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STATUTORY RELIGIOUS ACCOMMODATION IN EMPLOYMENT AND THE PROBLEMS OF JUDICIAL INTENT AND OUTCOME

by: R. George Wright[*]

I. INTRODUCTION

It is fair to say that intentions, including the most benevolent, do not dictate actual outcomes.[1] Policies, including those adopted by courts, can and do not only fail, but also, perversely, actually backfire.[2] Predicting the paths of causal chains in the realm of public policy should be daunting.[3] So we should not be surprised when benevolently intended policy judgments lead to the opposite of their intent.[4] The latest important example of this phenomenon is the Supreme Court's statutory religious discrimination case of *Groff v. DeJoy*.[5]

Below, I briefly examine the circumstances underlying *Groff*[6] and the crucial prior case law.[7] I then consider at length the *Groff* Court's treatment of both a substantial hardship and an undue hardship in accommodating workers' religious discrimination claims.[8] The Court in *Groff* created broad and important analytical gaps, generated a serious problem of distinguishing religious from political or cultural claims, and produced an even more severe problem of judicial intentions versus actual real-world effects.[9] A brief conclusion summarizes the argument.[10]

II. *GROFF*'S RECONSTRUCTION OF HARDSHIP AND ACCOMMODATION

In *Groff*, the plaintiff was an Evangelical Christian who took employment with the United States Postal Service.[11] Groff's job responsibilities were—for a time—compatible with his religious belief that Sunday should be reserved for rest and worship rather than secular labor.[12] Eventually, though, the U.S Postal Service's increased contracts with Amazon required a greater Postal Service commitment to Sunday and holiday deliveries.[13]

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[1] *See, e.g.*, WHEN SCHOOL POLICIES BACKFIRE: HOW WELL-INTENDED MEASURES CAN HARM OUR MOST VULNERABLE STUDENTS 3 (Michael A. Gottfried & Gilbert Q. Conchas eds., 2016).

[2] *See id. But cf.* Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. REV. 819, 819 (2002) (introducing important limitations on common conceptions regarding the scope of the problem with backfiring policies).

[3] *See, e.g.*, Jim Manzi, *What Social Science Does—and Doesn't—Know*, CITY J. (2010), www.city-journal.org/article/what-social-science-does-and-doesnt-know [https://perma.cc/6UMK-XSM3].

[4] At the extreme, see *Dred Scott v. Sandford*, 60 U.S. 393 (1856) insofar as the case may have been intended to defuse, if not resolve, the controversy over slavery.

[5] Groff v. DeJoy, 600 U.S. 447 (2023) (significantly altering the commonly understood broad meaning of Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)).

[6] *See infra* notes **Error! Bookmark not defined.**–21 and accompanying text.

[7] *See infra* notes 22–27 and accompanying text.

[8] *See infra* notes 28–104 and accompanying text.

[9] *See id.*

[10] *See infra* Part IV.

[11] Groff v. DeJoy, 600 U.S. 447, 454 (2023).

[12] *Id.*

[13] *Id.* at 454–55.

Groff sought and received transfers in an effort to avoid Sunday delivery assignments.[14] But these efforts were, in the end, unsuccessful.[15] During peak demand periods, his coworkers made the Sunday deliveries assigned to Groff.[16] At this point, the workplace in question was a small postal station with a total of only seven employees.[17] Some of the Sunday deliveries assigned to Groff were, in fact, made by the local postmaster, whose responsibilities did not normally include making any deliveries.[18] Groff's refusal to make Sunday deliveries under these circumstances and progressive discipline eventually resulted in his resignation and the filing of his Title VII religious discrimination claim.[19]

Title VII of the Civil Rights Act of 1964 prohibits the failure or refusal of covered employers "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of . . . religion."[20] Nondiscrimination in this context is interpreted to require the employer's reasonable accommodation of the employee's religious needs up to the point at which the accommodation would impose statutory "undue hardship" on the conduct of the employer's business.[21]

This formulation of the statutory limits on mandatory religious accommodation of course requires some clarifying interpretation. For decades prior to the *Groff* case, courts had focused, in many instances, on a particular verbal formulation in the Court's *Hardison v. TWA* case.[22] Justifiably or not, courts had often attended to the Court's declaration in *Hardison* that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[23]

The *Groff* Court focused instead on references in *Hardison* to a distinction between costs, or expenditures, that are either "substantial" or else "not 'substantial.'"[24] According to the Court in *Groff*, "there is a big difference between costs and expenditures that are not 'substantial' and those that are 'de minimis,' which is to say, so 'very small or trifling' that they are not even worth noticing."[25] The Court conceded that a number of cases have embraced "*de minimis*" costs to the employer as the governing standard.[26] But on the Court's current view, the *Hardison* case should instead be read as concluding that barely "more than a *de minimis* cost" does not reach the "undue hardship" standard statutorily imposed by Title VII.[27]

[14] *Id.* at 455.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 455–56.
[20] *Id.* at 457 (quoting 42 U.S.C. § 2000e-2(a)(1) (1964)).
[21] *Id.* (quoting 29 C.F.R. § 1605.1 (2024)), as codified at 42 U.S.C. § 2000e(j) (1964).
[22] *See Groff*, 600 U.S. at 464 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).
[23] *Id.* (quoting *Hardison*, 432 U.S. at 84).
[24] *Id.* (citing *Hardison*, 432 U.S. at 83).
[25] *Id.* (quoting *de minimis*, BLACK'S LAW DICTIONARY (5th ed. 1979)). There is also a big difference between costs, broadly defined, to an employer or to other employees, and employer expenditures defined more narrowly.
[26] *Id.* at 465.
[27] *See id.* at 468.

