DETERMINING THE APPROPRIATE DEFINITION OF RELIGION AND OBLIGATION TO ACCOMMODATE THE RELIGIOUS EMPLOYEE UNDER TITLE VII: A COMPARISON OF RELIGIOUS DISCRIMINATION PROTECTION IN THE UNITED STATES AND UNITED KINGDOM

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INTRODUCTION

"Few areas of law touch people more directly or deal quite as intimately with issues pertaining to human personality and its daily unfolding than does the law of work."[1] Those who participate in the workplace are directly impacted by the law of work. Even those who are not active participants in the workplace are indirectly impacted by the law of work through daily contact with businesses and their employees. Therefore, many scholars believe the treatment of the religious employee within the workplace serves as an exemplar of how religion should be treated in public law.[2] Others believe the treatment of religion in labor law reflects the general status of religion in any nation's law and culture.[3] Despite efforts to avoid dealing with the problems religious employees face in today's workplace, religion seems to be the hound from which we can never flee.[4] Most modern legal systems are forced to confront questions about religion continuously in labor law and other contexts.[5]

"The United States is no stranger to religion as a social and political force."[6] However, despite the United States' familiarity with religion in the workplace, the uptick in allegations of discrimination against employees who desired to exercise legally protected religious rights in their respective

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1. Thomas C. Kohler, *The Kenneth M. Piper Lecture: Religion in the Workplace: Faith, Action, and the Religious Foundations of American Employment Law*, 83 CHI.-KENT L. REV. 975, 986 (2008).

2. *See* Kenneth D. Wald, *Religion in the Workplace: Religion and the Workplace: A Social Science Perspective*, 30 COMP. LAB. L. & POL'Y J. 471, 475 (2009).

3. *See id.* at 474.

4. *See* Kohler, *supra* note 1, at 989.

5. *See id.*

6. Steven D. Jamar, Article, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 721 (1996).

workplaces has surprised lawyers, political scientists, and political theorists.[7] "Between 1997 and 2007, the number of religious discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) increased 100 percent."[8] "In six of the eleven years following 1992, the increase in such claims was greater than five percent per annum."[9] For example, the "EEOC received 2,466 charges of religious discrimination in 2004."[10] This increase has become so problematic that the EEOC found it necessary to reach out to religious communities.[11] Such a substantial growth in allegations of religious discrimination and unlawful failure to accommodate religious practices seems almost "like a running sore on the body politic, and one unlikely to be healed anytime soon."[12]

A plethora of factors has contributed to this unexpected increase. Some identify the increased number of hours in the average American workweek.[13] It logically flows that, as employers require employees to work for longer periods, the possibility for conflict with an employee's desire to observe religious holidays and attend worship services could increase. Other events, such as the tragedy on September 11, 2001, could also be indirectly responsible for the increase in claims because such events have changed the way certain religious minorities are viewed.[14] Therefore, negative attitudes could be at least partially responsible for alleged discriminatory treatment and the resultant increase in complaints with the EEOC. Some scholars are also convinced that greater religious diversity in the workplace, such as increases in Buddhists, Muslims, and Hindus participating in the workplace, has amplified the likelihood of clashing religious views.[15] Yet, no matter the cause, "[t]his troubling trend in the treatment of faith in the American workplace deserves close examination."[16]

This Note develops several means by which the treatment of employees of faith can be improved in hopes of reversing recent trends. Part I examines the breadth of religious discrimination protection in the United States and the United Kingdom. It analyzes the definition of "religion" and "religion and belief" in pertinent statutes. Part I also discusses basic principles of religious

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7. *See* Wald, *supra* note 2, at 472.

8. Leslie E. Silverman, *Understanding the New EEOC Guidelines on Religious Discrimination: An Immediate Look at the Legal Ramifications of the EEOC's New Compliance Manual Section on Religious Discrimination in the Workplace* 1 (2009), *available at* Westlaw Aspatore, 2009 WL 1428692.

9. Richard T. Foltin & James D. Standish, *Reconciling Faith and Livelihood: Religion in the Workplace and Title VII*, 31 HUM. RTS. 19, 24 (2004).

10. *See* Peter M. Panken, *Religion and the Workplace: Harmonizing Work and Worship* 2, in 1 ALI-ABA COURSE OF STUDY MATERIALS, CURRENT DEVELOPMENTS IN EMPLOYMENT LAW (2005).

11. *See* Silverman, *supra* note 8, at 1.

12. Kohler, *supra* note 1, at 975.

13. *See* Silverman, *supra* note 8, at 1.

14. *See id.*

15. *See id.*

16. Foltin & Standish, *supra* note 9, at 19.

discrimination, the evolution of protection of religion in the workplace, the underlying statutes protecting religion in the workplace, and particular problems with religion in the workplace. The United States and the United Kingdom are analyzed in separate sub-sections. Finally, a brief sub-section explains the differences between the two states.

Part II focuses on employers' obligations to accommodate religious employees. It discusses the source, evolution, and development of the duty to accommodate. It covers examples of conflicts between the United States' and United Kingdom's religious employee protection systems to elucidate both how the accommodation duty works in practice and the problems with and differences between the two systems.

In Part III, conclusions are stated and specific recommendations are made. The suggestions specify the ways in which the U.S. system of protection under Title VII can be improved to further protect the religious employee. However, the author hopes the improvements endorsed in Part III are universally applicable beyond Title VII and the United States.

I. DEFINITION OF RELIGION

At first glance, discussing or developing a legal definition of "religion" may seem unnecessary or unfeasible. Indeed, many academics believe the definition of religion is "hopelessly ambiguous"; however, lawyers and judges do not have the luxury of accepting this postulation.[17] Citizens often assume religion is simply about "churches and dogma and worship within organized faith communities. Yet, in practice, there is an astonishing diversity to what people connote by the concept 'religion.'"[18] "[E]ach nation has a unique culture of religion and state that manifests in a system of laws and policies governing the domains where state and religion intersect."[19] Therefore, every country must independently determine the definition it assigns to the term religion.

A. Importance of the Definition of Religion

The Western assumption that law and religion can be neatly distinguished is challenged in many cultures where the two concepts are tightly intertwined.[20] Within the last few decades, the definition of religion has been notoriously contested.[21]

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17. *See* T. Jeremy Gunn, Conference: *Religion, Democracy, & Human Rights: The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189, 191 (2003).

18. Wald, *supra* note 2, at 477.

19. *Id.* at 476.

20. *See* LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 10 (Peter Crane et al. eds., 2008).

21. *See id.* at 7.

> Domestic and international courts have grappled with [the definition of religion], often in the context of legal protections for religious freedom contained in constitutions or treaties. As societies become more pluralistic and more individualistic, the task of defining what religion is becomes ever more complex. People who claim that they have a religion or that they deserve the same protection as those who have a religion are no longer necessarily members of a relatively limited number of discrete communities of co-believers with settled practices and beliefs. Instead, they may belong to small, idiosyncratic groups. They may be free-thinkers or have composed a series of spiritual beliefs taken from a variety of sources. They may reject institutionalized religion but still consider themselves religious or spiritual in the personal sense.[22]

"Legal definitions do not simply describe the phenomenon of religion, they establish rules for regulating social and legal relations among people who themselves may have sharply different attitudes about what religion is and *which manifestations of it are entitled to protection.*"[23] Therefore, a working definition of religion becomes requisite in providing a principled basis for deciding religion cases and determining when a belief will qualify for protection.[24]

B. United States

1. Evolution of Religious Protection

The source of protection for the religious employee in the U.S. workplace is more straightforward compared to analogous protections in British and European law.[25] With the Title VII of the Civil Rights Act of 1964, the U.S. Congress passed the first comprehensive federal employment discrimination legislation that prohibited employment discrimination because of, *inter alia*, an individual's religion.[26] Under Title VII, a claimant's (plaintiff's) prima facie

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22. *Id.* at 7-8.

23. Gunn, *supra* note 17, at 195 (emphasis added).

24. *See* LUCY VICKERS, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION, AND THE WORKPLACE 15 (2008).

25. *See* discussion *infra* Part I.C.

26. *See* Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2000e-17 (1991); Piva v. Xerox Corp., 376 F.Supp. 242, 246 (N.D. Cal. 1974) (describing Title VII as "the first comprehensive federal legislation in the field of employment discrimination"); Smith v. N. Am. Rockwell Corp., 50 F.R.D. 515, 518 (N.D. Okla. 1970) (indicating that the Act is "generally heralded as the first effort by the United States Government to outlaw discrimination in private employment on the basis of race, religion, national origin, and sex").

case consists of three elements: 1) the employee holding a sincere religious belief that conflicts with an employment practice, 2) the employer being put on notice of the conflict, and 3) the employee being disciplined or otherwise suffering an adverse consequence for adherence to a religious belief.[27]

Although the statute clearly protects the religious employee, neither the text of the statute nor the legislative history was clear about the definition of religion.[28] "Title VII instead merely purported to prohibit religious discrimination to the same extent it prohibits discrimination against any other statutorily protected class."[29] Determining Title VII's definition of religion is the problem underlying many religious discrimination cases brought under Title VII.[30] Deriving an adequate solution to this complex inquiry is a daunting task.[31]

2. Struggling to Find a Definition

More than 100 years ago, the U.S. Supreme Court maintained a very narrow view of religion.[32] Originally, in order to qualify as a religion, a group's belief system had to refer to belief or worship of a deity.[33] This deity requirement remained in Supreme Court jurisprudence until the 1960s.[34]

Soon after the passage of Title VII, the U.S. Supreme Court drew a more expansive view of religion[35] in *United States v. Seeger*.[36] Rather than simply looking for the worship of a deity, the *Seeger* Court asked "whether a given belief that is sincere and meaningful occupies the place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for [protection]."[37] In *Welsh v. United States*, the Supreme Court extended the *Seeger* definition to include beliefs, which even the believer, might not classify as religious.[38]

However, despite the expansion of the definition of religion, the Supreme Court's definition has been described as "polythetic" or "non-essentialist," meaning that there are no specified requirements or elements in order for a

27. *See* Susannah P. Mroz, *True Believers?: Problems of Definition in Title VII Religious Discrimination Jurisprudence*, 39 IND. L. REV. 145, 151 (2005).

