



July 2012

Not Christian, but Nonetheless Qualified: The Secular Workplace - Whose Hardship?

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Recommended Citation

Alexis, Gwendolyn Yvonne (2012) "Not Christian, but Nonetheless Qualified: The Secular Workplace - Whose Hardship?," *Journal of Religion and Business Ethics*: Vol. 3 , Article 1.

Available at: <https://via.library.depaul.edu/jrbe/vol3/iss1/1>

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Not Christian, but Nonetheless Qualified: The Secular Workplace - Whose Hardship?

Cover Page Footnote

The author expresses thanks the following mentors: to Jose Casanova and Robert Wuthnow for teaching me the Sociology of Religion; to Margaret Farley, Nancy Ammerman, and the late Jacob Landinsky for teaching me NOT to leave Religion out of Sociology; and, finally, to Alan Dershowitz for teaching me to always apply the critical mind of the lawyer.

INTRODUCTION

“In both Islam and Hinduism, the notion that religion is separate from life is unthinkable. In many states Islam describes itself as a way of life rather than as a faith...”¹

An employee that does not see religious life as separate and apart from daily life will not fare well in the American workplace. In the corridors and cubicles of business and government, an advanced industrial society operates with the precision Max Weber theorized as attainable only in a bureaucratized setting not tethered by the limitations of religious authority.² Consistent with Weber's prognosis, business employers generally strive to maintain a secular workplace environment that is free of religious iconography. Moreover, the multicultural nature of U.S. society provides an additional incentive for employers to carve out the workplace as secular territory. Employers wish to avoid clashing religious viewpoints in workplaces that are seldom—if ever—religiously homogeneous.

As a consequence, many employers have adopted policies to ensure workplace secularity to honor the convictions of the irreligious, and also to place the various traditions on an equal footing.³ Therefore, when employees request exemptions from a workplace policy, such as a prohibition against religious garb, employers are apt to take a hard-line approach in order to avoid a "slippery slope."⁴ Being "overtly religious," by making one's religious beliefs visibly

¹ Joanne O'Brien and Martin Palmer, *The State of Religion Atlas* (New York: Simon & Shuster, 1993), 96. A similar observation has been made by Mark Lilla, a Columbia University professor, in his article, "The Politics of God": "Similarly, we must somehow find a way to accept the fact that, given the immigration policies Western nations have pursued over the last half-century, they now are hosts to millions of Muslims who have great difficulty fitting into societies that do not recognize any political claims based on their divine revelation. Like Orthodox Jewish law, the Muslim Shariah is meant to cover the whole of life, not some arbitrarily demarcated private sphere, and its legal system has few theological resources for establishing the independence of politics from detailed divine commands. It is an unfortunate situation, but we have made our bed, Muslims and non-Muslims alike." *The New York Times* Sunday Late Edition Final, Section MM, Magazine (August 19, 2007), 28.

² H. H. Gerth and C. Wright Mills, trans., *From Max Weber: Essays in Sociology* (Oxford, UK: Oxford University Press, 1946).

³ The speciousness of this belief in "secular neutrality" is an underlying theme of this essay.

⁴ Besides seeking accommodation to wear religious attire such as a yarmulke, turban, or *hijab*(headscarf), employers may receive requests to: (i) accommodate males with beards of varying lengths, dreadlock hairstyles, or never-shorn head hair; (ii) grant time off for observance of religious holy days or festival and feast days; (iii) provide space for daily ritual prayers; and (iv) offer food in the employee cafeteria that complies with certain theologically dictated dietary

apparent through religious apparel or grooming habits, is frowned upon in the workplace. As employers ask Muslim female employees not to wear the *hijab* to work and deny employment to Sikh males because of their turbans and uncut hair, the clash between East and West surfaces as more than merely a matter of cultural differences.

For the last two decades, there has been a steady increase in the number of religious discrimination claims filed with the Equal Employment Opportunity Commission (EEOC), the federal agency that administers the Civil Rights Act of 1964 (“Title VII” or “the Act” hereafter). Records of the EEOC indicate that the vast majority of these claims are being filed by individuals who assert that they have suffered discriminatory treatment because they are Muslim or because the perpetrator believed them to be Muslim.⁵ In response to the escalating number of complaints from persons targeted because they are “Arab-looking,” the EEOC has issued two separate “Fact Sheets” addressing the rights of “individuals who are perceived to be Muslim, Arab, South Asian, or Sikh”.⁶

The United States is a microcosm of the pattern of East/West migration that has occurred throughout the West as a result of migration trends established during the last quartile of the twentieth century. This was a period of unprecedented migration of non-Western, non-Christian peoples to the immigrant host lands of the West.⁷ Long touted as secular states in which religion is a private matter, it is extremely important that the pedigreed democracies of the West successfully incorporate these “different believers” – newly arrived immigrants whose religious life is not easily relegated to the private domain.⁸ Ritual prayers, religiously dictated grooming habits and attire, and theologically mandated dietary restrictions constrict the secular arena by becoming visible manifestations

restrictions. See United States Department of Justice Civil Rights Division, “Initiative to Combat Post-9/11 Discriminatory Backlash,” at *2 (“Some reasonable religious accommodations that employers may be required to provide workers include leave for religious observances, time and/or place to pray, and ability to wear religious garb”),http://www.eeoc.gov/facts/fs-relig_ethnic.html.

⁵ Equal Opportunity Employment Commission, *Religion-Based Charges FY 1999 – FY 2009*.

⁶ Equal Opportunity Employment Commission, Questions and Answers About the Workplace Rights of Muslims, Arabs, South Asians, and Sikhs Under the Equal Employment Opportunity Laws (2002), <http://www.eeoc.gov/facts/backlash-employee>.

⁷ Europe has experienced a burgeoning Muslim population due to an influx of laborers, refugees and asylum seekers from Eastern Europe and the Arab countries. In the 1950s there were less than 250,000 Muslims in Europe; today, there are approximately 20 million. Alex Alexiev, “Stumbling Toward Eurabia,” *Focus News Agency* (April 29, 2009), <http://www.focus-fen.net/index.php?id=f1604>.

⁸ Gwendolyn Yvonne Alexis, “Legislative Terrorism: A Primer for the Non-Islamic State; Secularism and Different Believers” (PhD diss., New School for Social Research, 2003).

of the sacred in workplaces, schools, transit terminals, hospitals, neighborhood parks, and various other public venues.

In a totalitarian state, the government could simply ban religion or use the country's constitution to officially label religion as a relic of the past. Castro's Cuba chose the latter route. Up until 1992, the Cuban Constitution provided:

Article 54. The socialist state, that bases its activity and educates the people in the *scientific materialistic conception of the universe*, recognizes and guarantees the freedom of conscience, the individual right to profess any religious belief and to practice, within the confines of the law, the religion of his preference [emphasis added].⁹

However, unlike Cuba, the immigrant host nations of the West are liberal democracies in which religious freedom is deemed to be a fundamental right. Hence, these Western nations are precluded from resorting to the tactics utilized by Cuba to rid their societies of religious influence. Nonetheless, the Western geopolitical region of homogeneously Christian nations is now facing for the first time the challenge of putting non-Christian religions on an equal footing with the Christian sects. The United States is a prime example: long lauded for its pluralistic society, it has only recently experienced *deep* diversity with the arrival of Muslims, Hindus, Sikhs, and Buddhists.¹⁰ Hence, there is a compelling need for the United States to validate the national narrative; namely, that its origin as a

⁹ In 1992, Article 54 was amended to exclude the phrase, “scientific materialistic conception of the universe.” This amendment was part of a concerted effort on the part of the Cuban Government to abandon its atheist stance. A year earlier, in 1991, a new law was passed allowing Cubans to both belong to the Communist Party and to participate in religious associations—something previously forbidden. Gwendolyn Yvonne Alexis, “The Cuba Watch,” 35 *Harvard Divinity Bulletin* 1, (2007), 12–14.

