NOTE

CAN THE REASONABLE PERSON BE RELIGIOUS? ACCOMMODATION AND THE COMMON LAW

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Since the 1990s, in theory, the Supreme Court has applied rational basis review to neutral and generally applicable laws that incidentally burden religious practice. Strict scrutiny is reserved for those laws that lack neutrality or general applicability. In practice, however, free exercise jurisprudence has developed quite differently. Employing an aggressive exemption strategy, many petitioners have argued, and many courts have accepted, that the existence of but one secular exemption eliminates the neutrality and general applicability of a law. As such, strict scrutiny is applied. For those who would prefer to return to the free exercise jurisprudence that predated Employment Division v. Smith*, this result may seem welcome, even a victory. This Note, however, suggests that such an approach should raise concern.*

This Note argues that this aggressive exemption free exercise theory requires the reasonable person standard of torts to accommodate parties' religious beliefs. Many courts that have addressed the issue have found the same. This Note then surveys the three responses courts have taken to accommodate religious belief in tort law: the "objective" approach, "the reasonable believer" test, and the "case-by-case" method. Fundamental Free Exercise and Establishment Clause problems with the "objective" and "reasonable believer" approaches demonstrate the superiority of a "case-by-case" analysis. That any accommodation is required, however, should give pause.

It is not the specific contours of tort law that give rise to the required accommodation, but rather the heavily individualized decision-making

* J.D., University of Virginia School of Law, 2021. I would like to thank, first and foremost, Professor Micah Schwartzman for his guidance and support throughout the writing process. I am deeply grateful for the feedback and comments I received along the way from many others, including Jordan Sisco, Jack Danon, Josh Short, and the members of the *Virginia Law Review*, particularly Matt West. All errors are my own.

process that tort law uses. Individualized decision-making is not a symptom, but rather a feature, of the common law. As such, finding a required religious accommodation to tort law has broad ramifications for our standards-based legal system. This Note argues that this outcome suggests a fundamental flaw with the Court's aggressive exemption free exercise jurisprudence.

INTRODUCTION

Marbury v. Madison teaches us that the judicial branch has the power to review the constitutionality of governmental acts.[1] This power of review comes up most frequently when congressional or state legislative acts run afoul of the Constitution. But what happens when someone claims that the common law, a product of judges and purportedly applied uniformly to all citizens, burdens a constitutional right? Can people demand exemptions from a tort standard solely because of a claim of individualized burden? Consider the following scenarios:

[1] 5 U.S. (1 Cranch) 137, 177–78 (1803).

In May 1991,[2] Gwendolyn Robbins was traveling through upstate New York with her father when he swerved their vehicle off the road and into a culvert at sixty-five miles per hour. Mrs. Robbins, severely injured in the crash, was rushed to a local hospital for surgery. Once there, however, she learned that proper treatment would require blood transfusions. She refused on grounds that it would violate her religious beliefs as a Jehovah's Witness. In the face of increased medical expenses and a reduced quality of life, Mrs. Robbins remained steadfast in refusing surgery. She later pressed for damages and the cost of continuing care in a negligence suit against the owner of the car.[3]

In August 1963, sixteen-year-old Ruth Eider was in a chairlift traveling down a mountain when the operator negligently stopped the lift. It was late afternoon and she and her nineteen-year-old male companion were stuck. After fifteen minutes of yelling, it became clear that no one was coming to help. Raised in an ultra-orthodox Jewish household, Ms. Eider had been taught that spending the night with a man in a place inaccessible to a third party was an overwhelming moral sin. Facing this prospect, Ms. Eider jumped from the lift. She eventually sued the State of New York (the operator of the mountain) for the cost of the injuries sustained in the jump.[4]

In March 2006, Marine Lance Corporal Matthew Snyder was killed in the line of duty in Iraq. Shortly thereafter, his father scheduled a funeral to commemorate his life for close friends and family. Members of the Westboro Baptist Church, a fundamentalist Christian sect, used this funeral as an opportunity to highlight their condemnation of homosexuality. They protested outside the ceremony carrying signs with slogans like "Thank God for dead soldiers," "God hates you," and "Semper fi fags" to spread their message. Mr. Snyder's father sued the Church for intentional infliction of emotional distress ("IIED"). In response, the Westboro Baptist Church claimed complete immunity from tort liability on both free speech and free exercise of religion grounds.[5]

[2] Verdict Form, Williams v. Bright, 632 N.Y.S.2d 760 (N.Y. Sup. Ct. 1995) (No. 17261/92), 1994 WL 16200195.

[3] Facts consolidated from trial and appellate court decisions. Williams v. Bright, 632 N.Y.S.2d 760, 762–63 (N.Y. Sup. Ct. 1995), rev'd in part, 658 N.Y.S.2d 910, 911 (N.Y. App. Div. 1997).

[4] Friedman v. State, 282 N.Y.S.2d 858, 859–63 (N.Y. Ct. Cl. 1967), modified, 297 N.Y.S.2d 850 (N.Y. App. Div. 1969).

[5] Snyder v. Phelps, 533 F. Supp. 2d 567, 569–70 (D. Md. 2008), rev'd, 580 F.3d 206 (4th Cir. 2009), aff'd, 562 U.S. 443 (2011). The district court dismissed the free exercise claim,

Although these three incidents, separated by over four decades, would seem to have little in common, the tort suits they spawned had to grapple with a question that has beguiled courts for years: In determining culpability, to what extent can tort law be modified to accommodate the strongly held religious beliefs of a party?[6] That is, when, if ever, can religion be a valid justification for ignoring the purportedly generally applicable standards of the common law?

At first glance, the answer to that question would seem to be never. The basic command of tort law is to "be reasonable."[7] Reasonableness permeates the legal system in one form or another, a lodestar which guides court decision-making,[8] and is determined "objectively."[9] This would appear to foreclose any consideration of parties' subjective religious motivation. Over the years, however, a number of courts and commentators have realized that the answer is not that simple, particularly when "objective" reasonableness conflicts with the Religion Clauses of the First Amendment.[10] In response, these courts and commentators have wrestled with a framework for accommodating religious belief in

distinguishing statutory and criminal restrictions on religious practice from other types of restrictions. Id. at 579. This Note suggests that the case law and logic of free exercise jurisprudence do not support such a distinction.

[6] The first court to address this question was the Supreme Court of Errors of Connecticut in *Lange v. Hoyt*, 159 A. 575, 577–78 (Conn. 1932). Understanding the difficulty of the issues raised, "[n]ot surprisingly, the Connecticut trial court ducked the issue and the Connecticut Supreme Court (of Errors as it then was) affirmed the ducking" by allowing the jury to consider that the plaintiff's religious beliefs were widely held in determining reasonableness. Guido Calabresi, Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem 47 (1985). Modern courts have similarly struggled with this question. See Munn v. S. Health Plan, Inc., 719 F. Supp. 525, 526 (N.D. Miss. 1989) ("This wrongful death case [involving a decedent who refused a blood transfusion on religious grounds] presents some of the most difficult questions which this court has ever been asked to resolve."); Rozewicz v. N.Y. City Health & Hosps. Corp., 656 N.Y.S.2d 593, 594 (N.Y. Sup. Ct. 1997) ("[T]he issues before me dealing with the deceased's refusal to accept blood transfusions raise[] some of the most difficult legal issues I have been faced with during my years on the bench.").

[7] "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances." Restatement (Second) of Torts § 283 (Am. L. Inst. 1965).

[8] See Benjamin C. Zipursky, Reasonableness In and Out of Negligence Law, 163 U. Pa. L. Rev. 2131, 2135–46 (2015) (detailing the many permutations of reasonableness).

[9] See Vaughan v. Menlove (1837) 132 Eng. Rep. 490 (C.P.) (discussing the importance of an objective standard of reasonableness and rejecting inquiry into subjective motivation).

[10] See supra note 6; see, e.g., Jeremy Pomeroy, Note, Reason, Religion, and Avoidable Consequences: When Faith and the Duty To Mitigate Collide, 67 N.Y.U. L. Rev. 1111 (1992); Note, Medical Care, Freedom of Religion, and Mitigation of Damages, 87 Yale L.J. 1466 (1978) [hereinafter Medical Care].

reasonableness calculations. Most of these approaches, however, arose well before the Supreme Court's modern free exercise jurisprudence came into focus in *Employment Division v. Smith*.[11] Consequently, they do not deal with current developments in First Amendment law. Furthermore, they fail to grapple with the serious Establishment Clause concerns raised by exempting individuals from complying with a reasonableness standard.[12] In our common law system, which is built upon a similar edifice of individualized reasonableness determinations, these considerations could reverberate broadly. This Note will attempt to address these issues.

Part I will argue that the Supreme Court's First Amendment jurisprudence after *Smith* not only allows, but requires, religious accommodation where application of the reasonable person standard burdens sincerely held religious belief. In reaching this conclusion, this Part will first show that the reasonable person standard lacks the neutrality and general applicability required under *Smith* and its Free Exercise Clause companion, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[13] This Part will then demonstrate that a lack of neutrality and general applicability can and will undermine any compelling interest the state could put forth in application. Thus, a religious adjustment is necessary.

Part II will discuss the three approaches that courts have taken to adjust the reasonable person standard for sincerely held religious belief. It will first address the "objective" test, which purports to reject consideration of subjective thought and prohibits courts from including religious belief in reasonableness determinations. The requirement of some accommodation under *Smith* and *Lukumi* makes this approach unworkable. This Part will then address the "reasonable believer" test, in which courts treat religion as an immutable characteristic of the party, similar to the "eggshell skull" rule in torts. It will reject this test on both Free Exercise and Establishment Clause grounds. Finally, this Part will discuss the "case-by-case" approach in which religion is one of many equally weighted factors used to determine the reasonableness of an action. It will contend that this

[11] Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

[12] See Anne C. Loomis, Thou Shalt Take Thy Victim as Thou Findest Him: Religious Conviction as a Pre-Existing State Not Subject to the Avoidable Consequences Doctrine, 14 Geo. Mason L. Rev. 473, 505–09 (2007) (purporting to address Establishment Clause concerns but failing to consider the full gamut outlined *infra* in Part II).

