SYMPOSIUM

HOW WOULD THE EUROPEAN COURT OF HUMAN RIGHTS DECIDE *HOLT V. HOBBS*?

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INTRODUCTION

In 2015, the Supreme Court decided *Holt v. Hobbs*, which affirmed a prisoner's right under the Religious Land Use and Institutionalized Persons Act[1] (RLUIPA) to grow a half-inch beard in accordance with his sincerely held Islamic faith.[2] This case involved weighing the prisoner's religious interests against the compelling governmental interest in prison security.[3] The balancing-of-interests framework rarely is found in American constitutional jurisprudence, which focuses on drawing lines and creating categories.[4] Instead, in the United States, this framework is largely statutorily created. Meanwhile, "'[p]roportionality' is today accepted as a general principle of law by constitutional courts and international tribunals across the world[,]"[5] such as the European Court of Human Rights ("ECtHR").[6]

Some, like Justice Stephen Breyer, have advocated for a wider use of proportionality in the United States.[7] The proportionality approach determines whether a law is "helpful, necessary, and appropriate" in achieving its intended goal

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1 42 U.S.C. § 2000cc (2012).

2 135 S. Ct. 853, 867 (2015).

3 *Id.* at 859.

4 Proportionality is used in the Eighth Amendment context. *See e.g.*, Atkins v. Virginia, 536 U.S. 304, 311 (2002). Vicki Jackson argues that it is also part of strict scrutiny. *See* Vicki C. Jackson, *Constitutional Law in the Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015).

5 Jackson, *supra* note 4, at 3096.

6 *See* Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMP. & INT'L L. 291, 297–98 (2012) (discussing proportionality in the United States and other jurisdictions).

7 *See id.*; Robert Barnes, *Breyer on the Constitution*, WASH. POST (Sept. 19, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/19/AR2010091904342.html.

by considering other factors at stake in its application.[8] Thus, the RLUIPA balancing test provides a point of comparison between U.S. law and the ECtHR's jurisprudence as the Supreme Court contends with the possible application of proportionality in future constitutional cases.

To that end, this Essay inquires: How would the ECtHR decide *Holt v. Hobbs*, given the same evidence provided at the district court level and the reasoning of the court of appeals? Analyzing this case through the ECtHR's lens will elucidate the implications of the proportionality test in American jurisprudence. To do so, Part I will compare the two jurisdictions. Part II will summarize *Holt v. Hobbs*. Part III will describe the ECtHR's relevant recent free exercise jurisprudence. Part IV will discuss how, based on this analysis, the ECtHR could decide *Holt v. Hobbs* in light of its overarching principles. Finally, the conclusion will show how RLUIPA has aligned the Supreme Court's statutory free exercise jurisprudence with the ECtHR's and will detail some normative concerns that these analytical structures present.

I. COMPARISON OF THE ECtHR AND THE SUPREME COURT

Both the ECtHR and the Supreme Court use balancing tests for certain religious freedom issues, although there are some noteworthy differences between them. Most importantly, the source of the religious right differs significantly. The ECtHR's religious rights protection is based in Article 9 of the European Convention of Human Rights,[9] which functions like a constitution, while the prisoner's religious rights asserted in *Holt v. Hobbs* are statutory: there is no constitutional requirement for prisons to accommodate prisoners' religious rights.[10] These differences do not foreclose analysis, however. Each court has looked to the other in certain contexts, and they are guided by similar concerns.[11]

A. The ECtHR's General Interpretive Principles

1. Article 9 of the European Convention

The European Convention on Human Rights protects religious freedom under Article 9, which 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."[12] While this right is not unlimited, it is "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

8 Schlink, *supra* note 6, at 292.

9 *See* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention].

10 *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

11 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573 (2003).

12 Convention, *supra* note 9, at art. 9, § 1. For an overview of the European Court of Human Rights's structure generally, see Francesca M. Genova, *Labor in Faith: A Comparative Analysis of* Hosanna-Tabor v. EEOC *Through the European Court of Human Rights' Religious Employer Jurisprudence*, 90 NOTRE DAME L. REV. 419 (2014).

protection of public order, health or morals, or for the protection of the rights and freedoms of others."[13] These limitations play a crucial role in the ECtHR's jurisprudence.

