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# Carnal Exhibitions: Material Religion and the European Court of Human Rights

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*This article presents an anthropological account of the European Court of Human Rights' approach to material religion. Focusing on a range of cases involving an alleged violation of Article 9 – the right to freedom of thought, conscience and religion – in relation to such diverse religious objects as cassette players, incense, crucifixes, photographs and cross necklaces, it draws on ethnographic studies of material culture to suggest a disconnect between the Court's emphasis on religion as belief and the lived experience of embodied, sensual and object-oriented religious practice. It concludes that Article 9's privileging of the forum internum over material practice has contributed to an immaterial view of religion and religious life. Such an understanding ultimately fails to appreciate the importance of objects in the creation, expression and maintenance of religious worlds.*

**Keywords:** freedom of religion, religious objects, European Court of Human Rights, *forum internum*

John Calvin, the Protestant reformer, had much to say about the practice of material religion. In his theology, those who require that God's presence be made manifest in tangible form are guilty of idolatry and spiritual adultery: not only do religious statues, icons and relics misrecognise God's character, but they divert the worship due to Him alone to objects, pictures or dead bodies. Calvin's *Institutes of the Christian Religion* puts it thus:

The human mind, stuffed as it is with presumptuous rashness, dares to imagine a god suited to its own capacity . . . . The god whom man has thus conceived inwardly he attempts to embody outwardly. The mind, in this way, conceives the idol, and the hand gives it birth. That idolatry has its origin in the idea which men have, that God is not present with them unless his presence is carnally exhibited, appears from the example of the Israelites: 'Up', said they, 'make us gods, which shall go before us; for as for this Moses, the man that brought us up out of the land of Egypt, we [know] not what is become of him' (Exod. 32:1).<sup>2</sup>

- 1 This article was written for presentation at the Law's Imagining of Religion seminar hosted by the University of Ghent on 23 September 2014, with thanks to Prof Eva Brems and Dr Lourdes Peroni for their invitation to speak and to the seminar participants for their helpful feedback.
- 2 J Calvin, *Institutes of the Christian Religion*, Vol I, trans H Beveridge (Edinburgh, 1845; first published 1536), p 129.

Calvin may have been writing in the sixteenth century, but his desire to maintain the boundaries between objects and agents has a timeless resonance.<sup>3</sup> Theologians are not alone in seeking to understand the ‘irreducible materiality’ of the amulet, the icon or the fetish.<sup>4</sup> This article is prompted by an interest in the implications of this quest for the interpretation of the law, and it asks whether or not a Calvinist suspicion of objects used in religious practice has made its way into the freedom of religion case law of the European Court of Human Rights (hereafter ‘the Court’).

Article 9 of the European Convention on Human Rights (ECHR), which codifies the right to freedom of religion, is a qualified right: while the right ‘to freedom of thought, conscience and religion’ is absolute, the right to ‘to manifest one’s religion or beliefs’ can, under certain circumstances, be limited without causing a violation of the Convention. The differential protection offered to belief and practice – or, in the ‘Strasbourg jargon’,<sup>5</sup> the *forum internum* and the *forum externum* – seems to posit legally protectable religion as being ‘private, voluntary, individual, textual and believed’.<sup>6</sup> Yet the religion that anthropologists find in the field can be public, corporate and grounded in a mesh of physical objects and bodily practices. Indeed, material objects are so critical to the creation of religious worlds that the anthropologist Webb Keane has argued that ‘Religions may not always demand beliefs, but they will always involve material forms’,<sup>7</sup> and despite the iconoclastic convictions of Calvin and his brethren, even adherents of religious traditions descended from the Protestant Reformation use physical objects to achieve proximity to the divine. Some American evangelicals, for example, set out steaming cups of coffee at an empty place at the kitchen table so as to be better able to treat an invisible God as physically present.<sup>8</sup> Even the members of Zimbabwe’s Friday Masowe Church, who are so opposed to the mediation of religious power that they reject the use of Bibles in the same way that other Protestants ‘do without popes and rosary beads’,<sup>9</sup> still end up attributing a special efficacy to certain kinds of objects, such as a blessed medicine called ‘holy honey’.<sup>10</sup>

3 One contemporary example is our fascination with robots and artificial intelligence. See D Vidal, ‘Anthropomorphism or sub-anthropomorphism? An anthropological approach to gods and robots’, (2007) 13 *Journal of the Royal Anthropological Institute* 917–933, for a comparison of human interaction with robots and ritual interaction with divine beings.