[13] 508 U.S. 520 (1993).

approach alleviates some of the Free Exercise and Establishment Clause problems of the "reasonable believer" standard and is the best option given the demands of the Supreme Court's First Amendment jurisprudence.

In the admittedly small arena of "failure to mitigate damages" cases, this outcome may seem palatable and even appropriate. But the implications of finding a required adjustment are far-reaching. If something as generic as a reasonableness standard is susceptible to required religious accommodation, what other purportedly generally applicable laws or standards are similarly vulnerable? Take, for example, *Snyder v. Phelps*, the Westboro Baptist Church case discussed above.[14] Although the Supreme Court decided the issue in the Church's favor on free speech grounds,[15] suppose, instead, that it had tackled the free exercise question.

Should the tort of IIED be subject to required religious accommodation because it has exemptions for speech protected under the First Amendment's Free Speech Clause? An aggressive exemption strategy to religious accommodation under *Smith* and *Lukumi* may suggest that the answer is yes. That outcome seems unsettling. It also begs for clarity on what laws or standards, if any, are so fundamental as to avoid required religious accommodation. This Note uses the finding of a required religious accommodation to the reasonable person standard to suggest the fundamental inadequacy of the Court's aggressive exemption jurisprudence under the Free Exercise Clause.

I. THE REASONABLE PERSON STANDARD: A CONSTITUTIONAL ANALYSIS

In the decades since its decisions in *Smith* and *Lukumi*, the Supreme Court has given little guidance on the development of First Amendment free exercise jurisprudence. As a practical matter, the Religious Freedom Restoration Act of 1993 ("RFRA") and the Religious Land Use and Institutionalized Persons Act of 2000's ("RLUIPA") codification of a strict scrutiny standard has presented more fertile ground for these claims.[16] Circuit courts, however, have developed robust case law interpreting, sometimes in conflict, the requirements of the Religion

[14] See supra text accompanying note 5.

[15] Snyder v. Phelps, 562 U.S. 443, 461 (2011).

[16] Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb; Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc.

Clauses. These cases guide the inquiry into free exercise accommodations today.

This Part will first conclude that the First Amendment is the avenue through which a claim for accommodation to state common law would arise. It will then examine the development of lower courts' understanding of the requirements of *Smith* and *Lukumi*. Finally, this Part will demonstrate that under that case law, the reasonable person standard of torts, facially and as applied, falls into the category of laws subject to a mandatory accommodation for sincerely held religious belief.

A. The First Amendment and State Common Law

The conclusion that the First Amendment requires an adjustment to the reasonable person standard, a product of state tort law, relies on the initial assumption that the First Amendment applies to state common law. It has long been settled that the Fourteenth Amendment incorporated the Religion Clauses of the First Amendment against the states.[17] Although some have questioned the incorporation of the Establishment Clause,[18] that issue does not present itself here. The question, rather, is whether the common law and the reasonable person standard embedded within are "state action" within the meaning of the First Amendment. At least one court has determined they are not.[19] But the holding in that case was an outlier and there is clear reason to believe that judicial enforcement of state common law satisfies the state action requirement.[20]

[17] See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause of the First Amendment against the states); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (incorporating the Establishment Clause).

[18] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in judgment) ("I would take this opportunity to begin the process of rethinking the Establishment Clause. I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.").

[19] See Shorter v. Drury, 695 P.2d 116, 124 (Wash. 1985) ("[Although] plaintiff asserts the submission of the issue of assumption of the risk to the jury violated the free exercise clause of the First Amendment[,] . . . a prerequisite for First Amendment cases is that there be some state action or interference. There is none here. This is a dispute between private individuals; plaintiff is denied no rights under the First Amendment." (citations omitted)). But see Williams v. Bright, 658 N.Y.S.2d 910, 913 (N.Y. App. Div. 1997) ("An order emanating from a State court constitutes 'state action' which, under the Fourteenth Amendment, would trigger First Amendment protections.").

[20] In addition to the *Williams* court, nearly every other court to address the issue of the conflict between the Free Exercise Clause and the reasonable person standard has adjudicated the dispute, at least implicitly acknowledging the enforcement of the common law as state action. See, e.g., Munn v. Algee, 924 F.2d 568, 574 (5th Cir. 1991); Munn v. S. Health Plan,

In *Shelley v. Kraemer*, the Supreme Court held "[t]hat the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment."[21] Although the case dealt with racially restrictive covenants and the Fourteenth Amendment's Equal Protection Clause, the logic, as most of the courts to address this issue have recognized, extends to the First Amendment's Religion Clauses.[22] The animating concern of the Court in *Shelley*, that judicially enforced rules could deprive parties of their constitutionally protected rights under the Fourteenth Amendment, applies with equal force to the First Amendment.[23] The determination of the First Amendment's applicability to state common law claims, however, does not settle the issue of whether the Constitution is the best place to ground a free exercise claim against tort law.

In the wake of the Supreme Court's decision in *Smith*, Congress enacted a statutory scheme to supplant the Court's holding.[24] The express purpose of the Religious Freedom Restoration Act was to return the Supreme Court's religious accommodation jurisprudence to the "strict scrutiny" test of *Sherbert v. Verner* and *Wisconsin v. Yoder*.[25] Under this test, the government had to justify any burden on a person's sincerely held religious belief, whether intentional or incidental, with a compelling governmental interest.[26] Under such a test, a plaintiff who claimed the

Inc., 719 F. Supp. 525, 529 (N.D. Miss. 1989); Braverman v. Granger, 844 N.W.2d 485, 496 (Mich. Ct. App. 2014); Lundman v. McKown, 530 N.W.2d 807, 827–28 (Minn. Ct. App. 1995).

[21] 334 U.S. 1, 14 (1948).

[22] See supra note 20. The Court in *Shelley v. Kraemer* went on to state that

> [i]t has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.

334 U.S. at 17.

[23] Id. at 17–18. Indeed, the Supreme Court's decision in *Cantwell v. Connecticut* that free exercise of religion is so foundational to "[t]he fundamental concept of liberty" to warrant incorporation against the states would seem to require this outcome. 310 U.S. 296, 303 (1940).

[24] RFRA, 42 U.S.C. § 2000bb.

[25] Id. § 2000bb(b). But cf. Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682, 713–17 (2014) (contending that RFRA did more than simply codify the Supreme Court's pre-*Smith* Free Exercise jurisprudence).

[26] Sherbert v. Verner, 374 U.S. 398, 403 (1963).

reasonable person standard denied her full recovery because of a sincerely held religious belief would likely have a valid claim.[27]

The Supreme Court's decision in *City of Boerne v. Flores*,[28] however, precludes that route. In *City of Boerne*, the Supreme Court ruled that the Religious Freedom Restoration Act was invalid as applied to the states, as it exceeded Congress's enforcement power under the Fourteenth Amendment.[29] In response to this decision, Congress passed the Religious Land Use and Institutionalized Persons Act, which again attempted to import a higher standard of review into religious exercise cases.[30] But as the name of the Act suggests, this statute was limited to claims regarding land use regulation of religious organizations and the religious exercise of prisoners.[31] For purposes of an inquiry into the requirement of religious accommodations under state common law, the only approach is through the *Smith* and *Lukumi* standard under the First Amendment to the Constitution.[32]

B. Free Exercise After Smith *and* Lukumi

This Section will lay out the approach that lower courts have taken in implementing and adjudicating disputes under the *Smith* and *Lukumi* framework. Under the current regime, a law that incidentally burdens religion, but which is both neutral and generally applicable, receives only rational basis review. A law that lacks neutrality or general applicability is subject to strict scrutiny. Assuming a burden on religious exercise for now,[33] the first Subsection will address how courts have interpreted the neutrality and general applicability requirements. It will argue that, despite a circuit split on the issue, the existence of secular exceptions or

[27] See Medical Care, supra note 10, at 1486–87.

[28] 521 U.S. 507 (1997).

[29] Id. at 536.

[30] 42 U.S.C. § 2000cc.

[31] Id. §§ 2000cc, 2000cc-1.

[32] This Note does not consider the impact of state RFRA laws on the outcome of the analysis. Although twenty-one states have RFRA laws on their books, given that the First Amendment likely requires some sort of accommodation, analysis under those laws would likely lead to a similar place. See Religious Freedom Restoration Act Information Central, Becket, https://www.becketlaw.org/research-central/rfra-info-central/ [https://perma.cc/C3V7-JDGE] (last visited Oct. 24, 2020). If formulated similarly to the federal RFRA, there would be no need to address "general applicability" and "neutrality," however. One could proceed directly to whether the government had a compelling interest. See infra Section I.C.

[33] See infra Section I.C for discussion of the burden needed to trigger a First Amendment claim.

discretion in implementation is likely fatal in this inquiry. With that finding in hand, the second Subsection will then detail how a lack of generality or neutrality is used to undermine compelling interests the government could have in implementation. As such, religious accommodation may be necessary even for laws that appear facially neutral.

1. What Do "Neutrality" and "General Applicability" Mean?

In *Smith*, the Supreme Court held that the First Amendment is not offended by the application of a neutral and generally applicable law that incidentally burdens an individual's religious practice.[34] The Court expanded upon the requirements for finding neutrality and general applicability in its subsequent decision in *Lukumi* and suggested that the analysis for the two prongs runs together.[35] Particularly relevant for purposes of the reasonable person standard, the Court discussed how a system of exceptions in a law could demonstrate a lack of neutrality.[36] The Court's guidance, however, was vague.[37] A split has since developed in the lower courts over the relationship between exemptions and a law's neutrality and general applicability. Under one approach adopted by the Third Circuit in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, the existence of any secular exception to a law eliminates general applicability and subjects it to strict scrutiny.[38] Under an alternative approach, followed by the Tenth Circuit in *Swanson ex rel. Swanson v. Guthrie Independent School District No. I-L*, the analysis focuses not on the existence of secular exemptions, but on the system's structure in making determinations on exceptions.[39] Both approaches broadly agree, however, that the existence of exemptions in a law can eliminate the requisite general applicability and neutrality.