28. *See id.*

29. 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, 10 (2001).

30. *See id.* at 158.

31. *See id.* at 145.

32. *See* Davis v. Beason, 133 U.S. 333 (1890).

33. *See id.*

34. *See* Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

35. *See* Panken, *supra* note 10, at 3.

36. United States v. Seeger, 380 U.S. 163 (1965).

37. *Id.* at 166.

38. *See* Welsh v. United States, 398 U.S. 333, 342-43 (1970).

belief system to qualify as a religion.[39] The Supreme Court's polythetic definition draws on the Lockean tradition in American law which "assumes that religious rights are inherent in individuals[,] and the state has no competence to define what is or is not authentically religious."[40] In practice, courts will not question whether a particular religious belief or practice is reasonable.[41] Such a broad definition seems problematic because the holder of the belief could seemingly define nearly any personal belief as religious in order to obtain Title VII protection.[42] However, courts have devised a solution to mitigate such a possibility. While a belief in deity has been removed, not every belief system qualifies for protection. U.S. courts have declined to safeguard personal, cultural, political, or social preferences that employees might attempt to define as mandatory religious practices.[43]

Furthermore, while courts are not willing to delve into defining a reasonable religious belief, they are willing to consider the sincerity of any purported belief.[44] Proving the sincerity of one's belief is part of establishing that one has a bona fide religious belief.[45] Furthermore, proof of a sincere religious belief is the first element of the prima facie case that an employee must show in order to be successful under Title VII.[46]

Employers faced with religious discrimination suits remain free to challenge the sincerity of an employee's belief by demonstrating that the employee's conduct has been inconsistent with or contrary to the asserted belief.[47] The sincerity analysis tends to focus on whether the person actually believes the purported belief.[48] Therefore, "even seemingly 'religious' beliefs do not qualify as 'religious' if they are not 'sincere.'"[49] While there is no formal or informal test, decisions such as *Hussein v. The Waldorf-Astoria*[50] and *Equal Employment Opportunity Commission v. Union Independiente de la*

39. Gunn, *supra* note 17, at 194.

40. Wald, *supra* note 2, at 479.

41. Mroz, *supra* note 27, at 156-67.

42. *See Seeger*, 380 U.S. at 168.

43. *See* Panken, *supra* note 10, at 4.

44. *See* Mroz, *supra* note 27, at 156-67.

45. *See* Equal Emp't Opportunity Comm'n v. Union Independiente de la Autoridad de Acueductos y Alcantarillados, 279 F.3d 49, 55 (1st Cir. 2002); Hussein v. Waldorf-Astoria, 134 F. Supp. 2d 591, 596 (S.D.N.Y. 2001).

46. *See* Andrew M. Campbell, *What Constitutes Employer's Reasonable Accommodation of Employee's Religious Preferences Under Title VII of Civil Rights Act of 1964*, 134 A.L.R. FED. 1, 26 (1996).

47. *See* Panken, *supra* note 10, at 4.

48. *See* Mroz, *supra* note 27, at 167.

49. *Id.* at 168.

50. *See Hussein*, 134 F. Supp. 2d at 597 (suggesting that truly religious beliefs cause certain actions consistent with the purported belief; denying a Title VII claim based upon a finding that the plaintiff did not hold a bona fide religious belief); *see also* Mroz, *supra* note 27, at 166-68.

Autoridad de Acueductos y Alcantarillados[51] implied that sincere religious beliefs cause believers to engage in behaviors consistent with those beliefs.[52]

Although no formal elements must be met for a belief system to successfully garner Title VII protection, inferences may be drawn from broad principles in U.S. case law to determine when a religious belief will qualify for Title VII protection. First, a religion is a belief system. [53] Second, religious belief systems address a discrete set of subjects.[54] Third, religious beliefs cause believers to engage in certain actions.[55] Fourth, religious people can be identified by comparing their purported beliefs to their actions.[56] Fifth, only truly sincere beliefs qualify for protection in the U.S. workplace under Title VII.[57]

3. Problems with this Definition

A literal reading of the previous principles indicates a particularly broad definition of what qualifies as a religion. Almost anyone could allege that his or her beliefs are religious. For example, a person would have to do little more than create a website, write covenants to be obeyed, have a few meetings, and follow what he or she asserts to believe to qualify as a religion. In practice, however, courts often hesitate to take the expansive view of *Seeger* at face value when considering non-traditional religions. Some courts have voiced reservations when applying *Welsh* because they question the idea that something qualifies as religion under Title VII when the holder of the belief, by his or her own testament, does not classify it as such.[58]

Other problems might not seem obvious on the surface. Under the current definition of religion, those who practice traditional religions are presumed religious and almost automatically receive Title VII protection while those adhering to less familiar belief systems are subjected to more exacting analysis and are less likely to be protected.[59] This concern for unequal treatment of minority religions is exacerbated because, in many cases, adherents to non-traditional religions are more likely to be subjected to discrimination based upon their odd beliefs, practices, or membership within minority

51. *See* Equal Emp't Opportunity Comm'n v. Union Independiente de la Autoridad de Acueductos y Alcantarillados, 279 F.3d 49, 56 (1st Cir. 2002) (stating that religion is a set of beliefs and those beliefs result in certain actions; holding that plaintiff's Title VII claim must fail because her actions, which were incompatible with her alleged beliefs, meant that she did not hold a bona fide religious belief); *see also* Mroz, *supra* note 27, at 168-72.

52. *See* Mroz, *supra* note 27, at 168.

53. *See id.* at 172-73.

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.* at 173-74.

classes.[60]

One additional problem with the current definition of religion is that most early cases interpreting the meaning of religion, including *Seeger* and *Welsh*, attempted to define religion in the context of the conscientious objector exception to serving in the military.[61] This definition was almost wholly adopted by courts in the context of Title VII with little, if any, consideration for the different policy rationales upon which the statutes or constitutional provisions for religious protection were based.[62] Therefore, consideration should be given to whether the definition of religion, as adopted within the context of the conscientious objector, should be modified to more fully address Title VII's unique problems.

Finally, many requests for religious accommodation or claims of religious discrimination are denied because of a plaintiff's perceived lack of sincerity in the religious belief. For example, most religions have a cornucopia of prohibitions including abstention from fornication, drunkenness or consumption of any alcoholic beverage, divorce, and other equivalent "evils."[63] However, if even a slight "deviation from a professed set of beliefs disqualifies a person from the category of 'religion,' very few people will be protected by Title VII."[64] Therefore, any or all of these conceptual errors in defining religion could lead to the failure to understand the nature of religious discrimination and persecution; this could preclude meritorious claimants from receiving deserved relief.[65]

C. United Kingdom

While the debate over the definition of religion has raged for quite some time in the United States,[66] the definition of religion has only recently become controversial in the United Kingdom.[67] "[T]he role of the Church of England as the established church is being placed under strain with the dual tensions of the rise of non-discriminatory human rights norms and the increasing religious pluralism of the population."[68] The United Kingdom is a "largely secular, albeit religiously diverse, society in which significant numbers of people

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60. See *id.*

61. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

62. *See generally Welsh*, 398 U.S. 333; *Seeger*, 380 U.S. 163 (lacking discussion of underlying policy rationales for conscientious objector protection and Title VII protection and the relevance, or lack thereof, of these differences).

63. Mroz, *supra* note 27, at 173-74.

64. *Id.* at 174.

65. *See* Gunn, *supra* note 17, at 215.

66. *See supra* Part I.B.

67. *See infra* Part I.C.1.

68. LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT, *supra* note 20, at 2.

embrace a variety of faiths or systems of belief."[69] As of 2004, there were approximately "41.9 million Christians, 0.6 million Hindus, 0.3 million Jews, 1.7 million Muslims, 0.4 million Sikhs, 0.2 million Buddhists, and 0.2 million adherents to other faiths in the United Kingdom."[70]

1. Pre-2003 and Lack of Protection

Until 2003, there was very little protection for the religious employee in the United Kingdom because the definition of religion was particularly narrow and there was not an explicit statutory prohibition against discrimination on the basis of race in the workplace. The 1980 decision of *In re South Place Ethical Society Barralet v. Attorney-General* [71] exemplifies the theistic view in place before 2003.[72] The majority defined religion as follows: "It seems . . . that two of the essential attributes of religions are . . . faith in a god and worship of that god."[73] Although this seems to be a very traditional view of religion, there was no monotheistic requirement, which allowed faiths such as Hinduism to also be classified as religion. [74] The paramount trouble with this definition was that if reason or personal conviction led:

> [P]eople not to accept . . . any known religion, but they [did] believe in the excellence of the qualities such as truth, beauty and love, or believe in the Platonic conception of the ideal, *their beliefs may be to them the equivalent of a religion, but viewed objectively they are not religion* . . . in its natural and accustomed sense.[75]

During this period, there was scant protection of the religious citizen and, more specifically, the religious employee. The Race Relations Act indirectly protected some religions under English and Scottish law.[76] Such protection only was accessible by members of religions closely associated with ethnic or racial minorities such as Sikhism and Judaism.[77] Significantly, protection for

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69. Peter Crumper, Article, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT'L L. REV. 13, 13 (2007).

70. Mark Hill, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom*, 19 EMORY INT'L L. REV. 1129, 1174 (2005).

71. *See* In re South Place Ethical Soc'y Barralet v. Attorney-General, [1980] 1 W.L.R. 1565 at 1573 (Eng.).

72. *See id.*

73. *Id.* at 1572.

74. *See* Hill, *supra* note 70, at 1142.

75. *Id.* (emphasis added).

76. *See* Peter Griffith, *Protecting the Absence of Religious Belief? The New Definition of Religion or Belief Equality Legislation*, 2 RELIGION & HUM. RTS. 149, 150 (2007).