¹⁰ “Until recently—that is to say, until the 1960s—the foreign origins of American religion were primarily European and African... To the home-country list today we must add the Philippines, China, Korea, Vietnam, Thailand, India, Iran, Cuba, Guatemala, and Mexico. Although Christians, in their staggering variety, are still by far the largest religious group in the United States, millions of adherents of other religions—Islam, Hinduism, Buddhism, and more—have joined Jews to expand the boundaries of American religious pluralism to an extent unimaginable only forty years ago. At the same time, Christians from Asia, the Middle East, and Latin America are de-Europeanizing American Christianity.” R. Stephen Warner, “Introduction,” in *Gatherings in Diaspora: Religious Communities and the New Immigration*, eds. Stephen Warner and Judith Wittner (Philadelphia: Temple Univ. Press, 1998), 3. See also, Diana Eck who states that her Pluralism Project “has tracked the changing religious landscape of the United States, especially investigating the ways in which immigrant religious traditions are changing in the American context and the ways in which America is changing as a result of the new immigration.” Diana L. Eck, “The Multireligious Public Square,” in *One Nation Under God? Religion and American Culture*, eds. Marjorie Garber and Rebecca L. Walkowitz (New York: Routledge, 1999), 3.

secular state has made it uniquely suited to the task of creating a level playing field for all religions.¹¹

Title VII makes religious discrimination illegal in all aspects of employment, including hiring and firing. Although Title VII is largely aimed at preventing intentional acts of discrimination, it also covers *unintentional* acts of discrimination such as may occur when neutral practices have a disparate (negative) impact upon persons who are members of the minority groups protected by the Act (“protected minorities”). This departure from the traditional meaning of “discrimination” (i.e., treating someone differently) is accomplished via Subsection 2000e-2(k) of the Act which introduces the concept of “disparate *impact*” discrimination and provides that it is established where:

...a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity... (Title VII, 2000e-2[k] [1][A]) (Emphasis Added).

The expanded definition of discrimination applies to all groups designated as protected minorities under Title VII and therefore religious groups are entitled to relief under the disparate impact theory of discrimination (“DIT” hereafter).

DIT holds much promise for religious minorities as a protected group in that once it is proven that a neutral office policy or practice has a disparate impact on religious minorities, the burden of proof is shifted to the employer to establish an affirmative defense of *business necessity* or the employer is *per se* guilty of an unlawful employment practice.¹² This means that even if one allows that an office dress code is a neutral policy that all employees must abide by, a case can still be made that employees who are religious minorities—especially non-Christians adhering to religions with theologically dictated modes of dress and grooming—are disparately impacted by the policy. In this essay, I argue that DIT, which shifts the burden of proof to the employer to establish “business necessity,”

¹¹ Unfortunately, in the early days of the Republic, the dream was greater than the reality. Throughout New England, mandatory church taxes supported Protestantism, granting a virtual religious monopoly to the Congregational churches of the Standing Order of New England. Akhil Reed Amar, *The Bill of Rights: Creation and Construction* (New Haven : Yale Univ. Press, 1998), 64. Nonetheless, the myth of an American legacy of religious pluralism is so deeply ingrained that it has paradigmatic status in the Sociology of Religion: “For well-known historical reasons the pluralizing process first came to fruition in America, resulting in the establishment of a system of mutually tolerant denominations that has persisted to this day.” Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (New York: Anchor Books, 1967), 137.

¹² Civil Rights Law of 1964, 42 U.S.C. §2000e-2(k)(1)(A)(i).

should be applied *in all religious accommodation cases involving religious minorities*. This is tantamount to making religious accommodation a “fundamental right” for religious minorities with the consequence that they would no longer have to approach employers with “hat in hand” seeking a religious exemption from some office policy—a request that could be refused by the employer at its discretion upon satisfying the present “undue hardship” standard, which is a much lighter burden of proof than “business necessity.”

RELIGIOUS ACCOMMODATION AS A FUNDAMENTAL RIGHT

“Neutrality is a theory about freedom of religion in a world that does not and cannot actually exist.”

Yale Law Professor Stephen L. Carter¹³

The specious nature of the United States’ claim to “secular neutrality” was made evident early in U.S. history by its encounter with the first resident non-Christian—the Jew.¹⁴ In his book, *Chutzpah*, legal scholar Alan Dershowitz disdains the claim that the U.S. is a Judeo-Christian society by pointing out that, at most, American Jews enjoy second-class citizenship.¹⁵ Dershowitz is not a lone voice in expressing the sentiment that rather than being a secular state, the United States is a country that has secularized Christianity.¹⁶ Certainly protection of the religious

¹³ “[W]hat we are bold to call neutrality means in practice that big religions win and small religions lose.” Stephen L. Carter, “Beyond Neutrality,” *The Christian Century* (October 11, 2000), 996.

¹⁴ That the United States is still being challenged to “make adjustments” to get this encounter right is made evident by the American military’s late 20th Century stance against the wearing of the yarmulke by military personnel. In *Goldman v. Weinberger*, 475 U.S. 503 (1986), the U.S. Supreme Court upheld a decision by the U.S. military to prohibit enlisted personnel from wearing yarmulkes while in uniform. However, shortly thereafter, the decision was rendered moot by Congressional enactment of the “Religious Apparel Amendment” permitting the wearing of yarmulkes by military personnel. Pub. L. 100-180, Sec. 508(a)(2), 101 Stat.1086 (1987); 10 U.S.C. Sec. 774.

¹⁵ “Soon after their arrival in significant numbers in their new homeland, American Jews recognized that their minority status would require nontraditional routes of group advocacy if they hoped to abolish the frequent de jure presence of pan-Christian values in American civic culture and public institutions. Indeed, organized Jewish interests were among the first to understand litigation as an effective method to instigate constitutional reform, whether such action challenged religious practices in public schools or state-mandated programs to assist parochial institutions.” Alan M. Dershowitz, *Chutzpah* (New York: Simon & Shuster, 1991), 161.

¹⁶ “Whatever one’s assessment of separating church and state, separating religious from political commitments is not simple and not necessarily of a piece with separating church and state” Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2003), 152; accord, Alexis, “Legislative Terrorism,” 2: “In this dissertation, I argue that it is specious to draw a distinction between the Islamic state where religion influences laws and the Western ‘secular’

liberty of non-Christians would be more likely to occur if in all cases in which an employee makes a religious accommodation request, the employer had to establish that a business necessity precludes granting the request.

I turn now to the argument being made in this paper; it is made in three parts. Part I deconstructs the U.S. secular narrative to elucidate why the onus should be placed upon the employer to defend any denial of a request made by a religious minority for a religious accommodation. Part II sets forth the legal and regulatory framework that must be navigated to establish religious accommodation as a fundamental right for protected minorities, thereby making an employer's refusal to accommodate subject to the "strict scrutiny" standard of judicial review. Part III discusses the critical role that civil society must play in order for religious minorities to obtain religious equality in the American workplace.