In *Fraternal Order*, the Third Circuit confronted a claim that the Newark police department's no-beard policy impermissibly burdened the

[34] 494 U.S. 872, 878 (1990).

[35] 508 U.S. 520, 531 (1993) ("Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

[36] Id. at 537 ("As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" (citation omitted)).

[37] See id. at 537–38.

[38] 170 F.3d 359, 360 (3d Cir. 1999).

[39] 135 F.3d 694, 701–02 (10th Cir. 1998).

religious beliefs of two officers who wanted to grow facial hair in line with their Muslim faith.[40] This might seem like the type of regulation at which *Smith* was directed. But the Third Circuit, in an opinion written by then-Judge Alito found otherwise.[41] Focusing on the existence of one secular medical exemption in the policy, the court concluded that it lacked the general applicability necessary for deference under *Smith*.[42] Although the medical exemption existed only because federal law required it,[43] the court reasoned that

> the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. . . . [W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.[44]

This approach, which has been adopted by a number of other courts,[45] thus allows the existence of secular exemptions, and in some cases only a singular exemption, to undermine the general applicability of a law. This approach is fatal to a claim of general applicability and neutrality in tort law.[46]

In *Swanson*, the Tenth Circuit tacked a different course, focusing the inquiry on the existence of a routine, individualized exemption system in determining whether a law lacked neutrality and general applicability.[47] In this case, the court addressed a local school board policy which

[40] *Fraternal Ord.*, 170 F.3d at 360.

[41] Id.

[42] Id. at 364–65.

[43] The medical exemption was necessary for compliance with the Americans with Disabilities Act, 42 U.S.C. § 12101. *Fraternal Ord.*, 170 F.3d at 365.

[44] Id. at 366.

[45] See, e.g., Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1234–35 (11th Cir. 2004) (holding that exemption for secular clubs but not churches and synagogues undermined stated governmental goal of keeping district social, opening law to claim of lack of general applicability); Rader v. Johnston, 924 F. Supp. 1540, 1551–53 (D. Neb. 1996) (finding that a college's housing policy which contained numerous written exemptions and allowed further ad hoc decisions in application lacked neutrality and general applicability); Mitchell County v. Zimmerman, 810 N.W.2d 1, 15–16 (Iowa 2012) (holding that secular exemption allowing school buses to use ice grips undermined general applicability of county ordinance prohibiting Mennonites' use of steel tires on roads).

[46] See infra Section I.C.

[47] 135 F.3d 694, 701–02 (10th Cir. 1998).

prohibited part-time attendance.[48] The Swansons wanted to homeschool their daughter in accordance with their Christian beliefs and supplement their teachings with classes at the public school.[49] They claimed that this new policy would impermissibly burden that free exercise right.[50] In denying this claim, the Tenth Circuit held that the policy was generally applicable under *Smith*, despite the existence of two secular exemptions for fifth-year seniors and those with individualized education plans.[51] In *Axson-Flynn v. Johnson*, the Tenth Circuit clarified the *Swanson* approach, explaining that objectively categorized exceptions do not undermine the generality of a law; the focus, rather, should be on whether a system of ad hoc, individualized considerations suggests a lack of generality.[52] The approach of the Tenth Circuit may conflict with that of the Third Circuit. Under either approach, however, the reasonable person standard, which contains both categorical exceptions and individualized determinations of reasonableness, likely fails the neutrality inquiry.[53]

2. What Is a Compelling Governmental Interest?

Once a court determines that a law lacks the requisite general applicability and neutrality for *Smith* to apply, it moves on to a compelling interest analysis.[54] This Subsection will not categorize the myriad ways in which courts have characterized a compelling interest.[55] Rather, it will show that courts have found that the same exemptions that undermine the general applicability of a law also cast doubt on the compelling nature of the interest in enforcement.[56] That is, courts have questioned whether the

[48] Id. at 697.

[49] Id. at 696.

[50] Id. at 697.

[51] Id. at 702.

[52] Axson-Flynn v. Johnson, 356 F.3d 1277, 1298 (10th Cir. 2004) ("*Smith*'s 'individualized exemption' exception is limited, then, to systems that are designed to make case-by-case determinations. The exception does not apply to statutes that, although otherwise generally applicable, contain express exceptions for objectively defined categories of persons.").

[53] See infra Section I.C.

[54] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) ("A law failing to satisfy these requirements [of neutrality and general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

[55] See Medical Care, supra note 10, at 1475–78 (describing the different approaches the Court has taken to the "compelling interest" definition).

[56] See *Lukumi*, 508 U.S. at 547 ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' [compelling

government's asserted interest is important when it is making other exceptions to the law. The Third Circuit employed this reasoning in *Fraternal Order*. In the case, the police department claimed "that permitting officers to wear beards for religious reasons would undermine the force's morale and esprit de corps."[57] The court rejected the argument as "the Department . . . provided no legitimate explanation as to why the presence of officers who wear beards for medical reasons does not have this effect but the presence of officers who wear beards for religious reasons would."[58] The Supreme Court, in the context of applying strict scrutiny analysis under RLUIPA, has employed similar reasoning.[59] Regardless of how important the governmental interest seems facially—from prison safety[60] to academic success and diversity[61]—courts have found that the presence of exceptions which do not serve the government's asserted interest calls into question the legitimacy of that interest, particularly against a claim of religious burden.

Under a strict scrutiny analysis, a lack of compelling interest is fatal to the policy at hand.[62] In these cases, the analysis need not consider whether the policy was narrowly tailored to achieve its goal.[63] In effect, a finding that a policy lacks generality and neutrality can both subject the law to strict scrutiny under the First Amendment and cause it to fail that strict scrutiny. Thus, some religious accommodation will be necessary.

C. The Reasonable Person and the First Amendment

Against this general applicability requirement, tort law, which purports to objectively judge behavior against that of an amorphous, reasonable

interest] . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (internal quotation marks and citation omitted)).

[57] Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999).

[58] Id. The court went on to conclude that "[w]e are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not." Id. at 367.

[59] See Holt v. Hobbs, 574 U.S. 352, 367–68 (2015) (finding a lack of compelling interest because "the Department's proclaimed objectives [ ] to stop the flow of contraband . . . are not pursued with respect to analogous nonreligious conduct" (internal quotation marks and citation omitted)).

[60] Id.

[61] Rader v. Johnston, 924 F. Supp. 1540, 1557 (D. Neb. 1996).

[62] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

[63] To survive strict scrutiny a law must *both* serve a compelling state interest *and* be narrowly tailored. Id. By implication, a law that lacks either of those characteristics will fail scrutiny.

person,[64] would seem to fit neatly under *Smith*. Even if the tort system does incidentally burden some individuals because of their religious beliefs,[65] its application of a uniform standard should ostensibly save it. This Section, however, will demonstrate that the reasonable person standard, in theory and in application, contains both the secular exemptions and subjective individualized assessments that undermine general applicability and neutrality under either test lower courts have employed. In turn, these exemptions defeat any of the state's arguments for compelling interest and suggest that religious accommodation to the reasonable person standard is not only permissible, but required. These individualized assessments are not a symptom, but a feature, of a common-law, standards-based system. As such, finding a requirement of accommodation in tort law may have broader implications in a legal system which uses contextualized reasonableness determinations as a cornerstone of decision-making.

In order to challenge a law's application under the First Amendment, a party must be able to show some actual burden on her free exercise.[66] The Supreme Court has not clearly spoken on this question.[67] It has, however, found that monetary consequences for following a sincerely held religious belief constitute a burden.[68] In the context of tort law, the aforementioned cases of Mrs. Robbins and Ms. Eider demonstrate that the burden requirement will typically be met. In these cases, tort law's "objective" approach imposes a reasonableness standard that would deprive someone of full monetary recovery for injuries resulting from religiously motivated conduct.[69] If Mrs. Robbins's religious objection to blood transfusions reduces the award she can receive, those monetary consequences are the burden the tort standard imposes. Similar dynamics are at work if Ms. Eider's religious impetus to jump prevents her from full recovery under a contributory negligence theory.

[64] See Vaughan v. Menlove (1837) 132 Eng. Rep. 490, 493 (C.P.).

[65] See, e.g., Munn v. Algee, 924 F.2d 568 (5th Cir. 1991).

[66] Sherbert v. Verner, 374 U.S. 398, 403–06 (1963).

[67] See, e.g., Medical Care, supra note 10, at 1470–71 (discussing *Sherbert*'s approach to a burden as conditioning a benefit on actions that violate religious belief).

[68] See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014).

[69] For example, Mrs. Robbins's refusal to undergo blood transfusions substantially increased the cost of her care and her future pain and suffering. Williams v. Bright, 632 N.Y.S.2d 760, 764 (N.Y. Sup. Ct. 1995), rev'd in part, 658 N.Y.S.2d 910 (N.Y. App. Div. 1997).

The reasonable person standard, however, necessarily burdens people for idiosyncratic beliefs.[70] In some cases, this is so even to what may be an unfair extent.[71] By design, in popular understanding, the reasonable person standard is supposed to overlook the individual's subjective notions of proper care to implement some community standard of what is average or what is good.[72] Given the broad reasonableness language of pattern jury instructions in states throughout the country, that is an attractive interpretation.[73] But closer examination of the reasonable person standard demonstrates that it is not as generally applicable and neutral as it may appear both in the exceptions it permits as a matter of law and the subjective nature of its application.

1. Is the Reasonable Person Standard Actually Neutral and Generally Applicable?

The headline section on negligence in the Restatement (Second) of Torts states that "[u]nless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."[74] For purposes of both mitigation of damages and contributory negligence, the Restatement contains similarly

[70] For example, there is no adjustment to the reasonable person standard for an individual's mental deficiency. See Restatement (Second) of Torts § 283B (Am. L. Inst. 1965) ("Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.").