77. *See id.*

religious individuals incapable of classifying themselves in terms of their ethnic origin was nonexistent.[78] Because discrimination was not prohibited, those of a religious persuasion other than the dominant faiths of the Church of England and Protestantism had few rights or privileges.[79] However, in 1997 a "quiet revolution" of treatment of religious expression in the workplace began.[80]

2. Evolution of Religious Protection

The United Kingdom utilizes a dualist approach to international law, which, in contrast to a monist approach, treats domestic law and international law as two distinct systems.[81] "[I]nternational treaties signed and ratified by the United Kingdom are not part of the domestic law . . . . Consequently, in order to be enforceable and to bind at the domestic level, such treaties must be domestically incorporated in an Act of Parliament."[82] The 2000 incorporation by Parliament of the Human Rights Act of 1998 (HRA) into British domestic law was a "constitutional milestone."[83] The HRA incorporates Article 9 of the European Convention on Human Rights (ECHR) into British law.[84] The HRA "protects the rights of employees in the public sector."[85] Under the HRA, British "courts have been obliged to apply the rights guaranteed by the [ECHR]"[86] to all citizens and to "ensure that the actions of public authorities are compatible with the ECHR."[87]

The ECHR guarantees freedom of thought, conscience, and religion.[88] Article 9 explicitly protects the right to change one's religion or belief and the right to manifest this religion or belief "in worship, teaching, practice and observance," subject to certain limitations such as protection of public safety and order, health, morals, and the rights and freedoms of others.[89] "In 2002, the law of discrimination in employment was extended to the ground of religion and belief in implementation of the European Community Directive 2000/78."[90] This Directive established a framework for equal treatment in employment and

78. *See id.*

79. *See* Crumper, *supra* note 69, at 14.

80. Mark Freedland & Lucy Vickers, *Country Studies: United Kingdom: Religious Expression in the Workplace in the United Kingdom*, 30 COMP. LAB. L. & POL'Y J. 597, 624 (2009).

81. *See generally* MALCOLM N. SHAW, INTERNATIONAL LAW 105-14 (4th ed. 1997) (explaining in detail the monist and dualist theories).

82. Hill, *supra* note 70, at 1129-30.

83. Crumper, *supra* note 69, at 16.

84. *Id.*

85. Freedland & Vickers, *supra* note 80, at 602.

86. Hill, *supra* note 70, at 1130.

87. Crumper, *supra* note 69, at 17.

88. *See id.* at 16-17.

89. *See* European Convention on Human Rights art. 9, ¶ 2, Nov. 4, 1950, 213 U.N.T.S. 221.

90. Freedland & Vickers, *supra* note 80, at 598.

occupation.[91] It also required all member states to protect against discrimination on grounds of religion and belief in the areas of employment, occupation, and vocational training.[92] The British government implemented this Directive on December 12, 2003,[93] in the Employment Equality (Religion or Belief) Regulations[94] (the Regulations).[95] The Regulations outlaw four types of conduct when based upon one's religion: (1) direct discrimination, (2) indirect discrimination, (3) harassment, and (4) victimization.[96] The Regulations were structured and modeled after the "Race Relations Act [of] 1976 and the Sex Discrimination Act [of] 1975. Some provisions are also similar to provisions in the Disability Discrimination Act [of] 1995."[97]

3. Struggling to Find a Definition

Although the HRA, from Article 9 of the ECHR, required religion and belief to be protected, it did nothing to clarify what religion and belief included. In fact, there was an absence of specificity in the ECHR itself.[98] This omission or lack of clarity was most likely deliberate because what religions and beliefs should be protected was ardently debated during the passage of the ECHR.[99] Thus, when the United Kingdom incorporated Article 9, it did not define precisely what religion and belief encompassed, and it still remains open today.[100]

The Regulations (the British adoption of the ECHR) unambiguously shield the religious citizen from employment and occupation discrimination on religion and belief grounds.[101]

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91. *See* Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC); Griffith, *supra* note 76, at 150 n.3.

92. *See* VICKERS, *supra* note 24, at 121.

93. *See* Nicol Scampion, *The Employment Equality (Religion or Belief) Regulations 2003: The Cases so Far and Anticipated Issues*, TANFIELD CHAMBERS 12, *available at* http://www.tanfieldchambers.co.uk/Asp/uploadedFiles/File/seminar%20notes/The%20Employment%20Equality%20(Religion%20or%20Belief)%20Regulations%202003%20Nicol%20Scampion%208th%20March%202007.pdf (last visited Nov. 26, 2010).

94. *See* The Employment Equality (Religion or Belief) Regulations 2003, 2003, S.I. 2003/1660 (U.K.) [hereinafter Regulations].

95. Griffith, *supra* note 76, at 150.

96. *See* Scampion, *supra* note 93, at 12.

97. DEPARTMENT OF TRADE AND INDUSTRY, EXPLANATORY NOTES FOR THE EMPLOYMENT EQUALITY (SEXUAL ORIENTATION) REGULATIONS 2003 AND EMPLOYMENT EQUALITY (RELIGION OR BELIEF) REGULATIONS ¶ 3 (2003), *available at* http://webarchive.nationalarchives.gov.uk/tna/+/http://www.dti.gov.uk/er/equality/so_rb_longexplan3.pdf (last visited Nov. 26, 2010) [hereinafter EXPLANATORY NOTES].

98. *See* VICKERS, *supra* note 24, at 14.

99. *See id.*

100. *See* ACAS, RELIGION OR BELIEF AND THE WORKPLACE: A GUIDE FOR EMPLOYERS AND EMPLOYEES 4 (2004), *available at* http://www.acas.org.uk/CHttpHandler.ashx?id=107&p=0 [hereinafter GUIDE FOR EMPLOYERS].

101. *See* Freedland & Vickers, *supra* note 80, at 601.

> Regulation 6 provides that it is unlawful to discriminate on grounds of religion or belief in the arrangements made for determining who to employ; in the terms of employment; and by refusing to offer employment. Once employed, it is unlawful to discriminate on grounds of religion or belief in the terms of employment afforded; in opportunities for promotion; or by dismissal or subjection to other detriment.[102]

By overtly protecting religion and belief, the Regulations overcame the clear inconsistency between religious groups that were and were not protected under the Race Relations Act of 1976.[103] The Regulations broadly apply to almost everyone involved in both public and private work: employees, contractors, office-holders, partnerships, and agency workers.[104] The terms religion and religious belief were intended to be "broad one[s] . . . in line with the freedom of religion guaranteed by article 9 of the ECHR."[105]

The Regulations defined religion or belief as "any religion, religious belief, or similar philosophical belief."[106] "Despite their non-religious content, it is clear that [philosophical] beliefs are intended to be protected, and yet equally clear that other non-religious views, such as political views, are not."[107] The great divide, and difficulty in definition, lies in determining what is a "religious or philosophical belief" (and thus is protected) and what is not (and thus not protected)."[108] In the United Kingdom, borderline religions are likely to be defined as belief, instead of religion. Yet, borderline beliefs will most often qualify for protection.[109]

The Equality Act of 2006 amended the definition of religion and belief. In pertinent part, this statute provides: "(a) '[R]eligion' means any religion, (b) 'belief' means any religious or philosophical belief, (c) a reference to religion includes a reference to lack of religions, and (d) a reference to belief includes a reference to lack of belief."[110] Removal of the word "similar" enabled the statute to include, for example, humanism, atheism, and agnosticism in the group of protected ideologies while not broadening the term religion to include them.[111] Although the Equality Act contains no set criteria for evaluating the meaning of religion or belief, the British courts, in practice, will likely consider questions such as whether a believer practices collective worship, whether there

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102. VICKERS, *supra* note 24, at 152-53.

103. *See id.* at 122.

104. *See id.* For the list of all protected categories, *see* Regulations, *supra* note 94, at ¶¶ 6-20.

105. EXPLANATORY NOTES, *supra* note 97, ¶ 11.

106. Regulations, *supra* note 94, ¶2(1).

107. VICKERS, *supra* note 24, at 15.

108. *See id.*

109. *See id.*

110. Equality Bill, 2005-6, H.L. Bill [99] cl.44. (U.K.).

111. *See* VICKERS, *supra* note 24, at 23.

is a clear belief system, and whether a purported religion or belief profoundly affects the way of life or world view for the believer.[112]

4. Problems with this Definition

Some academics in the United Kingdom fear that the revised definition of religion or belief will lead to the Regulations being "interpreted in ways in which would extend the scope of the Regulations to a large range of beliefs and thereby protect a very large group of people in ways which were not intended either by the Regulations themselves or by the amendment of the definition."[113] Such fears were voiced during debate on the bill in the House of Lords.[114]

At least one influential scholar believes these fears are overstated. Lucy Vickers, a Professor at Oxford University and perhaps the most renowned and well-respected scholar on religion in the British and European workplace, believes that such worries are unfounded based on the Explanatory Notes (Notes) accompanying the *original* version of the Regulations.[115] In these Notes, an analogy which defined a "similar philosophical belief" effectively stated the "belief should occupy a place in the person's life parallel to that filled by the God/Gods of those holding a particular religious belief."[116] She believes that this analogy will be used to interpret the new Regulations even though the word "similar" is no longer included.[117]

However, the debate still rages as to whether U.K. courts can and will interpret the statute literally in order to expand the number of protected groups or whether the courts will read the statute much like the previous one that included the word similar.[118] It seems the United Kingdom "is left with a legislative provision which appears to say one thing while Parliament, or at least the Minister responsible for the Bill, meant it to mean another."[119] British courts will either have to broadly define "religion and philosophical belief" or will have to strain to narrowly define "religion and philosophical belief" and render almost absurd decisions in a strained attempt to subdue the expansion of coverage.[120]

To further complicate matters, British courts cannot simply adopt the European Union (EU) case law of Article 9 because the EU inclusion of "conscience and thought," in addition to religion and philosophical belief,[121] has been interpreted by the European Court to include practices like

112. *See* GUIDE FOR EMPLOYERS, *supra* note 100, at 4.
113. Griffith, *supra* note 76, at 151.
114. 13 Jul. 2005 Parl. Deb., H.C. (2005) 1108 (U.K.). *See* Griffith, *supra* note 76, at 154.
115. *See* VICKERS, *supra* note 24, at 30.
116. *See* EXPLANATORY NOTES, *supra* note 97, ¶ 13.
117. VICKERS, *supra* note 24, at 23.
118. *See id.*; Griffith, *supra* note 76, at 156-58.
119. Griffith, *supra* note 76, at 157.
120. *See id.*
121. *See id.* at 158.

veganism[122] and pacifism.[123] These non-religious belief systems are outside the intended coverage of the Equality Act.[124] Thus, simply utilizing case law of the European Court is foreclosed as a resolution to this definitional enigma, leaving the definition of both religion and philosophical belief relatively instable when compared to the United States' definition.

