g.*, N.J. Stat. Ann., § 10:5-12(q)(3) (West 2020) (spelling out criteria to be used in determining undue hardship in accommodating religious practice of an employee).

tors or social activities as opposed to others. These differences could be expressed in separate statutes, rather than a single overarching antidiscrimination statute.

Moreover, one could ask whether the prohibition of indirect discrimination should be truly comprehensive and exceptionless, or whether there is—or must be—room for statutory carve-outs, to accommodate traditions or the rights of others, or for pragmatic reasons of cost-effectiveness. If indirect discrimination is truly the moral equivalent of direct discrimination, then that would give some reason for imposing coextensive prohibitions against both forms. If, however, indirect discrimination imposes lesser harms, or becomes morally wrongful only when additional factors are present such as social disadvantage, then there may be reasons for the scope of the prohibitions to diverge. If indirect discrimination norms are justified by the need for transformation of social structures, then there may be reason to limit the prohibition to situations where the need for that effort is evident. The IACtHR's ■ claim that direct discrimination norms must always be accompanied by indirect discrimination norms that apply to all public and private actors with regard to all conceivable grounds amounts to an immense leap of logic.

With regard to indirect discrimination by private actors, Khaitan points out that antidiscrimination law is often asymmetric, regulating employers' choice of employees but not employees' choice of employers, landlords' choice of tenants, and places of public accommodations but not their consumers.[74] These exclusions may have practical reasons or be based in individual liberty, but it is not because discrimination by consumers is never wrong.[75] Moreover, depending on the positive framework, the party that is regulated may also have individual rights relating to the transaction.[74] [75] [76] Antidiscrimination laws sometimes set out limitations on the size of the employers, landlords, and other businesses they regulate.[77]

Assuming that social disadvantage does exist and that the state is obliged not only to avoid indirect discrimination but to redress the disadvantage, perhaps in transformative ways, it does not necessarily follow that the duty should be localized on every transactional partner. Consider the example of

74. TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 198—200 (2015).

75. *See* Katharine T. Bartlett & Mitu Galati, *Discrimination by Customers*, 102 IOWA L. REV. 223 (2016); Michael Blake, *The Discriminating Shopper*, 43 SAN DIEGO L. REV. 1017 (2006).

76. For example, the U.S. Supreme Court has recently developed a so-called "ministerial exception" that removes a broad category of employees of religious organizations from the entire range of antidiscrimination laws as a matter of constitutional command. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171 (2012); Our Lady of Guadelupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020). The European Union Charter of Fundamental Rights gives some recognition in its Article 16 to the "freedom to conduct a business." *See* Xavier Groussot, Gunnar Thor Petersson, & Justin Pierce, *Weak Right, Strong Court — The Freedom to Conduct Business and the EU Charter of Fundamental Rights*, *in* RESEARCH HANDBOOK ON EU LAW AND HUMAN RIGHTS 326 (Sionaidh Douglas-Scott & Nicholas Hatzis eds., 2017).

77. *See, e.g.*, Bartlett & Galati, *supra* note 75, at 229 n. 22, 239.

religiously-based dietary restrictions. As a starting point, both the United States and Europe have been involved repeatedly in litigation over the food served in prisons, when prisoners belonging to minority religions seek food that complies with their dietary practices, such as halal, kosher, and vegetarian.[78] Such access may be especially important for inmates who are dependent upon a state institution for their nutrition. The state may also be under a duty not to obstruct, or additionally to promote, the availability of food that meets such religious dictates.[78] [79] But that proposition does not entail, even prima facie, that the state must require every restaurant to offer an adequate array of options that conform to the prescriptions of every religious minority in the society in order to ensure full social inclusion.

There are different ways to explain that result. One might actually apply indirect discrimination analysis in a detailed, fact-specific manner, and find that often the cost of accommodating certain dietary restrictions is disproportionately high compared to the individual's loss of enjoyment of a particular restaurant. One might conclude that the range of food offered by a restaurant is not generally the kind of subject to which indirect discrimination analysis should apply. Or one might make a practical, categorical judgment that in a particular society, enforcement of indirect discrimination norms against restaurant menus does not contribute sufficiently to the goal of equality to justify the effort.

As this example should illustrate, variation in the content of antidiscrimination legislation from state to state may be appropriate. States may have good reason to concentrate on different fields for regulation, or to enact different exceptions. Arguably they should adapt their legislation to particular patterns of systematic disadvantage in their societies. Universal rights are not always best served by globally uniform legislation.

Evidently legal systems do vary in how they treat these issues. Some of the variation may be indefensible and may be more part of the problem than a genuine effort at its solution, but specifically addressing the local context is appropriate. To leave all issues of indirect discrimination open for case-by-case adjudication is unfair to both complainants and defendants and does not provide an effective means of implementation for the norm. Socie-

78. For examples of cases concerning claimants who are Buddhist vegetarians, see Jakobski v. Poland, App. No. 18429/06, Eur. Ct. H.R. (Dec. 7, 2010), http://hudoc.echr.coe.int/eng?i=001-102121; Vartic v. Romania (no. 2), App. No. 14150/08, Eur. Ct. H.R. (Dec. 17, 2013), http://hudoc.echr.coe.int/eng?i = 001-139275. *Cf.* Erlich & Kastro v. Romania, App. No. 23735/16, Eur. Ct. H.R. (Sep. 9, 2020), http//hudoc.echr.coe.int/eng?i=00I-203114 (discussing complex acquisition and preparation of kosher food); Jones v. Carter, 915 F.3d 1147 (7th Cir. 2019) (concerning petitioner with a halal diet that included meat); Abdulhaseeb v. Calbone, 600 F.3d 1301 (10th Cir. 2010) (concerning a halal diet including meat); Williams v. Annucci, 895 F.3d 180 (2d Cir. 2018) (concerning a Nazarite Jewish kosher vegetarian). These cases were decided primarily on the basis of freedom of religion, not nondiscrimination.

79. *Cf.* Cha'are Shalom Ve Tsedek v. France, App. No. 30985/96, Eur. Ct. H.R., ψ 82 (Oct. 26, 2000), http://hudoc.echr.coe.int/eng?i = 001-58738 (ascertaining that the ultra-Orthodox members were "not in practice deprived of the possibility of obtaining and eating meat considered by them to be more compatible with religious prescriptions" before finding no violation of freedom of religion or equality).

ties should not strive to eliminate every conceivable disadvantage that results from any religious belief, and the contexts in which disadvantage is most urgent may depend on local conditions.

If that perspective is correct, then at the global level, human rights bodies should not insist that all states pursue the same model for regulating indirect discrimination, but should monitor the suitability of each state's legislation to the problems that it faces. In reviewing individual cases that have already been before national courts, global human rights bodies should not assume that each case should be decided as the global body would have decided it in the first instance, but should examine the reasoning that produced the prior decision. At the regional level, the ECtHR would be justified in affording a certain margin of appreciation—perhaps narrower than what the ECtHR currently provides, but still not reduced to zero.

In conclusion, close examination of the implications of norms prohibiting indirect discrimination on the basis of religion raises doubts about a rigidly uniform and abstract understanding of the content of the right and the methods by which it should be implemented. Further exploration may raise similar doubts about overly generalized approaches to indirect discrimination on some other bases as well.