2. The Margin of Appreciation

Fundamental to the ECtHR's analysis is the "margin of appreciation" doctrine. Since there is "no specific or single model" of government mandated by the European Convention on Human Rights, the "margin of appreciation" doctrine allows the ECtHR to respect legitimate differences in conceiving, structuring, and protecting conventional rights.[14] Under this doctrine, the ECtHR gives broad deference to individual Member States of the Council of Europe, the organization with which it is associated, when there is a lack of consensus among those states about the application of a conventional right, and scrutinizes a Member State's laws more closely if its laws are out of line with European consensus.[15]

This deference should provide Member States some freedom in approaching issues of rights and governance unless a consensus has been formed. In the context of Article 9 rights, however, it can be argued that this doctrine is being "erod[ed]" by the ECtHR's emphasis on neutrality in recent decisions, which narrows the range of legitimate approaches to Article 9 rights.[16] In the cases analyzed below, the "margin of appreciation" plays a fairly significant role. No similar doctrine governs the Supreme Court's interpretation of a federal statute.

B. The Supreme Court's General Interpretive Principles on Freedom of Religion

Under the landmark decision *Employment Division v. Smith*, the Supreme Court held that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest," as they do not violate the First Amendment's Free Exercise Clause.[17] It largely overruled the balancing test applied in prior cases,[18] which consisted of determining whether a law that substantially burdened religious exercise was "necessary to further a compelling state interest,"[19] on the premise that this balancing test would allow a religious believer "to become a law unto himself."[20]

This decision led to Congress's near-immediate, near-unanimous passing of the Religious Freedom Restoration Act (RFRA), signed into law by President Bill

13 Convention, *supra* note 9, at art. 9, § 2.

14 Andrea Pin, *(European) Stars or (American) Stripes: Are the European Court of Human Rights' Neutrality and the Supreme Court's Wall of Separation One and the Same?*, 85 ST. JOHN'S L. REV. 627, 641 (2011); *see also* Genova, *supra* note 12, at 427.

15 Genova, *supra* note 12, at 427–28.

16 *Id.* at 424 n.29.

17 494 U.S. 872, 886 n.3 (1990).

18 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

19 Holt v. Hobbs, 135 S. Ct. 853, 859 (2015).

20 *Smith*, 494 U.S. at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

Clinton.[21] Its aim was to "provide very broad protection for religious liberty," and restore, and indeed provide greater protection than, the pre-*Smith* compelling interest test.[22] RLUIPA,[23] enacted later, defined religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"[24] and applied to prisoners' religious free exercise.[25] RLUIPA provides, in relevant part, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates" that the burden is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that . . . interest."[26] RFRA and RLUIPA have provided the Supreme Court with a balancing-of-interests framework, and RLUIPA was the subject of the Supreme Court's analysis in *Holt v. Hobbs*.

II. *HOLT V. HOBBS*

A. Case Background and Summary

Arkansas inmate Gregory Holt was a devout Muslim who believed that his faith prohibits cutting his beard.[27] The grooming policy of the Arkansas prison in which he was incarcerated prohibited facial hair, only exempting those with dermatological problems who were permitted to wear a quarter-inch beard.[28] Although Holt believed that his religion mandates a full beard, he asked for permission from the prison to grow a half-inch beard, which he felt was a compromise.[29] The prison denied his request.[30] Holt then filed a complaint in federal district court, claiming that the grooming policy violated RLUIPA.[31]

At an evidentiary hearing, the Department of Corrections provided three reasons for the beard policy: (1) to prevent concealment of contraband in facial hair, (2) to hinder prisoners' ability to change their physical appearance by shaving in order to escape or enter restricted prison areas, and (3) to ensure proper monitoring

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21 Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html?mcubz=1&pagewanted=print; *see also* 42 U.S.C. § 2000bb(a)(2) (2012); Eugene Volokh, *1A. What is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:43 AM), http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/. The law's broad support may be decreasing. *See, e.g.*, Louise Melling, *ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law*, WASH. POST (June 25, 2015), http://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html.

22 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2756 (2014).

23 42 U.S.C. § 2000cc (2012).

24 *Id.* § 2000cc-5(7)(A).

25 *Id.* § 2000cc-1.

26 *Id.* § 2000cc-1(a).

27 Holt v. Hobbs, 135 S. Ct. 853, 859 (2015).

28 *Id.* at 859, 860.

