

CONCEPTUALIZING REASONABLE ACCOMMODATION

BRETT G. SCHARFFS¹

DOI: 10.7764/RLDR.4.44

1. Introduction

One common problem that arises in pluralistic societies is how to accommodate religious differences. In a society that is very homogenous, this is less likely to be an important issue because the laws will generally be responsive to the religious needs of the people through ordinary majoritarian politics. However, in pluralistic societies there may be some groups that have particular needs. While the large groups may be capable of protecting their interests through ordinary democratic processes, smaller groups, especially those that are less well understood and perhaps come from an unfamiliar religious tradition, will have greater challenges.

The issue of religious accommodation arises in many contexts. Perhaps most familiar is conscientious objection to military service. There are two values at stake here: one is equality and the other is nondiscrimination.² Equality is the idea that the burdens of citizenship should be shared by everyone; if one person is expected to lay his or her life on the line for the protection of the state then others should as well. The principle of equality is violated if some people are expected to serve and other people are given an exception or exemption from service. But military service burdens different people differently. For someone with a religious conviction that they must never bear arms or take a human life, military service creates a conflict with conscience that may not exist for others.

The need for religious accommodation occurs in many other contexts as well. Think of a doctor or nurse who has a conscientious objection to performing an abortion, or a minister who has a conscientious objection to performing a same-sex marriage. Or consider the cases that we are familiar with these days in the United States: people in marriage related services that might have conscientious objection to participating in same sex marriages. These are people like the

¹ Francis R. Kirkham Professor of Law and Director of the International Center for Law and Religion Studies, Brigham Young University Law School; BSBA, MA Georgetown University, B.Phil (Rhodes Scholar) Oxford University, JD Yale Law School.

² See generally *The Right to Equality and Non-Discrimination in the Administration of Justice*, in UNITED NATIONS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 666-668 (2003), <http://www.ohchr.org/Documents/Publications/training9chapter13en.pdf>.

photographer who is asked to photograph a wedding,³ or a baker,⁴ or a florist.⁵ Again the same two values are at stake: equality and nondiscrimination. We don't like the idea of people being refused service on the basis of their religious status, sexual orientation, or race; this is a matter of valuing nondiscrimination. On the other side of the nondiscrimination argument, we have the value of conscience and the sense that we should respect religious difference and try to be accommodating to those who have different views.

Religious accommodation also arises in contexts having to do with religious holidays,⁶ religious diet,⁷ and religious attire.⁸ Rules that look like they are neutral (for example the food that a prisoner gets in prison, or the uniforms that people wear to school, or the day on which a state-administered exam is given) might actually impact different religious groups in very different ways. All of these situations raise the issue of accommodation, how and to what extent we should, and are able to, accommodate religious difference.

In this article I will consider the idea of reasonable accommodation from three very different perspectives. We might think of these as three different or unique conceptions of understanding the problem of reasonable accommodation. Although I am going to identify three types, as a preliminary matter it is important to recognize that many situations will be hybrids. Identifying will hopefully be helpful for analytical purposes, but in the actual worlds that we encounter we are likely to have situations that are combinations of more than one of these conceptual frameworks. But these three different viewpoints each describe quite distinct and important prevailing attitudes or conceptual frameworks for thinking about the problem of reasonable accommodation.

The first of these views is to think of accommodations as exceptions to general and neutral rules—perhaps unfortunate exceptions to general and neutral rules. We might have a general rule requiring all able-bodied men to serve in the military, a basic conscription regime. When we give an exception to some people, this can be viewed as an exception to a rule that is trying to treat everyone equally.

³ See, e.g., *Elane Photography, LLC v. Willock*, 2013-NMSC-040 (N.M. 2013) (a photographer was charged with violating a human rights statute for refusing to photograph a same-sex commitment ceremony).

⁴ See, e.g., Eugene Volokh, *More on the Oregon Same-sex Wedding Cake Decision*, THE WASHINGTON POST, July 10, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/10/more-on-the-oregon-same-sex-wedding-cake-decision/?utm_term=.b828189ab7a2 (the owners of a bakery were fined \$135,000 for refusing to provide a wedding cake for a same-sex commitment ceremony).

⁵ See, e.g., *State v. Arlene's Flowers*, 2017 Wash. LEXIS 216 (Wash. 2017) (the owner of a floral shop was fined for refusing to provide flowers for a same-sex wedding).

⁶ See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (challenging an employer policy that permitted no more than three days of leave annually for religious purposes.)

⁷ See, e.g., *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003) (“We, however, have clearly established that a prisoner has a right to a diet consistent with his or her religious scruples”) (citations omitted).

⁸ *S.A.S. v. France*, No. 43835/11 Eur. Ct. H.R. (2014) (challenging the French prohibition on wearing a face-covering veil in public).

ISSN 0719-7160

A second prevailing attitude or conceptual framework is to think of a reasonable accommodation as an adaptation that an individual must make to the state. This is a characteristically French way of thinking about reasonable accommodation. From this perspective, for example not wearing a burkini (the Muslim swimsuit that covers the body and the head) at the beach might be a reasonable accommodation of general attitudes towards appropriate beach attire and not differentiating oneself.⁹ So the idea might be that it is a reasonable accommodation to expect the people at the beach to dress like the rest of the people at the beach dress. The idea here is that we want to think about what can reasonably be expected of individuals. What parts of their particularity or their unique views they might have to give up in order to belong, to be part of the group, and in order for the group to feel a sense of coherence and shared identity.