4 W Pietz, ‘The problem of the fetish, I’, (1985) 9 *Res* 5–17 at 10.

5 L Peroni, ‘Deconstructing “legal” religion in Strasbourg’, (2014) 3 *Oxford Journal of Law and Religion* 235–257 at 236.

6 W Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ, 2005), p 5. Although Sullivan is writing of the American context, her description seems to apply equally to the ECHR.

7 W Keane, ‘The evidence of the senses and the materiality of religion’, (2008) 14 *Journal of the Royal Anthropological Institute* 110–127 at 124.

8 T Luhrmann, *When God Talks Back: understanding the American evangelical relationship with God* (New York, 2012), p 74. For further examples of Christian material culture in the United States, see C McDannell, *Material Christianity: religion and popular culture in America* (New Haven, CT, 1995).

9 M Engelke, *God’s Agents: biblical publicity in contemporary England* (Berkeley, CA, 2013), p xxiv.

Religious practice, in other words, seems to require religious objects. Drawing on studies of material religion that seek to uncover what it is that these objects ‘do, how they engage believers, what powers they possess’,<sup>11</sup> this article presents an anthropological account of the cases of *Austrianu v Romania*, *Kovalkovs v Latvia*, *Lautsi and others v Italy*, *Jones v UK* and *Eweida and others v UK* in an exploration of the kinds of protection that the Court is and is not willing to extend to objects used for religious purposes.<sup>12</sup> It examines the potential inconsistency between these cases’ valorisation of religion as belief and the lived experience of religion under three headings: first, the privileging of intellectual assent over sensory experience; second, the denial of agency to religious objects; and third, the requirement that religious practices be closely connected to an underlying belief. It concludes that interpretations of Article 9 which emphasise internal belief over external practice are somewhat ill-equipped to deal with the experience of lived religion, because they prioritise the immaterial over the material and downplay the centrality of objects in the creation and expression of religious worlds.

## INTELLECTUAL ASSENT AND SENSORY EXPERIENCE

Sensory anthropology suggests that literate, industrialised nations tend to privilege the sense of sight as a means of acquiring and processing information about the world.<sup>13</sup> Since the invention of the printing press, our emphasis on the intellectual legitimacy of information acquired through sight has been reaffirmed in the ‘small-p’ protestant understanding of religion noted above,<sup>14</sup> which views the ideal religious adherent as an individual Christian reading and accepting the Bible for him- or herself.<sup>15</sup> An emphasis on the written word as the most appropriate means of accessing information about the divine is evident in the case of *Austrianu v Romania*. Mr Austrianu, a Baptist prisoner, argued that he had suffered a breach of his Article 9 rights when prison authorities confiscated his radio-cassette player and religious audio tapes, which had been awarded to

- 10 M Engelke, *A Problem of Presence: beyond scripture in an African Christian church* (Berkeley, CA, 2007), pp 226–228.
- 11 S Plate, B Meyer, D Morgan and C Paine, ‘Editorial statement’, (2005) 1 *Material Religion: The Journal of Objects, Art and Belief* 4–9 at 7.
- 12 *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013); *Kovalkovs v Latvia* App no 32051/05 (ECtHR, 31 January 2012); *Lautsi and others v Italy* App no 30814/06 (ECtHR, 18 March 2011); *Jones v UK* App no 42639/04 (ECtHR, 13 September 2005); *Eweida and others v UK* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
- 13 C Classen, *Worlds of Sense: exploring the senses in history and across cultures* (London, 1993), pp 5–7; C Classen and D Howes, *Ways of Sensing: understanding the senses in society* (London, 2014), pp 170–171.
- 14 Sullivan, *Impossibility of Religious Freedom*, p 7.
- 15 For an example of the cultivation of ethical listening techniques and the formation of religious subjectivity, see C Hirschkind, *The Ethical Soundscape: cassette sermons and Islamic counterpublics* (New York, 2013).

