Redefining "Religious Beliefs" Under Title VII: The Conscience as the Gateway to Protection

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Abstract

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The Conscience as the Gateway to Protection

The intent of this thesis is not to persuade anyone of a particular legal, ideological, or political belief. On the contrary, the purpose is to further Congress' intent in passing Title VII's prohibition of religious discrimination, regardless of one's opinion of whether that intent is right or wrong. The subsequent analysis focuses on whether the courts' application and subsequent development of these laws in light of Congress' purpose has been proper, and if not, how to rectify it. Unfortunately, the current state of Title VII's prohibition of religious discrimination is a Monet of jurisprudence. From afar, it appears a rational portrait of the present day values of religious protection. Look too closely, and the canvas of logic devolves into individual specks by which no man can deduce reason or understanding, nor predict the color of the next decision in a sequence.

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Chapter 1: Introduction

A Christian, a Jew, and an Atheist walk into a bar. Each applies for one available bartender position. All applicants meet the required qualifications, but two of them have caveats to employment. The Christian is evangelical, and as part of his faith must proselytize to customers and coworkers and educate people about Jesus Christ. The Jewish applicant observes the Sabbath from sundown Friday to sundown on Saturday, limiting his ability to work Friday evenings, the most popular night of the week. The Atheist has no employment stipulations and merely informs the manager he does not believe in God. Whom does the manager hire, and what are the legal consequences of this decision?

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against an employee (or potential employee) on the basis of religion and requires employers to reasonably accommodate religious practices where doing so would not cause an undue hardship.[1] Thus, if the manager chose not to hire any of the individuals above, his decision might be unlawful under Title VII and subject to a religious discrimination claim.[2] Furthermore, if he chose to hire either of the religious applicants, he would be required under Title VII to reasonably accommodate the new employee by allowing the religious practice of proselytizing or making scheduling exceptions, unless he could prove doing so was an undue hardship on the establishment.[3]

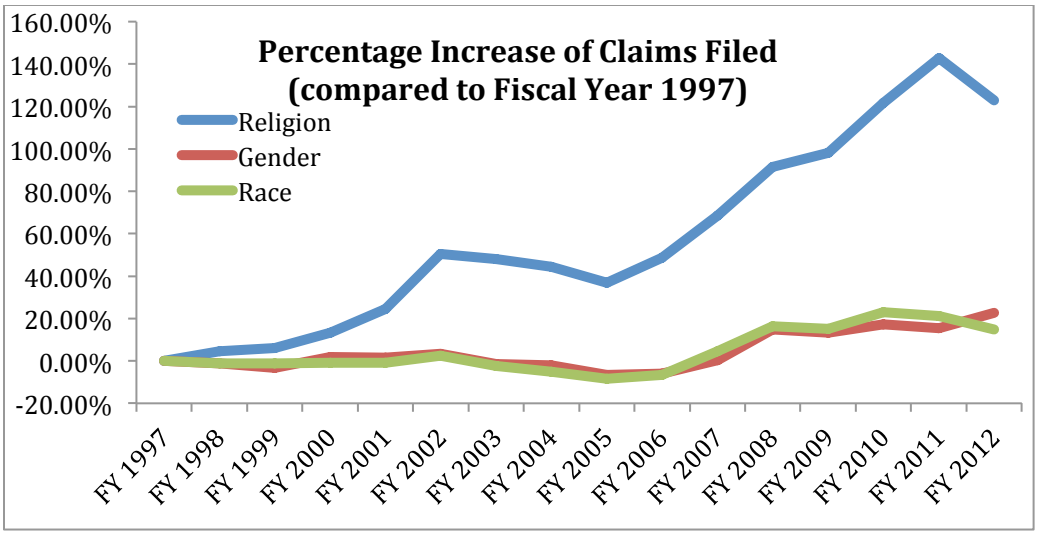
The unique problem posed by religion—unlike the other protected classes of Title VII—is that it is subjective, can change over time, and is not readily apparent at a

[1] *See* 42 U.S.C. § 2000e (1991).
[2] *See id*.
[3] *See id*.

glance.[4] When an employer is faced with hiring a religious applicant, it is vital he understands the law and requirement to accommodate religious beliefs. For example, at what point does hiring an employee who cannot work a specific day of the week become an undue hardship? If that line is not clear to employers or employees, such conflicts between the employer and employee can only be resolved by litigation to clear up the confusion. In light of these costs, many employers will likely avoid the situation entirely by hiring the Atheist, who requires no accommodation. Does the need to accommodate religious beliefs further the purpose of Title VII, or does it motivate employers to discriminate?

This uncertainty can be seen in the statistics. On March 6, 2014, the Equal Employment Opportunity Commission (EEOC) released a report stating that religious claims had more than doubled from 1997 to 2013.[5] The chart below shows that the increase of religious discrimination claims dwarfs the increase of race and gender claims over the same period:

[4] Reed v. Great Lakes Cos., 330 F.3d 931, 935-36 (7th Cir. 2003) ("A person's religion is not like his sex or race--something obvious at a glance.").
[5] *EEOC Issues New Publications on Religious Garb and Grooming in the Workplace*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Mar. 6, 2014), http://www.eeoc.gov/eeoc/newsroom/release/3-6-14.cfm.



(Figure 1)[6]

The number of religious discrimination claims filed with the EEOC has increased 123% in the past 20 years; in the same period, gender discrimination claims increased by 23% and race discrimination claims increased by 15%.[7]

More litigation means greater inefficiencies for everyone: public taxes fund the EEOC's investigations, employers increase the prices of goods and services to cover litigation expenses and damages, and individuals must suffer through the cost and emotional toll of a lawsuit where they may or may not be vindicated. "Predictability promote[s] liberty, by allowing the citizen to know the legal consequences of his or her actions and to plan accordingly."[8] If Congress or the courts developed clear boundaries and guidelines on what beliefs are protected (i.e., by clearly distinguishing between

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[6] *See Enforcement & Litigation Statistics*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm (last visited March 8, 2014). The graph of these statistics was created by the author.

[7] *Id*. One might suppose the explanation lies in increased discrimination against Muslims after the terrorist attacks of September 11, 2001. For the four years following fiscal year 2002 (which began on 1 October 2001, approximately 3 weeks after the attack), however, all three types of discrimination claims decreased. Similarly, fiscal years 2007 and 2008 saw drastic increases in EEOC claims, and they have significantly risen ever since. *Id*.

[8] JOHN H. LANGBEIN, RENEE LETTOW LERNER, & BRUCE P. SMITH, HISTORY OF THE COMMON LAW 498 (2009).

"religious" and "non-religious" beliefs) and explained the balance between reasonable accommodation and undue hardship, employees and employers would understand the differences between legal and illegal conduct and there would be fewer EEOC claims and lawsuits. Isn't the reduction or elimination of religious discrimination the most important goal?

Reasonable people may disagree about what the law *should* be. The intent of this thesis therefore is not to persuade anyone of a particular legal, ideological, or political belief. On the contrary, the purpose is to further Congress' intent in passing Title VII's prohibition of religious discrimination, regardless of one's opinion of whether that intent is right or wrong. The subsequent analysis focuses on whether the courts' application and subsequent development of these laws in light of Congress' purpose has been proper, and if not, how to rectify it. Unfortunately, the current state of Title VII's prohibition of religious discrimination is a Monet of jurisprudence. From afar, it appears a rational portrait of the present day values of religious protection. Look too closely, and the canvas of logic devolves into individual specks by which no man can deduce reason or understanding, nor predict the color of the next decision in a sequence.

Fifty years after the Civil Rights Act of 1964, litigants still have little guidance from the courts regarding how their cases will be analyzed. The failure of the courts to set forth an effective and understandable legal test creates uncertainty in litigation and leads to more trials since the parties have no idea how judges will review their cases. As one will see in the following analysis, the prima facie elements of religious discrimination are clear, but the method by which courts analyze each element appear to be nothing more than voodoo and chicken bones.

Identifying these issues is nothing new. Other legal scholars have discussed the unpredictability and inconsistency by the courts.[9] Some have complained of the misapplication of Title VII in certain cases, without proposing a solution.[10] Others have recommended balancing tests to give the courts more direction, but these multi-factor tests and the like only serve to grant judges greater discretion,[11] enabling them to justify their conflicting opinions because of factual distinctions rather than legal principles. The solution must be a legal test that limits judicial discretion and provides litigants with clear guidelines by which their case will be resolved.

The purpose of this thesis is to identify Congress' intent in distinguishing between protected and unprotected beliefs under the Civil Rights Act of 1964, the extent to which employers are expected to accommodate these beliefs and practices, analyze the evolution/devolution of this intent by the subsequent caselaw, and develop a clear, legal test to ensure courts properly apply the protections of Title VII in religious discrimination cases.[12] Part II analyzes the first element of any religious discrimination claim, whether

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[9] *See, e.g.,* Polly Hayes, *Note: Thou Shalt Not Discriminate: The Application of Title VII's Undue Hardship Standard in Balint v. Carson City*, 45 VILL. L. REV. 289, 312 (2000) ("The majority opinion is inconsistent…. [and] also contravenes the holding in *Hardison*").

[10] *See, e.g.,* Donna D. Page, *Comment: Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMP. L. 363, 408 (2005) (arguing veganism and vegetarianism could be religious beliefs under Title VII in response to a California case which decided the opposite); Kent Greenawalt, *Article: Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1 (2001) (asserting multiple opinions regarding how Title VII cases should be analyzed and decided, none of which constitute legal tests); Russell S. Post, *Note: The Serpentine Wall and the Serpent's Tongue: Rethinking the Religious Harassment Debate*, 83 VA. L. REV. 177 (1997) (complaining about the conflicting principles of Title VII and the Free Exercise Clause of the First Amendment).

[11] *See, e.g.,* Steve D. Jamar, *Article: Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719 (1996) (proposing a "principle-based" analysis for religious accommodation claims by focusing on "accommodation, tolerance, inclusion, neutrality and equality"); Theresa M. Beiner and John M. A. DiPippa, *Article: Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577 (1997) (arguing for a "true" application of the totality of the circumstances test).

[12] I intentionally exclude disparate impact cases from my analysis. Disparate impact cases impose liability on employers for facially neutral employment practices that result in a disparate impact upon a protected class. *See* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (holding high school equivalence requirement—diploma or written test—for promotion or transfer within company had a disparate impact on

the beliefs at issue are "religious?" Part III examines the employer's duty to reasonably accommodate protected beliefs. Part IV analyzes claims of religious harassment and the odd relationship between that and proselytizing. Part V identifies the problem common to each of these claims and proposes an analytical solution in accordance with Supreme Court precedence, which, by following Congress' original intent, will ultimately strengthen the law's protection of religion and reduce the incidents of discrimination.

African Americans). Inherent in such a claim is evidence that the practices affected a group of similar individuals (e.g., Hispanics, women, or Catholics). The problems discussed and analyzed in this thesis, however, stem from individual beliefs and practices and the difficulty in determining the extent Title VII protects these "religious beliefs." As such, disparate impact religious claims do not raise these same concerns. Therefore, this thesis will only address individual claims arising out of Title VII's protection of religious beliefs: disparate treatment, reasonable accommodation, and harassment.

Chapter 2: "Religious" Beliefs

A. Title VII Discrimination

In the early 1960s, the Civil Rights movement slowly gained traction as racism in the South received media attention.[13] When Martin Luther King Jr. and his followers marched in Birmingham, Alabama, to be met by an outspoken racist police commissioner, firehoses, and attack dogs, the clash sparked national debate.[14] Legislators pushed to end this racism by prohibiting race from serving as a factor in employment decisions.[15] The original text prohibited employment discrimination based on race, color or national origin; religion was added without any meaningful comment or discussion.[16]

A plaintiff whose employer unlawfully discriminated against him or her based on race, sex, color, national origin, or religion is a victim of disparate treatment.[17] To prove such a claim, the plaintiff must show that he 1) is a member of a protected class,[18] 2) is

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[13] LEGACIES OF THE 1964 CIVIL RIGHTS ACT 20-22 (Bernard Grofman ed. 2000).

[14] *Id*. at 11-12 ("precipitating event was the confrontation in Birmingham, AL in the spring of 1963 between the forces of Reverend Martin Luther King, Jr., and those of Eugene "Bull" Connor, the city's police commissioner…. Pictures of peaceful marchers, many of them schoolchildren, being met with fire hoses and attack dogs were spread across front pages throughout the country and shown each evening on national television."); *see* PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION 199 (1997) ("The civil rights movement gained irresistible momentum…[in] 1963 when the crisis of direct-action protest in Birmingham, Alabama, made civil rights a national political issue"); *see generally* RELIGION, RACE, AND JUSTICE IN A CHANGING AMERICA (Gary Orfield and Holly J. Lebowitz eds. 1999).

[15] MORENO, *supra* note 14, 199-230 (identifying the racial conflict as the impetus behind Title VII).

[16] *See* LEGACIES OF THE 1964 CIVIL RIGHTS ACT, *supra* note 13, 13-26 (outlining the history of the drafts, hearings, and passing of the Civil Rights Act without any mention of how "religion" was added); *see also* MORENO, *supra* note 14, 199-230 (after a full discussion of the racial conflict and motivation behind Title VII, religion is mentioned only when quoting the language of the statute).

"Sex" was added as a protected class by Congressman Howard Smith, presumably to "overload" the bill and create more opposition. LEGACIES OF THE 1964 CIVIL RIGHTS ACT, *supra* note 13, 22; MORENO, *supra* note 14, 213 (purpose was to "expand the scope of the act enough to make its enactment unpalatable to moderates" by raising fears "employers would grant preferential treatment to black women and discriminate against white Christian women.").

[17] 42 U.S.C. § 2000e (1991); *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (Outlining prima facie elements for disparate treatment claims).

[18] For a detailed analysis of the subtle shift in Title VII from anti-discrimination to "protected classes," and the negative consequences of market interference (with respect to private employers), *see* RICHARD A.

qualified for the position, 3) and suffered an adverse action, 4) under circumstances that rise to the level of discrimination.[19] Since religion is the only subjective class protected under Title VII, a plaintiff must prove he is a member of the class by showing he 1) sincerely holds 2) a religious belief.[20]

The confusion arises with this element: what constitutes a "religious" belief? The example in the introduction simplified an important aspect of Title VII cases. In today's modern society, however, sincerely held beliefs do not always fit squarely within the confines of mainstream "religion." The question thus revolves around whether a specific belief, perhaps arising out of religion, is protected by Title VII. Unfortunately, after one major amendment to Title VII and 50 years of jurisprudence,[21] courts are no closer to developing a line between protected and unprotected religious beliefs.

B. Legislative History of "Religion"

1. Conscientious Objectors

One of the first unique distinctions granted to religious believers was conscientious objector status. In 1656, Quakers, a sect of Christianity whose beliefs prohibited use of arms in warfare, were the first conscientious objectors in pre-revolutionary America.[22] Since then, Americans have recognized the need to balance individuals' religious beliefs with the need of government to protect itself by force, a "heavy burden… for all citizens to share."[23]

EPSTEIN, FORBIDDEN GROUNDS 176 (1992). *But see* MORENO, *supra* note 14, 201 (discussing arguments for the need for preferential treatment for minorities in order to "overcome the effects of past discrimination").

[19] *McDonnell Douglas Corp.*, 411 U.S. at 802.

[20] United States v. Seeger, 380 U.S. 163, 185 (1965).

[21] *See* 42 U.S.C. § 2000e (1972).

[22] CONSCIENCE IN AMERICA 17 (Lillian Schlissel ed. 1968).

[23] *Id*. at 15.

More recently (and still long before the Civil Rights Act of 1964) Congress defined "religious beliefs" in the Selective Training and Service Act.[24] This act, signed into law by President Franklin Roosevelt in 1940, required men between the ages of 21 and 36 to register for the draft.[25] It outlined an exception for conscientious objectors, those people who "by reason of religious training and belief, are conscientiously opposed to participation in war in any form."[26] Religion was defined as "an individual's belief in relation to a God involving duties superior to those arising from any human relations, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[27] The House debate of the 1940 act—which used the word "God"—identified the law's purpose as protecting those people who had conscientious scruples against handling lethal weapons or against participating in the war effort.[28] In other words, people who had a "moral or ethical consideration or standard that acts as a restraining force"[29] against war were protected.

Only the Second and Ninth Circuit Courts of Appeals have addressed this law, and neither case was complex.[30] In *United States v. Kauten*, the defendant requested excusal from the United States Army by claiming he was a conscientious objector.[31] His belief system was not based on a duty to God, however, but rather based on his political views (objecting to the policy of the draft), philosophical views (war is not a solution to problems), and his personal moral code (belief in Ghandi's policy of passive

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[24] Selective Training and Service Act, 54 Stat. 885, 889 (1940).
[25] *Id*. at 885.
[26] *Id*. at 889.
[27] *Seeger*, 380 U.S. at 165.
[28] 86 CONG. REC. 11418 (1940).
[29] *Scruple*, http://dictionary.reference.com/browse/scruple (last visited May 26, 2014).
[30] *See* United States v. Kauten, 133 F.2d 703 (2d Cir. 1943); Berman v. United States, 156 F.2d 377 (9th Cir. 1946).
[31] *Kauten*, 133 F.2d at 705.

resistance).[32] The court concluded that "a compelling voice of conscience" lies within the definition of "religious belief," but not within philosophical or political beliefs which were expressly excluded by Congress and thereby earn no unique protection.[33] Since Kauten's sincere opposition to war was due to his "personal philosophical conceptions," such beliefs were not "religious" under the statute.[34]

Similarly, in *Berman v. United States*, the defendant believed "[w]ar as a method is totally wrong…. [and therefore] refuse[d] to participate in this futility."[35] The Ninth Circuit found the defendant was sincere in his beliefs.[36] The anti-war philosophy (war's lack of effectiveness), however, was squarely within Congress' exclusion from the definition of a "religion," and the court affirmed the defendant's conviction.[37]

At this point in history, the exclusions from what was deemed "religious" were clear: the definition in the statute excluded political, sociological, or philosophical views, or those stemming from a merely personal moral code, and the Court of Appeals' prior decisions of *Kauten* and *Berman* solidified this distinction. The difficulty for future cases was in determining what was *included* in "religious beliefs."