[71] See, e.g., Robert M. Ague, Jr., The Liability of Insane Persons in Tort Actions, 60 Dick. L. Rev. 211, 224 (1956) (arguing that the mentally ill should be held to a modified standard of reasonableness); Elizabeth J. Goldstein, Asking the Impossible: The Negligence Liability of the Mentally Ill, 12 J. Contemp. Health L. & Pol'y 67, 90 (1995) (same). But see William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 182–84, 312–13 (1987) (defending current system on efficiency grounds); Daniel W. Shuman, Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care, 46 SMU L. Rev. 409 (1992) (defending on grounds that it more closely aligns with notions of therapeutic justice).

[72] See Kevin P. Tobia, How People Judge What Is Reasonable, 70 Ala. L. Rev. 293, 296–97 (2018) (exploring the traditional understandings of reasonableness as statistical (e.g., what is average) or prescriptive (e.g., what is good) and suggesting a third, hybrid notion).

[73] Patrick J. Kelley & Laurel A. Wendt, What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions, 77 Chi.-Kent L. Rev. 587, 595 (2002) ("In most pattern jury instructions on negligence, negligence is defined by using both the concept of ordinary care and the concept of the conduct of a reasonably careful person or one of her close relatives.").

[74] Restatement (Second) of Torts § 283 (Am. L. Inst. 1965).

broad language.[75] Although the Restatements are not law, courts look to them for guidance.[76]

Right off the bat, the language of the reasonable person standard contains a categorical exception.[77] Children are given an accommodation based on their age, experience, and other factors.[78] There may be good policy reasons for this adjustment.[79] For purposes of the inquiry into general applicability, however, all that matters is its existence.[80] In practice, courts have taken an approach consistent with the Restatement and have adjusted the standard of reasonableness for children when acting in non-adult activities.[81]

In addition to an adjustment for children, the Restatement also allows explicit accommodation for physical disabilities[82] and level of skill.[83] Courts have similarly followed the Restatement for this adjustment.[84]

[75] Restatement (Second) of Torts § 918 (Am. L. Inst. 1979) ("[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort."); Restatement (Second) of Torts § 464 (Am. L. Inst. 1965) ("Unless the actor is a child or an insane person, the standard of conduct to which he must conform for his own protection is that of a reasonable man under like circumstances.").

[76] See, e.g., The Institute in the Courts: Restatement Second of Torts, Am. L. Inst. (Apr. 16, 2015), https://www.ali.org/news/articles/institute-courts-restatement-second-torts/ [https://perma.cc/4VP3-N7GB] (detailing various courts which have continued to follow the leads of the Restatements).

[77] See supra text accompanying note 74.

[78] Restatement (Second) of Torts § 283A (Am. L. Inst. 1965) ("If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.").

[79] The Restatement explains this adjustment for children as arising "out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them." Id. § 283A cmt. b.

[80] See supra text accompanying notes 40–45.

[81] See Roberts v. Ring, 173 N.W. 437, 438 (Minn. 1919) (adjusting the standard of care to account for youth of defendant). But see Daniels v. Evans, 224 A.2d 63, 64 (N.H. 1966) (holding a child to same standard of care as adults when engaging "in activities normally undertaken by adults").

[82] Restatement (Second) of Torts § 283C (Am. L. Inst. 1965) ("If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability.").

[83] Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 12 (Am. L. Inst. 2010) ("If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.").

[84] See LaVine v. Clear Creek Skiing Corp., 557 F.2d 730, 734–35 (10th Cir. 1977) (holding that expert level of party may be considered when determining reasonableness; however,

Some courts have also allowed adjustment for individuals' "mental defects" in determining contributory negligence.[85] These are just some of a number of adjustments and exceptions explicit in the construction of the "objective" reasonable person.[86] As with the adjustment for children, there may be legitimate policy reasons for favoring some of these exceptions. The existence, however, of so many facial adjustments raises serious questions about the general applicability of the reasonableness standard.

Beyond the facial exceptions, the subjective and individualized nature of the reasonable person standard's application further challenges a claim of its neutrality and general applicability. This individualized consideration is not unique to the tort space in common law, but the emphasis on an "objective" standard can obscure the work that circumstantial determinations are doing. An example of an unwitting mother may help develop this point. In 1964, Dorothy Troppi visited her family physician about a birth control prescription. The pharmacist, however, negligently supplied Mrs. Troppi not a contraceptive, but a tranquilizer. Mrs. Troppi became pregnant and eventually sued the pharmacist for the ongoing costs of raising the child.[87]

This suit raised morally difficult questions regarding the nature of parent-child relationships and whether the birth of a healthy child can ever be deemed a "cost,"[88] but those are not a concern here. At the trial level,

lower court did not err when refusing to instruct jury as such); Dakter v. Cavallino, 866 N.W.2d 656, 663 (Wis. 2015) (determining that the superior knowledge rule, which requires those with superior skill to act commensurate with that skill, applied to a tractor-trailer driver). But see Spence v. Three Rivers Builders & Masonry Supply, Inc., 90 N.W.2d 873, 878 (Mich. 1958) (rejecting differing standards of reasonableness and holding that there is only one degree of care relevant in law).

[85] See Balt. & Potomac R.R. Co. v. Cumberland, 176 U.S. 232, 238 (1900) ("In determining the existence of such [contributory] negligence, we are not to hold the plaintiff liable for faults which arise from inherent physical or mental defects."). But see William J. Curran, Tort Liability of the Mentally Ill and Mentally Deficient, 21 Ohio St. L.J. 52, 63–64 (1960) (detailing two cases in which courts applied an "objective" approach to determinations of contributory negligence by plaintiffs with mental disorders).

[86] See generally James Fleming, Jr., The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1 (1951) (describing all the various subjective characteristics of the reasonable person standard).

[87] Troppi v. Scarf, 187 N.W.2d 511, 512–13 (Mich. Ct. App. 1971), abrogated by Taylor v. Kurapati, 600 N.W.2d 670 (Mich. Ct. App. 1999).

[88] Compare Byrd v. Wesley Med. Ctr., 699 P.2d 459, 468 (Kan. 1985) ("As a matter of public policy, the birth of a normal and healthy child does not constitute a legal harm for which damages are recoverable."), with Ochs v. Borrelli, 445 A.2d 883, 885–86 (Conn. 1982) ("In our view, the better rule is to allow parents to recover for the expenses of rearing an unplanned

the pharmacist asserted that Mrs. Troppi was ineligible for any monetary payment related to the upbringing of the child because she failed to mitigate damages.[89] That is, she did not give the child up for adoption or have an abortion.

Regardless of people's views on abortion or adoption, this argument would seem to be unsettling.[90] The court in Mrs. Troppi's case found just as much, ruling *as a matter of law* that it is unreasonable to require a party to consider those options.[91] A number of other courts have held similarly.[92] The implication of these cases is that a strong conviction against abortion or adoption can be reasonable. This result suggests that reasonableness is not merely a "scientific approach to reasonable prudence and damages."[93] If *Troppi v. Scarf* is correct, then "[t]he reasonable person is not the 'scientific' person who is bound to reduce damage costs regardless of the harm it does to faith, beliefs or ideals."[94] Individual beliefs and ideals inevitably impact the conception of reasonableness. Perhaps, in describing reasonableness as "what is average" or "what is good,"[95] that point is implicit. This raises the question, however, of *which* beliefs are included in that definition and which are not.[96] This inquiry has broad implications for our legal system,

child to majority when the child's birth results from negligent medical care. . . . There can be no affront to public policy in our recognition of these costs and no inconsistency in our view that parental pleasure softens but does not eradicate economic reality.").

[89] *Troppi*, 187 N.W.2d at 519–20.

[90] See Calabresi, supra note 6, at 50–54 (describing students' agreement with the trial court's decision in *Troppi* despite prior antipathy for accommodation for religious belief).

[91] *Troppi*, 187 N.W.2d at 520 ("While the reasonableness of a plaintiff's efforts to mitigate is ordinarily to be decided by the trier of fact, we are persuaded to rule, as a matter of law, that no mother, wed or unwed, can reasonably be required to abort (even if legal) or place her child for adoption.").

[92] See Girdley v. Coats, 825 S.W.2d 295, 297–98 (Mo. 1992) (en banc) (holding that tort of "wrongful birth" was not recognized in Missouri because the problem of mitigation of damages, and the implication of considering the reasonableness of abortion or adoption, was so extraordinary to remove the issue from tort law altogether); Schork v. Huber, 648 S.W.2d 861, 866–67 (Ky. 1983) (Leibson, J., dissenting) (rejecting the majority's refusal to recognize tort of unwanted birth over concerns about mitigation issue by suggesting that the court should hold as a matter of law that it is "unreasonable to require parents to submit the child in the womb to abortion, or the child in the crib to adoption").

[93] Calabresi, supra note 6, at 54 (internal quotation marks omitted).

[94] Id.

[95] See Tobia, supra note 72, at 296.

[96] Calabresi, supra note 6, at 54.

which uses various forms of reasonableness as cornerstones of decision-making.[97]

Regardless of whether Mrs. Troppi's opposition to abortion was grounded in religious or secular belief, the accommodation of that belief demonstrates the subjective nature of reasonableness. This raises further doubt about the neutrality and general applicability of the reasonableness standard. If her opposition to abortion is grounded in religion, why do some religious beliefs gain protection as "reasonable," while others, like Mrs. Robbins's refusal of blood transfusions, do not? In a system that has codified some religious beliefs as "reasonable," any attempt to eliminate the consideration of other, less mainstream beliefs would favor one religious view over another.[98]

Grounding the opposition in secular terms and explaining the tort system's accommodation that way does little to alleviate the problem. To begin, allowing consideration of secular, but not religious, beliefs in implementing reasonableness still undermines the purported generality. It permits a jury to subjectively assess the secular beliefs of the party when applying the reasonable person standard, but not the religious. This gives primacy to non-religious motivations for conduct over religious ones.[99] Beyond merely demonstrating the lack of neutrality in implementing the reasonable person standard, this "secular" justification also raises the question of where these deeply held "secular" beliefs originated.[100] Mrs. Troppi's suit raises this issue.