him after the successful completion of a 'Christian moral education' programme.<sup>16</sup> The Court found that because Mr Austrianu could attend religious seminars, continue his religious education by correspondence and read religious books, his ability to practise his Baptist faith had not been entirely prevented by the confiscation of his cassette player.<sup>17</sup> In other words, his religious needs were deemed to have been adequately met by his ability to read, write and study. This suggests a highly textual approach to religion. It appears suspicious of the kinds of sensual worship that the Protestant reformers might have dismissed as indulgently ritualistic, and is wary of the 'chanting and loud clamor' that they might have thought to be lacking in 'true devotion'.<sup>18</sup> Further, it seems to indicate that aural practices are not as significant in the formation of religious subjectivity as an engagement with the written word, as the judgment partially justifies the confiscation of the cassette player by reference to Mr Austrianu's continued access to religious texts.<sup>19</sup> It was not treated as having religious significance in its own right, for if the Court had accepted its use as an important element of the claimant's religious practice 'then it should have not mattered what other kinds of manifestation were allowed to the applicant'.<sup>20</sup>

The valorisation of the interior and intellectual over the exterior and sensual was also evident in the Latvian government's submissions to the Court in *Kovalkovs v Latvia*. In this case, the applicant prisoner was a follower of Vaishnavism, also known as the International Krishna Consciousness Society (ISKCON). He alleged, inter alia, that the Latvian government had infringed his Article 9 rights by removing incense sticks from his cell. Mr Kovalkovs' religious worship included chanting, meditation, massaging with oils and seeking to light incense in shared prison accommodation.<sup>21</sup> Yet in spite of these many and varied religious manifestations, the Latvian state seemed to think that his religious *actions* were less likely to indicate religious adherence than his interior *beliefs*, which they apparently thought could be accessed by examining the texts he read and the study he undertook. In fact, the government initially alleged that they could not have infringed his right to practise Vaishnavism on the grounds that he was not, in their view, a follower of this religion. They based this submission on the fact that he had once participated in a distance-learning Bible study course. The Court rejected this argument, instead stating that 'a person's choice to educate himself' could not be seen as proof that he had changed his belief

16 *Austrianu* at paras 34–36.

17 *Ibid* at paras 103–107.

18 Ulrich Zwingli, quoted in J Pelikan, *Credo: historical and theological guide to creeds and confessions of faith in the Christian tradition* (New Haven, CT, 2003), p 165; Keane, 'Evidence of the senses', p 124.

19 *Austrianu* at para 105. The judgment also notes that prison authorities had offered the claimant the use of a cassette player in the prison's cultural-educational facility.

20 Peroni, 'Deconstructing "legal" religion', p 243.

21 See *Kovalkovs* at para 15 for a prison administrator's description of these practices in the context of Mr Kovalkovs' incarceration.

system,<sup>22</sup> but it seems that, from the perspective of the Latvian government, Mr Kovalkovs' very public and very material commitment to Vaishnava practice was thought to be less significant in determining his 'real' religion than his intellectual engagement with the sacred texts of another faith.

Although the Court recognised Mr Kovalkovs' religious practice as a manifestation of belief, it seemed unwilling to protect manifestations that had a material impact upon the surrounding environment.<sup>23</sup> Unlike interior belief, the sounds and smells produced by his worship troubled the secular state's distinction between legitimate private belief and illegitimate public passion.<sup>24</sup> As such, it was found that his use of incense could reasonably be limited to protect the rights of others. In reaching its decision, the Court referred to evidence from the Riga branch of ISKCON, which stated that the use of incense in worship was not mandatory.<sup>25</sup> Yet the sounds and smells of Vaishnava worship might well be considered central to the religious practice of those who are, in the words of Steven Gelberg, a former ISKCON member, '*aesthetic ascetics*'.<sup>26</sup> Gelberg describes Vaishnava worship as involving the sacralisation of the senses. This sacralisation can be seen in the ornate decoration of ISKCON temples, heard in the use of conch shells, Hare Krishna chanting and *kirtana* music, and smelled in the incense, fresh flowers and camphor used in Vaishnava worship: 'Krishna Consciousness calls not for an extinguishing of the senses and sense activity, but rather their purification and elevation through devotional activity.'<sup>27</sup> Krishna Consciousness, then, reminds us that sensory engagement can be a core component of religious worship. By contrast, the Court's focus on intellectual assent at the expense of bodily experience works to construct religion as something immaterial, because it fails to take into account that religion is inevitably grounded in matter and experience.

