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A Prescription for Teaching the Law of Reasonable Religious and Disability Accommodation

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A PRESCRIPTION FOR TEACHING THE LAW OF REASONABLE RELIGIOUS AND DISABILITY ACCOMMODATION

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TABLE OF CONTENTS

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I. INTRODUCTION

It has perhaps never been more important than it is now for law professors to exhort their students to evaluate the tensions that emerge when assertions of religious liberty come into conflict with competing interests like societal welfare, civil rights, or third party interests. As a professor of Employment Law and Employment Discrimination Law, I familiarize my students with the claims that may be brought by employees in a variety of scenarios in which they are alleging religious discrimination, asserting a right to a reasonable accommodation, or otherwise affected by someone else's claim of the same. The adjudication of these claims, whether brought pursuant to the U.S. Constitution,[1] Title VII of the Civil Rights Act of 1964,[2] or another statute, necessitates an evaluation of the relative weight to be accorded to the interests on both sides.

I also teach my students about allegations of employers' disability discrimination and failure to reasonably accommodate an employee's disability under the Americans with Disabilities Act (ADA), which mandates a reasonable accommodation for an otherwise qualified disabled employee.[3] This short piece details an approach that I have taken toward teaching the concept of reasonable accommodation across contexts, while noting the critical differences between the standards applied, the policy and other considerations at issue under each statute, and the legislative and jurisprudential goals at stake in each scenario. It lays out the materials that I introduce as well as the approach that I take.

II. BACKGROUND

Title VII renders it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's . . . religion," among other protected classes.[4] Section 2000e(j) of Title VII defines the term "religion" as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . [a] religious

1. *See generally* U.S. Const. amend. I.
2. 42 U.S.C. § 2000e-16 (1964).
3. 42 U.S.C. §§ 12112a-b (2012).
4. 42 U.S.C § 2000e-2(a) (2012).

observance or practice without undue hardship on the conduct of the employer's business."[5]

The ADA, for its part, prohibits an employer from "discriminat[ing] against a qualified individual with a disability . . . ."[6] The Act goes so far as to define "discrimination" as including an employer's "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."[7] As per the EEOC, "an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[8] There are three types of reasonable accommodations.[9] The first type is a "modification[] or adjustment[] to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires."[10] The second type consists of "modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position."[11] The third type consists of "modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[12]

Examples of reasonable accommodations in the ADA include: making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position.[13]

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5. 42 U.S.C. § 2000e(j) (2012).
6. 42 U.S.C. § 12112(a) (1994).
7. 42 U.S.C. § 12112(b)(5)(A) (2012).
8. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Enforcement Guidance: Reasonable Accommodations and Undue Hardship Under the Americans with Disabilities Act*, (2012), https://www.eeoc.gov/policy/docs/accommodation.html [https://perma.cc/67RF-LXT3] [hereinafter *Enforcement Guidance*].
9. *Id.*
10. *Id.* (quoting 29 C.F.R. § 1630.2(o)(i) (1997)).
11. *Id.* (quoting 29 C.F.R. § 1630.2(o)(ii) (1997)).
12. *Id.* (quoting 29 C.F.R. § 1630.2(o)(iii) (1997)).
13. 42 U.S.C. § 12111(9) (2012); 29 C.F.R. § 1630.2(o)(2)(i-ii) (1997).

Interestingly, whereas under Title VII, the "undue hardship" defense has been read as a demonstration that the proposed accommodation inflicts more than a "de minimis" cost or burden on the employer,[14] the ADA's undue hardship analysis asks whether the employer is forced to incur a "significant difficulty or expense."[15]

Both analyses involve competing interests and a holistic evaluation of the job at the employing entity, in terms of both what it does and does not necessarily entail.[16] Obviously, when it comes to a reasonable accommodation mandate, wholesale deference to either side's framing of what is reasonable to ask for and what the essential functions of the position are would beg the question, so a court must delve into these fact-intensive queries with a searching, self-directed approach.[17] At the end of the day, the statutes will operate to compel change and adjustment in some cases, but not in others, and these changes will potentially impact not only the employee and employer, but third parties, like co-workers, customers, and society as a whole.[18] Adjudicating reasonable accommodation claims in any context thus necessitates, I believe, a step back to ask the larger question of what we aim to accomplish, for example, when we allow a statute or other law to be successfully wielded by an employee seeking an accommodation that will enable her to do her job. It is important, when teaching antidiscrimination law, that each statute's objectives, limitations, and capabilities be explored, both individually and, in comparison with one another, to solidify and cement understanding.

