# Never Again in the Workplace: Title VII's Shield of Intolerance

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With the passage of the Civil Rights Act of 1964, Title VII, it became unlawful for an employer to discriminate against an employee on the basis of his or her religion in the hiring, firing, and all terms, conditions, or privileges of his or her employment. If an employee's religious belief poses a work conflict, an employer is now bound to seek a reasonable accommodation, short of imposing any undue hardship on the employer. One of the primary obstacles to implementation has been defining "religion" under the act. Avoiding earlier judicial mistakes, courts have overlooked antisemitic behavior, shielding intolerance instead. Invariably, judicial outcomes now favor broad protection at the cost of supporting antisemitism and other forms of discrimination.

*Key Words: Antisemitism, Civil Rights, Title VII*

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Religion has been a cornerstone of societal progress since time immemorial. From the pagan beliefs of ancient civilizations to the monotheistic movements thereafter, and everything in between, Americans of all faiths (and particularly Jews) have clung to their beliefs both in personal guidance and in imposing a moral and ethical structure for society.[1]

For just as long, the ability for one to openly practice his or her faith has been an issue under fire. Only in the past fifty years, however, has the federal government provided any substantial protections against discrimination in the workplace for the open expression of one's religious beliefs. With the passage of the Civil Rights Act of 1964, Title VII,[2] it finally became unlawful for an employer to discriminate against any employee on

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1. Jews, for instance, throughout history have been the target of religious discrimination both in the workplace and elsewhere. From biblical through modern times, persecution has ranged from prohibitions of their religious practices, to expulsion from the lands. During the Holocaust, nearly six million were murdered merely for being Jewish. See "History of Antisemitism," http://www.simpletoremember.com/articles/a/HistoryJewishPersecution/; David Frederick Schloss, *The Persecution of the Jews in Roumania* (Nabu Publishing, 2010).

2. 42 USC §2000(e).

the basis of his or her religion[3] in the hiring, firing, and all terms, conditions, or privileges of his or her employment.

Under Title VII, if an employee's religious beliefs conflict with his or her employment, that employee is entitled to seek a reasonable accommodation, short of imposing any undue hardship on the employer.[4] Even with this broad protection against discrimination based upon one's religion, however, there still remained conflicts between the practice of one's faith and employment. Most important, the question was begged: what constitutes a "religion" within the scope of Title VII's protection?

The legislature and judiciary have attempted to resolve this question with statutory interpretation[5] and case law.[6] In trying to avoid their earlier mistakes of applying cultural stigmas, however, the courts have overlooked an inherent negative moral and ethical subjectivity in certain "religious" observances. In tending to favor broad assurances over carefully scrutinizing the dogmas of a person's beliefs, courts have provided protection where all moral compasses would have dictated otherwise. As precedent currently stands, absent any regulatory amendment, the possibility continues for Title VII's protection to accommodate beliefs that are morally and ethically intolerable—particularly antisemitism.

This article theorizes that while all morals and ethics are inherently subjective, ignoring rational scrutiny to protect *all* deeply held beliefs under the current understanding runs counter to the legislative and public policy intent of the Civil Rights Acts of 1957 and 1960 to eliminate discrimination. Part I discusses the evolution of Title VII, including the statutory entitlement to protection against religious discrimination in the workplace and an employer's burden to provide for a reasonable accommodation short of imposing an undue burden. Part II explores the statute's definition of a "religion" in light of its 1972 amendment compared with an academic approach to characterizing a "religion" versus a "cult," concluding that there is in fact no distinction aside from moral and ethical subjectivity. Part III illustrates how, fearing this arbitrary distinction, the courts have broadened Title VII's protections to such an extent that all morality has been lost. The argument is made that, despite the inherent subjectivity of religious morality, extending protections to all deeply held convictions without close

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3. Title VII also establishes protections for classes of employees based upon their race, color, sex, and national origin "with respect to compensation, terms, conditions, or privileges of employment"; 42 USC §2000(e)-2.

4. 42 USC §2000(e)(j).

5. Congress amended Title VII in 1972 to define "religion" as all aspects of religious observance and practice, as well as belief. See n. 28.