## ACTIVE OBJECTS

The Court's immaterial understanding of religion has resulted, at times, in a denial of the significance of religious objects for their users, including their agentive ability to mediate the divine. In the case of *Lautsi and others v Italy*, Ms Lautsi and her two children argued that the presence of crucifixes on the

22 Ibid at para 57.

23 See ibid at para 68, where the Court notes 'that the burning of incense sticks typically creates a powerful odour which is not pleasant to everyone and which might be disturbing to other prisoners'.

24 T Asad, *Formations of the Secular: Christianity, Islam, modernity* (Stanford, CA, 2003), p 8. For an empirical account of the resistance of the privatisation of religion, see J Casanova, *Public Religions in the Modern World* (Chicago, IL, 1994).

25 *Kovalkovs* at para 18.

26 S Gelberg, 'Exploring an alternative reality: spiritual life in ISKCON' in D Bromley and L Shinn (eds), *Krishna Consciousness in the West* (Lewisburg, PA, 1989), pp 135–163 at p 148, emphasis in original.

27 Ibid.

walls of Italian state schools infringed their right to education in conjunction with their Article 9 rights, as atheists, to freedom of thought, conscience and religion.<sup>28</sup> The case seemed to turn on how the crucifix ought to be interpreted, and on the kind of power that it might be thought to exercise over the impressionable students sitting under it. Reversing the decision of the Court's Second Section, the Grand Chamber dismissed Ms Lautsi's claims. This was due to its acceptance of the Italian government's argument that the crucifix was, at heart, a 'passive symbol'.<sup>29</sup> Judge Bonello, in his separate concurring opinion, refers to the 'mute presence of a symbol' as having no coercive effect on the pupils to whom it is exposed.<sup>30</sup> The majority similarly endorsed this rendering of the crucifix, suggesting that, although its meaning was, primarily, religious, the presence of a silent, passive symbol was not comparable to 'didactic speech or participation in religious activities'.<sup>31</sup> As such, it could not be said to have impacted the Lautsis' freedom not to believe.

*Lautsi* evinces a very different approach to religious symbols in state schools from that taken by the Court in cases involving Islamic headscarves, which have sometimes been understood to have an inherent proselytising effect upon the students to whom they are exposed.<sup>32</sup> As such, it is important to remember that the Court is not immune to continuing debates over the place of Christianity or the accommodation of religious minorities in Europe.<sup>33</sup> However, *Lautsi* seemed to suggest that the crucifix could be considered 'passive' because it was merely a visual symbol, an object lacking agency. Indeed, the Court's description of the crucifix as a mute symbol bears a striking similarity to the description of religious art as 'deaf and dumb' by the German iconoclast Andreas Karlstadt, who argued in 1522 that, since 'images are deaf and dumb, can neither see nor hear, neither learn nor teach and point to nothing other than the pure and simple flesh which is of no use, it follows conclusively that they are of no use'.<sup>34</sup>

Yet to refer to a crucifix as a passive symbol is to ignore much of the devotional practice that revolves around statues of Jesus, the Virgin Mary and the saints. These practices link 'the material world and the immaterial', bridging the gap between the mundane and the supernatural.<sup>35</sup> As the historian Robert Orsi

28 The right to education is protected under Article 2 of Protocol 1 of the ECHR.

29 *Lautsi* at para 36.

30 *Ibid*, concurring opinion of Judge Bonello at para 3.2.

31 *Ibid* at para 72.

32 See, for example, *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001).

33 For an anthropological account, see E Oliphant, 'The crucifix as a symbol of secular Europe: the surprising semiotics of the European Court of Human Rights', (2012) 28 *Anthropology Today* 10–12.