A SECULAR STATE WITH A PROTESTANT HERITAGE

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

... U.S. Constitution, Amend. I

Founded by Protestants and established by a Constitution that prohibits a commingling of church and state, the U.S. was destined to become the prototypical secular state. Its people rendered unto the state its due, but their constitution erected a firewall lest the profane be allowed to encroach upon sacred turf. The bifurcation of life into public and private spheres fits with Martin Luther's doctrine of two kingdoms. Luther's exegesis of the Christian Bible led him to posit two separate spheres of human activity, one civil and the other spiritual.¹⁷ The civil sphere is where humans interact with each other within

state where laws are influenced by religion. One is overt, the other covert – Tweedle-dee and Tweedle-dum.”); see also Berger, *The Sacred Canopy*, 108: “We cannot here pursue the interesting question of the extent to which there may be, so to speak, asymmetry between these two dimensions of secularization, so that there may not only be secularization of consciousness within the traditional religious institutions but also a continuation of more or less traditional motifs of religious consciousness outside their previous institutional contexts.”

¹⁷ “...Render to Cæsar the things that are Cæsar's, and to God the things that are God's.” *Mark 12:17*, *The Christian Bible*, King James Version. And, from Martin Luther: “He who is guided by these facts, who comprehends the distinction between the kingdom of heaven and the kingdom of the world, will know how to resist successfully all classes of fanatics.” Richard P. Bucher, ed., *The Sermons of Martin Luther*, VII:272-285, 280, (Grand Rapids, MI: Baker Book House, 1909), 280.

society—a place where they are subject to the civil laws of man. However, in the spiritual domain—concerned with one's soul – one is only answerable to God.¹⁸

Alas, this dualistic worldview is at odds with the worldviews held by the recent influx of non-Christian immigrants. A bifurcated existence directly conflicts with the doctrinal teachings of Islam which speaks to a wide-range of daily activities, with the result that most Muslims do not deem their religious beliefs to be unrelated to their public life. Similarly, Hindus think of their beliefs as integral to their lives for their sacred texts make no mention of a profane area of life that is not governed by religious thought.¹⁹For immigrants whose religious traditions do not countenance a dualistic worldview and its implicit boundaries for religious life, "becoming American" presents challenges not experienced by the primarily Christian and European immigrants that came over during the tidal wave of U.S. immigration at the beginning of the Twentieth Century.

SOCIAL THEORY ON RELIGIOUS IDENTITY AND IMMIGRATION²⁰

“Not to be – that is, not to identify oneself and be identified as—a Protestant, a Catholic, or a Jew is somehow not to be an American. It may imply being foreign, as is the case when one professes oneself a Buddhist, a Muslim, or anything but a Protestant, Catholic, or Jew, even when one's Americanness is otherwise beyond question.”
(Emphasis added)

Will Herberg²¹

Herberg was referring to "immigrant America" when he penned these words in *Protestant-Catholic-Jew: An Essay in American Religious Sociology*. Written in 1955, the book introduced what soon became the theoretical paradigm for

¹⁸ Heinrich Bornkamm, *Luther's Doctrine of Two Kingdoms* (Philadelphia: Fortress, 1966).

¹⁹ O'Brien and Palmer, 96.

²⁰ “Remarkably, religion was initially a minor theme in the scholarship on the ‘new,’ post-1965 immigration. Among sociologists and economists, the predominant emphasis was for a time on the socioeconomic insertion of immigrants and their children. ... But it was a major omission, nevertheless. As in the early 20th century, immigration today is fueling the development of minority religious groups, such as Korean and Chinese Buddhists, Indian Sikhs, and Arab and South Asian Muslims, thereby expanding the range of religious diversity.” Richard Alba, Albert J. Raboteau and Josh DeWind. “Introduction: Comparisons of Migrants and Their Religions, Past and Present,” in *Immigration and Religion in America: Comparative and Historical Perspectives*, eds. Alba, et al. (New York: New York University Press, 2009), 2. (Hereafter, “Alba, et al.”)

²¹ Will Herberg, *Protestant-Catholic-Jew: An Essay in American Religious Sociology* (Garden City, NY: Doubleday, 1955/1960), 257-258. Herberg, who had a PhD from Columbia University, was not a sociologist. Rather, he was a Jewish theologian and a promoter of ecumenism who taught Judaic Studies and Philosophy at Drew University (a Methodist university) for over 20 years.

sociologists examining the role of religious identity in the Americanization of immigrants.²² He theorized that an immigrant's religious identity served as a port of entry into American society, for "such was the shape of America that it was largely in and through his religion that he, or rather his children and grandchildren, found an identifiable place in American life."²³ Herberg's study was based upon the mainly European stock that arrived in America before World War II. As Herberg noted in the above quotation from his book, these immigrants were not Buddhist or Muslim; nor were they Hindu or Sikh, Herberg might have added. However, changes in U.S. immigration law in 1965 made U.S. immigration policy less Eurocentric and more accepting of immigrants from Asia.²⁴ As a result, many "post-1965 immigrants" are followers of the religions identified as foreign and, therefore, "un-American" in Herberg's seminal work.

Understandably, there is a good deal of scholarly interest in the extent to which the incorporation into U.S. society of the post-1965 immigrants with their non-Christian religions can be expected to differ from the assimilation process theorized by Herberg.²⁵ Non-Christian religions have yet to become an integral part of the American religious landscape, which means that followers of those "un-American religions" will face difficulties in gaining full acceptance as Americans. However, just as the United States needs to validate the authenticity of its democratic pedigree by successfully incorporating the newest immigrants into U.S. society, non-Christian immigrants have an important stake in this confrontation between East and West. First-generation immigrants must be able to transmit their religious heritage and cultural traditions to the second generation. In a much-cited study of two Asian-Indian immigrant groups in Los Angeles,

²² In *Gatherings in the Diaspora*, R. Stephen Warner refers to Herberg's *Protestant-Catholic-Jew* as "the classic sociological study of immigration and religion." ("Introduction," 1998, 15-16) And, Alba, et al. (2009, 1-2) describe Herberg's seminal work as "the most famous reflection on issues of immigration and religion ever written."

²³ Herberg, *Protestant-Catholic-Jew*, 27-28.

²⁴ "In 1965, driven by its desire to be seen as the egalitarian champion of the 'free world' and by a Kennedy-inspired sense of a single world, the United States changed the basic scheme of immigration law. Congress abolished the 1920's system that favored immigrants of Western European origins and established an open system premised on family reunification and designed to ensure that no country would have special preferences or quotas." Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850-1990* (Palo Alto: Stanford University Press, 1993), 79.

²⁵ The Pew Charitable Trusts sponsored the "Gateway Cities Projects" to examine the role of religion in the incorporation of the post-1965 immigrants into U.S. society. The Social Sciences Research Council has called for immigration scholars to give more attention to the role of religion in immigrant enculturation in the United States. Social Sciences Research Council, "Migration and Religion" (2009), <http://www.ssrc.org/programs/migration-and-religion>.

sociologist Prema Kurien observed that taking on a religious identity (even for those not religiously observant in their native homeland) is the first step towards immigrant enculturation in America.²⁶

Maintaining personal integrity will enable post-1965 immigrants, who are predominantly non-white, preserve their sense of self-worth thus enabling them to endow their children with a positive self-image. In short, in a racialized society such as the United States, the first generation must arm their children with pride, confidence, and an appreciation for their cultural heritage.²⁷ Unfortunately, in the United States non-whiteness elicits stereotypical responses in the education system and the workplace such as "probably not capable" and "most likely not qualified."²⁸ It is important to prevent these negative stereotypes from being absorbed by the second generation, leading them to develop low self-esteem and to lack confidence in their abilities. Since religion both bears and creates culture,²⁹ non-white immigrants, in particular, will find it beneficial to transmit their religious heritage to the second generation. Close-knit, supportive religious

²⁶ "How to 'fit in' but still maintain one's cultural and personal integrity is the challenge that most immigrants in the United States face in their transition from immigrants to ethnics. Indian immigrants from a Hindu background have achieved this end by using Hinduism, albeit a Hinduism that has been recast and reformulated to make this transition possible." Prema Kurien, "Becoming American by Becoming Hindu: Indian Americans Take Their Place at the Multicultural Table," in *Gatherings in Diaspora: Religious Communities and the New Immigrants*, *supra*, 37.