On this basis, the *Groff* Court then crucially endorsed a "substantial burden" test as the required measure of an employer's undue hardship.[28] The Court declared that "[w]e . . . understand *Hardison* to mean that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business."[29] The substantial burden test was, quite rightly, then said to be a "fact-specific inquiry."[30]

The problem here is that ordinary language suggests that there is a gap, and potentially a large gap, between a *de minimis*, or trivial, burden on the one hand, and a genuinely substantial hardship-level burden on the other. There is plainly a significant territory between the highest or "heaviest" *de minimis* burden and the "lightest" genuinely substantial burden. But *Groff*, unfortunately, does not discuss this undeniably extensive and important middle ground between the trivial and the genuinely substantial.

At this point, the *Groff* Court engaged in a dictionary-focused consideration of the meaning of "hardship" and of "undue hardship."[31] The Court determined that a "hardship" must be "something hard to bear,"[32] and perhaps a matter of "suffering or privation,"[33] if not "extreme privation."[34] In any event, the Court concluded that "a hardship is more severe than a mere burden."[35]

Thus, an increase in costs to an employer, up to some unspecified point, may indeed be a burden, but not severe enough of a burden to count as a hardship.[36] And on the Court's approach, an employer's defense to an employee's claim for religious accommodation is then further limited. The hardship to the employer must be "undue" as well.[37]

Let us here try to separate the descriptive from the normative. "Undue" hardship cannot simply be synonymous, by definition, with a "substantial" hardship. "Substantial" retains too much of a descriptive element to fully capture the undeniably normative meaning of "undue" hardship. To say that a hardship is "undue" is, instead, both judicially decisive and almost purely evaluative. The Court thus rightly elaborated on the meaning of "undue" hardship in the normative terms of "excessive or unjustifiable" and "unsuitable or inappropriate."[38]

"Undue hardship" as a normative conclusion as to an employer's circumstances is thus distinct from any essentially descriptive degree of hardship, as well as from a mere *de minimis*, or

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[28] *See id.* For academic responses to the *Groff* holding, see, for example, *Title VII—Religious Accommodations*—Groff v. DeJoy, 137 HARV. L. REV. 470 (2023); Nick Reaves, Groff v. DeJoy: Hardison *Is Dead, Long Live* Hardison*!*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 39 (2023). *See also* Hebrew v. Texas Dep't of Crim. Just., 80 F.4th 717, 721–22 (5th Cir. 2023) (discussing *Groff*); Hamilton v. Dallas Cty., 79 F.4th 494, 507–08 (5th Cir. 2023) (same).

[29] *Groff*, 600 U.S. at 468.

[30] *Id.*

[31] *See id.* at 468–71.

[32] *Id.* at 468 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 646 (1st ed. 1966)).

[33] *Id.* at 469 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1033 (1971)). The real coherence and import of the idea of an abstract corporation's "suffering" is not obvious. Does the size of the corporate employer sometimes matter in this specific context?

[34] *Id.* (quoting AMERICAN HERITAGE DICTIONARY 601 (1969)).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* (quoting WEBSTER'S THIRD, *supra* note 33, at 2492 ("'inappropriate,' 'unsuited,' or 'exceeding or violating propriety or fitness'")).

a minimal, burden.[39] "Substantiality" operates as a largely descriptive test, marker, or some other sort of indicator for the ultimately judicially conclusive normative standard of "undue" hardship.[40]

One unavoidable problem here is that most of our common understanding of "hardship" derives from the partly subjective, including the emotional, experiences of actual human persons, as opposed to merely artificial, abstract, corporate employers. Hardship is often largely a matter of deprivation, including a clearly subjectively conscious sense of that deprivation. Ordinarily, suffering and pain, as subjectively and consciously experienced, contribute substantially, at the very least, to the phenomenon of hardship.

Corporate defendants in religious accommodation cases may indeed have made a corporate decision to religiously discriminate, or not to accommodate an employee's religious practice. But it is not at all clear that an artificial, impersonal corporate defendant can undergo, or experience, hardship as the idea of hardship is normally envisioned.

Does a corporation endure hardship if the corporate bottom line deteriorates, perhaps beyond a certain point? Is there corporate hardship if the corporation is now less profitable, or loses money, or goes into Chapter 11 bankruptcy, or must liquidate its assets? Is insolvency painful or burdensome for the corporate employer itself? Is not corporate "belt-tightening" only a metaphor, and only loosely analogous to the hardship undergone by natural persons? Corporate "hardship" is, in reality, not even a remote approximation of any core, familiar, standard instance of actually suffered hardship.

Equally important, though, is the Court's discussion of hardship, of whatever sort, that is then further deemed to be "undue." "Undue" hardship is, as noted above,[41] cashable not in descriptive terms, but in largely evaluative terms.[42] Undue hardship is, understandably, conceived of as hardship that is excessive, unjustifiable, unsuitable, or inappropriate,[43] in a normatively decisive way. To call anything excessive, unjustifiable, unsuitable, or inappropriate is not to merely describe something, pending some further investigation into whether it is still somehow justifiable. "Undueness" or "excessiveness" is not a judicial test. It is the ultimate result of applying some judicial test. It has already been exposed to a decisive test and has failed that test. Thus, to judicially declare something to be unjustifiable is not to set up, call for, or specify some further test. Loosely related, excessive punishment is already not judicially permissible punishment. Lack of due process, where any process is owed, similarly, cannot be due process.

Now, with or without *Hardison* or *Groff*, we should already know that at least typically, mere *de minimis* costs to the employer will not suffice to show hardship that is undue.[44] This conclusion is more a matter of dictionary definition than of any distinct substantive judicial policy. A *de minimis* burden is, by definition, judicially trivial or inconsequential.[45] The *Groff* Court

[39] *Id.* ("When 'undue hardship' is understood in this way, it means something very different from a burden that is merely more than *de minimis* . . . .").

