A "Cruel Choice" Made Law: Freewheelin' Accommodation Claims and Harms of Conviction Endemic to Adverse Action

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Abstract

When Congress in 1972 expanded the definition of religion under Title VII, it accomplished an important step toward diversifying the workplace. Religion—in all of its manifestations—was given an insurance policy. No longer could an employer hide behind a neutral work policy or find shelter behind claims of inconvenience if those same measures diminished a worker's capacity to practice their religion. For the first time, an obligation was written "in stone"—one that required a reasonable accommodation of religion, short of undue hardship.

However, as courts took to the application of the Amended Statute, a backdoor emerged that gave employers an out. Instead of a duty to accommodate, this loophole provided a second option: to do nothing! If an employer simply refuses to offer an accommodation to resolve the conflict between work and religion, the employee is forced to decide between work and religion. If the employee chooses to work, he loses his cause of action for want of adverse action—a requisite element developed by lower courts in its jurisprudential framework. If the employee chooses to practice his religion, he may lose his job and—at best—prevail after many months (if not years) in litigation.

This article attempts to close this loophole by offering three approaches, one in particular based on the broadening definition of

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adverse action to account for harms of conviction triggered by this "cruel choice" between work and religion.

> *Perhaps there remains some tree on a slope, that we can see again each day: there remains to us yesterday's street, and the thinned-out loyalty of a habit that liked us, and so stayed, and never departed.*[1]

1. RAINER M. RILKE, *The First Elegy*, *in* THE POETRY OF RAINER MARIA RILKE 8 (A.S. Kline trans., 2001).

I. INTRODUCTION

Imagine with me two scenarios. The first involves Bailey: a hardworking emergency side paramedic who holds to the tenets of Rastafarianism. Because Bailey wants to work on the emergency side, he seeks consultation with his faith advisor to find a compromise between the safety protocols required by his employer and the faith ideals required by his religion. Finding a balance, Bailey partially shaves his beard, comes to orientation, passes his safety protocols, and meets all the requisite qualifications to work on the emergency side. His employer, however, has other plans—telling him the neutral work policy in place requires that his beard be *fully* shaved. In response, Bailey asks for a religious accommodation. When the employer refuses to budge, Bailey continues in protest. Instead of seeking to find a reasonable accommodation, the employer digs around Bailey's work history in hopes of finding a cause for termination— which they do, based on a theory that he omitted a prior termination in his application form. Bailey is terminated a week later.

The second story involves Rafi: a dedicated bank employee who practices the tenets of Islam. Every year, during the month of Ramadan, Rafi takes proactive measures to request an accommodation from his employer to celebrate his faith alongside the global Muslim community. Among his requests for the entire month, Rafi asks—in full compliance with company policy—for an extended lunch period for Friday prayer and a day off on Eid-al-Fitir (*Eid*) to celebrate the end of Ramadan. The employer, however, refuses to accommodate due to "scheduling concerns" and a speculative fear of "putting the branch at risk." As evidence for this alleged undue hardship, the employer offers a self-serving affidavit from the regional manager, which essentially asks the court to grant full deference to its operational judgment. When the day came for Friday prayer and for the day of *Eid*, Rafi came to work and violated his deeply held convictions out of fear of losing his job. By showing up to work, he lost his cause of action.

In these two stories, we have a Catch-22 embedded in the failure to accommodate jurisprudence under Title VII. One employee persists in demanding his rights to be accommodated and is made the subject of retaliatory action by way of an ad hoc fishing expedition into his employment history. By finding a "legitimate cause" for termination, the employer no longer must go about the inconvenience of

accommodating the employee. Another employee is denied his accommodation despite the absence of evidence for an undue hardship and comes to work from fear of termination. As a result, his cause of action is voided because he can no longer offer the requisite prima facie evidence for failure to accommodate, which requires adverse action. Here, again, the employer avoids the duty to accommodate by simply refusing to do so and relying on the employee to comply with work demands.

Those two instances strike at the heart of this Article.

II. A BRIEF HISTORY OF RELIGIOUS ACCOMMODATION

We live in a complex world. As such, simple solutions for regulating the vagaries of human experiences often run a short course before meeting discontinuation. In his sobering indictment of American churches' complicity in racism, Jemar Tisby delivers a hard truth: "The decades after the Civil War proved that racism never goes away, it just *adapts*."[2] This capacity for the adaptation of injustice is no less true in employment, if not more so given the multiplicity of faiths and lifestyle orientations where bigotry can rest its temperament. In her article discussing the various frameworks used by courts to narrow the scope of actionable discrimination, Sandra F. Sperino describes how in the early years after the passage of Title VII, courts remained vigilant for patterns of discrimination and the various ways that the law can handle its novel manifestations. Once the late 1980s rolled in, however, courts seemingly became "reluctant to adapt discrimination law, despite a growing literature suggesting a more complex view of discrimination and its motivations, as well as changes occurring in the workplace."[3]

My thesis here does not represent a large stock of cases. Many of these issues are typically resolved in such a fashion that eliminates the need for any complex innovation in the changing character of Title VII jurisprudence. But that is precisely the problem. A loophole has been created that continues to absorb various meritorious claims for religious discrimination, which in the aggregate magnify a cultural

2. JEMAR TISBY, THE COLOR OF COMPROMISE: THE TRUTH ABOUT THE AMERICAN CHURCH'S COMPLICITY IN RACISM 110 (2019) (emphasis added).

3. Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 81–82 (2011).

problem looming in the distance concerning the participation of religion in public life.[4] An issue that engenders opposing factions, draws life in the polarization of our community functions, and undermines our collective capacity to build those mediating structures that serve to bring us back together again.

To better explain these dynamics, the Article begins Section I by looking into the development of the failure to accommodate claim and the creation of an elements test that leaves a loophole in the system allowing employers to skirt their duty under Title VII. Section II then looks at the adaptation of Title VII from a prescriptive statute based on an affirmative duty to accommodate an employee, to a proscriptive statute whereby the employer circumscribes the accommodation mandate by placing the onus on the employee to make a "cruel choice" between their religion and work. Section III then attempts to close this "unfinished window" by offering three approaches: one offering to rewrite the religious accommodation test based on the current model for disparate treatment; another, rendering an employer's refusal to accommodate as ipso facto evidence of adverse action; and, a final option, in broadening the definition of adverse action to account for harms of conviction triggered by the "cruel choice" dilemma. Notably, the latter two create an interpretative framework for understanding the "cruel" realities of employment and why courts need to do a better job protecting religious employees.

4. That said, the uptick in religious discrimination claims has been thoroughly documented. As one recent scholar notes, the Equal Employment Opportunity Commission (EEOC) charge statistics show that "religious discrimination claims have doubled in the last twenty years and represent an increasing percentage of discrimination claims overall." Loren F. Selznick, *Mangers and Turbans: Nonverbal Religious Expression in A Diverse Workplace*, 49 U. BALT. L. REV. 183, 187 (2020). This corresponds to what the EEOC found in 2002. *See* Thomas D. Brierton, *"Reasonable Accommodation" Under Title VII: Is It Reasonable to the Religious Employee?*, 42 CATH. LAW. 165, 165 (2002) ("Despite recent surveys that show more employers are allowing employees to display religious materials at work and that about two-thirds of employers are allowing flexible scheduling for workers needing time off for religious observance, complaints of religious bias have increased more than fifty percent since 1992.").

A. Freewheelin' Accommodation Claim

Title VII under the Civil Rights Act of 1964 was passed with the express goal of banning workplace discrimination against protected members on the basis of their religion, among other things.[5] The language of the statute was vague regarding what conduct "religion" encompassed and so employers were presumptively given a wide margin of appreciation to continue to operate their business in whatever fashion they deemed appropriate, so long as their decisions did not evince

5. *See* 42 U.S.C. § 2000e (1964); Keith S. Blair, *Better Disabled Than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515, 521 (2010) ("Title VII of the Civil Rights Act of 1964 was enacted to give workers broad protection from discrimination in employment."). The report of the House Committee on the Judiciary stated:

> The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin . . . .
>
> Section 701(a) sets forth a congressional declaration that all persons within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of race, color, religion, or national origin. It is also declared to be the national policy to protect the right of persons to be free from such discrimination.

H.R. REP. NO. 88-914 (1963), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2401. A racial component was baked into the thinking of Congress. As the Supreme Court pointed out, the purpose of Title VII was to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971)) ("The objective of Congress in the enactment of Title VII [] . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."). As Paul W. Mollica explained: "Congress entrusted federal courts and the private bar with the mission of integrating black Americans, suffering disproportionately high rates of poverty and unemployment, into the United States workforce. This project meant uprooting even facially neutral workplace policies that had the effect of causing discrimination against blacks." Paul W. Mollica, *The Unfinished Mission of Title VII: Black Parity in the American Workforce*, 23 J. GENDER, RACE & JUST. 139, 140–41 (2020).

evidence of religious bias or discrimination.[6] To provide a semblance of regulation, Congress created the Equal Employment Opportunity Commission (EEOC) in 1965, giving the agency broad discretion to investigate charges of unlawful employment practices and to take certain remedial measures in concert with claimants and other state actors toward conciliation.[7] Despite federal courts being left with plenary power to secure compliance with Title VII, the EEOC was instrumental in putting governing standards in place for defining the discriminatory thresholds demanded in the workplace.[8]

To strengthen the protections afforded to employees, the EEOC in 1966 added administrative regulations that required employers to accommodate expressions of religion, unless such an accommodation would create "a serious inconvenience to the conduct of the business." However, these regulations also allowed an employer to adopt any work week schedule generally applicable to all employees, without

6. *See* Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. CIN. L. REV. 1411, 1431 (2009).

7. Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 836–37 (1969); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44–45 (1974). As the Supreme Court in *Alexander* explained:

> In addition to reposing ultimate authority in federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII. Individual grievants usually initiate the Commission's investigatory and conciliatory procedures. And although the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII.

Id. at 45.

8. *Alexander*, 415 U.S. at 45. One of the best concise resources on the topic of religion in the workplace is MICHAEL WOLF, BRUCE FRIEDMAN, DANIEL SUTHERLAND, RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO RELIGIOUS DISCRIMINATION AND ACCOMMODATION (1998). For more recent work, Bruce N. Cameron and Raymond F. Gregory provide excellent introductions—especially given that this topic lends well to practitioners' knowledge. *See* THOMAS R. HAGGARD & BRUCE N. CAMERON, UNDERSTANDING EMPLOYMENT DISCRIMINATION LAW (3d ed. 2020); RAYMOND F. GREGORY, ENCOUNTERING RELIGION IN THE WORKPLACE: THE LEGAL RIGHTS AND RESPONSIBILITIES OF WORKERS AND EMPLOYERS (2011).

regard to an employee's religious needs.[9] While the spirit of that act was good, the application left much wanting. So, a year later, the EEOC revised these regulations and stated that Title VII includes "an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees . . . where such an accommodation can be made without undue hardship on the conduct of the employer's business."[10] This language was then picked up and grafted into the 1972 amendment (Amended Statute), which eliminated any confusion as to the intent of Congress after the Sixth Circuit in *Dewey v. Reynolds Metals Co.* refused to incorporate the EEOC's reasonable accommodation requirement into Title VII.[11] As one court made clear in considering the issue anew in response to the Amended Statute, "courts could no longer dispute that Title VII mandated reasonable accommodation."[12]

On its face, the language in the Amended Statute suggests that a distinct cause of action for religious accommodation is based on a

9. *See, e.g.*, Smith v. Pyro Mining Co., 827 F.2d 1081, 1087 (6th Cir. 1987); Williams v. S. Union Gas Co., 529 F.2d 483, 487–88 (10th Cir. 1976); Cooper v. Gen. Dynamics, Convair Aerospace Div., 533 F.2d 163, 174–75 (5th Cir. 1976) (Rives, J., concurring in part and dissenting in part).

10. Reid v. Memphis Publ'g Co., 521 F.2d 512, 519 (6th Cir. 1975). *See generally* Brierton, *supra* note 4, at 167–69 (discussing EEOC's pre-Amendment guidelines).

11. *See* Dewey v. Reynolds Metals Co., 429 F.2d 324, 331 n.1 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971).

12. *See Smith*, 827 F.2d at 1087–88. Section 701(j) was added to the 1972 amendments on the floor of the Senate. The legislative history of the measure consists chiefly of a brief floor debate, contained in less than two pages of the Congressional Record, 118 CONG. REC. 705–06 (1972), and consisting principally of the views of the proponent of the measure, Senator Jennings Randolph. *See, e.g.*, Riley v. Bendix Corp., 464 F.2d 1113, 1116–17 (5th Cir. 1972); *Smith*, 827 F.2d at 1089–90 (Krupansky, J., dissenting). Importantly, among Senator Randolph's expressed concerns was that employees who were not receiving religious accommodations might soon find themselves in the cruel position of choosing between work and religion. *See* 118 CONG. REC. 705 (1972) ("[T]here has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work . . . on particular days. So there has been . . . a dwindling of the membership of some of the religious organizations[.]"); *see also* Bilal Zaheer, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(j)*, 2007 U. ILL. L. REV. 497, 507–09 (2007); Brierton, *supra* note 4, at 169–73.

two-step process that asks (1) whether the employee was given a reasonable accommodation; or, if not, (2) whether the employer has shown an undue hardship that would circumvent its duty to accommodate. While Congressional intention was vague regarding the *extent* that an accommodation may burden an employer, Justice Thurgood Marshall correctly argued that the 1972 amendment, at minimum, intended to eliminate the loophole in several forerunner cases where a termination decision was upheld despite the employer making *zero* effort to accommodate religion.[13] As the Court in *Trans World Airlines, Inc. v. Hardison* noted, "[i]t is clear from the language of § 701(j) that Congress intended to change this result by requiring some form of accommodation; but this tells us nothing about how much an employer must do to satisfy its statutory obligation."[14]

B. The Amended Statute Grows Legs

Prior to 1977, the Supreme Court did not weigh in on the question of how to interpret the specific language in the Amended Statute. Neither Congress nor the EEOC clarified what sort of accommodations

13. Two of these cases were *Riley* and *Dewey*. In *Riley v. Bendix Corp.*, the court found that the employer who discharged his employee for refusing to work on his Sabbath had not committed an unfair labor practice even though the employer had not made any effort whatsoever to accommodate the employee's religious needs. 330 F. Supp. 583, 591 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972). The lower court described the dubious practice this way: "If one accepts a position knowing that it may in some way impinge upon his religious beliefs, he must conform to the working conditions of his employer or seek other employment." *Id.* at 590. In its subsequent reversal, the Fifth Circuit held that the discharge was unlawful since the employer's failure to accommodate was not excused by showing undue hardship. *Riley*, 464 F.2d at 1118. Likewise, in *Dewey v. Reynolds Metals Co.*, the court held that "[n]owhere in the legislative history of [Title VII] do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another." 429 F.2d at 334, *aff'd*, 402 U.S. 689 (1971). As the Sixth Circuit later responded in *Smith* to the dissent's accusations that the majority was overruling *Dewey* by disregarding precedent, "Congress has spoken, and in doing so it has signaled that our decision in *Dewey* seventeen years ago is no longer good law." *See Smith*, 827 F.2d at 1088 n.7.

14. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 n.9 (1977).

are "reasonable" or when hardship to an employer becomes "undue."[15] Some circuit courts did offer guidance, indicating that "the phrases . . . are relative terms and cannot be given any hard and fast meaning."[16] A few found that an accommodation deemed "inconvenient," "bothersome," or "disruptive of the operating routine" was not *de facto* undue.[17] The Fifth Circuit even held that an "accommodation as a defense must be unsubtle, direct, undelayed and communicated without equivocation," and that a "statutory defense of accommodation is not met by some post hoc hypothesis."[18] In a related race discrimination claim, the Supreme Court further found that undue hardship cannot be found merely because the interest of other employees is being affected: "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."[19] In short, an accommodation could not be some vague promise of future relief if the worker gets back to work, nor can a denial be based on the prospect of some unforeseen hardship.

At first, this lack of clarity left the interpretative mechanism to lower courts to decide on a case-by-case basis whether the employer acted "reasonably" given the facts and circumstances. This meant that an accommodation was always subject to the vagaries of workplace conditions, the nature of the business in question, and to what extent can its operation be subject to adjustment. Those employers who serve

15. Notably, the EEOC also made no suggestions regarding what sort of accommodations are "reasonable" or when hardship to an employer becomes "undue." *Hardison*, 432 U.S. at 72.

16. *See* United States v. City of Albuquerque, 545 F.2d 110, 114 (10th Cir. 1976). The Seventh Circuit would adopt this thinking after *Hardison*. *See* Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978).

17. *See* Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937, 941, 944 (M.D. Ala. 1974); Kettell v. Johnson & Johnson, 337 F. Supp. 892, 895 (E.D. Ark. 1972).

18. Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 145 (5th Cir. 1975).

19. Franks v. Bowman Transp. Co., 424 U.S. 747, 775 (1976) (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971)). The court in *Draper* was also "somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice." *Draper*, 527 F.2d at 520.

the public or protect the lives of citizens, for example, were understandably given a higher level of latitude to carry on their "business" undisturbed.[20] The same standard applied in instances where an accommodation may create dangerous conditions based on the nature of the work.[21] As the Sixth Circuit explained: "Title VII does not require that safety be subordinated to the religious beliefs of an employee." [22] These legal questions continued shaping the parameters of "reasonableness," asking lower courts to make ad hoc decisions based on the available evidence[23]—factual decisions that courts of appeal rarely questioned, unless found to be in clear error.[24]

This analysis was somewhat simplified given the nature of the cases being brought. Before 1977, most of the cases dealt with Sabbath-Day observances and union related issues, focusing almost exclusively on the question of whether the employer could have reasonably accommodated the religious needs of the worker and whether doing so would cause an undue hardship.[25] The prima facie inquiry regarding

20. *See, e.g.*, *City of Albuquerque*, 545 F.2d at 114 ("[W]hen the 'business' of an employer is protecting the lives and property of a dependent citizenry, courts should go slow in restructuring his employment practices."); Williams v. S. Union Gas Co., 529 F.2d 483, 488 (10th Cir. 1976) ("The very nature of [a gas company's] business require[s] that service be available to the public 24 hours a day, 7 days per week.").