²⁷ "One of the most identifiable effects of racial discrimination in education and training is the negative impact it has on the performance of children at school. The failure to address the needs of minority children and those of migrant workers through, for example, combating racial stereotyping or through formulating school curricula that include modules on minority languages and cultures, can lead to school curricula which lack relevance for those children. As a result, children may lose interest and become bored at school which in turn increases the risk that children will drop out early or even fail to attend school at all." Report of UN Secretary-General, "Study on the effects of racial discrimination on the children of minorities and those of migrant workers in the fields of education, training and employment" (April 11, 2000).

²⁸ See, Daniel G. Solorzano, "Images and Words that Wound: Critical Race Theory, Racial Stereotyping, and Teacher Education," *Teacher Education Quarterly*, 24:3 (Summer 1997), 5-19. Also see, Jocelyn D. Larkin, "Stereotypes and Decisionmaking: Reconciling Discrimination Law with Science," *CPER JOURNAL* No. 192 (October 2008), 17, wherein it is stated: "Stereotypes cause us to gravitate to those who share our traits. When evaluating employees, supervisors will apply standards more leniently to those in the 'in-group.' Those in the 'out-group' will not get the benefit of the doubt."

²⁹ Eck, "The Multireligious Public Square," 5.

communities can provide the social capital that racial minorities lack in racialized American society.³⁰

In that sense, the situation of the non-white, non-Christian minorities among the post-1965 immigrants is very much akin to the situation of African-Americans in the United States. Since the time of slavery, the Black Church has been the mainstay of African-Americans—an important source of social capital available in a race conscious society that deemed them inferior because of the color of their skin.³¹ Just as African-Americans are visible minorities in the United States, Hindus, Sikhs, Muslims, and Buddhists are non-white, visible religious minorities who are easily identifiable as “different” in a society that is mainly white.³² Thus, like the African-American, the non-Christian exists on the margins of American society—an element of the group itself, but whose “position as a full-fledged member involves both being outside it and confronting it.”³³

How will the transition from newly arrived immigrant to hyphenated-American take place in this Century? Is it destined to be more confrontational

³⁰ The rewards, in terms of school success, that growing up in what sociologists refer to as “thick” religious communities can reap for the second generation have been documented by a study of Catholic Vietnamese immigrants living in an inner-city enclave in New Orleans. *See generally*, Min Zhou and Carl L. Bankston, III, “Social Capital and the Adaptation of the Second Generation: The Case of Vietnamese Youth in New Orleans.” 28 *Int’l Migration Rev.* (1994), 821-845.

³¹ “From the Revolutionary War Period to the present era, Blacks have used the church not only for spiritual guidance and social interaction, but also for an instrument to help guide them to freedom, equality and justice. The church gave Blacks a place in which to release their psychological burdens originating from social, political and economic discrimination placed upon them by a white society. They utilized the church not only for spiritual guidance, but for planning and initiating activities that would help them achieve their full human rights. Therefore, the Black Church seems to be the most important Black institution that continued to grow and prosper despite centuries of abuse and attack upon it and its people by various elements in our society.” Olin Chester Johnson, *The Black Church in America* [microform], (Washington, DC: ERIC Clearing House, 1975), <http://catalogue.nla.gov.au/Record/5288186>.

³² “When a new Hindu temple is constructed, when an Islamic school applies for permission to build, when a Sikh wearing a turban appears for a job interview, or when a Muslim woman wearing hijab goes to the grocery store, the striking visibility of a religious culture unfamiliar to many Americans may be the catalyst of suspicious and fearful response.” Eck, “The Multireligious Public Square, 7.

³³ Kurt H. Wolff, Editor and Trans. *The Sociology of Georg Simmel* (New York: Free Press, 1950), 402. Born in Berlin, Germany, Simmel (1858 - 1918) was of Jewish lineage although he, as did his parents, converted to Christianity. Despite the conversion, Simmel remained an outsider during his career as a professor in the German university system. This was the plight of many Jewish intellectuals in 19th Century Germany, a time when a racially based “secular anti-Semitism” had replaced religious anti-Semitism. That is to say, this *Modern* or *secular* hatred of Jews “was based not on religious practices of the Jews but on the theory that Jews comprised an inferior race.” Gary Grobman, *The Holocaust – A Guide for Teachers* (1990), 1, <http://remember.org/guide/>.

than immigrant integration in the past due to the dual factors of race and religion? The most recent World Values Survey indicates that the United States continues to distinguish itself as the most religious of the Western nations, when measured in terms of both the church-going habits of its residents and the percentage of its residents who deem religion to be “*very important*” in life.³⁴ This seems to imply that outward manifestations of religious identity (whether due to distinctive modes of dress, grooming habits, or obvious ethnicity) should not *per se* be as jarring in the U.S. environ as in other Western locales. However, religious tolerance has become much more nuanced in the United States as a result of the September 11th, 2001, attacks on the World Trade Center (“9/11”). Since 9/11, Arab-Americans have become frequent targets of harassment, racial bias, and discrimination in the United States.³⁵

Islam in the United States

Of all of the post-1965 immigrants, Muslims will have the most difficult time being accepted as Americans and getting their religion accepted as American. The 9/11 attack on the World Trade Center by Muslim extremists and the mounting death toll of American soldiers killed while “fighting terrorism” in Iraq and Afghanistan have generated misdirected hostility towards Islam on the part of many Americans.³⁶ In an address before the Turkish Parliament in April

³⁴ World Values Survey Association, “World Values Survey 2005 Official Data File,” www.worldvaluessurvey.org. But, see Grace Davie, “Europe: The Exception That Proves the Rule?” in *The Desecularization of the World: Resurgent Religion and World Politics*, ed. Peter L. Berger (Grand Rapids, MI: William B. Eerdmans, 1999), 68: “The European Values Study remains cautious about using the term secularization, even in regard to Western Europe, for the data are complex, even contradictory, and clear-cut conclusions are difficult. Bearing this in mind...we might more accurately say that Western Europeans are *unchurched* populations, rather than simply secular.”

³⁵ According to a report by the American-Arab Anti-Discrimination Committee (ADC) Research Institute, “Arab-Americans continue to face higher rates of employment discrimination than in the pre-9/11 period, in both public and private sectors.... Arab-American students continue to face significant problems with discrimination and harassment in schools around the country.” *ADC Research Institute Hate Crimes Report 2003-2007*(2008). The ADC is the largest Arab-American Civil Rights Organization in the United States. It was founded in 1980 to protect the civil rights of people of Arab descent in the United States and to promote Arab cultural heritage. The organization has 38 chapters nationwide and therefore has a membership list that spans the United States. Its headquarters is in Washington D.C. and it maintains the following website: <http://www.adc.org/>.