The third prevailing attitude or conceptual framework for thinking about reasonable accommodation is to think of accommodation as a place of refuge or safety. This is more than a play on words. In addition to an exception, the idea of accommodation invokes the idea of the traveler, the visitor who is looking for a place to rest and they find an inn or a hotel, a place where they receive accommodation. This accommodation is a type of refuge or protection, a place where they can let down their guard and sleep without a gun under their pillow. Where they can be safe and welcome, even though they might be different—even though their religion, social mores, language, culture, or place of background or residence might be different. In this article, I will discuss each of these frameworks in some detail.

2. Accommodations as (Perhaps Unfortunate) Exceptions to General and Neutral Rules

As previously noted, one important perspective is the state's perspective. From the state's perspective, an accommodation might be viewed as something that is unfortunate—an unfortunate exception—because after all, it violates the principle of equal treatment. Those seeking accommodations, typically religious minorities (think here of conscientious objectors to military service like the Quakers during the Revolutionary war in America)¹⁰ are seeking special treatment. From the state's perspective, they are not willing to carry all of the burdens associated with citizenship. So from the state's perspective, making accommodations—giving

⁹ In July 2016, David Lisnard, the Mayor of Cannes, France banned the burkini on public beaches. The former Prime Minister endorsed the ban because the burkini is “not compatible with France’s values. Pierre Briançon, *France’s Battle of the Burkini*, POLITICO Aug. 17, 2016, <http://www.politico.eu/article/france-battle-of-the-burkini-muslim-swimming-pool-forbidden-religion/>.

¹⁰ See Philadelphia Yearly Meeting of the Religious Society of Friends (printed by Samuel Sansom), *Rules of Discipline and Christian Advices of the Yearly Meeting of Friends for Pennsylvania and New Jersey from 1685-1760*, at 130 (1797) <http://quod.lib.umich.edu/e/evans/N24322.0001.001?rgn=main;view=fulltext> (“Friends be careful to keep up to the peaceable principles professed by us as a People, and no way unite with such who make warlike preparations, offensive or defensive, but upon all occasions to demean themselves in a Christian and peaceable manner, thereby demonstrating to the World, that when put to the trial, we are uniform in Practice and principle.”)

some people special treatment—might seem unfortunate. It might be an exception that we make begrudgingly or with some reservation.

From the perspective of the person seeking the accommodation, they might think of an accommodation as a right to have a special need met. For example, we think of the *right* to conscientious objection, the *right* to wear religious attire, and the *right* to celebrate one's religious holidays and have a day off from work. This is all viewed understandably as part of the right to practice, or in international human rights language, the right to “manifest” one's religion or belief.¹¹ So from the perspective of the person seeking the accommodation, an accommodation is a type of limitation on the state's power. We might say that we have natural rights to exercise our religion and the state has a duty to protect us in those basic and fundamental rights.

The legal approach that we adopt to this type of problem is likely to be viewed as a trade-off between the state's interest in equality on the one hand and the individual's interest in freedom of conscience on the other hand. The legal approach is likely to focus on the balancing of these different interests. We see a lot of free exercise jurisprudence, both in the United States¹² and in other countries,¹³ built upon these types of balancing tests.

The United States Supreme Court, for much of its history has used such a balancing test—the compelling state interest test—to consider requests for an accommodation.¹⁴ The question is first: is there a burden on religious exercise?¹⁵ If the answer is yes, the court asks whether the state has a compelling interest in burdening that religious exercise.¹⁶ If the answer is again yes, then the court asks if there is a less restrictive means that the state could employ to vindicate that interest without burdening the religious exercise.¹⁷ That is the type of balancing that takes place where we have the state's interest on the one hand versus the individual's rights on the other hand.

In the European Court of Human Rights, following the development of German jurisprudence, the test focuses on whether a limitation is really “necessary in a democratic society.” The idea is that limitations should be based upon one of the enumerated reasons in article 9 of the

¹¹ See International Covenant on Civil and Political Rights, art. 18.

¹² See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (applying the compelling state interest test to a free exercise claim).

¹³ See, e.g., *Kokkinakis v. Greece*, No. 14307/88 Eur. Ct. H.R. (1993) (applying a balancing test to determine whether a restriction on the free exercise of religion was “necessary in a democratic society”).

¹⁴ *NAACP v. Button*, 371 U.S. 415, 438 (1963) (“The decisions of [the United States Supreme] Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.”)

¹⁵ The compelling state interest test, as defined by the Religious Freedom Restoration Act is: “Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—**(1)** is in furtherance of a compelling governmental interest; and **(2)** is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b).

¹⁶ See *id.*

¹⁷ See *id.*

ISSN 0719-7160

European convention on human rights.¹⁸ Determining whether something is “necessary in a democratic society” becomes a measure of proportionality, thinking about the character of the limitation and the character of the religious freedom interest.