III. PEDAGOGICAL APPROACH

Any discussion of reasonable accommodation is best

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14. *See e.g.*, Trans World Airlines v. Hardison, 432 U.S. 63, 66, 84 (1977) ("To require an employer to bear more than a de minimis cost in order to give [employee his Sabbath day] off is an undue hardship . . . .").

15. *See* Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1048-49 (7th Cir. 1996); Bryant v. Better Bus. Bureau of Md., 923 F. Supp. 720, 740 (D. Md. 1996); *Enforcement Guidance*, *supra* note 8; *see also* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 7 (1996) (acknowledging that unlike the narrow interpretation of what constitutes an "undue hardship" by the Court in *TWA*, "[r]easonable accommodation . . . means something very different in the context of disabilities law . . . .").

16. Stephen Gee, *The "Moral Hazards" of Title VII's Religious Accommodation Doctrine*, 89 CHI. KENT L. REV. 1131, 1138-39 (2014).

17. *Id.* at 1147.

18. *Id.* at 1156, 1158.

grounded in the policy surrounding the law itself (statutes mandating nondiscrimination and reasonable accommodation) and the competing interests of those potentially affected by another's accommodation, whether that be a colleague, a client or patient of the employer, or the general public.[19] To the extent that case law and legislative history do not amply delve into the tensions engendered by these competing rights, interests, and considerations, legal scholarship is helpful as well.[20] What is the precise nature of the relationship between an accommodation that is simply not reasonable and one that confers an undue hardship on an employer? What is the evidentiary threshold and proper considerations when establishing either one?

Much has been made over the fact that the reasonable accommodation provision afforded to private employees alleging religious discrimination in violation of Title VII has, traditionally, been read as somewhat narrower and conferring less upon these plaintiffs than, for example, the reasonable accommodation provision of the ADA.[21] My class typically covers the ADA after we have covered Title VII, so when students confront the reasonable accommodation provision in the ADA, it is not the first time that they are examining the analysis, theory,

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19. *Trans World Airlines*, 423 U.S. at 85 ("[T]he paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment." Thus, "[i]n the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute *to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.*") (emphasis added).

20. Karlan & Rutherglen, *supra* note 15, at 11-12 (analyzing the contours of reasonable accommodation and undue hardship); Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the American with Disabilities Act*, 48 VAND. L. REV. 391, 433 (1995) (analyzing the undue hardship under the ADA); Russel H. Gardner & Carolyn J. Campanella, *The Undue Hardship Defense to the Reasonable Accommodation Requirement of the American with Disabilities Act of 1990*, 7 LAB. L. 37, 37-38 (1991) (analyzing the relationship of the reasonable accommodation and undue hardship defense); Harvey S. Mars, *An Overview of Title I of the American With Disabilities Act and its Impact Upon Federal Labor Law*, 12 HOFSTRA LAB. L.J. 251, 259-66 (1995) (analyzing both the reasonable accommodation requirement and the undue hardship defense of the ADA); Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices Under Title VII After Ansonia v. Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513 (1989) (analyzing the relationship between reasonable accommodation and undue hardship in the religious context); Kerri Stone, *Substantial Limitations: Reflections on the ADAA*, 14 N.Y.U.J. LEGIS. & PUB. POL'Y 509, 513-14 (2011); Alan D. Schuchman, *The Holy and the Handicapped: An Examination of the Different Application's of the Reasonable-Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745, 762 (1998).

21. Zablotsky, *supra* note 20, at 534.

or jurisprudence of reasonable accommodation in the workplace. By the time we get to the reasonable accommodation portion of the ADA, I am anxious to remind the students about Title VII and ask them about the treatment of reasonable accommodation across the two statutes. What follows are some of the topics, questions, and approaches that guide our ensuing discussion, as well as some of the sources and materials that I use.