³⁶ “The Assistant Attorney General for Civil Rights has directed the [Department of Justice] Civil Rights Division’s National Origin Working Group to work proactively to combat violations of civil rights laws against Arab, Muslim, Sikh, and South-Asian Americans, and those perceived to be members of these groups, through the creation of the Initiative to Combat Post-9/11

2009, President Obama felt the need to proclaim that the United States is not at war with Islam.³⁷ It is indeed essential for the United States to dispel the notion that it is in tacit agreement with escalating incidences of discrimination against Muslims (and those believed to be Muslim) in the United States. The U.S. Constitution requires nothing short of an unequivocal and unwavering commitment to religious liberty for Christians and non-Christians alike. Unfortunately, in a digital age with global media coverage of breaking news events around-the-clock, no evidence of anti-Arab sentiment or of religious persecution in the United States will remain undetected for long. As a result, some foreign allies of the U.S. already have the perception that Muslim-Americans are experiencing harassment, discrimination, and hostility solely because of their religious identity.³⁸

In light of this perception among our allies, U.S. policymakers must give attention to the extent to which workplace discrimination is occurring because of Islam's pariah status in the United States. Increasingly, the complaints lodged with the federal agencies charged with administering the nation's antidiscrimination laws are filed by Muslims (and those who have been perceived to be Muslim).³⁹ The standing of the United States in the world community will continue to suffer if it does not stem this rising tide of workplace hostilities towards Muslims and those believed to be Muslim. Religious persecution is an anomaly in a nation founded upon the premise that secularity would secure equal treatment of all religions.

Moreover, ending religious discrimination in the workplace is the key to integrating post-1965 immigrants into mainstream American society. If the wage

Discriminatory Backlash." U.S. Dept. of Justice, Civil Rights Division, *Initiative to Combat Post-9/11 Discriminatory Backlash* (2008) 1.

³⁷ Mark Tran, "US is not at war with Islam, says Barack Obama," *guardian.co.uk* (April 4, 2009).

³⁸ "Clearly, American domestic policy affects its relationship with foreign allies. Therefore, it is essential to the American interest that those relationships be strengthened and maintained. NSEERS and other programs that target the Arab, South Asian and Muslim communities for heightened scrutiny have been well publicized abroad, feeding a growing perception that Arab, South Asian and Muslim visitors are not welcomed in the United States. As a result, programs implemented after September 11, 2001, have caused a significant decrease in the number of people that travel to the United States." Dickinson School of Law Center for Immigrants Rights, *NSeers: The consequences of America's Efforts to Secure its Borders* (March 31, 2009), 33.

³⁹ "Since the attacks of September 11, 2001, the Equal Employment Opportunity Commission (EEOC) and state and local fair employment practices agencies have documented a significant increase in the number of charges alleging workplace discrimination based on religion and/or national origin. Many of the charges have been filed by individuals who are or are perceived to be Muslim, Arab, South Asian, or Sikh. These charges most commonly allege harassment and discharge." EEOC, *Questions and Answers*(2002), 1.

earners in an immigrant family cannot secure or retain gainful employment, the entire family unit risks entering a vicious cycle of poverty and dependency that continues from one generation to the next. When an immigrant family resides in a poor urban neighborhood, the second generation will attend poorer schools, decreasing the likelihood that the second generation will pursue higher education and realize the upward mobility that higher education can bring.⁴⁰ Since workplace discrimination hampers upward mobility, it has the potential to create a permanent societal underclass. Conversely, eliminating religious discrimination in the workplace will facilitate achievement of the important societal goal of integrating the latest immigrant population into mainstream American society. Although workplace discrimination against Muslims and other non-Christians is a dominant theme in this essay, the arguments made herein are equally applicable to all workplace discrimination experienced by persons who are religious minorities and therefore constitute a protected class under Title VII. It is the premise of this paper that, working together, federal regulatory agencies and civil society can end religious discrimination in the workplace. The remainder of this essay is devoted to defending this premise.

THE LEGAL AND REGULATORY FRAMEWORK: THE CURRENT STATE OF U.S. LAW

The case of *Webb vs. City of Philadelphia*, an employment discrimination case brought under Title VII, illustrates the deference given to an employer's uniform dress code policy – such policies are standard fare in the military and with police departments.⁴¹ In *Webb*, a municipal police department refused to accommodate the request of a female police officer to wear a *hijab* (a religiously observant headscarf worn by Muslim females) under her police cap. The district court found that accommodating the female employee's request would impose an undue burden upon the municipal employer.⁴² The Third Circuit agreed, holding that the City of Philadelphia had rightfully refused the accommodation because the Police Directive in question (Directive 78) served a compelling governmental purpose:

It [Directive 78] recognizes that the Police Department, to be most effective, must subordinate individuality to its paramount group mission of protecting the lives and property of the people living, working, and visiting the City of Philadelphia. The Directive's detailed standards with no accommodation for

⁴⁰ Portes and Zhou, "The New Second Generation," 74.

⁴¹ *Webb v. City of Philadelphia*, No. 07-3081 (3d Cir. April 7, 2009).

⁴² *Ibid.*

religious symbols and attire not only promote the need for uniformity, but also enhance cohesiveness, cooperation, and the esprit de corps of the police force. Prohibiting religious symbols and attire helps to prevent any divisiveness on the basis of religion both within the force itself and when it encounters the diverse population of Philadelphia.⁴³

The *Webb* decision makes it apparent that many non-Christian employees will be put in the situation of having to make a choice between (a) being faithful to their religious traditions and (b) adjusting their religious practices so that they may partake of the opportunities that enticed them to migrate to the U.S. in the first place.⁴⁴ Yet, there is little justification for putting non-Christian employees in this quandary given that their situation merits placing the employer under a heavier burden of proof than “undue hardship” – a liberal standard that gives *undue* deference to the employer and a standard that is applied on an individualized basis leading to a haphazard and highly unpredictable development of employment discrimination law.

Religious freedom is deemed to be a fundamental right in democratic societies. The U.S. Constitution establishes the right to freely practice one’s religion and therefore this right should trump an employer’s desire to maintain a secular workplace – a self-interested administrative decision as to office policies, not a constitutionally protected right.⁴⁵ Hence, there has never been sufficient justification for allowing the “undue hardship” standard to undermine religious freedom. Doing so allows the employer to treat religious accommodation as a privilege to be granted or denied at its behest, setting the wrong tone for negotiations between employer and employee with respect to an employee’s right to freely abide by sincerely held religious beliefs.⁴⁶ Quite to the contrary, in the U.S., an employee should have the right to adhere to modes of dress or grooming consistent with the employee’s religious belief even where such dress or grooming manifests a particular religious identity and thus frustrates an employer’s desire to maintain a workplace environment that is devoid of religious symbolisms.

⁴³ Ibid, 11-12.

⁴⁴ In his book, *Chutzpah*, noted legal scholar Alan M. Dershowitz took note of the hard choice that religious minorities face in the United States: “The lack of sensitivity for minority religions is played out every year when schools ranging from kindergartens to graduate schools schedule important events on Jewish (or other minority) holidays, thus requiring many students to choose between family and peers, between religion and success.” Dershowitz, *Chutzpah*, 328.

⁴⁵ U.S. Const., amend. I

⁴⁶ Civil Rights Law of 1964, 42 U.S.C. §2000ez(j). This provision broadly defines “religion” to include “all aspects such as religious observance and practice, as well as belief.”