[40] *Id.* at 468 ("In describing an employer's 'undue hardship' defense, *Hardison* referred repeatedly to 'substantial' burdens, and that formulation better explains the decision. We therefore . . . understand *Hardison* to mean that 'undue hardship' is shown when a burden is *substantial*. . . .") (emphasis added).

[41] *See supra* note 38 and accompanying text.

[42] *Id.* at 469.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 464 ("Of course, there is a big difference between costs and expenditures that are not 'substantial' and those that are 'de minimis,' which is to say, so 'very small or trifling' that that they are not even worth noticing.").

chose, among other alternatives to a *de minimis* standard, the rule that the increase in costs to the employer must instead be substantial if the employer is to prevail.[46]

How, though, is a court to determine that an increase in employer costs that is somehow attributable to a religious accommodation—and not to other causes—is substantial? The *Groff* Court declares that the test for substantiality "takes into account all relevant factors in the case at hand."[47] After *Groff*, the courts are thus left with an open-ended, broadly inclusive, highly fact-sensitive, particular circumstance-dependent balancing test.[48]

Judicial guidance in these respects is thus plainly necessary. By way of providing at least some general guidance, the *Groff* Court declares that among the relevant factors will be "the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of [an] employer."[49] In practice, though, even this apparently commonsensical guidance may actually be misleading.[50] Focusing on all that is relevant in only the particular case at hand may well lead courts to ignore the crucial cumulating effects of additional, arguably similar later claims.[51] Coworkers may now think of themselves as situated similarly to the initial prevailing religious claimant. At some point, courts may find, as in the classic fallacy of composition,[52] that accommodating a number of religious claimants is qualitatively very different from accommodating the first one or two such claimants. The Court historically recognized a version of this cumulation, or aggregation, problem in the classic wheat production Commerce Clause case of *Wickard v. Filburn*.[53]

But there will also be cases in which the courts should clearly not take hypothetical future cases into account. Asking what would happen if everyone, or just a number of others, did what a claimant seeks to do is not always appropriate.[54] Consider a hospital at which a religious claimant seeks to pray silently in a secluded, unobserved spot from noon to 12:05 p.m. on Fridays. An accommodation might be required for that claimant. But disaster would likely result if everyone in the hospital did exactly the same thing. Surgical patients might die, and crucial phone calls might go unanswered, perhaps ultimately putting the hospital out of business. Courts should normally focus, in that circumstance, on the reality that the claimant is not seeking to become a free rider, and that no disastrous imitation or universalization will, in fact, take place.

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[46] *Id.* at 470 ("We think it is enough to say that an employer must show that the burden of granting an accommodation would result in *substantial* increased costs in relation to the conduct of its particular business.") (emphasis added).

[47] *Id.*

[48] *Id.*; Hamilton v. Dallas Cty., 79 F.4d 494, 506–08 (5th Cir. 2023) (Ho, J., concurring) (noting some unresolved questions and fact-sensitive issues now generated by the *Groff* approach).

[49] *See Groff*, 600 U.S. at 470–71.

[50] *Id.* at 470.

[51] *See* Maurice A. Finocchiaro, *The Fallacy of Composition: Guiding Concepts, Historical Cases, and Research Problems*, 13 J. APPLIED LOGIC 24, 24 (2015), https://doi.org/10.1016/j.jal.2015.01.003; Trudy Govier, *Collective Responsibility and the Fallacies of Composition and Division*, OSSA CONF. ARCHIVE (2001), https://scholar.uwindsor.ca/cgi/viewcontent.cgi?article= 1629&context=ossaarchive [https://perma.cc/QQ9J-XFCD]; William L. Rowe, *The Fallacy of Composition*, 71 MIND 87, 87 (1962), https://doi.org/10.1093/mind/LXXI.281.87. The problem of aggregated instances of religious accommodation is noted but not resolved in *Hebrew v. Texas Dep't of Crim. Just.*, 80 F.4d 717, 723 (5th Cir. 2023) (applying *Groff*).

[52] *See* sources cited *supra* note 51.

[53] Wickard v. Filburn, 317 U.S. 111, 127–28 (1942).

[54] *See* Marcus G. Singer, *Generalization in Ethics*, 64 MIND 361, 361–62 (1955), https://doi.org/10.1093/mind/LXIV.255.361; Kent Bach, *When to Ask, "What if Everyone Did That?,"* 37 PHIL. & PHENOMENOLOGICAL RES. 464, 480–81 (1977), https://doi.org/10.2307/2106428.

The Court then suggests that "temporary costs, voluntary shift swapping . . . or administrative costs," either categorically or typically, will not amount to a substantial hardship.[55] But it is hardly clear that the presence of any one, two, or all three of these conditions cannot quite commonly aggregate to a substantial hardship to the employer. And more fundamentally, there is no reason why temporary costs cannot also be substantial, if not devastating. Voluntary job swapping may become less voluntary and more costly in subtle ways over time, even if no formal objection is lodged. Nor is there any reason why administrative costs cannot be substantial costs, or even push an employer into bankruptcy.