Once we have looked at some reasonable accommodation cases in both contexts, we discuss how representative cases provide data points that help to contour dividing lines and even implicit standards embedded in the jurisprudence.[22] With a sense of how the lines tend to be drawn slightly more generously when it comes to affording reasonable accommodations to employees under the ADA, we proceed to backtrack to the mere fact that religion, and no other protected class is afforded accommodation. I touch upon, briefly, the notion that other protected classes, like race, sex, and national origin, have generated discussion of why reasonable accommodation may be beneficial,[23] and the fact that only discrimination "because of" religion has been defined by Title VII as failing to grant a reasonable accommodation.[24]

I encourage my students to think about what distinguishes religion from other protected classes. We discuss the First Amendment's Free Exercise and Establishment Clauses.[25] We also discuss how the passage of the Religious Freedom Restoration Act and the special tax status afforded religious institutions illustrates how pervasively the U.S. government privileges religion across contexts, seeming to consider it (pardon the pun) sacrosanct and special, even vis-a-vis other protected class statuses.[26] As Professor Stanley Fish has said:

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22. Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 389-90 (2008).

23. *Id.* at 418 ("propos[ing] that employers be required to provide accommodation for appearance traits that an employee (or applicant) claims signal identification with a subgroup recognized by Title VII, such as race, sex, or national origin."); Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 66 n.366 (2007) ("Although scholars sometimes assume that the antidiscrimination rules of Title VII and accommodation mandates are fundamentally different, ... the two overlap in important respects and that certain aspects of Title VII, including its disparate impact prong, sometimes require accommodation."); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 667 (2001).

24. Gee, *supra* note 16, at 1135.

25. U.S. CONST. amend I.

26. Gee, *supra* note 16, at 1139.

> [B]y definition religion sees itself as above secular norms, although the issue of being exempt from those norms is a vexed one, occupying the territory between "render unto Caesar what is Caesar's" and "no one can serve two masters." The entire point of religion — at least of the theistic kind, Christianity, Judaism, Islam — is to affirm a fidelity to an authority and to a set of imperatives that exceed, and sometimes clash with, what is required by the state. The denial of religion's claim to be special is the denial of religion as an ultimate discourse, and is, in effect, the denial of religion as religion; it becomes just one more point of view.[27]

What generally comes next is a side-by-side view of the ADA and Title VII. As one scholarly article recites:

> The . . . (ADA) differs fundamentally from Title VII. Both prohibit something called "discrimination," but discrimination under the ADA means something quite distinct from what it means under Title VII. Under Title VII and other antidiscrimination statutes, employers can safely make employment decisions if they ignore race and other protected statuses and focus solely on criteria related to productivity. . . . At issue here are the basic models of discrimination. The central thrust of Title VII employs a "sameness" model of discrimination, requiring employers to treat African Americans and women exactly the same as others; their race and sex must be ignored and employers must focus instead on factors related to productivity. Although the ADA uses a sameness model in part, its distinctive thrust is a "difference" model, requiring employers to treat individuals with disabilities differently and more favorably than others. Employers must treat individuals with disabilities as qualified if they "can perform the essential functions" of the job. Employers are free to treat others as qualified only if they can perform all of the functions of the job. Similarly,

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27. Stanley Fish, *Is Religion Special?* N.Y. TIMES (Jul. 26, 2010), https://opinionator.bliogs.nytimes.com/2010/07/26/is-religion-special/?mcubz=3 [https://perma.cc/SV3M-L9EQ].

> employers must make "reasonable accommodations" for individuals with disabilities.[28]

Thus, as the article concludes, when it comes to accommodation and deference, "[u]nder Title VII . . . law, the employer defines the job as it wishes; Title VII merely insists that workers and applicants for those jobs be treated without regard to race or sex. The ADA goes beyond Title VII by requiring employers to restructure the jobs themselves."[29] This is in keeping with the notion that the ADA aims to affirmatively level the playing field, while Title VII merely issues a nondiscrimination mandate.[30] These differences, structural and substantive, are critical to grasp, and they form the baseline for the further analysis of reasonable accommodation.