34 A Karlstadt, 'On the removal of images' in B Mangrum and G Scavizzi (eds), *A Reformation Debate: Karlstadt, Emser and Eck on sacred images*, trans B Mangrum and G Scavizzi (Toronto, 1991; first published 1522), pp 19–39 at p 25.

35 J Mitchell, 'Performing statues: the presence and power of Catholic saints' in D Morgan (ed), *Religion and Material Culture: the matter of belief* (London, 2010), pp 262–276 at p 264.

notes in relation to American Catholic women's devotion to St Jude, the patron saint of hopeless causes, Catholics maintain their relations with divine and saintly beings through their interaction with physical objects such as statues and prayer cards.<sup>36</sup> It is through these objects that the saints become physically present in their lives. In fact, these devotees of St Jude understand the saint, as represented in a picture or a statue, as having the power of sight. One such woman

taped a holy card to the back of a picture of her son in the Navy for the saint literally to keep an eye on the boy overseas; another propped his image up on her kitchen windowsill so she could talk to him as she washed dishes and cleaned vegetables.<sup>37</sup>

These snippets of devotion show that, for some Catholics at least, religious statues are not passive. Rather, they are conduits of 'power and presence'.<sup>38</sup>

It is for this reason that religious statues can do much more than see. In Jennifer Scheper Hughes's study of a sixteenth-century Mexican crucifix known as the Cristo Aparecido, she notes that the crucifix's fame and devotional following led to it being used, along with a number of other religious statues and images, to defeat a typhus epidemic facing Mexico City.<sup>39</sup> Hughes writes that the benefit of taking a biographical approach to this particular crucifix is that it 'highlights devotees' own relationship to their *santo*; they attribute to him *animus* – existence, being, and agency'.<sup>40</sup> Ironically, in *Lautsi*, the Court protected the privileged place of Catholic symbols in Italian state schools by revising the crucifix's biography in such a way that it was declared mute, passive and unable to influence its surrounding environment. But in a tradition in which religious statues can not only look and see but cry, bleed and heal, one could argue that the sight of the crucifix breaks just as many sensory boundaries as the sound of Mr Austrianu's audio tapes or the aroma of Mr Kovalkovs' incense. Looked at in this light, it seems that the atheist Ms Lautsi, by acknowledging the impact that a crucifix could have on those sitting under it, was the person who approached it in the most Catholic way.

36 R Orsi, *Thank You, St. Jude: women's devotion to the patron saint of hopeless causes* (New Haven, CT, 1996).

37 *Ibid.*, p 97.

38 Mitchell, 'Performing statues', p 266.

39 J Hughes, *Biography of a Mexican Crucifix: lived religion and local faith from the conquest to the present* (Oxford, 2010), pp 85–104.

40 *Ibid.*, p 5. See also I Kopytoff, 'The cultural biography of things: commoditization as process' in A Appadurai (ed), *The Social Life of Things: commodities in cultural perspective* (Cambridge, 1986), pp 64–94, on object biographies.

## BELIEF AND MANIFESTATION

The official hierarchy of the Catholic Church does not always sanction these sorts of interactions with statues of the saints, Jesus and the Virgin Mary. Lived religion may not always square with official dogma, instead taking its cue from a wide variety of sources that include not only the words of the parish priest but also family practices, local concerns and personal relationships. As such, there is often a tension between ‘the indescribable god of the mystic or negative theologian and the physicality of the amulet, universal ethical norms and particular bodily habits, high doctrine and ritual sounds and smells’.<sup>41</sup> It is this aspect of religious life that is the focus of the following section, which suggests that Article 9’s emphasis on religion as belief makes it difficult for the Court to protect the use of objects for which the claimant cannot demonstrate a sufficiently close link between an underlying belief and the object in question.