D. Differences and Rationales

From a historical perspective, at least one glaring demarcation exists between the United States and United Kingdom. The group responsible for founding the United States was comprised largely of religious dissidents who came to find solace from molestation abroad, specifically from Britain. Therefore, since the time of its founding, the United States has had an explicit constitutional provision proscribing the establishment of a state religion.[125]

In contrast, the United Kingdom has always had an established religion.[126] "[T]he mere presence of an Established Church is not, per se, incompatible with a nation's human-rights obligations."[127] However, the "status of the Church of England nonetheless symbolizes a disparity of treatment" between the nation's different religious groups.[128] Throughout British history, the recognition of a single state religion has been the basis of antipathy toward different religions, specifically Roman Catholics.[129]

Although simply having an established religion is not proof that a state mistreats citizens with divergent religious views, a history of legal discrimination on the basis of religion possibly has long-lasting effects that cannot be eradicated by the passage of a statute forbidding such conduct.[130]

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122. *See* H v. United Kingdom, App. No. 18187/91, 16 Eur. H.R. Rep. 44, 44 (1993).

123. *See* Arrowsmith v. United Kingdom, App. No. 7050/75, 3 Eur. H.R. Rep. 218, 228 (1978).

124. *See* Griffith, *supra* note 76, at 150-51.

125. *See* U.S. CONST. amend. I. This Amendment states, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." *Id.*

126. *See generally* Crumper, *supra* note 69, at 21-26 (discussing the history of the Church of England and some of the problems, especially constitutional ones, associated with having an established church).

127. *Id.* at 22.

128. *See id.* at 40.

129. *See id.* at 15. Even today, the Sovereign cannot convert or be married to a Roman Catholic. *See* Act of Settlement, 1700, 12 & 13 Will. 3, c. 2, §§ 1-2 (Eng.); Crumper, *supra* note 69, at 25-29. Roman Catholic priests could not serve in the House of Commons until 2001. *Id.* The United States Constitution explicitly forbids a religious test for public service. *See* U.S. CONST. art VI, cl. 3.

130. Nothing in this Note is intended to imply that the British Government, in general, or the Crown, in particular, is not fulfilling its Human Rights obligations toward religious citizens or any others. Notably, Regulation 36 provides that the Regulations apply to acts by the government, including the Crown. Further, Regulation 37 provides that the Regulations apply

Favorable treatment for the followers of the majority religion might affect the decisions of the members of British courts, legislatures, employers, and the citizen at-large. Thus, it is possible that adherents to the national religion enjoy unintentionally favorable treatment by the public, employers, legislature, and even the British courts.

In terms of the relevant language in the ECHR, the inclusion of "and belief" and the absence of such language in Title VII suggest that borderline religions will qualify for protection in the United Kingdom but not in the United States. While non-traditional religious beliefs are required to prove they are not simply moral or ethical beliefs in order to fall under the penumbra of Title VII, such religions need not fight to be classified as such in the United Kingdom. Instead, they can qualify under the belief prong.[131] For example, beliefs such as atheism or humanism automatically obtain coverage in the United Kingdom,[132] while these seemingly non-religious belief systems will likely fail under Title VII. In more concrete terms, many moral and ethical beliefs excluded in the United States[133] would likely receive no challenge under the British religion and belief prong.

The difference in the language between the United Kingdom's and United States' religious protection statutes also has a more general ramification. The term religion is used in Title VII while religion and belief is used in the Equality Act. Not only will those adhering to minority religion find inclusion less likely under a religion only regime, the category of protected belief systems will be larger under a religion and belief analysis. This observation is not simply a logical extrapolation that religion is unavoidably narrower than religion *and* belief; rather, this observation rests upon the jurisprudence of the respective courts as noted.

II. Obligation to Accommodate

"In the employment setting, the term accommodate is [typically] used to create an affirmative duty on an employer to do something extra to meet the religious needs of the employee."[134] "Often times, accommodation comes in the form of modifying a policy, excusing the employee from a particular job requirement, or making a schedule change so the employee can attend a religious event."[135] In other instances, accommodations "merely require an employer to refrain from acting to the detriment of a protected group or require an employer to take steps to see that no protected group is illegally

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also to the House of Commons and House of Lords. *See* EXPLANATORY NOTES, *supra* note 97, ¶¶ 175-78; Regulations, *supra* note 94, ¶¶ 36-37.

131. *See* VICKERS, *supra* note 24, at 22.

132. *See id.* at 15.

133. *See supra* Part I.B.2.

134. Jamar, *supra* note 6, at 784.

135. Daniel R. Kelly & Brian T. Benkstein, *Karma, Dogma, Dilemma: Religious Accommodation at Work*, 66 BENCH & B. MINN. 26, 28 (2009).

disadvantaged."[136]

Even the broadest definition of religion (or religion and belief) would be hollow if an employer were not obliged to take steps to accommodate the religious employee. A world where employers were not allowed to intentionally discriminate would not look much different from a world without any sort of religious protection. To maximize religious protection, employers should be required to modify procedures and policies that disadvantage employees of faith. Imposing a negative duty that prohibits discriminatory practices or imposing an affirmative duty that requires accommodation of the religious employee can advance the laudatory goal of ensuring equal access to employment opportunities. The United Kingdom utilizes the former approach while the United States the latter.[137]

A. Obligation in the United States

A reasonable religious accommodation is "any adjustment to the work environment that will allow the employee to practice his religion."[138] A positive obligation to accommodate religious employees has not always existed under Title VII. "In its original form, Title VII did not explicitly require employers to accommodate employees' religious practices."[139] Though Congress made religious discrimination unlawful, it neglected to address the scope of an employer's accommodation obligation under section 703(a)(1) of Title VII and failed to indicate if an employer had an affirmative duty to accommodate the religious practices of its employees.[140] Problems from this lacuna were evident almost from the beginning of Title VII's implementation.[141] For example, if an employer did not wish to hire Jews, it could legally discriminate under the original version of Title VII by simply requiring Saturday work.[142]

The EEOC quickly resolved to close this loophole and interpreted Title VII as imposing such an affirmative duty.[143] In 1966, the EEOC issued guidelines that encouraged employers to set normal working hours and to accommodate religious practices unless the practices caused "serious inconveniences."[144] The EEOC later issued regulations that required an

136. Jamar, *supra* note 6, at 741.

137. This paragraph represents the author's belief about the importance of the duty to accommodate.

138. Panken, *supra* note 10, at 2.

139. Mroz, *supra* note 27, at 147.

140. *See* Peter Zablotsky, Article, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices under Title VII after* Ansonia Board of Education v. Philbrook, 50 U. PITT. L. REV. 513, 513-14 (1989).

141. *See* Foltin & Standish, *supra* note 9, at 20.

142. *See id.*

143. *See* Zablotsky, *supra* note 140, at 514.

144. Mroz, *supra* note 27, at 147.

accommodation with an exception that employers did not have to accommodate if it caused an undue burden.[145] However, most courts held that a positive duty to accommodate was outside the purview of Title VII.[146] This divergence was possible because the EEOC's interpretive guidelines do not have the force of law.[147]

The conflict over accommodation reached its pinnacle in 1970 in the Sixth Circuit Court of Appeals case, *Dewey v. Reynolds Metals Co.*[148] The Sixth Circuit rejected the EEOC's mandatory accommodation interpretation.[149] "The *Dewey* court's controversial rejection of the EEOC's interpretation of Title VII was subsequently affirmed by an equally divided Supreme Court."[150]

1. Source and Definition of Employer's Duty

In 1972, Congress reacted to *Dewey*[151] by amending Title VII and "explicitly requir[ing] employers to accommodate the religious practices of their employees."[152] In effect, the definition of religious discrimination, as contained in the 1972 amendment, made it unlawful for an employer not to accommodate the religious practices of its employees absent undue hardship to the employer's business.[153] Hardship refers to a detriment to the conduct of the employer's business.[154]

Although the amendment showed progress in protecting the religious employee, courts had little guidance as to what Congress intended the amendment to accomplish.[155] For example, the legislative history proved "unhelpful in ascertaining the *extent* of the obligation being created."[156] Three specific areas evolved where sufficient guidance was not present and the courts

145. *See* Foltin & Standish, *supra* note 9, at 20.

146. Zablotsky, *supra* note 140, at 514. *See* Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971), *aff'g* 429 F.2d 324 (6th Cir. 1970); Linscott v. Millers Falls Co., 316 F.Supp. 1369, 1372 (D. Mass. 1970) (no accommodation required where union dues payment was supported by compelling government interest), *aff'd*, 440 F.2d 14 (1st Cir. 1971), *cert. denied*, 404 U.S. 872 (1971); Kettle v. Johnson & Johnson, 337 F.Supp. 892, 895 (E.D. Ark. 1972) (EEOC guidelines requiring accommodation exceed the mandate of the Civil Rights Act).

147. *See* Moberly, *supra* note 29, at 12. *See generally* John S. Moot, Comments, *An Analysis of Judicial Deference to EEOC Interpretative Guidelines*, 1 ADMIN. L.J. 213 (1987).

148. *See* Dewey v. Reynolds Metals Co., 429 F.2d 324, 334 (6th Cir. 1970), *aff'd per curiam*, 402 U.S. 689 (1971).

149. *See* Moberly, *supra* note 29, at 14-15.

150. *Id.* at 15; *Dewey*, 402 U.S. at 689.

151. *See* Jamar, *supra* note 6, at 741; Moberly, *supra* note 29, at 12.

152. Mroz, *supra* note 27, at 147-48.

153. *See* Zablotsky, *supra* note 140, at 515.

154. *See* Jamar, *supra* note 6, at 743; discussion *infra* Part II.A.2.

155. *See* Foltin & Standish, *supra* note 9, at 20.