29 *Id.* at 861.

30 *Id.*

31 *Id.*

of facial hair.[32] Each of those three reasons had countervailing weaknesses: the Department's witnesses named no instance where inmates concealed contraband in facial hair and conceded that inmates could do so instead in the hair on their heads or clothing; no witness explained why taking photos of inmates without a beard, the solution adopted by other prisons, would not prevent identity-change issues; and the prison already monitored the quarter-inch beards allowed for dermatological purposes.[33]

B. The Lower Courts' Rulings

The district court ruled in favor of the prison on the grounds that the prison is entitled to deference and reasoned that Holt could exercise his religion through praying on a prayer rug, observing religious holidays, and maintaining his religious diet.[34] The Court of Appeals for the Eighth Circuit affirmed for substantially the same reasons and ultimately concluded that the Department had shown that the grooming policy was the "least restrictive means of furthering its compelling security interests."[35]

C. The Supreme Court's Opinion

The Supreme Court unanimously held that the Department's policy violated RLUIPA, as it substantially burdened Holt's undisputed sincerely held religious beliefs and was not shown to be the least restrictive means of furthering that interest.[36]

1. The "Substantial Burden" Analysis

The Court easily held that the prison policy was a substantial burden on Holt's free exercise because the prisoner was required to choose between facing disciplinary action or following his religious beliefs.[37]

The Court asserted that the district court had erred in considering religious practice and issues more broadly than is mandated by the substantial burden test. First, the district court improperly considered the other opportunities that Holt had to worship in holding that his religious exercise was not substantially burdened.[38] Second, the district court should not have considered that the burden to Holt's religious exercise was "slight" because "his religion would 'credit' him for attempting to follow his religious beliefs."[39] RLUIPA applies to all religious exercise even if it is not a strict requirement of the faith.[40] Third, the district court should have ignored Holt's testimony that "not all Muslims believe that men must

32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.* at 862, 864, 865, 867.
37 *Id.* at 862.
38 *Id.*
39 *Id.*
40 *Id.*

grow beards."[41] This belief "is by no means idiosyncratic. . . . But even if it were, the protection of RLUIPA . . . is 'not limited to beliefs which are shared by all of the members of a religious sect.'"[42] An individual is substantially burdened when required to choose between exercising his or her faith and obeying government rules.[43]

2. The "Compelling Governmental Interest" Test

Since Holt's "sincere exercise of religion [was] being substantially burdened,"[44] the Supreme Court stressed that RLUIPA requires a "more focused" compelling governmental interest—applying to Holt in particular—than the "'broadly formulated'" ones of prison safety and security.[45] The Court recognized that there is a compelling governmental interest in preventing prisoners from hiding contraband and identifying prisoners easily.[46]

3. The "Least Restrictive Means" Prong

The "least restrictive means" part of the Court's analysis led it to rule that the prison policy was unjustified.[47] The Court addressed the two compelling governmental interests: (1) preventing the hiding of contraband and (2) identifying prisoners easily.

First, the argument that a half-inch beard created a contraband concern was "hard to take seriously."[48] Fairly obviously, the beard could hide only something very small, and the prisoner "would have to find a way to prevent the item from falling out."[49] Furthermore, since prisoners can have longer hair on their heads, "it is hard to see why" they would opt to hide anything in their beards.[50] Even accepting this premise, however, there were less restrictive means available. The Department already conducted searches of prisoners' hair and clothing and permitted beards for dermatological reasons.[51] It failed to offer a compelling reason why these measures were insufficient.[52]

The Supreme Court also held that the prison's identification interest could be satisfied by the dual photo policy used by other prisons.[53] And, the prison did not detail why a half-inch beard was problematic when a quarter-inch beard, longer hair

41 *Id.*

42 *Id.* at 862–63 (quoting Thomas v. Review Bd., 450 U.S. 707, 715–716 (1981)).

43 *See id.* at 862 ("If petitioner contravenes [the Department's] policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise.").

44 *Id.* at 863 (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014)).

45 *Id.* (quoting *Burwell*, 134 S. Ct. at 2779).

46 *Id.* at 863, 864.

47 *Id.* at 863–65.

48 *Id.* at 863.

49 *Id.*

50 *Id.*

51 *Id.* at 864.