But taking students' thinking on these issues from abstract to concrete requires more specific examples. One that I have found particularly useful in class is to consider the plight of a specific employee in several different contexts and predicaments—a pharmacist. We thus consider the case of the pharmacist in need of accommodation. A Westlaw search of the word "pharmacist" within the same paragraph as "reasonable accommodation," which could be referring to a request made pursuant to Title VII or to the ADA, yields thirty-three results as of September 2017. In class, we consider the narrative of a pharmacist who may be working in any number of different work environments (small pharmacies, large chain pharmacies), in any part of the country (remote versus cosmopolitan, places where there may be greater diversity of beliefs or greater access to other pharmacies versus less), with any number of requests for accommodation, be they religion- or disability-based. By focusing on the pharmacist, and by envisioning her with any number of accommodation needs and in any number of professional settings, the operational rules that govern different types of employment discrimination scenarios are drawn into sharper focus.

When the focus is on the mandate that employers afford employees reasonable religious accommodation under Title VII, attention naturally turns, as it does in many discussions of the assertion of religious liberty, to the tensions inherent in a

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28. Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1199-1200 (2003).

29. *Id.* at 1202.

30. *Id.* at 1200.

scenario in which one person's assertion of religious liberty is seen as an incursion into other's (or society's) rights or interests.[31] So, for example, a pharmacist may seek to be exempt from dispensing certain types of medications because doing so would conflict with her religious beliefs. This medication may include various forms of birth control, emergency contraception taken after intercourse to prevent a pregnancy, and hormone-blocking drugs taken by transsexuals in the midst of transitioning. This exemption would require the provision of this medication by another willing employee when the employee is on duty. Under the precepts of Title VII jurisprudence, the requested exemption would be evaluated as a proposed reasonable accommodation, and the pharmacist's employer would need to argue that the accommodation is not reasonable, but rather that it confers an undue burden on it.[32]

In any event, the ensuing analysis is fact-intensive. Typically, courts adjudicating the issue of reasonable religious accommodations factor into their analyses things like the costs imposed on the employer by the accommodation and its relative ability to defray those costs,[33] whether the employer would have to violate its own clearly established seniority system, as well as harms of various sorts that may be conferred on third parties or society at large as a result of the accommodation.[34] Thus, it may very well be the case that a pharmacist with essentially the

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31. *See e.g.*, Trans World Airlines v. Hardison, 432 U.S. 63, 85-86 (1977).

32. *See e.g.* U.S. v. Bd. of Educ. for Sch. Dist. of Phila., 911 F.2d 882, 886-87 (3d Cir. 1990) (discussing the different defenses to alleging failure to reasonably accommodate).

33. *See e.g., Trans World Airlines*, 432 U.S. at 69 (taking into consideration the fact that allowing the employee to work four days a week and observe Sabbath, would have, among other things, required TWA to employ someone not regularly assigned to work Saturdays and pay premium wages); *see also Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 887 (acknowledging that the sort of "*de minimis* cost" addressed is usually economic in nature); *cf. Enforcement Guidance*, *supra* note 8 ("If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as its effective . . . .").

34. *See e.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2002) ("[I]n the context of a Title VII religious discrimination case, an employer need not adapt to an employee's special worship schedule as a 'reasonable accommodation' where doing so would conflict with the seniority rights of other employees."); *Trans World Airlines*, 432 U.S. at 79 ("[W]e cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances."); *see also Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d at 894 (holding that a state statute prohibiting teachers from wearing religious garb in class did not violate the Muslim teacher's Title VII rights where the statute advanced a compelling state interest in maintaining appearance of religious neutrality).

same job description and title may fare differently when requesting that another pharmacist handle the provision of certain prescriptions because of anything from the location of the pharmacy, to its size, to its resources.

However, some states have found the religious liberties at stake too vital to be denied in any event, and have passed so-called "refusal clauses" or "conscience clauses," pieces of legislation initially enacted in the wake of *Roe v. Wade*,[35] which rendered unenforceable all state laws that outlawed abortion because they were seen to violate a constitutional right to privacy.[36] These conscience clauses initially permitted doctors and other health care providers to refuse to perform or assist in an abortion.[37] Now, some states have passed versions that afford pharmacists the right to refuse to engage in the provision of certain services and the dispensing of certain prescription drugs when doing so would violate individual religious beliefs.[38] In both 2014 and 2016, Senator Cory Booker introduced the "Access to Birth Control Act" bill,[39] which would compel all pharmacists in the United States to dispense emergency contraception, but there is a great deal of resistance to what many see as a trammeling of the right to abide by one's conscience while retaining one's job.[40] Presently, several states, including Arizona, Arkansas, Georgia, and Idaho have enacted laws permitting pharmacists to refuse to dispense emergency contraception drugs.[41] Without explicitly naming pharmacists, other states, including Colorado, Florida, Illinois, Maine, and Tennessee have enacted more general conscience clauses.[42]