21. *See, e.g.*, *Draper*, 527 F.2d at 521("[S]afety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business.").

22. *Id.*

23. *See generally* Jean-Pierre v. Naples Cmty. Hosp., Inc., 817 F. App'x 822, 828 (11th Cir. 2020) (deeming that an employer that provided infusions for patients who need antibiotics or chemotherapy is part of the "protection of lives" rubric and thus given wider latitude to structure employment practices); EEOC v. Ithaca Indus., Inc., 849 F.2d 116, 120 (4th Cir. 1988) (en banc) (Wilkinson, J., concurring) (noting that the statute does not "require an employer to jeopardize safe and effective service to the public").

24. *See, e.g.*, Lake v. B.F. Goodrich Co., 837 F.2d 449, 451–52 (11th Cir. 1988); Redmond v. GAF Corp., 574 F.2d 897, 902–03 (7th Cir. 1978).

25. *See, e.g.*, *City of Albuquerque*, 545 F.2d at 111–12 (Sabbatarianism); *Williams*, 529 F.2d at 485 (same); *Draper*, 527 F.2d 515 (same); Riley v. Bendix Corp., 464 F.2d 1113, 1114 (5th Cir. 1972) (same); Cooper v. Gen. Dynamics, Convair Aerospace Div., 533 F.2d 163 (5th Cir. 1976) (union related issues); Yott v. N. Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974) (same); Ciba-Geigy Corp. v. Local No. 2548, United Textile Workers of Am., 391 F. Supp. 287, 297 (D.R.I. 1975) (same).

sincerity, notice, and adverse action that came to define the failure to accommodate discussion was still in its gestative process.[26] If

26. One lower court read the amended language to create a two-prong analysis: (1) a burden on the plaintiff to offer the employer an acceptable accommodation, and (2) a burden on the employer to demonstrate that the suggested accommodation will create an undue hardship. Yott v. N. Am. Rockwell Corp., 428 F. Supp. 763, 769 (C.D. Cal. 1977), *aff'd*, 602 F.2d 904 (9th Cir. 1979). Coincidentally, it was this same case that on appeal laid out the general freestanding framework after *Hardison* for failure to accommodate:

> Yott having established [a prima facie showing] that he had a belief that union membership and payment of union dues were contrary to his religion [i.e., sincerity], that he had informed Rockwell and Local 887 about his religious beliefs [i.e., notice] and that he was discharged for failure to join the union or pay union dues [i.e., adverse action], the burden shifted to Rockwell and Local 887 [] . . . to show that they had made good faith efforts to accommodate Yott's religious beliefs, and that the efforts were unsuccessful in reasonably accommodating those beliefs without undue hardship.

Id. at 907. Some courts before *Hardison* did suggest the need for a prima facie showing in the context of termination. The Fifth Circuit for example shifted the burden to the employer to show undue hardship after evidence of termination, citing to several cases that discussed the *general* rule under Title VII against religious discrimination. None of these cases, however, provide a freestanding prima facie test for religious accommodation claims.

Typically, employment discrimination claims are filtered through the *McDonnell Douglas* framework, which the court in *Young* and others likely invoked. *See* Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 143 (5th Cir. 1975); *see also* EEOC v. Howard Johnson Co., No. 76-153-P, 1977 WL 60, at *3 (S.D. Ala. May 12, 1977); Jordan v. N.C. Nat'l Bank, 399 F. Supp. 172, 179 (W.D.N.C. 1975), *rev'd*, 565 F.2d 72 (4th Cir. 1977). *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (setting forth the shifting burden framework). The shifting burden framework allows the employer to show "some legitimate, nondiscriminatory reason for its conduct [e.g., undue hardship]." *Id.* at 802. What the cited cases in *Young* likely suggested is that 42 U.S.C. § 2000e(j) offered a variation on this religious discrimination framework (see *infra* SECTION III.A) when employers fail to accommodate the religious needs of employees where such accommodations can be made without undue hardship. *See* Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937, 941 (M.D. Ala. 1974); Claybaugh v. Pac. Nw. Bell Tel. Co., 355 F. Supp. 1, 6 (D. Or. 1973). In this pre-*Hardison* period, one court did offer such a variation. *See Jordan*, 399 F. Supp. at 178–79.

anything, the elements were tacitly baked into the analysis, which focused on finding an equitable application of the Amended Statute.[27]

When the Supreme Court did get involved, it did so by painting "reasonableness" and "undue hardship" with broad strokes. In *Hardison*, the Supreme Court found the employer was not required by Title VII to carve out a special exception to its seniority system to help the employee meet his religious needs.[28] In fact, by doing so, the Court found that the employer would be engaging in unequal treatment of the nonreligious employees and thus violating their merits accrued under contract.[29] In its final thoughts, the Court defined an undue hardship as something that inflicts more than de minimis cost on the employer's business.[30] What amounts to "de minimis" was never determined, however, leaving that question for lower courts to figure out, once again.

This de minimis standard itself has rightly been criticized as ineffectual—providing courts no practical guidance in determining harm and at times even allowing clairvoyance to carry the day.[31] For

27. Procedure was largely based on the circumspection of the court regarding what steps the employer took to accommodate and whether the failure was reasonable given the totality of circumstances. *See, e.g.*, Davis v. S.F. Mun. Ry., 1975 No. C 75 2077, 1975 WL 11840, at *2 (N.D. Cal. Dec. 8, 1975); United States v. City of Albuquerque, 423 F. Supp. 591, 600–01 (D.N.M. 1975); Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382, 1386–87 (D. Neb. 1974); Olds v. Tenn. Paper Mills, Inc., No. 6897, 1974 WL 10519, at *3 (E.D. Tenn. Dec. 23, 1974). As one court stated a few months before *Hardison* was decided, "the touchstone of religious discrimination under the Act is whether a reasonable accommodation can, in fact, be reached between the parties without undue hardship." Anderson v. Gen. Dynamics, Convair Aerospace Div., 430 F. Supp. 418, 421 (S.D. Cal. 1977), *rev'd*, 589 F.2d 397 (9th Cir. 1978).

28. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 83 (1977).

29. *Id.* at 81–82, 84.

30. *Id.* at 84.

31. The EEOC recognizes the incongruity, noting that "undue hardship" for Title VII is a lower standard for the employer to meet than under the ADA, which is defined in that statute as "an action requiring significant difficulty or expense." *Section 12: Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, at §12-IV (Jan. 15, 2021) [hereinafter U.S. EQUAL EMP. OPPORTUNITY COMM'N], https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_71848579934051610749830452. Furthermore, "de minimis" means a "very small or trifling matter[.]" *De minimis*, BLACK'S LAW DICTIONARY (10th ed. 2014). As Judge Thapar notes, "that seems like the opposite of an 'undue hardship.'" Small

example, in one of the footnotes from *Hardison*, the Court gave credence to the "floodgate" or "steamroller" effect in recognizing potential future harm that a company as large as Trans World Airlines (TWA) may have given its "many employees whose religious observances . . . prohibit them from working on Saturdays or Sundays."[32]

In short order, unforeseen complications and speculative hardships were given new life—even for those employers who carried on menial tasks. As Justice Marshall ably describes in his condemnation of the majority in *Hardison*, the employer was now empowered to escape the duty of "even the most minor special privilege to religious observers," adding that "a society that truly values religious pluralism

v. Memphis Light, Gas & Water, 952 F.3d 821, 828 (6th Cir. 2020) (Thapar, J., concurring); *see also* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 936 (2019) ("By definition, de minimis costs are not hardships . . . and the statutory context provides no reason to think that Congress meant otherwise").

Judge Thapar offers an astute assessment of the rise and decline of Title VII thanks to *Hardison*: "The American story is one of religious pluralism. The Founders wrote that story into our Constitution in its very first amendment. And almost two-hundred years later, a new generation of leaders sought to continue that legacy in Title VII. But the Supreme Court soon thwarted their best efforts." *Small*, 952 F.3d at 829 (Thapar, J., concurring). Justice Alito has recently signaled his desire to review the "undue hardship" standard—indicating that "*Hardison*'s reading does not represent the most likely interpretation of the statutory term[.]" Patterson v. Walgreen Co., 140 S. Ct. 685, 686 (2020) (Alito, J., concurring). A recent lawsuit—rejected in April 2021—has brought this challenge to the Court's front door. *See* Dalberiste v. GLE Assocs., Inc., 814 F. App'x 495 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2463 (2021).

32. *Hardison*, 432 U.S. at 84 n.15. This floodgate/steamroller effect has been noted by several courts in various settings. *See, e.g.*, Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs., 867 F.3d 338, 381–83 (3d Cir. 2017) (Jordan, J., concurring in part and dissenting in part) (considering an accommodation to the Affordable Care Act); Udey v. Kastner, 805 F.2d 1218, 1220–21 (5th Cir. 1986) (considering an accommodation in prison); McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 462 (6th Cir. 1997) (considering an accommodation in school); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 452 (7th Cir. 1981) (considering an accommodation at work); Olsen v. Drug Enf't Admin., 878 F.2d 1458, 1463–64 (D.C. Cir. 1989) (considering an accommodation from federal drug laws for churches). Notably, the EEOC in its latest compliance manual has tried to shutter this loophole, indicating that "[a] mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship." *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 31, at §12-IV(B)(1).

cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job."[33] His reasoning was simple: Title VII requires preferential treatment for religion, short of incurring undue hardship.[34] In holding as the majority did, Title VII has been neutered and religious diversity undermined by the "cruel choice" dilemma that pinned work against religion. "The ultimate tragedy," wrote Justice Marshall, "is that despite Congress' best efforts, one of this Nation's pillars of strength[,] our hospitality to religious diversity[,] has been seriously eroded. All Americans will be a little poorer until today's decision is erased."[35]

Nine years later, the Supreme Court in *Ansonia Board of Education v. Philbrook* finalized the second stage of the development of the Amended Statute by discussing what amounts to a "reasonable" accommodation—recognizing that this duty was "somewhat awkwardly"

33. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting); *see also* Braunfeld v. Brown, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting) ("Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand."); Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring) ("While case law provides only limited protection for employees whose religious obligations conflict with neutral job requirements, . . . Title VII does not permit an employer to manipulate job requirements for the purpose of putting an employee to the 'cruel choice' between religion and employment."); Pinsker v. Joint Dist. No. 28J, 554 F. Supp. 1049, 1051 (D. Colo. 1983) ("It is patently clear that no person may constitutionally be put in the dilemma of choosing between employment and religion."). In a recent lawsuit dealing with a refusal to accommodate, the director of EEOC's Memphis District Office reiterated this law when she said that "[e]mployers should not force employees to choose between their job and their religious beliefs." Press Release, U.S. Equal Emp. Opportunity Comm'n, Century Park Associates / Garden Plaza of Greenbriar Cove Sued by EEOC for Religious Bias (Aug. 25, 2017), https://www.eeoc.gov/newsroom/century-park-associates-garden-plaza-greenbriar-cove-sued-eeoc-religious-bias.

34. *Hardison*, 432 U.S. at 87–88, 91 (Marshall, J., dissenting). This reasoning was vindicated almost forty years later when the Supreme Court held that "Title VII does not demand mere neutrality with regard to religious practices[,]" but rather it "gives them favored treatment." EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015).

35. *Hardison*, 432 U.S. at 97 (Marshall, J., concurring in part and dissenting in part).

grafted into Title VII.[36] In *Ansonia*, the employee was baptized into the Worldwide Church of God, thus preventing him from working as a schoolteacher on days of Sabbath. After asking for an accommodation, the employer offered him "unpaid leave for holy day observances that exceeded the amount allowed by the collective-bargaining agreement."[37] This, the Court found reasonable, adding two substantial primers to the definition of "reasonableness."

One, the Court notes that a proffered accommodation is reasonable when it "eliminates the conflict between employment requirements and religious practices."[38] While not all circuit courts agree, this provision for the elimination of conflict is the correct view.[39] Without it, the statute would be a mockery *ab initio* since the purpose of Title VII is to eliminate religious discrimination in *all* its forms. If the statute left room for the employer to engage in partial religious discrimination, maybe then partial accommodation would prove viable. But, that is not what Congress wrote and certainly not what the many companies in America strive for when they promote the value of diversity in employment.[40]

Two, the Court indicated that an employer's duty to accommodate ends when *any* reasonable accommodation is provided—regardless if it is the one the employee preferred.[41] This rejected the EEOC's guidelines, which required choosing the accommodation that "least disadvantages the individual with respect to his or her employment

36. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 63 n.1 (1986); *Abercrombie*, 575 U.S. at 787–88 (Thomas, J., concurring in part and dissenting in part).

37. *Ansonia*, 479 U.S. at 70.

38. *Id.* at 70–71.

39. *See id.* at 72–73 (Marshall, J., concurring in part and dissenting in part) ("[I]f the accommodation offered by the employer does not completely resolve the employee's conflict, I would hold that the employer remains under an obligation to consider whatever *reasonable* proposals the employee may submit."). Some circuits have retained a partial accommodation approach. *See also* EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313–14 (4th Cir. 2008); Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1030–31 (8th Cir. 2008); Tabura v. Kellogg USA, 880 F.3d 544, 551–54 (10th Cir. 2018).

40. *See* Selznick, *supra* note 4, at 184–86 ("American companies have sought diversity among their employees since the 1980s.").

41. *Ansonia*, 479 U.S. at 68–69.

opportunities."[42] This also inevitably installed a perennial tension that left the employee to accept a slew of unfavorable conditions that courts deemed reasonable and therefore sufficient to satisfy the requirements under Title VII.[43] Again, Justice Marshall got this one right, adding in his concurrence that "[a] forced reduction in compensation based on an employee's religious beliefs can be as much a violation of Title VII as a refusal to hire or grant a promotion."[44] As such, by reducing wages or accepting other unfavorable conditions that diminish opportunities of employment, the employee is simply being forced to choose between his religion and a partial forfeiture of privileges otherwise entitled to non-religious employees.

For his part, Justice Marshall saw better than most the perils of a deficient doctrine on religious accommodation and the consequential burden it placed on the faith of workers who find their exercise of religion at odds with occupational requirements. A tension that would develop into the "cruel choice" dilemma that undercut the guarantees of Title VII and reduce the vitality of bilateral negotiation toward the free exercise of religion at work. Before discussing this in more detail, let us step back and see how the adverse action prong became a burden tethered to this freewheelin' accommodation claim.

C. Downstream Development of Adverse Action

As the Supreme Court began to shape the boundaries for the failure to accommodate claim, lower courts began digesting its

42. *See id.* at 69 n.6.

43. *See, e.g.*, Jean-Pierre v. Naples Cmty. Hosp., Inc., 817 F. App'x 822, 827 (11th Cir. 2020) (discussing the reasonableness of helping a "laid off" employee apply for a new position, even though there was no guarantee that she would find something); McCray v. Fed. Express Corp., No. 2:17-cv-2918, 2020 WL 4676384, at *10–12 (W.D. Tenn. Aug. 12, 2020) (discussing the reasonableness of exhausting vacation days to accommodate religious observance); Bailey v. Metro Ambulance Servs., Inc., 992 F.3d 1265, 1275–76 (11th Cir. 2021) (discussing reasonableness in forcing a transfer to another position, despite objections from employee that the option would significantly stifle his employment opportunities); Camara v. Epps Air Serv., Inc., 292 F. Supp. 3d 1314, 1328 (N.D. Ga. 2017) (discussing how a transfer may be reasonable, even if the employee would earn less money or temporarily lose seniority privileges).

44. *Ansonia*, 479 U.S. at 74 (Marshall, J., concurring in part and dissenting in part).

constitutive parts through a prima facie framework explicitly based around a shifting burden analysis that places the onus on the employee to show sincerity, notice, and adverse action. Regarding the adverse action prong, a failure to accommodate was not enough to hold the employer liable—an employee had to suffer further harm after violating work requirements based on his religion. While retaining the general equitable model based on the question of reasonableness under the circumstances of each case, courts began applying this model as early as 1978, with several circuits laying the groundwork for the "cruel choice" dilemma to take effect.

1. Developing the Shifting-Burdens Test

The prima facie elements that defined the modern failure to accommodate framework began to explicitly emerge in the late 1970s, as courts began to formalize the standard required of aggrieved employees. The test would evolve into the standard three element test lower courts intuitively apply today—without due regard for the internal problems the test creates for religious employees.

In 1978, the Seventh Circuit opened these rounds in *Redmond v. GAF Corp.*, dealing with a Jehovah's Witness who could not in good conscience work on Saturdays due to his religious obligations.[45] In its analysis, the court found that once the employee's established religious practice is used as the basis for termination due to non-compliance with an otherwise neutral work demand, "the burden shift[s] to the employer to 'demonstrate that he is unable to reasonably accommodate the employee's . . . . religious observance or practice without undue hardship on the conduct of the employer's business."[46] In the court's language, an employee's implicit threshold requirement began to evolve, requiring a showing of sincerity, notice, and adverse action.

A few months later, the Ninth Circuit in *Anderson v. General Dynamics* made this explicit in dealing with a Seventh-Day Adventist who refused to join the union as part of his sincerely held religious convictions. Neither the employer, nor the union took steps to offer a reasonable accommodation, eventually terminating his employment "for the sole reason that he refused to become a member of or

45. Redmond v. GAF Corp., 574 F.2d 897, 899 (7th Cir. 1978).

46. *Id.* at 901.

contribute to the Union."[47] In deciding on whether the company failed its duty under Title VII, the court looked to whether the employee established a prima facie case of discrimination through a showing of: (1) a bona fide belief; (2) notice to his employer and the Union about his religious views that were in conflict with the Union security agreement; and (3) evidence of discharge for his refusal to join the Union and to pay union dues.[48] The next year, the Eighth Circuit would follow in adopting the prima facie language by citing to *Redmond* and *Anderson* for support.[49] From thereon, the remaining circuits explicitly joined, until the First became the last to join in 2002.[50]

Interestingly, the Supreme Court has never explicitly adopted the circuit courts' elemental approach to establishing a prima facie case of discrimination. As recently as 2015, the Court focused exclusively on the company's *motivation* in refusing to hire a Muslim applicant

47. Anderson v. Gen. Dynamics, Convair Aerospace Div., 589 F.2d 397, 399 (9th Cir. 1978).

48. *Id.* at 401.