From “Accommodation” to “Fundamental Right”

Using DIT to determine discrimination in religious accommodation cases will accomplish the objective of making religious accommodation a fundamental right for all employees – a right that can be denied only where an employer can establish a *business necessity* for refusing to grant the religious accommodation request. Under Title VII (42 U.S.C. §2000z[j]), “religion” is defined in a broad enough fashion to encompass the wearing of religious apparel, adhering to religious grooming and dietary mandates, observing religious holy days, engaging in ritual prayers, and the various other religious activities for which non-Christians seek accommodation from their employers. In addition to the broad elaboration of religious engagements contained in the statute, the EEOC has adopted regulatory guidelines which make it clear that it is sufficient for an employee seeking religious accommodation to *individually* deem a practice to be religious.⁴⁷

The elevation of “religious accommodation” to a fundamental right by utilizing DIT to establish employment discrimination in cases involving religious minorities (a “protected” class under Title VII) will lay the groundwork for a “strict scrutiny” review standard by the judiciary in all cases in which an employer has refused an employee’s request for a religious accommodation. Moreover, utilizing DIT to establish the applicability of the strict scrutiny standard of judicial review is not entirely untested in religious discrimination cases. In a unanimous decision, the highly respected New Jersey Supreme Court applied a strict scrutiny standard in a “hostile work environment” case that arose in the context of a religious discrimination claim by a Jewish employee.⁴⁸ The Court determined that “[T]he threshold for demonstrating a religion-based, discriminatory hostile work environment is no more stringent than the threshold that applies to sexually or racially hostile workplace environment claims.”⁴⁹

With respect to the U.S. Supreme Court, it adopted DIT in the landmark case of *Griggs v. Duke Power Co.*, noting that Title VII “proscribes not only overt

⁴⁷ The emphasis on what the individual believes is already the standard for determining if something is a religious practice. In other words, it is irrelevant whether other members of the religious sect of the employee agree that a particular practice is essential or non-essential: “The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.” *Guidelines on Discrimination Because of Religion*, 29 C.F.R. § 1605.1 (2006).

⁴⁸ Hostile work environment claims are generally based upon charges of race or sex discrimination. This particular claim was based upon a New Jersey antidiscrimination statute, the Law Against Discrimination, N.J.S.A. §§ 10:5-1–49 and involved a departmental culture in the Haddonfield Police Department that the court described as “ripe with anti-Semitism.”

⁴⁹ *Cutler v. Dorn*, 955 A.2d 917(N.J. 2008), 924.

discrimination, but also practices that are fair in form but discriminatory in operation.”⁵⁰ In other words, DIT allows the consequences of a policy to be taken into consideration, rather than simply allowing an employer to “skate by” on good intentions. In a provocative article, “Lakisha and Jamal Go to Work: Analyzing Workplace Appearance and Grooming Standards as ‘Racial Stereotyping,’” the authors acknowledge the legitimacy of an employer’s desire to establish certain standards of dress and grooming in the workplace while pointing out that often employers “use grooming and appearance policies to mitigate what they consider to be the negative aspects of minority identity stereotypes within the workplace.”⁵¹ The authors call for an acknowledgement that employers often have both legitimate and discriminatory reasons for adopting workplace appearance codes. Keeping in mind the possibility of dual motivations for workplace dress codes is especially appropriate in situations where employees are barred from wearing religious apparel. The risk of prejudicial action is especially high when Muslim employees seek religious accommodation given the Islamophobia that has surfaced in the United States since 9/11.⁵²

THE REGULATORY ROLE

Department of Labor (DOL)

U.S. employers are subject to an array of laws at the federal and state levels that govern the employer/employee relationship. The Department of Labor (DOL) distributes an *Employment Law Guide* ("the *Guide*") that offers a readily accessible source for business to stay informed about the laws, regulations, and executive orders that create enforceable rights for the American workforce.⁵³ It is

⁵⁰ *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). In *Griggs*, the employer Duke Power Co. required employees desiring to be promoted to other departments to have a high school diploma or pass a standardized intelligence test. This requirement resulted in a disproportionate number of minority workers being denied promotional transfers.

⁵¹ Angela Onwuachi-Willig, and Mario B Arnes, “Lakisha and Jamal go to Work: Analyzing Workplace Appearance and Grooming Standards as ‘Racial Stereotyping’ under the Mixed Motive Standard of Discrimination” (paper presented at the annual meeting of The Law and Society Association, Berlin, Germany, July 24, 2007).

⁵² Luke Howie, “The terrorism threat and managing workplaces,” *Disaster Prevention and Management* 1:3 (2007), 70-78; 70.

⁵³ The *Guide* is accessible on the DOL website (<http://www.dol.gov/elaws/elg/>). As an indication of the breadth of coverage, here are a few of the federal acts that establish employer obligations to employees: Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (2010), Occupational Safety and Health Act, 29 U.S.C. §654 (2010), Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1801–03 (2010), Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1001–91 (2010), Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401–41

an invaluable aid to major employers who, generally, are not exempted from any of the numerous employment laws (as are some small employers).⁵⁴ The DOL has two agencies that monitor employment discrimination for enforcement purposes; namely, the Civil Rights Center and the Office of Federal Contract Compliance Program (OFCCP).

Beyond its regulatory role, the DOL serves as a vital informational source for American business. Through the dissemination of information to employers – whether by means of the *Guide* or on its website – the DOL indirectly helps the nation achieve its goal of a diverse workforce. The government is a major purchaser of goods and services, and as such it is able to require of corporations desiring to become government suppliers or third-party vendors that they provide the government with documentation as to the diversity of their workforce as a prerequisite for participating in the government bidding process.⁵⁵ When the DOL makes it known that there are certain special requirements placed on businesses that receive federal financial assistance or which hold federal contracts or subcontracts, businesses are prone to self-regulate in anticipation of gaining access to the lucrative government market.⁵⁶

(2010), Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–41 (2010) and the Immigration and Nationality Act, 8 U.S.C. §1324(b) (2010). Additionally, there are a number of Executive Orders creating employee rights with respect to supply, service, and construction contracts; e.g., Exec. Order No. 11264, “Employment Nondiscrimination and equal Opportunity.” 31 C.F.R. 67 (1966). Rule 14.1.

⁵⁴ Employers can register with DOL to be notified when updated versions of the *Guide* are posted on the DOL website. <http://dol.gov/compliance>, <http://www.dol.gov/elaws/elg/>, <http://www.dol.gov/elaws/elg/>.

⁵⁵ “Each contracting agency in the Executive Branch of government must include the equal opportunity clause in each of its nonexempt government contracts. The equal opportunity clause requires that the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. American Indian or Alaskan Native, Asian or Pacific Islander, Black, and Hispanic individuals are considered minorities for purposes of the Executive Order. This clause makes equal employment opportunity and affirmative action integral elements of a contractor’s agreement with the government. Failure to comply with the non-discrimination or affirmative action provisions is a violation of the contract.” (Emphasis added.) Executive Order 11246, “Affirmative Action,” (1965/2002), <http://www.dol.gov/ofccp/regs/compliance/aa.htm>.

⁵⁶ Archie B. Carroll and Ann K. Buchholtz. *Business & Society: Ethics and Stakeholder Management* (7th Edition), (Mason, OH: South-Western Cengage Learning, 2009), 463-64.

The EEOC

The EEOC is the federal agency charged with enforcing Title VII and the Civil Rights Act of 1991.⁵⁷ The latter Act amended Title VII to strengthen and improve federal civil rights law. Perhaps the most significant factor in terms of giving teeth to Title VII is the provision in the Civil Rights Act of 1991 allowing damages and attorneys' fees to be awarded to the plaintiff in cases of intentional employment discrimination.⁵⁸ Although both Acts require an employer to *reasonably* accommodate the religious beliefs of employees and prospective employees, the EEOC enforcement guidelines specify that an employer is not required to make even reasonable accommodations where doing so would cause the employer to suffer an *undue hardship*.⁵⁹ The fact that the employer need not suffer undue hardship has provided U.S. employers with a great deal of "wiggle room," while at the same time erecting a significant hurdle for religious-minority employees seeking religious accommodations.