2. "Religion" in Title VII of the Civil Rights Act

Congress included religion as one of the five protected classes in Title VII without defining it.[38] In 1964, the law appeared clear; employment decisions and benefits should not be determined on the basis of one's race, color, religion, gender, or

[32] *Id*. at n.2.
[33] *Id*. at 708.
[34] *Id*. at n.2.
[35] *Berman*, 156 F.2d at 379.
[36] *Id*. at 382.
[37] *Id*.
[38] 42 U.S.C. § 2000e (1964).

national origin.[39] Such factors are—and should be—irrelevant in an employer's decision-making process. Therefore, refusing to hire a person because he is Jewish is as unlawful as not hiring someone because the person is black or female.[40]

Congress amended Title VII specifically in regards to religious discrimination only once, in 1972.[41] This amendment, *inter alia*, defined religion. The newly created section 701(j) states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[42]

This amendment accomplished three things. First, it defined religion circularly—religion includes religious beliefs—without providing any further insight as to what constitutes religion or religious beliefs.[43] Second, it incorporated the protection of religious beliefs to include *practices* of such beliefs.[44] Finally, it created a responsibility on employers to reasonably accommodate these beliefs and practices unless the accommodations created an undue hardship for the employer.[45]

This important legislation was poorly written. First, an affirmative requirement by employers (to reasonably accommodate an employee's religious beliefs) properly belongs in the language of the substantive text, not in the definition section. Second, the

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[39] *Id*. at § 2000e-2.
[40] *See id*.
[41] *See* 42 U.S.C. § 2000e (1972).
[42] *Id*. at § 2000e(j).
[43] *See, e.g.*, Brown v. Pena, 441 F.Supp. 1382, 1384 (S.D. Fla. 1977) ("The statutory definition is unenlightening").
[44] *See infra* Part III. It is important to note that this change appears to be intended to better explain the protections rather than broaden them. Senator Randolph from West Virginia stated: "The term 'religion' as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely beliefs, but also conduct: the freedom to believe, and also the freedom to act." 118 CONG. REC. 705 (1972).
[45] *See infra* Part III.

need to reasonably accommodate employees has no effect on the actual meaning of the word "religion." Based on the language, one might conclude that a religious practice—for example, going to church on Sundays—is not a religious practice if one's employer cannot reasonably accommodate the work schedule to allow him to attend. Certainly, attending church is a religious practice regardless of where you work, and regardless of the ability of your employer to accommodate it. Thus, while this amendment created the duty to reasonably accommodate religious beliefs and practices, it gave no further clarification regarding the meaning of "religion."

3. "Religion" has One Meaning

The word "religion" applies equally to Title VII as it does in the First Amendment of the Constitution ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof")[46] and the laws concerning conscientious objectors.[47] The Civil Rights Act protects these same beliefs by prohibiting discrimination in the workplace. Political, sociological, or philosophical beliefs, or beliefs stemming from a personal moral code[48] are therefore unprotected under the Civil Rights Act.[49]

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[46] U.S. CONST. amend. I.

[47] *See* Rivera v. Choice Courier Sys., 2004 U.S. Dist. LEXIS 11758, 15 (S.D.N.Y. 2004) ("A Court's limited role in determining whether a belief is 'religious' is the same under Title VII as it is under the *Free Exercise Clause of the First Amendment"*); *see also* Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1980) ("the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970)"). Both *Seeger* and *Welsh* were conscientious objector cases.

[48] The distinction between a "conscientious objection" to war and a personal moral code against war is often a difficult line to draw, but can be clearly seen with the following example. If the two categories were the same, anyone who was against killing another human being would be exempt from military service. As an Air Force officer, I would hope my fellow brothers and sisters in arms all have the personal moral code against killing other humans. Is that not the purpose and goal of a civilized society, to avoid violence and killing, and limit suffering? Furthermore, we want our generals to have a personal moral code against violence, but to also understand that violating that personal code may be necessary for the protection of our country. Therefore, if one's conscience and personal moral code could be used

C. Supreme Court Interpretation

The difficulty of analyzing religious claims is more problematic when an individual's belief system is not based on a traditional, or well-accepted, organized religion. In *United States v. Seeger*, the Supreme Court reviewed three conscientious objector cases in which the lower courts had determined the defendants' beliefs did not meet the definition of "religious training and belief."[50] The Court analyzed Congress' definition of religion, reviewed the legislative history and purpose behind the language, and the earlier cases of *Kauten* and *Berman*.[51] The narrow issue was whether the requirement of a "belief in a Supreme Being" was limited to beliefs based—literally—on the existence of a deity, or whether it refers to a broader concept of "a faith to which all else is subordinate."[52] In affirming the latter view, the Supreme Court created a simple test to delineate between religious and non-religious beliefs.

Seeger claimed he was a conscientious objector based on his "belief in a devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[53] His "skepticism and disbelief in God" did "not necessarily mean a lack of faith in anything whatsoever," and he compared his ethical belief in intellectual and moral integrity to that of Plato, Aristotle, and Spinoza.[54] Reading the language of the statute literally, the lower court determined his disbelief in God failed to meet the requirement of "religious beliefs" because he did not believe in a "Supreme Being."[55]

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interchangeably, the only people who *could* enlist in our military would be those who have no scruples against killing. Does this describe the military personnel our citizens want?

[49] Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1980).

[50] *See Seeger*, 380 U.S. 163 (1965).

[51] *Id*. at 174.

[52] *Id*.

[53] *Id*. at 166.

[54] *Id*.

[55] *Id*. at 167.

Similarly, a companion case (discussed in *Seeger*) involving defendant Peter reached the same result.[56] Peter claimed "it was a violation of his moral code to take human life and he considered this belief superior to his obligation to the state."[57] These values, he stated, were "derived from the western religious and philosophical tradition."[58] These magic legal words—"moral code" and "philosophical"—led the lower court to find Peter's belief was squarely excluded by the plain language of the statute.[59]

The Supreme Court found otherwise and concluded "there is a broad spectrum of religious beliefs found among us . . . [that] demonstrate very clearly the diverse manners in which beliefs, *equally paramount in the lives of their possessors*, may be articulated."[60] Based on this, the Supreme Court created the following test: a belief is "religious" when it holds a place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.[61] Of course, this test requires an understanding of who is "clearly qualified for exemption," which has the familiar ring of Justice Stewart's test for obscenity, "I know it when I see it."[62] As previously discussed, there appeared to be three main categories of people entitled to the exemption as holding religious beliefs—those who follow an organized religion, those who hold beliefs based on faith in a supreme power or being, and those who hold beliefs based on their conscience; i.e., those who hold beliefs in the same place in their lives as followers of organized religion hold their beliefs.[63]

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[56] *Id*. at 170.
[57] *Id*. at 169.
[58] *Id*.
[59] *Id*.
[60] *Id*. at 183 (emphasis added).
[61] *Id*. at 184.
[62] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[63] *Seeger*, 380 U.S. at 184.

Some have characterized the Supreme Court's holding in *Welsh v. United States*[64] as "a remarkable feat of linguistic transmutation."[65] On the application for draft exemption stating "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form," Welsh specifically redacted the words "my religious training and," and he could neither affirm nor deny a belief in a "Supreme Being."[66] In his application, Welsh stated:

> [T]he military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail in our responsibility *as a nation*.[67]

It may be difficult to determine whether this statement reveals Welsh's political views, philosophical views, moral views, or religious views. If it is a combination of any of these categories of beliefs, it is impossible to determine the proportion of any given category to determine whether to remove it from the protection of conscientious objector status. Certainly, many people may feel as though their political or philosophical beliefs are held so strongly that they consider such ideologies to be held in the same regard as others may hold religion, but such testimony doesn't blindly deserve protection.

Many people claim the Supreme Court's decision in *Welsh*—granting conscientious objector status to the defendant who specifically declared his believes were *not* religious, but rather philosophical—substantially broadened the definition of religion

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[64] 398 U.S. 333 (1970).
[65] *See, e.g.*, Note, *Toward a Constitutional Definition of Religion*, 91 Harv.L.Rev. 1056, 1065 n.60 (1978).
[66] Welsh v. United States, 398 U.S. 333, 341 (1970).
[67] *Welsh*, 398 U.S. at 342.

by expressly ignoring the statute's language to exclude philosophical beliefs.[68] The three dissenting Justices viewed the holding as a drastic departure from the Court's obligation to enforce the will of Congress, clearly expressed through the statute.[69] Even more telling was Justice Harlan's concurrence:

> Candor requires me to say that I joined the Court's opinion in [*Seeger*], only with the gravest misgivings as to whether it was a legitimate exercise in statutory construction, and today's decision convinces me that in doing so I made a mistake which I should now acknowledge….[70] Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as a patchwork of judicial making….[71]

Undoubtedly, even the majority in *Welsh* knew its holding was a stretch, relying on poetic imagery and emotion in an effort to overshadow their own concerns the decision went too far. In referring to the defendant and Seeger, the court proclaimed "[t]heir objection to participating in war in any form could not be said to come from a 'still, small voice of conscience;' rather for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces."[72] The beauty of this sentiment is marred only by the common-sense realization that all conscientious objector cases—whether based on protected religious beliefs or unprotected beliefs—arise when the claimant has suffered criminal punishment; without it, there would be nothing to appeal.

This illustrates the problem with the Seeger test; if the Supreme Court cannot explain its holding in *Welsh*, concluding he deserves protection but without being able to

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[68] *See, e.g.*, Malnak v. Yogi, 592 F.2d 197, 204 (1979) ("It can hardly be denied that the Supreme Court's reading of the statutory language was strained at best.") (Adams, J., concurring).
[69] *Welsh*, 398 U.S. at 368.
[70] *Id*. at 344 (Harlan, J., concurring).
[71] *Id*. at 366-67 (Harlan, J., concurring).
[72] *Id*. at 337.

sufficiently distinguish these philosophical beliefs from those excluded by Congress, there is little hope for lower courts.

D. Title VII Application

Courts continue to struggle to determine whether non-traditional beliefs are religious, and thereby protected under Title VII. The first hurdle is deciding whether a plaintiff's beliefs are sincerely held.[73] Sincerity refers to the plaintiff's credibility, i.e., whether the plaintiff is being truthful in expressing his beliefs.[74] Judges do not determine the validity of the beliefs,[75] but must determine whether the plaintiff truly believes them.[76] Once the judge determines the plaintiff is truthful, then he must determine whether the relevant set of beliefs are protected as "religious" under Title VII.[77]

In *Wilson v. U.S. W. Communications*,[78] an employee was discharged for wearing a graphic anti-abortion pin displaying a fetus, despite requests for her to remove it or cover it up in the workplace.[79] The employee, a Roman Catholic, made a religious vow

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[73] *Seeger*, 380 U.S. at 185.
[74] *Id*.
[75] *See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation").
[76] *Seeger*, 380 U.S. at 184-85.
[77] *Rivera*, 2004 U.S. Dist. LEXIS 11758, at 15 ("The inquiry is two-fold; 'whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious'").

If the plaintiff is not sincere, it is irrelevant whether the beliefs are religious—the plaintiff cannot meet his prima facie case. *See* Sidelinger v. Harbor Creek Sch. Dist., 2006 WL 3455073 (W.D. Pa. 2006). In *Sidelinger*, a teacher's claim that his religious beliefs forbade him from "self-adornment" and photographs; therefore, he refused to wear an ID badge as required for school safety. *Id*. at 2-5. The court did not believe his religious belief was "sincerely held" based on numerous inconsistencies in his testimony about his beliefs, direct contradiction of other evidence in the case regarding the statements of the defendant, and the teacher's use of an internet dating service in which he uploaded pictures of himself in direct violation of the religious beliefs he claimed prevented him from having an ID badge. *Id*. at 33-41. Similarly, a banquet waiter claimed religious discrimination by his employer when he was fired for being unshaven at work. Hussein v. Waldorf Astoria, 134 F. Supp. 2d 591, 594 (S.D.N.Y. 2001). Although he claimed shaving his face would violate his Islamic religious beliefs, he had worked at the company for approximately fourteen years—clean-shaven—and had received multiple demerits for violating the company's rules. *Id*. at 596-97. After he was discharged, the plaintiff went back to regularly shaving his face and was even clean-shaven for his deposition prior to trial. *Id*. at 594.
[78] 58 F.3d 1337 (8th Cir. 1995).
[79] Wilson v. U.S. W. Communications, 58 F.3d 1337, 1338 (8th Cir. 1995).

that she would wear the pin "until there was an end to abortion or until [she] could no longer fight the fight."[80] When employees complained, her supervisor offered her three options; either only wear the button in her cubicle, cover the button while at work, or wear a different button with the same message but without the photograph.[81] Wilson refused, claiming she could not cover nor remove the button "because it would break her promise to God to wear the button and be a 'living witness.'"[82] She defined a "living witness" as "someone who, by actions more than words, is a 'witness to the truth;'" wearing the button, therefore, was a substitute for preaching about anti-abortion.[83]

The district court determined Wilson's vow was a protected religious practice, but did not believe Wilson's testimony that she serve as a living witness.[84] The living witness requirement only arose after her employer offered her accommodations such as covering it up; 1) her prior interrogatory mentioned nothing about being a living witness, 2) her supervisor testified that she explained her vow as "wear[ing] the button until abortions were ended," and 3) she did not mention the need to be a living witness in an interview with a newspaper.[85] Thus, the court concluded (and the appellate court affirmed) the finding that Wilson's religious vow merely required she *wear* the button, and not that she display it, thereby exonerating the employer from wrongdoing since it had offered reasonable accommodations by allowing her to wear the button covered up.[86]

Both the Eighth Circuit Court of Appeals and district court clearly struggled with this case. The holding turned on a single fact: Wilson did not notify her employer that

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[80] *Id*. at 1339.
[81] *Id*.
[82] *Id*.
[83] *Id*. at 1340. Proselytizing in the workplace is addressed further in Part IV. *See infra* Part IV.
[84] *Wilson*, 58 F.3d at 1341.
[85] *Id*.
[86] *Id*. at 1342.

her vow to wear the pin necessarily meant displaying it for others to see until *after* the employer suggested she cover it up.[87] The court believed displaying the pin was not part of the vow and that she could have worn the pin on her underclothing, hidden from sight.[88] Thus, when offered a reasonable accommodation, the court found her claim that the pin needed to be on display was neither credible nor believable.[89] Of course, this holding ignores the fact this would have absolutely no effect on the "abortion war" which she identified as her purpose of wearing the pin in the first place.[90] Based on the court's holding, had she expressly stated to her employer her religious vow was to "wear an anti-abortion button 'until there was an end to abortion or until she could no longer fight the fight… *so I need people to see the pin for my fight to be effective*" the court would have determined her vow included displaying the pin, and the analysis would be focused on whether allowing her to do so constituted an undue hardship.

However, this highlights the problem with the court's analysis. If the court determined she was being insincere, it was not necessary to address the display of the pin as a religious belief. The lesson learned from this case is similarly unclear—is the holding that plaintiffs need to be extremely descriptive in their religious beliefs upon their initial notification to their employer? In other words, does Title VII protect religious vows only when the vows are spelled out so descriptively as to avoid a clever attorney's ability to split hairs on the words and definitions used by the employee, ironically based on the word "religion" that has been otherwise undefinable?[91] This case arose approximately 20 years after Congress amended Title VII to "define" religion, yet it

[87] *See id*. at 1341.
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *See Kauten*, 133 F.2d at 708 (the definition of religion is "incapable of compression into a few words").

grants no solace or clarity to employees or employers on how Title VII applies to people who make religious vows.