49. Brown v. Gen. Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979).

50. *See* EEOC. v. Unión Independiente, 279 F.3d 49, 55 (1st Cir. 2002); Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 133 (3d Cir. 1986); Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1019 (4th Cir. 1996); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 144 (5th Cir. 1982); Dorr v. First Kentucky Nat'l Corp., No. 84-5067, 1986 WL 398289, at *3 (6th Cir. July 17, 1986); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1486 (10th Cir. 1989); Beadle v. Hillsborough Cnty. Sheriff's Dep't, 29 F.3d 589, 592 n.5 (11th Cir. 1994); Lemmons v. Georgetown Univ. Hosp., 431 F. Supp. 2d 76, 95 (D.D.C. 2006). The Sixth Circuit in 1982 was already working under the assumptions of the prima facie framework, having adopted the elements (i.e., sincerity, notice, discharge) from the lower court. *Compare* McDaniel v. Essex Int'l, Inc., 509 F. Supp. 1055, 1057–58 (W.D. Mich. 1981), *aff'd*, 696 F.2d 34 (6th Cir. 1982), *with* McDaniel v. Essex Int'l, Inc., 696 F.2d 34, 36 (6th Cir. 1982). The cases in the cited above were the first to explicitly reference the test along with its elements. However, several circuits did so implicitly years earlier. The Tenth Circuit, for example, invoked the language of "prima facie . . . discrimination" by agreeing with the lower court that the standard was not met; however, the lower court never explicitly applied the elements test in its analysis. *See* Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe Cntys., 735 F.2d 388, 391 (10th Cir. 1984). The same can be said of the First and Fourth Circuits, who seemingly adopted the prima facie approach by reference, but only later adopted its express language. *See* EEOC. v. Caribe Hilton Int'l, 821 F.2d 74, 76 (1st Cir. 1987); Benton v. Carded Graphics, Inc., No. 93-1675, 1994 WL 249221 (4th Cir. June 9, 1994).

who they suspected might have a conflict with the company's in-store "Look Policy" banning headscarves."[51] As the majority noted in a footnote, a failure to hire on the basis of a religious practice "is *synonymous* with refusing to accommodate the religious practice."[52] So, while religious accommodation was at the heart of the decision, the Court ruminated only on the definition of "notice" and not on the viability of the remaining elements. This, consequently, leaves a refusal to accommodate as an option for showing discriminatory action—a solution argued for below.[53]

2. Defining Adverse Action

Since the heart of this Article deals with adverse action, its meaning should be discussed. As with most of the key terms under the Amended Statute, however, courts are largely inconsistent.

What amounts to "adverse" remains up-for-grabs, with courts allowing a host of options ranging from easy cases where explicit "discharge or discipline" exists (majority), to harder cases involving subjective fears, anticipation of disciplinary action, or other lesser forms of adverse action (minority). The Tenth Circuit, for example, has even employed the de minimis test as a standard for adversity—suggesting that conduct that has more than a de minimis impact on the employee's future job opportunities may amount to an adverse employment action.[54] Of special interest here is the Second Circuit in *Ansonia*, which

51. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 771 (2015). The circuit court below did apply the test. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1122 (10th Cir. 2013). It is of some note that the Supreme Court in 1986 was asked to establish a "proof scheme" for religious accommodation claims "analogous to that developed in other Title VII contexts," but refused to do so at that time. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67–68 (1986); *see also Toledo*, 892 F.2d at 1486 (noting that while the Supreme Court has never ruled on the issue, lower courts have implemented a two-step procedure for evaluating claims and allocating burdens of proof under the Amended Statute); *Lemmons*, 431 F. Supp. 2d at 95 (noting that the Supreme Court only signaled a need for a prima facie showing, without "articulat[ing] a framework for cases in which an employer has allegedly failed to accommodate an employee's religious beliefs under Title VII").

52. *Abercrombie*, 575 U.S. at 772 n.2.

53. *See infra* SECTION III.B.

54. Wilson v. Harvey, 156 F. App'x 55, 58 (10th Cir. 2005).

explicitly disowned the need for "discharge" as the proper showing of adverse action. In considering whether the employee was forced into a choice between his job and his religion, the court held that such a choice *includes* the choice of giving up a portion of his salary: "Title VII prohibits not only discrimination in hiring and firing but also discrimination 'with respect to compensation, terms, conditions or privileges.'"[55] When the Supreme Court reviewed the case on appeal, they called the employee's loss of pay due to the conflict "a detriment."[56]

For its part, the Ninth Circuit has been among the friendliest to employees, expanding the definition of adverse action to include the threat of discharge.[57] In *EEOC v. Townley Engineering & Manufacturing*, for example, the circuit suggested that the definition includes any form of penalty, explaining that "an employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy."[58] In *Dorr v. First Kentucky*, the Sixth Circuit likewise made things easier for the employee by rejecting an animus requirement. It noted that it is enough, for whatever motive, that the employer "discharged or demoted" the employee because of his activities that it knew to be religious.[59] Other circuits have also seemingly held that temporarily suspending an employee from a position of conflict—*while* searching for a reasonable accommodation—was enough for the employee to carry his burden.[60]

55. *Ansonia*, 757 F.2d at 482–83.

56. *Ansonia*, 479 U.S. at 66.

57. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 614 n.5 (9th Cir. 1988); Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993). At the same time, courts have also refused to acknowledge adverse action based on subjective fears or anticipation of discipline—leaving some room for "special circumstances" to substantiate unrealized threats. *See, e.g.*, Bowles v. N.Y.C. Transit Auth., 285 F. App'x 812, 814 (2d Cir. 2008); Lewis v. Wilkie, 909 F.3d 858, 869–70 (7th Cir. 2018); Dick v. Phone Directories Co., 397 F.3d 1256, 1268–69 (10th Cir. 2005).

58. *See Townley Eng'g & Mfg. Co.*, 859 F.2d at 614 n.5.

59. Dorr v. First Kentucky Nat'l Corp., No. 84-5067, 1986 WL 398289, at *5 (6th Cir. July 17, 1986); *see also* Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987) (setting the standard at discharge or discipline).

60. Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383 (9th Cir. 1984). Although, it remains unclear if the adverse action (i.e., removal) was intended to attach to the suspension without pay or the eventual transfer to a lower paying job. Related, the question of transfers also remains unclear. Note also the language in *Boone v.*

Other cases rely on performance reviews or point systems as tangible evidence of future threat to credit adversity.[61] The same goes for finding adverse employment action that may not assume to the level of discharge or discipline. As Judge David McKeague explained, citing to several circuit court opinions, "an adverse employment action short of discharge or discipline is sufficient to establish the prima facie case for religious accommodation."[62]

As a corollary to these cases, some courts use anticipatory disciplinary action as evidence of adverse action, essentially relieving the pressure from employees to stick around until the proverbial "Sword of Damocles" drops.[63] In *Young v. Southwestern Savings and Loan Ass'n*,

Goldin: "[While] Congress did not intend Title VII to provide redress for trivial discomforts endemic to employment . . . we conclude that reassignment can only form the basis of a valid Title VII claim if the plaintiff can show that the reassignment had some significant detrimental effect on her." 178 F.3d 253, 256 (4th Cir. 1999).

61. *See, e.g.*, Johnson v. City of Fort Wayne, 91 F.3d 922, 935–36 (7th Cir. 1996) (holding that negative employment evaluations do not constitute adverse employment action); Smart v. Ball State Univ., 89 F.3d 437, 442 (7th Cir. 1996) (holding that negative performance ratings alone did not constitute adverse employment actions); Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10th Cir. 1994) (holding that a performance review that is lower than past reviews but within the range of satisfactory does not constitute an adverse employment action); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1377, 1379 n.1 (6th Cir. 1994) (finding that a verbal warning and an employee's accumulation of "absence points" sufficed as evidence of discipline); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377 (4th Cir. 2004) ("[A] poor performance evaluation 'is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment.'"); Keene v. Thompson, 232 F. Supp. 2d 574, 580 n.6 (M.D.N.C. 2002) (finding that reprimands or suspensions that were removed or never added to the employee's discipline file are not considered adverse employment actions); Gallo v. Herman, No. 97-CTV. 8359, 1999 WL 249709, at *2 (S.D.N.Y. Apr. 28, 1999) (finding that plaintiff had not adduced any evidence that receipt of "still-high but not-quite-as-high-as-previous rating caused any material impact on term or condition of [his] employment"); Castro v. N.Y.C. Bd. of Educ. Pers., No. 96 CIV. 6314, 1998 WL 108004, at *7 (S.D.N.Y. Mar. 12, 1998) (recognizing that negative evaluations "unattended by a demotion, diminution of wages, or other tangible loss do not materially alter employment conditions").

62. Reed v. UAW, 569 F.3d 576, 584 (6th Cir. 2009) (McKeague, J., dissenting).

63. The "Sword of Damocles" is an ancient Greek story popularized by Cicero that involves Dionysius II granting Damocles the fortunes of the king (for a limited

the Fifth Circuit found sufficient evidence for constructive discharge when an employee reasonably sensed that her job was conditioned on having to participate in staff meetings that doubled as a religious service.[64] Writing for the majority, Judge Goldberg found that the employee could still make her showing of adverse action after she resigned in anticipation of her eventual discharge due to her ongoing refusal to attend these meetings.[65]

It is noteworthy that the fact pattern in *Young* was based on the "cruel choice" dilemma underlying this Article. Once Mrs. Young's ongoing absence from these staff meetings was discovered, and after giving her superior fair notice that she objected to being made subject to the religious nature therein, the employer told her the meetings are mandatory, that she could "close her ears" during the religious portion, and that the decision was ultimately her own as to whether she chose to continue missing the meetings.[66] As the court summarized, the superior "did not propose a ceasefire or a standstill agreement; he demanded unconditional surrender to the company policy of compulsory attendance at religious services."[67] Soon thereafter, Mrs. Young turned in her keys and left work in protest, asserting that she was discharged for refusing to attend the "prayer meetings."[68] Despite evidence showing that Mrs. Young made no attempt to seek accommodation and that the employer stood ready to accommodate her religion, the circuit court

period), subject only to the drop of a sword hanging from the ceiling and held in place by a single strand of a horse's tail. With this looming threat, Damocles decided he no longer wanted to enjoy the lifestyle of the King. The parable represents the idea that those in power always labor under the specter of anxiety and death, thus forbidding them from fully enjoying the opulence of their privileged status.

64. Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975).

65. *Id.* It is noteworthy that at trial, the jury found no illegal action on the part of the employer since the employee was not fired but resigned her position. *Id.* at 141.

66. *Id.* at 142.

67. *Id.* at 145. The Supreme Court clarified that the constructive discharge analysis requires objective "intolerability" or "circumstances of discrimination so intolerable that a reasonable person would resign," but not "deliberateness," or a subjective intent to force a resignation. *See* Green v. Brennan, 578 U.S. 547, 553–62 (2016) ("When the employee resigns in the face of such [intolerable] circumstances, Title VII treats that resignation as tantamount to an actual discharge.").

68. *Young*, 509 F.2d at 142. According to the employer, the actions of Mrs. Young were tantamount to her resignation. *Id.* at 142 n.4.

reversed, holding that she had made out a prima facie case of religious discrimination and that she was not required to bear the "considerable emotional discomfort of waiting to be fired."[69]

Finally, a minority of courts have gone so far as to seemingly eliminate the adverse action requirement all together. One such case from the United States District Court for the Northern District of Illinois compared Title VII with the Americans with Disabilities Act (ADA) in its discussion of Seventh Circuit precedent.[70] Since the prima facie elements in ADA-related cases only require evidence of a de facto failure to accommodate, the court reasoned that proof that an accommodation would not impose an undue burden would be sufficient, *in and of itself*, to support a religious failure to accommodate claim—without the need to show some separate adverse action.[71] Noting a key concern, the court went on to explain that the "injury in a failure to accommodate is the inability to practice one's religion that occurs immediately, not later when there may be some possibly related job action."[72] Despite being in the minority, this case illustrates the viability of finding religious discrimination by showing an employer's refusal to accommodate when accommodation was available.

All in all, adverse action includes any showing of discipline connected to religious belief or anything that forces the employee to choose between his or her religion and his or her "compensation, terms, conditions or privileges" of employment. To be safe, most cases largely follow the language of Judge J. Michelle Childs, who explains succinctly that to qualify as an adverse employment action, the harm alleged must work a "significant" detriment on a plaintiff.[73] To what degree is anyone's guess.

69. *Id.* at 143–45. In a similar case involving Muslim employees who needed a place to pray but were denied a reasonable accommodation and thus faced an on-sight dilemma between their work and religion, the court found sufficient evidence for a jury to find that the employer deliberately created a situation in which it was foreseeable that plaintiffs would feel compelled to quit. Mohamed v. 1st Class Staffing, LLC, 286 F. Supp. 3d 884, 906–08 (S.D. Ohio 2017).

70. *See* Nichols v. Ill. Dep't of Transp., 152 F. Supp. 3d 1106, 1121–22 (N.D. Ill. 2016).

71. *Id.* at 1122.

72. *Id.*

73. Brooks-Mills v. Lexington Med. Ctr., No. 3:17-CV-01849, 2020 WL 5810518, at *9 (D.S.C. Sept. 30, 2020). *Compare* Burlington Indus., Inc. v. Ellerth,

3. From Adverse Action to Accommodation-as-Option

While sincerity and notice are common sense implications attached to the language of the Amended Statute, it is the adverse action prong that seems to have a life untethered. Significantly, the question of adverse action proves a potent *causus belli*—allowing the employer to simply abstain from making the effort to accommodate, if they also abstain from taking any adverse action when the employee chooses to gamble with his job by following the dictates of his religion. This inevitably leads to the ill-fated instance where the employee is forced to make a "cruel choice" between his livelihood and his religion. If the employee chooses to come to work and violate their conscience, the employer gets the benefit of a lost cause in litigation when the employee tries to bring a failure to accommodate claim without the requisite showing of adverse action. If the employee follows the dictates of his conscience, the employer can still avoid a headache by simply abstaining from punishing the employee, thus triggering a repetitive cycle of "cruel" decisions.

We see this playing out in several decisions.[74] For example, in *Francis v. Perez*, the court acknowledged that the employer's refusal to accommodate the employee's Sabbatarian requests did not alone suffice to establish the prima facie elements. What was needed was an additional step after the refusal, requiring the employee to skip work, which would then presumptively trigger an adverse action.[75] In *Francis*, however, the employee refused to skip work and thus lost his claim.[76] The same thing happened in *Thompson v. Kaufman's Bakery*,

524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."), *with* Somers v. EEOC, No. 6:13-00257, 2014 WL 1268582, at *8 (D.S.C. Mar. 26, 2014), *aff'd*, 589 F. App'x 178 (4th Cir. 2015) ("[A] slight change in duties, absent a showing that Plaintiff received less pay or fewer benefits or 'even that her adjusted work was especially onerous or humiliating' does not constitute the requisite adverse employment action.").

74. *See infra* SECTION II. C.

75. Francis v. Perez, 970 F. Supp. 2d 48, 60 (D.D.C. 2013), *aff'd*, No. 13-5333, 2014 WL 3013727 (D.C. Cir. May 16, 2014).

76. Notably, akin to the situation in *Young v. Southwestern Savings & Loan Ass'n*, after the employee gave fair notice of her religious needs, the employer said

Inc., where a Muslim bakery employee required a Sabbatarian accommodation, but, nevertheless, continued to work the Saturday shift.[77] Because the employee continued coming to work, he was never disciplined—a fact the court noted was "fatal" to his religious accommodation claim.[78]

Important to the discussion below regarding harms of conviction, the *Thompson* court refused to acknowledge that the employee suffered any harm in being refused an accommodation.[79] This thinking is explained well by the Eastern District of Michigan:

> By agreeing to work . . . whether willingly or reluctantly, Plaintiff avoided suffering any adverse *employment* consequences as a result of her religious beliefs; rather, her personal religious observance suffered on account of her adherence to her work schedule. Yet, Title VII protects only the former, employment-related interests from abridgment.[80]

While this Article discusses the problem with this analysis in Section III.D, it is important to note here how this thinking create a rather interesting bias in favor of rigid religiosity. In refusing to recognize harms of conviction that follow the employee home, a threshold for compromise has been baked into the Title VII analysis, providing employers a second wind through the sheer act of employee compliance. Instead of accommodating religion in all of its manifestations, the religious accommodation test has been tailored toward those expressions of religious conscience that leaves less room for compromise or flexibility. The court in *Stone v. West* agrees as much, describing how the "Plaintiff's failure to insist upon strict adherence . . . effectively absolved her employer of the responsibility to reasonably accommodate her beliefs."[81] This, of course, invites an internal struggle

her presence was mandatory and left the compliance decision to the employee. *Id.* at 54.

77. Thompson v. Kaufman's Bakery, Inc., No. 03-CV-340S, 2005 WL 643433, at *2 (W.D.N.Y. Mar. 16, 2005).

78. *Id.* at *8.

79. *Id.*

80. Stone v. West, 133 F. Supp. 2d 972, 985 (E.D. Mich. 2001).

81. *Id.* at 986.

within the individual convictions of employees, while guaranteeing employers the freedom of conscience to do nothing until the "cruel choice" is made.