It was, in fact, the EEOC – not the U.S. Supreme Court – that first applied DIT. Title VII does not define discrimination; and in the early years of filing racial discrimination claims against employers on behalf of black workers, the EEOC relied solely on a definition of discrimination that required proving "unequal treatment." It was in 1966 that the EEOC conceived of DIT as a way to successfully bring a discrimination lawsuit against employers for policies that treated blacks and whites equally, but nonetheless resulted in unequal consequences for black employees.⁶⁰ In articulating DIT, the EEOC relied on the fact that Title VII also prohibits neutral policies and practices adversely impacting on members of protected groups where these policies and practices cannot be "justified by business necessity."⁶¹

⁵⁷ Additionally the EEOC enforces the following laws: the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Title I and Title V of the Americans with Disabilities Act of 1990 (ADA), and Sections 501 and 505 of the Rehabilitation Act of 1973, which sections prohibit discrimination against qualified individuals with disabilities who work in the federal government.

⁵⁸ Section 1977A of the Civil Rights Act of 1991, 42 U.S.C. 1981.

⁵⁹ "An employer does not have to provide a reasonable accommodation that would cause an 'undue hardship' to the employer." EEOC, Notice 915.002 (October 17, 2002), <http://www.eeoc.gov/policy/docs/accommodation.html#undue>.

⁶⁰ "In 1966, EEOC issued Guidelines on Employment Testing Procedures. This was the first public articulation of the principle that Title VII prohibited neutral policies and practices that adversely affected members of protected groups and could not be justified by business necessity" EEOC, Rule 14.1, "Employment Nondiscrimination and Equal Opportunity," (1966). 31 C.F.R. 67.

⁶¹ Civil Rights Law of 1964, Title VII, 2000e-2[k].

Muslim employees would greatly benefit from early articulation by the EEOC that religious accommodation is a fundamental right. This articulation can be accomplished through announcement in the *Guide*, adoption of new regulations to shift the burden of proof to the employer in all religious accommodation cases involving religious minorities and by the EEOC utilizing DIT in determining whether to file Title VII cases against employers who refuse to grant religious accommodation requests involving religious minorities. Long before the courts begin to regularly apply DIT in religious accommodation cases involving religious minorities, U.S. employers will have institutionalized a process for considering religious accommodation requests from their employees who are religious minorities that assures compliance with the strict scrutiny standard of judicial review. This is so because major corporate employers have in-house human resources staff and legal counsel whose jobs are to anticipate and avoid exposure of their employer to EEOC regulatory actions. Currently, the EEOC training manual for conducting investigations cautions that, "Charges involving religion may give rise to claims for *disparate treatment*, harassment, denial of reasonable accommodation, and/or retaliation."⁶²

According to a recent survey, 78.4 percent of Americans are Christian; and 10.3% of the American adult population has no religion, being atheist, agnostic, or "secular unaffiliated" (as distinguished from "Religious unaffiliated").⁶³ Altogether, only 4.7 percent of the American adult population adheres to America's four main non-Christian religions (Judaism, Buddhism, Islam, and Hinduism), which means that there are twice as many non-believers as non-Christians in America.⁶⁴

Because non-Christians are such a minute portion of the U.S. population, they will need to form coalitions with other larger groups in order to have any influence in the political arena. However forming such coalitions may be difficult given the newness of their religions on the American religious landscape. Moreover, as will be discussed next, political activism on the part of religion-based coalitions may run afoul of the Internal Revenue Code Section 501(c)(3) constraint on political activity by religious groups. In short, the American political process may not present non-Christians with the opportunity to strike a fair

⁶² (Emphasis Added), EEOC, Compliance Manual (2010).

http://www.eeoc.gov/policy/docs/religion.html#_Toc203359484.

⁶³ The Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey 2008*, <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

⁶⁴ Ibid.

bargain on their own. This reality is justification in itself for recognizing religious accommodation as a fundamental right.⁶⁵

CIVIL SOCIETY

In the U.S., where the religious sector constitutes one of the most vibrant segments of civil society, it is to be anticipated that first-generation immigrants would seek out those with whom they share a common religious heritage in trying to establish social ties in their newly adopted homeland. When all else is different and strange, one takes solace in being able to participate in familiar rites and rituals and in joining with others to observe the traditional holy days of one's faith. In short, a religious home can become a place of refuge for transplanted people. Religious institutions serve both secular and sacred functions. They perform a secular function, when their buildings are used as social space rather than sacred space. As social space, the place of worship provides a link to the secular world that lies outside of the sacred canopy⁶⁶ —a world occupied by persons with different worldviews from the believers inside the sacred tent. As sacred space, religious institutions serve to symbolically shut out the profane world, providing refuge from the cares of the day while uniting in fellowship those sharing a common belief.

Unlike the first wave of white, European, mainly Christian immigrants who found counterparts to their various Christian sects already established in the U.S., the post-1965 immigrants with their Eastern religions arrive on the American religious landscape as Georg Simmel's stranger.⁶⁷ Thus, in addition to serving as shelter from the outside world, the “new” immigrant churches will need to serve as a bridge to a greater society that may not be particularly welcoming. The new immigrant churches are not mainline religious denominations in the United State, although they represent world religions such as Hinduism, Islam, and Buddhism. Thus, unlike the Christian immigrants that arrived in the first wave of immigration earlier in the nation's history, there are fewer established, American religious communities to welcome the non-Christian

⁶⁵ “The difference - or so runs the argument - is that protection of minority rights occurs in the name of correcting defects of *process*, defects that may have prevented minorities from gaining for themselves a fair bargain in the political arena.” (Emphasis Added). Lewis F. Powell, Jr., “Caroline Products Revisited,” 82 Colum. L. Rev. 1087 (1982), 1090.

⁶⁶ Berger, *The Sacred Canopy*.

⁶⁷ “The stranger is thus being discussed here, not in the sense often touched upon in the past, as the wanderer who comes today and goes tomorrow, but rather as the person who comes today and stays tomorrow.” Wolff, *The Sociology of Georg Simmel*, 402.

immigrants to the flock or to give them a roadmap for navigating American society.

Can the religious institutions of Muslims, Hindus, Buddhists, and Sikhs acquire enough social capital and political clout to serve as mediating structures for those belonging to their congregations? The success of these institutions as sources of support for the newly arrived immigrants depends to a large extent on their ability to become instruments of civil society and serve as vigorous advocates for the civil rights of their congregants.⁶⁸ However, maintaining Section 501(c) (3) status (under the Internal Revenue Code) is critical for religious organizations which rely on tax-deductible contributions to keep their coffers filled. And, Section 501(c) (3) status is premised on an absence of political activity by the qualifying organization (IRC).