Consider the classic example of conscientious objection to military service. Whether or not there is a compelling state interest will probably be quite an easy question to answer because national security and protecting the nation from outside threats are compelling state interests. So the question then becomes, can we vindicate that interest while still protecting the rights of conscience of the conscientious objectors? For the most part we have determined that we can. Going back to George Washington and his letter to the Quakers after the Revolutionary War we see that usually it is possible to accommodate conscientious objectors, although it might not always be.¹⁹ There may be times when there is a national emergency of such a scale or scope that the possibility of accommodation is really not feasible.²⁰

The challenge to this approach—this way of thinking about the problem of accommodations—is to avoid exaggerating the magnitude of the state's interest. When balancing the rights or interests of an individual against the needs of the state, it is easy for the state's interest to be characterized in a way that simply overwhelms the individual's interests. As I have mentioned, the interest in national security, or the interest in uniformity and equal treatment are often exaggerated.²¹ The recurring challenge is to characterize the interest in ways that are fair, and not in overly abstracted or generalized levels of concern.

This legal approach begins with the presumption of freedom. The presumption is that if our rights to religious exercise are to be burdened, then the state must bear the burden of proving that those limitations on the exercise of religious freedom are justified.²² This approach begins with the presumption of freedom and then works through the issue of whether exceptions are available.

An example of accommodation as an exception is the treatment in United States jurisprudence of conscientious objection to participating in the Pledge of Allegiance. The story here runs from

¹⁸ European Convention on Human Rights, art. 9.2 (“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are *necessary in a democratic society* in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”) (emphasis added).

¹⁹ See George Washington, Letter from George Washington to the Society of Quakers (Oct. 13, 1789), <https://founders.archives.gov/documents/Washington/05-04-02-0188> [hereinafter Letter from George Washington to the Society of Quakers] (“I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated *with great delicacy and tenderness*, and it is my wish and desire that the laws may always be as *extensively accommodated* to them, as a due regard to the protection and essential interests of the nation may justify, and permit.”) (emphasis added).

²⁰ See *id.*

²¹ See, e.g., *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

²² See, e.g., *Holt v. Hobbs*, 135 S. Ct. 853, 863 (U.S. 2015).

the *Gobitis* case, which was decided in 1940,²³ to the *Barnette* case, which was decided just three years later.²⁴ In *Gobitis*, the Court held that it is constitutional to compel children to participate in reciting the Pledge of Allegiance in school.²⁵ Remarkably, the US Supreme Court did something that it very rarely does by explicitly reversing itself only three years later in *Barnette*.²⁶ It noted that there had been an exaggerated sense of the importance of the state's interest in unity and national security.²⁷

Barnette also dispelled the myth that these rules compelling children to participate in the pledge were general and neutral laws.²⁸ In reality, these laws were targeted at religious dissenters, Jehovah's Witnesses in particular.²⁹ In *Barnette* it became clear that the downside of coercion was evident and forcing children to participate in the Pledge of Allegiance against their will had a variety of consequences that were very undesirable.³⁰

It is interesting to look at the rhetoric in these two cases. Beginning with *Minersville School District vs. Gobitis*, Justice Frankfurter (himself a member of a religious minority), writing for the majority emphasized the importance of obedience to general and neutral laws. He said:

“Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.”³¹

Note that Frankfurter characterizes the school board regulation requiring the children to participate as a general law not aimed at the promotion or restriction of religious beliefs. This is probably a mischaracterization because, after all, the Minersville School District never had a rule

²³ *Gobitis*, 310 U.S. 586.

²⁴ *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²⁵ *See Gobitis*, 310 U.S. at 594-595.

²⁶ *Barnette*, 319 U.S. at 642 (“The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled . . .”)

²⁷ *Id.* at 641 (“The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”)

²⁸ *Id.* at 636 (the Court characterized the law as the “power of the State to expel a handful of children from school.”)

²⁹ *See, e.g., Gobitis v. Minersville School Dist.*, 24 F. Supp. 271 (D. Pa. 1938). Lillian and William Gobitis, members of the Jehovah's Witness faith, enrolled in Minersville Public School in 1935 and had refused to salute the flag during the “daily exercises of the Minersville Public School.” *Id.* at 272. That same year, the Minersville School District created the school regulation requiring students to recite the pledge of allegiance or face expulsion. *Id.* The same day the regulation was passed, the superintendent announced publicly that the Gobitis children were expelled. *Id.* at 273.

³⁰ *See supra* notes 35-36 and accompanying text.

³¹ *Gobitis*, 310 U.S. at 594-595.

ISSN 0719-7160

compelling students to participate in the pledge until the *Gobitis* children objected.³² In response to their assertion of a free exercise right not to participate in the pledge, the school district adopted the rule requiring obedience upon penalty of expulsion.³³ Frankfurter exaggerates the importance of unity and the imperatives of national security which underlie this decision. He says:

“The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people . . . The flag is the symbol of our national unity, transcending all internal differences.”³⁴

Note that this described as a matter of national security, of national unity. Compelling students to participate is a way of creating the binding tie of cohesive sentiment that holds our polity together.