6. See nn. 50, 53, 54.

scrutiny actually opens the door to undermining the legislative policy behind the Civil Rights Act.

## I. The Evolution of Title VII

The 1950s and 1960s were a time of great social movement and change. Civil rights groups and individual activists came out in vociferous support of greater equality and freedom for blacks,[7] women,[8] and other minority groups. After much political pressure, legislative recognition was finally afforded to such groups through the passage of the Civil Rights Acts of 1957[9] and 1960,[10] but the standards were generally weak, focusing primarily on the right to vote.[11]

Protests became increasingly violent and disruptive, organized through movements such as the Birmingham Campaign in the spring of 1963.[12] Finally, on June 19 of that year, President John F. Kennedy issued a statement to Congress on the civil rights issues, with a focus on the "fair and full" employment of blacks.[13] This included eliminating racial discrimination in employment, creating more job opportunities, and raising the level of skills through better education.[14] After a series of legislative bills, pro-

7. Sit-ins, boycotts, and non-violent protests, led by such figures as Martin Luther King Jr., Malcolm X, Rosa Parks, and W. E. B. Du Bois, fought for racial dignity, economic and political equality, and freedom from oppression. The National Association for the Advancement of Colored Persons (NAACP) was also making large strides in political lobbying. See Michael Weber and Michael MacCarthy-Morrogh, *Causes and Consequences of the African American Civil Rights Movement* (Evans Publishing Group, 2005).

8. In 1963, Betty Friedan published *The Feminine Mystique* (New York: Norton, 1963), in which she questioned the role of women in public and private life, thereby launching the rise of feminism.

9. 71 Stat. 634 (September 9, 1957).

10. 74 Stat. 86 (May 6, 1960).

11. 71 Stat. 634-638 (September 9, 1957) also gave judges the authority to protect voting rights through the independent investigation of claims depriving or interfering with the ability of certain citizens to vote.

12. In Birmingham, Alabama, the Southern Christian Leadership Conference (SCLC) rallied a campaign of organized protest against white civic authorities. To dissuade involvement, the police used dogs and high-pressure water hoses to control the demonstrators. These demonstrations quickly gained national media coverage as intensified outbreaks of dissolution. See n. 7.

13. Adam W. Aston, "Fair and Full Employment: Forty Years of Unfulfilled Promises," 15 *Wash. U.J.L. & Policy* 285 (citing *John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities,* Pub. Papers 483, 488 (June 19, 1963).

14. Ibid.

posals,[15] subcommittee hearings, and amendments discussed and debated by the House of Representatives and Senate, the regulation evolved into the amended Civil Rights Act of 1964, also known as Title VII.[16] From the principles of the day and the protections necessary for public satisfaction, Congress now afforded protection against discrimination, to be broadly applied in employment, expanding from race or color to national origin, sex, and religion.

As with all newly formed laws, despite the legislature's best efforts, provisions remained open for conflict in practice and judicial interpretation. The general public's understanding of the new rights afforded to employees and the requirements now placed on employers for abiding by Title VII was lacking in some key respects. Religion, in particular, was left open for misunderstanding, requiring elaboration and review by those infringed upon in a long line of evolutionary case history.

In relevant part, section 703(a)(1) of Title VII states that:

> It shall be unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[17]

When religion, sex, and national origin are a bona fide occupational qualification, however, "reasonably necessary to the normal operation of the business," such discrimination shall be permitted.[18] But what exactly is a "religion"? When is it necessary for the operation of an employer's business? And in what way or to what extent, if at all, are employees to be accommodated?

## Reasonable Accommodation and Undue Hardship

Numerous conflicts arose between employers and employees after the passage of Title VII. As ratified in the Act's 1964 draft, there was no

15. See Francis J. Vass, "Title VII: Legislative History," 7 *B.C.L.* Rev. 431 (1966), citing H.R. Rep. No. 570, 88th Cong., 1st Session (1963)—most notably including H.R. 405, "A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age" or the "Equal Employment Opportunity Act of 1963," the most recognizable predecessor to Title VII in its current form.

16. See n. 2.

17. 42 USC §2000(e)-2(a)(1).