Few religious organizations could remain in existence if donations to their congregation did not entitle the donors to a charitable deduction on their federal tax returns (against either the federal income tax or the federal estate tax). Ninety-five percent of the revenue of American religious organizations comes from charitable contributions.⁶⁹ The deductibility of a charitable donation is determined by Section 170(c) of the Internal Revenue Code. Since this Section provides only for the deductibility of donations to 501(c)(3) organizations, it is crucial for organizations whose main source of revenue is donations to maintain 501(c)(3) status. The precarious position of religious organizations that become politically active has motivated legal scholars to search for ways to reduce the chilling effect of Section 501(c)(3) on social activism by religious groups.⁷⁰ At least one legal scholar has called upon Congress to clear up the "confusing and ambiguous" language of Section 501(c)(3) to provide religious organizations with more

⁶⁸ The active involvement of Muslim religious organizations in *Webb v. City of Philadelphia*, *supra*, illustrates the importance of civil engagement in the fight against religious discrimination. Joining the AFCLU as friends-of-the-court were The Sikh Coalition, Council on American Islamic Relations, MajlisAsh'shura, American Muslim Law Enforcement Officers Association, Islamic Society of North America, Muslim Public Affairs Council, Muslim Alliance in North America, and Muslim-American Society Freedom Foundation. ACLU of Pennsylvania, et al., "Brief in Support of Reversal of Amici Curiae," *Webb v. City of Philadelphia* (2009), http://www.aclu.org/pdfs/womensrights/webbv.cityofphiladelphia_acluamicus.pdf.

⁶⁹ IndependentSector.org, "Facts and Figures About Charitable Organizations," http://www.independentsector.org/programs/research/charitable_fact_sheet.pdf.

⁷⁰ See, e.g., Keith Blair, Praying for a Tax Break: Churches, Political Speech and the Loss of Section 501(c)(3) Tax Exempt Status, 86 DENV. U. L. REV. 405, ____ (2009); David M. Andersen, Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status Insubstantial Attempts to Influence Legislation, 2006 BYU L. REV. 115, 115–74 (2006); see also Vaughn E. James, Reaping Where They Have Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?, 43 CATH. LAW. 29 (2004).

guidance in terms of what constitutes "substantial" political activity.⁷¹ The inability to engage in political activism is not a major hurdle for religious traditions that do not embrace social justice as part of their mission. However, where a religion's doctrinal teachings command the faithful to take social action to eradicate the injustice of *this world* – such as Protestantism which spawned the Social Gospel movement or Catholicism which resulted in the Papal Encyclical for Social Justice, the activities of that group are likely to run afoul of the Section 501(c)(3) ban on political action.⁷²

LET JUSTICE RAIN DOWN: THE BLACK CHURCH.

As was noted above, the Black Church has long been vested with the responsibility of "speaking truth to power"— of being a voice for the voiceless, a champion for the disenfranchised.⁷³ There is no doubt that the marches, sit-ins, and other acts of protest during the Civil Rights era constituted prohibited political activity under 501(c)(3), designed to influence legislation and bring an end to Jim Crow laws, Poll Taxes, and the like. The Black Church was heavily involved, as it needed to be, since its legitimacy within the black community was (and remains) contingent upon it fulfilling the role of advocate for the downtrodden and marginalized. Abiding by the Section 501(c)(3) stricture against political activity would cause the Black Church to lose credibility in the very community it was created to serve during the dark history of slavery. Indeed, it is important for all religious institutions, regardless of denomination, to retain the moral authority to speak up for the marginalized and downtrodden in society.

Particularly for non-Christian religious organizations, it will be important to preserve their religious integrity while becoming integrated into the American religious landscape. However, this integration will not be without costs. Although the United States has never officially declared Christianity to be the national religion, there is evidence that this is the case.⁷⁴ America's so-called civil religion

⁷¹ Vaughn E. James, "Reaping Where They Have Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?" 43 *Catholic Law* 29 (2004), 74.

⁷² A case in point is the All Saints Church of Pasadena, California, which has attracted the ire of the IRS by using its pulpit to (1) criticize Japanese internment camps during World War II, (2) protest against the Viet Nam War, and (3) call for an end to the War with Iraq. Ana Pecina Walker, "Churches Might be Freer without Tax Exemption," *News-Journal.com*. (September 24 2006).

⁷³ Additionally, it is worth noting that during the Civil Rights Era, when acts of civil disobedience were a frequent occurrence, the Black Church was joined by churches of all denominations who sought to speak truth to power about the injustices of segregation.

⁷⁴ The secularization of the Christian calendar is but one example of the widespread institutionalization of a work week and legal holidays that coincide with the theological teachings

is testament to the fact that the U.S. Government has never purposefully banned religion from the public square and its overriding presence as a form of generic Christianity means that in becoming part of the American religious landscape, “new” religions run the risk of homogenization as hybrid forms of Christianity.⁷⁵ This homogenization of immigrant religions has been identified in studies conducted by religious scholars that show no matter how a religion is practiced in its country of *origin*, it takes on a congregational form in the United States.⁷⁶

CONCLUSION

I have argued that DIT is the more appropriate legal theory to establish employment discrimination in religious accommodation cases that involve employees who are both religious minorities *and* national origin minorities – as are many post-1965 immigrants. Clearly the intentionally secularized American workplace has a disparate impact on employees whose religious life is not easily relegated to the private sphere because it entails adhering to particular modes of grooming or dress – such as uncut hair for Sikh males and the wearing of the hijab by Muslim women – that make religion manifest in secular space.⁷⁷ Hence, creation of a fundamental right to religious accommodation in the workplace for employees who are both religious minorities and national origin minorities is mandated.

Western secularism does not level the playing field for non-Christian religions; rather it has a chilling effect on the ability of non-Christians to freely

of Christianity. In 1870, President Ulysses S. Grant designated Christmas Day, the holiest day in the Christian calendar, save Easter, a federal holiday—thereby making it a non-workday for all federal employees, including U.S. postal workers. “Holidays,” 5 U.S.C. Section 6103 (2009).

⁷⁵ “Civil religion, narrowly conceived, is the use of God language with reference to the nation. [...] More broadly conceived, civil religion may be defined as the symbolism by which a people interprets its historical existence in light of transcendent reality.” Robert Wuthnow, *Producing the Sacred: An Essay on Public Religion* (Champaign, IL: Univ. of Illinois Press, 1994), 130..

⁷⁶ “This convergence toward de facto congregationalism is happening despite, indeed partly because of, the increasing divergence of religious cultures in the United States; it constitutes both assimilation to a deep-seated interdenominational American religious model and selective adaptation of normative elements contained in the various religious traditions that make up our pluralistic mosaic.” R. Stephen Warner, “The Place of the Congregation in the Contemporary American Religious Configuration,” in *American Congregations*, Vol. 2,” eds. James P. Wind and James W. Lewis, (Chicago: Univ. of Chicago Press, 1994), 54.

⁷⁷ See discussion above under section entitled “A Protestant State with a Secular Heritage.”

adhere to their religious beliefs. Non-Christians face a stacked deck in a society that has secularized Christianity. The impact on Muslims in the workplace merits special treatment. Nonetheless, faced with employers whose notions of what constitutes religious practices are grounded in the Christian tradition, all non-Christian employees face an uphill battle under the current “undue hardship” standard for granting religious accommodation in the workplace. This is a standard that leaves those adhering to minority religions to fend for themselves in convincing often-skeptical employers that religious practices with which they are unfamiliar merit an accommodation even when employer hardship will be minimal. The burden should be shifted to the employer to establish that a business necessity mandates denial of a fundamental right of religious liberty when religious minorities are involved. Recognizing religious accommodation as a fundamental right and applying DIT to determine whether an employer’s denial of a request for religious accommodation constitutes discrimination will result in a strict scrutiny standard for judicial review. And, at present, strict scrutiny of such denials by the judiciary offers the greatest hope for securing fair treatment of religious minorities in the American workplace.