In 2015, the Ninth Circuit upheld as constitutional Washington State's rules requiring a pharmacy to deliver or dispense drugs, and including secular but not religious

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35. Roe v. Wade, 410 U.S. 113 (1973); *see also* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Pharmacist Conscience Clauses: Laws and Information* (May 2012), https://www.ncsl.org/research/health/pharmacist-conscience-clauses-laws-and-information.aspx [https://perma.cc/CK6P-JU99] [hereinafter "*Pharmacist Conscience Clauses*"].

36. *Roe*, 410 U.S. at 154.

37. *See Pharmacist Conscience Clauses, supra* note 35.

38. *See e.g.*, ARK. CODE ANN. §§ 20-16-304(4)-(5) (2012) (allowing physicians and pharmacists to refuse to provide contraceptive procedures or supplies); COLO. REV. STAT. §§ 25-6-102(7), (9) (2018).

39. *See* S. 2960, 114th Cong. (2015-2016); *see also* H.R. 2567, 115th Cong. (2017-2018) (Access to Birth Control Act filed by Rep. Maloney, Carolyn B.).

40. *See Pharmacist Conscience Clauses, supra* note 35.

41. *Pharmacist Conscience Clauses, supra* note 35.

42. *Pharmacist Conscience Clauses, supra* note 35.

exemptions.[43] According to the Court:

> We recognize that there is a "trend of protecting conscientious objectors to abortions," . . . and that most—but not all—states do not require pharmacies to deliver prescriptions, such as Plan B and *ella*, in a timely manner. On balance, however, we are unconvinced that the right to own, operate, or work at a licensed professional business free from regulations requiring the business to engage in activities that one sincerely believes leads to the taking of human life is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . Accordingly, we decline to recognize a new fundamental right.[44]

The Supreme Court declined to grant certiorari, generating a strident dissent from Justice Alito, in which he declared the declination "ominous."[45] This case was seen as contrasting interestingly with the sentiment of the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*,[46] in which the Supreme Court allowed a for-profit, closely-held private corporation to claim an exemption based on the owners' religious convictions from a regulation adopted by the US Department of Health and Human Services under the Affordable Care Act.[47] The regulation required employers to cover certain contraceptives for their female employees, and the Ninth Circuit's opinion in *Stormans* drew comparisons to the Supreme Court's opinion,[48] with *The Atlantic* noting that "[o]n the surface, the *Hobby Lobby* and *Stormans* cases seem similar: Both involve private businesses whose religious owners object to laws requiring them to deal with contraception."[49] The paper asked what had happened in those two years that made the Supreme Court

43. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).

44. *Id.* at 1087-88 (internal citations omitted).

45. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (Alito, J., dissenting).

46. 134 S. Ct. 2751 (2014).

47. *Id.* at 2759.

48. *See Stormans*, 794 F.3d at 1075 n.4.

49. Emma Green, *Even Christian Pharmacists Have to Stock Plan B*, THE ATLANTIC (Jun. 29, 2016), https://www.theatlantic.com/politics/archive/2016/06/pharmacists-have-to-sell-emergency-contracptioneven-if-it-violates-their-religious-beliefs/489182/ [https://perma.cc/9GVY-QRN9].

change course so much since *Hobby Lobby*.[50]

The obvious answer, of course, is the changes in the composition of the Supreme Court's membership.[51] Even after Justice Scalia's death, the Court might have taken up the issue, since it only takes four Justices to procure a grant of certiorari.[52] However, those who would support one might have feared that without a fifth vote to reverse, a four and four affirmance of the Ninth Circuit would have ensued.[53] And, interestingly, only Justice Alito spoke out about the denial.[54] But was there also a combination of cultural, political, and other environmental changes that had changed the direction of the proverbial political winds on this issue? And it should be noted that we can never really draw broad conclusions from the Supreme Court's denial of certiorari. The Court will sometimes leave issues to percolate longer in the lower courts without voicing a clear opinion when the first opportunity presents itself.