18. 42 USC §2000(e)-2(e)(1).

requirement for an employer to accommodate an employee's religious beliefs or practices. With no guidelines on how to interpret the requirements for avoiding discriminatory practice, and with employees refusing to work when it conflicted with their observances, numerous complaints were filed with the Equal Employment Opportunity Commission (EEOC)[19] demanding clarification. Finally, in 1966, the EEOC published two interpretive principles to resolve this conflict. As stated by the EEOC:

(1) Title VII's non-discrimination requirement includes a duty on employers to accommodate the reasonable religious needs of their employees where such accommodation is possible without *serious inconvenience* [emphasis added] to the conduct of the business; and

(2) Employers remain free to establish normal workweek schedules, and to require adherence by all employees to such schedules, despite the disparate impact that such schedules might have on the religious observances of certain employees.[20]

One year later, in 1967, the EEOC amended this guideline to raise the standard for employers; "serious inconvenience" was replaced with "undue hardship" on the employer,[21] putting the burden on employers to prove that "the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence [due to religious observance]."[22]

Defining "undue hardship" was first tackled in *Trans World Airlines* v. *Hardison,*[23] where a union laborer (Hardison) had a conflict between his scheduled work shift and observance of the Saturday Sabbath. After a series of swapping shifts with other workers to avoid any problems with management, Hardison was finally forced to work an assigned Saturday shift, refused, and so was terminated. The labor union's collective bargaining agreement had established a seniority system through which accommodations for all employees was already in place, and the alternatives proposed by *Hardison* would have created an undue burden on Trans World by having to pay overtime wages to those picking up swapped shifts, and so

19. The EEOC was established by Congress as the federal agency responsible for resolving employment discrimination claims. This agency has the power to investigate allegations made by employees and adjudicate the matters for resolution. See Ernest C. Hadley, *A Guide to Federal Sector Equal Employment Law and Practice* (Arlington, VA: Dewey Publications, 2006).

20. See "Guidelines on Discrimination Because of Religion." 31 FR 8370 (June 15, 1966), codified at 29 CFR 1605.1(a) (2).

21. Ibid., 32 FR 10298 (July 13, 1967).

22. Ibid.

23. 432 U.S. 63 (1977).

forth.[24] The Supreme Court thereby held that Title VII's principal aim was to eliminate discrimination, not to require employers to give preferential or unequal treatment to non-religious employees so that religious employees may observe their faith.[25]

In response to this case and some confusion by employers over when an undue hardship actually applied, the EEOC again published guidelines to clarify the Act.[26] In evaluating whether such a hardship existed, the reviewing court was now directed to look at costs imposed on the employer (in relation to the size of the operation and the number of employees requiring the accommodation), and if any seniority system was in place that might be adversely affected by a shift change (ignoring voluntary employee shift swapping).[27] Throughout the following 40 years, this balancing test continued to be evaluated and interpreted. Cost and seniority, however, have remained the statute's two key principles for guidance.

With the employer's burden now codified, what was required to be done (or not done) when an employee's religious observances clashed with the employer's expectations had clearer footing, or at least a clarified method by which the courts would evaluate such conflicts. If an employee declared that his or her work or schedule conflicted with their faith and that he or she needed an accommodation for observance, employers and the courts had a method for evaluating the balance between competing interests. But what then does it mean to be a "religion" for purpose of accommodation?

## II. Defining Religion

In 1972, Congress amended Title VII by defining "religion" to include:

> "*all aspects of religious observance and practice, as well as belief* [emphasis added], unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's

24. Ibid, 78, 79, 84, n. 15.

25. Ibid., 85.

26. "After an employee or prospective employee notifies the employer . . . of his or her need for a religious accommodation, the employer . . . has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer . . . can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship." See 29 *C.F.R.* 1605.2.

27. Ibid. at 1605.2(e)(1) and (2).

> religious observance or practice without undue hardship on the conduct of the employer's business."[28]

By this amendment, *all* individual beliefs held as "religious" were to be accommodated (excepting the aforementioned undue hardships). The word "religious" itself is generally defined as "relating to or manifesting faithful devotion to an acknowledged ultimate reality or deity" or "scrupulously and conscientiously faithful."[29] Under this definition, a similarly broad interpretation is established.