Many people may agree that her failure to have an abortion or give up her child should not affect Mrs. Troppi's legal claims. What gives rise to that intuition, though, even if it is secularly based? Some have argued that strongly held secular beliefs derive from early religious tenets present at our nation's Founding.[101] Over hundreds of years, they may have been

[97] Zipursky, supra note 8, at 2132–33.

[98] In addition to demonstrating the lack of neutrality and general applicability of the law, this result would also violate the Establishment Clause, which requires that laws "be administered neutrally among different faiths." Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

[99] In practice, this is how the tort system under an "objective" test may work. A plaintiff refusing blood transfusions may be able to present evidence that she did not undergo the treatment because of medical risks, but will be barred from any consideration of religious objection to the same. See Rozewicz v. N.Y. City Health & Hosps. Corp., 656 N.Y.S.2d 593, 596 (N.Y. Sup. Ct. 1997) (discussing party's attempt to justify refusal of blood transfusion on medical grounds, but questioning in the instant case because party did not put forward enough evidence in support).

[100] See Calabresi, supra note 6, at 55.

[101] Id. at 55–56.

secularized, but their antecedent is in specific religious practices.[102] To the extent that this is true, including these beliefs in the reasonableness standard results in the same outcome as acknowledging a specific religious derivation in the first place: favoring dominant religions over others. Beyond violating the constitutional command of religious neutrality,[103] this outcome refutes the argument that similarly situated parties, even similarly situated religious parties, are treated equally under tort law's reasonableness test.

As a function of a broader common law system which values incremental adjustment particularized to the facts of each case, the tort system is far from monolithic in its imposition of a reasonable person standard. Given this fact, under the approach of either the court in *Fraternal Order* or *Swanson*, the reasonable person standard has too many objective exceptions and relies too greatly on individualized assessments to satisfy the requirements of *Smith* and *Lukumi*. As demonstrated infra, this determination likely defeats any compelling interest the state could have in implementation for the same reasons the Supreme Court found in *Holt v. Hobbs*[104] and the Third Circuit found in *Fraternal Order*.[105]

2. Is There a Compelling Interest in Exclusion of Religious Accommodation?

Throughout history, the government has put forth myriad compelling interests to justify burdens on religious practices.[106] Lurking in the background of the government's arguments, and addressed explicitly in

[102] Id.

[103] *Cutter*, 544 U.S. at 720; see also Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). But cf. McCreary County v. ACLU of Ky., 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) ("With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.").

[104] See supra note 59.

[105] See supra text accompanying note 58.

[106] In the pre-*Smith* era, the government's compelling interests ranged from "training children in patriotic impulses," Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 598 (1940), overruled by W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), to efficient administration of the social security system, United States v. Lee, 455 U.S. 252, 258–59 (1982).

the opinions of the responding courts, is a concern over anarchy.[107] Particularly in religious accommodation cases, the handwringing centers around the problem of "permit[ting] every citizen to become a law unto himself."[108] If the argument for a compelling interest in enforcement of the reasonable person standard takes the same form, the exceptions that already exist and have not hindered administrability will likely undermine the claim.

In *Reynolds v. United States*, the Supreme Court addressed a free exercise claim to a generally applicable law through a Mormon challenge to a federal anti-bigamy statute.[109] Although the opinion was rife with anti-Mormon bias,[110] the Court devoted a portion of its analysis to the potential anarchy caused by allowing people to opt out of laws on the basis of religious opinion.[111] "Government could exist only in name under such circumstances," the Court proclaimed.[112] This same concern is present in many of the Supreme Court's decisions in the *Sherbert* era, where the Court upheld the social security system[113] and the government's rights over public land[114] against free exercise claims. In *Smith*, the lawlessness concern motivated the rejection of *Sherbert* and the elimination of the compelling interest test for incidental religious burdens altogether.[115] In the face of these anarchy objections, however, the Court has also looked to exceptions in the law to prove that the concerns are practically unfounded, demonstrating a lack of compelling interest in uniform enforcement.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Supreme Court addressed a claim from a religious group that wanted to use a hallucinogenic plant for sacramental purposes in contravention of

[107] See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1447 (1990) (explaining that concerns over anarchy served as the basis for traditional objections to free exercise claims).

[108] Reynolds v. United States, 98 U.S. 145, 167 (1878).

[109] Id. at 161–62.

[110] Id. at 164 ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.").

[111] Id. at 166.

[112] Id. at 167.

[113] See Bowen v. Roy, 476 U.S. 693 (1986); United States v. Lee, 455 U.S. 252 (1982).

[114] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[115] 494 U.S. 872, 888–89 (1990) (detailing the long list of civic obligations that could be subject to required religious objections, affecting everything from vaccination requirements to environmental protection).

the Controlled Substances Act.[116] Focusing on an existing exemption for peyote, the Court rejected the government's compelling interest in "uniform application" of the statute.[117] The Court clarified that while the need for uniformity can preclude the recognition of exceptions, the government must tie that exemption to some administrative harm.[118] In this case, as the presence of the peyote exemption helped demonstrate, there was none.[119] Although *O Centro* was decided under the statutory framework of RFRA,[120] it is instructive when considering whether states have a compelling interest in applying the reasonable person standard.

Much like the exceptions for using peyote or wearing medically necessary beards, the presence of other exemptions and modifications in the reasonable person standard will undermine governmental interest in uniform enforcement. Additionally, as a product of a common law system where actions are judged against an incrementally adjusted standard of reasonableness, tort law would seem to lack the "rule-like" nature that necessitates uniform enforcement. If the Court could find that uniformity of enforcement was not a compelling interest for a categorical "rule" like the Controlled Substances Act,[121] it is likely that there is no compelling interest in uniform enforcement in a vague reasonableness "standard." The state could assert other interests in defense of the reasonable person standard beyond uniformity in application.[122] In order to overcome strict scrutiny, however, the government would have to explain why some beliefs and opinions, like Mrs. Troppi's, are justifiably included in the determination of reasonableness while others, like Mrs. Robbins's or Ms. Eider's, are not.

Assuming courts find no compelling interest and thus require some sort of accommodation, the next step is to craft a remedy. In many areas of constitutional law, this is a relatively straightforward step. The evidence of a search that violates the Fourth Amendment is usually suppressed.[123]

[116] 546 U.S. 418, 423 (2006).
[117] Id. at 434–35.
[118] Id.
[119] Id.
[120] Id. at 432.
[121] Id.
[122] See Pomeroy, supra note 10, at 1137–40 (discussing a number of different compelling interests the state could assert in current application of the reasonable person standard and finding them lacking).
[123] See Mapp v. Ohio, 367 U.S. 643, 657 (1961) (applying exclusionary rule for evidence gathered in violation of Fourth Amendment to the states). But see United States v. Leon, 468 U.S. 897, 921–22 (1984) (detailing "good faith exception" to exclusionary rule).

A law that violates the Free Speech Clause of the First Amendment is usually struck.[124] The specific contours of the Religion Clauses, however, make crafting an appropriate accommodation uniquely difficult.

II. THE REASONABLE PERSON STANDARD: ACCOUNTING FOR RELIGIOUS BELIEF

The Religion Clauses of the First Amendment state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[125] Although on their face, these "two Clauses express complementary values," in practice, "they often exert conflicting pressures."[126] On the one hand, an unemployment benefits scheme that denies someone compensation because she refuses to work on her Sabbath can violate the Free Exercise Clause.[127] On the other hand, a state law that mandates that employers give employees their day of Sabbath off can violate the Establishment Clause.[128] Reconciling these two conflicting directives has occupied the Court for decades.[129] However contradictory, these twin pillars guide the Court's jurisprudence, and any accommodation must satisfy both clauses.[130]

Acknowledging the requirements of the Religion Clauses and their conflict with the directives of tort law, courts have developed multiple ways to resolve the issue. This Part will detail three approaches courts have used to accommodate religious belief in the reasonable person standard. It will first consider the "objective" approach, in which religious belief is given no accommodation. Given the likelihood that the Free Exercise Clause demands some sort of adjustment, it will quickly reject this approach. This Part will then consider the "reasonable believer" approach, in which religion is treated like an underlying attribute of a

[124] See R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (detailing traditional free speech jurisprudence and explaining that any content-based restriction on speech which does not meet specifically circumscribed exceptions is invalid).

[125] U.S. Const. amend. I.

[126] Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

[127] Sherbert v. Verner, 374 U.S. 398 (1963).

[128] Est. of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

[129] Compare Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."), with *Cutter*, 544 U.S. at 719 ("While the two Clauses express complementary values, they often exert conflicting pressures.").

[130] *Cutter*, 544 U.S. at 719.

party and, similar to the "eggshell skull" rule,[131] a negligent party is automatically liable for all damages, however unforeseeable. Although this approach has some benefits, this Part will conclude that it raises substantial Free Exercise and Establishment Clause concerns that prevent its adoption. Finally, this Part will consider the "case-by-case" approach, in which religion is one of many factors considered in reasonableness determinations. Acknowledging the issues with this test, this Part will argue that it most clearly satisfies the dual directives of the Religion Clauses of the First Amendment. The patent shortcomings, however, suggest a larger problem with an aggressive free exercise jurisprudence that demands accommodation in the first place.

A. The "Objective" Approach

In *United States v. Ballard*, the Supreme Court outlined the principle that courts and juries should not inquire into the reasonableness or truth of individuals' strongly held religious beliefs.[132] In a long line of church property and employment dispute cases, courts have reiterated incompetence in determining the proper structure of a religion.[133] Seizing on the language of those cases, a number of the courts to address the issue of religion's role in the reasonable person standard have sustained the "objective" approach with no accommodation as the most preferable option.[134] But this approach overlooks the inherent free exercise problems associated with *not* granting an accommodation under current jurisprudence. It also does not consider the possibility that the "objective" approach itself involves a furtive reasonableness inquiry. Because the same reasons that militate for a required accommodation under *Smith* demonstrate the unworkability of the "objective" approach, they are only briefly rehearsed here.