The result of what happened after *Gobitis* is one of the distressing episodes of religious intolerance in U.S. history—perhaps the most distressing 20th century example of religious intolerance in the United States. Hundreds of instances of vigilante violence against Jehovah’s Witnesses who refused to salute the flag were reported within one week following the *Gobitis* decision.³⁵ These acts of violence included mob beatings, attacking houses where Jehovah’s Witnesses were believed to live, and burning the Witnesses’ places of worship. Harvard Law Professor Noah Feldman described the public reaction as follows: “[t]o some horrified observers, it appeared that the Supreme Court, by denying the children the constitutional right to be exempt from saluting, had declared open season on the Witnesses.”³⁶

Three years after *Gobitis*, the Supreme Court reversed itself in *West Virginia v. Barnette*. Justice Jackson, writing for the majority, held that there was a right to conscientious objection to participating in the pledge—a right rooted in the freedom of speech and in free exercise of religion.³⁷ He said, “[t]o believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”³⁸

Justice Jackson went on to say in some of the most memorable and oft-quoted language in Supreme court history:

³² *Gobitis*, 24 F. Supp. at 272.

³³ *Id.* at 272-273.

³⁴ *Gobitis*, 310 U.S. at 596.

³⁵ DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* 163-86 (1962).

³⁶ NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 185 (2010).

³⁷ *See* *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

³⁸ *Id.* at 641.

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”³⁹

This, of course, ignores that a mere three years earlier this fixed star in the Constitutional constellation had not been noticed.

What we see in the story of *Gobitis* to *Barnette* is an example of thinking of accommodation as an exception, and of the type of legal balancing that takes place in considering a claim for accommodation. We also see the variable outcomes that might result depending upon how the values at stake are weighted. If we view the state's interest in unity, national security, and uniformity very highly then we might get a result similar to *Gobitis*. If on the other hand we value the rights of thinking for oneself, the rights of conscience, the right to free exercise, then the balance might be struck for upholding the religious freedom claim as in *Barnette*.

It is notable that *Gobitis* was decided in 1940, which was a time of great national disunity. The country was divided by a raging national debate about whether the United States should get involved in World War II,⁴⁰ with the memory of World War I and the loss of life that war exacted fresh in people's minds. By 1943, the Japanese had bombed Pearl Harbor the nation was in with both feet in both the Pacific war against Japanese imperialism and the Atlantic war against Nazi Fascism and the people were united in the war effort.⁴¹ Interestingly, the emphasis on unity was much more salient at a time of national disunity, and the arguments for respecting freedom of conscience were much more easily respected at a time of actual national unity. It is also worth noting that the heavy price of coerced unity as manifest in Japanese Imperialism and Nazi Fascism were more apparent in 1943 than they had been in 1940.⁴²

3. Adaptations that Individuals Must Make to the State

The second framework for thinking about reasonable accommodation is to conceptualize accommodation as adaptations that the individual must make to the state. From the state's perspective, a reasonable accommodation can be viewed as an adjustment that must be made by individuals to accommodate the state's interests or needs. In this way of thinking, a

³⁹ *Id.* at 642.

⁴⁰ See, e.g., Susan Dunn, *The Debate Behind U.S. Intervention in World War II*, THE ATLANTIC, July 8, 2013, <https://www.theatlantic.com/national/archive/2013/07/the-debate-behind-us-intervention-in-world-war-ii/277572/>.

⁴¹ See, e.g., Ron Grossman, *With Nation at War, Unity Grew Along the Home Front*, CHICAGO TRIBUNE, Aug. 31, 2010, http://articles.chicagotribune.com/2010-08-31/opinion/ct-talk-victory-gardens-grossman-083120100831_1_war-bonds-korean-war-war-effort.

⁴² See *Barnette*, 319 U.S. at 640-641 (acknowledging the recent surge of coercive nationalist regimes: “Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.”)

ISSN 0719-7160

reasonable accommodation is an adjustment that the state can reasonably require of individuals. In both the French and Spanish languages, the sense of the term “reasonable accommodation” seems to suggest this type of State-oriented perspective. The idea is that a reasonable accommodation is an adjustment that the state can reasonably expect of its citizens in satisfying their duties as citizens to the state.

From the perspective of the person seeking the accommodation, it is perhaps objectionable that it is the individual that is forced to make the accommodation. The key concern here is that it violates religious freedom or religious or cultural expression. What a person seeking accommodation might really be asking for is what we might think of as “constitutional space”—or an area where we are protected in our basic rights and freedoms to live out different conceptions of the good, even if they do not correspond to the majority's conception of the right or the good.

The likely legal approach, if we think of reasonable accommodations as adaptations that the individual must make to the state, is thinking about what the boundaries are between what we have to give up as individuals in the interests of the group. The question will be the reasonableness of the adjustment or the burden required of individuals. For example, in the French burkini issue, the question is whether prohibiting the burkini on the beach is a reasonable accommodation of the state's interest in not having others feel uncomfortable. The challenge is that we begin with the tendency to think in terms of the rights or power of the state rather than the rights or interests of individuals. We ask ourselves the question, “is this something the state can reasonably expect of us, its citizens?” Rather than, “is this something the state can reasonably do in light of our rights and freedoms?” It might seem like a subtle difference, but that starting point perspective may have a large impact on how we think about balancing these interests.