On one side, pharmacists' associations and religious liberties groups took up the mantle of the objecting pharmacists, both in the case and in the public debate.[55] They argued that despite the centrality that had been accorded individual assertions of religious liberty and conviction by state laws, with an affirmative mandate like Washington's, the sheer inability of small pharmacies to accommodate individuals while abiding by the mandate could pose a threat to the continued employment of individual pharmacists.[56] On the other side, groups like the American Civil Liberties Union ("ACLU") vehemently defended the rules requiring pharmacies to deliver/dispense drugs despite their owners' religious objections.[57] They argued that a woman in need of some of the medications at issue might be dissuaded from using them or otherwise harmed if she were forced to seek them at another pharmacy.[58]

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50. *Id.*
51. *Id.*
52. *Id.*
53. *See id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*; *Supreme Court Declines To Hear Case About Religious Pharmacy Turning Women Away*, AMERICAN C.L. UNION (June 28, 2016), https://www.aclu.org/news/supreme-court-declines-hear-case-about-religious-pharmacy-turning-women-away [https://perma.cc/BL8K-BUJ6] [hereinafter "*Supreme Court Declines*".]
58. Green, *supra* note 49; *Supreme Court Declines*, *supra* note 57.

It must also not be forgotten that the litigation in *Hobby Lobby* was brought under RFRA,[59] whereas in *Stormans*, he brought a challenge to a state regulation, which could not have been litigated under RFRA.[60] I encourage my students to question and debate whether, as Judge Alito intimated in his dissent from the denial of certiorari, religious liberty is under attack, or whether the public health concerns attendant to compelling the immediate availability of Plan B and similar drugs need to prevail.[61] A similar debate took place in the United Kingdom ("UK") recently, starting in December of 2016.[62] At that time, the General Pharmaceutical Council (GPhC), promulgated draft standards and guidance that inserted a "duty to dispense" where there had previously been a "right to refer."[63] This was termed a "significant change" by the GPhC.[64] The draft guidance generated a great deal of input from groups and individuals that centered around the competing interests of religious liberties on the part of some and public health and access to prescriptions.[65] On June 22, 2017, the final guidance issued stated that individual pharmacists would retain the prerogative to refer customers to see other pharmacists when they needed prescriptions filled for, among other things, abortifacient or hormone-blocking drugs.[66]

This material is a springboard into a discussion of the concept of "reasonable accommodation" under the ADA and

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59. Green, *supra* note 49.

60. *See* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1075 n.4.

61. *See* Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2433 (2016) (Alito, J. dissenting).

62. GEN. PHARMACEUTICAL COUNS., *Consultation on Religion, Personal Values and Beliefs*, (Dec. 2016), https://www.pharmacyregulation.org /sites/default/files/consultation_on_religion_personal_values_and_beliefs_december_2016_0.pdf [https://perma.cc/F94Z-SNT7] (hereinafter "*Consultation on Religion*"); *see also* Philippa Taylor, *Good News for freedom of Conscience in the UK*, CMF BLOG (June 26, 2017), http://www.cmfblog.org.uk/2017/06/26/good-news-for-freedom-of-concious-in-the-uk/ [https://perma.cc/A7G4-H567].

63. Dr. Peter Saunders, *Regulator's Proposal to Remove Pharmacists' Conscience Rights is Unethical, Unnecessary and Quite Possibly Illegal*, CMF BLOG (Feb. 21, 2017), http://www.cmflblog.org.uk/2017/02/21/regulators-proposal-to-remove-pharmacists-conscience-rights-is-unethical-unneccesary-and-quite-possibly-illegal/ [https://perma.cc/3XE7-KSC7].

64. *Consultation on Religion, supra* note 62.