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[131] The "eggshell skull" rule holds that parties take their victims as they lie and are liable for all injuries, foreseeable or not, and even if a result of a pre-existing condition. See, e.g., Vosburg v. Putney, 50 N.W. 403 (Wis. 1891).

[132] 322 U.S. 78, 87–88 (1944).

[133] See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012) (granting churches wholesale exemption from employment regulations in hiring and firing of ministers); Jones v. Wolf, 443 U.S. 595, 604 (1979) (allowing courts to apply "neutral principles of law" to property disputes as long as it does not require resolution of ecclesiastical questions); Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871) (holding that courts should defer to churches' internal structures in resolving property disputes).

[134] See Munn v. Algee, 924 F.2d 568, 574–75 (5th Cir. 1991); Braverman v. Granger, 844 N.W.2d 485, 495–96 (Mich. Ct. App. 2014).

In *Munn v. Algee* and *Braverman v. Granger*, the Fifth Circuit and Michigan Court of Appeals, respectively, adopted a purely "objective" approach to the reasonable person standard, based primarily on concern over allowing a jury to judge the reasonableness of a party's religion.[135] Although this is a valid concern, it does not resolve the problems with the objective approach itself. Underlying the approach of the *Munn* and *Braverman* courts, and incapsulated in the name of the test, is the assumption that the test is truly "objective." That is, the assumption that the application of the test does not incorporate some religious, or at least quasi-religious, beliefs.[136] But as the example of Mrs. Troppi demonstrates, that might not be true.[137] Once that predicate assumption is challenged, the rationale for the "objective" approach is weakened. If jurors are always considering, furtively or openly, some strongly held beliefs in their analysis,[138] no approach is truly "objective." Artificially depriving jurors of an explanation for some actions (e.g., refusing to accept a blood transfusion) while implicitly allowing others (e.g., refusing to get an abortion) serves only to create a hierarchy in which some religious beliefs are included because they are widespread enough to be "average" or "good" while others are not.[139] Thus, the primary problem with the objective approach may be that it is not that objective.

Given this flaw in the "objective" test, the animating concern behind the *Munn* and *Braverman* courts' opinions rings hollow. If a jury is

[135] See *Munn*, 924 F.2d at 574–75 (holding that allowing the jury to consider "religiously motivated refusals to mitigate damages can involve weighing the reasonableness of religious beliefs and thus arguably would violate the establishment clause"); *Braverman*, 844 N.W.2d at 496 (finding that under either the "case-by-case" or "reasonable believer" approach, "the trier of fact will necessarily be required to judge either the reasonableness of the tenets of the person's religion or the reasonableness of the person's decision to abide by his or her religious beliefs in the face of death").

[136] See The Germanic, 196 U.S. 589, 596 (1905) ("The standard of conduct . . . is an external standard, and takes no account of the personal equation of the man concerned. The notion that it 'should be coextensive with the judgment of each individual,' was exploded, if it needed exploding, by Chief Justice Tindal, in *Vaughan v. Menlove* . . . ." (citation omitted)).

[137] See supra text accompanying notes 91–101.

[138] See Tobia, supra note 72, at 296–97. By describing reasonableness as "what is average" or "what is good," or even as some hybrid of the two, jurors are, by definition, importing their subjective determinations of which beliefs or feelings, secular or religious, are either average enough or good enough for inclusion. Id.

[139] See Calabresi, supra note 6, at 64; see also Pomeroy, supra note 10, at 1144 (arguing that where the court applies an objective standard, "[t]he jury is, in effect, instructed to assess religious practices against the benchmark of mainstream community norms, which will inevitably be influenced by majoritarian religious values").

already implicitly judging the reasonableness of individuals' belief systems, then any explicit introduction of religion will not change that fact. Indeed, in introducing evidence of religious motivation for an action, a party is simply providing an explanation for a course of conduct that the jury might otherwise deem per se unreasonable.[140] Depriving the jury of such information may, in reality, disadvantage a religious party more than one who takes the same course of action for secular reasons.[141]

B. The "Reasonable Believer" Approach

Recognizing the problems with the "objective" reasonable person standard, some commentators[142] and courts[143] have instead advocated for the adoption of a "reasonable believer" approach. Although there is some discrepancy in application, this test treats the religious beliefs of the party as an underlying characteristic, similar to a plaintiff with an "eggshell skull."[144] Under the test, as long as the religious party acts in accordance with how a "reasonable adherent of such sincerely held tenets" would have acted, the party should receive compensation for all injuries, regardless of a duty to mitigate.[145] The primary benefit of this approach, defenders contend, is that it removes courts from the determination of the party's reasonableness, satisfying *Ballard*.[146] This Section will first dispute that claim by demonstrating that the application of this approach usually implicates a reasonableness determination. It will then point to two additional problems that make this standard particularly unworkable under both the Free Exercise and Establishment Clauses. This Section will conclude that these additional problems, and particularly the Establishment Clause issue, disqualify this test as a possibility.

[140] See Williams v. Bright, 658 N.Y.S.2d 910, 915 (N.Y. App. Div. 1997) (finding that prospect of leaving jury with no explanation as to party's refusal of a blood transfusion would serve an injustice).

[141] See id. at 915–16.

[142] See Medical Care, supra note 10; Pomeroy, supra note 10.

[143] See Lange v. Hoyt, 159 A. 575, 577–78 (Conn. 1932); Lundman v. McKown, 530 N.W.2d 807, 827 (Minn. Ct. App. 1995); Williams v. Bright, 632 N.Y.S.2d 760, 769–70 (N.Y. Sup. Ct. 1995), rev'd in part, 658 N.Y.S.2d 910 (N.Y. App. Div. 1997).

[144] The "eggshell skull" rule holds that parties take their victims as they lie and are liable for all damage, foreseeable or not and even if a result of a pre-existing condition. Vosburg v. Putney, 50 N.W. 403, 404 (Wis. 1891).

[145] Pomeroy, supra note 10, at 1146; see also Medical Care, supra note 10, at 1486 ("[Religious plaintiffs] should be required to pursue only those 'reasonable' curative methods that do not violate their religious convictions.").

[146] See Pomeroy, supra note 10, at 1146–47.

In theory, a "reasonable believer" test may remove from the jury the possibility of judging a belief's reasonableness. In practice, however, there is a fine, and blurry, line between judging the reasonableness of people's actions given their beliefs and judging the reasonableness of their beliefs. In their analysis, courts have had difficulty in sticking to the former. In *Lundman v. McKown*, the Minnesota Court of Appeals applied the "reasonable believer" test to a wrongful death suit against Christian Scientist parents for failing to use traditional medical care that could have saved their child's life.[147] In upholding the verdict against the stepfather, the court purported to apply the "reasonable Christian Scientist" test, but then held, as a matter of law, that when a child's life is in danger, the reasonable Christian Scientist would defer to traditional care.[148] That is, effectively, the Minnesota court found the vehemence of this Christian Scientist's belief unreasonable. It then proceeded to substitute in its conception of how individuals should balance belief and duty to others.[149] Perhaps this is the right outcome. Perhaps it is not.[150] Regardless, the court engaged in the same type of reasonableness analysis that it tried to avoid.

The *Lundman* case also demonstrates a larger problem with the "reasonable believer" test that implicates fundamental questions regarding the judiciary's interaction with religious exercise. Under the "reasonable believer" approach, religious belief can provide an exception to the reasonable person standard only when that belief accords with those of a reasonable worshipper of that religion.[151] This approach takes courts into territory explicitly prohibited under First Amendment jurisprudence.[152] First, the test invites the courts to divine what the scripture of a religion demands in order to determine a baseline against

[147] 530 N.W.2d 807.

[148] Id. at 828.

[149] Id. at 828–29.

[150] The decision engendered spirited debate. Various religious organizations, including the Roman Catholic Archdiocese of St. Paul and Minneapolis and the National Association of Evangelicals, urged the Supreme Court to hear the case on appeal. Linda Greenhouse, Supreme Court Roundup; Christian Scientists Rebuffed in Ruling by Supreme Court, N.Y. Times (Jan. 23, 1996), https://www.nytimes.com/1996/01/23/us/supreme-court-roundup-christian-scientists-rebuffed-in-ruling-by-supreme-court.html [https://perma.cc/R3X3-EA-5E].

[151] Supra note 145.

[152] See Williams v. Bright, 658 N.Y.S.2d 910, 915 (N.Y. App. Div. 1997) (criticizing the *Lundman* court for "evaluat[ing] the reasonableness of various practices and tenets of the Christian Science faith; by doing so as a matter of law, it proceeded deep into the very 'forbidden domain' about which Justice Douglas cautioned [in *Ballard*]").

which to judge the party's actions. Second, the test requires a court to consider whether a plaintiff's idiosyncratic religious practices comport with general norms. The Supreme Court has rejected courts' roles in either inquiry.

To the first point, the same concerns that motivated many courts to stick with the "objective" approach militate against any analysis of scripture under the "reasonable believer" test. The *Ballard* Court addressed the question of whether juries are permitted to assess the veracity of an individual's religious belief and prohibited such inquiries.[153] The Court stressed that faith by its nature is inexplicable and incomprehensible to those who do not share the same beliefs.[154] By extension, courts and juries are powerless to determine what faith requires. Acknowledging the difficult constitutional questions involved when the government places restrictions on religious organizations, the Supreme Court has avoided reading otherwise general regulations as reaching that far.[155] When reaching decisions on the merits, the Court has found similar limitations on the government's and the judiciary's powers.

In a line of church property cases stretching from *Watson v. Jones*[156] to *Jones v. Wolf*,[157] the Court reiterated its incompetence at adjudicating matters of theology and foreclosed any legal inquiry requiring a consideration of religious doctrine.[158] In the employment dispute context, the courts have acted similarly. Even when laws have explicitly covered religious groups, courts have long recognized a "ministerial exception," based partially on recognition of the importance of a religious organization's ability to maintain control over membership and doctrinal interpretation.[159] Similarly, in the school funding context, the Supreme Court has abandoned the inquiry into whether a school is "pervasively

[153] United States v. Ballard, 322 U.S. 78 (1944).