Such an issue arose in the case of *Jones v UK*. Mr Jones, a member of the Church in Wales, submitted that his Article 9 rights had been violated by Halkyn Community Council’s refusal to sanction a memorial stone incorporating a photograph on the grave of his daughter, who was buried in Halkyn Cemetery. The Court rejected this claim as inadmissible, stating that the incorporation of photographs on graves could not be considered a practice of religion.<sup>42</sup> *Jones* bears some similarity to the Florida case of *Warner v City of Boca Raton*, in which a number of plaintiffs sought, without success, to have the graveside shrines and statues they had erected around their dead kin protected as an expression of religion.<sup>43</sup> In Sullivan’s analysis, cases such as *Warner* are evidence of the impossibility of religious freedom, in that they require state institutions to define the limits of legally protectable religion.<sup>44</sup> Although Sullivan’s thesis is beyond the scope of this article, the case of *Jones* is evidence of a similar definitional problem: the difficulty of untangling religion from kinship.

In addition to his Article 9 rights, Mr Jones complained that his right to respect for ‘private and family’ life had also been infringed.<sup>45</sup> The Court found this complaint to be manifestly ill-founded, stating that Article 8 applies primarily to relationships between living human beings as opposed to those who have died.<sup>46</sup> Yet death rarely results in the severing of the ties that bind. Much religious practice revolves around managing the continuing relations between the living and the dead, whether through ancestor worship or

41 Keane, ‘Evidence of the senses’, p 123.

42 *Jones* at para 3.

43 *Warner v City of Boca Raton*, 64 F Supp 2d 1272 (SD Fla 1999).

44 Sullivan, *Impossibility of Religious Freedom*, ch 5.

45 ECHR, Art 8.

46 *Jones* at para 2.



praying for the souls of one's dearly departed kin. While these practices are often compelled by religious teaching or tradition, the people engaging in them may not always be able to offer a legally coherent explanation of the beliefs that underlie their behaviour. Sumbanese followers of the *marapu* ancestral religion, for example, may perform rituals directed at ancestral spirits despite their having 'only the dimmest ideas about those spirits. Where they are located, what they are up to when you're not making offerings to them, how they actually carry out acts like making it rain, are simply not of interest.'<sup>47</sup>

Similarly, in the United Kingdom, people keep the dead close without necessarily subscribing to what theologians might recognise as a doctrinally orthodox view of the afterlife.<sup>48</sup> The resting places of the dead are often personalised with individuating objects, from photographs to football jerseys, and these otherwise everyday objects can achieve a sacred status when associated with the dead.<sup>49</sup> The Court, however, did not seem to appreciate the relationship between kinship and religion. Indeed, its treatment of the potential religiosity of the photographic memorial is remarkable for its brevity. Mr Jones's claim was dismissed in a matter of sentences, with the Court stating that 'it cannot be argued that the applicant's beliefs required a photograph on the memorial or that he could not properly pursue his religion and worship without permission for such a photograph being given'.<sup>50</sup> For the Court to deploy a notion of religious practice that entirely discounts Mr Jones's own designation of his behaviour as 'religious' suggests a failure to appreciate that the lived experience of religion does not always match what others – whether religious authorities or outsiders – might understand as the theologically orthodox approach to ritual and belief.

A broader understanding of the manifestation of belief was taken in *Eweida and others v UK*. In these conjoined applications, a British Airways check-in clerk and a nurse at a state-run hospital argued that their Article 9 rights had been violated by their employers' uniform policies, which forbade the visible display of their cross necklaces. The UK government submitted that because the crosses were worn as 'a personal expression of faith', and not on the basis of a scriptural command, they did not fall under Article 9.<sup>51</sup> The Court rejected this argument, stating that a religious practice will be considered a

47 Keane, 'Evidence of the senses', p 113. See also E Evans-Pritchard's classic *Nuer Religion* (Oxford, 1956), p 316, in which he writes of the Nuer people that 'They say that they are merely *doar*, simple people, and how can simple people know about such matters? What happens in the world is determined by Spirit and Spirit can be influenced by prayer and sacrifice. This they know, but no more.'

48 One Church of England clergywoman recently told the author that some members of her parish conceptualise the afterlife in terms of relatedness, that is, of 'being' with deceased family members.