The *Groff* Court then focuses specifically on the crucial fact that religious accommodation for one or more employees may well affect, in one way or another, other employees. The Court tries to distinguish between impacts on fellow employees that then go on to affect the conduct of the employer's business and impacts on fellow employees that have no such effects on the business.[56] The problem here is that the effects of one or more religious accommodations, in succession or not, on fellow employees, including on their morale, motivation, and initiative-taking, will plainly be hard to measure. But hard to measure effects can be substantial. Consider, by analogy, controversial attempts to measure the overall business effects, over a period of time, of working from home[57] or the phenomenon of "quiet quitting."[58]

The *Groff* Court then crucially attempts to impose an absolute, categorical exclusion of some factors from any consideration at all in assessing employer hardship.[59] Some workplace phenomena are thus to be identified, but then ignored, in determining whether a proposed accommodation involves a substantial, and thus an undue, burden on the employer's business.[60] These forbidden, non-cognizable, and often difficult-to-identify considerations may involve a coworker's reactions to a worker's religion or to the proposal or adoption of a religious accommodation.[61] The Court's references, here and elsewhere, it should be emphasized, to coworkers often encompass broad categories of customers, suppliers, corporate personnel, and students in school employment contexts.[62]

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[55] *Groff*, 600 U.S. at 471 ("Accordingly, today's clarification may prompt little, if any, change in the agency's guidance explaining why no undue hardship is imposed by temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs.").

[56] *Id.*

[57] *See* Nick Bloom, *Does Working from Home Damage Productivity? Just Look at the Data*, THE HILL (Sept. 29, 2023), https://thehill.com/opinion/technology/4228100-does-working-from-home-damage-productivity-just-look-at-the-data/ [https://perma.cc/RC6T-FFQA]; Benjamin Laker, *Working from Home Leads to Decreased Productivity, Research Suggests*, FORBES (Aug. 2, 2023), https://www.forbes.com/sites/benjaminlaker/2023/08/02/working-from-home-leads-to-decreased-productivity-research-suggests/?sh=79969a222afe [https://perma.cc/3BTH-GXL3].

[58] *See, e.g.*, Jim Harter, *Is Quiet Quitting Real?*, GALLUP, www.gallup.com/workplace/398306/quiet-quitting-real.aspx (May 17, 2023) [https://perma.cc/YMZ9-JF3K].

[59] *See Groff*, 600 U.S. at 472.

[60] *See id.*

[61] *See id.*

[62] *See* 42 U.S.C. § 2000e(b), (f) (defining "employer" broadly as "engaged in an industry affecting commerce who has fifteen or more employees" and "employee" as "an individual employed by an employer").

Specifically prohibited from any consideration in alleged undue hardship cases are any coworker's religious dislike,[63] animosity,[64] bias,[65] hostility,[66] aversion,[67] or discomfort[68] with respect to either the requester of a religious accommodation or to the mere fact of a proposal of, or the provision of, a religious accommodation.[69] The Court's logic here is loosely akin to that of a court's declining to grant a heckler's veto of personal disliked speech in the free speech cases.[70] In the Court's own words, "[i]f bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself."[71] The idea is presumably that coworkers should not be empowered to sabotage otherwise reasonable accommodations of a worker's religious beliefs or practices based on their own religious or anti-religious beliefs.[72]

Part of the deeper problem here is that if we know only that a person opposes, dislikes, bears animus toward, or is hostile toward a particular religious belief or practice, we unfortunately know nothing of the underlying grounds, reasons, or the nature and character of that opposition. Opposition to a religious belief or practice need not be based, in any measure, on some opposing religion or nonreligion. Opposition to a religious practice can just as easily be based on, say, one's presumably nonreligious political or cultural views. And Title VII is clearly not about protection from discrimination on political, general cultural, or ideological grounds.[73]

Thus, a coworker's opposition to, say, a religious display on a worker's desk need not be based on religion. Imagine, for example, a religious display that clearly opposes abortion and a coworker's opposition to that display. Must such opposition be based, wholly or in part, on some different or conflicting religious belief or on opposition to some or all religions? Evidently not.[74] A coworker who objects to restrictions on abortion may be utterly indifferent to any religious or nonreligious grounds, motives, or beliefs of the worker in question. The objection could easily be on what are taken to be secular political grounds.

Or consider a display on one's desk, for largely if not entirely religious reasons, of a Star of David that a coworker resents. Is the coworker's resentment necessarily also motivated by some religion, largely if not entirely? Suppose the coworker claims the resentment, with whatever plausibility in any given case, to be based not on hostility to any form of Judaism as a religion, or to Israel as a sovereign political state, or to Zionism as a political movement, but to some assumedly secular political program adopted by the State of Israel. The coworker's resentment or hostility could thus be plausibly based not on religion but on politics, culture, or national-ethnic

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See id.*

[67] *See id.* at 473.

[68] *See id.*

[69] *See id.* at 472.

[70] *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4 (1949); *see also* R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RSRV. L. REV. 159, 159 (2017).

[71] *Groff*, 600 U.S. at 472.

[72] *See id.* at 472–73.

[73] *See generally* R. George Wright, *Political Discrimination by Private Employers*, 87 U. CIN. L. REV. 761 (2019). We do not, however, suggest that political speech cannot also amount to actionable Title VII discrimination. *See, e.g.*, Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1246–47 (10th Cir. 1999).

[74] *See, e.g.*, Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47, 47 (1971); Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFFS. 37, 37 (1972). More elaborately, see Susan M. Wolf, *Book Review: Creation and Abortion: A Study in Moral and Legal Philosophy*, 10 CONST. COMMENT. 502 (1993).

rivalries. Crucially, after *Groff*, problems of establishing motive and problems of religious intersectionality are now much more frequent and now loom much larger and more intractable.[75]

Disentangling religion from nonreligious politics, culture, or nationality/ethnicity will thus often be remarkably difficult and, beyond some frequently reached threshold point, realistically impossible. The coworker who resents the Star of David may well, indeed, not have sorted out her own motivations, conscious or otherwise. Anti-Zionism can certainly provide cover for antisemitism.[76] This cover is evidently a common phenomenon.[77] But it remains true as well that "one can harshly criticize Israel's leaders and actions without being antisemitic."[78] One can, for example, criticize Israeli policy[79] without approaching, let alone falling into, anything like historic or contemporary antisemitic tropes, slurs, slanders, or stereotypes.