The confusion is present not only in cases involving religious vows, but also in cases involving commandments from God. Consider the case of a Roman Catholic woman who received a "calling from God" to attend a pilgrimage to a church in Yugoslavia during mid-October where visions of the Virgin Mary had appeared.[92] The problem caused by Tiano's religious calling was that she was a salesperson for Dillard's Department Store, and the pilgrimage in mid-October conflicted with Dillard's rule that no employee is allowed to take leave during the holiday shopping season.[93] After listening to all the testimony and evidence, the trial judge believed the requirement for the plaintiff to go on this pilgrimage in mid-October was a sincerely held religious belief.[94]

The appellate court, oddly enough, reversed and found the judge's factual decision was "clearly erroneous."[95] It may have been reasonable for the appellate court to determine the balance between a reasonable accommodation versus an undue hardship was in error. Such an assumption would be logical, perhaps even predictable. Of course, if this were the case, it would belong in the latter part of this thesis. Rather than analyze the legal application of the employer's duty to reasonably accommodate the employee, or potentially find an undue hardship for Dillard's thereby absolving it of the need to accommodate, the appellate court attacked the source of the duty. The court determined that Tiano's religious belief was limited to a pilgrimage to the church, but not necessarily

[92] Tiano v. Dillard Dep't Stores, 139 F.3d 679, 680 (9th Cir. 1998).
[93] *Id*.
[94] *Id*.
[95] *Id*. at 682.

during the month of October.[96] In other words, it substituted its own credibility determination for that of the trial court judge who personally witnessed the testimony as it was given. This is precisely why trial courts are granted deference for factual findings; they are in the best position to evaluate the believability of the witnesses.[97]

After reviewing the record, the appellate court determined Tiano's religious belief was to go on the pilgrimage, but without the temporal mandate.[98] Tiano testified she received the calling and "had to be there at that time."[99] Her pilgrimage companion's testimony, however, "strongly suggest[ed] that the timing of the trip was a personal preference."[100] The companion testified that she didn't remember a "definite reason" for going on the trip; rather they both "talked about it" and "thought it would be interesting to go on."[101] Thus, the appellate court believed the plaintiff's testimony and discredited the companion, finding she had been called by God. The appellate court then contradicted itself by believing the companion's testimony that the timing of the trip was personal, and not directed by God. To support this holding, the appellate court determined there was a lack of evidence because Tiano "offered no corroborating evidence to support the claim that she had to attend the pilgrimage between October 17 and 26…. She did not testify that the visions of the Virgin Mary were expected to be more intense during that period. Nor did she suggest that the Catholic Church advocated

[96] *Id*. at 683.
[97] *See id*. ("We have long held that questions of credibility 'are generally immune from appellate review'…because the trier of fact is uniquely positioned to observe the demeanor of a live witness on the stand.") (Fletcher, J., dissenting).
[98] *Id*. at 682.
[99] *Id*. at 682-83.
[100] *Id*. at 682.
[101] *Id*. at 682-83.

her attendance at that particular pilgrimage."[102] The Ninth Circuit essentially reviewed the facts *de novo*, substituting its judgment for that of the trial judge.

In choosing to split hairs regarding the plaintiff's testimony to limit the religious belief at hand, the appellate court failed to provide any meaningful analysis to help future litigants and lawyers better understand the bounds between legal and illegal conduct. The Ninth Circuit effectively placed an additional element on religious discrimination cases—unlike any others—requiring plaintiffs to not only testify but also provide corroborating evidence to support their beliefs.[103] Hence, in requiring plaintiffs to explain their religious beliefs, the Ninth Circuit in effect expects plaintiffs to cross-examine their Gods for evidence to enforce Title VII. And God, apparently, had better be prepared to explain Himself.

In both *Wilson* and *Tiano*, the courts chose to believe some aspects of religious practice but refused to believe others. In *Wilson*, the court believed the plaintiff made a vow to God to wear the abortion pin; common-sense demands the conclusion that wearing the pin requires it be displayed, yet the court claims the "visible" aspect of this belief was insincere. In *Tiano*, the court believed the plaintiff had a calling from God but not during a specific week in October; yet to reach this conclusion, the court relied on testimony from her travelling companion that they merely planned on the trip and that week merely because it would be "interesting." Such testimony, if believed, would make her entire claim of a calling from God insincere, not merely the timing of the calling. It appears the judges, while claiming not to be in the business of judging the validity of

[102] *Id*. at 682.
[103] *See id*. ("The only evidence offered by Tiano to prove that the temporal mandate was part of her calling was her testimony…She offered no corroborating evidence to support the claim that she had to attend the pilgrimage between October 17 and 26.").

beliefs, used the sincerity prong to carve out aspects they either failed to understand or believed should not be accommodated. A proper legal test to determine whether a set of beliefs is "religious" would require specificity and objectivity to prevent this type of shaky and unpredictable application.

The subjectivity by the courts is even more apparent when addressing non-traditional religions. No matter how they define "religion," courts appear to rule based on their instinct rather than thoughtful, objective analysis. A plaintiff in Florida claimed he was discriminated against due to his "personal religious creed" that ingesting Kozy Kitten People/Cat Food contributed to his well-being and improved his work performance.[104] The district court, without any analysis, held the plaintiff's creed "can only be described as such as a mere personal preference."[105] While the decision that the plaintiff was not protected under Title VII may have been correct,[106] the court cannot explain *why*.

Contrast that holding with *Toronka v. Cont'l Airlines, Inc*.[107] Toronka claimed to have a sincere religious belief that dreams caused future events, thereby excusing him from negligence in a car accident when his wife previously had a dream of him being in such an accident.[108] The court found Toronka's claim of religious discrimination "plausible" and stated "sincerely held personal convictions, which others find nonsensical, may still fit within the framework of a religious belief. There is, however, a rational limit to what courts are willing to accept as religious beliefs. See, e.g., [Kozy

[104] *Brown*, 441 F. Supp. at 1384.
[105] *Id*. at 1385.
[106] Of course, there is no way for anyone to determine whether this holding was correct or not because the opinion is so devoid of facts and analysis.
[107] 649 F. Supp. 2d 608 (S.D. Tex. 2009).
[108] Toronka v. Cont'l Airlines, Inc., 649 F. Supp. 2d 608, 609-10 (S.D. Tex. 2009).

Kitten People/Cat Food case]."[109] Where the bright line exists between rationality and irrationality, e.g., between eating cat food and believing a dream could cause brakes to fail on a car, remains a mystery. The court made no attempt to provide any guidance for future cases.[110]

Their inability to distinguish between the legitimacy of religious beliefs has not deterred the courts from continuing to issue rulings. They have determined, for example, that the Wiccan religion is a belief system that preaches a "peaceful, harmonious and balanced way of life which promotes oneness with the divine and all which exists," and recognizes the Mother Earth as a divinity.[111] Hence, Wicca is a protected religion under Title VII.[112] Atheism, the belief in the non-existence of God, can also be entitled to protection,[113] as seen in *Seeger* and *Welsh*.

Yet courts are split as to whether beliefs they regard as hateful—such as the white supremacy and anti-Semitism advanced by the Ku Klux Klan (KKK)— can be protected under Title VII.[114] In cases involving employees who were discharged based on their

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[109] *Id*. at 612.

[110] Presumably, the belief that bread and wine somehow transforms into flesh and blood of a man who died almost 2,000 years ago (directly contrary to physical evidence) may be seen as similarly nonsensical; but the Catholic belief of transubstantiation is an accepted religious belief. Francis J. Beckwith, *Transubstantiation: From Stumbling Block to Cornerstone*, (Jan. 21, 2011) http://www.thecatholicthing.org/columns/2011/transubstantiation-from-stumbling-block-to-cornerstone.html. Certainly, the extent to which a belief is "popular" cannot be the legal test.

[111] *What is Wicca, Witchcraft and Paganism?,* http://wicca.com/celtic/wicca/wicca.htm (last visited May 26, 2014).

[112] *See* Van Koten v. Family Health Mgmt., 955 F. Supp. 898 (N.D. Ill. 1997).

[113] *Reed*, 330 F.3d at 934.

[114] EEOC Dec. No. 79-06 (Oct. 6, 1978). The EEOC analyzed the KKK's history and concluded it was a political rather than religious organization. *See* Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025 (E.D. Va. 1973); Slater v. King Soopers, 809 F. Supp. 809 (Dist. Colo. 1992); *cf*. Peterson v. Wilmur Communs., Inc., 205 F. Supp. 2d 1014 (E.D. Wis. 2002). Although this may be true, the EEOC also defines religious beliefs as "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1980). Therefore, determining the organization is not "religious" does not end the analysis in any given case; a KKK member who holds the organization's beliefs with the strength of traditional religious views highlights an inherent conflict with EEOC guidance.

membership in the KKK, courts in the Fourth and Tenth Circuits originally held the KKK was a political group rather than a religion.[115] One problem with these holdings was they were conclusory; "the proclaimed racist and anti-Semitic ideology of the [KKK] … takes on a … narrow, temporal and political character inconsistent with the meaning of 'religion.'"[116] Neither of the courts attempted to explain how it determined such beliefs were not religious.[117] This appears to be yet another example of the courts ruling on their gut feelings rather than on any legal analysis.

Perhaps more important is the failure by the courts and the EEOC to recognize that religious beliefs are subjective.[118] The issue is not whether a claimed "religion" qualifies for protection, but rather whether the believer holds the set of beliefs as "religious" in the believer's own scheme of things.[119] Thus, even if the KKK described itself as a political organization, a member could hold such beliefs as part of their fundamental morality, thereby making them "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views"[120] consistent with the EEOC's definition of religion and the Supreme Court's holding in *Seeger* and *Welsh*.

Contrast these holdings with *Peterson v. Wilmur Communications, Inc*.,[121] in which the plaintiff was demoted due to his membership in the World Church of the Creator, a "religious organization" sharing some of the white supremacist beliefs of the

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[115] *See Bellamy*, 368 F. Supp. 1025; *Slater*, 809 F. Supp. 809.
[116] *Bellamy*, 368 F. Supp. at 1026; Slater v. King Soopers, 809 F. Supp. 809, 810 (Dist. Colo. 1992).
[117] *See Bellamy*, 368 F. Supp. 1025; *Slater*, 809 F. Supp. 809; *see also Peterson*, 205 F. Supp. 2d at 1022 (Both courts reached "the same result without further discussion").
[118] *Peterson*, 205 F. Supp. 2d at 1022 ("the fact that certain white supremacist organizations have been found not to be religions does not logically mean that Creativity also is not a religion for plaintiff, *given that the test for what is a religion turns in part on subjective factors*.") (emphasis added).
[119] Redmond v. GAF Corp., 574 F.2d 897, 901 n.12 (7th Cir. 1978); *Seeger*, 380 U.S. at 184.
[120] Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1980).
[121] 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

KKK.[122] Specifically quoting *Bellamy* and *Slater*,[123] the district court determined the plaintiff's belief was religious:

> "Religion" under Title VII includes belief systems which espouse notions of morality and ethics and supply a means from distinguishing right and wrong. Creativity has these characteristics. Creativity teaches that followers should live their lives according to what will best foster the advancement of white people and the denigration of all others. This precept, although simplistic and repugnant to the notions of equality that undergird the very non-discrimination statute at issue, is a means for determining right from wrong.[124]

Today, the KKK identifies itself as a religious organization.[125]

E. Conclusion

As these cases show, courts merely have a sense of what "religion" is, and rely on its indefinability as a means to reach the result the courts *feel* is justifiable. But religion is inherently subjective, which is precisely why an objective test is required; without it, the analysis devolves into merely a question of sincerity, and any thought or belief could be "religious" if the believer holds it in high enough regard. Yet Congress intended to protect a certain category of beliefs, not merely entrust judges to determine protection on a case-by-case basis. It is that intent which requires a clear and workable analysis for determining whether a set of beliefs are protected as "religious." Inclusion in the protected class of religion—whether a sincerely-held belief is "religious"—is the first element in any Title VII claim. As we see in Part III (religious accommodation) and Part

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[122] *Peterson*, 205 F. Supp. 2d at 1023. The organization "preaches a system of beliefs called Creativity, a central tenet of which is white supremacy." *Id*. at 1015.
[123] *Id*. at 1022 (Both courts reached "the same result without further discussion. Thus, these cases do not assist me in determining how the World Church of the Creator might be similar to or different from the KKK").
[124] *Id*. at 1023.
[125] *Welcome to the Ku Klux Klan: Knights Party*, http://www.kkk.com (last visited May 26, 2014) ("Bringing a Message of Hope and Deliverance to White Christian America! ... Pray that our people see the error of their ways and regain a sense of loyalty. Repent America! Be faithful my fellow believers. [signed] National Director of The Knights, Pastor Thomas Robb").

IV (harassment), the failure to have an effective legal test to determine whether a given belief is protected pervades all religious claims.

Chapter 3: Reasonable Accommodation / Undue Hardship

Sincerely-held religious beliefs earn the same protection from adverse employment action as does one's race or sex.[126] Unique to religion, however, is the right to be reasonably accommodated when employer policies conflict with such beliefs.[127]

As previously discussed, the original text of Title VII provided no requirement to reasonably accommodate religious practices.[128] In *Dewey v. Reynolds Metals Co*.,[129] the Supreme Court affirmed a Sixth Circuit holding that religious discrimination and failure to accommodate religious practices are "entirely different."[130] The employer's refusal to accommodate the plaintiff's observance of the Sabbath was not discrimination since the employer followed the terms of the collective bargaining agreement that applied equally to all, and discriminated against none.[131] "The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees."[132]

Congress disagreed, and the very next year amended the Civil Rights Act to require employers to reasonably accommodate the religious practices and beliefs of employees unless doing so would be an undue hardship.[133] When an accommodation can be made without an undue hardship on the employer, the employee is able to avoid

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[126] *See* 42 U.S.C. § 2000e-2 (1991).
[127] *Id*. at § 2000e(j).
[128] *See supra* Part II.A.2; *see also* 42 U.S.C. § 2000e (1964).
[129] 429 F.2d 324 (6th Cir. 1970) (*aff'd* 402 U.S. 689 (1971)).
[130] Dewey v. Reynolds Metal Co., 429 F.2d 324, 335 (6th Cir. 1970) (*aff'd* 402 U.S. 689 (1971)).
[131] *Id*. at 334.
[132] *Id*. at 335.
[133] 42 U.S.C. § 2000e(j) (1972).

choosing between his faith and his job.[134] This is the essence of the duty to accommodate—to resolve conflict between one's religion and one's livelihood.

To prove a claim of an employer's failure to accommodate, a plaintiff must show 1) he has a bona fide religious belief that conflicts with an employment requirement, 2) he notified his employer of the conflict, and 3) he was disciplined for failing to comply with the conflicting employment policy.[135] If the plaintiff proves this *prima facie* case, the burden shifts to the employer to prove either he provided a reasonable accommodation that the plaintiff refused, or could not accommodate the plaintiff without incurring an undue hardship.[136]

As seen in Part II, courts have a difficult time with whether the belief that conflicts with the employment policy is "religious" and protected, or unprotected like a merely personal preference? Failure to address this appropriately pollutes the remainder of a court's analysis. Although previously discussed, we will see this issue is necessarily intertwined in the determination of whether a plaintiff is entitled to a reasonable accommodation. Will the caselaw show an effective legal test to analyze these issues, or, as discussed in the previous section, are the courts unable to formulate a construct to apply this balancing test, ruling from the hip rather than taking careful aim with their decisions?

A. Legislative History

[134] Protos v. Volkswagen of America, Inc., 797 F.2d 129, 136 (3d Cir. 1986).
[135] *Id*. at 133-134.
[136] *Id*. at 134.

In the 1972 amendment to Title VII defining "religion," Congress adopted the EEOC's guidelines[137] that required employers to reasonably accommodate religious practices and beliefs unless doing so would cause an undue hardship on the business.[138] Senator Jennings Randolph from West Virginia[139] explained the need for this sweeping change, focusing entirely on the need to accommodate employees' Sabbath observances:

> There are several religious bodies…with certain strong convictions that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday…[For my denomination], we think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, "From eve unto eve shall you celebrate your Sabbath." [However,] [t]here has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.[140]

Senator Randolph continued with a few examples of balancing the need to accommodate such practices with the employers' interests. On one hand, the employer of a man who works 15 days on followed by 15 days off may be required to change the work schedule to a customary five- or six-day work week; without additional specifics, this would not be an undue hardship on an employer.[141] On the other hand, "[t]here are jobs that are Saturday and Sunday jobs, and that is all, serving resorts and other areas. Certainly the amendment would permit the employer not to hire a person who could not work on one

[137] Although the EEOC promulgates guidelines and examples regarding religious accommodations, such guidance is only as strong as the caselaw that enforces them. Thus, for the purpose of this thesis, I will focus solely on the legislative history and intent and the judicial branch's interpretation of it.
[138] 42 U.S.C. § 2000e(j) (1972).
[139] Jennings Randolph, former U.S. Senator for West Virginia, https://www.govtrack.us/congress/members/jennings_randolph/409027 (last visited May 26, 2014).
[140] 118 CONG. REC. 705 (1972).
[141] *Id*. at 706.

of the 2 days of the employment;"[142] Senator Randolph agreed such a requirement would constitute an undue hardship.[143] In the Senate, the amendment passed 55-0.[144]

As we know by experience and as we have seen up to this point, both traditional and non-traditional religions have a number of beliefs that, at times, conflict with employment policies. To understand the balancing test between the employee's beliefs and the needs of the employer, we must first identify its bounds: what beliefs "deserve" reasonable accommodation? The purpose of the duty to accommodate is "plainly intended to relieve individuals of the burden of choosing between their job and their religious convictions, where such relief will not unduly burden others. This is . . . a secular purpose, part of our 'happy tradition' of avoiding unnecessary clashes with the dictates of conscience."[145] Certainly there are some religious practices that require protection more than others. For example, religions place different levels of importance on visible displays of faith; on one end of the pendulum are religious *requirements* to wear religious symbols or clothing, while on the opposite end are methods to express one's beliefs (e.g., wearing a Christian cross). Yet the courts do not identify the distinguishing characteristics to separate these two polar opposites.[146]

As identified in Part II, by expanding the definition of "religious" beliefs to any belief that is sufficiently held, courts dilute the meaning of beliefs that are religious. Likewise, by failing to distinguish between required religious practices and practices that

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[142] *Id*.
[143] *Id*.
[144] *Id*. at 731.
[145] *Protos*, 797 F.2d at 136 (*quoting* United States v. McIntosh, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting)).
[146] *Cf. Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm ("Examples of religious dress and grooming practices include wearing religious clothing or articles (*e.g.*, a Muslim hijab (headscarf), a Sikh turban, or a Christian cross)").

are loosely based on religion, the courts have similarly diluted the meaning of *religious* practices.