65. Saunders, *supra* note 63.

66. GEN. PHARMACEUTICAL COUNS., *In Practice: Guidance on Religion, Personal Values and Beliefs*, (June 2017), https://www.pharmacyregulation.org/sites/default/files/in_practice_guidance_on_religion_personal_values_and_beliefs.pdf [https://perma.cc/VB2Z-L98V].

under Title VII.[67] Drawn into sharper focus, the plight of the pharmacist who cannot perform all that is asked of her boils down largely to the workings of the respective statutes employed, their goals, and their construction by courts. Structurally, what is going on in each scenario is somewhat similar; Title VII and the ADA each seek to combat discrimination, often rational or for "economic reasons," and often in the form of a failure to accommodate.[68] It is useful, though, to have students confronted with the pharmacist scenarios examine the discrimination being combated in each side by side and come to conclusions about the structures, objectives, and constructions of the statutes at play.

Once we have reviewed religious discrimination claims potentially brought by a pharmacist, my class looks at the plight of the same pharmacist who seeks permission to abstain from performing part of what would normally be considered part of her job duties, but this time, due to a disability. Fortunately, this kind of case has already come to court, so after we speculate about various hypothetical outcomes, we can look at some actual ones.[69]

In 2017, the Second Circuit Court of Appeals held in *Stevens v. Rite Aid Corp.* that a pharmacist whose trypan phobia, or fear of needles, could not expect to be accommodated under the ADA by bypassing his employer's policy that required pharmacists to administer immunization injections to customers by having someone else perform that part of his job for him.[70] Immunizations, however, were listed in Rite Aid's job description for its pharmacists as one of their "essential duties and responsibilities" for pharmacists.[71] According to the court, the plaintiff was not properly deemed, as the statute required him to be to claim relief, a "qualified individual" who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[72] The court held that it was compelled to find that the immunization injections were an essential job requirement for

67. Gee, *supra* note 16, at 1140.

68. Gee, *supra* note 16, at 1149.

69. *See e.g.*, Stevens v. Rite Aid Corp., 851 F.3d 224 (2d Cir. 2017).

70. *Id.* at 228, 231.

71. *Id.* at 229.

72. *Id.* at 229 (quoting 42 U.S.C. § 12111(8) (2012)). The court ultimately concluding that no "juror could reasonably conclude that Stevens was 'qualified to perform the essential functions of his job, with or without reasonable accommodation.'" *Id.* at 231.

Rite Aid pharmacists.[73] Specifically, the court found that the plaintiff's proposals "that Rite Aid could have either hired a nurse to give immunization injections for him or assigned him to a dual-pharmacist location do not propose true accommodations," because "[t]hose steps would be exemptions that would have involved other employees performing Stevens' essential immunization duties," and "Rite Aid was not required to grant Stevens these exemptions."[74]

In *Buser v. Eckerd Corp.*,[75] a federal district court in 2015 looked at a similar claim by a pharmacist with Parkinson's disease who could not administer injections due to tremors that he experienced.[76] The plaintiff there sought exemption from his employer's vaccination requirement, or, alternately, that he be furnished with an automatic injector to permit him to give injections without using an exposed needle.[77] The court determined that there was sufficient evidence for the plaintiff to survive summary judgment on, among other things, whether giving immunizations were an essential function of his job.[78] "However, the court also held [that the] plaintiff failed to adduce sufficient evidence showing a reasonable accommodation existed, if immunization was determined to be an essential function of his job."[79]

Interestingly, whereas there has been legislative intervention on the religious discrimination front, the few recent ADA cases brought by pharmacists have tended not to go the plaintiffs' way.[80] We discuss what this means in terms of the law's treatment of religion, and in spite of the broader construction of the reasonable accommodation mandate in the ADA. Using the workplace of a pharmacy and these scenarios as a springboard, we will then discuss the differences between the law's provisions for and handling of religious discrimination as opposed to disability discrimination more broadly. I note for my students, that numerous scholars have observed that the

73. *Id.* at 231.

74. *Id.* ("Moreover, as the District Court noted, Stevens failed to show that a vacant position at a dual-pharmacist store existed at the time of his termination.").

75. 2015 WL 1438618 (E.D.N.C. 2015).

76. *Id.* at *1.