While some cases on religious accommodation have revolved around finding one's beliefs to be of a "bona fide religion" before any discussion of accommodation is made,[30] this is not an actual requirement under Title VII.[31] Even as recently as 2009 in *EEOC* v. *Papin Enters., Inc.*,[32] however, this understanding continues to surface. In *Papin,* an employee who practiced Nuwaubianism[33] was terminated for refusing to remove a nose ring that she professed to be a part of her religious requirements. Although the court ultimately held in her favor, the crux of the matter centered on proving the observance to be of a religious nature. Here, Papin was unable to certify this belief due to the fact that her faith did not have formal ministers

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28. 42 USC 2000(e)(j).

29. "Religious." *Merriam-Webster Collegiate Dictionary,* 11th ed. (Springfield, MA: Merriam-Webster, Inc., 2003).

30. Requiring that the individuals be ". . . members of a bona fide religion . . . sincere in their religious beliefs." *Cutter* v. *Wilkinson*, 544 U.S. 709, 713 (U.S. 2005), where, despite stipulating that petitioners' faiths were sincere, accommodating their religious observances would have imposed an undue burden on the prison system; see also *Gerhardt* v. *Lazaroff,* 221 F. Supp. 2d 827, 833 (SD Ohio 2002). Similarly, Section 19 of the National Labor Relations Act, 29 U.S.C.S. §169, requires "an employee to be a member of and adhere to established and traditional tenets or teachings of a bona fide religion, body, or sect." *Wilson* v. *NLRB*, 920 F.2d 1282 (6th Cir. 1990).

31. See *International Assoc. of Machinists* v. *Boeing*, 833 F.2d 165, 169 (9th Cir. 1987), explaining that Title VII defines religion as "all aspects of religious observance and practice, as well as belief"; *Baird* v. *Cal. Faculty Assn.*, 34 Fed. Appx. 303, 304 (9th Cir. Cal. 2002).

32. 2009 U.S. Dist. LEXIS 30391 (M.D. Fla. 2009), declaring that "[a] claimant must prove initially that she has a *bona fide* religious belief that conflicts with a policy, that she told her employer, and that she was fired for not complying with the policy . . . [the] employer then assumes the burden to show that no reasonable accommodation was available that did not cause an undue hardship."

33. A black Muslim cult led by Malachi (Dwight) York. See Dwight York, James Ingram, and Francis Y. s. Garlawolu, *Nubianism* (General Books, LLC, 2010).

who could speak on her behalf.[34] Without any statutory requirement to assess an employee's religion as anything other than being "scrupulously and conscientiously faithful," there seems to remain an inherent need for courts to compare common religious observances against the outliers. While plaintiffs of the major, established world religions do not encounter this problem (Christianity, Islam, Judaism, for example), courts are often faced with new and different belief structures that test the molds. The problem is that courts are not proficient in the world's religions, and even those individuals recognized in the field as experts have not been able to provide a clear understanding of what makes a system of beliefs a religion.

Scholars have spent centuries attempting to organize a definitive understanding of what constitutes a "religion."[35] While many theories have been developed that help to distinguish this ambiguous term, there seems to be no single conclusive answer. Inevitably, religions are a human creation; they are an arbitrary classification, products of our mind and beliefs. As such, any relative good or evil associated with them is also a fiction; a black cat is only a negative superstition because we believe it to be so; the cross is only a sacred image because Christianity deemed it as such. Good and evil are thus relative, products of our beliefs and associations, and nothing more.

Religions are both reflections and fundamental aspects of society. Thus, as civilization evolves and our notions of good and evil change, so too do religions. Judaism, for example, one of the oldest religions still in existence today, can trace its origins as a means of distinguishing itself from idolatry and Hellenism.[36] Similarly, constantly emerging variations of existing religious movements, often called "sects,"[37] develop out of pre-existing religions.

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34. See n. 32, 1806.

35. ". . . scholars have engaged in the quest for the unique and definitive sine qua non, the 'that without which' religion would not be a religion but rather an instance of something else." Jonathan Z. Smith, *Imagining Religion: From Babylon to Jonestown* (Chicago: The University of Chicago Press, 1982). Smith approached the topic with a comparative study of human experiences and perception, historical perspective, and analysis of modern-day movements. Though Smith never successfully defined the term "religion," he was able to provide a deeper understanding of the human psyche in action.