In a sense, the "cruel choice" dilemma becomes a test of religious conviction: the proverbial example of Daniel, who refused to abide by the orders of the King and got sent into the lion's den as a consequence for his defiance.[82] The prescription to reasonably accommodate thus becomes a proscription from taking adverse action in the rare instance where an employee decides to skip work.[83] It becomes the scenario noted by Justice Marshall, where employers are absolved from granting "even the most minor special privilege to religious observers to enable them to follow their faith."[84] By favoring rigid religiosity, the unintended consequences leads to increased claims of strict accommodation and a diminished opportunity to promote a confident pluralism that comes through good faith bilateral negotiations. This further aggravates what Justice Marshall foresaw as the slow surrender of this Nation's "hospitality to religious diversity"; consequently, diminishing the utility of religion in the workplace and the participatory framework that Title VII intends for religious employees.[85]

III. THE "CRUEL CHOICE" DILEMMA: TITLE VII AS A PROSCRIPTIVE STATUTE

Before turning to this Article's solution, it is important to briefly discuss the American commitment to religious liberty and the competing interest at play. Only by understanding the broader conversation on the role of religion and its allotted volume in public conversations can we fully understand the necessary balance established through a multigenerational conversation within the Supreme Court. In looking

82. *See Daniel* 6:16.

83. *Cf. Stone*, 133 F. Supp. 2d at 986 ("[A]lthough Plaintiff's religious beliefs ostensibly conflicted with the demands of her job, she subordinated the former to the latter, thereby avoiding a conflict which otherwise might have led her employer to take adverse action against her."). As the court in *Stone* acknowledged, most cases revolve around an employee who resigned, suffered discharge, or was disciplined. *Id.* at 985.

84. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 86–87 (1977) (Marshall, J., dissenting).

85. *Id.* at 97.

at the competing elements, the ramifications of the "cruel choice" dilemma and why a solution must be offered to restore a cause of action to employees can be understood.

A. An American Story

Judge Amul Thapar once wrote: "[t]he American story is one of religious pluralism."[86] The Founding Fathers intended this much when they sent us on a new errand in church-state relations, built on the language of Constitutional promise. Historian Mark Noll captured this development in his seminal work on American religious history, explaining that many of the major founders saw that religion "had a role to play in making the moral calculus of republicanism actually work."[87] As Noll explains throughout *America's God*, the founding period was marked by a needful balance between various conceptions of political and theological innovations, ranging from a mistrust of inherited authority, notions of popular sovereignty, common sense philosophy, and a distinctive view of providence that gave the people its form and character.[88]

As for established churches, they knew they had a role to play in setting the moral backbone of the Nation, despite no longer being in control through traditional modes and methods that gave them widespread jurisdiction throughout history. Thomas Jefferson illustrated this development in his apt comparison between the guarantees of religious freedom as a "fair" and "novel" experiment, with the historical assumption of dominion over faith through established means of conformity.[89] Christianity would no longer be propped up by the

86. Small v. Memphis Light, Gas & Water, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring).

87. MARK NOLL, AMERICA'S GOD 203 (2002); *see also* STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN THE NINETEENTH-CENTURY AMERICA 23 (2010) ("Although many of the founders ascribed a special quality to the nation's founding, few attributed more than an indirect providential influence in explaining the monumental events.").

88. NOLL, *supra* note 87, at 209–10.

89. THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, *in* THOMAS JEFFERSON: WRITINGS 346 (Merrill D. Peterson ed., 1984); JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 1 (4th ed. 2016); *see also* SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF

prescriptions and proscriptions on religion from the government—denominations would have to "stand on their own feet and on equal footing with all other religions."[90] As Sidney Mead artfully put it in *The Lively Experiment*, "[e]ach man must do his own thinking and believing, as he must do his own dying."[91] In sum, ever since the founding generation, the public engagement of religion struck at the heart of a national conversation. It is the axe at the very root of our constitutional order.[92] And, has inevitably, led to ongoing debates between established and popular sentiments, emerging to create what Nathan Hatch called an "anarchic, free-market pluralism."[93] Nothing in the history of America managed to shape—for better or for worse—the public sentiment and character of the American people quite like the participation of religion and its ontological contribution to what it means to be a

CHRISTIANITY IN AMERICA 55–71 (1963). According to one biography, "Jefferson believed that the greatest threat to religious and political freedom was the overreaching of rulers who sought to indoctrinate dependent subjects in their supposed duties." ANNETTE GORDON-REED & PETER S. ONUF, "MOST BLESSED OF THE PATRIARCHS": THOMAS JEFFERSON AND THE EMPIRE OF THE IMAGINATION 276 (2016).

90. WITTE & NICHOLS, *supra* note 89, at 1. Similar sentiments were expressed by prominent church-state thinkers in the nineteenth-century like Sanford H. Cobb, who wrote about "the peculiar merit and glory" of the American people who were able to establish a nation on the principles of Religious Liberty, adding: "Not toleration, but equality, puts all religions in the same relation to the law, under which there can be no preferences of one before another. The only relation between the Church and state is that of mutual respect." SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 521 (1968).

91. MEAD, *supra* note 89, at 58. While this experiment struck an idealized vision for the American Setting, the reality would often be very different as Christian Republicanism gave birth to the evangelical impulse throughout the eighteenth and nineteenth century. Mark Noll captures this best when he writes, "[t]he new wineskin of a republic without an established church was a secular creation, but the new wine that filled it was evangelical." NOLL, *supra* note 87, at 206. This impulse would find itself being pushed out throughout the nineteenth and twentieth century by various secular groups that took the separation of church and state seriously (i.e., no more special exemptions for Protestantism). *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002).

92. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996) ("[W]e cannot repudiate that decision without . . . rendering all constitutional rights vulnerable to repudiation if they go out of favor.").

93. NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 212 (1989).

citizen. "No one can deny," wrote Judge Manuel Real, "that respect for individual religious beliefs was and is one of the most important marks of our freedom."[94] As such, attempts to rid religion from the private square is an attempt to revise history and set in place an abridged memory that fundamentally lobotomizes the nature of the American self and undercuts the "marks of our freedom." Religious privatization does not represent American values, nor should it ever be something we strive to achieve. It is instead a treasonous attempt to engineer mass amnesia; and, in its stead, replace our history with the history of an alien design.

In 1940, the Supreme Court echoed these sentiments in its erudite assessment regarding the regulation of religion and the need for striking appropriate measures that ensure the infringement on religion is reasonable.[95] Mindful of the sharp differences that arise in matters of religious faith and political belief, Justice Owen Josephus Roberts noted that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[96] In 1944, Justice William Francis Murphy delivered a concurrence where he warned about the danger of "unscrupulous or bigoted men" who use their "taxing and licensing power . . . to suppress freedoms and destroy religion

94. Yott v. N. Am. Rockwell Corp., 428 F. Supp. 763, 769 (C.D. Cal. 1977).

95. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

96. *Id.* at 310. Citing to *Cantwell*, Justice Frankfurter two-decades later adds some layers to this argument, writing:

> This is not to say that governmental regulations which find support in their appropriateness to the achievement of secular, civil ends are invariably valid under the First or Fourteenth Amendment, whatever their effects in the sphere of religion. If the value to society of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose religious practices are curtailed by it, or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained.

McGowan v. Maryland, 366 U.S. 420, 462 (1961).

unless it is kept within appropriate bounds.[97] In 1947, the Court returned to the language of Jefferson in establishing a wall of separation as a constitutional principle for Religious Clause jurisprudence—leaving the question of the wall's "porous" status for later generations to determine.[98] And, in 1952, religion was back in business with the eminent phrase from Justice William Orville Douglas concerning the American character: "[w]e are a religious people whose institutions presuppose a Supreme Being."[99] Back and forth, the conversation went for the next two decades, with major cases dealing with film censorship, ecclesiastical authority, conscientious objectors, public school administration, and taxpayer exemptions all shaping the contours of the public engagement with religion, while the public was busy shaping itself into a new American form of libertine self-expression.[100] Writing in the 1960s, Harvey Cox puts his thumb on something remarkably prophetic that speaks to this period of change and the challenge that the church would face going forward: "[s]horn of its political might by two hundred years of revolutions, deprived of its cultural influence by the Enlightenment, and finally robbed of its psychological power by

97. Follett v. Town of McCormick, 321 U.S. 573, 579 (1944) (Murphy, J., concurring).

98. *See* Everson v. Bd. of Educ. of Ewing TP., 330 U.S. 1, 15, 18 (1947). The next year, the Court made sure to solidify its "wall of separation" metaphor as hard constitutionalism. *See* Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 231 (1948) ("Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped."). While this history is not the task of this Article, there are more than enough resources out there to get a person started. *See, e.g.*, STEVEN WALDMAN, SACRED LIBERTY (2019), GREEN, *supra* note 87; WITTE & NICHOLS, *supra* note 89; STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM (2014); HAMBURGER, *supra* note 91. *See generally* KENT GREENAWALT, RELIGION AND THE CONSTITUTION (2008) (Volumes 1–2); DOUGLAS LAYCOCK, RELIGIOUS LIBERTY (2010) (Volumes 1–5).

99. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

100. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); United States v. Seeger, 380 U.S. 163 (1965); Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970); Wisconsin v. Yoder, 406 U.S. 205 (1972).

the causal this-worldliness of modern urban man, the church may very soon have to go back and start from scratch."[101]

Regarding religion and work, perhaps the pivotal discussion came in 1961 with Justice Felix Frankfurter's discerning and lengthy disposition of a challenge to the ubiquitous Sunday ("Blue") Laws (i.e., laws requiring business owners to stop work on Sunday), which disadvantaged members of the Orthodox Jewish tradition that already closed their shops on Saturdays. As the Court acknowledged, the legislation turned on a question of the constitutional "choice of means" that pinned the economic success of a community of faith and their religious requirements.[102] Important to the discussion here, the Court dismissed the question of granting exceptions to the Sunday Laws by simply saying that the enforcement problems suffice to warrant blanket bans and that the injury to Sabbatarians religion—including the "economic pressures" which urge them to give up their usage—is permissible.[103] Discussing the policy concerns and the competing values of a day-of-rest from the "increasingly mechanized and competition-driven society," the Court offered this assessment: "[t]he nature of the injury which must be balanced against it is the economic disadvantage to the enterpriser, and the inconvenience to the consumer, which Sunday regulations impose upon those who choose to adhere to the Sabbatarian tenets of their faith."[104] In 1977, when the Court finally waded into the thickets of Title VII jurisprudence in the wake of the Amended Statute, Justice Marshall picked up on these problematic themes in his careful assessment of the social policy that follows from the majority opinion, writing: "this result is deeply troubling, for a society that

101. HARVEY COX, THE SECULAR CITY 260 (2013).

102. McGowan v. Maryland, 366 U.S. 420, 513–14 (1961).

103. *Id.* at 513, 520. Reflecting on another case dealing with Sunday Laws, Justice Brennan adds some needed critique: "the Court, in my view, has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous. The Court would justify this result on the ground that the effect on religion, though substantial, is indirect." Braunfeld v. Brown, 366 U.S. 599, 615–16 (1961) (Brennan, J., concurring and dissenting).

104. *McGowan*, 366 U.S. at 520–21. While acknowledging the "undeniable financial burden" placed on certain religions, the Court thinks hard work may fix the problem: "without minimizing the fact of this disadvantage, the legislature may have concluded that its severity might be offset by the industry and commercial initiative of the individual merchant." *Id.* at 521.

truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job."[105]

These dynamics cannot be minimized or hermetically sealed from the sanctity of the workplace. A symbiotic relationship necessarily exists, which demands a tailored harmony between the prophets of faith with the margins of profit—nestled deep within the context of daily exposure between "diverse people, cultures, ideas, and viewpoints."[106] Those in charge understandably are driven by self-interest and the inconvenience of accommodation is often just that—an inconvenience.[107] Other times, however, it is more than this: since "unscrupulous or bigoted men" exist, they often find themselves in positions where their prejudice can readily hide behind the innovations of professional jargon causing havoc to employee's rights downstream. Discrimination finds a way to evolve and hide in plain sight, with courts often unable to see through its veneer of neutrality. While the drafters of the Amended Statute attempted to aid in the recourse of grievances-filed by finding a meaningful balance between managers and workers, the legal system over time has tipped the scales in favor of profit. Courts became a bit too friendly with managers, creating interpretative models that substantially favored employers over religious workers.[108]

105. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting).

106. Grutter v. Bollinger, 539 U.S. 306, 330 (2003); *see also* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

107. Judge Wilkinson explains this well: "Religion does not exist in a vacuum in the workplace. Rather, it coexists, both with intensely secular arrangements . . . and with the intensely secular pressures of the marketplace. Hence the import of the statutory term 'accommodate.'" EEOC. v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313 (4th Cir. 2008).

108. *See, e.g.*, Charlotte Garden, *Religious Accommodation at Work: Lessons from Labor Law*, 50 CONN. L. REV. 855, 869 (2018) (noting that the undue hardship requirement is "a major limitation that sharply diminishes the usefulness of Title VII for religious employees . . ."); Selznick, *supra* note 4, 194–215 (discussing some of the purported hardship employers can use to avoid accommodating); Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C. L. REV. 91, 116–24 (2018) (discussing the various scenarios where "customer preference" gives the employer an out to accommodating employees); Sperino, *supra* note 3, at 86–115 (discussing some of the judicially-created frameworks that substantively limit discrimination claims).

Instead of perpetuating a balance through the mandates of accommodation, these models incentivized the replacement of sacred values with cost-benefit analysis and utilitarian concerns for wealth and conformity.[109]

B. Laws of Conduct

Having set the mood for a dynamic open contestation, the discussions that followed among courts and administrative bodies did establish at least two major laws of conduct for applying Title VII in favor of employees.

The first is that the very language of Title VII and the EEOC guidelines placed an *affirmative duty* on an employer to attempt an accommodation.[110] This right is based on the necessary alleviation of

109. *See* JEFFREY STOUT, BLESSED ARE THE ORGANIZED: GRASSROOTS DEMOCRACY IN AMERICA 224–25 (2010). This profit margin includes not only monetary incentives, but various work-force dynamics. *See, e.*g., *Hardison*, 432 U.S. at 80–81 (1977) (scheduling concerns based on a neutral seniority system); Peterson v. Hewlett-Packard Co., 358 F.3d 599, 607–08 (9th Cir. 2004) (concerns to attract and retain a qualified, diverse, and tolerant workforce); Yott v. N. Am. Rockwell Corp., 602 F.2d 904, 908–09 (9th Cir. 1979) (concerns regarding costs of future accommodations (i.e., floodgate/steamroller effect) and unrest with unionized members given history of labor relations); Brown v. Polk Cnty., 61 F.3d 650, 655 (8th Cir. 1995) (en banc) (efficiency regarding other jobs); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 134–35 (3d Cir. 1986) (no undue hardship where "efficiency, production, quality and morale . . . remained intact during [employee's] absence"); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826 (9th Cir. 1999) (fear based on conflicts with another law); EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 91 (N.D. Ga. 1981) (customer preference); Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975), *vacated on reh'g*, 433 U.S. 903 (1977) ("The EEOC . . . has noted the possibility of undue hardship when the employer can make a persuasive showing that employee discontent will produce 'chaotic personnel problems.'").

110. *See, e.g.*, Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 73 (1986) (Marshall, J., concurring in part and dissenting in part); Crider v. Univ. of Tenn., 492 F. App'x 609, 612 (6th Cir. 2012); EEOC v. Ilona of Hung., Inc., 108 F.3d 1569, 1574 (7th Cir. 1997); *see also Hardison*, 432 U.S. at 75 ("[T]he employer[] [has a] statutory obligation to make reasonable accommodation for the religious observances of its employees . . . ."); Pinsker v. Joint Dist. No. 28J, 735 F.2d 388, 390 (10th Cir. 1984) ("Title VII requires reasonable accommodation or a showing that reasonable accommodation would be an undue hardship . . . ."); Yott v. N. Am. Rockwell Corp., 428 F. Supp. 763, 766 (C.D. Cal. 1977) ("[T]he statute imposes on an employer the

conflict that requires a choice between religion and work, and is summarized by the EEOC Compliance Manual, in which it states that the accommodation requirement is "plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions . . . ."[111] While this provision is based on balancing religious needs and business demands—what most courts have rightfully recognized as a mutual obligation to cooperate in good faith—the employer is *still* required to make some effort to accommodate its employees, short of incurring undue hardship.[112]

The second guarantee is that an employee is not required to surrender his or her religion when entering the workforce. Retaining one's religious identity and having that aspect removed from the consideration process in, for example, hiring and firing decisions, is the purpose of Title VII, which ensures that employees not be forced to choose between faith or work. This right attaches to the "terms, conditions, or privileges" of employment and protects employees through the reasonable accommodation framework—a reliance upon which triggers a cause of action when violated. It is a right affirmed by the Supreme Court when it extended a "preferential" claim for the exercise of religion by subjecting an employer's "[o]therwise-neutral policies . . . to the need for an accommodation."[113] As the Ninth Circuit aptly summarized, Title VII "requires an employer to accommodate the religious beliefs of an employee in a manner which will reasonably preserve that employee's employment status, *i.e.*, compensation, terms, conditions, or privileges of employment."[114] By refusing to accommodate an employee's religion without showing undue hardship, an employer materially affects an employee's "terms, conditions, or privileges" of

requirement that he adopt or bring into agreement his otherwise non-discriminatory business conduct with the religious beliefs of his employee.").

111. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 31 (quoting *Protos*, 797 F.2d at 136); *see also* EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1120–21 (10th Cir. 2013).

112. *See, e.g.*, *Hardison*, 432 U.S. at 75 n.9; Am. Postal Workers Union v. Postmaster Gen., 781 F.2d 772, 777 (9th Cir. 1986); Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977); McDaniel v. Essex Int'l, Inc., 696 F.2d 34, 35 (6th Cir. 1982); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145–46 (5th Cir. 1982).

113. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015).