52 *Id.*

53 *Id.* at 865.

on prisoners' heads, and mustaches did not cause similar concerns.[54] While prison officials' expertise should be respected, it was no substitute for "RLUIPA's rigorous standard. And without a degree of deference that is tantamount to unquestioning acceptance, it [was] hard to swallow the argument" that the denial of the half-inch beard furthered the Department's interest.[55] Thus, the Court reversed the Eighth Circuit's decision.[56]

III. ECtHR CASES ON RELIGIOUS EXERCISE

The ECtHR's religious freedom jurisprudence centers on Article 9 of the European Convention. In its analysis of Article 9, the European Court uses a step-by-step proportionality framework, first determining whether there has been an "interference" with or "limitation" of the applicant's Article 9 rights,[57] then examining whether this interference was "prescribed by law"[58] for a "legitimate aim[]"[59] as laid out in Article 9 and was "necessary in a democratic society"[60] to achieve that legitimate aim.

This Part will examine each of these steps in the European Court's current caselaw to explicate what this proportionality test means. The analysis will focus on three cases: *Poltoratskiy v. Ukraine*,[61] *Eweida v. United Kingdom*,[62] and *S.A.S. v. France*.[63] Each of these cases provides parallels to *Holt v. Hobbs*. *Poltoratskiy v. Ukraine* concerns a prisoner who claimed that his Article 9 rights were violated when he was unable to see a priest.[64] *Eweida v. United Kingdom* focuses on two women who wanted to wear external signs of their faith.[65] *S.A.S. v. France* involves France's general prohibition of burqas and other full-face coverings.[66] These cases provide insight into how the European Court would rule on *Holt v. Hobbs*.[67]

54 *Id.*

55 *Id.* at 864.

56 *Id.* at 867.

57 *See, e.g.*, S.A.S. v. France, App. No. 43835/11, ¶ 110 (Eur. Ct. H.R. 2014) (quoting Convention, *supra* note 9, at art. 8, 9).

58 *Id.* ¶ 111 (quoting Convention, *supra* note 9, at art. 9).

59 *Id.* ¶ 111.

60 *Id.* ¶ 111 (quoting Convention, *supra* note 9, at art. 8, 9).

61 App. No. 38812/97 (Eur. Ct. H.R. 2003).

62 Apps. No. 48420/10, 59842/10, 51671/10, & 36516/10 (Eur. Ct. H.R. 2013).

63 App. No. 43835/11.

64 App. No. 38812/97 at ¶¶ 163, 164.

65 Apps. No. 48420/10, 59842/10, 51671/10, & 36516/10 at ¶ 3.

66 App. No. 43835/11 at ¶ 3.

67 The analysis will exclude other ECtHR cases concerning external manifestations of religion and religious integration, as their value in the prison context would be limited to questions of whether there are more complex cultural evaluations undergirding the ECtHR's decisions. For a discussion of whether the ECtHR's decisions concerning Muslims show different treatment for Islam than other faiths, see MICHAEL D. GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 88–97 (2007).

A. Poltoratskiy v. Ukraine

Poltoratskiy v. Ukraine shows that prisoners are entitled to Article 9 rights,[68] although caselaw on this subject is limited. In that case, a prisoner on death row met with a priest only once months after his parents sent the government a letter requesting that he receive visits with a priest and was denied the ability to meet with a priest at any other time.[69] The ECtHR did not consider the guidelines preventing priests' visitation to be "law," as they were internal, unpublished, and unavailable to the public.[70] The Court held that this situation interfered with the prisoner's Article 9 rights.[71]

B. Eweida v. United Kingdom

In *Eweida v. United Kingdom*, the ECtHR, in relevant part, considered the applications of two women who claimed that their employers violated their Article 9 rights in prohibiting religious necklaces.[72]

1. Facts and Procedural History

Nadia Eweida worked for British Airways, a private employer.[73] British Airways' uniform policy prohibited visible accessories unless they were preapproved by local management.[74] Although she previously had concealed her cross necklace, Eweida decided to wear it openly.[75] Her manager told her that she would be sent home unpaid for refusing to comply, so she reluctantly followed the policy.[76] Later, she decided to display the cross again and was sent home without pay.[77] British Airways eventually offered her an administrative position that did not require a uniform as an accommodation, but she rejected it.[78] British Airways, after receiving negative publicity, amended its policy to allow visible religious symbols, but it did not compensate her for her lost earnings.[79] Eweida filed a claim with the Employment Tribunal, citing British law and the European Convention.[80]