156. Sara L. Silbiger, Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since* Trans World Airlines v. Hardison, 53 FORDHAM L. REV. 839, 842 (1985).

stepped in to fill the void. The amendment did not define 1) the scope or definition of reasonable accommodation, 2) the scope or definition of undue hardship, and 3) the relationship between these two principles.[157] The U.S. Supreme Court resolved these issues in two seminal decisions: one addressing what constitutes undue hardship and the other reasonable accommodation.[158]

2. Hardison, Philbrook, *and the Employer's Lightened Burden*

In 1977, *Trans World Airlines v. Hardison*[159] was the first time the Supreme Court addressed the concepts of reasonable accommodation and undue hardship.[160] In *Hardison*, the "Court held that any accommodation imposing more than a de minimis cost constitutes an 'undue hardship' for the purposes of Title VII."[161] "Since its articulation in 1976 [in *Hardison*], the phrase de minimis cost has become virtually synonymous with the term undue hardship."[162] By endorsing this standard, the majority's decision narrowed an employer's duty to accommodate by setting a dreadfully low threshold for undue hardship.[163]

The holding drew harsh criticism from Justice Marshall in dissent and from many academics and scholars. *Hardison* has been disparaged as marking "the beginning of the contemporary Supreme Court's debilitation of employees' Title VII protections against unlawful discrimination on the basis of religion."[164] In his dissent, Justice Marshall stated that he read Title VII as requiring employers to grant privileges to religious employees as part of the accommodations process.[165] He further argued that big employers, like Trans World Airlines, could bear these "more than de minimis costs" without constituting undue hardship.[166] In probably his most pointed critique, Justice Marshall proclaimed that the majority's reading so vitiated the obligation to reasonably accommodate as to result in effectively nullifying it.[167] Justice Marshall's prediction has appeared to come true as evidence exists that the obligation to accommodate has been essentially nullified.[168]

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157. *See* Zablotsky, *supra* note 140, at 516-17.

158. *Id.* at 518.

159. *See* Trans World Airlines v. Hardison, 432 U.S. 63 (1977).

160. *See* Laurel A. Bedig, Comment, *The Supreme Court Narrows an Employer's Duty to Accommodate an Employee's Religious Practices Under Title VII:* Ansonia Board of Education v. Philbrook, 53 BROOK. L. REV. 245, 246 (1987).

161. Mroz, *supra* note 27, at 148.

162. Zablotsky, *supra* note 140, at 543.

163. *See* Bedig, *supra* note 160, at 246.

164. David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27, 30 (1992).

165. *See id.* at 32.

166. *See id.*

167. *See* Foltin & Standish, *supra* note 9, at 23.

168. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 62-66 (1986), *aff'g* 757 F.2d 476 (2d Cir. 1985); Gregory, *supra* note 164, at 30.

The Supreme Court further narrowed the accommodations required of employers[169] in 1986 in *Ansonia Board of Education v. Philbrook.*[170] The Second Circuit Court of Appeals held that "[w]here the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's . . . business."[171] While the Second Circuit's holding was consistent with the EEOC's interpretation of accommodation, the Supreme Court explicitly disagreed, stating that the EEOC's interpretation was "simply inconsistent with the plain meaning of the statute."[172] The majority held "that an employer fulfills its duty to accommodate under Title VII so long as it offers a reasonable accommodation to the employee."[173]

"[W]here the Employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship."[174] Accordingly, the undue hardship issue only becomes relevant when the employer claims it is unable to offer *any* reasonable accommodation.[175] "Essentially, an employer must attempt to accommodate the religious beliefs and practices of his or her employees so as to remove conflict between the employee's religious belief[,] and [in] the performance of his or her employment duties is not necessarily required to adopt the accommodation the employee insists on."[176] The *Philbrook* majority reasoned that in enacting 701(j) and amending Title VII, Congress was motivated by a desire to ensure that employees were given additional opportunities to observe religious practices at reasonable costs.[177]

3. Examples of the Duty to Accommodate

Although the duty of employers has been diminished quite significantly, many would argue employees still bring claims with moderate success.[178] Speaking most broadly, courts finding a failure to accommodate on the part of the employer have stressed that an employer is obligated to initiate finding an

169. *See* Bedig, *supra* note 160, at 247.

170. *See Philbrook*, 479 U.S. at 68.

171. Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 484 (2d Cir. 1985), *aff'd* 479 U.S. 60 (1986).

172. *Philbrook*, 479 U.S. at 69 n.6.

173. Mroz, *supra* note 27, at 148.

174. *Philbrook*, 479 U.S. at 68.

175. *See id.* at 69.

176. Peter M. Panken & Lisa J. Teich, *Religion and the Workplace: Harmonizing Work and Worship – Some Recent Trends and Developments* 1341, 1352, in ALI-ABA Course of Study, Airline and Railroad Labor and Employment Law (2008).

177. *See* Campbell, *supra* note 46, at 32.

178. *See supra* Part II.A.2.

accommodation, that the employee has a duty to cooperate in finding an accommodation, and that failure by the employer to take the first step will lead to finding a failure to accommodate in most every case.[179]

Problems in Title VII claims arise in the framework of requests to accommodate particular days off work for religious observance.[180] This holds true both for current and prospective employees.[181] While there is not an absolute right to refuse to work on one's own Sabbath or on particular religious holidays, section 701(j) of Title VII "clearly anticipates that some employees will absolutely refuse to work on their Sabbath and that this firmly held religious belief require[s] some offer of accommodation by employers."[182] Once an employee brings this issue to an employer's attention, the duty to accommodate an employee's request for days off for religious observance is satisfied so long as the employer offers some sort of flexibility such as shift swapping, unpaid time off, usage of personal days, etc.[183]

On the other hand, requests for modifications to uniforms or dress codes are more complex because a diversity of interests and rights collide. This collision includes the freedom of religion and of expression for the employee, the employer's freedom to maintain a religiously neutral workplace, the negative rights of the staff and customers, and the interests of promoting diversity within the workplace.[184] Seemingly, some situations call for an actual duty to accommodate more than others. For example, allowing an employee to wear a headscarf, a neatly groomed beard, or a skirt would present little or no possibility of actual economic costs on the employer in most cases.[185]

However, mere hypothetical claims that an employer does not wish to deviate from company policy or concerns over possible negative effects on the image of the employer will not amount to economic hardship (undue burden) and will not alleviate the employer of the duty to accommodate.[186] Proof of actual economic loss, perhaps in the form of a customer voicing offense and declining to do business with the employer, could satisfy the de minimis cost standard and remove the employer's obligation to accommodate. This justification for denial of an accommodation request presents a further quandary.[187] Customer preference is not sufficient to justify discrimination in the context of race or gender discrimination[188] but appears to be enough in the religious context. This begs the question, if mere preference of customers

179. Campbell, *supra* note 46, at 28.

180. *See id.* at 27.

181. *See* Panken, *supra* note 10, at 4.

182. Equal Emp't Opportunity Comm'n v. Ithaca Indus., 849 F.2d 116, 118 (4th Cir. 1988); Campbell, *supra* note 46, at 52.

183. *See* VICKERS, *supra* note 24, at 188-89.

184. *See* Freedland & Vickers, *supra* note 80, at 613.

185. *See id.* at 614-15.

186. *See* VICKERS, *supra* note 24, at 189.

187. *Id.* at 189.

188. *See* Diaz v. Pan American World Airways, 442 F.2d 385, 389 (5th Cir. 1971).

cannot make legal otherwise illegal discriminatory acts in the context of race or gender, why treat religion differently? This question, with no obvious answer, is explored in Part III of this Note.

4. Problems in the United States

Today, it seems well settled that an employer's obligation to accommodate is satisfied once it proposes a single reasonable option to accommodate.[189] There is no duty for an employer to entertain some other accommodation that is more desired by an employee than the accommodation proposed by the employer.[190] The "interpretation of the duty to accommodate has [become] somewhat restrictive, leaving employers with a most slender of duties to accommodate."[191] Combining the holdings of *Hardison* and *Philbrook* makes the duty to accommodate more fictional than real. What is given with the creation of the duty to accommodate is taken by the very low level of hardship needed to defeat the duty to accommodate.[192]

While a narrow, and therefore less meaningful, duty to accommodate religious practices might result in a reduction in litigation over the scope of the employer's duty to accommodate, it has the "unfortunate repercussion of penalizing those members of our society who belong to religious minorities."[193] This correlation might be imperceptible on the surface. Consider that minority religions are more likely to have conflicts due to the decreased likelihood that their practices and holy days are recognized by most employers. Therefore, the number of claims by minority religions will be greater compared to majority religions. Thus, since narrowing the duty to accommodate will decrease the likelihood of success for claims under all religions, and since minority religions or beliefs are more likely to be litigated in court, the effects of a narrow definition will fall disproportionately on non-traditional religions.

Critics have pointed out that justification for the narrow definition has no basis in the language or legislative history of Title VII.[194] Scholars agree that after *Philbrook*, the "likelihood of an employee obtaining resolution of religious and work conflicts in an effective manner is lessened."[195] This contrasts with the express purpose of Title VII and its 1972 amendment. As Title VII's sponsoring Senator remarked, the purpose of the amendment was to protect religious observers whose employers failed to adjust work schedules and guidelines in addition to reaffirming in a more explicit manner that a duty to accommodate existed.[196]

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189. *See* Campbell, *supra* note 46, at 25-27.
190. *See id.* at 27.
191. VICKERS, *supra* note 24, at 186.
192. *See id.* at 187.
193. Bedig, *supra* note 160, at 248.
194. *See* Campbell, *supra* note 46, at 32.
195. Bedig, *supra* note 160, at 268.
196. *See generally* 118 CONG. REC. 705, 705-06 (1972) (statement of Sen. Randolph).