B. Is the Plaintiff Entitled to a Reasonable Accommodation?

To be entitled to a religious accommodation, one must have a bona fide religious belief that conflicts with the employer's policy.[147] In *Reed v. Great Lakes Cos*.,[148] the plaintiff was an executive housekeeper for a hotel.[149] One of his duties was to ensure a free copy of the Bible—provided by the Gideons—was placed in each room.[150] When Reed met with his supervisor and the Gideons, the Gideons provided the Bibles, read passages from the Bible, and prayed.[151] Reed left in the middle of this meeting, offended by its religious character.[152] After a heated meeting with his supervisor, Reed was fired for insubordination.[153] The Seventh Circuit Court of Appeals identified that religion may be seen as taking a position on divinity, in which case atheism is therefore a religion (the belief that there is no divinity).[154] However, Reed didn't claim to be an atheist, rather he put forward no evidence as to his religious beliefs.[155] "An employee is not permitted to redefine a purely personal preference or aversion as a religious belief."[156] Thus, Reed "utterly" failed to meet his *prima facie* case.[157]

The *Reed* case is clearly an exception to the rule, setting forth a very low bar for plaintiffs to overcome. The dilution of "religious practices" occurs when the court skips

[147] EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1120 (10th Cir. 2013).
[148] 330 F.3d 931 (7th Cir. 2003).
[149] *Reed*, 330 F.3d at 933.
[150] *Id*.
[151] *Id*.
[152] *Id*.
[153] *Id*. Although not addressed by the court, the timing of the discharge is highly relevant. Reed was not fired after walking out of the meeting; rather, he was fired after the heated discussion with the manager, which suggests Reed's conduct during the meeting was the cause of his discharge. *Id*.
[154] *Id*. at 934.
[155] *Id*. at 933.
[156] *Id*. at 934.
[157] *Id*.

the analysis of whether the apparent conflict is actually a religious practice. In *Redmond v. GAF Corp*.,[158] the plaintiff led a Bible study class on Tuesday evenings; this class did not conflict with his employment.[159] However, when the church elders rescheduled the Bible study class to Saturdays, the plaintiff notified his employer and refused to work Saturdays in order to lead the class.[160] The court made short shrift of whether an accommodation was necessary, and held the defendant's failure to attempt to accommodate this new schedule resulted in liability for the wrongful discharge.[161] The more important question, and the analysis that is more important for future litigants, is whether this Bible study class was truly a "religious practice" intended for protection.

Certainly, there is a difference between a requirement from God that a believer not work on a given day of the week, and the scheduling preferences of a church. Perhaps borrowing from the teachings of Jesus Christ that one should not "let the left hand know what the right hand is doing,"[162] the Court of Appeals wrote its opinion using quotes without regard to the context from which they were extracted.[163] It quickly dispatched any claim that Title VII was limited to practices specifically "mandated or prohibited by a tenet of the plaintiff's religion" in two short paragraphs.[164]

First, the court determined the "very words of the statute ('*all aspects* of religious observance and practice…') leave little room for such a limited interpretation."[165] It is interesting the court decided to emphasize the words "all aspects" rather than the one word that actually grants protection: "religious." The court feigned difficulty in an

[158] 574 F.2d 897 (7th Cir. 1978).
[159] *Redmond*, 574 F.2d at 899.
[160] *Id*.
[161] *Id*. at 903-04.
[162] *Matthew* 6:3.
[163] *See Redmond*, 574 F.2d at 900.
[164] *Id*.
[165] *Id*. at 899.

interpretation of the statute requiring the judge to determine the tenets of a particular religion.[166] The conflict in the actual case is limited to whether the church's schedule trumps the employer's schedule; Saturday was not a holy day, rather just a more convenient day for the church. No significant research is required into the religion of Jehovah's Witnesses to determine its tenets,[167] and the judge could easily have asked the plaintiff during his testimony.

Nonetheless, the court determined such an analysis would be contrary to a mandate of the Supreme Court that "it is no business of courts to say . . . what is a religious practice or activity."[168] If courts were precluded from determining whether a belief was religious and instead had to rely on the testimony of the plaintiff, Title VII would protect all "sincerely held beliefs," rather than sincerely held *religious* beliefs. Of course, such a mandate from the Supreme Court does not exist.

The issue quoted above from *Fowler v. Rhode Island*[169] was whether a gathering of Jehovah's Witnesses in a public park involving a sermon was precluded under a state law that allowed religious gatherings but prohibited public addresses.[170] Other religious sects were allowed to gather in the park and hold their own services, thereby resulting in unequal treatment to the method by which Jehovah's Witnesses held services.[171] Rhode Island conceded the plaintiff was engaged in religious activity; it argued, however, that

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[166] *Id*. at 900.
[167] *See, e.g.,* Kentucky Com. On Human Rights v. Lesco Mfg. & Design Co., 736 S.W.2d 361, 363 (Ky. Ct. App. 1987).
[168] *Redmond*, 574 F.2d at 900 (*quoting* Fowler v. Rhode Island, 345 U.S. 67, 70 (1953)).
[169] 345 U.S. 67 (1953).
[170] *Fowler*, 345 U.S. at 67.
[171] *Id*. at 69.

this religious activity was not protected by the First Amendment.[172] The Supreme Court held:

> [I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers…. To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.[173]

As is clear from the context, the issue for the Supreme Court was not whether the activity was religious or not, but rather the subjective application of the law in Rhode Island. Yet, with selective editing and judicial creativity, the Court of Appeals for the Seventh Circuit used the underlined language to reach their final conclusion, again, with no basis in the law.[174]

Since "*all aspects* of religious observance and practice" are protected, and the court is precluded from determining "what is religious," the Seventh Circuit concluded: "conduct which is 'religiously motivated'…is protected [by Title VII]."[175] Therefore, since Redmond was religiously-motivated to lead Bible study, he was entitled to an accommodation.[176] Such a broad legal test—whether the conduct is motivated by religion or not—doesn't simply dilute the meaning of religious beliefs, it destroys it.[177]

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[172] *Id*.
[173] *Id*. at 70 (emphasis added).
[174] *Redmond*, 574 F.2d at 900.
[175] *Id*.
[176] *Id*. at 901.
[177] Surprisingly, this same court stated 25 years later "an employee is not permitted to redefine a purely personal preference as a religious belief." *Reed*, 330 F.3d at 935. Yet this is exactly what the "religiously-motivated" test permits. Regardless, the court ignores its previous "religiously-motivated" language but

This drastic expansion of protected beliefs is not limited to the Seventh Circuit; the Eleventh Circuit, although not expressly adopting the "religiously-motivated" test, appears to support it nonetheless. In *Dixon v. Hallmark Cos*.,[178] the employer had a policy prohibiting religious artwork in the management office, and informed the plaintiffs of this policy.[179] The supervisor believed displaying such artwork would violate the Fair Housing Act since the company received federal funds in the form of rental assistance and is subject to periodic inspections.[180] Ignoring this, the plaintiffs hung a picture with a Bible quotation on it.[181] After being told to remove it, re-hanging it, and then arguing with the supervisor about it, the Dixons were fired for insubordination.[182] The Eleventh Circuit chastised the district court judge for granting summary judgment to the employer.[183] "The Dixons have presented evidence that they are sincere, committed Christians who oppose efforts to remove God from public places" and therefore may have a legitimate reasonable accommodation claim.[184] Apparently, it is enough to request an accommodation if, because of an employee's religious beliefs, he merely dislikes a policy of his employer.

A Second Circuit district court also committed similar missteps in *Rivera v. Choice Courier Svs*.[185] Rivera's employer required its couriers to "dress in neat and good taste."[186] Rivera, an evangelical Christian, attached lettering to his jackets displaying the

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doesn't correct it; rather the court cites *Redmond* for the limited holding that an employee must notify the employer of the conflict. *Id*.
[178] 627 F.3d 849 (11th Cir. 2010).
[179] Dixon v. Hallmark Cos., 627 F.3d 849, 853 (11th Cir. 2010).
[180] *Id*.
[181] *Id*.
[182] *Id*.
[183] *Id*. at 855.
[184] *Id*.
[185] 2004 U.S. Dist. LEXIS 11758 (S.D.N.Y. 2004).
[186] *Rivera*, 2004 U.S. Dist. LEXIS 11758, at 3.

message "Jesus is Lord."[187] The company requested he not display the message because a customer may incorrectly believe the company endorsed the message, and "as respectful as [the company was] of his personal beliefs, it needed to be equally respectful of our other employees[']s beliefs, our clients, and company policy."[188] Rivera filed a religious discrimination claim under Title VII upon his discharge.[189]

The EEOC determined there was no basis to his claim since wearing this message was not an essential practice of the plaintiff's religion, and the company was not required to accommodate the plaintiff's discretionary request.[190] Unlike the Seventh Circuit in *Redmond*, the EEOC seemingly encountered no difficulties in determining whether this clothing preference was a tenet or requirement of the plaintiff's beliefs. Since the plaintiff testified he "needed to express the name of the Lord Jesus to as many people as possible,"[191] the district court determined the plaintiff's wearing of "Jesus is Lord" on his vest was a religious practice and he satisfied his prima facie case.[192] Similar to the Seventh Circuit, the court determined Title VII "protects more than practices specifically mandated by an employee's religion."[193]

Likewise, the same court held a plaintiff enrolled in a three-year Lay Pastor Program with classes on Saturdays was entitled to religious accommodation, analogizing the program to religious ceremonies and bible study (*Redmond*), rather than arguably

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[187] *Id*.
[188] *Id*. at 8.
[189] *Id*.
[190] *Id*. at 9. The EEOC has subsequently changed their position on this issue and discretionary practices are now included. *See Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, *supra* note 146 ("Examples of religious dress and grooming practices include wearing religious clothing or articles (*e.g.*, a Muslim hijab (headscarf), a Sikh turban, or a Christian cross)").
[191] *Rivera*, 2004 U.S. Dist. LEXIS 11758, at 19.
[192] *Id*. at 22-23.
[193] *Id*. at 22.

comparing the course to educational enrollment in a secular subject matter.[194] One does not have to ponder long to see the problematic results of such a holding. An employee seeking a college degree in Theology would be entitled to scheduling accommodation based solely on his major, while his peer working on an Economics degree would not. The greater conflict occurs when the Economics major needs to leave work early to attend a Theology class….

Not all circuits have accepted this broadening of religious protection into discretionary practices. In *Cloutier v. Costco Wholesale*,[195] a district court case in the First Circuit, the plaintiff was a member of the Church of Body Modification and believed in "spiritual growth through body modification."[196] One of the Church's tenets is that members should "seek to be confident models in learning, teaching and displaying body modification."[197] Over a substantial length of time, Cloutier received tattoos and piercings, to include getting an eyebrow ring.[198] Later, Cloutier's employer implemented a new dress code policy prohibiting facial jewelry, and asked her to remove the eyebrow ring.[199] Cloutier offered to wear a band-aid over her piercing, but Costco refused to allow it.[200] After several discussions between Cloutier and Costco, Costco agreed to accommodate her by allowing her to wear a retainer—a plastic spacer less noticeable than jewelry that prevents the piercing from healing and closing.[201] Cloutier refused,

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[194] *See* Reyes v. N.Y. State Office of Children & Family Servs., 2003 U.S. Dist. LEXIS 12644 (S.D.N.Y. 2003).
[195] Cloutier v. Costco Wholesale, 311 F. Supp. 2d 190 (Dist. Mass. 2004).
[196] *Id*. at 191.
[197] *Id*. at 193.
[198] *Id*. at 192.
[199] *Id*. at 193.
[200] *Id*. at 194.
[201] *Id*.

claiming the retainer would violate her religious beliefs to *display* her eyebrow piercing at *all* times.[202]

The main issue for the court was whether wearing and/or displaying facial jewelry was a sincerely held religious belief therefore entitling the plaintiff to an accommodation.[203] The court begins its hobbled analysis by assuming the Church of Body Modification is a bona fide religion, and reviewed the tenets of its "faith," noting it has no requirement to *display* piercings or tattoos at all times; it then immediately discounts this analysis, correctly stating "[o]f course, the fact that the [Church of Body Modification] does not mandate the practice that the plaintiff insists upon is not, by itself, fatal to Cloutier's claim…. If Cloutier's belief that she must constantly display her body modifications is her religious belief, she is entitled to accommodation."[204] Relying on the fact that Cloutier originally offered to wear a band-aid over her facial piercing and did not claim that concealment of her piercings would violate her religious scruples until the lawsuit began, the court determined she had a "strong personal preference" to display her piercing, but her beliefs were not "religious."[205]

Yet, the court is effectively expressing its disbelief in her claim. Fundamental beliefs regarding "spiritual growth" through body modification—such as whether the modifications must be visible or concealed—do not change with the winds. Theoretically, one person may have religious beliefs that require the modifications are always displayed while another person may believe in growth through body modification, without a requirement that one be a walking canvas. Cloutier's flip-flopping on this

[202] *Id*. at 195.
[203] *Id*. at 199-200.
[204] *Id*. at 199.
[205] *Id*.

apparently fundamental issue goes not to her personal preference as the court claims, but to her *sincerity* in the beliefs. The court didn't believe her claim the piercing must be displayed because she had previously been content with concealing it.[206] Thus, based on the court's factual findings, the claim should have been denied because the beliefs were not sincerely held. Instead, the court determined the belief was a personal preference rather than a religious belief, and, rather than explaining itself, concluded, "[i]t is not necessary for the court to wrestle with this troubling question, however, since Costco's offer of accommodation was manifestly reasonable as a matter of law."[207] Unfortunately, this unmerited air of confidence failed to hide the court's lack of analysis. By determining the plaintiff was not entitled to reasonable accommodation, the court confused and combined the analyses of sincerity, religion, and reasonable accommodation. This provides no standard or foreseeability for future plaintiffs and defendants.

Another distinction courts fail to recognize is between religious prohibitions and affirmative expressions of faith. A Jehovah's Witness refused to greet customers on the telephone with "Merry Christmas;" since her religion precluded the observance of Christmas, making this statement would violate her religious beliefs.[208] The court determined she was entitled to a reasonable accommodation, such as either not answering

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[206] *Id*.
[207] *Id*.
[208] Kentucky Com. On Human Rights v. Lesco Mfg. & Design Co., 736 S.W.2d 361, 363 (Ky. Ct. App. 1987). Unlike a member of another religion that does not celebrate Christmas, Jehovah's Witnesses believe it is improper to celebrate the birth of Jesus Christ. *See Why Don't Jehovah's Witnesses Celebrate Christmas?* JEHOVAH'S WITNESSES, http://www.jw.org/en/jehovahs-witnesses/faq/why-not-celebrate-christmas/ (last visited May 25, 2014) ("We believe that Christmas is not approved by God because it is rooted in pagan customs and rites"). Thus, to wish someone "Merry Christmas" would violate a tenet of the Jehovah's Witness' faith, as opposed to someone who may be Jewish and not believe in such an event or celebration, and therefore may prefer not to make such a statement.

the phone or greeting customers with "good morning."[209] To force her to say "Merry Christmas" would be to force her to disobey a tenet of her faith—precisely the situation Congress intended to avoid.

In *Banks v. Service Am. Corp*.,[210] however, the plaintiffs affirmatively expressed their Christian beliefs by greeting customers—against company policy—with phrases such as "God bless you" and "Praise the Lord."[211] These plaintiffs claimed "[h]onoring God through their speech, through such greetings, was a deep seated sincerely held religious belief and [they] could not stop the practice without violating their beliefs."[212] No analysis was required in this case, as the defendant conceded these were sincerely held religious beliefs and thus entitled to accommodation.[213] Is the religiously-motivated practice of saying "Praise the Lord" and the religious prohibition against saying "Merry Christmas" deserving of the same protection? If so, should an employer be required to make the same effort to accommodate these two practices equally, or is there a difference between avoiding a violation of one's faith and expressing one's faith?

C. Notice Requirement

The second element in a failure to accommodate claim is that the employee notified the employer of the conflict.[214] The employer is not required to know or understand the religious requirements of his employees; as previously discussed, beliefs are subjective and an individual's beliefs are not required to conform to the traditional views of the organized religion of which they may be a member. The notice requirement

[209] *Lesco Mfg. & Design Co.*, 736 S.W.2d at 364.
[210] Banks v. Service Am. Corp., 952 F. Supp 703 (Dist. Kan. 1996).
[211] *Id*. at 707.
[212] *Id*.
[213] *Id*. at 708.
[214] Chalmers v. Tulon Co., 101 F.3d 1012, 1019 (4th Cir. 1996).

is simple when—as in most cases—the employee directly informs the employer of the conflict, but this element is again used by the courts as an excuse to rule based on their visceral reactions rather than objective standards.