All domestic courts ruled in favor of British Airways. First, the Employment Tribunal rejected her claim because the "visible wearing of a cross was not a mandatory requirement of the Christian faith but Ms[.] Eweida's personal choice[,]"

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68 Poltoratskiy v. Ukraine, App. No. 38812/97, ¶ 167 (Eur. Ct. H.R. 2003). In the United States, prisoners have limited constitutional rights. *See Prisoners' Rights*, LEGAL INFO. INST., https:// www.law.cornell.edu/wex/prisoners_rights (last visited Mar. 20, 2017).

69 *Poltoratskiy*, App. No. 38812/97 at ¶¶ 21, 33, 49, 75, 165–66.

70 *Id.* ¶ 158.

71 *Id.* ¶ 160.

72 Apps. No. 48420/10, 59842/10, 51671/10, & 36516/10, ¶ 3 (Eur. Ct. H.R. 2013).

73 *Id.* ¶ 9.

74 *Id.* ¶ 10.

75 *Id.* ¶ 12.

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.* ¶ 13.

80 *Id.* ¶ 14.

and no evidence of a similar complaint existed in British Airways' 30,000-person workforce.[81] The Court of Appeal agreed and held that the British Airways rule was "a proportionate means of achieving a legitimate aim."[82] It noted that British Airways addressed the problem once it had been raised and in the interim offered Eweida a position that would have had no public contact.[83]

The second petitioner, Shirley Chaplin, worked as a nurse.[84] She had worn a cross necklace for more than thirty years and believed that removing it would violate her faith.[85] The hospital's policy, based on the Department of Health's guidance, prohibited necklaces in hospitals because they create a "risk of injury," but religious accommodation requests could be made with the manager.[86] When V-neck tunics were introduced for nurses, she requested an accommodation to wear her cross with them.[87] The hospital denied her request because a patient could pull on the necklace and cause harm.[88] She then suggested wearing a necklace with a magnetic clasp that would immediately open if pulled.[89] The hospital also rejected this suggestion, reasoning that the cross could come into contact with open wounds after being pulled.[90] It suggested instead that the cross be clipped to the lanyard she was required to wear, which she needed to remove "when performing close clinical duties."[91] Chaplin rejected this proposal.[92]

She filed a complaint with the Employment Tribunal, which ruled in favor of the hospital because the hospital's position was "based on health and safety rather than religious grounds."[93] Furthermore, it maintained that the hospital's response to her request was proportionate.[94]

2. Was There an "Interference" with or "Limitation" on Religious Exercise Rights?

The ECtHR recognized that both women's Article 9 rights had been limited.[95] It acknowledged, however, that "if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9."[96]

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81 *Id.*
82 *Id.* ¶ 16.
83 *Id.*
84 *Id.* ¶ 19.
85 *Id.* ¶ 18.
86 *Id.* ¶ 19.
87 *Id.* ¶ 20.
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.* ¶ 21.
94 *Id.*
95 *Id.* ¶¶ 95, 97.
96 *Id.* ¶ 83. This concept is different from the United States's understanding of RLUIPA. *See supra* Section II.C.

3. The Proportionality Analysis: Was this Limitation "Prescribed by Law" for a "Legitimate Aim" and "Necessary for a Democratic Society?"

The ECtHR next determined whether those limitations had a legitimate aim and were proportionate to their goals. First, British Airways' image-crafting was a legitimate aim.[97] But the relative importance of the two competing interests—a fundamental right on the one hand, and the "wish to project a certain corporate image" on the other—were simple to weigh.[98] British Airways' custom of accommodating turbans and hijabs, the amendment of its uniform code, and the discreet nature of the cross all showed that "the earlier prohibition was not of crucial importance."[99] Thus, in Eweida's case, the British courts' failure to properly weigh her rights against British Airways' policy violated Article 9.[100]