Viewing accommodations in this way is also backwards in a sense because it begins with the presumption of regulation and requires the justification for freedom. Examples of this way of thinking about accommodation as an adaptation of individuals to the state can be seen in U.S. cases involving wedding photographers, bakers, and florists.⁴³ The idea is that we begin with the state's interest in important values, such as non-discrimination. We then emphasize the dignitary harm to those that have been refused service.⁴⁴ An example of this situation might be a same-sex couple that goes into a floral shop asking for flower arrangements for their wedding and is denied.⁴⁵

⁴³ See *supra* notes 3-5.

⁴⁴ See, e.g., *State v. Arlene's Flowers*, 2017 Wash. LEXIS 216, at 8-9 (Wash. 2017) (the court emphasized how a same-sex couple felt “very hurt and upset emotionally” after “[their] florist” that they had frequented for years refused to provide flowers for their wedding) (citations omitted).

⁴⁵ See, e.g., *id.*

There is a tendency in these situations to discount the expressive components of the services.⁴⁶ If we think of the wedding photographer, the baker, and the florist as something like a freelance writer, we would not imagine that they should be coerced to accept any commission that comes their way. If we think of them as more like a public accommodation that serves everyone, like a fast food restaurant, then there is something clearly objectionable about refusing service to people based upon characteristics such as sexual orientation.⁴⁷

There is also a tendency to discount the sincere religious freedom and conscience issue by saying, “well there is nothing in baking cakes or in putting together flower arrangements that has to do with conscience.” An example of this mindset is found in the recent Supreme Court case, *Holt v. Hobbs*. *Holt* involved a Muslim prisoner who wanted to wear a short beard due to his religious convictions. The prison refused, saying that it was not possible to make an accommodation due to security concerns (i.e. the possibility that the prisoner might hide contraband in their half inch beard).⁴⁸

The case was decided under the compelling state interest test as articulated in the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁴⁹ The court analyzed the State’s asserted interest and whether this was an accommodation that the state could reasonably request of the prisoner.⁵⁰ The court answered no. They said that the state, the prison in particular, had exaggerated the security concerns and they dismissed these not just as exaggerated, but frankly as fanciful.⁵¹ The court said: “Although the Department’s proclaimed objectives are to stop the flow of contraband and to facilitate prisoner identification, ‘[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct,’ which suggests that ‘those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.’”⁵² The formal compelling state interest test is the same, but the emphasis is slightly different. It becomes more focused on the reasonableness of the state’s demand for an accommodation.

⁴⁶ See, e.g., *Elane Photography, LLC v. Willock*, 2013-NMSC-040, 52-57 (N.M. 2013) (“There is no exemption from antidiscrimination laws for creative or expressive professions”).

⁴⁷ See *id.* at 13 (holding that photography service was a “public accommodation” and that the photographer had violated the NMHRA that prohibited sexual orientation discrimination in public accommodations).

⁴⁸ *Holt v. Hobbs*, 135 S. Ct. 853, 861 (U.S. 2015) (“At the hearing, the Department called two witnesses. Both expressed the belief that inmates could hide contraband in even a 1/2-inch beard, but neither pointed to any instances in which this had been done in Arkansas or elsewhere.”)

⁴⁹ *Id.* at 859 (“We hold that the Department’s policy, as applied in this case, violates the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. §2000cc *et seq.*, which prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest.”)

⁵⁰ See *id.* at 863.

⁵¹ *Id.* (“We readily agree that the Department has a compelling interest in staunching the flow of contraband into and within its facilities, but the argument that this interest would be seriously compromised by allowing an inmate to grow a 1/2-inch beard is hard to take seriously. As noted, the Magistrate Judge observed that it was ‘almost preposterous to think that [petitioner] could hide contraband’ in the short beard he had grown at the time of the evidentiary hearing.”) (citation omitted).

⁵² *Id.* at 866 (citation omitted).

ISSN 0719-7160

Here the court reached the conclusion that the state exaggerated its interest and that its demand was unreasonable. The court said:

“The Department also asserts that few inmates require beards for medical reasons while many may request beards for religious reasons. But the Department has not argued that denying petitioner an exemption is necessary to further a compelling interest in cost control or program administration. At bottom, this argument is but another formulation of the ‘classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.’ We have rejected a similar argument in analogous contexts, and we reject it again today.”⁵³

The court responds by rejecting the slippery slope argument that if we make one exception we will have to make a long list of additional exceptions. This is rejected and characterized as the “classic rejoinder of bureaucrats throughout history.”⁵⁴ This is interesting because at other times the court has characterized the slippery slope problem as a real problem, whereas here they characterize it as something which seems pretextual.

4. Accommodation as a Place of Refuge and Safety

The third framework for thinking about accommodation is as a place of refuge and safety. Here the state's perspective, and the perspective of the individual seeking the accommodation are more in line with each other. The state will view accommodation as a place of shelter or protection, as I have mentioned, the provision of an accommodation in a hotel or an inn. Or the creation of a safe place where people can live in peace and safety even in light of their differences. The person seeking the accommodation might be analogized to a weary traveler, someone who is perhaps a stranger or a minority. Someone who might be vulnerable and someone who might have specific needs that are unlikely to be met by ordinary political mechanisms.