The employee must prove the employer was aware of the *conflict*, not just aware of the employee's religious beliefs.[215] The Eighth Circuit, for example, has determined the employer needs "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements."[216] A district court in the Eleventh Circuit agreed with this analysis in *Hellinger v. Eckerd Corp*.[217] In *Hellinger*, the plaintiff was an Orthodox Jew who applied for an opening as a pharmacist.[218] Hellinger neither mentioned religious restrictions on his application nor did he make any requests for accommodation.[219] The defendant contacted the plaintiff's previous employer as a reference, and learned that the plaintiff refused to sell condoms due to his religious beliefs.[220] The defendant did not hire the plaintiff.[221] In determining the plaintiff met his prima facie case, and specifically met the notice requirement, the court determined the defendant was aware of the need of an accommodation, and to require the notification come from the plaintiff himself would be "hyper-technical."[222]

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[215] *See id*. at 1020 ("knowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious activity"); *see also* Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315 (3d Cir. 2008) (courts do not require employers to understand particularized beliefs and observances of various religious sects).
[216] Brown v. Polk County, 61 F.3d 650, 654 (8th Cir. 1995).
[217] 67 F.Supp. 2d 1359, 1363 (S.D. Fla. 1999).
[218] Hellinger v. Eckerd Corp., 67 F.Supp. 2d 1359, 1361 (S.D. Fla. 1999).
[219] *Id*.
[220] *Id*.
[221] *Id*.
[222] *Id*. at 1363.

Yet compare those holdings with a recent decision from the Court of Appeals for the Tenth Circuit. Abercrombie and Fitch, a clothing store specializing in "East Coast collegiate fashion," has a "Look policy" requiring its clerks and salespeople to wear the store's clothing as a work uniform.[223] A Muslim woman interviewed for a job while wearing a black hijab, or headscarf.[224] No questions were asked about the plaintiff applicant's religion, nor did the applicant request any accommodation[225] from the "Look policy" which prohibited black clothing and caps.[226] Based on the interview, the manager ranked her well in each interview category, concluding her evaluation with a recommendation to hire her.[227] Unsure of whether the headscarf conflicted with the company's dress policy, the interviewing manager consulted with a senior manager.[228] She "assumed [the applicant] was Muslim…[and] figured that was the religious reason she wore her head scarf."[229] The senior manager, however, determined the headscarf was incompatible with the dress code, and instructed his subordinate to reaccomplish the evaluation by giving her a lower score, thereby changing the recommendation to hire her.[230]

The Tenth Circuit laid out two bright line rules that, unlike the previously-discussed cases, provide guidance to plaintiffs in its region. First, the court held only religiously-*required* beliefs or practices are entitled to accommodation.[231] The court reminded the parties that the intent of the duty to accommodate is to protect plaintiffs

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[223] *Abercrombie & Fitch Stores, Inc.*, 731 F.3d at 1111.
[224] *Id*. at 1113.
[225] *Id*.
[226] *Id*. at 1111.
[227] *Id*. at 1113.
[228] *Id*. at 1114.
[229] *Id*. at 1113.
[230] *Id*. at 1114.
[231] *Id*. at 1120.

from the "spot where they must choose between their religious convictions and their job."[232] Therefore,

> even if applicants or employees engage in a practice for religious reasons, so long as they do not feel obliged to adhere to the practice (that is, do not consider the practice to be inflexible), then there is no actual conflict, nor a consequent need for the employer to provide a reasonable accommodation.[233]

This bright-line rule—accommodation is only required when the religious practice or belief is *required*—directly conflicts with the other circuits who follow the amorphous "religiously-motivated" test used in *Redmond*. The drastic gap between these two legal tests must be resolved.

The second bright-line rule set forth by the Tenth Circuit was the employer must have *actual* knowledge of the conflict between the employee's/applicant's belief and the employer's policies.[234] In the case at hand, the manager assumed the plaintiff wore her headscarf for religious reasons, but didn't have *actual* knowledge; therefore, Abercrombie & Fitch was entitled to summary judgment since the plaintiff could not prove the notice requirement in her failure to accommodate claim.[235] It appears as though the Tenth Circuit is attempting to craft a new test in order to rule in Abercrombie's favor; a test that suggests employers may feign ignorance and stick their head in the sand to avoid their legal obligations.

Although different from the enough-information-to-know-about-the-conflict test of the Third, Fourth, Eighth, and presumably Eleventh Circuits, the results and

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[232] *Id*.
[233] *Id*. at 1121.
[234] *Id*. at 1125.
[235] Although not at issue in the court's reversal of the summary judgment decision, it appears the plaintiff could continue to trial on her claim of disparate treatment: Abercrombie & Fitch appears to have refused to hire her due to the perception of her sincerely held religious practice of wearing the headscarf. *Id*. at 1143 (Ebel, J., dissenting).

application seem to be the same. If an employer has enough information *to know* there is a conflict between the employee's beliefs and the employer's policies—as in *Hellinger*—he has actual knowledge of the conflict. Similarly, where the employer knows generally of the plaintiff's religious beliefs, but doesn't know how it may conflict with the employer's policies, the employer has neither enough information to know about the conflict, nor actual knowledge of such conflict.[236]

There is no predictability as to when courts will determine whether a plaintiff is entitled to a reasonable accommodation for the religious beliefs. Judges confuse religious beliefs for the sincerity of such beliefs. The Fifth and Seventh Circuits go so far as to believe that any practice that is "religiously motivated" is entitled to protection and accommodation, without any distinction between required and discretionary preferences of the believer. On the other hand, the Tenth Circuit protects only required religious practices; discretionary practices are entitled no accommodation whatsoever.[237]

Once the court has determined that a given practice is entitled to accommodation, the next problem arises when determining whether there is an undue hardship for an employer. Unfortunately, as is the standard when dealing with religious discrimination cases, the courts have provided little guidance as to what analysis litigants should expect in any given scenario.

D. Undue Hardship

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[236] *See, e.g., Wilkerson*, 522 F.3d at 319-320.

[237] *See Redmond*, 574 F.2d at 900 ;*see also* Cooper v. General Dynamics, Convair Aerospace Div., Ft. Worth Operation, 533 F.2d 163 (5th Cir. 1976) ("If the employee's conduct is religiously motivated, his employer must tolerate it unless doing so would cause undue hardship to the conduct of the business"); *cf. Abercrombie & Fitch Stores, Inc.*, 731 F.3d at 1120 ("For there actually to be a conflict, logic dictates that an applicant or employee must consider the religious practice to be an inflexible one—that is, a practice that is required by his or her religious belief system").

In *TWA v. Hardison*,[238] the Supreme Court interpreted and defined the balancing test between employees requiring religious accommodation and employers. Hardison worked at a TWA maintenance base operating 24 hours a day, 365 days a year.[239] During his employment, Hardison joined the Worldwide Church of God, a tenet of which required observance of the Sabbath from Friday evening to Saturday evening.[240] Initially, this didn't cause any problems for either TWA or Hardison; he had enough seniority to change his work schedule to avoid a conflict with his Sabbath, and if one arose, he could swap shifts with other qualified employees.[241] This arrangement satisfied TWA's employment policies, Hardison's religious beliefs, and the Union's staffing and seniority rules.[242]

The foundation of the litigation in this case arose when Hardison voluntarily bid for and received a transfer to another building site.[243] The two locations had separate seniority lists; due to the transfer, Hardison's seniority dropped to the near bottom of the list. Although TWA agreed to allow Hardison to receive a schedule that did not conflict with his Sabbath, the union was unwilling to violate their seniority system and Hardison did not rank high enough to avoid Saturday duty.[244] Hardison requested a four-day workweek, but to allow this, TWA would suffer some form of hardship.[245] TWA could 1) leave Hardison's position empty on Saturdays, impairing the function of his section, 2) replace Hardison with another qualified employee or supervisor, which would leave the replacement's section undermanned, or 3) pay premium wages to an employee not

[238] 432 U.S. 63 (1977).
[239] TWA v. Hardison, 432 U.S. 63, 66 (1977).
[240] *Id*. at 67.
[241] *Id*. at 68.
[242] *Id*.
[243] *Id*.
[244] *Id*.
[245] *Id*. at 68-69.

scheduled to work on Saturdays to replace Hardison.[246] TWA rejected these options.[247] Hardison refused to report to work on Saturdays, and he was discharged for insubordination.[248]

The Supreme Court held TWA would have suffered an undue hardship to grant Hardison the accommodation he requested.[249] Title VII doesn't require the employer to forgo the valid collective bargaining agreement, which represents and protects the employment rights of all its employees, for the sake of an accommodation for one; to support such a holding would deprive the other employees of their contractual rights because they don't have religious beliefs similar to that of Hardison.[250] "Title VII does not contemplate such unequal treatment."[251] In fact, Title VII affords special treatment to bona fide seniority and merit systems, determining that such practices—absent a discriminatory intent—are not unlawful employment practices even if they have a discriminatory effect.[252] Requiring TWA to pay another employee to cover Hardison's shift, or bear the cost of being undermanned in a section would have constituted an undue burden on TWA and is not required under Title VII.[253] The Supreme Court drew its line; "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[254]

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[246] *Id*.
[247] *Id*. at 68.
[248] *Id*. at 69.
[249] *Id*. at 84.
[250] *Id*. at 80.
[251] *Id*. at 81
[252] *Id*. at 82; *see* 42 U.S.C. § 2000e-2(h) (1972) ("Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin….").
[253] *Hardison*, 432 U.S. at 84.
[254] *Id*.

The Supreme Court's holding in *Hardison* appears consistent with Senator Randolph's explanation during the discussion of reasonable accommodation in the Senate.[255] Where an employer can reschedule its employees without difficulty to accommodate the Sabbath, the employer is obligated to do so; employers who have 24-hour operations or require weekend work, however, may not have the same ability to accommodate Sabbath observance.[256] Thus, in the case of a firefighter who observed the same Saturday Sabbath as Hardison, the Tenth Circuit Court of Appeals found—prior to the *Hardison* decision—it was an undue hardship to accommodate the employee where to do so would require either providing less favorable working conditions for all other employees, or leaving the fire station critically undermanned.[257] Thus, it seems both Congress and the Supreme Court agree; if an employer can accommodate a religious belief or practice, he is obligated to do so as long as it doesn't impose a cost to the employer (beyond trivial/*de minimis* costs).

The duty to accommodate is a two-way street;[258] the EEOC describes it as an "interactive process" between the employee and the employer.[259] An employee has a duty to cooperate with the employer's good faith efforts to accommodate,[260] and cannot impose liability on its employer by demanding an unreasonable accommodation.[261]

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[255] 118 CONG. REC. 705-06 (1972).
[256] *Id*. at 706.
[257] United States v. Albuquerque, 545 F.2d 110, 115 (10th Cir. 1976).
[258] *See* Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 69 (1986) ("bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business") (*quoting* Brener v. Diagnostic Center Hospital, 671 F.2d 141, 145-46 (5th Cir. 1982)).
[259] *Religious Discrimination*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/types/religion.cfm.
[260] *Cloutier*, 311 F. Supp. 2d at 198.
[261] *See* Jordan v. North Carolina Nat'l Bank, 565 F.2d 72 (4th Cir. 1977). In *Jordan*, the plaintiff applied for a job with the defendant, but notified the bank she celebrated the Sabbath on Saturday and would be unable to work on any Saturday. *Id*. at 74. The bank manager informed her they would "try to accommodate her" but could give her no guarantee. *Id*. at 75. The plaintiff stated she could not accept the

Similarly, an employer must attempt to accommodate the employee's religious beliefs[262]—mere hypothetical or potential hardships are not sufficient to avoid this obligation.[263]

This cost is not limited to only financial effects. In *Hardison*, the hardship included the financial cost of premium pay or hiring an additional worker, and other courts have loosely followed suit, determining that less than $20 of monthly incurred costs associated with an accommodation is not an undue hardship.[264] But *Hardison* also identified an intangible cost: lowered effectiveness in the Hardison's section if he didn't work on Saturdays and was not replaced by another supervisor.[265] The Fifth Circuit further examined undue hardship in a similar case where the plaintiff refused to work his Sabbath, and offered to pay the difference in wages for his employer to pay another worker overtime.[266] The district court found the costs associated with "hir[ing] an overtime employee and bill[ing] [the plaintiff] for the additional wages" were still more

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position without such a guarantee and filed her lawsuit claiming the bank failed to accommodate her. *Id*. at 73. This requirement of the plaintiff's was "so unlimited and absolute in scope—never to work on Saturday—that it speaks to its own unreasonableness and thus beyond accommodation." *Id*. at 76.

[262] *See* EEOC v. Aldi, Inc., 2008 U.S. Dist. LEXIS 25206 (W.D. Pa. 2008). Once notified the plaintiff's religious beliefs forbade working on Sundays, the employer merely responded that Sunday work was an essential function of the job and the plaintiff needed to report to work as scheduled. *Id*. at 33. The employer failed to attempt to accommodate, failed to facilitate shift-swapping, and didn't "even engage in a discussion with [the plaintiff] as to the existing rotation system and voluntary shift swap policy." *Id*. *See also* Balint v. Carson City, 180 F.3d 1047, 1056 (9th Cir. 1999) ("The mere existence of the City's seniority system does not relieve it from the duty to attempt reasonable accommodation of its employees' religious practices").

[263] *See*, *e.g.*, Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1976) ("We are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice"); Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d 397, 402 (9th Cir. 1978) (Undue hardship requires more than proof of some co-worker's grumbling or unhappiness with a particular accommodation).

[264] *See, e.g.*, *Anderson*, 589 F.2d 397; Burns v. Southern Pacific Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978) (holding that plaintiffs with religious beliefs forbidding union membership, thereby depriving union of less than $20 in monthly income, was not undue hardship).

[265] *Hardison*, 432 U.S. at 85.

[266] Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1028 (5th Cir. 1984).

than *de minimis*.[267] This holding appears consistent with *Hardison*; unfortunately, intangible costs by their very nature are difficult to prove, granting judges yet another element on which to hang their proverbial hats with neither rhyme nor reason.[268]

A court in the Sixth Circuit surprisingly adopted this principle in *EEOC v. Arlington Transit Mix, Inc*.[269] The plaintiff, a mechanic, regularly attended church services on Wednesday evenings, and had requested—and received—an accommodation to ensure he was able to leave work in time to attend.[270] During this period of accommodation over approximately two years, the employer instituted a new policy that one mechanic could never work alone for reasons of safety and availability for road service.[271] The plaintiff was discharged when he left a mechanic alone one evening by leaving work at 5:52 p.m. to attend his 7:00 p.m. church service.[272] The court held this violation of the employer's policy constituted an undue hardship, and thus the plaintiff's discharge was lawful.[273] However, the second mechanic arrived at 6:01 p.m., a mere nine minutes after the plaintiff left.[274] No road service requests were received in this nine-minute window, nor was anyone injured.[275] Thus, the court's logic was that undue hardship was not incurred by this incident, but rather at the *speculation* of harms that could be caused at a future incident, *if* the plaintiff were to violate the policy again.[276]

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[267] *Id*.
[268] *See, e.g.*, *Burns*, 589 F.2d at 407 (Undue hardship requires more than proof of a coworker's "grumbling").
[269] 734 F.Supp. 804 (E.D. Mich. 1990).
[270] EEOC v. Arlington Transit Mix, Inc., 734 F.Supp. 804, 805 (E.D. Mich. 1990).
[271] *Id*. at 808.
[272] *Id*. at 807.
[273] *Id*. at 810.
[274] *Id*. at 809.
[275] *See id*. at 809-10.
[276] The court defines the accommodation "required" by the plaintiff as "[r]equiring Arlington to allow all mechanics to work the same shift…[forcing] it to increase the amount of overtime paid." *Id*. at 809. Yet, as is clear from the facts, the plaintiff only wanted the accommodation to leave in time for his church service, even if doing so would, at times, temporarily conflict with the employer's "one-mechanic" policy.

Compare these holdings with the decision in *Banks* (involving cashiers stating "God Bless You" in violation of company policy) where the employer received 20-25 complaints regarding this conduct in a three-month period and feared a boycott, losing customers, or potentially losing its service contract.[277] The district court within the Tenth Circuit determined this was "more hypothetical than real" and "speculative at best."[278] Under such an analysis, employers would rarely be able to use intangible costs as a basis for undue hardship. If approximately one complaint every three days isn't enough, what is? If an employer has a decline in sales over this period, would the court change its decision or claim that there are a multitude of reasons for declining sales?

E. Conclusion

Court analyses of failure to accommodate claims continue to cause bewilderment among litigants. The scope of protected beliefs and practices range from the broad "religiously motivated" to the more narrow "religiously required." Reasonable accommodation and undue hardship remain a loose balancing test of interests for courts

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Id. The court, in essence, held that the employer's duty to accommodate ceased once it conflicted with the employer's "one-mechanic" policy: "Arlington clearly could not have reasonably accommodated his religious beliefs on that evening." *Id*. But the duty to accommodate only arises *after* there is a conflict with an employment policy. Thus, the court holds that conflict between the employee's beliefs and the employer's policy constitutes undue hardship, thereby eliminating the duty to accommodate. How could the court have reached such a conclusion?