In Chaplin's case, the ECtHR held that the state action did not violate her Article 9 rights.[101] The interest weighed against those rights was the "health and safety of nurses and patients," which falls within the scope of Article 9 Section 2's legitimate aims and is "inherently of a greater magnitude" than British Airways' interest.[102] Moreover, Chaplin was given a number of accommodation options, although she found them insufficient.[103] Finally, the ECtHR noted that "hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence."[104] Therefore, her rights were not violated.[105]

C. S.A.S. v. France

In *S.A.S. v. France*, the ECtHR held that France's burqa ban was acceptable under Article 9 of the European Convention.[106]

1. Facts and Procedural History

S.A.S. v. France involved France's national law prohibiting anyone from concealing his or her face in public.[107] The French government promulgated this ban in response to the growing prevalence of the burqa,[108] which was understood as a fundamentalist, not religious, symbol that undermined France's commitment to

97 *Eweida*, App. No. 48420/10, 59842/10, 51671/10, & 36516/10 at ¶ 94.
98 *Id.*
99 *Id.*
100 *Id.* ¶ 95.
101 *Id.* ¶ 100.
102 *Id.* ¶¶ 98, 99.
103 *Id.* ¶ 98.
104 *Id.* ¶ 99.
105 *Id.* ¶ 110.
106 App. No. 43835/11, ¶ 159 (Eur. Ct. H.R. 2014).
107 *Id.* ¶ 100.
108 *Id.* ¶ 16.

"liberty, equality, [and] fraternity."[109] A Muslim woman brought the issue before the ECtHR, claiming that the ban violated her Article 9 rights.[110]

2. Was There an "Interference" with or "Limitation" on Religious Exercise Rights?

The ECtHR addressed the Article 9 claim with language similar to the Supreme Court's in *Holt v. Hobbs*: "[E]ither she complies with the ban and thus refrains from dressing in accordance to her approach to religion; or she refuses to comply and faces criminal sanctions."[111] The applicant neither needed "to prove that she is a practising Muslim [n]or to show that it is her faith which obliges her to wear the full-face veil."[112] The ECtHR then turned to its proportionality test to determine whether the ban was justified.

3. The Proportionality Analysis: Was this Limitation "Prescribed by Law" for a "Legitimate Aim" and "Necessary for a Democratic Society?"

The ECtHR evaluated France's claims in light of the legitimate aims listed in Article 9. France asserted two of these aims: "public safety" and "respect for the minimum set of values of an open and democratic society."[113]

The ECtHR rejected France's arguments that banning face concealments protected the safety of persons and property and prevented identity fraud.[114] Like the Supreme Court in *Holt v. Hobbs*, the ECtHR recognized that the requirement to "give up completely" an individual's "manner of manifesting . . . religion or beliefs" was too great a burden for this justification;[115] France could achieve the same public safety goals by "a mere obligation to show [one's] face and to identify [one]self" under particular circumstances.[116]

The French government claimed that the burqa ban ensured "respect" for three of "the minimum set of values of an open and democratic society": "[R]espect for equality between men and women, respect for human dignity and respect for the minimum requirements of life in society."[117] The ECtHR found only one to be persuasive. The Court rejected the sex equality argument because women themselves were asserting the right to wear the burqa.[118] France's argument from human dignity also failed, as the Court noted that the veil represents France's pluralism, adheres to certain conceptions of decency, and does not harm others' human dignity.[119] But the ECtHR accepted that there may be "minimum

109 *Id.* ¶¶ 16, 17.
110 *Id.* ¶¶ 3, 11.
111 *Id.* ¶ 110; *see supra* Section II.C.
112 *S.A.S.*, App. No. 43835/11 at ¶ 56.
113 *Id.* ¶ 114.
114 *Id.* ¶ 139. This argument was secondary to the main reason for the ban. *Id.* ¶¶ 17, 115.
115 *Id.* ¶ 139; *see supra* Section II.C.
116 *S.A.S.*, App. No. 43835/11 at ¶ 139.
117 *Id.* ¶ 116.
118 *Id.* ¶¶ 118–19.
119 *Id.* ¶ 120.

requirements of life in society" to foster "living together."[120] The Court agreed that the inability to see one's face harms one's own socialization and "breach[es] the right of others to live in a space of socialisation which makes living together easier."[121] Finally, a wide margin of appreciation needed to be given to France to craft its own policy to promote "living together."[122]

In its decision, the ECtHR gave weight to a concern that the Supreme Court rejected under RLUIPA—the ability to practice religion in other ways. Although "the scope of the ban is broad," it still does not extend to "the freedom to wear in public any garment or item of clothing—with or without a religious connotation—which does not have the effect of concealing the face."[123] The ban is aimed at the burqa's concealment feature, not its religious aspect.[124] The ECtHR seemed to imply that Muslims' ability to wear a simple headscarf weighs in favor of France's ban. Hence, the burqa ban remained, even in light of Article 9's guarantees.