114. *Am. Postal Workers Union*, 781 F.2d at 776.

employment, or inflicts a "significant change in benefits."[115] Only by reasonably accommodating the employee or by showing undue hardship does the employer retroactively render a failure to accommodate excusable.[116]

C. The Lost Cause

As outlined in Section I.C., the "cruel choice" is the mechanism by which an employer can circumvent its duty to accommodate its employees' reasonable religious request by simply abstaining from taking any adverse action. If the employee succumbs to the fear of losing his job and violates their religion by behaving in accordance with employment demands, they lose their claim for want of adverse action. So, while courts have continuously criticized employers or unions who take negligible steps to accommodate the religious needs of employees, a pattern has emerged that provides a path for an employer to take such steps, if they also avoid penalizing the employee if he disobeys.[117] This has led to a number of situations where the court dismisses viable

115. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761, 767 (1998). In a parenthetical, the Eleventh Circuit correctly interpreted *Abercrombie* to hold that "discriminating against an employee or applicant based on her religious practice 'is *synonymous* with refusing to accommodate the religious practice.'" Jean-Pierre v. Naples Cmty. Hosp., Inc., 817 F. App'x 822, 828 (11th Cir. 2020). This tautology can then be said in reverse, i.e., refusing to accommodate the religious practice is *synonymous* with discriminating against an employee based on her religious practice. "To accuse the employer of the one is to accuse him of the other." *Abercrombie*, 575 U.S. at 772 n.2.

116. *See Abercrombie*, 575 U.S. at 778 (Alito, J., concurring) ("[The] defense . . . allows an employer to escape liability for refusing to make an exception to a neutral work rule if doing so would impose an undue hardship."). Showing undue hardship removes the imprimatur of religion being a motivating factor for why the employer failed its duty to accommodate. *See id.* at 772. The employer is therefore no longer liable under the statutory language of Title VII because it can show de minimis harm and the law is deferential to that sort of setback. *See Hardison*, 432 U.S. at 84. While the adverse employment action remains (i.e., the failure to accommodate), it is deemed permissible and thus able to overcome the deferential preference extended to the employee's religion. *Abercrombie*, 575 U.S. at 775.

117. *See, e.g.*, *Hardison*, 432 U.S. at 77; Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445 (7th Cir. 1981); Anderson v. Gen. Dynamics, Convair Aerospace Div., 589 F.2d 397 (9th Cir. 1978).

failure to accommodate claims because the employees, whether willingly or reluctantly, compromised their religion and thus forfeited their cause of action for want of adverse action. Since many of these cases are similar, considering only a few within the various circuits will suffice to illustrate the typical pattern concerning adverse action and its required showing for claim viability.

Starting with *Ali v. Alamo Rent-A-Car, Inc.*, we find the court wrestling with a company's "Look Policy" that prohibited a Muslim employee (Ali) from wearing a headscarf while serving customers.[118] After refusing to accommodate her religion, the company transferred Ali to another position with less customer engagement and eventually terminated her employment for reasons unrelated to her religion.[119] Without a viable claim for adverse action, Ali was forced to file a motion to amend the judgment, arguing that the parameters of Title VII do not require a showing of adverse employment action.[120] However, to no avail: the Court maintained that the adverse action requirement *is* mandated by the statute as part of the necessary showing that the employer's practice deprived her of "employment opportunities" or otherwise adversely affect her status.[121] In responding to the various arguments from Ali, the court agreed that the Amended Statute held that an employer *does* discriminate on the basis of religion if it can accommodate the religious practice without undue hardship—however, the provision "does not affect the basic statutory requirement for adverse employment action."[122]

118. Ali v. Alamo Rent-A-Car, Inc., 8 F. App'x. 156, 157 (4th Cir. 2001).

119. *Id.* at 157 n.1 ("[Ali] concede[d] that her termination was lawful . . . .").

120. *Id.* at 157.

121. *Id.* at 158. The court explained that "Section 2000(e)–2(a) joins religion with race, color, sex, and national origin in the same sentence. Because race, color, sex, and national origin require a showing of adverse employment action, Ali bears the burden of showing why religion should be treated differently." *Id.*

122. *Id.* A subsequent decision in the same circuit would go on to define adverse action as anything that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Jensen-Graf v. Chesapeake Emps.' Ins. Co., 616 F. App'x 596, 598 (4th Cir. 2015). Notably, my primary argument does not rely on the good riddance of adverse action, but only its definition—which the court did not consider. *Ali*, 8 F. App'x. at 158 n.2. That said, the reason why religion is different from "race, color, sex, and national origin" (as the

Likewise, in *Reyes v. New York State of Children & Family Services*, the lower court delt with a claim for religious accommodation concerning time off on Saturdays. The court addressed the scope of adverse action under the third element for religious accommodation, finding its definition broad and encompassing any material change to working conditions that amounts to something more disruptive than a mere inconvenience or alteration of job responsibilities—including "other indices . . . unique to a particular situation."[123] But the employee partially complied with the requirements to work Saturdays and the only action taken by the employer was to mandate that Reyes provide a doctor's note for any further use of sick leave.[124] Because the documentation alone did not rise to the level of adverse employment action, Reyes could not establish a prima facie case of religious discrimination and thus forfeited his claim.[125]

The same thing happened in *Price v. Advanced Medical Clinics, P.C.*, where an employee objected to attending various Scientology-based courses required by her employer. While her termination was found to be a product of direct discrimination for not believing in the teaching of Scientology, the failure to accommodate claim went nowhere because the employee continued to attend the courses.[126] As the court explained, "[g]iven her continued compliance, Plaintiff obviously cannot show that she was terminated for *refusing* or *failing* to comply

court asked) is because of the precise "awkward[ness]" of the Amended Statute—acknowledged in *Ansonia*—and its creation of an accommodation framework bereft of adverse action requirement. *See id.* at 158; Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 63 n.1 (1986); *see also* Blair, *supra* note 5, at 544–48. The uniqueness of religion will be discussed in some measure in Section III.C.A.—to say nothing about the language from *Abercrombie* that outlined the preferred status of religion over otherwise-neutral workplace policies. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015) (Alito, J., concurring).

123. Reyes v. N.Y. State Off. of Child. & Fam. Servs., No. 00 Civ. 7693, 2003 WL 21709407, at *7 (S.D.N.Y. July 22, 2003), *aff'd*, 109 F. App'x 466 (2d Cir. 2004).

124. *Id.*

125. *Id.*

126. Price v. Advanced Med. Clinics, P.C., No. 1:04-CV-1818, 2005 WL 8154586, at *6–7 (N.D. Ga. Aug. 18, 2005), *report and recommendation adopted sub nom.* Price v. Advance Med. Clinics, P.C., No. 1:04-CV-1818, 2006 WL 8431648 (N.D. Ga. Feb. 27, 2006).

with Defendants' allegedly mandatory attendance policy."[127] This case shows how courts have used the failure to accommodate claim as a separate stand-alone feature and how the adverse action prong has to directly align with the conflict *between* the employee's religion and work requirements.

This direct alignment was illustrated in *Clark v. U.S. Security Associates, Inc.*, where the court admitted that an employee's Wiccan faith and her desire to celebrate Yule "all day" suffered on account of her adherence to the defendant's work schedule.[128] A similar instance happened in *Isse v. American University*, where a shuttle bus driver was refused time off to pray in accordance with his Muslim faith.[129] There, the district court struck down the failure to accommodate claim for want of adverse action, noting that the employee—whether willingly or reluctantly—failed to attend his Friday prayers in lieu of driving an assigned route, and therefore could not show that he was either disciplined or threatened with discipline as a result of the conflict.[130] Likewise, in *Johnson v. Midcoast Aviation*, the court found that an Episcopalian employee complied with work protocols that required him to wipe off his ashes on Ash Wednesday—a religious ceremony that contributed to his "spiritual development."[131] As the court explained, had this case been an instance where the employee refused and was disciplined or discharged because of that refusal, then an accommodation claim would be appropriate.[132]

In all these cases (and more),[133] the fundamental outcome is the same: by agreeing to work in non-observance of religious beliefs,

127. *Id.* at *8.

128. Clark v. U.S. Sec. Assocs., Inc., No. 06-1348, 2008 WL 11500374, at *5 (M.D. Pa. Jan. 17, 2008), *report and recommendation adopted*, No. 4:06-CV-1348, 2008 WL 11500370 (M.D. Pa. Feb. 11, 2008).

129. Isse v. Am. Univ., 540 F. Supp. 2d 9, 16–17 (D.D.C. 2008).

130. *Id.* at 28–29.

131. Johnson v. Midcoast Aviation, No. 4:06-CV-1805, 2008 WL 3200801, at *1 (E.D. Mo. Aug. 6, 2008).

132. *Id.* at *7.

133. Several other cases have had the same outcome based on the failure to show adverse action. *See, e.g.*, Francis v. Perez, 970 F. Supp. 2d 48, 60–61 (D.D.C. 2013); *Isse*, 540 F. Supp. 2d at 29; Gueye v. Evans, No. 04 CIV. 6029, 2006 WL 3298427, at *6 (S.D.N.Y. Nov. 13, 2006); Mehar v. 7-Eleven, Inc., No. AW-06-1776, 2007 WL 8045972, at *5 (D. Md. May 29, 2007); Stone v. West, 133 F. Supp. 2d 972, 985 (E.D.

employees seemingly avoid suffering an adverse employment action and thus forfeit their claim for religious discrimination. In the mind of the courts, whatever harms of conviction took place, they were indirectly linked to the employment conflict, and therefore insufficiently tied to the employee's privileges of employment to show adverse action. The employer, in turn, is excused from offering an accommodation and thus benefits from a convenient loophole that harms religious self-realization and undermines the purpose of Title VII in providing the method for a diverse workforce. Since the employee is back to work, the conflict is repeatable, creating the tailored conditions for employment interaction based on the process of non-accommodation and arbitrary choice administration. A process, to borrow a quote from Tertullian, that "is at once merciful and cruel; it passes by, and it punishes."[134]

IV. THE UNFINISHED WINDOW

From the children's stories about Aladdin and the magic lamp comes an episode about the unfinished window. After recovering the lamp rumored to make its owner the most powerful man in the world, Aladdin fell smitten over the Princess, whose beauty had caught his attention and whose affection he desired more than anything else in the world. To draw near to her, Aladdin sent his mother—stockpiled with magic jewels—to solicit the Sultan for the hand of the Princess in marriage. And the Sultan agreed! After a waiting expired, Aladdin came to claim the hand of the Princess and sought to build her a palace befitting of her beauty. In this palace were many windows lined with the finest "rubies, diamonds, and emeralds." On seeing the palace and the four-and-twenty windows, the Sultan cried: "It is a world's wonder! There is only one thing that surprises me. Was it by accident that one window was left unfinished?" "No, sir, by design," returned Aladdin.

Mich. 2001); Franks v. Nebraska, No. 4:10CV3145, 2012 WL 71707, at *13 (D. Neb. Jan. 10, 2012); Pledger v. Mayview Convalescent Home, Inc., No. 5:07-CV-235-F, 2009 WL 1010428, at *13 (E.D.N.C. Apr. 14, 2009); Faulk v. Volunteers of Am., N. Ala., Inc., No. 3:08-CV-0591, 2009 WL 10675327, at *16 (N.D. Ala. Sept. 30, 2009).

134. Tertullian, *Apology*, LOGOS VIRTUAL LIBR. ch. 2, http://www.logoslibrary.org/tertullian/apology/index.html (last visited Mar. 10, 2022) (translated by S. Thelwall).

One window left for the Sultan to complete, which he neither had the means nor the resources to accomplish. Alas, only the Genie of the Lamp could finish this window and he did so at Aladdin's command.[135]

In many ways, the "cruel choice" dilemma and the failure to accommodate test is exactly that: an unfinished window. Whether unwilling or unable, most courts have consistently failed to finish the lattice on the Amended Statute—leaving workers to bear the cost of their conviction. While *some* have attempted to redefine the freewheelin' accommodation claim, most have done little to close the "cruel choice" dilemma and restore the fullness of the Congressional design in removing artificial barriers between work and religion.

A. A Shifting Standard

In 2015, Justice Clarence Thomas threw a wrench into the religious accommodation framework. The case, involving the EEOC, dealt with a "Look Policy" used by the clothing company Abercrombie & Fitch, which refused to hire a Muslim applicant because her religion required her to cover her hair with a veil.[136] Based on the narrow question regarding "notice," the Court found that whether the employer *knew* that the applicant had to wear the veil could be determined through contextual variables, instead of explicit evidence.[137] Because the company had a policy that functioned to exclude certain physical displays of religion, it was ipso facto discriminatory and would move the burden of proof to the company to show why an accommodation was impossible.[138]

Since *Abercrombie* was decided, discussions have taken place regarding what Justice Thomas indicated as a pervasive problem among lower courts of "wrongly assum[ing] that Title VII creates a

135. *See Aladdin and the Wonderful Lamp*, *in* THE BLUE FAIRY BOOK 72 (Andrew Lang ed., 1965). For easy access to this children's story, see *Aladdin and the Wonderful Lamp*, LIT2GO, https://etc.usf.edu/lit2go/141/the-blue-fairy-book/3132/aladdin-and-the-wonderful-lamp/ (last visited Mar. 10, 2022).

136. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 678, 770 (2015).

137. *See id.* at 773–75.

138. *See id.* at 774–75. ("[W]hen an applicant requires an accommodation as an 'aspec[t] of religious . . . practice,' it is no response that the subsequent 'fail[ure] . . . to hire' was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.").

freestanding failure-to-accommodate claim distinct from either disparate treatment or disparate impact."[139] This phrase, as some courts have failed to recognize, was not just his dissenting view, but a reiteration of what the majority got right.[140] By citing to the same section in the majority opinion, Justice Thomas stated his agreement that "two—and only two—causes of action" exist for religious discrimination and repeated that the majority put to rest the notion that Title VII creates a freestanding religious-accommodation claim.[141] His major contention was that the issue of accommodation is better left within the framework of disparate impact liability and that the majority avoided this conclusion by inventing a new theory: "the disparate-treatment-based-on-equal-treatment claim."[142]

After *Abercrombie*, courts have wrestled with this question of how a freestanding accommodation claim can continue to exist when the Court made clear that only two causes of action for claims of religious discrimination exist under Title VII.[143] Some courts have simply ignored the tension, continuing to apply the elements test in light of the EEOC's compliance manual that states "[a] religious accommodation claim is distinct from a disparate treatment claim, in which the question

139. *Id.* at 787 (Thomas, J., concurring in part and dissenting in part).

140. *See* Bhuiyan v. PNC Bank, No. 1:16-cv-03421, at 38 n.41 (N.D. Ga., May 7, 2019) ("Justice Thomas' dissenting opinion is not the law.").

141. In his dissent, Justice Thomas cites to the majority *Abercrombie* opinion at 575 U.S. at 770–73. *See Abercrombie*, 575 U.S. at 780 (Thomas, J., concurring in part and dissenting in part).

142. *Id.* at 789 (Thomas, J., concurring in part and dissenting in part).

143. *Id.* at 771; *see also* Exby-Stolley v. Bd. of Cnty. Comm'rs, 979 F.3d 784, 794 n.3 (10th Cir. 2020) ("Title VII does not have . . . a freestanding claim; any claim under Title VII must necessarily be brought under the rubric of a disparate-treatment claim or disparate-impact claim."); EEOC v. N. Mem'l Health Care, 908 F.3d 1098, 1102 (8th Cir. 2018) ("In our view, it is noteworthy that, prior to *Abercrombie & Fitch*, the EEOC took the position 'that Title VII creates a freestanding religious-accommodation claim,' a position the Court 'rightly put[ ] to rest' in that decision."); Amina Musa, Note, *'A Motivating Factor' - the Impact of* EEOC v. Abercrombie & Fitch Stores, Inc. *on Title VII Religious Discrimination Claims*, 61 ST. LOUIS U. L.J. 143, 164 n.87 (2016) ("Section 2000(e)(j) and the duty to accommodate was seemingly merged in with the definition of 'religion' under Title VII's 'disparate treatment' provision . . . .").

is whether employees are treated equally."[144] Tracking the developments since *Abercrombie* was decided, one study has noted the familiar trend that most courts have simply ignored the shift in precedent and gone along, business-as-usual, applying the failure to accommodate claim in its freestanding-form—using the traditional three-elements and all.[145] Alas, "[a] sow that is washed goes back to her wallowing in the mud."[146]

However, while most courts have maintained the use of the traditional model, some courts have made efforts to modify their approach.[147] In their 2019 article, Bruce N. Cameron and Blaine Hutchison set out the argument for the death of the freewheelin' accommodation claim. Arguing that the Supreme Court in *Abercrombie* rejected the "bifurcated view of religion" rooted in the language of Title VII, the authors show that the statutory provisions under the statute and its amended form now includes an individual's religious observances and practices.[148] Consequently, religious accommodation is no

144. *See* 42 U.S.C. § 2000e(j); EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1120 (10th Cir. 2013) (citation omitted); *see also* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 63 n.1 (1986) ("The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion."). The Northern District of Georgia acknowledged the emergence of two approaches regarding religious discrimination claims involving a failure to accommodate. However, because the employee came to work and thus forfeited his cause of action, the split did not need to be resolved. Bhuiyan v. PNC Bank, No. 1:16-CV-3421, at 35 (N.D. Ga. Sept. 27, 2019). Notably, the EEOC in its updated (2020) Compliance Manual recognizes that the failure to accommodate claim is a type of disparate treatment and that, since the *Abercrombie* decision, "some lower courts have nevertheless continued to characterize denial of accommodation as a distinct cause of action." *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 31, at § 12-I n.17.

145. *See* Bruce N. Cameron & Blaine L. Hutchison, *Thinking Slow About* Abercrombie & Fitch*: Straightening Out the Judicial Confusion in the Lower Courts*, 46 PEPP. L. REV. 471, 505 (2019) (listing cases in Appendix: "Part I Cases").

146. 2 *Peter* 2:22.

147. *See* Cameron & Hutchison, *supra* note 145, at 508 (listing cases in Appendix: "Part II Cases"). Among the examples, the district court of Colorado offers a succinct position statement, holding that "freestanding religious accommodation claims are not viable in light of *Abercrombie*." EEOC v. JBS USA, LLC, 339 F. Supp. 3d 1135, 1176 (D. Colo. 2018).