The reason for the court's decision is based on the court's inability to distinguish between reasonable accommodation and undue hardship. The plaintiff previously had left as late as 6:15 and 6:30 to arrive on time. *Id*. Yet on this day, knowing Cox was on his way back, the plaintiff requested permission to leave at 5:52 p.m., and his supervisor told him to wait until another mechanic arrived. *Id*. at 806. The plaintiff refused, and left nine minutes sooner than he was allowed. *Id*. at 809. The issue in this was not one of undue hardship; rather, the employer offered the plaintiff a reasonable accommodation—to leave work once a second mechanic arrived. By doing so, the employer fulfilled its duty under Title VII, but the plaintiff unreasonably failed to follow it. The question of undue hardship was never triggered (as undue hardship only applies when the employer claims it *couldn't* reasonably accommodate the employee). *Wilson*, 58 F.3d at 1342 ("when the employer reasonably accommodates the employee's religious beliefs, the statutory inquiry ends… Undue hardship is at issue 'only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.'") (*quoting* Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 68-69 (1986)).

[277] *Banks*, 952 F. Supp at 710.

[278] *Id*.

to use as an ends-justifying-the-means form of analysis (or more accurately, analysis avoidance). Worse still, none of these cases identify any cogent analysis by which parties can predict the outcome of their litigation.

Chapter 4: Harassment and Proselytizing

Up to this point, we have discussed two types of religious discrimination claims: disparate treatment[279] and failure to reasonably accommodate religious practices.[280] A third basis for a discrimination complaint is harassment based on the plaintiff's protected class (e.g., racial or sexual harassment).[281] If supervisors or coworkers harass the plaintiff based on his or her religion or religious practices to such an extent that it alters "the terms or conditions of employment," the employer may be liable for damages.[282] There are two types of harassment claims. *Quid pro quo* applies when the harassment results in a tangible employment action (promotion, demotion, etc.); for example, when a plaintiff proves she was not promoted due to her refusal to submit to a supervisor's sexual demands, she has established "the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII."[283] When a supervisor takes such an action to demote or fire an individual, he does so under the employer's authority; such an injury could not have occurred if not for the agency relationship between the supervisor and the employer.[284]

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[279] *See supra* Part II.
[280] *See supra* Part III.
[281] JOEL WM. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION 183 (9th ed., 2013); *see* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (outlining prima facie elements for harassment claims).
[282] 42 U.S.C. § 2000e-2 (1991); FRIEDMAN, *supra* note 281, 183.
[283] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 753-54 (1998).
[284] *Id*. at 761-62. The decision to demote, fail to promote, or discharge an employee is inherently imputed to the employer: "The decision is most cases is documented in official company records, and may be

Even if there is no tangible employment action, the plaintiff may be able to prove a claim of a hostile work environment. For example, an employee subjected to pervasive racial or religious slurs in the workplace may serve as a basis for a hostile work environment lawsuit, even without a specific adverse employment action;[285] this type of harassment claim requires a high evidentiary standard showing the plaintiff's workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[286]

Harassment claims require 1) severe or pervasive conduct,[287] 2) that created a hostile environment (both objective and subjective),[288] 3) that was unwelcome, and 4) based on the plaintiff's protected class.[289] In the case of a hostile work environment

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subject to review by higher level supervisors. The supervisor often must obtain the imprimatur of the enterprise and use its internal processes." *Id*. at 762.

[285] *Meritor Sav. Bank, FSB*, 477 U.S. at 66 ("Courts [have properly] applied this principle to harassment based on race… religion… and national origin"); Compston v. Borden, Inc., 424 F.Supp. 157, 160-61 (S.D. Ohio 1976) ("When a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an employee before his fellows because of the employee's professed religious views, such activity will necessarily have the effect of altering the conditions of his employment").

[286] Harris v. Forklift Sys., 510 U.S. 17, 21 (1993).

[287] The "'mere utterance of an… epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII." *Id*. at 21; *see*, *e.g.*, Bourini v. Bridgestone/Firestone N. Am. Tire, L.L.C., 136 Fed. Appx. 747, 751 (6th Cir. 2005) (eight alleged incidents over five years, none of which were severe, were not pervasive enough to alter the terms and conditions of employment); Powell v. Yellow Book USA, Inc., 445 F.3d 1074, 1078 (8th Cir. 2006) (religious postings in employee's cubicle did not constitute severe or pervasive religious harassment); Tyson v. Clarian Health Partners, Inc., 2004 U.S. Dist. LEXIS 13973, 33 (S.D. Ind. 2004) (Inappropriate teasing does not rise to the level of harassment even when motivated by religious animus); Keplin v. Maryland Stadium Auth., 2008 U.S. Dist. LEXIS 105545, 8 (D. Md. 2008) ("callous behavior by one's superiors" is not sufficiently severe or pervasive to create a hostile or abusive environment); Khan v. Prison Health Servs., Inc., 2005 U.S. Dist. LEXIS 16954, (S.D. Ind. 2005) (comments expressing peculiarities of the Islamic religion and showing a lack of tact or sensitivity for a person's beliefs are not "hostile" under Title VII); Favors v. Ala. Power Co., 2010 U.S. Dist. LEXIS 69268, 28-30 (S.D. Ala. 2010) (Offhand references to [plaintiff's] religion from time to time are "far too innocuous and benign to satisfy the 'severe or pervasive' prerequisite for a hostile work environment claim").

[288] Proof of actual injury, such as psychological harm, is not required. *See Harris*, 510 U.S. at 21.

[289] Scott v. Montgomery County Sch. Bd., 963 F.Supp. 2d 544, 558 (W.D. Va. 2013) ("[T]he challenged conduct must be 'motivated by religious animosity'…it is not 'sufficient that the alleged harassment only relate to religion'"); Rivera v. P.R. Aqueduct & Sewers Auth., 331 F.3d 183, 190 (1st Cir. 2003) ("[T]he

claim, however, an employer may not have knowledge of the abusive acts of its employees or managers; therefore, employers may assert an affirmative defense in hostile work environment claims and avoid liability by showing 1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and 2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[290]

A. Religious Harassment

Harassment by a supervisor requiring subordinate employees to be a certain religion in order to be promoted or avoid discharge is equally illegal and reprehensible as a supervisor who demands sexual favors as a condition for employment. In *Venters v. City of Delphi*,[291] the police chief continuously subjected the plaintiff, a dispatcher, to religious harassment.[292] The police chief was a "born-again Christian" who regularly discussed his religious beliefs to the plaintiff; he stated that one had to be "saved" to be a good employee; the plaintiff was running out of time to be saved; the police station was "God's house;" he criticized her personal decisions (such as living with another single woman and spending time with married police officers); and he provided a Bible and

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question is not whether a religious person could find the [conduct] offensive; it is whether religious animus prompted [it]"); *see Meritor Sav. Bank, FSB*, 477 U.S. at 67-68; Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (The plaintiff "must always prove that the conduct at issue was not merely tinged with offensive…connotations, but actually constituted '*discrimination*…because of…[the plaintiff's protected class]"). Thus, where male co-workers harass the male plaintiff *because* he is male, the plaintiff's claim can survive; the fact that the harassers and the plaintiff are of the same gender is not fatal to his claim. *Oncale*, 523 U.S. at 82. Similarly, even if the harasser and plaintiff are both Christians, the claim of religious harassment can equally survive when the plaintiff can show the harassment was *because of* her religion. Leslie v. Johnson, 2006 U.S. Dist. LEXIS 24064, 45 (S.D. Ohio 2006) (Argument that he could not have subjected the victim to religious harassment since she claimed to be Christian too had "no caselaw to support [it];" the harassment was still unwelcome).

[290] *Burlington Industries, Inc.*, 524 U.S. at 765.

[291] 123 F.3d 956 (7th Cir. 1997).

[292] *See* Venters v. City of Delphi, 123 F.3d 956 (7th Cir. 1997).

religious matters to the plaintiff with the police department's training materials.[293] "Interspersed with these religious lectures were numerous references to Venters' status as an at-will employee who, as [the police chief] reminded her, could be dismissed at any time."[294] Over time, the police chief's harassment became even more egregious, telling her she "had a choice to follow God's way or Satan's way," and that the latter choice would leave her unemployed.[295] He then suggested she was a victim of child abuse, she had sex with family members and animals, she was sacrificing animals in Satan's name, and suicide would be preferable to her continuing this life of sin.[296] Within a matter of days, the police chief fired Venters for reasons that could reasonably appear as a pretext for failing to conform her religious beliefs to his.[297] The Seventh Circuit concluded the claim "fits neatly within the *quid pro quo* framework" because the police chief improperly "made adherence to his set of religious values a requirement of continued employment in the police department."[298]

Although harassment claims are legally distinct from disparate treatment claims (discussed in Part II), the protections are factually similar. Just as the police chief of the City of Delphi was prohibited from hiring or firing employees based on their religious beliefs, he was likewise prohibited from using an individual's religious beliefs (or lack thereof) as a condition of continued employment. For the employee, the effect is the same; his or her religious beliefs are a barrier to equal employment treatment. What stands out in harassment cases—unlike the disparate treatment cases discussed

[293] *Id*. at 962-63.
[294] *Id*. at 963.
[295] *Id*. at 964.
[296] *Id*.
[297] *Id*. at 977.
[298] *Id*.

previously—is that the defendant often uses his or her religious beliefs as both a legal sword and shield; the defendant is religiously motivated to harass the employee and then seeks shelter from liability because of the supervisor's own "protected" religious beliefs.

Such arguments, when made by supervisors, often fall upon deaf ears in the courtroom. In *Venters*, the police chief claimed a First Amendment right to free speech and religious exercise and "the Bible requires him to witness those [beliefs] to people who want to hear it."[299] Although he identified an apparent conflict—his religious beliefs and right to free speech as compared to the plaintiff's right to be free from hearing his religious beliefs and speech—the court quickly dispatched this issue.[300] The case was not about the police chief's religious views, but rather using his office to impose these views on his subordinate, adding these views as a condition of employment, and to create an abusive environment for an employee because of her own religious views.[301]

This is one area of religious discrimination cases (perhaps the only area) in which the courts clearly agree and effectively contend with religious beliefs. A court in the Eleventh Circuit denied an employer's motion for summary judgment when a supervisor made remarks such as "[t]his is a Christian company and there is no place in it for anyone who is not Christian"[302] and treated the plaintiff—a Hindu who refused to convert to Christianity—differently than other employees who accepted Bibles from the supervisor and were re-baptized, and was eventually discharged.[303] The court determined "a reasonable jury could conclude that once it became apparent the plaintiff had no

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[299] *Id*.
[300] *Id*.
[301] *Id*.
[302] The employer was a not a bona fide religious organization exempt from Title VII. *See* 42 U.S.C. § 2000e-1(a) (1991).
[303] Panchoosingh v. Gen. Labor Staffing Servs., 2009 U.S. Dist. LEXIS 29109, 20-22 (S.D. Fla. 2009).

intention of actually converting to Christianity or 'saving' himself through baptism, [his supervisor] turned on him and started looking for reasons to dismiss him."[304] The fact that the supervisor's motivation was religiously motivated based on his own beliefs, as opposed to merely discriminating against Hindus for some secular reason, properly played no part in the court's analysis.[305]

Similarly, in a case within the Ninth Circuit, the court denied a summary judgment motion by a supervisor who repeatedly required the plaintiff to attend daily prayer meetings, informed plaintiff that homosexuality was immoral and he was going to hell if he did not become a Mormon, and required the plaintiff to "out himself" to his co-workers and assure them he was in a monogamous relationship so as to assure the other employees he was not promiscuous and did not want to have sex with any of them.[306] Again, the supervisor's religious beliefs were immaterial to the court's opinion.[307]

The "conflict" between the supervisor's religious beliefs and the plaintiff employee's religious beliefs is most effectively explained and put to rest in *EEOC v. Preferred Mgmt. Corp.*,[308] a case within the Second Circuit. The EEOC alleged multiple disparate treatment and religious harassment claims against Preferred Management Corp. ("Preferred"), a home health care agency, for seven of its employees and former employees.[309] The co-owner and Chief Executive Officer of Preferred was a born-again Christian who believed in a religious directive to share her faith everywhere, including

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[304] *Id*. at 25.
[305] *See generally id*.
[306] Erdmann v. Tranquility Inc., 155 F.Supp. 2d 1152, 1161 (N.D. Cal. 2001).
[307] *See generally id*.
[308] 216 F.Supp. 2d 763 (S.D. Ind. 2002).
[309] EEOC v. Preferred Mgmt. Corp., 216 F.Supp. 2d 763, 769-70 (S.D. Ind. 2002). The lawsuit also included an allegation the defendants engaged in a pattern or practice of discrimination. *Id*. at 769.

the workplace.[310] The mission statement of Preferred is "to be a Christian dedicated provider of quality health care," and the CEO further defines Preferred's mission as "presenting God and his Son, Jesus Christ, to all of Preferred's employees."[311] Employees are required to sign a document, as a condition of employment, stating they agree and actively support Preferred's mission and values; managers and supervisors are instructed to use such values to discipline employees and rate their performance.[312] The allegations against the company included, *inter alia*, regular prayers during meetings;[313] terminating an interview because the interviewee belonged to a different sect of Christianity and telling her she would burn in hell;[314] informing managers that if they "were not where they should be spiritually, they should resign;"[315] quizzing employees during training entitled "Home Care 101" to which the correct answers were usually "Jesus, God, or the Bible;"[316] and—in response to an employee's comment that "Christians did not have a corner on the 'God market'…and there is more than one way to get to God"—the CEO stated: "[The comment] was new age thinking and it was not allowed at Preferred Home Health Care."[317] Both the EEOC and Preferred generally agreed that the CEO's religious beliefs permeated the workplace.[318]

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[310] *Id*. at 772-73.
[311] *Id*. at 773. It is important to note that Preferred was not a religious organization exempt from Title VII. *See* 42 U.S.C. § 2000e-1(a).
[312] *Preferred Mgmt. Corp.*, 216 F.Supp. 2d at 773.
[313] *Id*. at 775.
[314] *Id*. at 776-77.
[315] *Id*. at 779.
[316] *Id*. at 783.
[317] *Id*. at 793.
[318] Many of the allegations against the company were supported by both the plaintiff's and defendant's statements of fact. *See id*. at 772-803.

At the outset of its analysis, the court addressed the "clash" of the religious rights of the plaintiffs with those of the defendants:[319]

> It is important to bear in mind that this case does *not* involve a "balancing" of the plaintiffs' religious rights and Preferred's religious rights as if their respective rights were asserted against each other. Instead, the issues here involve two different legal relationships: Title VII positions the plaintiffs against Preferred; the First Amendment and the [Religious Freedom Restoration Act] pit Preferred against the federal government (in its persona as the EEOC).[320]

Thus, Title VII is solely a shield against discrimination, not a sword to justify discrimination. To allow Preferred's religious beliefs and freedom of speech to support its religious harassment of its employees would require the courts to allow an employer's freedom of speech to defend against similar claims of sexual or racial harassment.[321] Such speech may be protected on the streets from criminal sanctions, but is regulated in the workplace by Title VII.[322] So long as Title VII remains a constitutional prohibition on employment discrimination, religious practices and speech may lawfully lead to liability for an employer. Anti-Semitic remarks directed at an employee because he is Jewish,[323] or harassment because an employee is Muslim is clearly prohibited by Title VII.[324] There is no "balancing test" between the religious beliefs of the harasser and the harassed… or is there?

B. Proselytizing as a Reasonable Accommodation

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[319] *Id*. at 805.
[320] *Id*. at 805-06.
[321] *See id*. at 809.
[322] *Id*.
[323] *See* Weiss v. United States, 595 F.Supp. 1050, 1053 (E.D. Va. 1984) (Plaintiff was constant target of religious slurs and taunts such as "resident Jew," "Jew faggot," and "Christ killer").
[324] *See* EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 311 (4th Cir. 2008) (Co-workers often called the plaintiff names such as "towel head" and "Taliban," posted a cartoon depicting persons in Islamic attire as suicide bombers, hid his timecard, unplugged his computer equipment, mocked his appearance, and defaced his business cards, all because he was Muslim).

Unique to religious harassment claims, unlike other protected classes, is the conflict created by the duty to accommodate employees' religious beliefs and practices.[325] Some religions encourage proselytization, defined as the act of "induc[ing] someone to convert to one's faith."[326] Inherent in that definition is the determination that the listener's faith (or lack thereof) is wrong, inferior, or damnable. Thus, the very act of proselytizing, as seen in both *Venters* and *Preferred*, may be sufficiently offensive or abusive (by judging another's religious beliefs) to justify a claim of harassment. As the court identified in *Preferred*, there is no balancing between the beliefs of the harasser or the harassed—Title VII is not a sword to allow a religious observer to behave in a way that would constitute misconduct if conducted by a secular employee. Unfortunately, the problems identified in Parts II and III—a lacking workable definition of "religion," failure to identify what constitutes "protected" religious practices, and inconsistent application of reasonable accommodation versus undue hardship—arise in full force when courts are faced with similar fact patterns brought as reasonable accommodation claims rather than harassment claims.