IV. HOW WOULD THE ECtHR ANALYZE *HOLT V. HOBBS*?

This Part will analyze the ECtHR's hypothetical response to a Member State that asserted the Arkansas prison's justifications in *Holt v. Hobbs*. For this hypothetical, the court of appeals would act as the court of last resort in a country party to the European Convention and Holt would file a petition with the ECtHR.

A. Would the Prison Policy Be an "Interference" with Article 9 Rights?

The ECtHR likely would hold that the prison's grooming policy implicates the prisoner's Article 9 rights because the prisoner lacks any alternatives. The ECtHR's guiding principle—that forcing someone to choose not to practice one aspect of his or her faith can in itself be a limitation on his or her free exercise—is similar to RLUIPA's statutory provision: RLUIPA allows any burden on a sincerely held religious belief to be evaluated in its own right.[125]

Furthermore, as the ECtHR stated in *S.A.S. v. France*, Article 9, similar to RLUIPA, is implicated even if religious exercise is not required by the religion.[126] The ECtHR would acknowledge, either implicitly or explicitly, that Holt's belief is not "idiosyncratic." That is similar to the United States's rule in which a religious belief need not be widely shared.[127]

B. Would This Interference Be Proportional?

The analysis would then move to whether this interference with the Article 9 right was limited by law for a legitimate aim as necessary in a democratic society.

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120 *Id.* ¶ 121.
121 *Id.* ¶ 122.
122 *Id.* ¶¶ 154–55.
123 *Id.* ¶ 151.
124 *Id.*
125 Holt v. Hobbs, 135 S. Ct. 853, 860 (2015).
126 *S.A.S.*, App. No. 43835/11 at ¶¶ 55–56; *see also Holt*, 135 S. Ct. at 862.
127 *S.A.S.*, App. No. 43835/11 at ¶¶ 55–56.

Since the Arkansas prison guidelines are published online,[128] unlike the policy at issue in *Poltoratskiy v. Ukraine*,[129] the ECtHR's emphasis on the margin of appreciation would regard the regulation as "law."

The prison's emphasis on prison safety and prisoner identification would fall under one of Article 9's "legitimate aims"[130] of "public safety."[131] The ECtHR would recognize "public safety" broadly but would scrutinize these claims.[132] It acknowledges that certain governmental organizations are "better placed to make decisions about . . . safety than a court."[133] Hence, it might recognize that prisons are better equipped to make their own judgments about prison safety.

Yet, like the Supreme Court, the ECtHR most likely would hold that the prison's greater expertise in running its affairs does not shield it from judgment. The ECtHR declined to defer to France's assertion of public safety for the burqa ban: France's requirement for women to "give up completely" their manifestation of belief was disproportionate to the security aim because "a mere obligation to show [one's] face and to identify" oneself would have sufficed.[134] In this case, the prison's refusal to allow Holt to wear a beard when others could wear one for dermatological reasons probably would lead the ECtHR to reject the prison's safety rationale, much like the Supreme Court did. The prison's denial of a half-inch beard likely would be considered disproportionate for the reasons that the Supreme Court emphasized: other prisons had adopted a less burdensome policy, and, like the French government, the Arkansas prison was unable to articulate why such a system would be insufficient.[135]

Some factors, however, may weigh in favor of allowing the ban on longer beards. The ECtHR could find it acceptable that the prisoner could practice his faith in other ways, just as it indicated that the availability of the headscarf was satisfactory in France. Also, the proportionality test allows the ECtHR to weigh broader societal goods in Europe. As an international body, it can examine pan-European trends to make a holistic assessment of values. The ECtHR in *S.A.S. v. France* allowed the ban to be upheld on its original grounds, a fostering of community values, which seems less compelling under United States jurisprudence. Furthermore, while an individual may be able to move to a country more welcoming of his or her religious expression, prisoners lack choice; if the prison harms their religious rights, they cannot remedy the situation.