36. "*Ioudasmos* [Judaism] seems to identify the ways and practices of the Jews in contradistinction with those of the 'barbarians' . . . contrasted with *Hellenismos,* the ways and practices of the Greeks." See "Judaism: An Overview." In Lindsay Jones, *Encyclopedia of Religion,* 2nd ed. Vol. 7 (Detroit, MI: Thomson Gale Publishing, 2005), 4969.

37. "Sects are simply alternative religious organizations with traditional beliefs and practices . . . Almost all religious traditions begin as what we today would call

One of the most infamous counter-religious movements of modern times is that of James Warren Jones and the People's Temple. Jones had created his own society[38] that, at first glance, seemed to mirror the world's many religions. In fact, it was originally affiliated with Christianity (ranked the largest Protestant congregation in northern California in 1974).[39] Jim Jones, however, soon began to stray from the religious norm and, once deemed to be an outsider, the country turned on him and his organization. Though undisputedly a paranoid and tyrannical leader, it was only when national perspective changed that the People's Temple moved from being a "religious sect" to an evil "cult." It was only after the country believed it to be evil that it became so.

What occurred with the People's Temple and its mass suicide in 1978[40] was not new, historically. In 960 A.D., for example, when the Roman army threatened to massacre the Jewish population living on top of Mt. Masada in Israel, the Jewish community chose suicide to preserve their beliefs; hundreds died.[41] More recently, in the 1960s, there was the self-immolation of Buddhist monks during the Vietnam War.[42] The perception of such occurrences is just that—human perception. Judgment of "good" and "evil," application of morality and ethics, seems to be mostly justified only after the fact. Religions are supposed to be divine and holy. Thus, nobody wants to affiliate miscreants and their deeds with sacred faiths. Hesitancy to affiliate violence and uncivilized actions with religions created the term "cult" out of the necessity to provide a classification for those groups generally disliked by the public and society.[43] In a sense, they are the

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a sect." Charles Kimball, *When Religion Becomes Evil* (New York: Harper Collins, 2002), 73.

38. Jones' community ran a "parallel mode of government. Internally, it was a counterpolis. It had its own modes of leadership, its own criteria for citizenship, its own mores and laws, its own system of discipline and punishment." See n. 35, 115.

39. David Chidester, *Salvation and Suicide: Jim Jones, the People's Temple, and Jonestown* (Bloomington, IN: Indiana University Press), 1988.

40. Approximately 900 temple members ingested cyanide in a mass-suicide event. Ibid.

41. Killing oneself is a sin in Judaism. Instead, the community systematically murdered one another in a group "suicide" until the final individual killed himself. This way, the Romans were unable to claim victory over the Jewish population that had survived a lengthy siege in an attempt to overrun the religious community. See Michael Grant, *The Jews in the Roman World* (Macmillan, 1973).

42. Monks doused themselves in gasoline and lit themselves on fire in order to both protect their ideals and protest. See n. 35, 112.

43. ". . . the dogma of cults are more irrational and absolutist than that of more established religion." Andrew J. Pavlos, *The Cult Experience* (Westport, CT: Greenwood Press, 1982), 16.

rejects and outsiders of the religious world. In both a scholarly and a judicial grounding, this "outsider" distinction seems to play a key role in analyzing religious observances.

The mass media's force in creating public opinion is a relatively recent phenomenon. The printing press,[44] allowing for the first mass production of books and manuscripts, was not invented until the 1400s. The radio[45] was unheard of until the late 1800s, and even then was not even popular for general public use until the mid-1900s. Television[46] has also followed a similar history, only becoming affordable for general ownership in the mid 20th century. Before such inventions were made available to the public, information was a slow-spreading concept. What is now known globally within seconds would only have happened (if at all) within a period of months. Therefore, it follows that only recently could public opinion and dissent be advertised; only within the past two centuries has gossip had a venue for mass distribution. This affects all facets of life, from political agendas, to social trends, and of course to religion. And the terrors it can bring are of no small consequence. Adolf Hitler, for example, seeing this instrumentality, utilized all of these new means for mass communication to instill his Nazi agenda.[47] It is then no coincidence that it wasn't until the mid to late 20th century that "cult began to take on negative connotations in popular discourse."[48]