This legal approach is quite different and less familiar than the other two approaches. This might be because, at least in American free exercise jurisprudence, thinking of an accommodation as a place of refuge or safety encourages us to think of accommodation as part of an ethic of hospitality rather than just an ethic of rights. We do not ask whether we have a right to this special need being protected. Rather we ask, “is this need something that we can accommodate without incurring unacceptable costs?” The question is the reasonableness of the adjustment or burden that is required of the state. In a way, it is the mirror opposite of the accommodation view that we saw in the second perspective. Instead of asking whether this is something that the

⁵³ *Id.* (citations omitted).

⁵⁴ *Id.* (citation omitted).

state can reasonably ask of its citizens and people within its jurisdiction, we ask if it is something that the state can reasonably do to accommodate the special religious needs of the visitor or the minority in their midst.

For example, if we think of the dietary needs of prisoners, we might not approach this from an overtly legal position asking “is there a right to have your special diet provided?” But rather we might ask the question, “can we reasonably accommodate this dietary need without incurring unreasonable additional expense?” The answer may be yes, and it might be no; the answer might vary in different circumstances. But the nature of the question is quite different. We begin by asking, “can we the majority, or can we the state, reasonably accommodate this difference?” Rather than asking whether it is reasonable to expect the minority to shift in ways that are familiar to us.

The challenge of this approach is that it is difficult to formulate workable legal rules to enforce this idea. It is much more likely to be a mindset of accommodation rather than a simple right to receive an accommodation. So the goal or the challenge will be to pursue non-discrimination and equal treatment while being sensitive to the particular needs of particular groups, such as minorities.

An example of accommodation as a place of refuge and safety is found in U.S. President George Washington's letter to the annual meeting of the Quakers.⁵⁵ Shortly after being elected, President Washington received letters of congratulations from a variety of religious groups, including a group of Jews and a group of Quakers.⁵⁶ His letters of response to these groups contain some of the most profound and beautiful expressions of reasonable accommodation that exist in U.S. political and legal discourse.

Keep in mind that Washington had good reason to doubt the patriotism and the loyalty of Quakers. Not only did they oppose bearing arms, and so refused to serve in the Revolutionary militias,⁵⁷ they also refused even to lend money or pay taxes to the Revolutionary armies⁵⁸—and many Quaker businessmen were quite wealthy. In addition, they were viewed as loyalists to a large extent,⁵⁹ and were also anti-slavery.⁶⁰ Thus, the Quaker's loyalty to the government was

⁵⁵ Letter from George Washington to the Society of Quakers, *supra* note 19.

⁵⁶ See, e.g., *supra* notes 21 and 62.

⁵⁷ While fighting with Quakers in the French and Indian War, Washington “could by no means bring the Quakers to any terms. They chose rather to be whipped to death than bear arms, or lend us any assistance whatever upon the fort, or any thing of self-defense.” Paul F. Boller, Jr., *George Washington and the Quakers*, 49 THE BULLETIN OF FRIENDS HISTORICAL ASSOCIATION 70 (Autumn, 1960) (citation omitted).

⁵⁸ See Philadelphia Yearly Meeting of the Religious Society of Friends (printed by Samuel Sansom), *Rules of Discipline and Christian Advices of the Yearly Meeting of Friends for Pennsylvania and New Jersey from 1685-1760*, at 132 (1797) <http://quod.lib.umich.edu/e/evans/N24322.0001.001?rgn=main;view=fulltext> (“Friends may be careful to avoid engaging in any Trade or Business tending to promote War; and particularly against sharing or partaking of the spoils of War . . . It is the sense of this Meeting, that a Tax levied for the purchasing of Drums, Colours, and other warlike uses, cannot be paid consistent with our Christian Testimony.”)

⁵⁹ See Joseph S. Tiedemann, *Queens County, New York Quakers in The American Revolution: Loyalists or Neutrals?*, 52 HISTORICAL MAGAZINE OF THE PROTESTANT EPISCOPAL CHURCH 215 (1983) (“The response of Quakers to the American

ISSN 0719-7160

subject to question for a variety of reasons. In spite of that, and in the immediate aftermath of coming through the crucible of the Revolutionary War, this is what George Washington wrote:

“I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated *with great delicacy and tenderness*; and it is my wish and desire, that the laws may always be as *extensively accommodated* to them, as a due regard to the protection and essential interests of the nation may justify and permit.”⁶¹

Notice that this does not invite us to engage in a balancing test between the rights of conscience on the one hand and the national interest or the interest in non-discrimination (or other important values) on the other hand. Rather it invites us to treat the conscientious scruples of everyone with “great delicacy and tenderness.” This reflects what I have been calling the ethic of hospitality, rather than the ethic of rights. And, in a way, Washington articulates an early and expansive notion of the compelling State interest test when he says that the laws should extensively accommodate conscientious needs of individuals as long as the protection and essential interest of the nation are protected. The “essential interests”—that sounds a little bit like a compelling state interest.