[154] Id. at 86–87.

[155] See, e.g., NLRB. v. Cath. Bishop of Chi., 440 U.S. 490, 501 (1979) (employing the avoidance doctrine to hold that the National Labor Relations Act does not cover certain religious schools in order to avoid confronting "serious constitutional questions").

[156] 80 U.S. (13 Wall.) 679 (1871).

[157] 443 U.S. 595 (1979).

[158] See, e.g., *Watson*, 80 U.S. (13 Wall.) at 729 ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own."); *Wolf*, 443 U.S. at 602 ("[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.").

[159] See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012).

sectarian" for Establishment Clause purposes.[160] Not only is such an inquiry "unnecessary" and "offensive," but it is also "well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."[161] The common thread in these cases is the rejection of the judiciary's role in examining religious belief and interpreting doctrine.

Introducing evidence of religious tenets and unrelated religious beliefs to the jury also invites discrimination into the trial process. *Munn v. Algee* is instructive on this point.[162] In that case, the trial judge not only allowed introduction of the party's faith to explain a lack of mitigation, but also allowed extensive questioning into the tenets of said faith.[163] Opposing counsel used this opportunity to question the party on less conventional aspects of his beliefs,[164] which had little probative effect and could only bias the jury.[165] For example, the trial was held in the wake of the Supreme Court's controversial decision in *Texas v. Johnson*[166] striking down flag-desecration laws.[167] In order to foment resentment, opposing counsel used its cross-examination to highlight the tenets of Jehovah's Witnesses' faith that prohibited saluting the flag and serving in war.[168] On appeal, the dissenting judge noted that there was no reason for introduction of this evidence except as a "calculated effort to 'poison' the minds of the jurors and to affect their verdict."[169] Any analysis that welcomes inquiry into the foundations of a religious belief opens the door to the same type of discrimination.[170]

Beyond the problem of involving courts in the determination of proper practice, the "reasonable believer" test has a further issue in that it requires a comparison of an individual's practices with those of the

[160] Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion).
[161] Id.
[162] 924 F.2d 568 (5th Cir. 1991).
[163] Id. at 580–81 (Rubin, J., dissenting).
[164] For example, "Q: Let me ask you this. Isn't it true that the Jehovah Witnesses' faith adheres to the belief that Christ returned to earth in 1914 and has invisibly ruled since that time through the Watchtower?" Id. at 580.
[165] Id. at 581–82.
[166] 491 U.S. 397 (1989).
[167] *Munn*, 924 F.2d at 580 (Rubin, J., dissenting).
[168] Id. at 580–81.
[169] Id. at 584.
[170] The Federal Rules of Evidence prohibit the use of evidence of religious belief "to attack or support [a] witness's credibility." Fed. R. Evid. 610. They explicitly permit admission of religious belief for any other purpose, however, including to "show[] interest or bias." Fed. R. Evid. 610 advisory committee's note.

general religious community of which she is a part.[171] This approach conflicts with the Supreme Court's holding in *Thomas v. Review Board*.[172] In *Thomas*, the Court addressed an unemployment compensation claim from a Jehovah's Witness who quit his job for religious reasons that did not comport with the widely held beliefs of members of his faith.[173] In holding that the Free Exercise Clause protects idiosyncratic religious practice, the Court stated that the

> guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[174]

Any attempt by a court to determine the reasonableness of a petitioner's beliefs by judging them against those of his larger religious community is presumptively invalid.

In addition to the free exercise problems, the "reasonable believer" test also raises serious Establishment Clause concerns by treating religion as a pre-existing state under an "eggshell skull" rule. Although the Supreme Court's jurisprudence under the Establishment Clause has been muddled,[175] one strand of the analysis has developed to require that religious accommodations impose no burden on non-beneficiary third parties.[176] Some scholars contest whether such a third-party harm doctrine

[171] Pomeroy, supra note 10, at 1147 ("[Under the "reasonable believer" test], the jurors are encouraged not to ask whether the plaintiff's religiously-motivated conduct makes sense in terms of the 'community's' majoritarian values. Rather, they are directed to weigh the plaintiff's conduct by putting themselves in the position of a reasonable adherent of the plaintiff's own faith.").

[172] 450 U.S. 707 (1981).

[173] Id. at 715–16.

[174] Id.

[175] See Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–82 (2019) (describing the problem of pinning down the meaning of the Establishment Clause as "vexing" and going through all the issues associated with the Court's attempted solution under the *Lemon v. Kurtzman* test).

[176] See, e.g., Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (holding that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 709 (1985) (striking down state statute requiring employers to give employees their day of Sabbath off because "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath").

should exist;[177] the language of the Court's decisions, however, makes clear that some consideration of such harms enters the calculus.[178] What is unclear is how much harm suffices to trigger a violation under the Establishment Clause.

The Court has not addressed this specific question, but the commentators who developed the approach have distinguished between burdens to the general population and burdens to cognizable, individual third parties.[179] The Establishment Clause, they argue, permits accommodations that lead to the former, but prohibits those that lead to the latter.[180] The Court's decisions in this area generally support this interpretation.[181] Only when cases have involved the ability of religious organizations to determine their own membership has the Court granted religious accommodations that burden individual third parties.[182] These cases recognize that religious organizations have "powerful free exercise and associational interests" that outweigh the harm to third parties.[183] Such acute interests of religious autonomy are not at play in the individual tort context.[184]

Applying this third-party harm principle to accommodations to the reasonable person standard demonstrates the problem of the "reasonable believer" test. In treating religion like a pre-existing physical condition under the "eggshell skull" rule, courts would automatically shift the burden of someone's religious belief onto the negligent party. The burden of this accommodation—forcing a negligent party to pay for increased medical bills, pain and suffering, and more—would be individualized.[185]

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[177] See Micah Schwartzman, Nelson Tebbe & Richard Schragger, The Costs of Conscience, 106 Ky. L.J. 781, 798 n.79 (2018) (detailing some common arguments against third-party harm principle on grounds that it would eliminate accommodations altogether).

[178] *Cutter*, 544 U.S. at 720.

[179] See Schwartzman, Tebbe & Schragger, supra note 177, at 782–83.

[180] See id.

[181] See supra note 176.

[182] Schwartzman, Tebbe & Schragger, supra note 177, at 793.

[183] Id.

[184] In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court recognized that in the realm of religious autonomy, the First Amendment "gives special solicitude to the rights of religious organizations" beyond what would be required under *Smith*'s "general applicability" requirement for individual religious practice. 565 U.S. 171, 189–90 (2012) (distinguishing Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990)).

[185] In Mrs. Robbins's case, the trial judge adopted the "reasonable believer" test and the jury awarded her four million dollars in future pain and suffering damages. The "bulk of the damages" was a direct result of her failure to receive blood transfusions and thus substantially

The "assumption of the risk" rationale behind this approach would burden negligent parties directly and individually.

Understanding this risk, some proponents of the "reasonable believer" approach respond that in reality, individual defendants rarely bear the burden; rather, insurance companies that diffuse costs across a range of policy holders are on the hook.[186] Underlying this objection is an assumption that everyone carries insurance. While this may be true for a large majority of people, an estimated thirteen percent of U.S. drivers do not carry auto insurance, for example.[187] When one of those thirteen percent of drivers negligently hits a Jehovah's Witness, he or she is individually responsible for the increased expense of treating injuries in accordance with the victim's religious beliefs.

Even granting that all parties are insured, this argument poses further problems. To begin with, the increased cost of negligent driving from refusing appropriate medical care will be passed on to someone.[188] The pool of policy holders absorbing that burden is substantially smaller than the tax base of the United States, so it may be hard to characterize it as a burden on the "general public." More problematic, though, is the incentive in rate setting that insurance companies will have. In areas with high populations of Jehovah's Witnesses, Christian Scientists, or other religious groups with objections to certain medical treatments, insurance companies will be incentivized to set higher rates to account for the increased cost of negligence.[189] Although this may raise religious discrimination claims, there is no federal law prohibiting the

increased the burden on the defendant. Williams v. Bright, 632 N.Y.S.2d 760, 764 (N.Y. Sup. Ct. 1995), rev'd in part, 658 N.Y.S.2d 910 (N.Y. App. Div. 1997).

[186] *Williams*, 658 N.Y.S.2d at 919 (Rosenberger, J., dissenting) ("[T]he monetary damages to plaintiff will be paid, not by the deceased tortfeasor, but by an insurance carrier. This observation, carried to its logical extension, would substantially diminish the concept linking fault and monetary responsibility for damages in most tort claims.").

[187] Facts + Statistics: Uninsured Motorists, Ins. Info. Inst., https://www.iii.org/fact-statistic/-facts-statistics-uninsured-motorists [https://perma.cc/D47L-UK9T] (last visited Dec. 12, 2019) (data as of 2015).

[188] But cf. *Williams*, 658 N.Y.S.2d at 919 (Rosenberger, J., dissenting) (claiming that refusal of medical treatment does not occur often enough for increased premiums to play out in fact).

[189] Insurance companies already explicitly take location into account in setting policy rates based on the higher rates of vandalism, theft, and accidents in urban areas. What Determines the Price of an Auto Insurance Policy?, Ins. Info. Inst., https://www.iii.org/article/what-determines-price-my-auto-insurance-policy [https://perma.cc/9X34-WU8B] (last visited Dec. 12, 2019).

consideration of religion in auto insurance rates,[190] and a number of states have placed only weak limitations on the practice.[191] These practical concerns further demonstrate the deficiencies of the "reasonable believer" approach.

C. The "Case-By-Case" Approach

The "case-by-case" approach avoids many of the issues that plague the "objective" standard and the "reasonable believer" test. Under this analysis, the religious belief of a party, taken at face value without "theological proof," is one of many equally weighted factors considered in the determination of reasonableness. Thus, in the case of Mrs. Robbins, the factfinder considers her religious explanation for refusing a blood transfusion in concert with all other factors relevant to the reasonableness determination.[192] This approach recognizes the individualized analysis that inheres in a reasonableness inquiry without artificially elevating—or diminishing—religious belief above or below other relevant considerations. Although far from perfect, the test presents a middle ground between the "objective" test's Free Exercise problems and the "reasonable believer" approach's Establishment Clause issues.