Beyond this, it seems inconsistent for the Supreme Court to emphasize the congressional desire for flexibility as the basis for denying the employee the right to select a reasonable method of accommodation, then to use flexibility to allow an employer to satisfy the accommodation duty by offering any reasonable alternative without considering any of the employee's reasonable alternatives.[197] Furthermore, the Supreme Court in *Philbrook* stated the reason for not considering the employee's accommodation, so long as the employer offered at least one reasonable accommodation as well, is that it feared the employee would hold out for the single accommodation that most benefitted the employee. But, in so holding, the employer now has that very same power and can simply offer the one reasonable accommodation in its own best interests.[198]

From a policy perspective, comparable problems arise. There are three alternative ways to interpret and enforce the concepts of accommodation and undue hardship. The first is a neutral option that balances accommodation and undue hardship and gives equal weight to both. The second option, adopted in *Philbrook*, benefits employers and focuses primarily on reasonable accommodation. The final option is employee-benefitting, wherein undue hardship controls.[199] If the 1972 amendment was expressly intended to benefit the employee by placing a previously unrecognized duty on employers to accommodate, why would the Supreme Court adopt the option that benefits the employer when the amendments were to help the religious employee?[200]

B. Obligation in the United Kingdom

Until recently the United Kingdom has provided few, if any, direct protections for religious employees,[201] and there was also little responsibility for employers to accommodate. Though there are established churches in England and Scotland, "the law of the State makes little systematic provision for the safeguarding of . . . the observance of religious law and practice in the workplace. Such law is dispersed and particular. Furthermore, the existing law is difficult from which to discern general principles of broad application."[202] There is no explicit statutory or common law right for even the most basic religious practices such as time off for observance of religious holy days.[203]

1. Source and Definition of the Employer's Duty

The model utilized in both the United Kingdom and Europe differs from the United States because it does not explicitly impose an obligation upon the

197. *See* Zablotsky, *supra* note 140, at 564.
198. *See id.* at 566-67.
199. *See id.* at 543-68.
200. *See id.* at 543-68; Bedig, *supra* note 160, at 256.
201. *See supra* Part I.C.1.
202. Hill, *supra* note 70, at 1134.
203. *See id.* at 1136; *supra* Part I.C.1.

employer.[204] The Regulations, which govern the treatment of religious employees, protect "against direct and indirect discrimination, and they do not impose a specific duty on employers to make reasonable accommodations for the needs of the religious employee."[205] There is a negative duty to not act in a discriminatory fashion, which allows the religious action to continue, unless there is good reason to discriminate and the employee practices his religion or belief in an inappropriate manner.[206] "Where a complainant can show that [he or she has] been disadvantaged . . . and that persons of a particular religion or belief are particularly disadvantaged by this treatment, then the burden is on the discriminator to show a justification."[207] Notably, the scheme of accommodation in Britain is also required in disability discrimination.[208]

An "act of discrimination is justifiable only if an employer can demonstrate that there was no viable alternative method of achieving the outcome desired."[209] The overarching legal question is whether the restriction on the religious activity is proportionate to a legitimate aim.[210] The Department of Trade and Industry's Explanatory Notes to the Regulations explains this concept:

> Where the application of a practice, group disadvantage, and individual disadvantage are established, the alleged discriminator must show that the provision, criterion or practice pursues a legitimate aim, and is a proportionate means of doing so. The discriminator's justification must be objective (i.e. demonstrating legitimacy and proportionality), and will be subjected to close scrutiny by courts and tribunals; it is not sufficient for the discriminator merely to argue that his view of justification is a reasonable one.[211]

Based on these Explanatory Notes, satisfaction of the proportionality and legitimacy requirement means that an act of discrimination against a religious employee is lawful. Justification for an employer's discriminatory acts usually occurs with indirect discrimination, where neutral criteria are applied and have a disparate impact on those holding a religion or belief.[212] "A wide variety of aims may be considered as legitimate."[213] Legitimate aims include business needs, economic efficiency, profitability, administrative efficiency, and the

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204. *See* VICKERS, *supra* note 24, at 220.
205. *Id.*
206. *Id.*
207. Scampion, *supra* note 93, at 14.
208. *See* VICKERS, *supra* note 24, 220.
209. *See* Hill, *supra* note 70, at 1165.
210. *See* Freedland & Vickers, *supra* note 80, at 614; Scampion, *supra* note 93, at 13-14.
211. EXPLANATORY NOTES, *supra* note 97, ¶ 39.
212. *See id.*; Scampion, *supra* note 93, at 13-15.
213. EXPLANATORY NOTES, *supra* note 97, ¶ 40.

available supply of labor.[214] However, "aims related to the discriminatory effects of a practice cannot be considered as legitimate."[215]

Proportionality analysis focuses on whether the means utilized are "an appropriate and necessary means of achieving the legitimate aim in question."[216] The ultimate decision often depends on the facts of the case.[217] However, speaking most generally, "an appropriate means is one which is suitable to achieve the aim in question, and which actually does so. A necessary means is one without which the aim could not be achieved; it is not simply a convenient means."[218] Courts also consider the available alternative ways in which the aim could be achieved with fewer resultant discriminatory effects, with fewer employees allegedly affected by discrimination, or with a lesser degree of disadvantage because of a religious practice.[219]

Proportionality also relates to the economics surrounding the situation. For example, courts investigate the size of the alleged violating organization, the cost that non-discrimination might have on the organization, and whether or not this cost would be excessive for a particular organization.[220] Thus, what might be legal discrimination by one employer might be illegal discrimination by another. The dispositive could simply be the size or profitability of the employers' operations.

> Whether or not accommodation should be required in any particular case will thus depend on whether it is proportionate to do so, bearing in mind the relative strength of the competing interests in question, and whether the aim can be realised in a way that reduces the adverse impact on those other interests.[221]

Because Article 9 protects religious freedom as both an individual and a group right, religious freedom includes the right to create religiously homogenous workplaces.[222] As a result, employers do not have to modify practices and are allowed to discriminate on the basis of religion so long as they are not taking into account the religious persuasion of the *employee*.[223] For example, a Catholic employer could lawfully refuse to employ one who has been divorced.[224] However, this right of religious ethos organizations is now

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214. This is a nonexclusive list. *See id.*
215. *Id.*
216. *Id.* ¶ 41.
217. *See id.*
218. *Id.*
219. *See id.*
220. *See id.* ¶ 42.
221. VICKERS, *supra* note 24, at 54.
222. *See* Freedland & Vickers, *supra* note 80, at 602.
223. *Id.* at 603-04.
224. *See id.* at 604.

limited by the Regulations in cases where the employment practices of these groups disproportionately discriminate on religious grounds.[225] Thus, even if the employer gives a legitimate justification for the religious requirement, the employer might be required to rationalize the requirement as applied to the specific individual in question. This more stringent standard forces an employer to show that accommodating just one employee would not be feasible or would defeat its legitimate reason for having the requirement.[226] Therefore, such a limitation increases the potential for effective protection of members of majority and minority religious groups.[227]

The "proportionality equation," as Lucy Vickers calls it, can be summarized in three steps:

> The first issue in the . . . equation is to assess the relative strength of the competing interests. . . . The second issue is to consider the range of interests with which such interests may compete in the workplace, such as an employer's financial interests and the equality interests of other employees. These . . . will intersect with each other, and may act singly or cumulatively to suggest that protection should be limited. Finally, a range of additional contextual factors will be considered which may have the effect on the determination of whether it is proportionate to require protection. Issues in this category include the type of employer, as well as background issues such as whether the workplace is viewed as a public or private space.[228]

2. *Examples of the Obligation*

There are very few seminal cases that explain and define the duty of non-discrimination. However, looking at the principles of proportionality and legitimate aim in practice assists in clarifying the duty of non-discrimination.

A refusal to accommodate an employee's request for a change in hours to enable a religious employee to partake in a religious observance usually amounts to indirect discrimination.[229] This refusal is tantamount to putting an employee at a disadvantage by requiring an employee to work a particular timetable.[230] Under the proportionality requirement, the factors a court may

225. *See id.* at 603.

226. *See* VICKERS, *supra* note 24, at 133-34.

227. *See id.* at 134.

228. *Id.* at 55.

229. *See id.* at 155 (noting that this "could be direct discrimination if an employer allows some religious individuals time off and not others, and the reason for the different treatment is religion.").

230. *See* Freedland & Vickers, *supra* note 80, at 616.

consider include the ease with which requests can be swapped or covered, the availability and costs of covering, the length of time of the request, and finally, the frequency of requests.[231] If volunteers are available to take the employee's shift, if the time to cover is short, or the employer truly did not need the employee during the time, the refusal would likely be inappropriate and thus discriminatory.[232]

"Employers' requirements that staff comply with a particular dress code can put religious individuals at particular disadvantage, and where this is the case they need to be justified."[233] In order for this type of discrimination to serve a legitimate aim, there needs to be a clear, objective basis for any restriction on religious dress.[234] Hypothetical reasons why the uniform or dress restriction might be useful will not suffice; instead, the employer must show the dress code is necessary.[235] However, the employer could have the legitimate aim of allowing customers to be free from the effects of religious expression. This might suffice for objective basis requirement, but one must still prove proportionality.[236] The issue of proportionality can be complicated regarding bans on items such as headscarves or veils because the negative right of customers and other employees to be free from religion is also important.[237] The possible positive effect a ban on these items might have on customers or fellow employees will be balanced against the negative effect on the employee as part of the proportionality analysis.[238]

3. Problems in the United Kingdom

The proportionality equation places courts in a difficult position.[239] While proportionality is a mathematical term that implies a calculation can be made with significant precision, "in the legal context, one is measuring incommensurable interests, and mathematical precision is impossible."[240] Furthermore, because interests are incommensurable in nature, precision and pure objectivity are not feasible.[241] Resolving this issue becomes even more complex when one considers the almost incalculable number of interests that might compete in one case. Essentially, standards or guiding principles are difficult to decipher; therefore, it is necessary to decide each conflict on a case-by-case basis. While an individualized approach has the benefit of allowing

231. *See id.*
232. *See id.*
233. *Id.* at 613.
234. *See* VICKERS, *supra* note 24, at 163.
235. *See id.*
236. *See id.*
237. *See id.* at 158.
238. *See id.* at 162.
239. *See id.*
240. *Id.* at 54.
241. *See id.* at 55.

analysis of each conflict in context, it also leads to the adverse consequence of thwarting predictability. This uncertainty might negatively affect employers, and to a lesser extent employees, in ordering their affairs. If each case is truly fact-dependent, ostensibly comparable cases could have divergent outcomes based upon one factual difference.