In Washington’s letter to the Hebrew Congregation in Newport he alluded to a scripture from the Old Testament Prophet, Micah: “But they shall sit every man under his vine and under his fig tree; and none shall make them afraid: for the mouth of the Lord of hosts hath spoken it.”⁶² Micah himself envisioned a time when swords will be beaten into plowshares, and spears into pruning hooks, and when “nation shall not lift up a sword against nation, neither shall they learn war any more.”⁶³ In Washington’s conception, protecting conscience is a matter of providing a safe place—a vine and fig-tree where each person can rest and be sustained without fear in the shade of his or her moral or religious convictions, answerable only to God.⁶⁴

Revolution is an historical issue over which there continues to be disagreement. Although Friends at the time proclaimed their neutrality, contemporaries, instead, often believed them to be loyalists, and historians have not yet satisfactorily resolved the controversy.”)

⁶⁰ “George Washington was a *soldier* and *slaveholder* and the [Quakers were] *pacifist* and *emancipationist*; it is not surprising, therefore, that the two should have clashed from time to time.” Paul F. Boller, Jr., *George Washington and the Quakers*, 49 THE BULLETIN OF FRIENDS HISTORICAL ASSOCIATION 69 (Autumn, 1960).

⁶¹ Letter from George Washington to the Society of Quakers, *supra* note 19.

⁶² Micah 4:4 (King James); Compare with George Washington, *Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island* (Aug. 18, 1790), <http://founders.archives.gov/documents/Washington/05-06-02-0135> (“May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid.”)

⁶³ Micah 4:3 (King James).

⁶⁴ Letter from George Washington to the Society of Quakers, *supra* note 19. (“The liberty enjoyed by the People of these States, of worshipping Almighty God agreeable [sic] to their Consciences, is not only among the choicest of their *Blessings*, but also of their *Rights*—While men perform their social Duties faithfully, they do all that Society or

Accommodating conscience, as Washington invites us to see, should not be viewed as making an accommodation, but as providing accommodation. An example of accommodation as a place of refuge and safety can be seen in the recent British Columbia Court of appeals decision in *Trinity W. Univ. v. The Law Society of B.C.*. Trinity Western University, a university in Canada, has a code of conduct referred to as the “Community Covenant.”⁶⁵ The “Community Covenant” requires honesty and integrity, but it also requires that students agree to abstain from sexual activity outside of marriage between a man and a woman.⁶⁶

The Law Societies of several Canadian provinces had made a decision not to allow Trinity Western graduates to practice based on the concern that they would discriminate against sexual minorities and same sex married couples.⁶⁷ Trinity Western challenged that decision in court. Interestingly, there were divided outcomes in various provinces in Canada, some emphasizing discrimination against sexual minorities, such as the Ontario decision,⁶⁸ and some emphasizing discrimination against religious minorities and their freedom of religion and association, such as in Nova Scotia⁶⁹ and British Columbia.⁷⁰ The British Columbia Court decided in November 2016 that “[t]he Law Society’s decision not to approve TWU’s faculty of law denies these evangelical Christians the ability to exercise fundamental religious and associative rights which would otherwise be assured to them under section 2 of the *Charter*.”⁷¹ The court then goes on to say:

“A society that does not admit of and accommodate differences cannot be a free and democratic society — one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.”⁷²

The point is that nondiscrimination, if taken to an extreme, can itself end in discrimination. And here the court emphasizes the importance of creating a constitutional space where Trinity Western can live out their religious convictions without fear of reprisal and penalty.⁷³

the State can with propriety demand or expect; and remain responsible only to their Maker for the Religion or modes of faith which they may prefer or profess.”)

⁶⁵ Trinity W. Univ., Community Covenant Agreement, TWU.CA, <http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf> (last visited Feb. 17, 2017).

⁶⁶ *Id.* (“In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions: . . . sexual intimacy that violates the sacredness of marriage between a man and a woman.”) (citation omitted).

⁶⁷ *Trinity W. Univ. v. The Law Society of B.C.*, 2016 BCCA 423, at ¶ 21.

⁶⁸ *Trinity W. Univ. v. The Law Society of Upper Canada*, 2015 ONSC 4250, at ¶ 123-124.

⁶⁹ *See Trinity W. Univ. v. Nova Scotia Barristers’ Society*, 2015 NSSC 25, at ¶ 270.

⁷⁰ *Trinity W. Univ. v. The Law Society of B.C.*, 2016 BCCA 423, at ¶ 164.

⁷¹ *Id.* at ¶ 190.

⁷² *Id.* at ¶ 193.

⁷³ *See id.*

ISSN 0719-7160

Another example of accommodation as a place of refuge and safety is found in the South African constitutional court case of *MEC for Education: Kwazulu-Natal and Others v. Pillay*.⁷⁴ Pillay was a young middle school student of South Indian descent and after reaching puberty, she had a nose stud placed in her nose over school holidays.⁷⁵ This was in violation of the school dress code which prohibited all jewelry.⁷⁶ She petitioned the school for an exception based on the cultural significance of the jewelry to her as a Hindu and the school said no.⁷⁷ Her case went through the equity courts to the Constitutional Court, which held that refusing an accommodation to Pillay was unfair discrimination and ordered the school to amend its code of conduct “to provide for the reasonable accommodation of deviations from the Code on religious or cultural grounds and a procedure according to which such exemptions from the Code can be sought and granted.”⁷⁸