148. *See* Cameron & Hutchison, *supra* note 145, at 481–82. The bifurcated problem involves the disparate treatment provision of Title VII (i.e., 42 U.S.C. §

longer a stand-alone claim rooted in the definition of religion (i.e., 42 U.S.C. § 2000e(j)) and must be baked into the disparate treatment claim and its accompanying *McDonnel Douglas* framework, which created a shifting burden framework that employment discrimination claims are typically filtered through.[149] According to them, the new framework would adopt the traditional disparate treatment elements, requiring the employee to show that he: (1) was a member of a protected class, (2) was qualified for the position, (3) was rejected or suffered an adverse employment action despite his qualifications, and (4) after being rejected, the position was filled by someone with the same qualifications, or the position remained open and the employer sought someone with the same qualifications.[150] While this approach may not create a simpler interpretative structure for disparate treatment claims, it has the benefit of reconciling the Supreme Court's language with the existing framework.

1. Circuit Courts

Within the circuit courts, there is a confusion. While some courts have continued to apply the traditional three-elements test, others have added a bit of nuance to the discussion.[151] Overall, the

2000e-2(a)(1))—which ensured equal treatment for religion, but excluded religious practice and observance—and, the definitional section (i.e., 42 U.S.C. § 2000e(j)) for religion, which guaranteed accommodation for religious practice. *Id.* at 480; *see also* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 613 (9th Cir. 1988) ("As originally enacted, Title VII of the Civil Rights Act of 1964 simply prohibited employment discrimination on the basis of religion. This prohibition clearly covered discrimination on the basis of religious *belief*; whether it protected employees' religious *practices* was less clear. To clarify the point, Congress amended Title VII in 1972 by adding a definition of religion.").

149. *See* Cameron & Hutchison, *supra* note 145, at 485–86.

150. *Id.* at 500–02. Based on the language in *McDonnell Douglas* and *Abercrombie*, the authors also considered this fourth element to be a matter of discerning whether "something adverse happened to the protected class member that did not happen to those outside of the protected class . . . ." *Id.* at 485 n.82, 502.

151. Circuits upholding the traditional test after *Abercrombie* include the Sixth, Tenth, and Eleventh Circuits. *See* Winchester v. Wal-Mart Stores, Inc., No. 16-5890, 2017 WL 11489879, at *3 (6th Cir. Mar. 2, 2017); Tabura v. Kellogg USA, 880 F.3d 544, 549 (10th Cir. 2018); Jean-Pierre v. Naples Cmty. Hosp., Inc., 817 F. App'x 822, 826 (11th Cir. 2020).

question unfortunately is far too often ignored, even when courts are given the opportunity to offer some clarification consistent with the Supreme Court's proscription on forcing workers to choose between their work and religion.

For example, in a recent decision, the Second Circuit reduced the accommodation test to showing that the employee "requires an accommodation of [his or her] religious practice" and that "the employer's desire to avoid the prospective accommodation [was] a motivating factor in [an employment] decision."[152] The Fourth Circuit, while treating the failure to accommodate claim as a stand-alone cause of action, likewise "modified" the test to require a showing of only: (1) a bona fide religious belief or practice that conflicts with an employment requirement, and (2) evidence that a need for an accommodation served as a motivating factor in the employer's *adverse employment action*.[153] However, since the adverse action prong is baked into this second element, the "cruel choice" dilemma remains.[154] The Fifth Circuit also—in a case dealing with a nursing home employee who refused to pray the Rosary with a resident—stipulated that the holding in *Abercrombie* reduced the critical question in claims of accommodation to "what *motivated* the employer's employment decision."[155]

All these cases suggest that the operative language for courts has now increased from clarifying questions regarding what is "reasonable" and what is "de minimis," to what is "adverse" and what suffices as a "motivating factor."

2. District Courts

Among the lower courts, some have followed suit in offering a semblance of a solution—however muddled they may be—for

152. Lowman v. NVI LLC, 821 F. App'x 29, 31 (2d Cir. 2020) (quoting EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 773–74 (2015)).

153. Abeles v. Metro. Wash. Airports Auth., 676 F. App'x 170, 176 (4th Cir. 2017).

154. The Fourth Circuit requires adverse action to be discharge (constructive or otherwise) or discipline. *See, e.g.*, EEOC v. Consol Energy, Inc., 860 F.3d 131, 143–44 (4th Cir. 2017); Booth v. Maryland, 337 F. App'x 301, 309 (4th Cir. 2009).

155. Nobach v. Woodland Vill. Nursing Ctr., Inc., 799 F.3d 374, 378 (5th Cir. 2015).

eliminating the failure to accommodate claim as a stand-alone issue. These solutions come in the form of reducing the three elements to two—focusing primarily on the question of employer's motivation. As several courts have noted, this "new" standard requires a showing that: (1) the employee had a sincere religious belief that conflicts with a job requirement, and (2) the need for a religious-based accommodation motivated the employer's adverse employment decision.[156]

A court in Florida applied this logic, for example, by merging the failure to accommodate claim within the disparate treatment framework—seeking to find whether an employer made an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.[157] In its analysis, the court recognized the traditional prima facie framework prior to *Abercrombie*, noting that after the decision, the employee "need only show that his need for an accommodation was a motivating factor in the employer's decision . . . ."[158] Once again, this seemingly novel framework is really more of an abandonment of the "actual knowledge" provision and less of an abandonment of the adverse action prong, which the court retained by redefining the third element to say simply that "the employer may not take adverse action with the motive of avoiding the need for accommodating a religious practice."[159] The Eleventh Circuit subsequently confirmed this in upholding the traditional elements test, with the slight modification that the employee need not show that employer has "actual knowledge" of his need for an accommodation.[160]

156. *See, e.g.*, EEOC v. Triangle Catering, LLC, No. 5:15-CV-00016-FL, 2017 WL 818261, at *8 (E.D.N.C. Mar. 1, 2017); Jackson v. NTN Driveshaft, Inc., 15-cv-01321, 2017 WL 1927694, at *1 (S.D. Ind. May 10, 2017); Webster v. Dollar Gen., Inc., 197 F. Supp. 3d 692, 702 (D.N.J. 2016); Summers v. Whitis, 15-cv-00093, 2016 WL 7242483, at *4 (S.D. Ind. Dec. 15, 2016); Schwingel v. Elite Prot. & Sec., Ltd., No. 11 C 8712, 2015 WL 7753064, at *5 (N.D. Ill. Dec. 2, 2015); EEOC v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298, 1318 (D. Colo. 2015); Ross v. Rockwell Automation, No. 5:14-cv-1886, 2015 WL 3970128, at *2 (N.D. Ohio June 30, 2015).

157. Walker v. Indian River Transp. Co., No. 8:15-cv-2245-T-27, 2017 WL 388921, at *2 (M.D. Fla. Jan. 27, 2017), *aff'd*, 741 F. App'x 740 (11th Cir. 2018).

158. *Id.* at *3 (quoting EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 678, 772 (2015)).

159. *Id.*

160. Dalberiste v. GLE Assocs., Inc., 814 F. App'x 495, 497–98 (11th Cir. 2020) (quoting *Abercrombie*, 575 U.S. at 772).

Notably, this threshold debate among lower courts is nothing new. These types of approaches were offered in 1975 by Judge James Bryan McMillan, where he combined the Amended Statute with the existing prima facie threshold under *McDonnell Douglas*. According to Judge McMillan in *Jordan v. North Carolina National Bank*, the religious discrimination test relies on showing the following burden shifting framework: (1) a sincerely held religious belief that prevents compliance with a work mandate; (2) that the employee was qualified for the job; (3) that the employee told the employer about the conflict and asked for an accommodation; (4) an employer's refusal to take reasonable steps to accommodate the religious beliefs of the employee, and; (5) that the employer failed to demonstrate that an accommodation would work an undue hardship on the employer's business.[161]

Conspicuous in its absence is any mention of the need to show adverse action.[162] The court went on to explain that the initial prima facie framework shifts the burden to the employer to prove that they offered a reasonable accommodation, or was unable to do so without incurring undue hardship.[163] So it would appear that this framework in *Jordan* is broken down into the prima facie elements (i.e., sincerity, qualification, notice, and refusal), with the additional shifting burden element that requires the employer to justify its failure to accommodate.

While these efforts are well intentioned, more is needed. The lingering question of adverse action remains in-play, and because lower courts are not likely to change the rules of engagement any time soon, employees deserve a new solution. This Article offers one easy solution and one requiring a little more . . . imagination.

161. *See* Jordan v. N.C. Nat'l Bank, 399 F. Supp. 172, 178–79 (W.D.N.C. 1975), *rev'd*, 565 F.2d 72 (4th Cir. 1977).

162. In this case, the issue, like in *Abercrombie*, was one based on an accommodation for a proscriptive employee. *Id.* at 179.

163. *Id.* This understanding reflects the positions of several other courts that read the Amended Statute to say that a "duty not to discriminate on religious grounds . . . includes an obligation on the part of an employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." *See, e.g.*, Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284, 1288 (D. Vt. 1974); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937, 941 (M.D. Ala. 1974).

B. Prescriptive Mandate With Teeth

Aside from the above-mentioned attempts to accommodate the standard, there is an easier option: the "prescriptive mandate with teeth" option. This standard would trigger a comprehensive enforcement system that aligns with the original language of the Amended Statute. Moreover, this would provide a process that guarantees effective enforcement of the statutory scheme and provides for a cause of action for the aggrieved brought on by the discriminatory conduct of an employer.[164] And the 1980 EEOC Guidelines state:

> After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation.[165]

The stated language requires three things: (1) notice (plus, sincerity is assumed), (2) reasonable accommodation, and (3) justification for refusal. The first two trigger an affirmative duty and an inference of discrimination upon failure or refusal, which can then be retrogressively excused by showing that a reasonable accommodation *was* provided or that no accommodation was possible without undue hardship. As Ninth Circuit Judge Marsha Berzon wrote in dissent:

> To require employees to wait for *other* unfavorable employment actions before they can take steps to protect

164. Yott v. N. Am. Rockwell Corp., 428 F. Supp. 763, 766 (C.D. Cal. 1977).

165. 29 C.F.R. § 1605.2(c) (1980). The most recent compliance manual defined the reasonable accommodation standard this way: "Title VII requires an employer, once on notice, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship." *See* EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 31, at § 12-IV. Further, the EEOC recognized that a denial of religious accommodation is typically a form of disparate treatment in the terms and conditions of employment. *Id.* § 12-I.

> their interests has no basis in the statute. Nor does mandating that employees must risk financial hardship, negative employment histories, and the anxiety of waiting for a discharge or other discipline to occur before their statutory right to religious accommodation can be vindicated.[166]

In sum, neither the EEOC's Guidelines, nor its Compliance Manual, requires further adverse employment action. The failure to accommodate religious observance is itself a Title VII violation, which only a showing of undue hardship can excuse.[167]

The underlying administration for this solution adopts the direct evidence thinking in employment related claims that bypasses the need for a prima facie framework at summary judgment. Direct evidence of discrimination is defined as "evidence that, if believed, proves the existence of a fact without inference or presumption."[168] Typically, "'only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of' some impermissible factor constitute direct evidence of discrimination."[169] If direct evidence is established sufficient to prevail at trial, applying the shifting burden framework is inappropriate.

Under this model, the failure to accommodate triggers a concomitant duty to provide a reason for said failure by showing, for example, undue hardship. Once the triggering day has elapsed, the cause of action remains for the allotted period under the statute of limitation, regardless if the employee compromised his religion by obeying workplace conditions.[170] Since intentional discrimination occurs where an employer has treated a particular person less favorably regarding his "terms, conditions, or privileges" of employment on the basis of a protected category, a cause of action would emerge ipso facto by a breach

166. Lawson v. Washington, 319 F.3d 498, 501–02 (9th Cir. 2003) (Berzon, J., dissenting).

167. *See id.* at 500–01 (Berzon, J., dissenting).

168. Jefferson v. Sewon Am., Inc., 891 F.3d 911, 921 (11th Cir. 2018).

169. *Id.* at 922 (citation omitted).

170. *See* 42 U.S.C. § 2000e-5(e)(1); *see also* Isse v. Am. Univ., 540 F. Supp. 2d 9, 28 (D.D.C. 2008) (noting that a rejection of a request for an accommodation is a "discrete act of discrimination" that triggers Title VII's statutory charge-filing requirement).

of statutory duty to accommodate under the statute.[171] Additionally, as Judge Berzon aptly interprets *Hardison*: "accommodation is a statutory obligation and . . . failing to accommodate is itself an unlawful employment practice, without regard to whether *another* employment consequence, other than the failure to accommodate, is visited upon the employee."[172] This breach is rendered as an act of religious discrimination in the same vein that any proof of direct evidence verifies the existence of discriminatory intent.

The danger this serves is to avoid those instances where an employer simply refuses to accommodate the religious needs of his employee and gets away with the dereliction by the sheer act of fearful compliance. By implementing a process incentivizing an employer to avoid an accommodation it deems inconvenient, Title VII is weakened further given its already low bar for undue hardship.[173] Certainly, the "cruel choice" remains a problem, but at least it does not surrender the employee's right to seek redress in court.

C. Expanding the Meaning of Adverse Action

As discussed, there is a loophole that needs closing. One that benefits the employer in allowing them to change the "terms, conditions, or privileges" of employment and still be retroactively excused by the willing or reluctant conduct of religious workers from fear of the prospect of unemployment. This loophole transforms the inference of discrimination into a lost cause for workers seeking to balance religion and work. Once a notice of conflict triggers a duty to accommodate, the employer must act; and, yet, as the court in *Francis v. Perez* regrettably held, this refusal alone does not suffice to establish a prima facie

171. *See* Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

172. Lawson v. Washington, 319 F.3d 498, 500 (9th Cir. 2003) (Berzon, J., dissenting).

173. *See* Walker v. Indian River Transp. Co., No. 8:15-cv-2245-T-27, 2017 WL 388921, at *3 (M.D. Fla. Jan. 27, 2017); *see also* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 678, 773 (2015) ("[A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.").

case because the worker compromised her religion in complying with conflicting work requirements.[174]

The "cruel choice" paradigm—the second, more "creative" option—intends to close this gap by recognizing an adverse action in the very "cruel choice" of having to decide between one's work and one's religion, thus placing the burden back on the employer to justify its refusal. It does this by appealing to the nature of religion, the sanctity of the individual, and the dignitary harm that comes with the rendering of one's autonomy to the functions of economy.

1. What is Religion?

Defining religion is a daunting task, to say the least. The eminent Judge Augustus Hand offers an excellent starting point, rightly indicating the difficulty in compressing the content of the term into a few words. He writes:

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellowmen . . . in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.[175]

Adding to this definition requires a level of superlative imagination since the concept of religion means so many different things, to so many different people.

At its most basic, religion is a relationship between persons and "the divine," governed by various religious traditions that encompass certain non-negotiable demands on believers in their private and public lives.[176] Among the features of religion is a pervasive energy that

174. Francis v. Perez, 970 F. Supp. 2d 48, 60–61 (D.D.C. 2013).

175. United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).

176. *See* Kathleen A. Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717, 724 (2018); Blair, *supra* note 5, at 547. Pope Benedict XVI illustrates this well when he describes being a Christian as "not the result of an ethical choice or a lofty idea, but the encounter with

entangles the fibers of daily experiences and the institutional pillars of a democratic system of government. It is an undeniable mechanism for good and for ill, guided by the whims and structural defaults of a transcendent design that draws mankind toward a process of creation and decay. Importantly, it provides the process for carving out shared commitments to ultimate truth through the pursuit of broad interests and the application of those interests to daily living. As Paul Tillich remarked, religion is, in its most basic sense, a bridge between the grounded reality in life and the "all-determining" future "ground and substance of man's spiritual life" after death.[177]

Religion has many uses, among those is its ability to draw the bonds between common experiences that come from rooted commitments to something that transcends a person's moral autonomy. It is the intermediary between the natural and supernatural—a bridge between the natural pursuit of man's disposition and his search for the fullness of being. It is a formative expression: gathering the faithful into an associative framework, or what Tertullian called a "body knit together . . . by a common religious profession, by unity of discipline, and by the bond of a common hope."[178] This further speaks to the illustration offered by Simone Weil, who wrote about the mystery of religion as a wall between two prisoners that keep them apart but provides them the means for communication.[179]

Furthermore, religion provides an oasis from the "worm of human nature" and the seeming incoherence of mechanical existence.[180] Sociologist Daniel Bell once observed that man's awareness of their finiteness, "the inexorable limits to their powers . . . and the consequent effort to find a coherent answer to reconcile them to that human

an event, a person, which gives life a new horizon and a decisive direction." Pope Benedict XVI, *Deus Caritas Est*, THE HOLY SEE (Dec. 25, 2005), http://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est.html.

177. PAUL TILLICH, THEOLOGY OF CULTURE 8 (Robert C. Kimball ed., 1959).

178. Tertullian, *supra* note 134, at ch. 39.

179. SIMONE WEIL, *Metaxu*, *in* THE SIMONE WEIL READER 363 (George A. Paniches ed., 1977).

180. *See* TIMOTHY P. JACKSON, POLITICAL AGAPE: CHRISTIAN LOVE AND LIBERAL DEMOCRACY 46 (2015).

condition" will draw them back "to the effort to recover the sacred."[181] He also argued that the "world has become too scientistic and drab," and that human restlessness will seek new measures toward "a sense of wonder and mystery."[182] As such, efforts to stifle or privatize religion will never be successful since its penetrates a very basic need of humanity: *purpose*. Unless man is reduced to a mindless automaton, man will never stop seeking answers to the deepest questions of his condition. Questions that the mere material can never adequately answer, raising the darkened sobbing of Rilke: "we are not really at home in the interpreted world."[183]

While transcendence is often the perennial quality of religious expression, other nuanced definitions exist that place the immanence of divine being at center stage. Discussing the culture wars of the modern period, Steven D. Smith in his excellent work notes the implacable friction between the various conceptions of *transcendent* religiosity and the *immanent* sacred—each vying to colonize the public spaces with their respective symbols of legitimacy.[184] It is this latter, "inner-worldly" source of authority, that predominates the strange rites of our modern religions—as less and less people flock to institutions of religion and replace their commitments of faith with expressions of self-creation. Refusing to abandon mystery, these individuals make religion "the gradually developed experiences of men" who preserve "some perception of the Infinite in nature and in human life."[185] Corresponding to the transcendentalism of Ralph Waldo Emerson, they see the sublimity of nature and marks its lovers as those whose spirit of infancy never dies. He writes: "Standing on the bare ground,—my head bathed by the blithe air, and uplifted into infinite space,—all mean egotism vanishes. I become a transparent eye-ball; I am nothing; I see

181. Daniel Bell, *Modernism, Postmodernism, and the Decline of Moral Order*, *in* CULTURE AND SOCIETY: CONTEMPORARY DEBATES 319, 328 (Jeffrey C. Alexander & Steven Seidman eds., 1990).