77. *Id.*

78. *Id.*

79. *Id.*

80. Denise Johnson, *Why Claims Under American with Disabilities Act are Rising*, INS. J. (Oct. 7, 2016), https://www.insurancejournal.com/news/national/2016/10/07/428774.htm [https://perma.cc/K8KN-8N99].

reasonable accommodation mandate of Title VII has been construed more broadly in favor of employers than that of the ADA,[81] with some even calling for Title VII to be amended to adopt the ADA's more generous-to-plaintiffs reasonable accommodation provision.[82] Stephen Gee, another scholar, however, disagrees starkly with this call, citing everything from the immutability of disability as opposed to religion to Establishment Clause impediments for the proposition.[83] Gee argues that "[t]he ADA is afforded a stronger accommodation standard, [and a] . . . more preferential Title VII standard could be struck down in violation of the Establishment Clause due to the potential governmental entanglement with religion."[84]

The fact of the matter is, however, that the two provisions in the two statutes guaranteeing entitlement to a "reasonable accommodation," have some stark differences between them,[85] and my goal is always to see if I can elicit these differences from students as they study the two side-by-side. Despite the fact that both the ADA and Title VII were drafted and enacted to eradicate workplace discrimination against groups that would be particularly susceptible to and uniquely harmed by it, there is guidance stretching back a long way that would predicate divergent interpretations of terms like "reasonable" or "undue hardship."[86]

As stated, the centerpiece terms of the respective statutes, "reasonable accommodation" and "undue hardship" are to be

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81. Keith S. Blair, *Better Disabled Than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515, 530–31 (2010); Henry L. Chambers, Jr., *Reading Amendments and Expansions of Title VII Narrowly*, 95 B.U.L. REV. 781, 797-98 (2015); Schuchman, *supra* note 20, at 754.

82. Blair, *supra* note 81, at 530-31; Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, 17 FEDERALIST SOC'Y REV. 50, 58 (2016) ("consider, for example, the duty of reasonable accommodation of disabilities. The legislature should have as much latitude to protect religion as it has to protect these other important values."); *see also* Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 GEO. WASH. L. REV. 685, 704 (1992) ("The legislature should have as much latitude to protect the exercise of religion that it has to protect other important values in life. . . .Congress struck the balance in Title VII by requiring 'reasonabl[e] accommodat[ion],' short of 'undue hardship' to the employer—the same statutory standard that it applies to accommodation of persons with disabilities.").

83. Gee, *supra* note 16, at 1131.

84. *Id.* at 1167.

85. *Id.* at 1148.

86. *Id.* at 1142.

construed quite differently.[87] As one scholar has observed:

> Congress specifically rejected *Hardison's de minimis* standard for the interpretation of "undue hardship" under the ADA, stating that the ADA requires a significantly higher standard than that created by the Supreme Court for Title VII. Second, religious beliefs (which reflect a choice) and disabilities (which do not) are fundamentally different "animals," so a law designed to protect one may not be a fully appropriate comparative instrument for the other. Thirdly, "disability" carries a certain stigma that we initially may be reluctant to apply to religion, as many people consider disabled individuals to be substantially incapacitated by their disabilities and unable to participate in normal life activities.[88]

Each of these facets of the premise for the different construction informs and animates our discussion, but we discuss the fact-intensive nature of each case and how critical which jurisdiction a pharmacist works in can be, as everything from state-specific protections to benches differently poised on the issue of accommodation in any number of contexts can be determinative of what happens in a case or a challenge. Our class winds up with a discussion about societal and judicial attitudes toward religion and the protection of religious liberties and some projections about whether the status of things will change, and why.

IV. CONCLUSION

After years of teaching the concept of "reasonable accommodation" in two different contexts at two different points in the semester, I decided to revisit one while covering the other. I did this by focusing my lesson on the plight of a pharmacist in search of an accommodation that would excuse her from doing part of her job, but in a variety of contexts and scenarios. The

87. *Id.* at 1135.

88. Laura E. Watson, *(Un)reasonable Religious Accommodation: The Argument for an "Essential Functions" Provision Under Title VII*, 90 S. CAL. L. REV. 47, 70–71 (2016); *see also* Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 89 (2016).

result has been a more thoughtful, productive class discussion about everything from changing attitudes toward religious liberty, to comparative developments and approaches toward religious liberty in the United States and abroad, to the differences between Title VII and the ADA.