Cults deviate from the religious norm in both their practices and ideologies. When Judaism appeared in pagan Rome, or when Christianity arose from Judaism, their beliefs followed a variant path. Also, a cult's membership, being new, will typically consist of only a small gathering. While organized religions may have a following in the millions, a cult could very well only have adherents in the thousands, hundreds, or even double digits. All of the major religions today were then at one point a "cult" as defined through this analysis. But while these faiths have in the past gotten away

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44. See Samuel Willard Crompton, *The Printing Press: Transforming Power of Technology* (New York: Chelsea House Publishers, 2004).

45. See Hugh G. J. Aitkin, *The Continuous Wave: Technology and the American Radio: 1900-1932* (Princeton, NJ: Princeton University Press, 1985).

46. See Albert Abramson, *The History of Television: 1942-2000* (Jefferson, NC: McFarland & Company, 2003).

47. The *Völkischer Beobachter* ("People's Observer") newspaper, the book *Mein Kampf* (detailing Hitler's beliefs), numerous radio broadcasts, and a wide range of alternatives made it possible for the Nazi party to take power and use it in the way they did. See Anthony Rhodes, *Propaganda: The Art of Persuasion—World War II* (New York: Chelsea House, 1976).

48. Lindsay Jones, *Encyclopedia of Religion*, 2nd ed., Vol. 3 (Detroit, MI: Thomson Gale Publishing, 2005), 6513.

with much discrepancy, today it has become much harder. With the world watching everything, and information spreading at the speed of light, one slipup can mean catastrophe. As seen with Jim Jones, their intentions were good. And it was only after negative press, and their inability to recover from it, that the groups began spiraling downward toward destructive ends. Otherwise, there remains no practical distinction between a "religion" and a "cult," and the perception of a religion remains a fickle thing.

## III. The Judiciary's Moral Standard: Protecting a Right with a Wrong

The Civil Rights Act's protection against religious discrimination is to be extended to "all aspects of religious observance and practice, as well as belief."[49] Originally, this is not necessarily what was afforded to employees discriminated against based upon their beliefs not conforming to the recognized major world religions (i.e., Christianity, Islam, Judaism), societal expectations, or belief structures running counter to the norm. Instead, courts were open to imposing their own moral and ethical subjectivity in deciding when employees would be entitled to such protection. When these outlier beliefs, these counterculture observances or values, conflicted with what society found to be acceptable, Title VII was left open to withdraw back into the shell of theory.

The court in *United States* v. *Seeger*[50] was one of the first instances where the moral subjectivity of a plaintiff's beliefs gained the spotlight. Here, the plaintiff had refused to join the military effort of World War II on the basis that he was a conscientious objector, later convicted for violating the Universal Military Training and Service Act.[51] During this time of global conflict, American culture placed a strong emphasis on doing one's duty to serve one's country, and those avoiding their responsibility were generally held in low regard. Despite this cultural emphasis on serving when drafted, the court in *Seeger* found that his beliefs were within the scope of the Act because they were "sincere and meaningful . . . occup[ying] a place in the life of its possessor parallel to that filled by the orthodox belief in God."[52] To put it plainly, because the plaintiff's views

49. See n. 28.

50. 380 U.S. 163 (1965) .

51. ". . . exempt[ing] from military training and service those who, by reason of religious training and belief are opposed to participation in war, and which defines 'religious training and belief' as an individual's belief in a relation to a 'Supreme Being' involving duties superior to those arising from any human relation . . ." 50 USC Appx. 456(j).

52. Ibid., 166.

were tangibly similar to the cultural, monotheistic, God-fearing society of the time, the court found them to be protected. This was later clarified in *Welsh* v. *United States*, which found that a belief system does not necessarily require the concept of a God, Supreme Being, or an afterlife, so long as it is held with the strength of religious convictions.[53] Although in each case the plaintiff's rights were upheld, the court was forced to tackle the discrepancy between affording protection and meeting society's expected outcome.