Similarly, a display of a Christian cross or other Christian symbol might offend a coworker. But that coworker might be motivated by what they take to be the secular, political, or cultural implications of some form of Christianity. The coworker might believe, whether justified or not, that the Christian cross carries adverse but entirely secular implications for broad categories of persons, including women and sexual minorities, or for the religiously uninhibited pursuit of, say, population stabilization, science, biotechnology, and medical progress.[80]

Consider, in particular, objections to a worker being granted an exemption on religious grounds from a company's vaccination requirements. Such coworker objections may, but may not, themselves have any religious element. The opposing, entirely secular idea may simply be that the exempt employees are being irresponsible with respect to their coworkers' physical health.

Distinguishing religiously based hostility to a display or an accommodation from nonreligiously based hostility is, post-*Groff*, much more often required and, realistically, remarkably difficult. Nor can the law simplify matters by asking what response and with what sort of intensity or emotion a given religious or nonreligious coworker should have to a religious display. Courts may ask what the opposing coworker actually believes and emotionally feels, or else what a reasonable coworker would believe and feel or, perhaps, what a reasonable coworker with some of the particular coworker's actual characteristics would believe and feel. But our loosely related experience with Justice O'Connor's endorsement test for Establishment Clause

[75] *See generally Anti-Zionism as Antisemitism: How Anti-Zionist Language from the Left and Right Vilifies Jews*, ADL (Apr. 4, 2023), https://www.adl.org/resources/blog/anti-zionism-antisemitism-how-anti-zionist-language-left-and-right-vilifies-jews [https://perma.cc/T7LJ-QNYD]. Courts must now also more fully and more frequently address increasingly difficult issues of religious intersectionality. *See* Rachel C. Schneider et al., *How Religious Discrimination Is Perceived in the Workplace: Expanding the View*, SOCIUS (Jan. 24, 2022), https://doi.org/10.1177/23780231211070920; Jackeet Singh, *Religious Agency and the Limits of Intersectionality*, 30 HYPATIA 657, 657 (2015).

[76] *See Anti-Zionism as Antisemitism*, supra note 75.

[77] *See id.*

[78] *Id.*

[79] *See, e.g.*, *Netanyahu Government Survives No-Confidence Votes in Israeli Parliament*, REUTERS (Mar. 27, 2023, 4:39 AM), https://www.reuters.com/world/middle-east/netanayhu-government-survives-no-confidence-votes-israeli-parliament-2023-03-27/ [https://perma.cc/E5ZM-PSQ7] (Knesset votes of 59–53 and 60–51, protesting judicial review overhaul plan).

[80] Consider the human health benefits pursued through a variety of genetic and biological engineering practices. *See, e.g.*, Usha Lee McFarling, *International Team Creates First Chimeric Human-Monkey Embryos*, STAT (Apr. 15, 2021), https://www.statnews.com/2021/04/15/international-team-creates-first-chimeric-human-monkey-embryos/ [https://perma.cc/D583-6P67].

cases[81] suggests that none of these approaches is likely to help in identifying—and sorting out—mostly religious from mostly—or entirely—nonreligious objections to a religious display.[82] In both the religious Title VII and the O'Connor endorsement test cases, the incentives for strategic, self-serving testimony as to the nature and strength of one's own sentiments are strong. Why not, after *Groff*, simply claim that one's objections to, say, a particular religious display are based, sufficiently or entirely, on secular political or cultural grounds? In truth, though, sincere objections to such displays are likely to be vague, multiple in their nature, and not in the form of separable concerns, as in discrete items on a list.[83] The coworker's objections are likely to amount not to a listing, but to an interactive, interdependent, "complex and structured array"[84] of more or less articulable considerations.

Whether strategically or not, a coworker's objection to a religious practice, or to any accommodation thereof, can thus often be credibly expressed in nonreligious terms. This is a lesson from the loosely related discussion of the controversial public reason liberalism of John Rawls.[85] Ordinary persons, no less than religiously minded legislators, can often credibly cite, more or less sincerely, one or more evidently secular reasons for their beliefs.[86] How often will the objecting coworker say, "I object to this religious display, but I concede that the religion it endorses has no seriously harmful secular consequences." Or anything like, "This is contrary to God's law and will, but it will have no significant adverse effects in secular terms."

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[81] *See, e.g.*, Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 778–82 (1995) (O'Connor, J., concurring). Consider, in particular, a public health-based, entirely secular objection to granting a religiously based exemption from a general workplace vaccination requirement. *See generally*, Dr. A. v. Hochul, 142 S. Ct. 552, 552 (2021) (mem.) (Gorsuch, J., dissenting from denial of injunctive relief).

[82] *See, e.g.*, Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1597 (2010) ("The use of a reasonable person standard in sexual harassment and ceremonial deism cases can, if it embodies the viewpoint of the dominant group, undermine the goals of Title VII and the Establishment Clause."); Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 739 (2006) ("[T]he reasonable observer analysis . . . will depend entirely on what background knowledge and cultural assumptions the judge feeds to the observer."); ERWIN CHEMERINSKY & FRANCES OLSEN, *Leading Cases*, *in* THE SUPREME COURT 1988 TERM, 103 HARV. L. REV. 137, 228–39 (1989) (critiquing variants of the endorsement tests in Establishment Clause cases); Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases:* McCreary County v. ACLU of Kentucky *and* Van Orden v. Perry, 4 FIRST AMEND. L. REV. 139 (2006); Benjamin I. Sachs, *Whose Reasonableness Counts?*, 107 YALE L.J. 1523 (1998); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 291 (1987) ("[R]eligious diversity in this country is sufficiently broad to ensure that almost anything government does will likely be seen by someone as endorsing or disapproving of a religious viewpoint or value.").