The school's interest in order and uniformity was not sufficient to overcome the interest in equality and human dignity. Interestingly, the key factor in the Court's analysis is equality.⁷⁹ Even though, in one way of thinking about the problem, Pillay is not seeking *equal* treatment, but *special* treatment. Nevertheless, the court said that protecting equality might require us to recognize and accommodate some of our differences. The court said:

“The traditional basis for invalidating laws that prohibit the exercise of an obligatory religious practice is that it confronts the adherents with a Hobson's choice between observance of their faith and adherence to the law. There is however more to the protection of religious and cultural practices than saving believers from hard choices. As stated above, religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality. Are voluntary practices any less a part of a person's identity or do they affect human dignity any less seriously because they are not mandatory?”⁸⁰

The court rejects this as a simple balancing problem between accommodating religious beliefs and adhering to the law.⁸¹ Instead the court says that protecting religious freedom and cultural practice requires more than simply balancing, rather we protect these interests because they are central to human identity, to human dignity, and to equality.⁸² Equal treatment might require us to take into account special needs. The Court concludes that, “the protection of voluntary practices applies equally to culture and religion.”⁸³ The school's action was thus discriminatory

⁷⁴ *MEC for Education: Kwazulu-Natal and Others v. Pillay*, 2008 (1) SA 474 (CC) (S. Afr.).

⁷⁵ *Id.* at ¶ 5.

⁷⁶ *Id.*

⁷⁷ *Id.* at ¶ 7-8.

⁷⁸ *Id.* at ¶ 119.

⁷⁹ *See id.* at ¶ 62.

⁸⁰ *Id.* (citations omitted).

⁸¹ *See id.*

⁸² *See id.*

⁸³ *Id.* at ¶ 66.

and had to be justified as a fair discrimination in order to be upheld.⁸⁴ In determining whether the discrimination was fair, the Court considered the principle of reasonable accommodation, defining it as:

“the notion that sometimes the community . . . must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.”⁸⁵

In determining the extent of the duty to accommodate, the Court adopted a flexible standard: “Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.”⁸⁶ Notice, however, that the reasonable accommodation is something that the state does for its people—positive measures that might incur a hardship or even expense in order to allow people to participate in society and to enjoy all of their rights equally. So an accommodation is something that the state does in order to make it possible for people to live with freedom, equality, and dignity. This is the opposite of the statist approach to thinking about reasonable accommodation in asking what the state can reasonably expect of its people. Here instead we ask what can reasonably be asked of the state by its people. The difference between the two approaches is quite significant.

5. Conclusion

Thus we see, reasonable accommodation is a complex concept, and it is subject to a variety of different conceptions. What we have learned over many years in dealing with religious difference (not just in the United States, but in the European Court of Human Rights and constitutional courts around the world) is that it usually is possible to accommodate religious needs without undue costs or hardship to the state or majority interests. However, the prevailing attitude or conceptual framework that we bring to the task will be important.

If we think of accommodation as a perhaps unfortunate exception to general and neutral rules, then we may be stingy in making an accommodation because of our emphasis on equality and equal treatment and our desire not to give some people special or favorable treatment. Second, if we think of a reasonable accommodation as an adaptation that individuals must make to the state, then we are likely to have perhaps an even more narrow understanding of what is a reasonable accommodation. After all, the state’s needs will be large and what the state will believe it can reasonably expect of its people in order to create a social environment of people feeling comfortable with each other might be quite expansive. Third, if we think of accommodations as a place of refuge and safety, we are nudged away from an ethic of rights and

⁸⁴ See *id.* at ¶ 69.

⁸⁵ *Id.* at ¶ 73.

⁸⁶ *Id.* at ¶ 76.

ISSN 0719-7160

toward an ethic of hospitality. We ask not what the state can reasonably ask of us, but of what we can reasonably ask of the state in protecting us in our religious individuality and our religious particularity.

In a way each of these three mindsets reflects different fundamental political values. If we think of accommodation as an exception to general rules, we will be focused on liberty. We will start with a presumption of liberty and we will allow limitations on religious freedom only when the state has a compelling interest or only when imposing those limitations are “necessary in a democratic society.” If we think of reasonable accommodation as an adaptation that individuals must make to the state, the primary value will be equality. The idea that, as the Court held in *Gobitis* or as the French officials held in the *Burkini* case,⁸⁷ equality requires us to sacrifice some of our individuality and our claimed individual needs. And finally, if we think of accommodation as a place of refuge and safety, the primary value may be fraternity, or a genuine spirit of brotherhood. Liberty, equality, and fraternity are, of course, the great founding values of the French Revolution.⁸⁸ As I mentioned in the beginning, what we are likely to see is hybrids, where each of these values is in some sense significant. Nevertheless, we can ask ourselves which of these three ways of thinking about reasonable accommodation should be our dominant or preeminent framework.

⁸⁷ See *supra* note 9.

⁸⁸ “A legacy of the Age of Enlightenment, the motto ‘Liberté, Egalité, Fraternité’ first appeared during the French Revolution. Although it was often called into question, it finally established itself under the Third Republic. It was written into the 1958 Constitution and is part nowadays of the French national heritage.” *Liberty, Equality, Fraternity*, FRANCE IN THE UNITED STATES: EMBASSY OF FRANCE IN WASHINGTON, D.C., Nov. 30, 2007, <http://franceintheus.org/spip.php?article620>.