First, under the "case-by-case" approach, a party's religious belief is admissible as one of many equal factors used in determining the reasonableness of her actions under the circumstances. In formulating a hypothetical jury instruction in accordance with this approach, the court in Mrs. Robbins's case stressed this fact.[193] This test simply serves to correct the deficiency of the purportedly "objective" test, which privileges some types of widely held beliefs but artificially precludes consideration of more idiosyncratic ones. Allowing for the introduction of the religious basis for a party's actions provides the jury with an explanation for what

[190] Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, Understanding Insurance Antidiscrimination Laws, 87 S. Cal. L. Rev. 195, 199 (2014).

[191] Id. at 238 (finding that sixteen states have weak to no limitation on the use of religion in setting auto insurance rates).

[192] *Williams*, 658 N.Y.S.2d at 915–16.

[193] Id. (explaining that a proper jury instruction would include language that "such belief is a factor for you to consider, together with all the other evidence you have heard, in determining whether the plaintiff acted reasonably in caring for her injuries, keeping in mind, however, that the overriding test is whether the plaintiff acted as a reasonably prudent person, under all the circumstances confronting her").

might otherwise be deemed per se unreasonable conduct.[194] As such, it averts the injustice that may naturally arise.[195]

Rather than being left with no explanation for Mrs. Robbins refusing blood transfusions or Ms. Eider deciding to jump, the jury, under the "case-by-case" test, would consider their religious motivation in context with all other relevant factors. This accords with the analysis that a jury would implicitly have done in addressing Mrs. Troppi's refusal to have an abortion, had the judge not removed the question from the factfinder. This approach simply puts less traditional religious beliefs on the same legal ground as mainstream beliefs and secular ideology. Concededly, it opens the door for some judgment of the reasonableness of the person's beliefs, regardless of what instruction the judge gives the jury. As demonstrated, however, even under the most objective standard this may be inevitable.[196]

Second, this approach also avoids the difficulties associated with courts setting themselves up as ecclesiastical authorities in determining proper practices of religion.[197] Unlike the "reasonable believer" test, the question in the "case-by-case" approach is merely whether, given her belief, the party acted reasonably. The professed belief of the party is taken without "the introduction of any 'theological' proof, by way of either expert or lay testimony, as to the validity of religious doctrine."[198] Thus, because there is no need to determine the foundational religious teachings against which to judge the party's actions, the court avoids the problem of determining questions of scripture.[199] It also reduces, if not eliminates, the risk of lawyers using the controversial tenets of a party's faith to bias the jury, as those facts are inadmissible in the first place.[200] Accepting the beliefs of the party at face value will not lead to the attendant problem of insincere claims. In nearly all of these cases, the parties are giving up treatment

[194] See id. at 915.

[195] Id. ("We conclude that the unmodified application of that formulation would work an injustice in this case, as well as in others of a similar nature. It seems apparent to us that a person in plaintiff Robbins' position must be permitted to present to the jury the basis for her refusal of medical treatment; otherwise, the jury would simply be left with the fact of her refusal, without any explanation at all.").

[196] See supra Section II.A.

[197] See supra Section II.B.

[198] *Williams*, 658 N.Y.S.2d at 916.

[199] See supra text accompanying notes 153–59.

[200] See supra text accompanying notes 162–70.

which could save their lives,[201] save them substantial expense,[202] reduce pain and suffering,[203] or some combination of the above. That parties would go to such lengths likely speaks to the sincerity of their beliefs on its own.[204]

Third, the "case-by-case" approach avoids some of the Establishment Clause issues that plague the "reasonable believer" test. The Free Exercise Clause and the Establishment Clause offer dual, and occasionally contradictory directives.[205] At some point, the demands of the Free Exercise Clause run headlong into the requirements of the Establishment Clause.[206] Thus, it may occasionally be impossible to perfectly reconcile the two.[207] The "case-by-case" analysis minimizes this conflict by reducing the primacy of religion in reasonableness determinations.

Under the "case-by-case" approach, there will inevitably be instances where religious parties receive full compensation for injuries where they otherwise would not. That is the point of the test. Regardless of whether that judgment is paid by the defendant or his insurance company, there will likely be a burden on a specific individual.[208] The important distinction, however, between the "reasonable believer" test and the "case-by-case" analysis is in the differing approaches they take in distributing that burden. Under the "reasonable believer" analysis, religion is given primacy in the finding of reasonableness.[209] Once the determination is made that a person acted in accordance with her religion, the negligent defendant is liable for all damages, regardless of a duty to mitigate.[210] Thus, by going out on the road, a driver assumes the risk of hitting someone with a sincerely held religious belief, which could substantially raise the consequences of negligence.[211]

[201] See Munn v. Algee, 924 F.2d 568, 571 (5th Cir. 1991).

[202] See Williams v. Bright, 632 N.Y.S.2d 760, 764 (N.Y. Sup. Ct. 1995), rev'd in part, 658 N.Y.S.2d 910 (N.Y. App. Div. 1997).

[203] Id.

[204] But cf. Lewis v. Califano, 616 F.2d 73, 81 (3d Cir. 1980) (remanding case to trial court for determination of sincerity of party's religious objection to surgery in a disability claim).

[205] See supra text accompanying notes 125–30.

[206] Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

[207] See id.

[208] See supra text accompanying note 185.

[209] Pomeroy, supra note 10, at 1145–46.

[210] Id. at 1150–51.

[211] This concept is a derivation of the "eggshell skull" rule which tells a defendant that she must "take her victim as she finds her." Id. at 1151–53.

The "case-by-case" approach rejects this automatic burden shifting. Religious beliefs are one of many equally weighted factors the court considers in determining reasonableness. This reduces the Establishment Clause concern because the burdensome actions of a religious party are not per se reasonable. Beliefs, thus, can be considered in the context of other concerns and factors that dictate the proper course of action in any scenario. The prior example from *Lundman v. McKown* may be helpful in bringing out the nuances. In that case, Christian Scientist parents failed to treat their son with traditional medicine, which led to a wrongful death suit.[212] Under the "reasonable believer" test, if the court finds that most Christian Scientists would rely on faith healing, even in the face of death, the defendants have a wholesale immunity from liability. The only determinant in the reasonableness of their actions is the faith to which they subscribe. Whatever the Establishment Clause means, it cannot possibly permit religious edicts to supplant law,[213] without any regard for the substantial cost to third parties.[214]

Under the "case-by-case" approach, this decision likely comes out differently.[215] The strongly held religious beliefs of the parents are considered in conjunction with other factors in the case, including the welfare of the child, and weighed by the jury. The inclusion of the religious nature of the objection may explain what, absent that knowledge, could seem like callous inaction in refusing medical care. But it cannot singlehandedly trump consideration of the effects that their individual beliefs have on others. In the context of typical tort suits where there is a failure to mitigate, this consideration may play a reduced role. Where, however, the consequences of a professed religious objection are so stark, the problems associated with granting people wholesale immunity from liability come into relief.

[212] Lundman v. McKown, 530 N.W.2d 807 (Minn. Ct. App. 1995).

[213] Allowing the reasonableness determinations of scripture to per se trump those of the law could be seen as governmental establishment of a church. The Supreme Court explicitly barred this in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church.").

[214] Schwartzman, Tebbe & Schragger, supra note 177, at 782–83.

[215] And probably in line with how the court purporting to apply the "reasonable believer" test actually ruled. *Lundman*, 530 N.W.2d at 828 (purporting to apply the "reasonable believer" approach but explicitly weighing the religious justifications against other considerations, including duty to others).

CONCLUSION

The "case-by-case" approach does not resolve all of the Free Exercise and Establishment Clause problems that arise in this space. It inevitably permits the jury to consider the reasonableness of a party's beliefs. Furthermore, by design, it will in some cases shift the burden of someone's religious belief, and consequent failure to mitigate damages, to identifiable, individual parties. This burden shifting may raise particular concern given that the qualities that make tort law susceptible to required religious accommodation are not unique, but a feature of a standards-based, common-law system. The ramifications of a required religious accommodation in tort law may be that all of common law, or even more broadly, all standards-based decision methods, are subject to the same type of religious objection. Thus, even if this accommodation seems palatable in the tort space, where few cases turn on religious considerations, larger implications loom in the background.

Concededly, the reasonable person standard differs from legislative acts and even other common-law torts like IIED. There may be justifiable reasons why society is prepared to recognize exceptions to IIED on free speech grounds, but not on free exercise grounds. Similarly, there may be good reasons why marijuana dispensaries should operate during a health pandemic, but religious organizations should not.[216] More extremely, there may be valid reasons why we are willing to grant exceptions to a general prohibition on killing for self-defense, but not for killings that accord with sincerely held religious belief. But if one accepts the proposition that an aggressive exemption strategy can demonstrate the lack of general applicability of a purportedly neutral standard like the reasonable person, then every religiously motivated tort or murder may have to be litigated with the government justifying enforcement by a compelling interest.

This consequence, though, militates not against the use of the "case-by-case" approach in tort law, but rather against the scheme of free exercise jurisprudence that requires accommodation to any law upon the

[216] The Supreme Court found as much in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring), upholding California's building capacity limitations related to the COVID-19 pandemic. Four members of the Court, however, found the health regulations imposed by the state discriminatory for treating similarly situated secular and non-secular businesses differently. The dissenters would have applied strict scrutiny to strike them down as applied to religious organizations. Id. at 1614 (Kavanaugh, J., dissenting).

discovery of but one exception or individualized decision-making process. But that is the current Supreme Court doctrine; thus, some accommodation to the reasonable person standard is necessary. And under the dual commands of the Free Exercise and Establishment Clauses, the "case-by-case" approach is the most workable solution. As the Supreme Court has recognized, "the government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause."[217] Under the current doctrine, this is likely one of those cases.

[217] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987).