The ECtHR's deep scrutiny of the public safety justification, in light of the ECtHR's ultimate holding in favor of the burqa ban, seems to be a mere warning to other Member States about the limits of safety rationales. Because the ECtHR recognizes a legitimate margin of appreciation, it may be more willing to assess

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128 *See* ARK. DEP'T OF CORRECTIONS, INMATE HANDBOOK (2015), http://adc.arkansas.gov/images/uploads/inmate_handbook.pdf.

129 *See Ukraine*, App. No. 38812/97, ¶ 158 (Eur. Ct. H.R. 2003).

130 *S.A.S.*, App. No. 43835/11 at ¶ 111.

131 Convention, *supra* note 9, at art. 9.

132 *See S.A.S.*, App. No. 43835/11 at ¶¶ 115, 139; *see also* Eweida v. United Kingdom, Apps. No. 48420/10, 59842/10, 51671/10, & 36516/10, ¶ 83 (Eur. Ct. H.R. 2013).

133 *Eweida*, Apps. No. 48420/10, 59842/10, 51671/10, & 36516/10, at ¶ 99.

134 *S.A.S.*, App. No. 43835/11 at ¶ 139.

135 Holt v. Hobbs, 135 S. Ct. 853, 866 (2015).

concerns of safety, which seem more empirical, than problems of culture and tradition. Questions about public safety have a sort of uniformity across Western jurisdictions, while questions of culture are more varied. A country can promote its culture more broadly but should not attempt to obscure these cultural decisions under the guise of public safety.

Relatedly, the ECtHR seems to recognize that a State can protect culture through fairly coercive means without violating the European Convention. Social cohesion remains a driving consideration at the ECtHR even in the face of religious liberty concerns. In Holt's case, then, the ECtHR might be more willing to accept the prison's argument if it included fostering internal community and equality of treatment, rather than public safety. The ECtHR seems to recognize an interest in similar treatment to create social harmony in a way RLUIPA does not permit. With these considerations, the European Court could rule in favor of the prison.

CONCLUSION

The foregoing exercise shows the differences between the ECtHR's Article 9 proportionality balancing test and RLUIPA's burden-shifting framework. The Article 9 test seems distinctly European, with its emphasis on proportionality and the margin of appreciation. The ECtHR's position as an international organization causes it to defer to national decisions and acknowledge the diversity of European States. It refrains from creating easily applicable factor tests, as these tests would overstep the ECtHR's role as an international protector of rights.

The Supreme Court's test has the hallmarks of the American common law and statutory system: a multipart test, fact-intensive analysis, and fairly bright lines. The Supreme Court has the authority to issue definitive opinions on statutory interpretation to create uniform rules throughout the United States. A clear command from the Supreme Court limits the amount of discretion—and therefore power—that lower courts have. The proportionality test's very benefit in the European system of providing deference to domestic courts, letting them retain some power over their own affairs, could be a detriment to the Supreme Court's goal of equal application of laws. Yet, even with these interpretive and factual distinctions, this case likely is fairly easy for both Courts. Currently, there seems to be a harmony between the European and American regimes in result, even if not in the fundamentality of this right.

The margin of appreciation doctrine thus gives the ECtHR the flexibility to defer more in the future to a country's own determinations about its own interests. Although the ECtHR's existence is partially to remove questions of rights protection from political contingencies, the margin of appreciation allows it to dialogue with its Member States and provide greater room for local policy decisions while still being fairly insulated from political pressures. And, since it knows no stare decisis, its caselaw can fluctuate rather easily between extremes, and it can reshape its policy of adjudication in accordance with its "living instrument" doctrine.

Finally, the constitutional-statutory distinction shows the values of the communities at large. RLUIPA is a concession for religious believers. Congress has made a policy judgment that protection of religious belief is worthwhile even in the face of other neutral laws. In the State parties to the ECtHR, the religious right

is constitutionally fundamental and supplants domestic jurisdictions' own determinations and policy judgments.

Issues of religious liberty will continue to present themselves in both jurisdictions. Further, the utility of proportionality-style tests in American jurisprudence will remain a live issue for years to come. It remains to be seen whether this apparent convergence is a sign of a larger unity or just one point of similarity in otherwise disparate approaches.