The absence of an explicit duty to accommodate can lead to inadequate protection for the religious employee. Such a duty admits that changes to the workplace are indispensable if the needs of particular individuals or groups are to be fully addressed.[242] Because religious practices vary extensively, an individualized duty to accommodate will often improve protections of religious interests at work when compared to a generalized non-discrimination duty.[243] The benefits and burdens of the United Kingdom's and United States' systems are discussed below and further illuminate the problems that are, or might be, faced in the United Kingdom.

C. Differences and Rationales

American employers have an affirmative, statutory duty to accommodate the requests of religious employees when employment practices clash with the employee's sincerely held religious beliefs unless this would cause an undue hardship.[244] In contrast, British employers have a negative duty to forego implementation or discontinue the use of employment practices that have the effect of discriminating against religious employees unless the practice is proportionate to further the employer's legitimate interest.[245] The explanation for the difference is the divergence in the underlying statutory language.[246] The

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242. *See id.* at 221.

243. *See id.*

244. *See supra* Part II.B.

245. *See supra* Part II.C.

246. The amendment to the CRA of 1964, 42 U.S.C. § 2000e(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 to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." On the other hand, Regulation 3 provides:

> (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if -
>
> (a) on grounds of religion or belief, A treats B less favorably than he treats or would treat other persons; or
>
> (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but -
>
> (i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,
>
> (ii) which puts B at that disadvantage, and
>
> (iii) *which A cannot show to be a proportionate means of achieving a legitimate aim.*
>
> (2) The reference in paragraph (1)(a) to religion or belief does not include A's religion or belief.

theory supporting the accommodation duty admits that treating differently situated people similarly can amount to discrimination and that, in many cases, the employer needs to take a minimal affirmative step and account for the religious difference of its employees.[247]

The most glaring difference between accommodation and non-discrimination is that the affirmative accommodation duty puts the onus squarely upon the employer to make an effort to accommodate the needs of the religious employee.[248] This difference has the *potential* to create a heightened level of protection for religious interests in the workplace and to overcome the difficulties caused by individuals being forced to prove indirect discrimination, or disparate impact, on groups of fellow-believers.[249] This prospective advantage has led some scholars in the United Kingdom to advocate for the introduction of the duty to accommodate in order to better protect religious employees.[250]

However, when looking at how the United States Supreme Court has delineated undue hardships and reasonable accommodation,[251] a very narrow duty, or the ability to negate an affirmative duty with a showing as negligible as "de minimis cost," would provide diminutive benefits. Concerns also arise regarding whether the duty to accommodate has a negative impact. Instead of ensuring that employers are changing the structures that cause these problems, employers might be reacting to policies that are harmful.[252] Also, a stringent affirmative duty, or an exception that is more difficult to overcome than de minimis cost, could go too far in protecting the religious employee at the expense of the non-religious employee or, more likely, the employer. This debate has persisted among scholars in the United Kingdom; as of late 2009, no drastic changes seem imminent.[253]

It is noteworthy that the burden placed upon the employer is contextual in the United Kingdom but not in the United States. Whether an accommodation creates an undue burden is absolute under the Supreme Court's present interpretation. Accommodating a religious employee is not required if it would place more than a de minimis cost upon the employer, whether it is a small business with a two dozen employees[254] or a Fortune 500 company with tens of

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(3) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Regulations, *supra* note 94, ¶ 3 (emphasis added).

247. *See* VICKERS, *supra* note 24, at 221.

248. *See id.* at 220.

249. *See id.* at 220 & 129.

250. *See generally* BOB HEPPLE ET AL., EQUALITY: A NEW FRAMEWORK 47-49 (2000) (stating that there is support in the academic world for introducing an affirmative duty on employers).

251. See *supra* Parts II.A.1, II.A.4, II.A.5.

252. *See* VICKERS, *supra* note 24, at 221.

253. *See* HEPPLE, *supra* note 250.

254. *See Federal Laws Prohibiting Job Discrimination Questions and Answers*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/facts/qanda.html (last modified Nov. 21, 2009) (listing all equal employment opportunity statutes which apply to each

thousands. However, the United Kingdom follows a proportionality analysis using economics specific to a company to determine if religious accommodation is feasible. Therefore, these different systems are likely to cause different outcomes for similar scenarios.[255]

III. RECOMMENDATIONS AND CONCLUSIONS

Title VII and its subsequent amendments fall short in defending rights of the religious employee at work.[256] One academic pointedly summarized these concerns:

> Efforts to ensure that people of faith are treated fairly in the American workplace have met with mixed success over the last four decades. While the passage of Title VII of the Civil Rights Act represented a major milestone, its full promise has yet to be realized. Even after the amendments to Title VII in 1972 and the litigation of numerous cases, people of faith remain dangerously vulnerable to the arbitrary refusal of employers to accommodate their religious practices. In a country founded by those fleeing religious intolerance, and in which religious freedom is enshrined in our most basic law, it is not too much to hope that we will soon achieve another milestone in civil rights, this time by assuring that Americans of all creeds are accorded respect by employers, able to remain true to their faith and participate as full partners in the workplace. [257]

Such a view emphasizes the perspective of the religious employee. From the employer's point of view, the situation might look very different. Unavoidable marketplace interaction necessitates an employee to "contract away" or give up some privacy and autonomy.[258] However, some aspects of personhood cannot be sold or contracted away without "ceasing to be a person."[259] The law should set the parameters within which the employee must act but should not force the employee to alienate those things most dear to him just to participate in employment. Below are ways in which Title VII can be improved so employees of faith are better protected in the workplace.

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employer; for example, Title VII does not apply to employers with fewer than fifteen employees).

255. *See supra* Part II.

256. Foltin & Standish, *supra* note 9, at 24.

257. *Id.*

258. *See* Freedland & Vickers, *supra* note 80, at 625.

259. *See id.*

A. Determining the Proper Definition of Religion

It may be enticing to narrowly define religion and taper the duty to accommodate based on a belief that claims of workplace discrimination because of religious affiliation are trivial. However, such a sanguine view is problematic because it naturally defines religion in terms of the dominant culture and often leaves those of minority faiths and those who regard religion as the essence of their personal identity subordinate to the de facto tyranny of the majority.[260]

The other side of the coin is to broadly define religion to include most conceivable forms of religion as well as comparable philosophical beliefs or convictions. The United Kingdom subscribes to this definition.[261] While religions of all varieties are protected in the United Kingdom, other non-religious beliefs such as agnosticism, humanism, and even pacifism also fall within the penumbra of such a definition.[262] An amendment or re-interpretation of the term religion as used in Title VII could broaden the groups that obtain protection. However, inclusion of varied philosophical beliefs and other non-religious beliefs, no matter how central they might be for the holder, was clearly outside Congress's purview when it adopted and amended Title VII.[263]

Although it is not problem-free,[264] the United States Supreme Court's existing definition of religion remains most desirable. The greatest reservation in accepting the Supreme Court's narrow definition of religion is the difficulty that minority or lesser-known religions have in attaining protection compared to mainstream religions. Yet, asking "whether a given belief that is sincere and meaningful occupies the place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for [protection]"[265] is a fair and workable standard for determining what should be classified as religion. The Court has removed the requirement of worshipping a deity,[266] the monotheistic requirement,[267] as well as necessitating the holder of the belief to classify it as religion in order to receive protection.[268]

Therefore, the Supreme Court's definition strikes an appropriate balance.

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260. *See* Wald, *supra* note 2, at 483.

261. *See supra* Part I.C.4.

262. *See* EXPLANATORY NOTES, *supra* note 97, ¶ 13.

263. While Congress might desire to expand the protection beyond religion to include certain political or philosophical beliefs, this Note's recommendations are based on the intention of Congress at the time the CRA was passed and amended. The intention at that time was to eliminate discrimination in the workplace because of, *inter alia*, religion. *See* Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2(a)(1)-(2) (1991).

264. *See supra* Part I.B.3.

265. United States v. Seeger, 380 U.S. 163, 166 (1965).

266. *See* Torcaso v. Watkins, 367 U.S. 488, 489-90 (1961).

267. *See* Gunn, *supra* note 17, at 165.

268. *See* Mroz, *supra* note 27, at 172-73.

In most cases, true religion will qualify for protection. Concerns with the Court's contemporary treatment of religion are generally related to the disqualification of a particular plaintiff based on the insincerity of a purported faith, not the categorical disqualification of his or her faith. While some may take issue with the sincerity requirement, it serves as a beneficial test by which to judge if the person allegedly discriminated against truly adheres to a religion.[269]

B. The United States Congress Should Change the Obligation to Accommodate by Re-defining the Term Undue Hardship

While the definition of religion adopted in the United States suitably balances the competing interests of employees and employers, the Supreme Court's interpretations of the Civil Rights Act of 1991 have precluded the full realization of the amendment's intended effect.[270] Nonetheless, the legislature, not the courts, is the appropriate vehicle through which modifications of the duty to accommodate should be addressed.

In reference to accommodating the religious employee, the United States' design is superior to the equivalent British system because the former includes an explicit and affirmative duty on the employer to accommodate employees.[271] While neither scheme is without problems,[272] a duty to accommodate is essential for religious workers to be truly protected from discrimination in the workplace. The American system strikes a fair balance among the competing interests of employers, employees, and customers.[273] It also provides an individualized "approach to providing protection, and ensures that religious staff can only be disadvantaged when there is a real reason to do so."[274]

Admittedly, the right to resign from participation in the workplace is the ultimate protection for freedom of religion. However, this should be the last resort when scrutinizing any conflict, not the starting point. A religious employee should be forced to exercise this right only when the accommodation required to resolve the conflict within the workplace results in a legitimate and substantial hardship to the employer.

If Congress adopted a new definition for undue hardship that nullified the Supreme Court's current definition, Title VII would be revolutionized and would give full effect to the undue hardship requirement of religion and the workplace. An undue hardship should not be defined as a situation that imposes "more than de minimis costs," but rather as a situation which imposes

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269. Holding a sincere religious belief is one of the prima facie requirements for actionable discrimination under Title VII. *See supra* Part I.B.1.

270. *See supra* Part II.A.5.

271. *Compare supra* Parts II.A.4., II.B.3.