[83] *See* Jeremy Waldron, *Isolating Public Reasons*, *in* RAWLS'S POLITICAL LIBERALISM 113, 124 (Thom Brooks & Martha C. Nussbaum eds., 2015).

[84] *Id.*

[85] *See* JOHN RAWLS, POLITICAL LIBERALISM 1–11 (1996). For critiques of Rawls's public reason approach to lawmaking and its associated discourse, see STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE 221–25 (2010); STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC 349–50 (2018); Christopher J. Eberle, *Religious Reasons in Public: Let a Thousand Flowers Bloom, but Be Prepared to Prune*, 22 ST. JOHN'S J. LEGAL COMMENT. 431, 439 (2007); Kent Greenawalt, *On Public Reason*, 69 CHI.-KENT L. REV. 669, 686–88 (1994); David Hollenbach, *Public Reason/Private Religion? A Response to Paul J. Weithman*, 22 J. RELIGIOUS ETHICS 39, 45 (1994). More broadly, see LENN E. GOODMAN, RELIGIOUS PLURALISM AND VALUES IN THE PUBLIC SPHERE (2014).

[86] Eberle, *supra* note 85, at 436 (noting that "religious claims are less popular (affirmed by fewer people) than other sorts of reasons—secular reasons, or some subset of secular reasons").

III. *GROFF* AS PROMOTING THE OPPOSITE OF WHAT IT INTENDS

What we have discussed above contributes to, but is not itself, the most serious of *Groff*'s problems. Concisely put, *Groff* is, in practice, likely to produce—in many cases if not overall—effects that are diametrically opposed to those the *Groff* Court intends. *Groff* is likely, perversely, to backfire, and to exacerbate what *Groff* and Title VII itself both see as major workplace problems.

It is inevitable that any major social policy will have unintended consequences.[87] Not all of those unintended consequences will be favorable, or else neutral and insignificant. John Dewey once wrote that "[i]t is wilful folly to fasten upon some single end or consequence which is liked, and permit the view of that to blot from perception all other undesired and undesirable consequences. . . . Yet this assumption is continually made."[88] Worse, some policies, as in *Groff*, tend to achieve, in practice, the very antithesis of their broad purpose.

Let us then examine the nature and foundation of this "backfiring" problem in *Groff*. The Court in *Groff* clearly intended, as we have seen, to shift the judicial focus in Title VII religious accommodation cases away from anything like a *de minimis* employer-hardship standard[89] to a substantial-hardship-to-the-employer standard.[90] But there is, in reality, an important range of employee hardship that lies between the merely trivial, or *de minimis*, on the one hand, and a genuinely substantial hardship on the other. This is a major gap, and a major problem in applying *Groff*. But either way, the judicial understanding of "undue" employer hardship in *Groff* focuses on substantial, as distinct from even the highest merely *de minimis*,[91] hardships.

Anything like a shift from a *de minimis*, or barely more than *de minimis*, standard to a substantial hardship standard is plainly an attempt by the Court to require employers to bear greater burdens of religious accommodation. The judicial intent is clearly to require employers to accommodate more religious practices than in the past. We merely assume here, for the sake of the argument, that burdens on one or more coworkers can be sufficiently disentangled from burdens on the employer.[92] But in practice, distinguishing between those burdens on coworkers that are disentangled, and those burdens that are not disentangled, and then somehow translating those burdens into substantial burdens on the employer is difficult, if not impossible. Burdens on

[87] *See* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOCIO. REV. 894, 894 (1936); *see also* Richard Vernon, *Unintended Consequences*, 7 POL. THEORY 57 (1979) (examining how political theorists categorize and explain unintended consequences).

[88] JOHN DEWEY, HUMAN NATURE AND CONDUCT 229 (Dover Publ'ns, Inc. 2002) (1922).

[89] *See supra* note 23 and accompanying text.

[90] *See supra* note 24 and accompanying text.

[91] For classic accounts of the idea of a *de minimis* harm or a harm too trifling for the court to redress, see, for example, Frederick G. McKean, Jr., *De Minimis Non Curat Lex*, 75 U. PA. L. REV. 429 (1927); Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537 (1947); Sandifer v. U.S. Steel Corp., 571 U.S. 220, 233 (2014) (defining *de minimis non curat lex* to mean "the law does not take account of trifles"). On such an approach, a *de minimis* burden could not be a cognizable, let alone a legally undue, burden or hardship in the first place, by definition. *See id.* At a constitutional level, James Madison appears to have endorsed the *de minimis* principle in at least some Establishment Clause contexts. *See* JAMES MADISON, WRITINGS 787–88 (Jack N. Rakove ed., 1999) (letter to Edward Livingston of July 10, 1822). *But see* Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (per curiam) ("Applicants . . . are irreparably harmed by the loss of free exercise rights 'for even minimal periods of time . . . .'") (citations omitted).

[92] *See supra* note **Error! Bookmark not defined.** and accompanying text.

employees, however intangible, may well be translated, directly or indirectly, and over a shorter or longer term, into burdens on the employer.[93]

In any event, the shift in *Groff* from something like *de minimis* burdens to substantial burdens, however fleshed out, is clearly aimed at benefiting, overall, employees who may request some religious accommodation in the workplace. By analogy, now shifting a standard of proof to a lighter, mere preponderance of the evidence standard from a prior and more demanding clear and convincing evidence standard would normally be intended to benefit, overall, persons bringing claims. Similarly, a judicially imposed shift from minimum scrutiny to strict scrutiny of government actions would normally be intended to benefit, all things considered, persons bringing claims against the government.