Attempting to avoid this pitfall in the future, the EEOC derived an amended regulation from these cases, stating: "the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[54] In clear, textual form, the EEOC adopted a standard by which subjective interpretations are still to be implemented on an individual basis to decide whether that plaintiff's belief structure imposes a moral or ethical guideline, or if it is held with the strength of traditional (modern, popular, and widespread) religious views. To protect from cultural contamination in their decisions, courts have applied this regulation with great deference given to beliefs, seemingly ignoring their moral compasses to protect even discriminatory, hateful, and antisemitic dogmas.

In *Peterson* v. *Wilmur Communications,*[55] the plaintiff belonged to the Church of Creativity, holding central to its tenets the notions of white supremacy and antisemitism.[56] The church's founder, Ben Klassen, has declared democracy to be a Jewish tool to "divide and conquer." The church also has published numerous antisemitic manuscripts, including "The Truth About 9-11: How Jewish Manipulation Killed Thousands." After an article was published detailing these beliefs and Peterson's involvement with the organization, his employer demoted him to a position with lower pay and no supervisory duties. Peterson then brought suit, claiming religious discrimination under Title VII, arguing, ironically, that discriminating against him because of his discriminatory beliefs was improper.

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53. 398 U.S. 333, 339 (U.S. 1970), where the court similarly held that Welsh, a conscientious objector, was not guilty under the Universal Military Training and Service Act because his beliefs were "sincere, intensely personal, and occupied a place in petitioner's life parallel to that filled by the God"; see also *United States* v. *Bush*, 509 F.2d 776 (7th Cir., 1975), which found the plaintiff's atheistic ethical beliefs to be religious despite his having no notion of an afterlife.

54. 29 C.F.R. 1605.1.

55. 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

56. See Sarah Henry, "The Religion of Hatred," *The San Francisco Chronicle,* February 6, 1994; see also Michael George, *Theology of Hate: A History of the World Church of the Creator* (Gainesville, FL: University Press of Florida, 2009).

Citing the EEOC regulation adopted after *Seeger,*[57] the court here found that while the white supremacy and antisemitic notions of Peterson's beliefs were substantially similar to that of the Ku Klux Klan (held by other courts to be a political and social movement, not a religion),[58] the strength of his convictions to the Creativity movement was similar in fervor to that of traditional faiths and so upheld as a protected religion. Even though the teachings of his church were counter to the societal and cultural norms, and even though his faith preached antisemitic, hateful fervor, he was afforded protection under Title VII against discriminatory treatment by his employer because he deeply held those beliefs. The court tried so hard to uphold the notion that there is no imposition of a subjective moral or ethical interpretation that, while going on to declare religion includes any faith "espous[ing] notions of morality and ethics and suppl[ying] a means from distinguishing right from wrong,"[59] it actually provided protection for individuals espousing notions of hatred, violence, and intolerance. Do the courts truly want to recognize that the Church of Creativity, in condemning the Jewish population, knows right from wrong? Does holding this hatred on such a pedestal, with such fervor, truly make it a "religion" and thus entitled to the protective rights of Title VII?

In 1933, Adolph Hitler officially became the chancellor of Germany under the mantra of restoring the nation to its former economic prosperity.[60] From the earliest of his speeches, it was clear that Hitler's policy included a shifting of blame and hatred onto the Jews (along with other minority groups, such as the Gypsies).[61] Initiated by the Nuremberg Laws,[62] antisemitic and discriminatory treatment of Jews began a prevalent rise in the nation's politics, media, culture, and laws, culminating in the Holocaust.[63]

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57. See nn. 50 and 52.

58. 205 F. Supp. 2d 1014, 1022; see also *Slater* v. *King Soopers, Inc.,* 809 F. Supp. 809 (D. Colo. 1992), which found that the Klu Klux Klan is a political organization, not a religion, as defined under Title VII.

59. Ibid., 1023.

60. See Mary Fullbrook, *The Divided Nation: A History of Germany 1918-1990* (Oxford, UK: Oxford University Press, 1992).

61. Ibid.

62. Jewish citizens were deprived of all rights, prohibited from using public transportation, banned from public parks, and forced to wear a yellow star indicating that they were Jewish. See Amy Newman, *The Nuremberg Laws: Institutionalized Antisemitism,* Words That Changed History Series (Lucent Books, 1998).