272. *See supra* Parts II.A.5., II.B.4.

273. *See* VICKERS, *supra* note 24, at 223.

274. *Id.*

"significant difficulty or expense" on the employer.[275] Under this new determination of undue hardship, courts would look to factors such as the cost of the accommodation in relation to the size and operating costs of the employer, as well as the number of individual employees seeking an accommodation.[276]

While this designation dramatically departs from the way in which the Supreme Court interprets the term, it is much more consistent with the protections afforded in antidiscrimination legislation for other protected classes such as the disabled in the American with Disabilities Act.[277] When comparing the way gender and religion are treated under Title VII, a divergence is evident. For example, in *International Union v. Johnson Controls, Inc.*,[278] the Supreme Court stated: "The extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender."[279] While the Court states that anything more than de minimis cost alleviates the employer of its Title VII duty in the context of religion, it clearly states that this is unacceptable for gender.[280]

One area in which the United States could benefit from the Regulations is with contextual examination. In Britain, when analyzing an employer's refusal to change a work rule or regulation that negatively and disproportionately impacts those holding to a particular religion or belief, the examination is contextual.[281] Even without a duty to accommodate, there could be circumstances under which greater protection is afforded to religious employees under the British scheme. Imagine a large employer that has a "no time off" policy over a particular busy period. However, several employees requested time off during this period due to a religious holiday. Assume that the simplest solution to this conflict would be to have other employees not practicing this religion pick up these shifts, even if this meant the payment of overtime. In the United Kingdom, an additional cost of paying a few employees time-and-a-half, as compared to regular pay, would be viewed proportionally. Not allowing these employees time off would likely be deemed discrimination, despite the additional costs of paying overtime. In contrast, in the United States, the failure to accommodate these requests would likely *not* be discriminatory because the payment of overtime, as compared to regular pay, constitutes more than de minimis cost.

Changing the definition of undue burden, and, by extension, the duty to

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275. *See The Workplace Religious Freedom Act*, INST. FOR PUB. AFFAIRS, http://www.ou.org/public/vote/2000/wrfa.htm (last visited Nov. 26, 2010).

276. *See id.*

277. *See* Foltin & Standish, *supra* note 9, at 24.

278. *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991).

279. *Id.* at 210.

280. *See also* Foltin & Standish, *supra* note 9, at 23 (asking if the Supreme Court is treating claims of religious discrimination less seriously than other forms, such as race and gender discrimination).

281. *See* EXPLANATORY NOTES, *supra* note 97, ¶ 41; *supra* Part II.B.1.

accommodate, is not novel. Both houses of Congress have considered legislation that would have redefined undue burden almost identically to that advocated in this Note.[282] This proposed bill, called the Workplace Religious Freedom Act of 1997, garnered support from a diverse assemblage of religious organizations.[283] The bill has been introduced in Congress multiple times between 1997 and 2005 but has never survived discussions in sub-committees.[284]

Congress, in amending the definitions of any terms, must choose its words very carefully. If it decides to amend, due deliberation is necessary to avoid the same problems the United Kingdom encountered when it adopted the Equality Act of 2006.[285] The potentially negative effects of re-defining terms in a haphazard manner "can be uncertainty at best and legislation which is inappropriate or impossible to effectively implement on its own terms at worst."[286] Beyond this, Congress must instruct as to the precise definition lest the same problems that evolved pursuant to the passage of the CRA of 1991 repeat themselves.

C. An Additional Modification to the Duty to Accommodate Will Give Full Effect to All the Language of the CRA of 1991

Congress should explicitly require an employer to implement a reasonable accommodation suggested by the employee that more fully resolves or eliminates a conflict so long as it does not lead to undue hardship (under either the current definition or the definition of undue hardship advocated for in

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282. In July of 2007, Senator John Kerry (D-MA) and Dan Coats (R-IN) introduced a bill called the Workplace Religious Freedom Act of 1997 (WRFA; S. 1124). Rep. William Goodling (R-PA) introduced a House version, H.R. 2848. *See Religious Freedom in the Workplace,* ONT. CONSULTANTS ON RELIGIOUS TOLERANCE, http://www.religioustolerance.org/wrfa.htm (last visited Nov. 26, 2010).

283. These religious organizations included but were not limited to: American Jewish Committee; American Jewish Congress; Anti-Defamation League; Baptist Joint Committee on Public Affairs; Center for Jewish and Christian Values; Central Conference of American Rabbis; Christian Legal Society; Church of Scientology International; Council on Religious Freedom; General Conference of Seventh-day Adventists; Hadassah-WZOA; International Association of Jewish Lawyers and Jurists; Jewish Council for Public Affairs; National Association of Evangelicals; National Council of the Churches of Christ in the USA; National Jewish Coalition; National Jewish Coalition; National Sikh Center; North American Council for Muslim Women; Presbyterian Church (USA), Washington Office; Southern Baptist Convention Ethics and Religious Liberty Commission; Traditional Values Coalition; Union of American Hebrew Congregations; United Church of Christ United Methodist Church General Board on Church and Society; and United Synagogue of Conservative Judaism. *See id.*

284. *See* Federal Legislation Clinic, *Title VII and Flexible Work Arrangement to Accommodate Religious Practice & Belief,* GEORGETOWN UNIVERSITY LAW CENTER, http://workplaceflexibility2010.org/images/uploads/FWA_TitleVII.doc (last visited Nov. 26, 2010).

285. *See* Griffith, *supra* note 76, at 151-59; *supra* Part I.C.3-4.

286. *See* Griffith, *supra* note 76, at 162.

this Note). Doing so would ensure that these legislatively-related concepts would be considered in tandem. This proposed amendment is similar to the reading Justice Marshall endorsed in his dissent in *Philbrook*.[287] As Title VII stands today, in a post-*Hardison* and post-*Philbrook* world, the concepts of undue hardship and reasonable accommodation are often separated, or undue hardship is not addressed at all. According to *Philbrook*, if the employer offers a single reasonable accommodation, its duty concludes despite there being a much more suitable accommodation available that would not result in undue hardship.[288]

Logically, accommodation offered by the employer will often be that which is most advantageous to the *employer*, as opposed to the *employee*. If an employee rejects the proposed accommodation because it does not eliminate the conflict between religion and work, an analysis of the employee's proposal should commence. Otherwise, employers will never have to face the undue hardship portion of the statute.[289] It is reasonable to assume that, when enacting legislation to protect the religious employee, Congress intended for the employee to have a voice in the accommodation process.[290]

Such a reading would treat the undue burden portion of the standard as the outer limits of what an employer must do to accommodate. That is, an employer must accommodate a religious employee's request so long as the accommodation further resolved the conflict and was not an undue burden. This view has been explicitly endorsed by the EEOC.[291] If more than one means of accommodation exists which will not cause an undue hardship, an employer should be obligated to implement the one that disadvantages the *employee* least with respect to his employment opportunities.[292]

D. The Rationale Behind Changing the Duty to Accommodate

Even though Congress amended Title VII in the CRA of 1991, it "did not define the terms 'reasonable accommodation' or 'undue hardship' and has not amended the definition of 'religion' in which such terms are used or otherwise given substantive guidance as to the meaning of such terms since 1972."[293] Because the Supreme Court failed to clarify the concepts of reasonable accommodation and undue hardship, different applications among the circuits will continue.[294] These modifications increase the threshold for showing undue

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287. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 73-74 (1986) (Marshal, J. Dissenting).

288. *See id.* at 68-69.

289. *See* Bedig, *supra* note 160, at 256.

290. *Id.* at 257.

291. *See* Reasonable Accommodation Without Undue Hardship as Required by Section 701(J) of Title VII of the Civil Rights Act of 1964, 29 C.F.R. § 1605.2(c) (1986).

292. *See id.*

293. Campbell, *supra* note 46, at 26.

294. *See* Bedig, *supra* note 160, at 246.

hardship and treat hardship and reasonable accommodation as interrelated and inseparable; they are more in tune with the amendments passed by Congress in 1972. The amendment was added to protect the religious employee and to specifically require the employer to take at least some affirmative steps, which it was not explicitly required to take under the original version of Title VII in 1964.[295]

CONCLUSION

Today, the United States affords greater protection to religious employees relative to the United Kingdom. The Supreme Court's contemporary definition of religion is broad enough to ensure that almost every religious individual can qualify under Title VII. However, more must be done to guard against discrimination.

No recent changes would indicate a reversal or even a slowing of the swell in religious discrimination claims with the EEOC in the near future. The courts have been unwilling or unable to deal with these issues in the past, and they are unlikely to do so soon. However, Congress sits in a central position to play a vital role in ensuring full realization of the protections intended when Title VII was passed and amended. After careful consideration, through modification and amendment, Congress can redefine the term undue burden and how the concepts of undue burden and reasonable accommodation should be analyzed. Congress should also give guidance and direction to the courts in how the protections of Title VII should apply in practice.

Such changes further the goal of equality in at least two ways. First, the implementation of the recommendations advanced in this Note serve to place protection against religious discrimination on par with race, gender, and disability. There would no longer be analytic variation among these groups whose safeguards emanate from the same statute. Second, employees of faith in the United States would be able to participate in the workplace without compromising their religious convictions. Through eliminating discrimination, believers will no longer suffer disadvantage because of their adherence to their faith.

Comparing the way challenges relating to religion are treated in the British and American workplace serves as an example of how other countries can address similar problems. From the definition of religion as it relates to the breadth of protection to the decision about whether to adopt a negative non-discrimination or positive accommodation duty, the recommendations advanced

295. *See* Jamar, *supra* note 6, at 742. "This amendment was the first legal recognition that religion-based cases needed to be treated differently from other cases. The normal duty under Title VII is not to treat employees differently in an adverse manner based on the listed characteristics. But, as a result of the amendment, an *employer has an affirmative duty to treat certain employees differently, and some would argue favorably*, by accommodating their religious needs." *Id.* (emphasis added).

in this Note enable others to solve challenges related to discrimination in the workplace. These are not peculiarly British or American dilemmas; they are illustrative of those faced across the globe. Until religious discrimination is eliminated, legal and academic scholars must continue to develop novel solutions, and governments must adapt their approaches to solve this ever-present concern.