182. Daniel Bell, *The Return of the Sacred? The Argument on the Future of Religion*, 28 BRIT. J. SOC. 419, 445 (1977).

183. RAINER MARIA RILKE, *The Duino Elegies: The First Elegy*, *in* THE POETRY OF RAINER MARIA RILKE 8 (A.S. Kline trans., 2001).

184. *See* STEVEN D. SMITH, PAGANS & CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC 258–300 (2018).

185. LYMAN ABBOTT, REMINISCENCES 461 (1915).

all; the currents of the Universal Being circulate through me; I am part or particle of God."[186]

Still others reduce the definition of religion to the whims of human innovation—perhaps most interestingly in the governance of society or society itself as the exalted vision of a civil religion. Writing about the latter, Robert Bellah has called religion a type of "common culture;" and, civil religion, as the national consciousness "where there would be no split in the soul of Christian and citizen."[187] Regarding the former, J. Paul Williams would serve to be the architype in his appeal for an Established Church in America based on the *religion* of democratic ideals.[188] He argues in *What Americans Believe and How They Worship* that culture "is above everything a faith, a set of shared convictions, [and] a spiritual entity" that must be firmly placed and held in the minds and hearts of the people.[189] To this end, Williams turned to the public school system to create a mechanism for the "systematic and universal indoctrination" of children through metaphysical sanctions and ceremonial reinforcements.[190]

Courts have taken a more or less deferential approach to accepting religious claims. In general, the Supreme Court has announced its incompetence to wade into the nuances of particular tenets and left the question of sincerity largely academic.[191] At some point, asserted

186. Ralph Waldo Emerson, *Nature*, *in* ESSAYS & LECTURES 1, 10 (1983).

187. *See* ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL 167 (2d ed. 1992); *see also* Robert N. Bellah, *The Final Word*, *in* CHRISTIANITY AND HUMAN RIGHTS 351, 351–65 (John Witte, Jr. & Frank S. Alexander eds., 2010); Robert N. Bellah, *Civil Religion in America*, *in* AMERICAN CIVIL RELIGION 21 (Russel E. Richey & Donald G. Jones eds., 1974).

188. J. PAUL WILLIAMS, WHAT AMERICANS BELIEVE AND HOW THEY WORSHIP 371 (1952) ("[G]overnmental agencies must teach the democratic ideal *as religion*.").

189. *See* SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 69 (1963) (quoting J. Paul Williams).

190. *See* MARTIN E. MARTY, THE NEW SHAPE OF AMERICAN RELIGION 82–83 (1958). Martin Marty notes elsewhere that J. Paul Williams "showed that the priestly approach to national self-transcendence in civil religion does not always belong to the political right and center." MARTIN E. MARTY, RELIGION & REPUBLIC: THE AMERICAN CIRCUMSTANCE 90 (1987).

191. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014); Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981).

claims may become "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection," but that is typically rare.[192] Brought

The idea of disallowing judges to question the truthfulness of religious dogma was stated best by James Madison when he wrote that allowing for this:

> [I]mplies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.

JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* MADISON: WRITINGS 29, 32 (1999). Adding to this, Thomas Jefferson commented on the disestablishment of religion as a means to protect the basic principles of separation of church and state, writing that disestablishment prohibited the government "from intermeddling with religious institutions, their doctrines, discipline, or exercises." And disestablishment prohibits:

> [T]he power of effecting any uniformity of time or matter among them. Fasting & prayer are religious exercises. The enjoining them [is] an act of discipline. Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own particular tenets.

Thomas Jefferson to Samuel Miller, LIBR. OF CONG. (Jan. 23, 1808), https://www.loc.gov/resource/mtj1.040_0811_0812/?sp=1&st=text/.

192. *Thomas*, 450 U.S. at 715. In general, the sincerity analysis is necessary to differentiate sincerely held beliefs and those aimed to perpetuate a fraud on the court. *See* Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014); Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984). As the Supreme Court noted, the threshold question for sincerity is not in the truth of a belief, but whether that belief is truly held. United States v. Seeger, 380 U.S. 163, 185 (1965). A few examples where sincerity fails rests on questions surrounding whether the practice is based on a purely personal belief, a mere aversion, or an instance where a person's contradictory conduct sufficiently undermines his alleged adherence. *See* Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 482 (2d Cir. 1985); EEOC. v. Unión Independiente, 279 F.3d 49, 57 (1st Cir. 2002); Seshadri v. Kasraian, 130 F.3d 798, 800-01 (7th Cir. 1997); Vetter v. Farmland Indus., Inc., 120 F.3d 749, 752 (8th Cir. 1997). Some courts have also applied a tentative factors test (i.e., "useful indicia") adopted by the Third Circuit to determine if the claimant's belief system is sufficiently religious:

into the workplace, religion remains essential: not only to strengthen the cohesive sentiments that form the interpersonal developments of co-workers, but also serving to elevate their relationships above the mundane common pursuit of mere material goods. As such, religion must not only be protected, but promoted as a function of everyday expression. Its visible display parallels the conveyance of information attached to the process of dialectics—without which man is reduce to the operational parts of an impersonal machinery. As Abraham Kuyper astutely noted, "[t]o mistreat the workman as a 'piece of machinery' is and remains a violation of his human dignity."[193]

Without religion, man is further separated from the wellspring of communal existence and forced to forfeit many corollary rights downstream. As John Witte keenly describes, "[r]eligion is too vital a root and resource for democratic order and rule of law to be passed over or pushed out. Religious freedom is too central a pillar of liberty and human rights to be chiseled away or pulled down."[194] And, so it is, with statutes like Title VII serving as the representative bulwark that ensures religion remains protected in its fullest sense and not as something to be casually dismissed. The ecumenical Orthodox Patriarch Bartholomew once remarked that "faith is not a garment to be slipped on and off; it is a quality of the human spirit, from which it is

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981). Examples of application by lower courts range from rejecting the religious character of a white supremacist group (i.e., Creativity Movement), while accepting the religious character of the Satanic Temple. *Compare* Conner v. Tilton, No. C 07-4965, 2009 WL 4642392, at *6–14 (N.D. Cal. Dec. 2, 2009), *with* Satanic Temple v. City of Scottsdale, No. CV18-00621-PHX, 2020 WL 587882, at *5–7 (D. Ariz. Feb. 6, 2020).

193. ABRAHAM KUYPER, THE PROBLEM OF POVERTY 71 (James W. Skillen ed., 2011).

194. John Witte, Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 450 (2016).

inseparable."[195] By treating religion as something disposed to the whims of the individual, employers violate this very human spirit in disregard to law and policy.

However you define it, religion remains an indelible quality of the human condition. Religion is a force to be reckoned with that can neither be shut out, nor restrained from its baser tendencies toward dominion. It is a force that permeates Western legal institutions and goes to "the heart of [a] pluralistic society."[196] Without its public remonstrance, its imbedded qualities in the sanctity and dignity of man become a festering swell—burdened by the weight of privatization. When a system forces an individual decision between religion and livelihood, it invokes a fundamental dilemma between two basic needs that tear at the soul of the individual—generating various harms of conviction that should be accounted for in the calculus of adverse action.

2. Sanctity (needs-based) Claims

Harms of conviction come in various forms, typically based on harms to the sanctity and dignity of an individual.[197] The terms "sanctity" and "dignity" are often used synonymously and thus surrender their idiosyncratic utility in distinguishing the proper scope of interest being violated by restrictions on religion. For that reason, a word needs to be said concerning these two types and how they play a role in creating the rubric for the special psychic harms that occur due to the cruel choice dilemma.

The Latin *sanctitas* means "inviolability, sacredness, sanctity."[198] It connotes historical claims for moral purity or holiness, particularly when it was seen as a product of divine favor.[199] It is, to borrow a phrase from Timothy P. Jackson, "gifted inviolability based on

195. John Witte, Jr., *Introduction*, *in* CHRISTIANITY AND HUMAN RIGHTS 8, 42 (John Witte, Jr. & Frank S. Alexander eds., 2010).

196. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

197. *See* James E. Wood, Jr., *The Relationship of Religious Liberty to Civil Liberty and A Democratic State*, 1998 BYU L. REV. 479, 484 ("The ultimate basis of religious liberty, as with all civil liberty, is found in the dignity and sanctity of the human person and the inviolability of the human conscience.").

198. *See* JACKSON, *supra* note 180, at 187.

199. *Id.* at 89.

impersonal essence."[200] Understood properly, sanctity is something given, not earned. It is connected to basic needs (e.g., food, drink, companionship) and future potentials (e.g., rational thought, bodily growth). It is an inalienable feature of the human design—tested by the marks of the *imago dei* or "natural rights" endemic to one's human nature. When people speak about the sanctity of life, they mean a permanent feature of existence and not something earned through virtuous labor or reaching some age of maturation. "A sanctified party is not approached from within economies of exchange, but rather is treated with awe precisely to indicate that he is beyond price."[201]

Importantly, this unconditional favor accompanies a duty to respect the sanctity of another as you seek from others the same respect. When Christians invoke the love of God, for example, they speak about the unconditional salvation of God through the agency of his Son and the Holy Spirit—wholly set apart from any loveliness of the recipients of salvation: "he saved us, not because of works done by us in righteousness, but according to his own mercy . . . ."[202] The same applies to loving one's neighbor: not because one's neighbor is particularly lovely, but because he too is made in the image of God and worthy of charity. As Jackson writes, "love of neighbor, attentive to the sanctity of life, is the indispensable social good."[203]

Further, the pursuit of ultimate purpose and meaning is linked to an inviolable condition of mankind and to the concept of the freedom of conscience developed throughout history.[204] To violate this feature

200. *Id.* at 90.

201. *Id.*

202. *Titus* 3:5; *see also Ephesians* 2:8–9 ("For by grace you have been saved through faith. And this is not your own doing; it is the gift of God, not a result of works, so that no one may boast.").

203. JACKSON, *supra* note 180, at 87. Lenn Goodman in his Gifford Lectures offers an astute assessment of the Levitical command to "love thy neighbor as thyself," contending, as Simone Weil did, that the domination instinct soils the mastery of the ego and frustrates the genuine pursuit of balanced regard for the interests of others. SIMONE WEIL, *Love*, *in* THE SIMONE WEIL READER 357, 360 (George A. Paniches ed., 1977); LENN E. GOODMAN, LOVE THY NEIGHBOR AS THYSELF 10, 13 (2008).

204. *See* Wood, *supra* note 197, at 484–88; *see also* ROBERT LOUIS WILKEN, LIBERTY IN THE THINGS OF GOD: THE CHRISTIAN ORIGINS OF RELIGIOUS FREEDOM (2019) (discussing the epistemological development of conscience and liberty in the history of Christian thought).

is to violate a person's administrative matrix: it is to abridge the sanctity of man's conscience regarding matters of ultimate concern. Borrowing from the words of Noah Webster, this process destabilizes the individual's close relationship with his "intangible loyalties, the ethos and higher principles, of the society in which he live[s]."[205] To rend one from such pursuits of higher ends is to fundamentally compromise the sanctity of an individual's being and subject them to disharmony.[206]

As such, when employers subject their employees to the "cruel choice" of deciding between work and religion, they inject themselves into the sanctity of an individual's commitments and force the employee to pollute the convictions of their faith while retaining their professions. Mechanisms empowered to take such liberties succeed in replacing the ordered freedoms of man's essential design by replacing the privileges and commitments he has in entering the workforce, with secular gears that pressure the employee toward the employer's ultimate aim. The "cruelty" of the choice as it connects to the sanctity of

205. CHARLES L. GLENN, THE AMERICAN MODEL OF STATE AND SCHOOL 32 (2012).

206. In the early church, the religious person strove for sanctity, or *purity*, which was necessary to sustain a type of harmony with the unseen world and the supreme good. They did this by seeking to "avoid impurity, or corruption, or pollution, that would negate or undermine the association with the sacred." *See* SMITH, *supra* note 184, at 40–41; see *also* PETER BROWN, AUTHORITY AND THE SACRED 17 (Canto ed. 1997). Today, this sanctity-based view attached to pollution is often invoked in religious liberty cases involving Native Americans given the sacred nature of various geographical shrines to their religion and the need to keep those sites ritually pure. *See, e.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77 (D.D.C. 2017); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 448 (1988). As one source rightly noted, "the choices that federal land managers make regarding Native American sacred sites have some of the most profound implications of any land management decisions. They have the potential to destroy not only specific religious sites but also entire religious belief systems." Michelle Kay Albert, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 COLUM. HUM. RTS. L. REV. 479, 480–81 (2009); *see also* John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 22 (1991) ("Sacred site claims arise when the spiritual and interdependent relationship of Native Americans with all living things, including land, is threatened by development.").

that individual is based precisely on this exchange of higher ends in favor of a condescension to the labor market.

So while a tension is unavoidable, a balance must still be struck between the competing needs of employer and employee. Title VII tries to do just that by requiring on open contest of interests that must be acknowledged and respected to the extent possible. While many courts have dwindled the efficacy of the scope of Title VII's protection with various mechanisms favorable to employers (e.g., de minimis standard, weighing evidence at the summary judgment stage, "honest belief doctrine"),[207] a step toward acknowledging an expanded definition of adverse action can reverse this trend.

3. Dignitary (interest-based) Harms

Alongside the harms connected to sanctity are harms connected to dignity. This term from the Latin *dignitas* is rooted in an interest-based model of metaphysics, whereby the underlying conditions of personality may be stifled through legal exclusions. As such, dignity is fundamentally a product of merit, something achieved through the labor of personal performance and won through "self-consciously embodying the good, freely choosing the right, and effectively maximizing social utility."[208] It is, more broadly speaking, based on a calculation of rewards and punishments—an element that connects to self-expression and the opportunity to manifest the fullness of one's respective ideals.

Unlike the claims of sanctity, claims of dignity are not inalienable or innate, but find their fullness through the individualistic pursuit of discovered commitments. Timothy P. Jackson has done exceptional work in engaging with this term and keeping its respective qualities separate from sanctity. In *Political Agape*, he connects it to a virtue of character or a principle of accomplishment, yielding admiration and respect from others. "Insofar as dignity entails the self-conscious exercise of autonomy, it is the necessary and sufficient condition for

207. *See generally* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL (2017) (discussing the multitude of judicially created doctrines that help employers prevail at summary judgment).

208. JACKSON, *supra* note 180, at 89.

moral responsibility."[209] Just as sanctity attaches to the conscience of the individual, so, too, does the dignity of the individual attach to his vocation being bartered: "As the birds are born to fly, so human beings are born to work."[210] As Martin Maier explains, from a Christian perspective, "work is much more than merely a source of income. It is an integral part of human identity and fulfilment."[211] To those tasked with providing for others, the Bible has a stark warning that exacerbates the "cruelty" of the decision: "if anyone does not provide for his relatives, and especially for members of his household, he has denied the faith and is worse than an unbeliever."[212]

The recognition of dignitary harm has become a *cause célèbre* in cases dealing with the struggle between faith and equality interests involving LGBT-members. Many of these issues deal with an underlying mechanics tethered to claim for antidiscrimination based on preventing dignitary harm. This process, however, is not individualized—driven by a desire for social transformation and the assurances of full participation to protected members through an educational process that renders prejudice something *all* citizens instinctively reject.[213] The

209. *Id.* at 89–90.

210. *See* MARTIN LUTHER, TREATISE ON GOOD WORKS 122–23 (Scott H. Hendrix trans., 2012) (paraphrasing the text of *Job* 5:7).

211. Martin Maier, *The Future of Work After* Laudato si', 108 STUD.: AN IRISH Q. REV. 454, 454 (2019). Cathleen Kaveny offers a profound lesson when she writes that "[a]ll work is to be judged by how it contributes to the wellbeing of the worker; all workers, no matter what their specific tasks, deserve work that accords with their subjective dignity." Cathleen Kaveny, *Catholic Social Teaching and the Gig Economy: Engaging Labour Law and the Desert Fathers*, 108 STUD.: AN IRISH Q. REV. 399, 402 (2019).

212. 1 *Timothy* 5:8 (ESV).

213. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purpose of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627, 649 (2015). Koppelman and others have done well to illustrate the consequential harm that comes with being refused service independent of an intent to discriminate. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW & SOCIAL EQUALITY 7 (1996) ("[T]his project of cultural transformation is one in which the state is appropriately enlisted where it can be helpful."); *see also id.* at 57–114. ACLU's Louise Melling adds further layers to the harm targeted for removal:

> Anti-discrimination laws are fundamentally a way of according recognition, of embracing and opening the doors to those

language in many of these cases is instructive, dealing with the emanation of dignitary harm as the impediment to full citizenship. In various ways, courts have signaled the guarantees of participation through the language of: (1) equal access to goods and services,[214] (2) equal respect for private sexual conduct,[215] (3) equal dignity to make "profound choices" regarding who to marry,[216] and (4) equal right to the benefits of employment without being subject to discriminatory behavior on the basis of being gay or transgender.[217] In cases dealing with antidiscrimination laws, courts have illustrated this process of social engineering by stating that their purpose goes beyond expressing government values and into the realm of ensuring "that services are freely available in the market, and they protect individuals from humiliation and dignitary harm."[218] This understanding is further rooted in the process of destigmatization; or, what the Supreme Court invoked in its concerns that broad exceptions to antidiscrimination measures would create a floodgate effect "resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[219] In Andrew

> traditionally excluded. By declaring that a group has a right to access goods and services and jobs in an anti-discrimination law, the political community takes an affirmative step to accord respect and recognition to a previously excluded group.

Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER 177, 190 (2015); *see also* Donald P. Haider & Jami Taylor, *Two Steps Forward, One Step Back: The Slow Forward Dance of LGBT Rights in America*, *in* AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS 42, 54 (Carlos A. Ball ed., 2016) (envisioning their early advocacy for marriage equality in Massachusetts to be an effort to ensure everyone across the state can go "cradle to grave without discrimination and oppression based on sexual orientation, gender identity, or gender expression.").

214. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018).

215. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

216. Obergefell v. Hodges, 576 U.S. 644 (2015).

217. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

218. Elane Photography, LLC v. Willock, 309 P.3d 53, 64 (N.M. 2013).

219. *Masterpiece Cakeshop*, 138 S. Ct. at 1727; *see also* Brush & Nib Studio, LC v. City of Phx., 448 P.3d 890, 936 (Ariz. 2019) (Bales, J., dissenting) ("The prohibition on discrimination not only promotes equal access, but also serves to eradicate

Koppelman's iteration of the "stigma theory," he outlines leading thinkers on the subject in an effort to show the dignitary harm associated with discrimination is one meant to disenfranchise the individual from full-participation in society.[220] As a result, he writes, a "society devoted to the idea of equal citizenship . . . will repudiate those inequalities that impose the stigma of caste . . . ."[221]

Importantly, the dignitary harms attached to members of the LGBT-community can just as readily be attached to harms of conviction that face the religious community in the employment setting. Where discrimination in the former was meant to disenfranchise the individual from full-participation in society, discrimination in the latter is meant to disenfranchise the individual from full-participation in the workplace. As the protections of Title VII dwindle and more generous paths are carved out by courts through there interpretative frameworks,

discrimination and the attendant humiliation and stigma that result if businesses can selectively treat some customers as second-class citizens.").

220. *See* KOPPELMAN, *supra* note 213, at 58–59; Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977) ("[T]he essence of any stigma lies in the fact that the affected individual is regarded as an unequal in some respect."); *see also* STEVEN B. SMITH, HEGEL'S CRITIQUE OF LIBERALISM: RIGHTS IN CONTEXT 117 (1989) ("For the desire for recognition is a desire unlike others. It is a socially mediated desire insofar as the enjoyment of respect depends upon gaining the approbation of others."). Also illustrative is the statement from Paul Brest regarding the psychic harms attached to various forms of discrimination:

> A second and independent rationale for the antidiscrimination principle is the prevention of the harms which may result from race-dependent decisions. Often, the most obvious harm is the denial of the opportunity to secure a desired benefit—a job, a night's lodging at a motel, a vote. But this does not completely describe the consequences of race-dependent decisionmaking. Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior. Moreover, because acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries.

Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976).

221. KOPPELMAN, *supra* note 213, at 59.

fewer expressions of religion will need to be accommodated as a result. While the Amended Statute was meant to ensure that employees are free to exercise their religion short of undue hardship, the "cruel choice" dilemma creates an endless cycle of dignitary harms, exacerbated further by the employee's false assumptions regarding his protected status.

With several fields of employment already untenable to certain members of the religious community (e.g., pharmacists, public accommodation businesses, county clerks), and with the business market increasingly saturated with the ethos of a progressive system of interaction, a fair question emerges regarding the full participation of religious employees and the extent of protection that remains under Title VII.[222]

222. *See, e.g.*, State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019) (public accommodation); Summers v. Whitis, No. 4:15-cv-00093, 2016 WL 7242483 (S.D. Ind. Dec. 15, 2016) (county clerk); Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015) (pharmacist). It is worth noting that the Roberts court (since 2005) has been largely favorable to religious liberty cases, typically involving Christian conservative claimants, which has done little to advance a wider (and more accurate) image of the utility of religious freedom for all faiths. *See, e.g.*, Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1382–83 (2020); Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 U. KAN. L. REV. 535, 535–39 (2020). Opinions on the development of religious clause jurisprudence in the last decade has generated a fascinating debate that finds preeminent scholars taking widely opposite views on recent developments. *Compare* Richard Garnett, *Symposium: Religious Freedom and the Roberts Court's Doctrinal Clean-up*, SCOTUSBLOG (Aug. 7, 2020, 9:57 AM), https://www.scotusblog.com/2020/08/symposium-religious-freedom-and-the-roberts-courts-doctrinal-clean-up/ ("An important part of the Roberts court story . . . is that it has both continued and facilitated developments-for-the-better in law-and-religion."), *with* Erwin Chemerinsky & Howard Gillman, *Symposium: The Unfolding Revolution in the Jurisprudence of the Religion Clauses*, SCOTUSBLOG (Aug. 6, 2020, 10:36 AM), https://www.scotusblog.com/2020/08/symposium-the-unfolding-revolution-in-the-jurisprudence-of-the-religion-clauses/ ("It is becoming increasing [sic] clear that longstanding principles concerning the First Amendment's religion clauses are being discarded by the conservative justices.").

In his excellent article for the National Affiars, William J. Haun rightly summarizes these debates as a matter about the role of religion and the (present) common good: "[l]egal and cultural debates involving religious liberty are converging toward a single question: whether free religious exercise is part of the common good, or what might now be called a society's overall well-being." William J. Haun, *Religious*

And, despite the arguable confusion on matters of religious obligation that springs from an immature theology of weak or strong conscience in matters of moral complicity, their sincerity is unquestionable and their full-participation in the labor force essential.[223] In the end, Kathleen A. Brady is correct when she estimates: "[a]ccommodations for religious believers and groups whose beliefs and practices are out of step with prevailing norms protect the benefits of American pluralism."[224] The workplace remains a microcosm for these discussions and an essential forum for striking the proper balance between the free exercise of religion and the interest of profit.

4. Responding to Objections

Before we come to the end, a few words are needed to address some of the more interesting objections that help better flesh out this Article's solution. The first deals with the "actual harm" requirement and whether this Article's approach jettisons this aspect of adverse action. In short, it does not! What it does is simply ask to expand the definition of "actual harm" to include *harms of conviction*. Notably, this argument is not without legal precedent, both from the standpoint of companies and individuals. The Tenth Circuit, for example, liberally defines the phrase "adverse employment action" by applying a "case-by-case approach" to fully consider the "unique factors relevant to the situation at hand."[225] The Second Circuit does the same, leaving room for what it calls "indices . . . unique to a particular situation."[226] While these cases focus on claims for sex and age discrimination, their common language in the same field of civil rights litigation makes it

Liberty and the Common Good, NAT'L AFFS. (Spring 2020), https://www.nationalaffairs.com/publications/detail/religious-liberty-and-the-common-good.

223. *See* Anton Sorkin, *"Them": Bridging Divides Between Distant Neighbors After* Masterpiece Cakeshop, 54 U.S.F. L. REV. 117, 156–62 (2019).

224. Brady, *supra* note 176, at 726.

225. Sanchez v. Denver Pub. Schs., 164 F.3d 527, 532 (10th Cir. 1998) (sex and age discrimination claim).

226. Galabya v. N.Y.C. Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (age discrimination claim).

"reasonable to believe that the terminology bears a consistent meaning."[227]

Within the case law for Title VII, we find this in several decisions that acknowledge the viability of "spiritual hardship" as a method proving undue hardship. In *Townley Engineering & Manufacturing*, for example, the owners of a closely held corporation attested to making a "covenant with God" that their business would operate based on certain Christian principles.[228] As part of this commitment, the owners required all the workers to attend a weekly devotional service, which one of their atheist employees eventually found objectionable and sought an accommodation.[229] Instead of allowing the employee to skip, they told him that he "could sleep or read the newspaper" during the services.[230] When the case was brought before the Ninth Circuit, the employer contended that accommodating the employee would cause a "spiritual hardship." In turn, the court acknowledged that such a harm may exist, writing that a cost cannot always be measured in terms of dollars, and that spiritual "costs" must also be given consideration.[231] However, the court noted that it remains dubious that such "costs" can inflict the required level of hardship on a corporate employer.[232] The reason for this is a seemingly weak connection between spiritual cost and the employer's economic well-being.[233]

On an individual level, this discussion can readily be compared to the harm acknowledged by the Supreme Court in *Sherbert v. Verner*. There, the Court dealt with a state's unemployment compensation statute that required an employee be "able" and "available" to accept "suitable work." The employee, however, could not work on Saturdays based on religion, which disqualified her from receiving unemployment benefits.[234] In its analysis, the Court found that the

227. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 253 (2012).

228. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 611–12 (9th Cir. 1988).

229. *Id.* at 612.

230. *Id.*

231. *Id.* at 615.

232. *Id.*

233. *Id.* at 616.

234. Sherbert v. Verner, 374 U.S. 398, 400–02 (1963).

unemployment benefits package not only declares the employee ineligible for benefits solely on the basis of her religion, but also puts pressure on her to forego the practice of her religion to accept work.[235] As the Court explains, requiring a worker to choose between her work and the precepts of her religion "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[236] Just as the employee is harmed by the "cruel choice" framework within the context of full-participation, so, too, does the Court in *Sherbert* acknowledge a corresponding penalty on the free exercise of religion when the state conditions the availability of benefits upon the employee's willingness to "violate a cardinal principle of her religious faith."[237]

Combining these two cases, my approach then asks to expand the definition of adverse action to include a form of "spiritual hardship" attached to the sanctity and dignity of religion and work. In the Title VII context, the purpose of the Amended Statute is to ensure that interferences to the "compensation, terms, conditions, or privileges of employment" be limited to only those things that cannot be reasonably accommodated without causing undue hardship. Among these privileges is the right not to surrender one's religion at work, which is the functional equivalent of an employer's "business activities." Instead of focusing on the "economic well-being" of the employer from *Townley Engineering & Manufacturing*, my approach focuses on the "spiritual well-being" of the employee and the latitude set-out by Title VII

235. *Id.* at 404.

236. *Id.* ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

237. *Id.* at 406. The Supreme Court in *Thomas* explains this well:

> [W]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981).

in granting special favor to accommodating religion. Without this balanced protection, members of the religious community will continue to suffer a special form of "psychic harm" when made to sever the ties of their deeply held commitments.[238]

This then takes us immediately to a second objection demonstrated at length in *Stone v. West.* In that case, Judge Gerald Ellis Rosen indicates that Title VII does not protect against harms to personal religious observances by invoking a false dichotomy between the protective aims of Title VII *during* the workday, while discounting the harms of conviction that manifest outside of work.[239] This logic engages in a specious wall of separation agility that suggests that expressions of faith and its fulfillments therein can be readily compartmentalized

238. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723, 1727 (2018); KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW 57–58 (2015). John Witte illustrates this further by connecting rights, duties, and harm: "[f]or many religions, freedoms and commandments, rights and duties belong together. To speak of one without the other is ultimately destructive. Rights without duties to guide them quickly become claims of self-indulgence. Duties without rights to exercise them quickly become sources of deep guilt." John Witte, Jr., *"To Serve Right and to Fight Wrong": Why Religion, Human Rights, and Human Dignity Need Each Other*, *in* POPE BENEDICT XVI'S LEGAL THOUGHT: A DIALOGUE ON THE FOUNDATION OF LAW 106, 115 (Marta Cartabia & Andrea Simoncini eds., 2015). Regarding balance and harm, note the limiting language from Reinhold Niebuhr: "[p]sychic coercion is dangerous, as all coercion is. Its ultimate value depends upon the social purpose for which it is enlisted." Reinhold Niebuhr, *Moral Man and Immoral Society*, *in* REINHOLD NIEBUHR: MAJOR WORKS ON RELIGION AND POLITICS 135, 328 (Elisabeth Sifton ed., 2015); *see also* H.L.A. HART, LAW, LIBERTY, AND MORALITY 22 (1963) ("[I]nterference with individual liberty may be thought an evil requiring justification for simpler, utilitarian reasons; for it is itself the infliction of a special form of suffering—often very acute—on those whose desires are frustrated by the fear of punishment.").

239. Stone v. West, 133 F. Supp. 2d 972, 985 (E.D. Mich. 2001) ("[H]er personal religious observance suffered on account of her adherence to her work schedule."). This argument regarding spiritual fulfilment tracks closely with other major opinions from the Supreme Court—most notably in *Lyng*—that commits the same reductionistic error and shows why compartmentalizing the scope of religious attainment is problematic. *See, e.g.*, Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, 30 J.L. & RELIGION 36 (2015); Joshua D. Rievman, *Judicial Scrutiny of Native American Free Exercise Rights:* Lyng *and the Decline of the* Yoder *Doctrine*, 17 B.C. ENV'T. AFFS. L. REV. 169 (1989).

between work and home. While protecting the free exercise of religion when the employee gambles with his job (i.e., non-compliance), it forfeits those same rights when the employee gambles with his religion (i.e., compromise) thereby incentivizing the employer's dereliction of duty by holding fast to house odds. It is a curious and untenable reading of the purposes of Title VII that truncates its remedial aims of protecting the exercise of religion, regardless of where the pangs of conviction are felt. As Ninth Circuit Judge Joseph Tyree Sneed wrote: "[a]n employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy."[240]

The *Stone* court summarized this error, holding that Title VII protects employees from suffering an employment action *as a result* of the employees failure to comply with a demand of employment.[241] What the Amended Statute says is quite different—putting the duty on the employer to act; namely, that Title VII protects employees from suffering an employment action *as a result* of the employer's failure to accommodate.[242] And although the court in *Stone* recognizes that actual harm is tethered to the "compensation, terms, conditions, or privileges of employment," it fails to recognize how the very exercise of religion *at work* is a part of that same list of guarantees.[243]

240. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 614 n.5 (9th Cir. 1988).

241. *Stone*, 133 F. Supp. 2d at 985.

242. The catch-22 is that while an employee's refusal to compromise his religion does not eliminate the employer's duty to attempt to accommodate, the employee's compromise does! *Cf.* EEOC v. Ithaca Indus., Inc., 849 F.2d 116, 118 (4th Cir. 1988) ("The district court's conclusion that unless Dean was willing to compromise his religious belief by agreeing to work Sundays on some occasions, Ithaca had no duty to attempt to accommodate the belief turns the statute on its head.").

243. *See supra* Section III.C; *Stone*, 133 F. Supp. 2d at 986 (circumscribing material harm to things like "termination, demotion, decreased wages, a less distinguished title, a material loss of benefits, or significantly diminished responsibilities"). For whatever reason, in its citation, *Stone* leaves out one more avenue imported from *Crady* by the Sixth Circuit: "[a] materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, *or other indices that might be unique to a particular situation*." *See* Crady v. Liberty Nat'l Bank & Tr. Co. of Ind., 993 F.2d 132, 136 (7th Cir. 1993) (emphasis added); Hollins v. Atl. Co., 188 F.3d 652, 662 (6th Cir. 1999).

Third, any suggestions that my approach will open the "floodgates" is a rhetorical leap towards an unproven "parade of horribles." These cases are not as prevalent as some would have courts to believe and only work in instances where the employer neglects its duty to accommodate and finds an escape hatch thanks to the averseness or ignorance of the employee who may not know that nuances of the "cruel choice" dilemma. To quote the Supreme Court in *Sherbert*: "there is no proof whatever to warrant such fears."[244] On the other hand, if the employee does not come to work, then the dignitary harm to his religion is moot and only the employee's subjective fears of an adverse action exists. In that sense, the material harm is not sufficient to sustain the "discharge or discipline" standard since the employer is now the one absorbing the cost of its failure to accommodate; and job security—especially in at-will states or, say, during a pandemic—is generally not one of the "terms, conditions, or privileges of employment."[245]

Finally, the court in *Goldmeier v. Allstate Insurance* upheld the need for adverse action, noting the "analytical difficulties" in cases where the employer is held liable for "turn[ing] a blind eye to employees' religiously motivated minor deviations," despite the absence of evidence showing detriment to the employee.[246] However, this is not quite right, since under my approach the liability would only attach if the employer is unable to rectify its failure through the available affirmative defenses. Excusing the employee's "minor deviation" does not retroactively excuse the employer's major statutory dereliction. And even if that is enough, it ignores the entire issue of when an employee does not deviate from work requirements and yet loses his cause of action. Notably, in a subsequent decision from the Sixth Circuit that upheld the adverse action prong, the court left open the potential for broadening the element to include psychic harm: "[u]nless a plaintiff has suffered some *independent harm* caused by a conflict between his employment obligation and his religion, a defendant has no duty to make any kind of accommodation."[247]

244. Sherbert v. Verner, 374 U.S. 398, 407 (1963).

245. *See* Van Der Meulen v. Brinker Int'l, 153 F. App'x 649, 655 (11th Cir. 2005) ("[T]he test for adversity should be objective, and that an employee's subjective feelings about an employer's actions should not be considered.").

246. *See* Goldmeier v. Allstate Ins. Co., 337 F.3d 629, 637–38 (6th Cir. 2003).

247. Reed v. UAW, 569 F.3d 576, 580 (6th Cir. 2009) (emphasis added).

V. CONCLUSION

This country was founded on a balance between the public participation of religion and the common good strains attached to market capitalism. While religion cannot be expected to always trump the interest of gross profit, a balance must be kept intact for the sake of minimizing the harms of conviction imposed on religious employees. The Supreme Court has been clear that Title VII imparts a special status on religion in the workplace, whereby otherwise-neutral policies must give way to the need for an accommodation.[248] This guarantee is tethered to expectations that protect the religious modes of life from what Justice Warren Earl Burger aptly called "a hydraulic insistence on conformity to majoritarian standards."[249] While the work of vigilance remains to retain the balance of the pendulum, restoring this balance today is an essential step in the jurisprudence of religion-at-work. By expanding the definition of adverse action, courts can finish the window and finally eliminate the "cruel choice" made law.

248. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015).

249. Wisconsin v. Yoder, 406 U.S. 205, 217 (1972).