Some courts, perhaps in an effort to avoid the issue headfirst, allow reasonable accommodation claims to survive, but are quick to limit an employee's ability to proselytize to customers. In *Knight v. State Dep't of Pub. Health*,[327] the plaintiffs were government employees who felt "called to proselytize while working with clients."[328] Both plaintiffs were reprimanded for their proselytizing after the department received

[325] *See supra* Part III.
[326] *Proselytize*, http://www.merriam-webster.com/dictionary/proselytize (last visited May 25, 2014).
[327] 275 F.3d 156 (2d Cir. 2001).
[328] Knight v. State Dep't of Pub. Health, 275 F.3d 156, 160 (2d Cir. 2001).

client complaints.[329] The Second Circuit determined both plaintiffs failed to meet their prima facie elements because neither plaintiff notified the employer of the religious need to proselytize prior to receiving the reprimands.[330] Even if the plaintiffs had met their prima facie case, the court further concluded that the employer reasonably accommodated them by only limiting the proselytizing to clients.[331]

In a similar case out of the Eighth Circuit, an ultrasound technician had a religious belief that "require[d] him to counsel women out of having abortions."[332] The employer offered him the following accommodation: the plaintiff wouldn't have to perform an exam on any patient contemplating an abortion and if a patient spontaneously disclosed she was considering an abortion, he could walk out and not perform the exam.[333] However, this accommodation does nothing to resolve the conflict between his religious beliefs and the employer policy. The plaintiff was "required" to convince women to avoid getting abortions, so merely being allowed to walk out of the examination room doesn't accommodate his beliefs.[334] The court could have determined that allowing the plaintiff to proselytize to patients was an undue hardship, but in an effort to quickly resolve the case, the judge ignored the purpose of the duty to reasonably accommodate,[335]

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[329] *Id*. at 161-63.
[330] *Id*. at 167-68.
[331] *Id*. at 168.
[332] Grant v. Fairview Hosp. & Healthcare Servs., 2004 U.S. Dist. LEXIS 2653, 2 (D. Minn. 2004).
[333] *Id*. at 9.
[334] When the plaintiff made this argument to the court, it erroneously responded that "[b]ecause neither the United States Supreme Court nor the Eighth Circuit has adopted such a test, this argument is unpersuasive." *Id*. at 13.
[335] *See* Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987); *Protos*, 797 F.2d at 136 (*quoting McIntosh*, 283 U.S. at 634 (Hughes, C.J., dissenting)) (The purpose of the duty to accommodate is "plainly intended to relieve individuals of the burden of choosing between their job and their religious convictions, where such relief will not unduly burden others").

as well as the basic definition of "accommodate,"[336] and resolved the case by merely holding the plaintiff was reasonably accommodated.[337]

Some courts have handled claims involving proselytizing to coworkers similarly, by identifying the inherent conflict between the religious freedom of the evangelizer and the listeners. In an Eleventh Circuit district court, the plaintiff was discharged for proselytizing to coworkers and subordinates by condemning two who were homosexual, continually trying to convert a Muslim, attempting to lay hands on employees, and giving unsolicited Bibles at work.[338] In firing him, the defendant had "not only the right, but a legal duty to keep its workplace free of harassment."[339] In a comparable case within the Fourth Circuit, the court held the proselytizer put the employer "between a rock and a hard place, and thus any attempt to reasonably accommodate plaintiff's proselytizing would have imposed an undue burden upon defendants."[340]

A court in the Ninth Circuit summarily rejected a plaintiff's claim requesting reasonable accommodation to proselytize to subordinates in the workplace by holding her religious beliefs did not "require" her to recruit subordinates to join her Bible study, and therefore the employer was not required to accommodate her.[341] Unlike the previous cases, this court continued with a sweeping holding regarding proselytizing, without any discussion of harassment, that "[e]ven if active recruitment was a tenet of [her] religious

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[336] *Accommodate*, http://www.merriam-webster.com/dictionary/accommodate (last visited May 26, 2014) ("to provide what is need or wanted for").
[337] *Grant*, 2004 U.S. Dist. LEXIS 2653, at 9.
[338] *Weiss*, 1999 U.S. Dist. LEXIS 23587, at 25.
[339] *Id*.
[340] Whatley v. S.C. Dep't of Pub. Safety, 2007 U.S. Dist. LEXIS 2391, 17-18 (D.S.C. 2007).
[341] EEOC v. Serrano's Mexican Rests., LLC, 2007 U.S. Dist. LEXIS 25693, 9-10 (D. Ariz. 2007).

beliefs, defendant would not have been required to allow [her] to impose her beliefs on her coworkers."[342]

Such cases make it appear as though proselytizing in the workplace would never be allowed. Courts ignore religious motivations when it comes to harassment claims, and in the cases above, judges are eager to find no reasonable accommodation to allow it (one way or another). By entertaining such cases, however, the courts are suggesting that proselytizing is entitled to reasonable accommodation in *some* situations. Yet none of the holdings identify the boundaries of those situations where an employer must allow the employee to evangelize and no undue hardship arises.

In fact, there are direct conflicts in logic. Recall *Rivera*, the case out of the Second Circuit that determined it was a reasonable accommodation to allow a courier to wear a "Jesus is Lord" vest in violation of company policy. Isn't this comparable to proselytizing? In *Rivera*, the employer was concerned customers would believe the company endorsed this Christian message; seemingly the same concern that arose in *Knight* where one of the plaintiffs evangelized to clients on two occasions. Similar cases in the same circuit, but with entirely opposite outcomes. And neither holding provides any analysis to differentiate itself from the other.

The Eleventh Circuit appears to experience similar schizophrenia. In *Weiss*, a Florida district court held that employers have both the right *and legal duty* to keep the workplace free of harassment.[343] Such a bold statement would surely support an employer who wants a secular workplace. Yet the Eleventh Circuit overruled another Florida district court in *Dixon*, determining there was evidence that the plaintiffs "are

[342] *Id*. at 10.
[343] *Weiss*, 1999 U.S. Dist. LEXIS 23587, at 25.

sincere, committed Christians who oppose efforts to remove God from public places," thereby allowing trial to continue to determine whether the plaintiffs had the "right" to hang religious messages in the workplace against the employer's policy.[344] Is the Eleventh Circuit drawing the line between oral proselytizing and written proselytizing? Perhaps *Weiss* would have come out differently had he merely worn a shirt to work every day that read, "My coworkers are homosexuals, sinners, and are going to hell."

The Tenth Circuit is perhaps the most candid. It was a court within the Tenth Circuit that determined it was a reasonable accommodation to allow cashiers to say "God Bless You" in violation of company policy, warnings, and more than twenty complaints in a three month period by customers.[345] Such a holding directly conflicts with *Knight* and *Grant*, where one or two complaints were sufficient to satisfy the undue hardship requirement. One judge in the Tenth Circuit delicately explained the problem: "While Title VII rightly condemns acts of religious discrimination in the workplace, the line between permissible commentary in the workplace and a religiously hostile workplace quickly becomes fuzzy."[346]

C. Conclusion

It seems impossible for one to distinguish these holdings and predict the outcome in future cases involving proselytization. One could reasonably conclude the solution is to sue first; by asking for an accommodation to harass his customers and coworkers, the proselytizer seems to have a chance of success, compared to defending a harassment claim where his religious beliefs are disregarded in the legal analysis. Or perhaps the solution is to avoid the word "proselytize" and somehow define the religious practice in a

[344] *Dixon*, 627 F.3d at 855.
[345] *See supra* text accompanying notes 210-213; *Banks*, 952 F. Supp 703.
[346] Sprague v. Adventures Inc., 121 Fed. Appx. 813, 817 (10th Cir. 2005) (Tymkovich, J., concurring).

different way, like the plaintiffs in *Dixon* claimed the practice of "opposing efforts to remove God from public places."[347] Should such semantics change the legal rights of employees and employers?

More importantly, is proselytizing truly a religious belief intended for protection under Title VII? The First Amendment doesn't serve as a defense to sexual or racial harassment;[348] is it logical to presume that the First Amendment may serve as a defense for religious harassment, or that Title VII could permit a violation of Title VII through a reasonable accommodation claim? Yet courts continue to treat religious claims with kid gloves. An employee was fired for sending an e-mail to his coworkers with a picture of a barbecue restaurant and a marquee that contained the words, "Safest Restaurant on Earth. No Muslims Inside" and the personalized message by the plaintiff Mr. Ogle, "I think this is wonderful."[349] In bold letters, the court opinion reads: "The e-mail sent by Mr. Ogle was not an expression of his religious beliefs; therefore, Mr. Ogle failed to state a claim under which relief may be granted pursuant to Title VII."[350] Had he prefaced his comment with "As a Christian…" would he have created the right to be offensive, and precluded his employer from reprimanding him?

Consider the case of *Peterson*, where the court held that the World Church of the Creator, a sect of Christianity with a heavy dose of white supremacy, was a religion.[351] If he claimed a reasonable accommodation to racially harass his black coworkers, most courts would not entertain the claim. In determining whether he was entitled to a reasonable accommodation, there would be no analysis of how many times he used the

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[347] *Dixon*, 627 F.3d at 855.
[348] *See* Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1247 (10th Cir. 1999).
[349] Ogle v. Ind. Dep't of Workforce Dev., 2013 U.S. Dist. LEXIS 165325, 1-2 (S.D. Ind. 2013).
[350] *Id*. at 6.
[351] *See supra* text accompanying notes 121-124; *Peterson*, 205 F. Supp. 2d at 1023.

N-word, or to what extent his behavior was "severe or pervasive"—the court would merely hold that the employer *has the right* to keep the workplace free of harassment, and by extension, to have a "No racist commentary" policy. Whether the speech involves racism, sexism, or religionism—shouldn't employers be free to limit it in the workplace?

Chapter 5: Redefining Religion

The source of the problems in religious discrimination cases is an unworkable definition of "religion." Congress first defined religion as a belief in God, and later as a belief in a "Supreme Being." The Supreme Court aptly noted this didn't limit legal protection to beliefs based literally on the existence of a deity, but rather applied to a broader concept of "a faith to which all else is subordinate."[352] Religion, under *Seeger*, was thus redefined as beliefs held in the same place as traditional religious views are held.[353] Yet this doesn't *define* religion, but instead directs courts to find the source of traditional religious beliefs and compare them to where the plaintiff holds his or her beliefs. Congress' definition in Title VII fails to add further guidance, defining religion—circularly—as "all aspects of religious observance and practice, as well as belief."[354] None of these definitions adequately define "religion."

Finding a non-legal definition of religion is much easier. Religion is "set of beliefs concerning the cause, nature, and purpose of the universe, especially when considered as the creation of a superhuman agency or agencies, usually involving devotional and ritual observances, and often containing a moral code governing the

[352] *Seeger*, 380 U.S. at 174.
[353] *Id*. at 184.
[354] 42 U.S.C. § 2000e(j) (1991).

conduct of human affairs."[355] While others may not use the same words, the sentiment is the same.[356] Religion outlines one's morality, values, and guides a person on how to live his or her life. As the Supreme Court correctly identified, one can hold these values without having a belief in God or a Supreme Being.[357] Such beliefs emanate from one's conscience, "the inner sense of what is right or wrong in one's conduct or motives."[358]

The connection between conscience and religion is nothing new; as the Greek poet Menander described in approximately 300 B.C.,[359] "Conscience is a God to all mortals."[360] Furthermore, the word "conscience" pervades the history, legislation, and cases involving religious beliefs but has never been used as the legal test. As previously stated, Congress intended to protect those people who had *conscientious* scruples against handling lethal weapons or against any participation in the war effort; hence, "conscientious" objectors.[361] "Religious training and belief" was "intended to be an expression of a more liberal interpretation of claims of conscience."[362] Similarly, the

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[355] *Religion*, http://dictionary.reference.com/browse/religion (last visited June 9, 2014).
[356] *See Religion*, http://www.merriam-webster.com/dictionary/religion (last visited June 9, 2014) ("a cause, principle, or system of beliefs held to with ardor and faith").

Some courts have attempted to determine whether a belief is religious by asking whether the belief is based on "a theory of man's place in the universe." *See, e.g.*, *Abercrombie & Fitch Stores, Inc.*, 731 F.3d at 1117; Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 324 (5th Cir. 1977) (identifying "the 'religious' nature of a belief depends on (1) whether the belief is based on a theory 'of man's nature or his place in the Universe,' (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere.") (Roney, J., dissenting); *Malnak*, 592 F.2d at 208 ("One's views . . . on the deeper and more imponderable questions the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong are those likely to be the most 'intensely personal' and important to the believer"). Yet requiring judges to inquire into the purposes, logic, or background of one's beliefs to determine whether they are founded upon such a theory and therefore are legally "religious" directly conflicts with the Supreme Court's mandate to for judges to not be "arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716.
[357] *Seeger*, 380 U.S. at 174.
[358] *Conscience*, http://dictionary.reference.com/browse/conscience (last visited June 9, 2014).
[359] *Menander – Greek Poet*, http://ancienthistory.about.com/od/dailylifesocialcustoms/ig/Poets/Menander.htm (last visited June 9, 2014).
[360] MENANDER, MONOSTIKOI, http://en.wikiquote.org/wiki/Menander (last visited June 3, 2014).
[361] *See supra* Part II.B.1.
[362] CONSCIENCE IN AMERICA, *supra* note 22, 214.

Kauten court concluded that within "religious belief" lies "a compelling voice of conscience."[363] Conscientious beliefs, i.e., those beliefs emanating from one's conscience, are protected.

Based on this, I propose redefining religion and religious beliefs as "a system of beliefs emanating from the conscience," hereinafter, the Conscience test. Where the Supreme Court in *Seeger* set forth the legal test of protection where the beliefs are held in the same place as traditional religious views,[364] the Conscience test merely takes it to its necessary conclusion by identifying where religious beliefs are held: the conscience. Whether one follows the voice of God or one's own conscience, both appear the same to a third-party and should be treated equally.[365] One's conscience, therefore, is the gateway to protection.

The failure to set forth a clear definition of "religion" has led to a host of problems. As seen in Parts II and III, judges confuse religious beliefs with the sincerity of those beliefs.[366] Without clear boundaries, courts rely on the indefinability of religion as a means to reach a result based on the individual judge's feelings rather than precedent, granting protection to some moral and ethical beliefs, but withholding protection from beliefs the judge deems immoral.[367] This breadth of discretion,

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[363] *Kauten*, 133 F.2d at 708.
[364] *Seeger*, 380 U.S. at 184.
[365] *See* CONSCIENCE IN AMERICA, *supra* note 22, 15 (This book…is a record of the collisions of convictions—the individual's belief that he must not *violate the voice of his conscience or the word of his God*, and the state's assertion that it must preserve its own viability, by force of arms when need be…") (emphasis added).
[366] *See supra* Part III.C; *Wilson*, 58 F.3d at 1341 (disbelieving plaintiff's claim to display the abortion pin, but concluding it was therefore not a religious belief, rather than a sincere belief); *Tiano*, 139 F.3d at 683 (disbelieving the temporal mandate of the plaintiff's calling to God, therefore finding it not "religious"); *Cloutier*, 311 F. Supp. 2d at 199 (disbelieving the belief to always display her piercing when the plaintiff previously agreed to cover it up, but holding it was a religious accommodation to allow her to cover it up rather than merely holding she was insincere).
[367] *See supra* Part II.D; *see also supra* text accompanying notes 114-125 (discussing conflict between cases involving racist beliefs).

camouflaged by the *Seeger* "definition" of religious beliefs, is further exacerbated by the unique duty to reasonably accommodate religious beliefs and practices. Circuit courts are split as to whether practices must be religiously required or "religiously motivated" to earn an accommodation,[368] and the low burden set by the Supreme Court in *Hardison* to define an undue hardship as anything more than *de minimis* has been transformed by some courts to hold employers to a higher standard when dealing with intangible costs—again, based on the discretion of the judge rather than any analysis of legal precedent.[369] The misapplication of reasonable accommodation claims becomes readily apparent in cases involving proselytizing. Under the current legal scheme and definition, Title VII creates an inherent conflict by potentially allowing harassing behavior when motivated by one's religious beliefs.[370]

The Conscience test solves these problems by redefining religion, by both defining it again, and differently.[371] As promised in the introduction, the purpose of this thesis is not to substitute the author's judgment for that of Congress or the Supreme Court, but rather to further their intent.[372] The new definition for religion as "a system of beliefs emanating from the conscience" is based both on the legislative history and court precedence, and while it may be different from that used in *Seeger*, it holds the same meaning. With more careful construction, however, the redefinition of "religious beliefs" outlines clear boundaries to separate protected beliefs from unprotected beliefs.

A. "System of Beliefs"

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[368] *See supra* Part III.D.
[369] *See supra* Part III.E.
[370] *See supra* Part IV.
[371] *Redefine*, http://www.oxforddictionaries.com/us/definition/american_english/redefine (last visited May 29, 2014) ("Define again or differently").
[372] *See supra* Part I.

Although religion is difficult to define, one commonality can be found in all definitions: religion is a system of beliefs.[373] Although a legal issue may arise about a specific practice or belief, the plaintiff must be able to show this stems from a greater set of beliefs and principles. In the cases previously discussed, this is an easy element to prove for most plaintiffs. But it also clearly culls out those plaintiffs who do not have a religious basis for their claim.