In the religious Title VII cases, requiring the employer to do more, and to bear greater costs, in accommodating religious beliefs and practices is thus plainly intended to benefit, overall, those who might wish to bring such religious claims. But this benevolent intention may well not be fulfilled in practice, under our actual contemporary cultural circumstances.

The *Groff* Court doubtless sought, more particularly and more fundamentally, something like less religiously related employee alienation and low morale. We must, however, consider the contemporary cultural landscape, including its workplaces, as it actually stands. General amiability and universal respect are in distinctly short supply in many workplaces, as elsewhere.[94]

And in our general corporate and cultural context, many employees of all sorts may already feel rather limited solidarity or devotion to the overall corporate workplace or employer, or to enhancing the overall corporate balance sheet.[95] It is said that "enterprises are becoming

[93] *See, e.g.*, Robert Half, *3 Signs of Low Employee Morale and How to Meet the Challenge*, ROBERT HALF (Apr. 7, 2023), https://www.roberthalf.com/us/en/insights/management-tips/5-signs-of-low-employee-morale-in-the-workplace-and-how-to-counteract-it [https://perma.cc/N6NR-SJJ2]; Mike Kappel, *How to Boost Employee Morale at Your Business*, FORBES, https://www.forbes.com/sites/mikekappel/2017/05/31/how-to-boost-workplace-morale-at-your-business/?sh=76207dd2a7b7 (Apr. 14, 2022) [https://perma.cc/2GWU-HRSF]. *See also supra* note 58 (discussing the passive, difficult to fully measure "quiet quitting" phenomenon).

[94] For a mere sampling of the relevant literature, see generally EZRA KLEIN, WHY WE'RE POLARIZED (2020) (explaining the history of increased political polarization and polarization feedback loops); KEVIN VALLIER, MUST POLITICS BE WAR? RESTORING OUR TRUST IN THE OPEN SOCIETY (2019); KEVIN VALLIER, TRUST IN A POLARIZED AGE (2020); Henry E. Brady & Thomas B. Kent, *Fifty Years of Declining Confidence & Increasing Polarization in Trust in American Institutions*, 151 DAEDALUS 43 (2022), https://doi.org/10.1162/daed_a_01943 (describing how increased political polarization leads to less trust in institutions and more difficult community responses); Jordan Carpenter, et al., *Political Polarization and Moral Outrage on Social Media*, 52 CONN. L. REV. 1107 (2021) (explaining how political polarization leads to socially negative behavior); Steven Callander & Juan Carlos Carbajal, *Cause and Effect in Political Polarization: A Dynamic Analysis*, 130 J. POL. ECON. 825 (2022), https://doi.org/10.1086/718200; Jarett T. Crawford & Jane M. Pilanski, *Political Intolerance, Right* and *Left*, 35 POL. PSYCH. 841 (2014), https://doi.org/10.1111/j.1467-9221.2012.00926.x (describing how political polarization leads to intolerance and bias towards the other side); Vyacheslav Fos, Elisabeth Kempf & Margarita Tsoutsoura, *The Political Polarization of Corporate America*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 30183, 2023), https://doi.org/10.3386/w30183 (finding that top executives at firms are becoming more polarized and are more likely to leave the firm due to polarization); Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690 (2015), https://doi.org/10.1111/ajps.12152 (finding political polarization is just as strong as racial polarization); Elizabeth Kolbert, *How Politics Got So Polarized*, NEW YORKER (Dec. 27, 2021), https://www.newyorker.com/magazine/2022/01/03/how-politics-got-so-polarized [https://perma.cc/R2JB-EQXU]; Alexander George Theodoridis, *The Hyper-Polarization of America*, SCI. AM., https://blogs.scientificamerican.com/guest-blog/the-hyper-polarization-of-america/ [https://perma.cc/KZD4-WUTQ].

[95] For a brief, but insightful, discussion, see JONATHAN SACKS, THE DIGNITY OF DIFFERENCE: HOW TO AVOID THE CLASH OF CIVILIZATIONS 154–55 (2003).

collections of people bound to one another by little more than temporary convenience."[96] But again, many workplaces have become notably more intensely politicized and culturally polarized across many dimensions as well.[97]

If we combine all these phenomena, we begin to appreciate how encouraging more religious Title VII cases, by increasing what responding defendant employers must show in order to prevail, is likely to backfire. Presumably, the underlying goal of Title VII in religious cases is not to increase the number of such cases that are brought, year after year. Nor is it to increase the ratio of prevailing religious complainants against employers. Instead, the more reasonable statutory aims, among others, would be to broadly reduce religiously based alienation and religiously related demoralization in the workplace.

Given these basic underlying aims, the switch from anything like a *de minimis* standard to a more demanding substantial hardship standard for employers may well have perverse effects. A *de minimis* standard plainly limits and discourages the incentives of religious employees to file under Title VII. Thus, only the more egregious violation cases, and the more easily accommodated religious complainants, tend to prevail. Formal religiously based complaints thus tend to be relatively few, by comparison with other more complainant-friendly possible judicial tests. Under a *de minimis* standard for employers, conspicuous employee crosses, for example, may in practice tend to be exchanged for less conspicuous versions, or tucked under one's clothing, consistent with one's religious beliefs. The religiously unaccommodated employee may consider working from home[98] or exiting in favor of another employer if the job market is sufficiently permissive.[99]

In contrast, a legal standard that, as in *Groff*, demands greater effort and heavier cost-bearing by employers incentivizes a greater number of religious Title VII complaints by employees. Some more or less cogent complaints the religious employee will, of course, still lose. But it is likely, with the increased incentives to file, and thus more cases of various strengths being filed, that the most basic statutory goals will be impaired overall. Even with a now greater likelihood of success in any given case, the total number of losing religious claimants will actually increase substantially, along with, certainly, the total number of prevailing religious claimants. This is just a matter of basic math.