49 Sullivan, *Impossibility of Religious Freedom*, p 216.

50 Jones at para 3.

51 *Eweida* at para 58.

manifestation so long as ‘the act in question [is] *intimately linked* to the religion or belief’.<sup>52</sup> This is certainly a broader view of the kinds of acts that fall under the scope of Article 9 than that put forward by the UK. However, the Court still stressed that there must be a ‘sufficiently close and direct nexus between the act and the underlying belief’, which suggests that the use of religious objects will only be protected so long as they are seen as external proof of what is deemed to be religion’s real core, that is, belief.<sup>53</sup> As Lourdes Peroni notes, this propagates both a temporal and a spatial hierarchy of belief over practice, in that spatially internal belief must exist prior to the spatially external manifestation of that belief.<sup>54</sup>

For Mrs Eweida and Mrs Chaplin, proving a connection between their objects and their underlying beliefs was not an issue. After all, as members of religious traditions that place a great emphasis on the saving power of faith, it was not difficult for them to prove that the wearing of a visible cross was deeply connected to their belief in the death and resurrection of Jesus.<sup>55</sup> But for those whose religion is more concerned with orthopraxy than with orthodoxy, this broader understanding of what will be protected still leaves much religious practice out in the cold. The assumption that religious objects will have a meaning that can easily be explained to others risks sidelining the fact that, for a great many people, religion is as much about doing as it is about believing and, as *Jones* suggests, religious practices and the objects they require may not always map onto an official creed or doctrinal statement. As such, a restriction of protection to objects which have a definite basis in belief may end up benefiting some religious forms over others.<sup>56</sup>

## CONCLUSION

Article 9’s inbuilt privileging of the *forum internum* over the manifestation of religion or belief seems to have made it difficult for the Court to protect objects used for religious purposes.<sup>57</sup> In *Austriano*, Article 9’s protestant-with-a-small-p definition of religion led the Court to suggest that religious needs could be adequately met by the ability to read and study religious texts, thereby emphasising the intellectual aspects of religion over alternative or complementary forms of embodied engagement. In *Kovalkovs*, it allowed the Court to downplay the potential centrality of sensory worship in the

52 Ibid at para 82, emphasis added.

53 Ibid.

54 Peroni, ‘Deconstructing “legal” religion’, p 255.

55 Mrs Eweida is a Coptic Orthodox Christian, while Mrs Chaplin is a member of the Free Church of England.

56 Peroni, ‘Deconstructing “legal” religion’, pp 248–251.

57 Unless, as noted above, the object in question is ‘intimately linked’ to belief.

claimant's religious practice, while in *Lautsi* it led to the protection of a religious object through the denial of its agency. Further, this belief-based approach to religion leads to difficulties for those who cannot demonstrate a satisfactory connection between the use of a religious object and their underlying religious beliefs. Although this connection was easily demonstrated in the case of *Eweida*, it was dismissed in the case of *Jones*, where the Court found that the desire to erect a photographic memorial could not be considered a practice of religion.

The Article 9 case law often refers to the idea of proportionality, to balancing the competing interests that are at play in any given case.<sup>58</sup> Yet it is worth reflecting on the fact that for those for whom religion forms the cornerstone of their identity, almost any interference with their religious practice might be deemed disproportionate. The significance of Shirley Chaplin's crucifix to her sense of Christian self is, perhaps, a case in point. Unlike in the case of Nadia Eweida, the British Airways check-in clerk, Mrs Chaplin's treatment was not deemed to have violated the Convention. The Court found that the managers of the hospital in which she worked 'were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence'.<sup>59</sup>

That health and safety concerns proved 'a compelling and proportionate reason' to interfere with Mrs Chaplin's freedom to manifest her belief was, perhaps, 'unsurprising',<sup>60</sup> and it was for this reason that some quarters welcomed the ruling as a victory 'for common sense'.<sup>61</sup> From Mrs Chaplin's perspective, however, the judgment was nothing of the sort. It is therefore worth considering why she attached such great significance to an object that some would easily dismiss as a health and safety risk. As with the Protestant reformers invoked at the beginning of this article, Mrs Chaplin understands her salvation to be guaranteed by her faith in Jesus, not by the cross around her neck. However, she also believes that removing her cross would represent 'a violation of [this] faith'.<sup>62</sup> She sees her crucifix as being similar to a wedding ring; it is, after all, a sign of the covenant relationship she has made with God, and she worried that taking it off would be tantamount to 'divorcing God'.<sup>63</sup>