In *Reed*, for example, the plaintiff "refused to indicate what if any religious affiliation or beliefs (or nonbeliefs) he [had]."[374] While the court didn't struggle with the outcome, it unnecessarily analyzed his religious discrimination and reasonable accommodation claims separately, later holding that his refusal to pray with the Gideons was a personal preference rather than a religious practice.[375] Under the Conscience test, the case would have been immediately dismissed. Since Reed failed to explain the moral principles or set of beliefs he held that rendered the meeting with the Gideons offensive, he wouldn't satisfy the first part of the Conscience test, the requirement of having a "system of beliefs." Likewise, having a system of beliefs is the distinguishing factor between *Brown*[376] (eating cat food) and *Toronka*[377] (believing in the power of dreams): Brown failed to identify how eating cat food was a religious practice because he didn't explain his religious beliefs from which it was derived,[378] while Toronka explained his

[373] *See, e.g.*, *Religion*, http://dictionary.reference.com/browse/religion (last visited June 1, 2014) ("*set of beliefs* concerning the cause, nature, and purpose of the universe…").
[374] *Reed*, 330 F.3d at 933.
[375] *Id*. at 935.
[376] *See supra* text accompanying notes 104-106.
[377] *See supra* text accompanying notes 107-109.
[378] *See supra* text accompanying notes 104-106.

unusual beliefs regarding fate and the power of dreams which allowed him to survive a motion to dismiss.[379]

Furthermore, by requiring plaintiffs to show they have a "system of beliefs," judges can better determine the plaintiff's sincerity and credibility without questioning the specific belief or practice at issue. Judges are not "arbiters of scriptural interpretation,"[380] but general questions regarding the underlying principles of one's religion may uncover a lack of sincerity by the plaintiff.[381] It also protects against the hypothetical plaintiff described in *Reed*, who "could announce without warning that white walls or venetian blinds offended his 'spirituality,' and the employer would have to scramble to see whether it was feasible to accommodate him by repainting the walls or substituting curtains…."[382] This bright-line element allows employers to avoid the costs of discovery and litigation from arguably frivolous claims, while continuing to protect plaintiffs with true religious beliefs.

B. "Emanating from the Conscience"

A belief emanating from one's conscience is protected, regardless of whether its original source lies with an organized religion or a religious text. Applying this to *Welsh* shows the Supreme Court didn't broaden the definition of religious beliefs, but instead stayed true to this principle.[383] Rather than ask whether Welsh's views were political or philosophical, the better question is whether his views emanated from his conscience. The mere fact that Welsh used the word philosophy in place of religion is irrelevant; just

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[379] *See supra* text accompanying notes 107-109.
[380] *Thomas*, 450 U.S. at 716.
[381] *See, e.g., Cloutier*, 311 F. Supp. 2d at 199 (identifying the changes in the plaintiff's "principles" regarding the necessity of displaying or covering up her piercing).
[382] *Reed*, 330 F.3d at 935.
[383] *See supra* text accompanying notes 64-72.

as one can falsely claim a religious belief that is untrue, a plaintiff's use of the word "philosophy" shouldn't result in a dismissal of his case. The question is not whether a view is philosophical, but rather whether it resides in the same place in his mind as religion occupies: his conscience. The Supreme Court could have avoided dissention—as they did in *Seeger*—by realizing the true simplicity of its own holding. This new definition is not new at all—the language comes directly from Congress and the courts. This slight word change, however, drastically improves the determination of sincerity of the plaintiff and distinguishes religious beliefs from other unprotected beliefs.

The *Seeger* definition can easily be over-broadened and confused with the sincerity requirement; a problem not present in my recommended "Conscience" test. The Supreme Court's *Seeger* test asks "whether the claimed belief holds a place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption."[384] This language may suggest that all a plaintiff needs to show is that he is sincere; if he testifies that his belief is held "religiously" he could satisfy this definition without more. The *Seeger* test thus transforms the language "sincerely-held religious beliefs" into "sincerely-held beliefs." Clearly, this is not what the Supreme Court intended. By redefining religious beliefs by specifically including the location of religious beliefs—one's conscience—the definition gets to the heart of the matter: morality.

There is a fundamental aspect to conscientious beliefs that separates them from all other types of belief (political, philosophical, personal, etc). "A healthy Conscience is like a wall of bronze,"[385] separating morally right behavior from that which is morally

[384] *Seeger*, 380 U.S. at 184.
[385] SIMILES DICTIONARY 141 (2d ed. 2013) (*quoting* Erasmus).

wrong. It imparts a belief universally applied to everyone. Since 1940, Congress specifically delineated between "conscientious objectors" who were against war in general, and those who opposed war based on a personal moral code.[386] In other words, those whose conscience instructed them it was morally wrong for *people* to engage in war earned protection and exemption from the draft; a person who believed it was immoral for him *as an individual* to support the war effort or kill an enemy combatant was entitled no such protection.[387] The difference lies in whether the belief is to be universally applied to everyone, or is limited to the believer.

Abortion is a good example. Wilson's belief that abortion was morally wrong clearly emanated from her conscience, and she believed abortion *by anyone* was immoral.[388] Contrast this with Vice President Joseph Biden, who, during the 2012 Vice Presidential Debate, responded with the following when asked how his religion affects his view on abortion:

> My religion defines who I am, and I've been a practicing Catholic my whole life. And has particularly informed my social doctrine. The Catholic social doctrine talks about taking care of those who -- who can't take care of themselves, people who need help. With regard to -- with regard to abortion, I accept my church's position on abortion as a -- what we call a (inaudible) doctrine. Life begins at conception in the church's judgment. I accept it in my personal life. But I refuse to impose it on equally devout Christians and Muslims and Jews. . . . I -- I do not believe that we have a right to tell other people that -- women they can't control their body. It's a decision between them and their doctor.[389]

Unlike Wilson, Vice President Biden's personal moral code instructs *him* that abortion is immoral, but it is not a belief to be universally applied to everyone; rather, it's

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[386] *See supra* Part II.B.1.
[387] *See supra* note 48.
[388] *See supra* text accompanying notes 78-90.
[389] Joseph Biden, Vice Presidential Debate (Oct 11, 2012) (transcript available at http://www.politico.com/news/stories/1012/82310.html).

a decision he believes is immoral, but for others "it's a decision between them and their doctor." The difference between a protected religious belief and a personal moral code is whether the morality is applied universally (e.g., Wilson's view of abortion) or individually (e.g., Biden's view).

By redefining religious beliefs as those emanating from the conscience, courts can easily analyze and delineate between those practices deserving of protection under Title VII, and those that do not. Veganism, for example, may be a protected belief, and one scholar has argued it can be a religion for some people.[390] The question is whether the person practices veganism because of the moral doctrine "that man should live without exploiting animals," or because of a personal preference for a non-dairy vegetarian diet?[391] If the former, it should be protected; if the latter, it is unprotected as merely individual preference. This new definition makes the analysis simple for appellate review purposes and also educates litigants and trial judges as to what evidence to present and the facts to elicit.

This proposed definition also sheds light on the real issue in these cases. For example, did Wilson's vow to wear *and display* the anti-abortion button emanate from her conscience? Undoubtedly, her faith in Catholicism, Jesus Christ, and her beliefs against abortion are all part of her "religion." However, Wilson was not fired for any of these beliefs—she was fired for her practice of wearing the pin.[392] The issue was not whether her belief that abortion is immoral stemmed from her conscience, but whether

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[390] *See* Page, *supra* note 10, 408. Unfortunately, this article proposes no solution to better define "religion"; rather, she argues that veganism or vegetarianism *could be* a religious belief for some people under the *Seeger* test. *Id*. She correctly identifies the problem with applying the test, but recommends a "broad and tolerant" definition of religion, without providing an actual definition. *Id*.
[391] Ryan Berry, *Veganism*, *in* THE OXFORD COMPANION TO AMERICAN FOOD AND DRINK 604-05 (2007).
[392] *Wilson*, 58 F.3d at 1339.

her vow to wear an anti-abortion pin emanated *from* her conscience.[393] She decided on her own volition to wear the pin; thus, the belief emanated from her own personal choice, not her conscience, and is therefore entitled to no protection.

This distinction—protecting an order *from* God, but not a promise *to* God—is important based on Congress' mandate to not protect personal preferences. An order from God is similar to a Biblical requirement: God says thou shalt not kill, thou shalt not steal, or thou shall visit a church to see the Virgin Mary (e.g., *Tiano*). Coming from one's God, these orders define morality for the individual. But to allow an individual to turn a preference (e.g., to wear a pin) into a moral issue by making a "promise to God" would ignore Congress' distinction between personal preference and religious practice. This is precisely the problem in religious accommodation cases.

C. Solving Reasonable Accommodation

The language "emanating from the conscience" describes beliefs that come from God or one's inner voice and delineates between what is morally right and morally wrong. Thus, as previously discussed, the duty to reasonably accommodate employees' religious practices prevents employees from choosing between their morality and the job.[394] The prime example is Sabbath observers. They did not choose what day is the Sabbath, or their responsibilities on that day; rather, their God instructed them (either personally or through a religious text) to observe the Sabbath and not work. Thus, the duty to not work on the Sabbath emanates from their conscience, and Title VII rightfully

[393] Had God instructed her to wear the abortion pin, this would be a valid belief: she has a system of beliefs—Catholicism—and it demands she obey God. Thus, she would have been morally obligated to wear the pin, just as anyone who received an order from God would be.
[394] *Protos*, 797 F.2d at 136.

requires employers attempt to accommodate those people from committing a sin by clocking in. For the employee, this is not an issue of preference, but a religious mandate.

On the other hand, a person who chooses to attend church on Saturday evenings rather than Sunday mornings does so out of convenience, not out of any moral obligation. An employer should not be forced to accommodate this preference merely because it has some attenuation to a religious belief. Reasonable accommodation was intended to resolve conflict between one's morality and employment, but where one's morality is not at issue—as with a personal preference—there is no terrible conflict to be avoided. In other words, Title VII puts a small burden on employers (the duty to reasonably accommodate) in order to avoid the placing a great burden on an employee (sacrificing moral values to avoid an adverse action).

Yet due to Title VII's poorly constructed and cyclical definition of "religious beliefs,"[395] judges have erroneously broadened the beliefs that are protected as religious. In *Redmond*, the employer was obligated to accommodate the employee's work hours because his church rescheduled his Bible study class.[396] There was no issue or morality—God didn't change the Sabbath or require Bible study on a given day. Rather, the church made the change for its own convenience, and the employer was essentially required to accommodate the church's preference. This is no different than the employee who makes a "promise to God" to go to church during his lunch break, requiring an additional 30 minutes more than other employees. Title VII was intended to resolve conflict between religion and employment, not provide a benefit merely for having religious beliefs.

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[395] 42 U.S.C. § 2000e(j) (1991) ("all aspects of religious observance and practice, as well as belief").
[396] *See supra* text accompanying notes 158-177.

The proposed definition solves this problem by better framing the question as whether the practice of attending Bible Study on Tuesday emanates from the plaintiff's conscience? The answer is clearly no. Title VII puts no duty on employers to accommodate the mere preferences of its religious employees, yet some courts have expanded the purview of reasonable accommodation significantly by allowing reasonable accommodation for any practice that is somehow tied to religion, so much so that merely being religious now confers the benefit of excepting oneself from his or her company policy, and threaten a lawsuit if held to the standards of secular employees.

The "religiously-motivated" test endorsed by the Second and Seventh Circuits[397] would be put to rest with my proposed definition. In *Redmond*, the court went to great lengths to justify the test, to include intentionally misinterpreting a Supreme Court case to claim "precedence."[398] In *Reyes*, a court in the Second Circuit held that participation in a Lay Pastor Program deserved accommodation (even though enrollment in a secular subject would not be).[399] Did the need to enroll emanate from his conscience? Would he have considered his actions immoral if he chose not to sign up for this program? If not, why should his employer be required to accommodate his school schedule, but not the schedules of its other employees seeking higher education?

Other circuits, like the Tenth Circuit, have adopted the "religiously-required" test in determining whether an accommodation is necessary,[400] and while this appears more logically sound, it too fails in practical application. The *Banks* case was within the Tenth Circuit, and involved cashiers who violated company policy by telling customers "God

[397] *See supra* text accompanying notes 175-194.
[398] *See supra* text accompanying notes 158-177.
[399] *See supra* text accompanying note 194.
[400] *See supra* text accompanying notes 231-233.

Bless you" (and received numerous complaints).[401] In that case, the plaintiffs claimed this was required and they couldn't "stop the practice without violating their beliefs."[402] Under the "religiously-required" test, they deserve an accommodation. The Conscience test, however, doesn't require magic words or specific testimony. While the underlying religious beliefs of honoring God and believing in Him may emanate from the conscience, the focus must be on the practice of greeting customers with this phrase; the question is whether the practice of saying "God Bless You" to this customer emanates from the plaintiff's conscience? Do the plaintiffs believe this is a moral requirement to greet people in a specific way, or conversely, do they believe it is immoral if they greet customers differently?

We don't know the answers to these questions, but if the plaintiffs had some discretion by which they could say "God Bless You" to some people but not others, isn't it appropriate for the employer to expect they exert that discretion while at the workplace? Certainly when balancing discretionary practices, the employee's discretion is no greater or more important than the employer's discretion to have a policy against such a practice. Just as Title VII puts a small burden on employers to avoid the great burden of an employee sacrificing his moral values, Title VII should place no burden on an employer when there is similarly no burden to the employee's immortal soul because the practice he seeks accommodation for is discretionary.

D. Resolving the Conflict Between Harassment and Proselytizing

Courts have identified the inherent conflict between harassment and proselytizing, and scholars have recommended different types of balancing tests to determine when

[401] *See supra* text accompanying notes 210-213.
[402] *See supra* text accompanying notes 210-213.

proselytizing should be allowed or forbidden.[403] To condone any form of proselytizing, however, is to suggest that a reasonable accommodation under Title VII can give an individual the right to violate Title VII and harass others. The Conscience test resolves this conflict and eliminates any perceived fuzziness.

Discretionary practices, where the individual asserts one's "power to act in accordance to one's own judgment,"[404] are not protected under the Conscience test. As explained above, merely stating a practice is "required" doesn't necessarily mean it is without discretion. Many evangelical Christians may claim proselytizing is "required" by their faith, but this requirement inherently demands discretion such as to whom do I proselytize, when, for how long, etc. Without some level of discretion, proselytizers could not go into public places without talking constantly; they would stop every pedestrian they passed, and they couldn't buy anything without sharing their message with the salespeople, cashiers, and other customers. Common sense tells us Christians who are "required" to proselytize make certain judgment calls… the barista at Starbucks is off-limits when it's crowded, people engaged in conversation are off-limits because it would be rude, and the boss is off-limits during business meetings. The Conscience test asks whether the need to proselytize to the coworker *that day* emanated from the believer's conscience, and in all likelihood, the answer would be similar to *Redmond*; Bible study and proselytizing is important, perhaps necessary, but morality doesn't

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[403] *See* Michael D. Moberly, *Article: Bad News for Those Proclaiming the Good News?: The Employer's Ambiguous Duty to Accommodate Religious Proselytizing*, 42 SANTA CLARA L. REV. 1 (2001) (recommending balancing of employee and employer rights by applying the same standards as used in the National Labor Relations Act and solicitation rights); Charlotte Elizabeth Parsons, *Comment: Doing Justice and Loving Kindness: A Comment on Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 643 (1997) (recommending categorization to different types of religious harassment); Beiner and DiPippa, *supra* note 11 (arguing for a "true" application of the totality of the circumstances test).

[404] *Discretion*, http://dictionary.reference.com/browse/discretion (last visited June 3, 2014).

require it occur at a given time or on a given day. Proselytizers have this leeway and utilize it, perhaps out of convenience, respect for social norms, or fear of repercussions. The employer should also have the leeway to prohibit it in the workplace for the very same reasons.

E. Final Thoughts

This redefinition both clarifies and explains the principles that have always served as the foundation for "religion" in all contexts, be it the First Amendment, conscientious objectors, and Title VII. It further aids courts in identifying the practice at issue, an important distinction from the religious belief upon which the practice is founded. By adopting "religion" redefined as "a system of beliefs emanating from the conscience," employers and employees will have a greater understanding of the law, better predict the outcome of cases, and there will be fewer religious claims—and fewer violations—as all parties see the bright line between legal action and illegal religious discrimination.

To attempt to distinguish between valid and invalid "religions" is an exercise in futility; there are at least 41,000 sects of Christianity worldwide, i.e., 41,000 distinct sets of religious beliefs based on a single text.[405] But we can identify the types of beliefs deserving protection when we use the word "religion." They are those beliefs that fundamentally circumscribe one's morality, the bright line between right and wrong. Whether a person receives this morality from Jehovah, Allah, God, Zeus, Shiva, Jesus, Thor, Gaea, or his or her inner voice of conscience is irrelevant. We, as Americans, are free from persecution of such beliefs by our Government under the First Amendment of

[405] The Pew Forum on Religion & Public Life, *Global Christianity: A Report on the Size and Distribution of the World's Christian Population* 95 (December 19, 2011) (report available at http://www.pewforum.org/files/2011/12/Christianity-fullreport-web.pdf).

the Constitution, and free from discrimination based on these beliefs by our employer under Title VII of the Civil Rights Act. The redefinition of "religious beliefs"—a system of beliefs emanating from the conscience—executes Congress' intent that "religious beliefs" and "conscientious scruples"[406] are one in the same under the law.

[406] 86 CONG. REC. 11418 (1940).