The increased number of both winning and losing Title VII religious complaints occurs, crucially, in our corporate and broader cultural context of intensified political extremism and distrust.[100] This context is a recipe for increased workplace pathologies that tend to sweep up religious accommodation claimants, and their opponents, along with everyone else in the workplace. Religiously motivated workers may well file and win more cases, and thus certainly benefit in that sense, while also, crucially, being collectively worse off, to one degree or another, in absolute, overall, and collective terms.

Any such absolute loss of workplace satisfaction for religious claimants is likely worsened if both religious and nonreligious employees think self-consciously in terms of their own separate,

[96] *Id.* at 154.

[97] *See* Wright, *supra* note 73; David Gelles, *Red Brands and Blue Brands: Is Hyper-Partisanship Coming for Corporate America?*, N.Y. TIMES (Nov. 23, 2021) https://www.nytimes.com/2021/11/23/business/dealbook/companies-politics-partisan.html [https://perma.cc/2KK5-PWMG]; SACKS, *supra* note 95, at 154–55.

[98] *See* sources cited *supra* note **Error! Bookmark not defined.** and accompanying text.

[99] *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 76, 79–81 (1970).

[100] *See* sources cited *supra* note 94.

perhaps increasingly distinct and adversarial, identities.[101] And we should most definitely not assume that there will be solidarity, as distinct from yet further fragmentation, among the widely disparate and quite often conflicting variety of religious claimants themselves.[102] Religious believers themselves may well confront one another adversely in religious discrimination cases. Plainly, even the complainant's co-religionists at the workplace may be divided among themselves on the bringing of a religious discrimination complaint. And one person's religious accommodation may well be another religious believer's heresy or abomination, beyond secular cultural objections. This increased adversarialism amounts not so much to a zero-sum game, as to a broadly unappealing negative-sum game,[103] with religious claimants typically being among the net losers.[104] *Groff* thus tends to turn latent, smoldering conflicts among opposing religious believers, among some co-believers, and among religious believers and their secular opponents, into Title VII conflicts.

IV. CONCLUSION

The *Groff v. DeJoy* case unhappily, but inevitably, generates a variety of realistically unresolvable fundamental problems in typical statutory religious accommodation cases. Perhaps even more important, though, are the unintended and perverse results of *Groff*'s placing a generally heavier burden of religious accommodation on employers. The *Groff* standard indeed incentivizes the bringing of more religious discrimination cases, and both the winning and losing of such cases by religious claimants. But our adversarial cultural circumstances, including the typical inseparability of religion, politics, and culture, crucially affect the actual, but unintended, results of judicial reforms. The *Groff* rule is likely to result, unintendedly, in greater, not less, overall religiously grounded alienation and demoralization in the typical workplace.

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[101] *See generally* YASCHA MOUNK, THE IDENTITY TRAP: A STORY OF IDEAS AND POWER IN OUR TIME Ch. 4 (2023); Kwame Anthony Appiah, *The Politics of Identity*, 135 DAEDALUS 15, 20 (2006) ("If recognition entails taking notice of one's identity in social life, then the development of strong norms of identification can become not liberating but oppressive."); Mary Bernstein, *Identity Politics*, 31 ANN. REV. SOCIO. 47, 51 (2005), https://doi.org/10.1146/annurev.soc.29.010202.100054 (referring to those "who view society as fragmented into multiple identity groups that have undermined the common cultural fabric of American society . . . ." and to the claim that identity groups tend to splinter into ever more narrow categories); Amy Chua, *Tribal World: Group Identity Is All*, 97 FOREIGN AFFS. 25, 26 (July/Aug. 2018) (referring to studies indicating that group bonding may reduce empathy for others); Francis Fukuyama, *Against Identity Politics: The New Tribalism and the Crisis of Democracy*, 97 FOREIGN AFFS. 90, 92–93 (Sept./Oct. 2018) (referring to religious groups and other groups as "fracturing into segments based on ever-narrower identities"); Mark Lilla, *The End of Identity Liberalism*, N.Y. TIMES (Nov. 18, 2016) https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html [https://perma.cc/6RLL-TLG4]; Cass R. Sunstein, *Why I Am a Liberal*, N.Y. TIMES (Nov. 20, 2023), https://www.nytimes.com/2023/11/20/opinion/cass-sunstein-why-liberal.html [https://perma.cc/N57U-T6B2]; E.M. Forster, *Two Cheers for Democracy*, 147 NATION 57, 65 (1938) ("Tolerance, good temper, and sympathy—well, they are what matter really . . . .").

[102] Religious claimants in general also constitute a highly diverse and often intensely polarized, if not mutually hostile, overall group. *See* Kent Greenawalt, *Religion and Polarization: Various Relations and How to Contribute Positively Rather than Negatively*, 20 LEWIS & CLARK L. REV. 1157, 1157–59 (2017) ("[A]ll religious groups have some sharp disagreements with each other, and these can lead to full-scale rejection, hatred, and even violent conflict.").

[103] *See, e.g.*, *Negative Sum Games: Situations That Destroy Value*, ADR TIMES (Apr. 9, 2024), https://www.adrtimes.com/negative-sum-game/ [https://perma.cc/V884-9F5Z]. Admittedly, there can, potentially, be net winners even in a negative-sum game. *See id.* But that is not, under our own remarkable political and cultural circumstances, the way to sensibly bet.

[104] *See id.*