63. Six million Jews were systematically murdered in the world's most horrific genocide. See Michael Berenbaum, *The World Must Know,* 2nd ed. (Baltimore: The Johns Hopkins University Press, 2006), 93.

But this form of antisemitism was not new[64] nor has it been resolved since. The United Nations Commission on Human Rights proposed a resolution as recently as 1994 (fiercely opposed by Syria) to prohibit intolerant discrimination.[65] Comments made during political campaigns still draw sensitive attention.[66] And organizations like the Ku Klux Klan, dedicated to demonizing minorities like Jews and Blacks, still thrive. With the modern prevalence of antisemitism, it is obvious then that some overlap will occur between people's intolerant beliefs and their workplaces.

As noted earlier, all notions of morality and ethics, right and wrong, are inherently subjective and dependent upon the culture holding their value. Under this simple analysis, even these antisemitic beliefs are subjectively tolerable. In *Peterson*, the underlying legislative and policy intent of Title VII was purportedly upheld by providing protection against discrimination to all aspects of religious observance and practice—clearly without any subjective evaluation of their moral and ethical value. So, is the only test whether a faith provides some recognizable system for making this determination, regardless of its moral compass? Does it only matter that the beliefs are deeply held, without any scrutiny as to an objective right and wrong? Are the courts to defer to any and all systems for determining right and wrong regardless of the consequences the believer's acts carry?

The courts have yet to begin reconciling how a "religion" includes a determination of "right from wrong" but allows for faiths such as Creativity to espouse the hateful antisemitic rhetoric that it does. Instead, the only such distinction the judiciary is actually willing to make on record is whether the group is political or religious, distinguishing the Klu Klux Klan and Nazism from the "church" of Creativity and other such intolerant groups. Are the courts, then, by recognizing Creativity in contrast to the other groups passively acknowledging that preaching antisemitic hatred and propaganda is an establishment of right and wrong?

As seen in *Peterson*,[67] the court provides workplace protections even for those belonging to hate groups such as the Church of Creativity. But "religions" such as these themselves promote discrimination. In essence, the current judicial model is set to permit accommodating employees even

64. Referenced as "the longest hatred," antisemitic rhetoric has been around since ancient Greece and Egypt, dating back to at least 270 BCE. See Robert S. Wistrich, *A Review of Antisemitism: The Longest Hatred* (London: Thames Methuen, 1991).

65. See Anne Bayevsky, "The UN and the Jews," Christian Action for Israel, 2004. http://www.cdn-friends-icej.ca/un/andthejews.html.

66. See Cathy Lynn Grossman, "Sarah Palin's 'blood libel' claim stirs controversy," *USA Today,* January 13, 2011.

67. See n. 55.

when such an accommodation may promote a greater discriminatory practice. Unlike with The People's Temple, evaluating the right or wrong of groups such as these is not an after-the-fact analysis, but instead raises up centuries of bigotry, hatred, and massacre.

## Conclusion

Both practical and moral reasons exist for not extending protections to all deeply held religious beliefs. An employee seeking time to pray during a break in the workday should certainly be accommodated; one whose religion dictates human sacrifice should not, regardless of how sincere the belief may be. Similarly, employees should not be accommodated so that they may further their antisemitic or otherwise intolerant and hateful beliefs. Although clearly an imposition of morality on applying Title VII, there are conceivably foundational "rights" and "wrongs" that should be enforced—murder, human sacrifice, and intolerance included—beyond subjective cultural norms. Some values arguably extend beyond a subjective implication to actually becoming objective standards of morality. Whether this is merely a practical imposition for the preservation of order in society, or an underlying morality, the necessity to deny some "freedoms" is inarguable.

The 1972 Title VII amendment definition[68] makes no reference to morality or ethics. Only through judicial interpretations has this imposition of subjective criteria come into play. Unfortunately, the precedential value of these interpretations serves to prevent courts from applying the legislative policy underlying the Civil Rights Act. Courts have thus felt compelled to overlook a general sense of morality by providing blanket protection, regardless of how wrong the consequences of such decisions may be.

Some acts should never be condoned.

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68. See n. 28.