58 In relation to Mr Austrianu's cassette player, see *Austrianu* at paras 103–107; to Mr Kovalkovs' incense, see *Kovalkovs* at paras 63–69; to the Italian state's crucifix, see the concurring judgment of judges Rozakis and Vajčić in *Lautsi*; and in relation to Mrs Eweida's and Mrs Chaplin's cross necklaces, see *Eweida* at paras 93–101.

59 *Eweida* at para 99.

60 M Hill, 'Lillian Ladele is the real loser in the Christian discrimination rulings', *The Guardian*, 17 January 2013, available at <<http://www.theguardian.com/commentisfree/belief/2013/jan/17/lillian-ladele-loser-christian-discrimination-rulings>>, accessed 1 October 2014.

61 A Copson, 'BHA: "Persecution of Christians" and "aggressive secularism" claims exposed as false by European court judgment', 15 January 2013, available at <<http://www.politics.co.uk/opinion-formers/bha-british-humanist-association/article/persecution-of-christians-and-aggressive-secularism-claims-e>>, accessed 1 October 2014.

62 *Eweida* at para 18.

As was noted at Mrs Chaplin's tribunal hearing, not all Christians would attach such significance to the visible wearing of a cross or crucifix,<sup>64</sup> and fewer still would feel compelled to pursue the issue to the European Court of Human Rights. Some conservative evangelicals even worried that the case's emphasis on an object (as opposed to the saving power of faith) might actually work to the detriment of the claimant's gospel witness.<sup>65</sup> But Mrs Chaplin is also an evangelical Protestant, and from her perspective the presence of the cross actively reinforced her Christian faith by encouraging her to demonstrate another Protestant virtue: that of sincerity, or the alignment of belief, word and deed. In other words, the physicality of the cross helped to make an 'interior state relatively visible'.<sup>66</sup> As she said at her tribunal:

if others know I am a Christian because they see the Cross on my necklace, I tend to focus more on my actions and words to keep them as consistent as possible with the requirements of my Christian faith. If I were forced to not wear the Cross, my accountability to Christian living while at work may be compromised and my actions may suffer.<sup>67</sup>

Mrs Chaplin's case is a reminder that, even in the Reformed tradition, religious objects are critical in the formation of religious subjects. As with cases involving an alleged breach of conscience, the relationship between a belief and its manifestation – that is, whether a belief causes a manifestation or a manifestation contributes to a belief – is a complex one.<sup>68</sup> For Mrs Chaplin, the importance she attached to her crucifix was great enough for her to give up a much-loved career in frontline nursing. Given that religious objects have the power to force such decisions, it seems likely that the Court will continue having to wrestle with these carnal exhibitions,<sup>69</sup> and with the agency with which religious subjects endow them.

63 'Call for new law to protect workers wearing crosses', *Christian Concern*, 25 January 2013, available at <<http://www.christianconcern.com/our-concerns/religious-freedom/call-for-new-law-to-protect-workers-wearing-crosses>>, accessed 1 October 2014.

64 *Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009 at para 17. See also L Peroni, 'The European Court of Human Rights and intragroup religious diversity: a critical review', (2014) 89 *Chicago-Kent Law Review* 663–687, for an account of the Court's approach to intragroup religious diversity.

65 The author's field research, which was carried out at a conservative evangelical church, found that some congregants thought that the *Chaplin* and *Eweida* cases (or their media portrayal) had overemphasised the importance of external symbols at the expense of internal faith.

66 W Keane, *Christian Moderns: freedom and fetish in the mission encounter* (Berkeley, CA, 2007), 210.

67 *Eweida and Chaplin v UK* App nos 48420/10 and 59842/10, Statement of Facts (ECtHR, 12 April 2011).

68 See *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 and *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, as well as their subsequent appeal to the European Court of Human Rights in *Eweida and Others v UK*.

69 Calvin, *Institutes of the Christian Religion*, p 129.